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REGULATORY IMPROVEMENT ACT OF 2007

HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 3564

SEPTEMBER 19, 2007

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REGULATORY IMPROVEMENT ACT OF 2007

WEDNESDAY, SEPTEMBER 19, 2007

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

The Subcommittee met, pursuant to notice, at 3:04 p.m., in room 2141, Rayburn House Office Building, the Honorable Linda Sánchez (Chairwoman of the Subcommittee) presiding.

Present: Representatives Conyers, Sánchez, Johnson, Lofgren, Delahunt, Cannon, Jordan, Keller, and Franks.

Staff present: Susan Jensen, Majority Counsel; Daniel Flores, Minority Counsel; Adam Russell, Majority Professional Staff Member.

Ms. SÁNCHEZ. This hearing of the Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, will now come to order. And I will recognize myself for a short opening statement.

Today's hearing provides an opportunity for us to officially begin one important project, as well as to formally bring to a close a related project. Today we begin the process of reauthorizing and securing funding for the Administrative Conference of the United States. To that end, I especially commend my colleague, the Ranking Member, Mr. Cannon, for his leadership in introducing H.R. 3564, the "Regulatory Improvement Act of 2007," and for his deep and abiding commitment to revitalizing the conference.

[The bill, H.R. 3564, follows:]

110TH CONGRESS
1ST SESSION

H. R. 3564

To amend title 5, United States Code, to authorize appropriations for the Administrative Conference of the United States through fiscal year 2011, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 18, 2007

Mr. CANNON (for himself and Ms. LINDA T. SÁNCHEZ of California) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 5, United States Code, to authorize appropriations for the Administrative Conference of the United States through fiscal year 2011, and for other purposes.

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 "Regulatory Improvement Act of 2007".

SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

Section 596 of title 5, United States Code, is amended to read as follows:

"§ 596. Authorization of appropriations

"There are authorized to be appropriated to carry out this subchapter not more than $1,000,000 for fiscal year 2008, $3,300,000 for fiscal year 2009, $3,400,000 for fiscal year 2010, and $3,500,000 for fiscal year 2011. Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.".

○

Ms. SÁNCHEZ. Today we will also consider the final installment of a 2-year study known as the Administrative Law Process and Procedure Project for the 21st Century, which was sponsored on a bipartisan basis by the Judiciary Committee. Let me first explain the project.

Through the guidance of the Congressional Research Service, particularly Mort Rosenberg, Curtis Copeland and T.J. Halstead, the Committee undertook a comprehensive analysis of the state of administrative law in our Nation. Over the course of this project, this Subcommittee held six hearings, participated in three symposia, and sponsored three empirical studies.

Last December, an interim report in excess of 1,400 pages was issued, detailing various findings along with recommendations for legislative reform and suggested areas for further research and analysis. In particular, this report addressed: the agency adjudicatory process; public participation in the rulemaking process; the role of science in the regulatory process; the utility of regulatory analysis and accountability requirements; and congressional, presidential and judicial review of agency rulemaking.

One of the project's most enduring legacies, however, will undoubtedly be how it underscored the absolute and urgent need to have a permanent, neutral, non-partisan think tank that can dispassionately examine administrative law and process and that can make credible recommendations for reform, namely the Administrative Conference of the United States.

Although reauthorized in the 108th Congress with overwhelming bipartisan support, the conference has not been funded since, and its current reauthorization expires next week. In addition to supporting the reauthorization of ACUS, I hope my colleagues on this Subcommittee will also join me in the next step, obtaining funding for the conference once and for all.

As I am sure the witnesses at today's hearing will explain in great detail, an extremely nominal investment to fund ACUS will unquestionably redound in billions of savings in taxpayer dollars. Accordingly, I look very much forward to today's hearing and to receiving the testimony from all our witnesses.

I would now like to recognize my colleague, Mr. Cannon, the distinguished Ranking Member of the Subcommittee, for any opening remarks he may have.

Mr. CANNON. Thank you, Madam Chair. I think the panel is quite familiar with my views on the issue. And so, with your permission, I would like to submit my statement for the record and want to just reiterate the one thing you said. You said many things that I agree with, but getting this thing funded is actually really the next big important step, as well as the reauthorization for which we are here today. So thank you for the hearing. And if you will accept my statement for the record, I will submit it.

Ms. SÁNCHEZ. Without objection, so ordered.

[The prepared statement of Mr. Cannon follows:]

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

I would like to extend a warm welcome to the witnesses today, and I thank the Chair for scheduling this hearing. I hope that our work today leads promptly toward an authorized and appropriated Administrative Conference of the United States.

ACUS was established in the 1960s to foster uniformity, effectiveness and fairness in federal administrative procedure. It was a small but productive agency that fulfilled its mission well.

It served innovatively as a "private-public think tank," conducting basic research on how to improve the regulatory and legal process."

It facilitated the interchange among administrative agencies of information useful in improving administrative procedure.

It collected information and statistics from administrative agencies and published reports evaluating and discussing procedural improvements.

It served as a resource for Members of Congress and congressional committees.

The initial jurisdiction was intentionally broad, and ACUS was the key implementing agency for the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act.

ACUS developed and promoted procedures implementing the Negotiated Rulemaking Act, which encourages consensual resolutions accounting for the needs of affected interests.

It recommended a model administrative civil penalty statute that has served as the basis for dozens of pieces of legislation.

It facilitated judicial review of agency decisions and the elimination of technical impediments to such review.

It helped to focus attention on the need for the federal government to be more efficient, smaller and more accountable.

It actively promoted information-technology initiatives, such as developing methods by which the public could participate electronically in agency rulemaking proceedings.

The list goes on and on.

I cannot imagine what kind of regulatory structure we would confront had it not been for ACUS' contributions.

I know that, whatever that structure might have been, it would certainly have been much more expensive and more cumbersome.

As Richard Wiley, former Chairman, Commissioner and General Counsel of the Federal Communications Commission, once explained:

"ACUS, along with the Office of Federal Procurement Policy, convinced successfully some 24 agencies to initiate [Alternative Dispute Resolution] and to try to use it in disputes with private sector companies and government contracts. Given the fact that you have $200 billion going into the Government procurement program every year, the potential savings in that one program are simply enormous."

To take just one specific agency, the Social Security Administration estimated that the Conference's recommendation to change that agency's appeals process generated approximately $85 million in savings.

Those figures, of course, were all in yesteryear's dollars.

What was the cost to the taxpayer? The last appropriation for ACUS was merely $1.8 million per year.

Against this background, it is easy to understand the observation of former White House Counsel C. Boyden Gray that "as long as there is a need for regulatory reform, there is a need for something like the Administrative Conference."

Numerous other authorities, experts and luminaries have also weighed in on behalf of ACUS, including Supreme Court Justices Scalia and Breyer and prominent members of academia. One law school dean perhaps put it best, urging that: "if the Conference didn't exist, it would have to be invented."

It also is easy to understand, and to laud, the bipartisan support that exists for the Conference's reauthorization and re-funding.

As I said at the outset, I hope that this hearing is the start of finally bringing ACUS back. It can only help us to reinvigorate the centuries-old effort to help the government govern best by governing least, and to do so by identifying and helping to deploy the 21st Century methods that can help us do that in ways we never could before.

I yield back the remainder of my time.

Ms. SÁNCHEZ. And I just want to thank our witnesses for being patient. I know we started this hearing somewhat late due to the vote schedule on the floor. We are expecting votes in approximately 40 minutes, so we are going to try to get through as much of the testimony as possible.

With that, I am pleased to introduce the witnesses for today's hearing. Our first witness is Mort Rosenberg, a specialist in American public law in the American Law Division at CRS. For more than 25 years, Mr. Rosenberg has been associated with CRS. Prior to his service with that office, he was chief counsel to the House Select Committee on Professional Sports. And he has held a variety of other public service positions. In addition to these endeavors, Mr. Rosenberg has written extensively on the subject of administrative law.

Our second witness is Professor Jody Freeman. Professor Freeman teaches administrative law, environmental law, and natural resources law and is the director of the Harvard Law School Environmental Law Program. Her work in administrative law focuses on public-private collaboration and governance, regulatory innovation, negotiated approaches to regulation, and privatization. Prior to joining Harvard Law School, Professor Freeman taught for 10 years at my alma mater, the UCLA School of Law, where in 2004 she received the law school's Rutter Award for Excellence in Teaching, and in 2001, was voted professor of the year.

Our third witness is Dr. Curtis Copeland, a specialist in American national government at CRS. Dr. Copeland's expertise, appropriately relevant for today's hearing, is Federal rulemaking and regulatory policy. Dr. Copeland has previously testified before this Subcommittee, and he is one of three CRS experts who are assisting the Subcommittee in the conduct of its administrative law project.

His contributions to the project are deeply appreciated. Prior to joining CRS, Dr. Copeland held a variety of positions at the Government Accountability Office over a 23-year period.

And our final witness is Professor Jeffrey Lubbers.

Did I pronounce that correctly?

Professor Lubbers, if I am smirking, it is because today is National Talk Like a Pirate Day. And landlubber is what comes to mind when I hear your name. I apologize.

Professor Lubbers is a fellow in law and government. He holds expertise in administrative law, government structure, and procedures, regulatory policy and procedures.

From 1982 to 1995, Professor Lubbers was the research director of the Administrative Conference of the United States. He has published two books, "A Guide to Federal Agency Rulemaking" and "Federal Administrative Procedures Source Book."

He is also the editor of the American Bar Association's (ABA) Developments in Administrative Law and Regulatory Practice. In addition to teaching, Professor Lubbers is also an administrative law consultant whose clients include numerous Federal agencies, law firms, public interest groups, and international organizations, including the OECD and World Bank.

I want to thank you all for your willingness to participate in today's hearing. Without objection, other Members' opening state-

ments will be placed into the record. And we will ask that the witnesses please limit their oral remarks to 5 minutes. Your written testimony in its entirety will be placed into the record.

For those of you not familiar with the lighting system, when you begin your testimony, the light will appear as green. When you have 1 minute remaining, it will warn you by changing to yellow. And then when your time expires, it will turn red.

If the light should turn red and you are in the middle of a thought, we will allow you to finish off that thought before proceeding to the next person's testimony. After each person has presented his or her testimony, Subcommittee Members will be permitted to ask questions subject to the 5-minute limit.

At this time, I would invite Mr. Rosenberg to proceed with his testimony.

TESTIMONY OF MORT ROSENBERG, ESQ., SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE (CRS), WASHINGTON, DC

Mr. ROSENBERG. Thank you very much, Madam Chairman, Mr. Cannon. Good to be here again and with you. And I am honored to be here to talk about the reauthorization and funding of the administrative conference.

This last 3 years has been very rewarding, even though it was arduous. And the commitment that the Committee has had to this has been wonderful.

I thought that I might concentrate my remarks with respect to two empirical studies that CRS commissioned. And I thought it would be useful to devote the time to that because of in describing the difficulties encountered by CRS in these studies, it underlines and underscores the need for a reactivated ACUS.

ACUS' past accomplishments in providing nonpartisan, nonbiased, comprehensive, and practical assessments with respect to a wide range of agency processes, procedures and practices are very well documented. During the hearings considering ACUS' reauthorization in 2004, C. Boyden Gray, a former White House counsel during the George G.W. Bush administration, testified before your Subcommittee in support of reauthorizing ACUS, stating that, "Through the years, the conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs." This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

Further evidence of the widespread respect of and support for ACUS continued. Work was presented by Supreme Court Justices Scalia and Breyer, both of whom worked at ACUS prior to their judicial careers.

Justice Scalia stated that ACUS was an approved and effective means of opening up the process to 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 low cost. Examples of the accomplishments for which ACUS has been credited range from simple and practical such as the publication of time-saving resource material to anal-

yses of complex issues of administrative process and the spurring of legislative reform in those areas.

I would here note that ACUS' established credibility and nonpartisan reputation opened doors at Federal agencies and allowed access to ACUS-sponsored research, to internal operational information that normally would not have been available otherwise. Justice Scalia remarked, "I think the conference's ability to be effective hinged in part on the fact that we were a Government agency. And when we went to do a study at an agency, we were not stonewalled."

"Very often a member of that agency was on our own assembly. And so, the agency would cooperate in the study that we did. I think it is much harder to do that kind of a study from the outside. The agencies tended to look upon us as essentially people from the executive branch trying to make things better."

Justice Breyer concurred, commenting that, "the American Bar Association's administrative law section's attempts to do studies of agencies," commenting on that. What the conference could do that the Ad Law section couldn't do is just what Scalia is talking about. They could get access to the information inside the Government and the off-the-record reactions of people in charge of those agencies. So it produced a conversation that you can't have as easily just through the ABA.

Justice Scalia underlined that point. I was chairman of the ad law section for a year. And there is a big difference between showing up at an agency and saying "I am from the American Bar Association, I want to know this, that, and the other," and coming from the administrative conference, which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world.

The CRS experience with its two sponsored empirical studies was disappointing for the very reasons alluded to by the justices. 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 an agency 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. With this potential obstacle in mind, when CRS considered a comprehensive study of science advisory panels in Federal agencies to determine, among other things, how many there were, are, how were members selected, how issues of neutrality and conflict of interest are handled and the impact of advisory body recommendations on agency decision making, we provided the research group at Syracuse University's Maxwell School of Public Administration with letters of introduction from the director of CRS and you, Chairman Cannon, as well as the Ranking minority Member of the Subcommittee, to try to assure agency officials of their bona fide and neutral academic purposes.

Ms. SÁNCHEZ. Mr. Rosenberg, I apologize. But your time has expired. The time goes quickly.

Mr. ROSENBERG. I would just conclude that——

Ms. SÁNCHEZ. If you would like to conclude.

Mr. ROSENBERG [continuing]. We tried very hard to get entree for these people, and we couldn't do it. It is the imprimatur and the reputation of ACUS that works and that has reestablished these kind of empirical studies will work.

[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

"REAUTHORIZATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES"

PRESENTED ON

SEPTEMBER 19, 2007

Madame Chair and Members of the Subcommittee:

I am honored to appear before this Subcommittee again today to discuss reauthorization and funding of the Administrative Conference of the United States (ACUS).

As you are aware, the Administrative Law, Process, and Procedure Project for the 21st Century (Project) has been a bipartisan undertaking of the House Judiciary Committee, overseen and conducted by your 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 twelve years since its demise in 1995 that could 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, and its initial reauthorization is to expire this month on September 30.

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 and 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.

Together with my CRS colleagues Curtis Copeland, who is on today's panel, and T.J. Halstead, we assisted in the planning, preparation and conduct of hearings before this Subcommittee, public symposia, and empirical studies. In December 2006 we provided the Subcommittee with a 1,436 page Interim Report that provides detailed discussions of the emergent issues in each of the seven topic areas; 68 expert recommendations for further areas of study and possible legislative action, transcripts of the seven hearings held by the Subcommittee; a copy of the West study on "Outside Participation in the Development of Proposed Rules;" and copies of the proceedings of the Symposium on E-Rulemaking in the 21st Century (December 5, 2005), the Symposium on the Role of Science in Rulemaking (May 9, 2006), and the CRS Symposium on Presidential, Congressional, and Judicial Control of Rulemaking" (September 11, 2006). Many of the recommendations emanated from the hearings, symposia, and the West study.

It is anticipated that many of the results of the studies and symposia will be for further congressional consideration of these issues. Other results will 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. 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. And to describe the difficulties encountered by two of the CRS-sponsored empirical studies that may contribute to the debate on recreation of an ACUS-like institution.

ACUS' past accomplishments in providing nonpartisan, nonbiased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices are 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, both of whom worked with the ACUS prior to their judicial careers. 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 materials, 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,

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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)(May 20, 2004 Hearing).

[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).

information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

ACUS evolved a structure to develop objective, nonpartisan 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 was never 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 would 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. 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, when asked about the cost-effectiveness of the Conference, Justice Scalia commented 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 nonpartisan 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. Justice Scalia remarked that, " I think the Conference's ability to be effective hinged in part on the fact that we were a government agency, and when we went to do a study at an agency, we were not stonewalled. Very often, a member of that agency was on our own Assembly, and so the agency would cooperate in the study that we did. I think its much harder to do that kind

of study from the outside. The agencies tended to look upon us as essentially people from the executive branch trying to make things better."[5]

Justice Breyer concurred, commenting on the American Bar Association's Administrative Law Section's attempts to do studies of agencies: "[W]hat the Conference could do that the Ad Law Section couldn't do is just what Scalia is talking about: they could get access to the information inside the Government and the off-the record reactions of people in charge of those agencies. So it produced a conversation that you can't have as easily just through the ABA." Justice Scalia underlined the point: "I was Chairman of the Ad Law Section for a year, and there's a big difference between showing up at an agency and saying, 'I'm from the American Bar Association, I want to know this, that and the other,' and coming from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world."[6]

The CRS experience with its two sponsored empirical studies was disappointing for the very reasons alluded to by the Justices. 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. With this potential obstacle in mind, when CRS considered a comprehensive study of science advisory panels in federal agencies to determine, among other things-- how many are there; how are members selected; how issues of neutrality and conflict of interest are handled; and the impact of advisory body recommendations on agencies decisionmaking-- we provided the research group at Syracuse University's Maxwell School of Public Administration with letters of introduction from the Director of CRS and the Chairman and Ranking Minority Member of this Subcommittee to assure agency officials of their bona fides and neutral academic purposes. That effort was of no avail and the agencies with the most advisory bodies, such as Health and Human Services, "closed their doors," refusing to respond to e-mail surveys and requests for personal interviews. As a last resort, CRS attempted to enlist the assistance of a former Hill client who was a senior official at the Office of Management and Budget, again to no avail. The result was a product that relied essentially on public documents which provided few insights with which to assess the workings of such important bodies. 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 arguably would come at an opportune time. For example, the Department 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

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[5] May 20, 2004 Hearing at 10.

[6] *Id*, at 17.

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.[7] 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 still appear to be needed. Similarly, all the agencies transferred had their own statutory and administrative requirements for rulemaking which do not appear to have been 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 "proprietary 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. A recent report of the Government Accountability Office was critical of DHS's progress after four years in addressing its management and implementation problems.[8]

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

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

[8] U.S. Government Accountability Office, "Department of Homeland Security: Progress Report on Implementation of Mission and Management Functions," GAO-07-1081T.

> 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 of 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; it could also 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 availability to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies has suggested that if the procedures used for e-rulemaking are not carefully developed, the public at-large could be effectively disenfranchised rather than having its participation enhanced. My colleague, Curtis Copeland, will address the latest issues that have arisen with respect to the executive's attempts to get a government-wide e-rulemaking system up and running, issues that appear ripe for ACUS-like guidance.

The Interim Report identifies a number of emergent proven and procedural problems that merit attention. Among other public participation issues that may need study are 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 practice by agencies avoiding notice and comment rulemaking by means of "nonrule 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? 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 orders?

On a positive note, a third study commissioned by CRS, which was unfettered by agency noncooperation, will be reported on next by Professor Jody Freeman of the Harvard Law School. Professor Freeman agreed to conduct a study which would analyze the pertinent rulings of all federal circuit courts of appeal from 1994 to 2004 to determine, among other issues, the rate at which rules are invalidated in whole or in part; the reasons for those invalidations; and the agencies most invalidated. Long-cited anecdotal evidence suggested that the successful challenge rate was 50% or more. Professor Freeman's preliminary findings appear to demolish that long-standing notion as mythical and perhaps suggests that the major blame heaped on the courts by the so called "ossificationists" for burdening the agency rulemaking process lies elsewhere, perhaps equally with Congress and the Executive.

In any event, I will 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. It is a decision that might be mediated by a reactivated and funded ACUS.

Ms. SÁNCHEZ. Thank you. I appreciate your testimony.

At this time I would invite Professor Freeman to begin her testimony.

TESTIMONY OF JODY FREEMAN, ESQ., PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MA

Ms. FREEMAN. Madam Chair and Members of the Subcommittee, thank you for the invitation to testify today. Let me just applaud your efforts and your leadership, both Chair Sánchez and Ranking Member Cannon. This is an area of inquiry and study that is not the most exciting for everyone. I understand that as an administrative law professor. But the truth is nothing is more important than ensuring that our Government agency policies are fair, effective and efficient.

Today, very briefly in my short time, I will describe the results of a study that I conducted in cooperation with, or at the behest of, CRS that is quite a comprehensive study of the judicial review of agency rules across all of the circuits over an 11-year period. More broadly, I will make two points.

The first is the desperate need—and I am not overstating—the desperate need for research and study of the administrative process to help Congress engage in meaningful reform. And the second point, the benefit to be gained by funding an independent agency like the administrative conference, which can produce, sponsor and organize that kind of research.

Just very briefly to make the case, the need for empirical data is striking. There are many misconceptions about the administrative process that could lead Congress down the wrong path to reform and could lead to a vast waste of taxpayer dollars.

Agencies promulgate thousands of rules each year. The rules have, as you well know, the force and effect of law. They have a dramatic impact on our economy and society. And yet our empirical knowledge of how well agencies do this is very thin.

We do not know, for example, how effective agencies' rules are. In fact, the people who study the administrative process don't yet agree on what a measure of effectiveness would be.

We don't know how much time agencies spend on average promulgating rules. We don't know if cost benefit analysis and other analytic mechanisms used by the president or by Congress work and achieve the results they purportedly are designed to achieve. We have a lot of mechanisms, both in terms of executive orders and statutes that require ante-analysis of rulemaking, but very few post-analyses of how well these things work.

There are many myths about the administrative process that lasts for years. My favorite is one that circulated and was cited in congressional testimony that 80 percent of EPA rules are challenged. It was made up.

Imagine if Congress had gone and tried to reform administrative process at the EPA with a totally fabricated statistic like that. This is what keeps me awake at night.

Again, a few more. Among other things we don't know well are rules implemented. Do they achieve their goals? Are agencies doing better in their use of science? What would better mean? Are agencies doing things with data collection that could be copied, absorbed

by other agencies if we could just generalize across them and figure out what best practices are?

Let me turn briefly to our study. The goal of the study was to—and this is a study I conducted with my coauthor, Joe Doherty, of your alma mater, Chair Sánchez, UCLA School of Law. He can't be here, but he is an empirical expert and certainly available to answer questions later.

The goal was to study the rate at which rules are invalidated in whole or part, the reasons why, whether there is bias on the panels of judges that review these rules, and whether there is anything else about, any patterns we could detect, in terms of who files these lawsuits and who tends to win. And we have submitted for the record a much more detailed description.

And I am sure you are relieved to know I won't take you through the tables. I don't have time. Our data show that the clear majority, 58 percent, of challenged rules are upheld in their entirety. And nearly 80 percent are upheld in whole or part, only 11 percent invalidated in their entirety. This is again all rules across all circuits for an 11-year period, the most comprehensive study we are aware of.

The results are generally consistent over time across all the agencies and unaffected by the composition of the judicial panels reviewing the rules. And I can go into any detail you wish if you are interested in questions. But the implication of this is simply that we don't think the rulemaking process is in crisis.

Agencies are not seeing their rules invalidated at alarming rates, nor are there disturbing patterns in terms of alleged bias of partisan judicial panels. Nor are we seeing skewed results in terms of the likelihood of success of you are a corporate versus an environmental versus a Government plan.

We are contesting past studies. That is, some scholars have suggested that one or another agency was having great difficulty defending its rules. One study said EPA rules are entirely or mostly upheld only 33 percent of the time. That is not what our data says.

Our study challenges that picture is inaccurate. And this leads me to my statement in support of ACUS. There remains a significant percentage of rules that are invalidated in whole or part, which suggests we need additional study about why, why do rules fail, and what reasons do judges invalidate them, why do judges invalidate them.

This leads me to the need for ACUS. I am to stop also.

Ms. SÁNCHEZ. You can finish your thought.

Ms. FREEMAN. I have three things to say about ACUS. It is a bargain, especially at the funding levels being considered by this Subcommittee.

For the last 12 years, we have missed it desperately. I could give you examples of what ACUS could have done, but wasn't allowed to do. And third, there is no substitute, whether within the Government, OMB, GAO or universities for what ACUS can accomplish. Thank you.

[The prepared statement of Ms. Freeman follows:]

PREPARED STATEMENT OF JODY FREEMAN

HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138

JODY FREEMAN
Professor of Law

Hauser Hall 412
(617) 496-4142
Fax: (617) 496-4947
freemanl@law.harvard.edu

Statement of

Jody Freeman
Professor, Harvard Law School

before the
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary

United States House of Representatives

Hearing on the Regulatory Improvement Act of 2007

Washington, D.C.

September 19, 2007

Madam Chairman and Members of the Subcommittee:

Thank you for the invitation to testify at this Hearing on the Regulatory Improvement Act of 2007. I first would like to applaud the Subcommittee's leadership, especially Chairman Sanchez and ranking member Cannon, for their commitment to the issues we will discuss today, and specifically for inviting commentary on the need for a reauthorized and well funded Administrative Conference. For many people, matters of administrative law and process are not the most exciting, but the truth is, nothing is more important than ensuring that our government agencies make effective, efficient, and accountable policy decisions.

I am a Professor of Law at Harvard Law School. I am an expert on administrative law and have written numerous articles on the regulatory and administrative process. I co-author a leading casebook in administrative law, now in its third edition, and I teach

legislation and regulation, administrative law, and advanced administrative law. I am a past Chair of the Executive Committee on Administrative Law for the American Association of Law Schools (AALS) and I have served as and Executive Officer of two subcommittees of the Administrative Law Section of the American Bar Association. I recently concluded an empirical study of judicial review of agency rules, which I will discuss briefly today. The study covers over ten years of challenges to federal agency rules in the United States Courts of Appeals. My co-investigator on that study, Joseph Doherty, Director of the Empirical Research Group at the University of California, Los Angeles Law School, could not be here today, but he will be happy to answer any follow-up questions you might have.

I will briefly describe the results of this study in my testimony today, but more broadly, I will focus on two points: (1) the need for research and study of the administrative process to help Congress engage in meaningful reform; and (2) the benefits to be gained by funding an independent agency like the Administrative Conference of the United States (ACUS) to produce and sponsor such research.

I. The Need for Empirical Research on the Administrative Process

Congressional law reform efforts aimed at making the administrative process more effective, efficient and fair would benefit greatly from research into administrative law and process. The need for empirical data is striking. Many scholars have conducted empirical studies of the judiciary and Congress but there is a relative lack of empirical research on the administrative state. Why does this matter? There are many misconceptions about the administrative process that could lead Congress down the wrong path to reform. Without empirical data, Congress could waste precious time and resources on matters that are not real problems, while ignoring aspects of the administrative process that genuinely require legislative attention.

Given the importance and power of federal agencies, it is surprising how little we know about them. I will focus my remarks on rulemaking, but the scope of the research needed on the administrative state is much broader, and includes every aspect of agency policymaking as well as adjudication.

Agencies promulgate thousands of rules each year; these rules have the force and effect of law, and many of them, as the members of this subcommittee know, have very significant social and economic impacts. The agencies that produce a high volume of rules include the Department of Transportation, the Environmental Protection Agency, the Department of Homeland Security, and Health and Human Services. Federal agencies affect virtually every corner of the U.S. economy and every aspect of social life. They regulate the financial markets, telecommunications and consumer products; they set environmental, health and safety standards; and they establish rules governing immigration, homeland security as well as law and order. Yet our empirical knowledge of the efficiency, effectiveness, and fairness of the agency rulemaking processes remains very limited.

Although scholars, agency officials, judges and members of Congress often call for reform of administrative procedures, the truth is that we lack even the most basic knowledge about how well federal agencies are performing their assigned tasks. For example, we simply do not know whether agency rules are effective; indeed, we have no agreed upon measure for assessing "effectiveness." We do not know whether executive oversight mechanisms like cost-benefit analysis improve rules. We do not even know the extent to which agency rules are fully implemented—most of the analytic requirements Congress and the President imposes on agencies occur *ex ante*, on the front end of the rulemaking process, with very little attention paid to implementation *ex post*. We do not know how long, on average, and across agencies, the rulemaking process takes. Nor do we know how often rules are challenged in court, whether those rules generally survive judicial review, and if they do not, why courts invalidate them.

There are many myths about the administrative process that survive unchallenged for years, and that can lead congressional reform efforts astray. For example, it was long asserted that eighty per cent of EPA rules are challenged in court. This statistic was relied upon by academics, legislators, and journalists, quoted by successive administrators of EPA, and cited before congressional committees as truth. Yet the statistic had no empirical basis—it was made up. A recent empirical study found that no more than thirty-five per cent of the EPA's rules are challenged. What if Congress had reacted to that statistic by altering the EPA's rulemaking process to limit agency discretion, or by adding more procedural steps? This might have hampered or slowed rules unnecessarily. The point is that only with good data can Congress choose wisely where to invest its resources.

Among the things we do not know and ought to know are these: how well rules are implemented and whether they achieve their goals; whether agencies are issuing rules faster than they used to; whether agencies are getting better at rulemaking in the sense that their rules avoid or survive legal challenge; whether there is a difference in performance between executive and independent agencies in terms of the quality or speed of their rulemaking processes; whether agencies are doing a superior job of analyzing scientific data; whether there is a wide variation in rulemaking processes across agencies and whether there are successful approaches that could be adopted more broadly; whether cost-benefit analysis and other ex ante analytic requirements improve the efficiency or effectiveness of rules; and whether there are institutional obstacles to effective agency priority-setting and resource allocation.

II. Results of Freeman and Doherty Empirical Study: Judicial Review of Rulemaking

Purpose of the Study

This study grew out of conversations with staff from the Congressional Research Service during the 109th Congress about this subcommittee's interest in empirical work on the administrative process.[1] The goal of the study is to investigate what happens to legislative rules upon judicial review, including the rate at which they are invalidated in whole or part; the reasons why they are invalidated in whole or part; and any trends in the cases that might be attributable to differences in (1) the agencies generating the rules; (2) the litigants challenging them; or (3) the composition of the judicial panels hearing the cases. While this study is only a beginning, we expect it to yield useful data on the judicial treatment of rules.

Summary

Our data shows that the clear majority (58%) of challenged legislative rules are upheld in their entirety; that nearly 80% are upheld either in whole or part; and that only 11% are invalidated in their entirety.[2] These results are generally consistent over time, across agencies, and unaffected by the composition of the judicial panels reviewing the rules. Using conservative estimates from other studies of the number of "major" or "economically significant" legislative rules promulgated annually,[3] we can estimate that a very small percentage of rules are challenged each year (2.6%), and that a tiny percentage are invalidated in whole (0.3%) or in part (1.1%).

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[1] In its earlier Oversight Report, this Subcommittee identified issues that require further study, including (1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of agency rulemaking, (5) the agency adjudicatory process; (6) and the utility of regulatory analysis and accountability requirements; and (7) the role of science in the regulatory process.

[2] Put another way, the data show that 42% of challenged rules are invalidated in whole or part.

[3] These estimates are based on studies of rulemaking by Stephen Croley, Professor of Law, University of Michigan, using totals of rulemakings compiled by RISC and OIRA pursuant to Executive Order 12866, and by GAO pursuant to the Congressional Review Act. Because these agencies collect data about rules using different criteria, there are discrepancies in their totals (e.g., OIRA double counts proposed and final rules so its numbers are likely inflated; GAO counts rules from independent agencies which could inflate its totals compared to OIRA which does not). Taking into consideration the risk of over-counting and under-counting as a function of how a "rule" is defined by each agency, Croley estimated that between 1000-1500 substantive or significant or "core" rules are promulgated each year by federal agencies. We chose the lower number of that range for our calculations above, but even if we halved Croley's estimate to be even more conservative, or used the 500-700 range of "major" rules subject to OMB review annually, the percentage of rules invalidated each year would be extremely small.

Description of Study and Methodology

We acquired data on administrative agency appeals from the Administrative Office of the Courts (AOC) that concluded during the period 1994-2004.[4] The data consists of 3,075 cases, which AOC culled from an initial database of 10,000 cases involving administrative agency appeals from all federal circuit courts over the eleven year time period. AOC culled the 3,075 cases using the following rules: The cases included administrative agency appeals that were terminated in the federal courts of appeal. The cases excluded Board of Immigration Appeals cases and consolidated appeals. A further reduction limited the dataset to include cases that were terminated on the merits and in which an opinion was published. The AOC provided us with certain information about each case, including docket number, names of appellant(s) and respondent(s), the final date of the case and the administrative agency involved. Our research involved (1) determining which of the 3,075 cases were rulemaking cases (the "threshold" decision), and (2) collecting information about each rulemaking challenge.

We randomly assigned one-third of the cases (1,025) to one of three research assistants to read and code. Using the docket numbers and other information in the AOC file, they were able to locate published opinions in 3,071 (99.9%) of the cases. In most of the cases (88%) a single docket number was associated with a single opinion. One-half of the remainder (6%) consisted of two docket numbers consolidated into a single opinion, and opinions that consolidated three or more individual dockets comprised the balance. This process reduced the total number of cases to 2,871. We trained our research team to code cases following detailed written instructions developed through a pilot study conducted in 2005-2006. All data collection was preceded by an analysis of the case in order to answer two threshold questions: whether the case involved a challenge to a notice and comment (legislative) rule; and whether the court reached the merits of the case. Ten percent (n=282) of the cases reviewed crossed the threshold and were analyzed in-depth. These rulemaking cases were coded for information on procedural history, enabling statute(s), the parties to the case, the judges, the basis or bases for the challenge, the outcome and the remedy.

Preliminary Results

Rules from thirty agencies were challenged during the eleven-year period under study. Challenges against two agencies constituted a majority of the cases: the EPA (102) and the FCC (88). There were ninety-two others. Of the others, only the Federal Energy Regulatory Commission (9), the Internal Revenue Service (23), the Federal Aviation Administration (7) and the Department of Transportation (12) had more than four challenges during the period under study.

[4] The database includes cases that were docketed from 1991-2003 and decided between November 1994 and 2004. We thank Pragati Patrick of the AOC and Curtis Copeland of CRS for assistance in obtaining the database. We also thank Mort Rosenberg for helpful consultation. We presented a preliminary version of the results from our pilot study at a forum convened by the Congressional Research Service in September, 2006. For feedback on those results, we are grateful to Peter Strauss, Jeff Lubbers and Randy May.

We allocated case outcomes among five categories, ranging from complete invalidation of the rule to upholding the rule in its entirety, with intermediate categories for rules that are partially invalidated and partially upheld, and for remand. We found that, *on average, 58% of all rules are upheld in their entirety* (Table 1). This varied somewhat among agencies. EPA rules were upheld entirely in 46% of cases, FCC rules were upheld entirely in 57% of cases, and all other agency rules were upheld entirely in 72% of cases. Twenty per cent of rules were completely invalidated (9% were remanded), and another 22% were invalidated in part (16% were remanded).

Rules were typically challenged on four grounds: the rule violates the Constitution (14%); the agency made an error of law (74%); the rule was arbitrary or capricious (62%); or the agency committed a procedural error under the Administrative Procedure Act (11%) (Table 2). FCC rules were challenged most often on arbitrary or capricious grounds (74%), as were EPA rules (68%); other agencies were challenged on this basis 46% of the time. The most common challenge, regardless of agency, was on the basis of interpretation of law: this challenge arose in 80% of EPA cases, 70% of FCC cases and 72% of cases involving other agencies.

Some challenges varied by agency. The FCC was much more likely to be challenged on constitutional grounds (27%) compared to the EPA (3%) or other agencies (14%). EPA rules were more likely to face challenges on APA procedural grounds (15%) than rules from the FCC (9%) or other agencies (8%).

The distribution of challenges to the rules is reflected in the pattern of invalidations, though the rate of invalidation is lower than the rate of challenges. Three per cent of FCC cases were invalidated in whole or part on constitutional grounds (Table 3). Sixteen percent of all challenged rules were invalidated in whole or part on arbitrary or capricious grounds, and a smaller proportion (3%) of rules were invalidated on grounds that the agency rulemaking process violated the APA. When EPA rules are invalidated, whether in whole or part, the most frequent reason cited is that the agency made an error of law (37%); the second most common reason is that the rule is arbitrary or capricious (18%) (Table 3). Likewise, when FCC rules are invalidated, the most frequent reason is error of law (24%), and the second is arbitrary or capricious (19%).

We might expect that the partisan composition of the three-judge panel would influence outcomes of appeals of agency rules. This does not appear to be true. Panels with three Republican-appointed judges were as likely as panels with two or one Republican-appointed judges to uphold rules outright (54%, 57% and 55%, respectively) (Table 7). The panels with three Democratic-appointed judges appear more likely to uphold rules (76%), but the number of cases is too small to arrive at any statistically valid conclusions. In addition, there does not appear to be a systematic partisan effect with regard to the particular agency whose rules are in question. EPA rules are the least likely to be upheld, independent of the panel's makeup.

Appeal outcomes are not correlated with the type of petitioner. Corporate petitioners are no more likely to succeed at invalidating rules than are environmental or other types of petitioners (Table 8). There are slight differences in the percentage of rules that are upheld in their entirety (63% of corporate petitions vs. 52% of environmental petitions) but these differences are not statistically significant.

There is no apparent trend in either upholding or invalidating rules. Some year-to-year variation exists, but these differences are statistically insignificant (Table 9). The percentage of cases in which rules have been upheld in their entirety did not drop below 50% during the eleven-year period under study, and was within the 50-60% range for eight of the eleven years included in the study.

Implications

Our study suggests that the rulemaking process is not in crisis. Agencies are not seeing their rules invalidated at alarming rates, nor are there any disturbing patterns in terms of the alleged "bias" of partisan judicial panels. Nor are we seeing skewed results in terms of the likelihood of success of particular litigants. In the past, some scholars have suggested that one or another agency was having great difficulty defending its rules upon judicial review—one study stated that EPA rules were entirely or mostly upheld only 33% of the time. Our study challenges that picture as inaccurate. Still, there remains a significant percentage of rules that are invalidated in whole or in part, which suggests the need for additional study of why such rules, or aspects of them, fail.

III. The Need for the Administrative Conference of the United States

Over the last dozen years, since ACUS has been defunct, empirical study of the administrative state has occurred only in fits and starts: a few academics have undertaken to do empirical studies (though not in a coordinated way); the CRS has sought to elicit research on behalf of Congress (though this has been mostly ad hoc); the American Bar Association's Administrative Law Section has made some reform proposals; and admirably, Professor Neil Kerwin created the Center for the Study of Rulemaking at American University. Yet none of these organizations or initiatives can replace the Administrative Conference, with its mandate from Congress to study agencies and agency process in a comprehensive and systematic way.

I should make clear that it is unrealistic to expect universities to sponsor systematic research about the administrative state. First, it is an expensive prospect that not all universities are in a position to fund. The study I reported to you today was generously funded by the Deans of Harvard Law School and the UCLA School of Law, and it has cost thousands of dollars so far. Second, empirical work on agency processes is not the kind of research that tends to earns law professors tenure in major law schools, so it is a dangerous thing to undertake in terms of one's future career prospects. And finally, even if a handful of academics are willing to pursue empirical study of the administrative process, there is an absence of any coordinating body at the moment that can make good use of the results, and direct further inquiries.

Both Justice Scalia and Justice Breyer have testified in enthusiastic support of ACUS, which reflects the respect this agency garnered over the years across the ideological spectrum. As Justice Scalia has said, and as Curtis Copeland has emphasized today, there is no realistic substitute for ACUS. The agencies themselves cannot be expected to take a long-term critical view of their own processes, nor are they equipped to consider broader, sometimes government-wide reforms. OMB is not an appropriate neutral body for the study of agency process, especially since the impact of OMB oversight is something that itself requires empirical study.[5] Congressional staffs have neither the time nor the expertise to work on the more technical reform proposals that a body like ACUS might generate; indeed, ACUS could be a valuable resource for them. And outside organizations like the American Bar Association—no matter how meritorious their proposals—do not have the clout to convince agencies to adopt significant reforms. Agencies treat inquiries and reform suggestions from such bodies with suspicion, and tend to react to them defensively. By contrast, ACUS was always viewed as a government insider that could often get agencies to adopt changes voluntarily. It was respected as a nonpartisan expert agency with a balanced membership drawn from academia, the judiciary, and high level private sector and government practice. ACUS was also a valuable asset and source of information for Congress—ACUS worked with congressional committees and committee staffs in the early stages of legislative development.

Moreover, at past funding levels, and at funding levels likely to be considered by this Subcommittee, ACUS is a bargain. Its key strength is in bringing together people of great distinction from both the public and private sectors—to think carefully and systematically about sensible good government reform. As Justice Scalia has only half-jokingly pointed out, many of these people charge very high billable rates; Congress gets their help for free. If it is re-authorized and appropriately funded, ACUS can provide an invaluable service to Congress.

IV. An Agenda for a re-authorized and funded ACUS

While I would not characterize the administrative state as being in crisis, it is operating with a sixty year old manual—the Administrative Procedure Act—which is in need of reform. The APA's rudimentary procedures have been supplemented over time by executive orders, ad hoc statutory requirements and judicial decisions. Agencies now face enormous procedural burdens that should be rationalized and made more efficient. Agencies must also respond to a world that has changed significantly since the APA was passed, a world characterized by technology that could enhance public participation in the administrative process, but that could also overwhelm it. Administrative procedures

[5] OMB/OIRA cannot perform the functions of ACUS because it represents the interests and policy imperatives of the White House. OMB cannot be expected to take a more independent view of agency performance. Moreover, OIRA is charged with overseeing rulemaking, and in particular with enforcing executive orders requiring cost-benefit analysis. Yet this encompasses only part of what federal agencies do. OMB does not oversee agency adjudication, agency grants and contracts, and other important agency actions. OMB is not equipped to engage in programmatic research and reform of the administrative state. It lacks the mandate, the personnel, and the credibility with agencies that ACUS has historically enjoyed.

must also be developed to manage novel forms of public-private partnership, and extensive outsourcing that did not exist when the APA was passed.

Other witnesses on today's panel have offered examples of what ACUS might have helped Congress to do (or avoid) had it been in existence over the last 12 years and I have no doubt that during this time ACUS would have performed a very useful service. I am in full agreement with Mr. Copeland's suggestion, for example, that ACUS could have helped to generate a more balanced and informed discussion of the implications of E.O. 13422, which has attracted a great deal of attention and generated controversy among administrative law scholars and members of Congress. The other panelists have also suggested issues that ACUS might focus on in the future, including electronic rulemaking and public participation, congressional review, informal policymaking through consent decrees, the role of science in rulemaking and a host of other issues. I agree with these as well. I wish only to underscore that I believe ACUS could be the incubator for the next generation of administrative law research and I would suggest two areas in particular that in my view would benefit from careful study.

One of the issues that a re-authorized and funded ACUS should focus on is government outsourcing. Private entities increasingly perform what we traditionally view as government functions, including some functions associated with the military, prisons, and national security. Questions about the effectiveness and efficiency of outsourcing have arisen in the context of the response to hurricane Katrina and the war in Iraq. The trouble is that such contracts can escape effective oversight. Private providers have contractual obligations vis-à-vis the government, but their actions typically fall outside of administrative law protections, process and regulation. How, if at all, should we conceive of these actors in administrative law? Is there a need for administrative law reform to address the issues raised by contracting out? This is a topic of considerable relevance at the moment, and it will only become more important over time.

The second area where ACUS could direct much needed research is the reconciliation of the principles of administrative law with the imperatives of national security. Like other agencies, the various agencies within the Department of Homeland Security (DHS) undertake administrative processes and promulgate rules. However, unlike the other agencies, the DHS has not, perhaps understandably, been subject to commensurate scrutiny or cost-benefit analysis. How are the administrative law principles of transparency and accountability, fairness and effectiveness, to be reconciled with national security interests? Is the APA the appropriate framework for dealing with contemporary matters of national security? These are not easy questions to answer but ACUS could provide a forum for their consideration. These are among the next generation of issues that ACUS might profitably explore.

Finally, a relatively small financial investment in ACUS could lead to significant cost savings down the road by directing Congress to high priority issues that are most in need of reform, and directing Congress away from taking costly steps that may be unnecessary. This concludes my remarks. I would be happy to respond to any questions that you might have.

Appendix

Judicial Review of Agency Rules: An Empirical Analysis

Jody Freeman, Professor of Law, Harvard Law School
Joseph W. Doherty, Director, Empirical Research Group, UCLA School of Law

September 19, 2007

TABLES

Table 1. Appeal outcome by agency type.

Outcome	Agency			
	EPA	**FCC**	**Other**	**Total**
Invalidated	14%	9%	11%	11%
Invalidated & Remanded	13%	9%	5%	9%
Invalidated in part, Upheld in part, & Remanded	22%	17%	9%	16%
Invalidated in part, Upheld in part, no Remand	6%	8%	3%	6%
Upheld	46%	57%	72%	58%
N	102	88	92	282

Column totals may not equal 100% due to rounding

Table 2. Basis for challenging the rule

		Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Agency	**N**	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Insuff. Info**	**Notice Insufficient**	**APA**	**Other Statutory rulemaking requirements**
EPA	102	3%	80%	68%	7%	1%	1%	18%	15%	12%
FCC	88	27%	70%	74%	6%	3%	1%	10%	9%	11%
Other	92	14%	72%	46%	14%	1%	0%	18%	8%	8%
Total	282	14%	74%	62%	9%	2%	1%	16%	11%	10%

Table 3. Reasons for invalidating the rule
(Includes both complete and partial invalidations)

		Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Agency	**N**	**Constitutional**	**Interp. of Law**	**A/C**	**SE**	**Other SOR**	**Insuff. Info**	**Notice Insufficient**	**APA**	**Other Statutory rulemaking requirements**
EPA	102	0%	37%	18%	1%	0%	12%	6%	6%	3%
FCC	88	3%	24%	19%	0%	1%	5%	3%	2%	0%
Other	92	1%	13%	10%	3%	0%	5%	3%	1%	2%
Total	282	1%	25%	16%	1%	0%	7%	4%	3%	2%

Table 4. Chevron Step 1 and Step 2 analyses* and outcomes by agency

		Overturn		Uphold	
Agency	**N**	**Chevron Step 1**	**Chevron Step 2**	**Chevron Step 1**	**Chevron Step 2**
EPA	102	28%	6%	16%	51%
FCC	88	15%	8%	22%	41%
Other	92	8%	5%	17%	39%
Total	282	17%	6%	18%	44%

*Categories not mutually exclusive due to multiple Chevron analyses in individual rule challenges.

Table 5. Reasons for upholding the rule

		Rule within agency's authority		Rule survives substantive review			Court able to review	Agency followed relevant procedural requirements		
Agency	N	Constitutional	Interp. of Law	A/C	SE	Other SOR	Suff. Info	Notice was Sufficient	APA	Other statutory rulemaking requirements
EPA	102	3%	49%	39%	3%	1%	3%	11%	9%	6%
FCC	88	15%	49%	54%	5%	3%	4%	4%	6%	11%
Other	92	9%	47%	32%	9%	1%	1%	11%	5%	4%
Total	282	9%	48%	41%	6%	2%	2%	9%	7%	7%

Table 6. Outcome of challenge by basis for challenge

	Basis For Challenge								
	Rule not within agency's authority		Rule fails substantive review			Court unable to review	Agency failed to follow relevant procedural requirements		
Outcome of Challenge	Constitutional	Interp. of Law	A/C	SE	Other SOR	Insuff. Info	Notice was insufficient	APA	Other statutory rulemaking requirements
Invalidated	5%	11%	7%	8%	0%	0%	11%	13%	7%
Invalidated & Remanded	3%	8%	7%	0%	0%	50%	9%	7%	0%
Invalidated in part, Upheld in part, & Remanded	13%	20%	24%	36%	0%	0%	32%	20%	24%
Invalidated in part, Upheld in part, no Remand	15%	7%	7%	4%	0%	50%	9%	0%	7%
Upheld	65%	54%	55%	52%	100%	0%	39%	60%	62%
N	40	210	176	25	5	2	44	30	29

Table 7. Percentage of cases where rules upheld in entirety, by agency and partisan composition of 3-judge panel					
Agency	**Partisan composition of 3-judge panel**				
	3R 0D	**2R 1D**	**1R 2D**	**0R 3D**	**Total**
EPA	38%	51%	37%	67%	46%
FCC	47%	51%	65%	80%	57%
Other	84%	69%	67%	100%	72%
Total	54%	57%	55%	76%	58%
N	46	117	94	17	282
F	3.86	1.72	3.92	0.65	6.80
Prob>F	.03	.18	.02	.54	.00

Table 8. Appeal outcome by petitioner type.				
	Petitioner Type			
Outcome	**Other**	**Corp**	**Enviro**	**Non-Profit**
Invalidated	13%	9%	12%	20%
Invalidated & Remanded	6%	10%	10%	20%
Invalidated in part, Upheld in part, & Remanded	17%	12%	24%	13%
Invalidated in part, Upheld in part, no Remand	7%	6%	2%	0%
Upheld	56%	63%	52%	47%
N	109	116	42	15
Chi-square=11.23, DF=12, p=.51				
Column totals may not equal 100% due to rounding				

Table 9. Percentage of cases that are upheld in entirety, by year of final date.		
Final Date	**% Upheld Outright**	**Number of Cases**
1994	56%	9
1995	65%	26
1996	70%	30
1997	56%	27
1998	69%	29
1999	56%	18
2000	55%	31
2001	52%	31
2002	52%	31
2003	50%	24
2004	54%	26
Total	58%	282

Ms. SÁNCHEZ. Thank you so much for your testimony, Professor Freeman.

I would now invite Dr. Copeland to proceed with his testimony.

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

Mr. COPELAND. Thank you, Madam Chairman, Members of the Subcommittee. I am pleased to be here today to discuss recent rulemaking and administrative law issues that the Administrative Conference, or ACUS, might have been able to address as well as issues that it might address in the future.

Although it is ultimately impossible to know what effect ACUS would have had on these issues, it is not far fetched to say that ACUS would have made a difference in our understanding and ability to deal with them.

One such issue occurred within the last month. On August 17th, the Centers for Medicare and Medicaid Services sent a letter to State health agencies requiring them to use specific procedures to ensure that the States' Children's Health Insurance Program, or SCHIP, does not substitute for coverage under group health plans. Although CMS said it was just providing guidance to the States, some observers considered this letter a rule that should have been submitted to Congress under the Congressional Review Act. Therefore, they said, the letter's requirements could not take effect.

Had ACUS been available, it could have provided professional, objective, non-partisan advice to both Congress and CMS about whether the letter's requirements had crossed the line into rulemaking and, therefore, avoided at least this part of the SCHIP controversy. More generally, during the last decade ACUS might have published studies, convened panels and possibly issued authoritative guidance to all Federal agencies regarding this aspect of the rulemaking process.

ACUS could have also been a player regarding an issue that came before this Subcommittee this year, Executive Order 13422, and its changes to the presidential regulatory review process. One of the most controversial elements of this executive order required agencies to designate presidential appointees as regulatory policy officers who appear to have been given enhanced authority to stop agency rulemaking.

However, little was known about these policy officers' identities or their responsibilities. Even OMB did not know whether the new RPO designees were different than the ones serving prior to the executive order. Had ACUS been around during the last 12 years, it could have conducted studies indicating how many of the policy officers were already presidential appointees and determine whether the new designees represented a significant change. That information may not have diffused the controversy, but it might well have led to a more informed discussion.

Another possible issue for ACUS is electronic rulemaking, which supporters say has the potential to increase the democratic legitimacy, improve regulatory policy decisions and decrease administrative costs. However, the Bush administration's effort to create a centralized electronic docket for all Federal agencies has generated

strong congressional concern about its funding and management, and concerns from others about the functionality of the docket's application. ACUS could have provided Congress and the Administration advice on all these issues, bringing together leading experts to ensure compliance with applicable legal requirements and that the new docket system is cost-efficient, effective and user friendly.

Civil penalties is another issue that ACUS could have examined more recently. In 1996, the year after ACUS was eliminated, Congress enacted legislation requiring agencies to examine their civil penalties for at least once every 4 years, and if necessary, adjust them for inflation. However, as GAO reported 3 years ago, certain provisions in the legislation actually prevent agencies from adjusting their civil penalties for inflation.

As a result of this lack of action, the deterrent value of civil penalties have declined sharply over the years. Had ACUS been available, it might have been able to call attention to these problems while the legislation was being considered in Congress or could have identified the problems during implementation more rapidly. My written statement identifies several additional broad areas that ACUS could have addressed, including public participation in rulemaking, science in rulemaking, the effectiveness of analytic requirements placed on the agency rulemaking agencies, privacy protection, information access, presidential directives. The list goes on.

Also ACUS could have helped in the development of what Neal Kerwin from the American University called the professionalization of rulemaking, ultimately leading to a defined career path. Although many organizations within and outside of Government have studied these kinds of issues, ACUS appears to have been unique in its ability to serve as a nonpartisan, deliberative forum and as a long-term source of unbiased, objective information on a range of topics.

Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions.

[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

September 19, 2007

on

"The Regulatory Improvement Act of 2007"

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the proposed "Regulatory Improvement Act of 2007," which would reauthorize the Administrative Conference of the United States (ACUS). As you requested, my testimony will focus on what role ACUS might have played in relation to several recent issues in rulemaking and administrative law. As you know, however, CRS takes no position on any legislative option.

I should begin, however, with a caveat. At this subcommittee's hearing on ACUS in May 2004, Associate Justices Steven G. Breyer and Antonin Scalia were asked a similar question — what problems might have been avoided had ACUS not been eliminated in 1995. Both indicated that it was impossible to know.[1] It is the perennial problem of describing the counterfactual; what would have happened if certain events had been different. Perhaps ACUS would have had no effect on these rulemaking and administrative law issues, and all of them would be as unclear or as difficult as they are today. But it is not far fetched to say

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[1] U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Reauthorization of the Administrative Conference of the United States*, hearing, 108th Cong., 2nd sess., May 20, 2004 (Washington: GPO, 2004), p. 18.

that ACUS could have made a difference, and as a result we would be further down the road to understanding and dealing with these issues than we are now.

What is a "Rule"?

One such issue occurred within the past month, and serves as an illustration of how ACUS could have addressed elements of a current controversy. On August 17, 2007, the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services sent a letter to state health officials requiring them to use five specific procedures to ensure that the State Children's Health Insurance Program (SCHIP) does not substitute for coverage under group health plans.[2] CMS said the letter simply clarified how the agency applies existing statutory and regulatory requirements in reviewing state requests to extend SCHIP. Some health care advocacy groups, however, asserted that the letter would effectively establish a new income limit for SCHIP at 250% of the federal poverty level, eliminate the discretion that states have traditionally had to tailor their SCHIP programs, and eliminate health coverage for tens of thousands of children in at least 18 states.[3]

The CMS letter is part of an ongoing policy debate regarding how the SCHIP program should be administered and which children should be covered.[4] However, it also raised a separate, more narrowly focused, yet important issue of administrative law — was the August 17 CMS letter really a "rule" under the Administrative Procedure Act (APA) of 1946 (5 U.S.C. 551 *et seq.*) that should have been published in the *Federal Register* for public comment? Also, was this document a "rule" for purposes of the Congressional Review Act (CRA) (5 U.S.C. 801-808), and therefore subject to a congressional resolution of disapproval? The potential implications of these questions are significant for the SCHIP program. The CRA says that federal agencies must submit their covered rules to each house of Congress and the Comptroller General before they can take effect, and that any resolution of disapproval has to be introduced within 60 days after Congress receives the rule. In the case when a document is not sent to Congress, can Congress consider a resolution of disapproval under the CRA? Can the August 17 letter be challenged? Who understands these issues and can provide advice on them?

ACUS was eliminated in 1995 — the year before the CRA was enacted. Had ACUS been in existence during the past decade, it could have been the source of authoritative, nonpartisan guidance regarding the coverage of the act. ACUS could have convened expert panels or commissioned authoritative studies of the act's implementation to provide ongoing information to decisionmakers both in executive branch agencies and in Congress. As a result, ACUS arguably would have been well positioned to advise CMS in regard to the requirements in the August 17 letter, and to advise Congress as to its oversight role.

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[2] To view a copy of this letter, see [http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf].

[3] Steve Teske, "CMS Tells States to Adopt More Ways To Stop Insurance 'Crowd-Out' From SCHIP," *BNA Daily Report for Executives*, Aug. 21, 2007, p. A-15.

[4] For information on legislative proposals in the 110th Congress, see CRS Report RL34129, *Medicaid and SCHIP Provisions in H.R. 3162 and S. 1893/H.R. 976*, by Evelyne Baumrucker (coordinator), Bernadette Fernandez, April Grady, Jean Hearne, Elicia J. Herz, and Chris Peterson.

Rules Versus Guidance. More generally, ACUS could have helped address what has become a major issue in administrative law, and an issue that has been of considerable interest to Members of Congress from both parties in recent years — what is the difference between an agency "guidance document" and a "rule"? Just as Congress sometimes enacts broad legislation and leaves the specific requirements to be developed through regulations, agencies sometimes publish regulations that require further delineation in subsequent guidance documents. That is essentially what CMS said it was doing in the August 17 SCHIP letter — issuing guidance to the states to clarify what the existing regulations (42 C.F.R. 457.805) mean when they say that states must have "reasonable procedures" to prevent substitution of public SCHIP coverage for private coverage. Some courts have ruled that agency guidance documents, unlike regulations, cannot have a binding effect on the public.[5] Some may question whether the CMS letter — when it said that states would be expected to include five general "crowd out" strategies in their SCHIP procedures,[6] make three specific types of assurances regarding the program,[7] and amend their state plans within 12 months "or CMS may pursue corrective action" — crossed the line into rulemaking. Currently, it is unclear. But it is clear that guidance documents, unlike rules, do not have to be published for public comment, and are not subject to a host of statutory and executive order rulemaking requirements.

This certainly is not the first time that questions have been raised regarding agencies' "guidance" documents. In 2000, the Committee on Government Reform published a report that raised questions regarding a number of guidance documents issued by the Environmental Protection Agency, the Department of Labor, and other agencies.[8] The report indicated that agencies issue thousands of guidance documents each year that are intended to clarify the requirements in related statutes and regulations. For example, the Occupational Safety and Health Administration reported that it had issued 3,374 guidance documents in the previous four years.[9] EPA reported it had issued 3,653 guidance documents in that period. If ACUS had been in existence during the past 12 years, it could have supported studies, convened panels, and otherwise provided information to agencies that might have brought greater clarity to this situation.

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[5] See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Agencies Use Them to Bind the Public?" *Duke Law Journal*, vol. 41 (1992), p. 1311.

[6] Those five policies are: (1) imposing waiting periods between dropping private coverage and enrollment; (2) imposing cost sharing in approximation to the cost of private coverage; (3) monitoring health insurance status at the time of application; (4) verifying family insurance status through insurance databases; and (5) preventing employers from changing dependent coverage policies that would favor a shift to public coverage.

[7] These three assurances were that: (1) the state has enrolled at least 95% of the children in the state below 200% of the federal poverty level who are eligible for either SCHIP or Medicaid; (2) the number of children in the target population insured through private employers has not decreased by more than two percentage points over the prior five year period; and (3) the state is current with all reporting requirements in SCHIP and Medicaid and reports on a monthly basis relating to the crowd-out requirements.

[8] U.S. Congress, House Committee on Government Reform, *Non-Binding Legal Effect of Agency Guidance Documents*, 106th Cong., 2nd sess., H.Rept. 106-1009 (Washington: GPO, 2000).

[9] Ibid., p. 5.

Presidential Review of Rulemaking

ACUS could have also been a player in a recent and ongoing controversy involving presidential review of rulemaking. On January 18, 2007, President Bush issued Executive Order (E.O.) 13422, making the most significant amendments to the review process in almost 14 years.[10] Among those changes were requirements that each agency head designate one of the agency's presidential appointees as the "regulatory policy officer" or RPO. The order also eliminated the provision requiring the RPO to report to the agency head, and appeared to give the RPO significant new authorities. For example, it said that unless specifically permitted by the agency head, "no rulemaking shall commence" in the agency without the policy officer's approval. (Previously, the RPOs were only supposed to "be involved" in the regulatory process, and to "foster the development" of sound rules.)

This change, and other changes made by E.O. 13422, generated strong differences of opinion between rulemaking experts and interest groups, and were characterized by critics as a "power grab" by the White House that undermines public protections and lessens congressional authority,[11] and by proponents as "a paragon of common sense and good government."[12] Congressional concerns about the executive order led to the addition of a provision to the FY2008 Financial Services and General Government appropriations bill (H.R. 2829, which funds the Office of Management and Budget (OMB) and other agencies) stating that "None of the funds made available by this Act may be used to implement Executive Order 13422." The amendment was agreed to as Section 901 of the legislation as passed by the House. In the wake of this action, the Director of OMB sent a letter to the chairmen and ranking members of the House and Senate Appropriations Committees stating that "If the President were presented with a bill that contained a restriction on the implementation of Executive Order 13422, the President's Senior Advisors would recommend that he veto the bill."[13] In the Senate, the provision was taken out when the bill was reported by the Appropriations Committee, but some media reports indicate that the issue may be taken up during a House-Senate conference on the legislation this fall.[14]

What could ACUS have added to this discussion? Perhaps what supporters argue that it often did best — provide what was viewed as unbiased, objective information to

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[10] Executive Order 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review," 72 *Federal Register* 2763, Jan. 23, 2007.

[11] Public Citizen, "New Executive Order Is Latest White House Power Grab," available at [http://www.citizen.org/pressroom/release.cfm?ID=2361]. See also Margaret Kriz, "Thumbing His Nose," *National Journal*, July 28, 2007, pp. 32-34.

[12] Attributed to William Kovacs, Vice President of Environment, Energy, and Regulatory Affairs, U.S. Chamber of Commerce, in John Sullivan, "White House Sets Out New Requirements for Agencies Developing Rules, Guidance," *BNA Daily Report for Executives*, Jan. 19, 2007, p. A-31.

[13] Letter to Senators Robert C. Byrd and Thad Cochran, and to Representatives Jerry Lewis and David Obey, from Rob Portman, Director, Office of Management and Budget, July 12, 2007.

[14] "Durbin Vows to Block Funds for White House Regulatory Review Order," *Inside EPA*, Sept. 6, 2007, available at [http://www.insideepa.com/secure/docnum.asp?f=epa_2001.ask&docnum=CLEANAIR-18-18-18].

decisionmakers. For example, during the subcommittee's hearing last February, the acting administrator of OMB's Office of Information and Regulatory Affairs (OIRA) said that most RPOs were already presidential appointees, and also said that the executive order did not substantively change the policy officers' duties or reporting relationships. However, it appeared that little was known — even by OIRA — about who the agency RPOs were or what they actually did. When OIRA published the list of newly designated RPOs in July 2007, it was not clear how many of the incumbents had changed because OIRA did not have a list of the policy officers before the executive order was issued.[15] Had ACUS been available to examine this issue, it might have been able to provide real-time information on the RPOs, noting whether they already were presidential appointees, whether they were usually in positions subject to Senate confirmation, and whether the new RPO designees represented a change in these positions. That information may not have defused the controversy, but it might well have led to more informed discussion of the issues.

An ACUS examination of E.O. 13422 would not have been the first time that the agency weighed in on presidential review of rulemaking. In 1988, ACUS examined the practice, generally validated its exercise, and made certain recommendations to improve its openness and public acceptability.[16] In 1993, E.O. 12866 (which E.O. 13422 amended) incorporated ACUS's recommendations for more openness in the process, requiring agencies to disclose the changes made to draft rules that are submitted to OIRA.[17] However, OIRA now wields considerable influence over agencies' rules *before* they are formally submitted to OMB. In fact, OIRA has said that this "informal review" period is when it can have its *greatest* influence on agency rulemaking.[18] Therefore, GAO recommended in 2003 that agencies be required to disclose changes made at OIRA's suggestion during both formal and informal review, but OIRA said doing so would inappropriately intrude on the deliberative process.[19] A reconstituted ACUS could examine this issue and make recommendations as to whether more openness is in the public interest. ACUS could also weigh in on whether the transparency provisions of E.O. 12866 should apply to guidance documents that may now have to be submitted to OIRA because of the changes made by E.O. 13422.[20]

Electronic Rulemaking

Another ongoing issue in administrative law is electronic rulemaking — i.e., the use of information technology (IT) to facilitate a range of activities related to the process of developing regulations. "E-rulemaking" in the federal government began within individual

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[15] The July 2007 list of RPO designees can be found at [http://www.whitehouse.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf].

[16] ACUS Recommendation 88-9, *Presidential Review of Rulemaking* (1 C.F.R. 305.88-9).

[17] 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].

[18] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, 03-929, Sept. 22, 2003.

[19] Ibid.

[20] E.O. 13422 requires agencies to notify OIRA of upcoming significant guidance documents, and to submit those documents to OIRA if requested by the administrator. It appears that those guidance documents are not covered by the transparency provisions in E.O. 12866.

agencies in the mid-to-late 1990s, but current government-wide initiatives can be traced to both congressional and presidential sources. For example, the E-Government Act of 2002 (P.L. 107-347) requires federal agencies, "to the extent practicable," to accept public comments on their rules electronically and to ensure that one or more federal websites contain those comments and other materials normally maintained in rulemaking dockets. E-rulemaking is also one of 24 e-government projects launched as part of the Bush Administration's President's Management Agenda. The Administration established a website (www.regulations.gov) in January 2003 through which the public could identify all federal rules that were open for comment, and provide comments on those rules. The second phase of the Administration's initiative is currently underway, and is intended to create a centralized electronic docket (the "Federal Docket Management System," or FDMS) to allow the public to review agency rulemaking materials (e.g., agencies' legal and cost-benefit analyses for their rules) and the comments of others.

E-rulemaking has been described by proponents as a way to increase democratic legitimacy, improve regulatory policy decisions, decrease agencies' administrative costs, and increase regulatory compliance. However, the implementation of e-rulemaking in the federal government has been controversial. Congress has objected to how e-rulemaking and several other e-government projects have been funded (through transfers of appropriations), and has voiced strong concerns about the centralized management of the initiatives.[21] To date, more than two dozen federal agencies have transferred nearly $50 million to the Environmental Protection Agency (EPA) to build FDMS.[22] (In a 2003 business case, EPA estimated the cost of constructing the docket at about $20 million.) OMB officials have said these transfers are being done under the Economy Act (31 U.S.C. 1535), which allows agencies to purchase goods and services from one another. However, it is unclear whether the Economy Act allows agencies to transfer their appropriations primarily for the construction of the docket without receiving ongoing, FDMS-related goods and services.[23]

Also, some observers have criticized the functionality of some of the applications being used in the new docket system. For example, Thomas R. Bruce, director of Cornell University's Legal Information Institute, said most of the problems with the FDMS website

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[21] For example, Section 841 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006 (P.L. 109-115) prohibited the transfer of funds to e-government projects without the approval of the House and Senate Committees on Appropriations. In explaining the rationale for this provision, the House report for the legislation (H.R. 3058) noted "serious concerns about the continued forced implementation of this initiative on Departments and Agencies," and said "many aspects of this initiative are fundamentally flawed, contradict underlying program statutory requirements and have stifled innovation by forcing conformity to an arbitrary government standard. Most importantly, the implementation of this initiative has forced departments and agencies and offices and bureaus within each to transfer funds without the consent of the Committee and has used funds for activities for which funding was not specifically appropriated."

[22] See U.S. Government Accountability Office, *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, GAO-05-420, Apr. 25, 2005; and OMB's *Report to Congress on the Benefits of the President's E-Government Initiatives* for FY2006 and FY2007, available at [http://www.whitehouse.gov/omb/egov/documents/FY07_Benefits_Report.pdf].

[23] See, for example, Jason Miller, "Providers look for a level playing field; OMB has not decided how to resolve inequities in the 1932 Economy Act," *fcw.com*, Feb. 19, 2007.

"stem from the amount of knowledge you need to have to make it work effectively."[24] He said the site requires users to be familiar with the rulemaking process and to know which government entity regulates specific subjects. Other concerns have focused on a reported lack of consistency in how key data are submitted into the docket system. Robert Carlitz, director of Information Renaissance, said that although e-rulemaking program managers provided a few standard fields, they also allowed agencies to add any additional fields they wanted. He said this "led to a certain amount of anarchy because you can have the same information submitted in different ways by the agencies."[25] Still other concerns center on the limited search capability in FDMS. Currently, the system allows only searches within certain data fields (e.g., the titles of documents), not throughout the text of the documents in the docket. Barbara Brandon, a law librarian at the University of Miami School of Law, has been quoted as saying that if the system is not going to provide full text searching, "then it has really been oversold."[26] EPA officials said they are aware of this limitation, and that full-text searching would likely be added in 2007.

ACUS might have been able to improve the implementation of e-rulemaking in the federal government. As was pointed out during this subcommittee's hearing in May 2004, ACUS played a key role in the Clinton Administration's National Performance Review recommendations on regulatory systems, one of which was that agencies should "Use information technology and other techniques to increase opportunities for early, frequent and interactive public participation during the rulemaking process and to increase program evaluation efforts."[27] Regarding funding of the initiative, ACUS could have advised Congress and the Administration on the best ways for cross-cutting programs like e-rulemaking to be funded by vertically organized and appropriated executive branch agencies. ACUS might have also played a role in ensuring that the centralized approach that OMB selected was, in fact, the most cost-efficient way to provide docket services to the agencies and the public. Regarding the functionality of the system, it might have brought together leading experts in Web design and suggested ways to make FDMS and the regulations.gov website more user friendly and useful.

More generally, ACUS might serve as a mechanism through which agencies learn about innovative uses of IT in rulemaking and regulatory management. In 2001, the General Accounting Office (GAO, now the Government Accountability Office) issued a report indicating that individual federal and state agencies were implementing new ways to provide regulatory compliance assistance and perform other administrative functions, but federal agencies were frequently unaware of each other's activities.[28] GAO recommended that OIRA develop a systematic process for agencies to share information on these innovations, but OIRA declined to comment on the recommendations. According to the legislation that

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[24] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website," *BNA Daily Report for Executives*, Mar. 30, 2007, p. C-5.

[25] Ibid.

[26] Ibid.

[27] Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, Report of the National Performance Review (Washington: GPO, 1993), p.168.

[28] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232 (Washington: Feb. 12, 2001).

originally established ACUS in 1964, one of its functions was to "arrange for interchange among agencies of information useful in improving administrative procedures."[29]

Civil Penalties

ACUS might have also played a positive role regarding civil penalties, and it would not have been the first time that the conference would have done so. ACUS made recommendations in the past about particular agencies' penalties, and suggested the establishment of a regime of administratively imposed civil penalties. In fact, as former OIRA administrator Sally Katzen testified before the predecessor to this subcommittee in 1994, ACUS's prototype civil penalty statute became the model for more than 200 civil penalty laws.[30]

A current issue, in this regard, concerns the Federal Civil Penalties Inflation Adjustment Act. As amended in 1996 (the first year ACUS was no longer in business), the act requires agencies with covered civil penalties to examine and, if necessary, adjust those penalties for inflation at least every four years. However, GAO reported in 2003 that federal agencies were often not adjusting their penalties, and one reason was how the act itself was written.[31] Among other things, the act contains complicated rounding formulas that prevent agencies from capturing all the inflation that occurs between adjustments and that apparently prevents agencies from increasing certain penalties until inflation has increased by 45% or more. Therefore, its name notwithstanding, GAO concluded that the Inflation Adjustment Act may actually *prevent* agencies from adjusting some of their penalties for 15 years or more. Meanwhile, the deterrent power of those civil penalties decreases year after year. GAO also reported the following:

> The act does not give any agency the authority or responsibility to monitor agencies' compliance or provide guidance on its implementation. Lack of monitoring and guidance may have contributed to the widespread lack of compliance with the act's requirements and the numerous questions raised to us regarding its provisions.[32]

Had ACUS been available in 1996, it might have been able to call attention to these problems while the Inflation Adjustment Act amendments were being written, perhaps suggesting improvements before enactment. Had ACUS been available after 1996, it might have been able to identify the flaws more rapidly.

Other Areas

ACUS might have been able to play a significant role in a number of other areas of administrative law that have arisen in the past 12 years, and if Congress so chooses, could prospectively play a role in a range of issues currently facing Congress and federal agencies.

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[29] Administrative Conference Act of 1964, P.L. 88-499.

[30] Testimony of Sally Katzen before the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, Apr. 21, 1994, p. 4.

[31] U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, Mar. 14, 2003.

[32] Ibid., p. 3.

In fact, those areas match almost exactly the areas delineated in this subcommittee's "Administrative Law, Process, and Procedure Project for the 21st Century."[33]

Public Participation. For example, within the area of public participation in rulemaking, ACUS could examine:

- whether efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., the review panels established by the Small Business Regulatory Enforcement Fairness Act of 1996) are working and should be retained or expanded;[34]
- the effectiveness of the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in giving the public advance notice of upcoming rules;[35]
- whether agencies are appropriately using the "good cause" exception to notice and comment rulemaking, which can effectively eliminate public input to the rulemaking process;[36]
- whether agencies should be able to avoid the analytical requirements in the Unfunded Mandates Reform Act and the Regulatory Flexibility Act by skipping publication of a proposed rule;[37] and
- whether Congress should extend the APA prohibitions regarding *ex parte* contacts during formal rulemaking to informal "notice and comment" rulemaking.

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[33] For more information and to view a copy of the committee print of this initiative, see [http://judiciary.house.gov/Media/PDFS/Printers/110th/31505.pdf].

[34] The requirement for these panels is codified at 5 U.S.C. 609. GAO examined the initial implementation of this requirement, and generally concluded that the panels were worthwhile. See U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, Mar. 18, 1998.

[35] The Unified Agenda is published twice each year by the Regulatory Information Service Center (RISC) and provides for uniform reporting of data on regulatory activities under development throughout the federal government. In 2001, GAO reported that the Unified Agenda was not always accurate. See U.S. General Accounting Office, *Accuracy of Information in the Unified Agenda*, GAO-01-1024R, July 27, 2001.

[36] In 1998, GAO determined that about half of all final rules were published without a proposed rule, including some actions with a $100 million impact on the economy. The most common reason was agencies' use of the "good cause" exception, which allows agencies to not issue a proposed rule if doing so is "unnecessary, impracticable, or not in the public interest.". See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

[37] GAO determined that the lack of proposed rules has affected the coverage of both statutes. See, for example, U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

Science and Rulemaking. Regarding the role of science in the regulatory process, a reconstituted ACUS might examine:

- how science advisory committees should be constructed to ensure they are not biased;
- whether agencies have too much discretion to deny correction requests under the Information Quality Act,[38] and whether those denials should be subject to judicial review;[39]
- whether government-wide standards for peer review are needed, whether OMB had the authority to issue such standards in 2004,[40] and the effect of the standards on the time agencies take to issue rules;
- what constitutes the "weight of the evidence" in making risk-based regulatory decisions, and whether government-wide standards on risk assessment would be feasible or useful.[41]

Congressional Review. In addition to the issues discussed earlier in this testimony, ACUS might examine a number of issues related to the Congressional Review Act, such as:

- whether agencies should still be required to send all their final rules to the House, the Senate, and GAO, or just those rules that are not published in the *Federal Register*; and
- whether there should be an expedited procedure for House consideration of rules reported for review (as there is in the Senate).[42]

Finally, if requested, ACUS could examine the pro's and con's of establishing a "Congressional Office of Regulatory Analysis" (essentially, a legislative branch OIRA) to help Congress oversee agencies' compliance with rulemaking requirements.

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[38] The Information Quality Act (sometimes referred to as the Data Quality Act) is a two-paragraph provision added to the 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), and is codified at 44 U.S.C. 3504(d)(1) and 3516.

[39] Courts have indicated that these decisions are not currently subject to judicial review. See *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.

[40] 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].

[41] OMB issued proposed standards in 2006, but the National Academy of Sciences concluded they were "fundamentally flawed" and should be withdrawn. OMB has not indicated whether it will publish final risk assessment standards. To view a copy of the proposed standards, see [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

[42] For a discussion of this issue, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

Analytical Requirements. Another possible area of inquiry for ACUS could be the analytical and implementation requirements that Congress and various Presidents have placed on rulemaking agencies. For example, ACUS could examine:

- whether cost-benefit analysis is inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize,[43] and if not, what steps can be taken to ensure that regulatory costs and benefits are fairly and accurately measured;
- whether agencies are adhering to the cost-benefit analysis requirements in E.O. 12866 and OMB Circular A-4;[44]
- whether OIRA applies those cost-benefit analysis requirements in a consistent way, or whether certain types of rules, or rules from certain agencies (e.g., the Department of Homeland Security), are essentially exempt from these requirements;
- the accuracy of agencies' pre-promulgation estimates of regulatory costs and benefits;[45]
- whether cost-benefit requirements themselves would pass a cost-benefit test;
- whether Congress or the Administration should define key terms in the Regulatory Flexibility Act (e.g., "significant economic impact on a substantial number of small entities") and other analytic requirements;[46]

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[43] See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002); and Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

[44] Previous studies suggest that agencies are often not doing so. See, for example, Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996); and 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). To view a copy of OMB Circular A-4, see [http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf].

[45] 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. In 2005, OMB reviewed the literature on *ex ante* cost and benefit estimates, and concluded that federal agencies tend to overestimate both benefits and costs. See 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].

[46] GAO has repeatedly said that the lack of clarity regarding "significant economic impact on a substantial number of small entities" in the act has affected its implementation. See, for example, U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, Apr. 2, 1999; U.S. General Accounting Office, *Regulatory*

(continued...)

- whether agencies should be required to develop "plain language" compliance guides for all significant rules, and whether existing compliance guide requirements are having the desired effect;[47]

- whether the numerous analytical and accountability requirements in various statutes and executive orders should be rationalized and codified in one place; and

- whether the analytical and accountability requirements have contributed to better rulemaking, and their effect on what has been called the "ossification" of the rulemaking process.[48]

Personal Information Privacy Protection. There may be several non-rulemaking areas that a reconstituted ACUS could review and assess. One such area is the adequacy of the Privacy Act regarding such issues as:

- "routine use" disclosure of personally identifiable information, or a disclosure that is "compatible" (undefined in the statute) with that for which the data were originally collected; and

- "data mining," or the use of sophisticated data analysis tools, including statistical models, mathematical algorithms, and machine learning methods, by federal agencies to discover previously unknown, valid patterns and relationships in large data sets.

Improved Information Access. ACUS could explore ways that public access to unpublished federal agency records might be improved under the Freedom of Information Act (FOIA) through:

- alternative dispute resolution arrangements that might be utilized after an administrative appeal has failed to result in the disclosure of requested records, but before litigation for such records is initiated; and

- reducing the variety of information control markings (other than those authorized by Executive Order for security classification purposes) in use, clarifying the authority for their issuance, and clarifying their relationship to the exemptions of the FOIA.

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[46] (...continued)
Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule, GAO/GGD-00-193. Sept. 20, 2000.

[47] GAO reported in 2001 that the compliance guide requirement in the Small Business Regulatory Enforcement Fairness Act was not working as Congress intended. See U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

[48] Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process, *Duke Law Journal*, vol. 41 (1992), pp. 1385-1462.

Presidential Directives. Finally, ACUS might be tasked to explore improved management of presidential directives, such as National Security Presidential Directives and Homeland Security Presidential Directives, including:

- their variety, purpose, and legal status; and
- their accountability and public availability.

A Profession of Rulemaking

All these issues have been raised by scholars, federal agencies, and others since ACUS was eliminated in 1995. All could be examined by a reconstituted ACUS in the same objective, nonpartisan, and influential way that it was widely viewed as exhibiting prior to its demise. But ACUS could also play a more general role within the regulatory arena, bringing about what Cornelius M. Kerwin of American University has termed "the professionalization of rulemaking." In a recent white paper, Professor Kerwin highlighted the importance of the field of regulation management, but also stated that it lacks visibility, focused attention, and support.[49] If Congress instructed it to do so, ACUS could help identify "best practices" among regulatory agencies, and could help establish a defined career path and training for regulatory managers.

Who Else Could Play This Role?

Existing federal agencies or other entities may be considered candidates to perform the functions discussed herein. One possible candidate is OMB's Office of Information and Regulatory Affairs (OIRA), which is required in E.O. 12866 to be "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency."[50] The executive order also requires the administrator of OIRA to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency."[51] However, OIRA is a relatively small office, and is annually responsible for reviewing about 700 draft proposed and final agency rules before they are published in the *Federal Register*, and for reviewing thousands of agency information collection requests. Also, OIRA is located within the Executive Office of the President, and its actions reflect presidential priorities. As the current OIRA administrator wrote in an article 10 years ago this fall, "OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective

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[49] Cornelius M. Kerwin, *The Management of Regulation Development: Out of the Shadows*, IBM Center for the Business of Government, 2008 Presidential Transition Series, p. 33. In addition to being a professor of public administration and president of American University, Professor Kerwin is also director of the university's Center for the Study of Rulemaking.

[50] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993, Sec. 2(b).

[51] Ibid., Sec. 6(b).

analysis."[52] Therefore, OIRA would likely not be viewed by many as an independent and objective arbiter regarding the kind of issues that would come before ACUS.

The Government Accountability Office might also be a candidate, given it has published numerous studies on regulatory issues in the past 10 to 15 years.[53] Also, because of its role in the Congressional Review Act, GAO has rendered numerous decisions during the past 10 years on what constitutes a "rule" under the CRA.[54] However, while independent and nonpartisan, GAO is at heart an investigative organization, and (as noted on its website) "studies how the federal government spends taxpayers' dollars." Therefore, GAO may not be the appropriate organization to take on ACUS-like functions, and agencies may not welcome GAO auditors in the same way that they would an organization like ACUS.

Other possible candidates include professional associations like the National Academy of Public Administration, or the American Bar Association. However, as Justices Breyer and Scalia testified at a hearing before this subcommittee three years ago, a strong argument could be made that ACUS should be a government entity, and should be independent of any cabinet department or other agency.[55]

Although a variety of academic and governmental entities has examined many of the issues that ACUS could have addressed, none of these entities appears to have the institutional memory of an ACUS, and none appears to be as capable of serving as a respected forum to which Congress, the President, the courts, and federal agencies could turn to obtain objective, reliable information. In that regard, ACUS appears to have been unique.

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Madam 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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[52] Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?," *Regulation* (fall 1997), pp. 17-23.

[53] For a compendium of these reviews, see U.S. Government Accountability Office, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-06-228T, Nov. 1, 2005.

[54] For a compendium of these decisions, see [http://www.gao.gov/decisions/cra/index.html].

[55] For example, when asked whether the functions of ACUS should be privatized, Justice Scalia said "I think it has to be within the Government because ... you have an entree to the agencies... [I]f you have an agency that has the respect of other agencies ... your chances of being able to do a thorough study with the cooperation of the agency are vastly increased. That could not be done by a private corporation." See U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Reauthorization of the Administrative Conference of the United States*, 108th Cong., 2nd sess., May 20, 2004 (Washington: GPO, 2004), p. 17.

Ms. SÁNCHEZ. Thank you, Dr. Copeland. And I noticed you came in under the 5-minute mark. I appreciate that.

At this time I would invite Professor Lubbers to begin his testimony.

TESTIMONY OF JEFFREY S. LUBBERS, ESQ., PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, DC

Mr. LUBBERS. Thank you very much, Madam Chair and Ranking Member Cannon, Members of the Committee. I am very pleased to be here today to discuss with you the continuing need to reauthorize the Administrative Conference of the United States, ACUS.

I first want to applaud the Committee's leadership in this bipartisan effort that led to the successful effort 3 years ago to enact the Federal Regulatory Improvement Act of 2004, which reauthorized ACUS until the end of this current fiscal year. Unfortunately, no appropriations were made available to reconstitute ACUS in the past 3 years, so another reauthorization is necessary.

Due to the work of this Committee in fostering studies and forums on the importance of the administrative process, I believe that at this time the foundation has been laid for a successful appropriations effort. So I strongly support a new 2007 version of the Regulatory Improvement Act, H.R. 3564. And I also want to salute the excellent statements and all of the work of my fellow panelists who have been so instrumental in providing assistance to the Committee in this effort.

As you mentioned, I spent 20 years of my professional career working at ACUS from 1975 until it lost its funding in 1995. I truly believe it was one of the Federal Government's most cost-effective institutions. And it has been sorely missed.

I have written three short articles supporting the revival of ACUS, which I am appending to this testimony. In my years at ACUS I saw just how cost-effective it was. We had a small staff and a small budget, but a large membership of agency representatives and private sector experts who donated their time in order to see consensus on some of the most vexing administrative procedure problems of the day, problems that the rest of the Government did not have the time to think about in such an ordered way.

Our small budget was leveraged into savings many times over for the Government due to streamlined procedures, efficiencies in government-wide operations, and the sharing of information among agencies about procedural problems. Perhaps more important, the members were drawn from a wide variety of backgrounds and interest groups.

It was heartening to see interest group lawyers who are normally strong opponents in the world of litigation, lobbying and politics come together in a spirit of cooperation to seek consensus on process. I firmly believe that the connections forged in the ACUS meetings helped increase civil discourse and reduce the level of partisanship in legal Washington, as the testimony of Justices Scalia and Breyer demonstrated, also the support for reviving ACUS by both the American Bar Association and the Center for Regulatory Effectiveness.

Mr. Copeland, just 2 weeks ago I had a reminder of how ACUS is missed. I was asked to provide testimony to a small, independent agency that was created in 2003, the U.S. Election Assistance Commission.

This agency was delegated the important function to issue standards and provide grants to the States for improvements in election processes around the country. Of course, as a Federal agency, it is covered by numerous cross-cutting procedural statutes such as the APA, Freedom of Information Act, Privacy Act, Sunshine Act, Paperwork Reduction Act and Government Performance and Results Act, just to name a few, many of which require agencies to take affirmative steps to publish procedural regulations and guidelines.

The commissioners were seeking advice on what they had to do under these laws. And when I spoke to them, several of them said publicly that they wished there was an ACUS today that could advise them. Several of the commissioners told me privately that they had received no orientation about these laws when they were appointed, and now they realized they really need some.

This is just the kind of advice and training that ACUS was able to do for new agencies like EAC. I also believe that a large inventory of administrative procedure issues has built up since ACUS shut its doors in 1995. And I gave kind of a laundry list 2 years ago when I appeared before this Committee, and I won't repeat them today.

I also believe that the authorization of appropriations, the dollar amounts included in the bill, are appropriate. They are about the same in today's dollars as ACUS' highest appropriation of $2.3 million in 1992. And to put this amount in perspective, I would note that far greater amounts are often authorized by Congress for individual studies of the administrative process.

I was personally involved in a congressionally mandated study just published today of one aspect of the Social Security Program. And the study cost $8.5 million.

And I can't resist also pointing out the story in last Saturday's *Washington Post* about a report of the Department of Justice's inspector general, which found that DOJ spent $6.9 million in the last 2 years just to host and send employees to 10 conferences, with a total amount of $81 million for all conferences only in those 2 years. So I think the administrative conference is quite a bargain in light of these figures.

So in summary, I would suggest that for all of these reasons, as elaborated in my attached articles and earlier testimony, I would strongly support the reauthorization and the reappropriation of this highly effective and cost-saving agency.

Thank you, Madam Chair, Mr. Cannon. And I would be happy to try to answer any questions you might have.

[The prepared statement of Mr. Lubbers follows:]

PREPARED STATEMENT OF JEFFREY S. LUBBERS

STATEMENT OF JEFFREY S. LUBBERS*

HEARING BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES
ON
H.R. 3564, THE "REGULATORY IMPROVEMENT ACT OF 2007
SEPTEMBER 19, 2007

Madam Chair and Members of the Committee:

I am pleased to be here today to discuss with you the continuing need to reauthorize the Administrative Conference of the United States (ACUS). I first want to applaud the Committee's leadership in this bi-partisan effort that led to the successful effort three years ago to enact the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, which reauthorized ACUS until the end of this current fiscal year.

Unfortunately, no appropriations were made available to reconstitute ACUS in the past three years, so another reauthorization is necessary. Due to the work of this Committee in fostering studies and forums on the importance of the administrative process, I believe that this time the foundation has been laid for a successful appropriations effort. So I strongly support a new 2007 version of the Federal Regulatory Improvement Act.

I also want to salute the work of my fellow panelists who have been so instrumental in providing assistance to this Committee in this effort.

As I explained to this Committee in 2005,[1] I spent 20 years of my professional career working at ACUS from 1975 until it lost its funding in 1995. I truly believe it was one of the federal government's most cost-effective institutions, and it has been sorely missed. I have written three short articles supporting the revival of ACUS, which I am appending to this testimony:

- Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005);

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

[1] Statement of Jeffrey S. Lubbers, Hearings Before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, on "The Administrative Process and Procedures Project," November 1, 2005.

- Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAWYER 26 (Nov./Dec. 2004);
- Jeffrey Lubbers. *"If It Didn't Exist, It Would Have to be Invented"—Reviving the Administrative Conference*, 30 ARIZ. ST L. REV. 147 (1998).

In my years at ACUS I saw just how cost-effective it was. We had a small staff and a small budget, but a large membership of agency representatives and private sector experts who donated their time in order to seek consensus on some of the most vexing administrative procedure problems of the day—problems that the rest of the government did not have the time to think about in such an ordered way. Our small budget was leveraged into savings many times over for the government, due to streamlined procedures, efficiencies in government-wide operations, and the sharing of information among agencies about procedural problems.

Perhaps more important, the members were drawn from a wide variety of background and interest groups. It was heartening to see interest group lawyers, who were normally strong opponents in the world of litigation, lobbying, and politics, come together in a spirit of cooperation to seek consensus on process. I firmly believe that the connections forged in the ACUS meetings helped increase civil discourse and reduce the level of partisanship in legal Washington. But you don't have to take my word for it. The 1995 letters and the May, 2004 testimony before this Committee in support of ACUS by Justices Scalia and Breyer are the most vivid evidence of this spirit. Also persuasive is the strong support for reviving ACUS expressed by both the American Bar Association [see http://www.abanet.org/adminlaw/annual2007/Tab2ACUS.pdf], and by the Center for Regulatory Effectiveness, [see http://www.thecre.com/emerging/20010521_acus.html].

And I don't have to tell you that regretfully, we seem to have regressed in terms of civility and bi-partisanship in the last dozen years.

Just two weeks ago I had a reminder of how ACUS is missed. I was asked to provide testimony to a small independent agency that was created in 2003, the U.S. Election Assistance Commission. This agency was delegated the important function to issue standards and provide federal grants to the states for improvements in election processes around the country. Of course, as a federal agency, it is covered by numerous cross-cutting procedural statutes such as the Administrative Procedure Act, Freedom of Information Act, Privacy Act, Government in the Sunshine Act, Paperwork Reduction Act, and Government Performance and Results Act—many of which require agencies to take affirmative steps to publish procedural regulations and guidelines. The Commissioners were seeking advice on what they had to do under these laws, and when I spoke to them, several of them said publicly that they wished that there was an ACUS today that could advise them. Several of the Commissioners told me privately that they had received no orientation about these laws when they were appointed and that now they realized they really needed some.

The EAC is not alone in this regard—other new agencies or agencies with new rulemaking responsibilities have asked me for help with their administrative procedures. This is just the kind of advice and training that ACUS was able to do, and that no entity is doing now.

I also believe that a large inventory of administrative procedure issues has built up since ACUS shut its doors in 1995. Two years ago, before this Committee, I suggested a research agenda for a revived ACUS.

I won't repeat today everything I said on that occasion, but I will list the topics I think are most in need of attention:

I. The Rulemaking Process.

- A. The Increasing Complexity of the Rulemaking Process.
  1. *Analysis of Impact Analyses.*
  2. *White House Review of Agency Rules.*
  3. *Congressional Review.*
  4. *The Nexus of Science and Rulemaking.*
  5. *What's Holding Back Negotiated Rulemaking?*
  6. *"Midnight" Rules.*
  7. *"Lookback" at Existing Regulations.*
- B. E-Rulemaking.
  1. *Issues Concerning the Informational Goal.*
  2. *Issues Concerning the Participatory Goal.*

II. Broader Regulatory Issues.

- A. Regulatory Prioritization.
- B. Retrospective Reviews of Agency Rulemakings.
- C. Alternative Approaches to Regulation.
- D. New Approaches to Enforcement.
- E. Waivers and Exceptions.
- F. Alternative Dispute Resolution.
- G. Cooperative Federalism.
- H. Requirements for Agency "Planning" in Natural Resource Regulation.
- I. Agency Structure.

III. Administrative Adjudication

- A. The Administrative Law Judge Program.
- B. Administrative Appeal Boards.
- C. Mass Adjudication Programs.

IV. Judicial Review of Administrative Agency Action

- A. *Chevron*-Related Issues.

B. Access to the Courts.

C. Attorney Fees.

In terms of the legislation being considered by the Committee in today's hearing, I would support the same type of "clean bill" that was drafted for the 2004 legislation. I think the ACUS statute is well-suited for its function and it provides the flexibility that is needed for its Chair to manage the operation. I would however support one change recommended by my former colleague, Gary Edles, in his testimony before this Committee on the 2004 legislation—to avoid a potential problem caused by a restrictive interpretation by the Office of Legal Counsel of the Emoluments Clause of the Constitution.[2] He suggested an additional sentence be added to section 593(b)(6) of ACUS's enabling statute as follows:

> The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, therefore, shall not be considered to hold an office of profit or trust for purposes of Article 1, Section 9, Clause 8 of the U.S. Constitution.

As for the authorization of appropriations to be included in the bill, ACUS' highest appropriations was $2.3 million in 1992—about the same in today's dollars as the $3.2 million figure authorized in the 2004 Act for FY 2007. (During the four-year reauthorization cycle immediately preceding ACUS' shutdown, OMB had authorized ACUS to request an amount of appropriations that would have reached $2.928 million in FY 1998.) I supported the amounts in the 2004 legislation and would think that similar amounts with a slight inflation adjuster would be appropriate in the 2007 legislation. Thus I would think that the figures could be $3.4 million for FY 2008,[3] $3.6 million for FY 2009, and $3.8 million for FY 2010.

To put these amounts in perspective, I would note that far greater amounts are often authorized by Congress for individual studies of the administrative process. I was personally involved in a congressionally mandated study of just one aspect of the Social Security program that cost $8.5 million.[4] And I can't resist pointing out the story in last

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[2] For more on this issue, see Gary J. Edles, *Service On Federal Advisory Committees: A Case Study of OLC's Little-Known Emoluments Clause Jurisprudence*, 58 ADMIN. L. REV. 1 (2006).

[3] I recognize that even in the best-case scenario, a reauthorized ACUS probably would not receive FY 2008 appropriations or have its Chairman appointed until some months into FY 2008. But I think it would be better for the appropriators to make whatever adjustment is needed in that regard.

[4] *See* Public Law No. 108-203, "The Social Security Protection Act of 2004," 42 USC § 1305 note, Section 107(b), which authorized and appropriated up to $8,500,000 "for purposes of conducting a statistically valid survey to determine how payments made to individuals, organizations, and State or local government agencies that are representative payees for benefits paid under title II or XVI are being managed and used on behalf of the beneficiaries for whom such benefits are paid." I served (pro bono) on the National Academies Committee that undertook this study for the Social Security Administration, which resulted in a report, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and*

Saturday's Washington Post about a report of the Department of Justice's Inspector General, which found that DOJ spent $6.9 million in the last two years to host or send employees to ten conferences, with a total amount of $81 million for all conferences in those two years.[5]

The Administrative Conference is quite a bargain in light of those figures.

So in summary, I would suggest that for all these reasons, as elaborated in my attached articles and my earlier testimony, I would strongly support the reauthorization and the re-appropriation of this highly effective and cost-saving agency.

Thank you Madam Chair, and I would be happy to try to answer any questions you might have.

Minimizing Misuse (2007), *available* in pre-publication version *at* http://books.nap.edu/openbook.php?record_id=11992&page=R1.

[5] *See* Lara Jakes Jordan, *Snacks Take Big Bite Out of DOJ Budget*, ASSOCIATED PRESS, washingtonpost.com, Sept. 15, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/15/AR2007091500588.html.

Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.

*By Jeffrey S. Lubbers**

In President Bush's first press conference after the bitter 2004 election, he remarked: "With the campaign over, Americans are expecting a bipartisan effort and results."[1] He also commented that, "[O]ne of the disappointments of being here in Washington is how bitter this town can become and how divisive. I'm not blaming one party or the other. It's just the reality of Washington, D.C ... It also makes it difficult to govern at times."[2]

The President actually took a first step to promoting bipartisanship and reducing bitterness in Washington a few days before the election on October 30, 2004, by signing into law Public Law 108-401, the Federal Regulatory Improvement Act of 2004, a bill to reauthorize the Administrative Conference of the U.S. (ACUS).[3]

As regular readers of the *News* know, ACUS was closed in October 1995 after almost 30 years of making recommendations to the government on improving the fairness and efficiency of administrative procedures because congressional appropriators, determined that ACUS had "fully accomplished its mission," and so appropriated no funds.[4]

In my own post mortem to ACUS written in 1998, I optimistically concluded that, "[I]t is only a matter of time before Congress and the President recognize this country's need for objective, non-partisan expertise on the crucial, but not always politically 'sexy,' issues of administrative procedure implementation and reform."[5] I am pleased to say that time has now come thanks to the efforts of Representative Chris Cannon (R. UT), Chairman of the House Judiciary Committee's Subcommittee on Commercial and Administrative Law, who this summer held two hearings on "Reauthorization of the Administrative Conference of the United States," and then in July introduced (along with 33 co-sponsors) H.R. 4917.

The two hearings conducted by the House Subcommittee amply demonstrated broad support for ACUS's revival. The first hearing provided the perhaps unprecedented spectacle of two Justices of the Supreme Court discussing the operations of an executive branch agency before a committee of Congress. Both Antonin Scalia and Stephen Breyer, each of whom had served in ACUS earlier in their careers,[6] were unstinting in their support for reviving it.[7] Both Justices had in fact written Senate Judiciary Committee in a vain attempt to preserve ACUS in 1995,[8] and their continuing commitment to ACUS speaks volumes.

The second hearing was also a bipartisan event with former ACUS members C. Boyden Gray and Sallyanne Payton[9] and former staff lawyers Philip Harter and Gary Edles[10] providing strong support for the revival of ACUS.

Mr. Gray, former White House Counsel in the Bush I Administration, spoke on behalf of this Section of the ABA and the ABA itself. He stressed the bipartisan support for the Conference and concluded that: "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."[11]

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* Section Fellow, and Fellow in Law and Government, Washington College of Law, American University; former Research Director of the Administrative Conference from 1982–1995.

[1] Transcript, George. W. Bush, Presidential Press Conference, Nov. 4, 2004, *available at* http://www.whitehouse.gov/news/releases/2004/11/20041104-5.html.

[2] *Id.*

[3] The bill, H.R. 4917, was passed by the House of Representatives by unanimous consent on October 8, 2004, and then three days later, the House bill was passed by the Senate, also by unanimous consent. It was signed into law by President, on October 30. Pub. L. No. 108-401, 118 Stat. 2255.

[4] *See* H. Rep. No. 103-127 (1993) (Treasury, Postal Service, and General Government Appropriations Bill, 1994) at p. 76. For the definitive account of this period, see Toni Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L. J. 19 (1998).

[5] Jeffrey S. Lubbers, *"If It Didn't Exist, It Would Have To Be Invented"-Reviving The Administrative Conference*, 30 ARIZ. ST. L. J. 147, 161 (1998).

[6] Justice Scalia was Chairman of ACUS from 1972–74, and Justice Breyer was a liaison representative of the Judicial Conference from 1981–95. For a description of Justice (then-Judge) Breyer's activities as a member of ACUS, see Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 ADMIN. L. J. AM. U. 775 (1995).

[7] *See* Statement of Antonin Scalia, before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, Hearing on the Reauthorization of the Administrative Conference of the United States (May 20, 2004), *available at* http://www.house.gov/judiciary/scalia052004.htm. and Statement of Stephen Breyer, *id.*, *available at* http://www.house.gov/judiciary/breyer052004.htm.

[8] The two letters are reprinted as an appendix to Lubbers, *supra* note 5, at 162-67.

[9] Mr. Gray was a member of the Presidentially appointed Council of ACUS from 1993–95, and Ms. Payton was a public member from 1980–88.

[10] Mr. Harter was Senior Staff Attorney at the Conference in the late 1970s and subsequently a consultant on several major research projects. Mr. Edles was the Conference's General Counsel from 1987–95.

[11] Testimony of C. Boyden Gray, before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, Hearing on the Reauthorization of the Administrative Conference of the United States (June 24, 2004), *available at* http://www.house.gov/judiciary/gray062404.htm

As a drafting matter, the legislative revival was relatively simple. One of the interesting things about the Congressional action to defund ACUS in 1995 was that ACUS's authorizing statute, the Administrative Conference Act,[12] was not repealed and remains in the U.S. Code. The reauthorizing legislation recognized this, and was designed to refund ACUS with only minimal changes to the Administrative Conference Act.[13]

This mandate, along with the broad powers and duties already assigned to the Conference,[14] provides ample authority for tackling the important problems of the day. For example, Boyden Gray pointed to the need for "some empirical research on the innovation of the OMB 'prompt' letter, matters relating to data quality and peer review issues."[15] These are all recent initiatives of Congress and OMB relating to the need for better prioritization and information and scientific consensus in regulation.[16] Phil Harter provided numerous other ideas about ACUS's future operational and research functions.

ACUS's mix of research and operational/coordinative functions is what made it valuable in the past and it is what ACUS needs to do in the future. After all, procedural improvements can produce large savings to the government.[17] But there are also the intangible, but real, benefits of simply promoting consensus and dialogue-two resources in short supply in Washington these days. The Conference was a true public-private partnership, where partisan politics were checked at the door. Experts from opposite ends of the Washington political spectrum, such as James Miller of Citizens for a Sound Economy and Alan Morrison of the Public Citizen Litigation Group, could and did have cordial and productive discussions of administrative reform. Government officials and private experts could reach understandings that often eluded otherwise adversary relationships. This can happen again once ACUS reopens its doors.

But the resurrection is not yet complete. The authorized funds must still be appropriated. Public Law 108-401 authorizes the appropriations of not more than $3 million, for fiscal year 2005, $3.1 million for fiscal year 2006, and $3.2 million for fiscal year 2007[18]-providing a lean but reasonable budget, since the Conference's highest budget was just over $2 million in the early 1990s.

The ABA strongly urged the Senate Appropriations Committee to provide the authorized $3 million for FY 2005 during the brief post-election session.[19] Unfortunately this did not happen, so the effort must be renewed in the next Congress. But once the Congress does provide the appropriations, and if President Bush appoints a respected and non-partisan Chair who can command respect among all sectors of the legal community, in and outside of Washington, a renewed era of consensus and bipartisanship, at least in the sometimes obscure but crucial world of administrative law, will begin.

[12] Pub. L. No 88-499, as amended, codified at 5 U.S.C. §§ 591-96.

[13] The new law only adds four new paragraphs (2-5) to the "Purposes" section of the Administrative Conference Act, 5 U.S.C. § 591.

[14] *See* 5 U.S.C. § 594. Its central statutory mission is to: "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs."

[15] Gray testimony, *supra* note 11.

[16] For more information on these initiatives, see the website of the Office of Information and Regulatory Affairs in OMB. For prompt letters see, http://www.whitehouse.gov/omb/inforeg/prompt_letter.html; for data quality and peer review issues, see http://www.whitehouse.gov/omb/inforeg/infopoltech.html.

[17] Some such savings can be quantified. For example, a simple change devised by the Conference in 1980 to end the once notorious "race-to-the courthouse" procedure has probably saved over a million dollars since. *See* ACUS Recommendation 80-5, "Eliminating or Simplifying the 'Race-to-the Courthouse' in Appeals from Agency Action," 45 Fed. Reg. 84,954 (Dec. 24, 1980). The recommendation was implemented in 1988 by Pub. L. No. 100-236, Selection of Court for Multiple Appeals, 101 Stat. 1731. It was estimated that each such race produced $100,000 in unnecessary litigation costs. Alternative dispute resolution processes recommended and furthered by the Conference in the last 15 years of its existence also saved millions. *See* Administrative Conference of the U.S., *Toward Improved Agency Dispute Resolution: Implementing the ADR Act* (Feb. 1995) (documenting savings). Streamlined civil penalty procedures resulting from an ACUS recommendation made in 1972 under then-Chairman Scalia have produced tens of millions of additional dollars for the U.S. Treasury since then. *See* ACUS Recommendation 72-6, "Civil Money Penalties as a Sanction," *available at* http://www.law.fsu.edu/library/admin/acus/305726.html. Later statistics, published in Colin Diver, The Assessment and Mitigation of Civil Money Penalties, 79 COLUM. L. REV. 1435 (1979), showed a dramatic increase in receipts to the U.S. Treasury.

[18] Pub. L. No. 108-401 § 3.

[19] *See* letter from Robert D. Evans, Director ABA Governmental Affairs Office to Hon. Ted Stevens, Chairman, and Hon. Robert Byrd, Ranking Member, Committee on Appropriations, U.S. Senate, (Nov. 12, 2004).

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Focus On

JEFFREY S. LUBBERS

Reviving the Administrative Conference of the United States: The Time Has Come

In October 1995, the Administrative Conference of the United States (ACUS) shut its doors after almost 30 years of making recommendations to the government on improving the fairness and efficiency of administrative procedures. ACUS shut down its operations abruptly because, even in the face of ongoing reauthorization hearings by other committees of the 104th Congress, congressional appropriators had determined that ACUS had "fully accomplished its mission,"[1] and therefore appropriated no funds.

Of course, the "mission" to improve government administration can never be "fully accomplished," and, as Professor Toni Fine showed in an article published in 1998,[2] the story is a lot more complicated. But that is water under the bridge, and the intervening years have shown that ACUS is needed now more than ever.

In my own postmortem to the demise of ACUS, written in 1998, I optimistically concluded that "it is only a matter of time before Congress and the President recognize this country's need for objective, nonpartisan expertise on the crucial, but not always politically 'sexy,' issues of administrative procedure implementation and reform."[3] That time has now come, thanks to the efforts of Rep. Chris Cannon (R-Utah), chairman of the House Judiciary Committee's Subcommittee on Commercial and Administrative Law. In summer 2004, the subcommittee held two hearings on reauthorizing the Administrative Conference of the United States, and, on July 22, Rep. Cannon (along with 33 co-sponsors) introduced H.R. 4917, the Federal Regulatory Improvement Act of 2004, a bill to reauthorize ACUS.[4]

H.R. 4917 was passed by the House of Representatives by unanimous consent on Oct. 8, and then three days later, was passed by the Senate and cleared for the President, also by unanimous consent. This unanimity was all the more remarkable given the bitter partisanship that has pervaded Washington during this campaign season. It provides great hope that an appropriation for fiscal year 2005, an appointment of a chair, and the physical rebirth of ACUS will soon be forthcoming.

The two hearings conducted by the House subcommittee amply demonstrated broad support for reviving ACUS. The first hearing provided the perhaps unprecedented spectacle of two Supreme Court justices discussing the operations of an agency of the executive branch before a congressional committee. Both Antonin Scalia and Stephen Breyer, both of whom had served in ACUS earlier in their careers,[5] were unstinting in their support for reviving the agency. Justice Scalia concluded: "The Conference was a proved and effective means of opening up the process of government to needed improvement," adding that it was "a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise."[6] Justice Breyer concurred, saying "I believe that the Conference was a unique organization, carrying out work that is important and beneficial to the average American, at low cost."[7] Both justices had, in fact, written to the Senate Judiciary Committee in 1995, in a vain attempt to preserve ACUS.[8] Both justices' continuing commitment to ACUS, as shown in their letters to the committee, speaks volumes.

The second hearing was also a bipartisan event. Former ACUS members C. Boyden Gray and Sallyanne Payton[9] testified, as did two former staff lawyers for ACUS, Philip Harter and Gary Edles.[10] All of them provided strong support for reviving the Administrative Conference. Gray, a former White House counsel in the senior Bush administration, spoke on behalf of both the Administrative Law and Regulatory Practice Section of the American Bar Association and the ABA itself. He stressed the bipartisan support the Administrative Conference had and concluded: "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."[11] Payton, a distinguished law professor, represented the National Academy of Public Administration's Standing Panel on Executive Organization and Management (EOM Standing Panel). She stated: "The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique — and, as we have observed during the years since its demise, irreplaceable — function."[12] Harter, also a law professor and a nationally recognized expert in dispute resolution, testified: "I wholeheartedly support the resurrection of the Administrative Conference: Its re-establishment would not only save the government significant sums of money, it would also enhance democratic — or, to be non-partisan about it, civic republican —

government."[13] Edles, who served as an attorney in five agencies before joining the ACUS as a senior staff member and now teaches law in the United States and England, pointed out that "there are no other entities that can play the unique role that ACUS played" and stressed the need for "political recognition that some entity needs to be available to police the inner recesses of the administrative process, and that ACUS is the best available option."[14]

All these statements echo the equally fervent encomiums of the writers and witnesses who sought to save the Administrative Conference in 1995[15] as well as those who again mourned its passing in a symposium published in the *Arizona State Law Journal* in 1998.[16] Given the durability of support for the ACUS among its former participants and among members of the ABA,[17] the lack of a successor to take on most of its functions, and the disappearance of any strong opposition to former or potential future activities of the ACUS,[18] it is possible that, if the small amount of funding needed for the conference's operation can be found, the legislation can proceed without controversy. It is telling that, even many years after the ACUS ceased to operate, members of Congress still regularly introduce bills assigning responsibilities to the conference.[19]

Moreover, drafting legislation to revive the conference was relatively simple. One of the interesting aspects of Congress' refusal to fund ACUS in 1995 was that Congress did not repeal ACUS's authorizing statute, the Administrative Conference Act,[20] and it thus remains part of the U.S. Code. Because the reauthorizing legislation recognizes the existence of the statute, H.R. 4917 basically re-funds ACUS with only minimal changes in the Administrative Conference Act. The legislation authorizes appropriations of no more than $3 million for FY 2005, $3.1 million for FY 2006, and $3.2 million for FY 2007.[21] The only other changes to the act are four additional, more specific paragraphs to § 591, the section dealing with "purposes" section. Although perhaps unnecessary,[22] these additional specifications seem quite appropriate. With the new paragraphs 2–5, the new section reads as follows:

> The purposes of this subchapter are —
>
> 1. to provide 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. to promote more effective public participation and efficiency in the rulemaking process;
> 3. to reduce unnecessary litigation in the regulatory process;
> 4. to improve the use of science in the regulatory process; and
> 5. to improve the effectiveness of laws applicable to the regulatory process.

This mandate — along with the broad powers and duties that § 594 already assigns to the Administrative Conference — provides ample authority for tackling the important problems of the day. What are these problems? As the former research director of ACUS, I maintained an up-to-date agenda of procedural problems that were worth studying. One way I compiled that list was to seek the advice of ACUS members — both from the government and the private sector — as well as the larger academic community. Several witnesses at the congressional hearings held in summer 2005 provided a good starting point for a new list of procedural problems that merit examination.

Boyden Gray pointed to the need for "some empirical research on the innovation of the OMB [Office of Management and Budget] 'prompt' letter, matters relating to data quality and peer review issues." These are all recent initiatives introduced by Congress and the OMB relating to the need to improve prioritization, information, and scientific consensus related to government regulation.[23] Phil Harter spoke in detail about future functions of the Administrative Conference. Because I cannot improve on his thoughts in this regard, I cite his comments here in full:

> One of its foremost functions would be to review and evaluate whether the basic law governing administrative procedure, the Administrative Procedure Act, as well as other procedural requirements should be revised and updated. It could also arrange for the interchange among administrative agencies of information potentially useful in improving administrative procedures. Another role it could discharge would be the preparation of resource documents, bibliographies, and advice and recommendations on various topics confronted by agencies. Although now aging, ACUS handbooks are on the desks of many of the leaders in the administrative process on both sides of the great public-private divide.
>
> The new ACUS could also focus on the more minute details of the administrative process as well. Specifically, it could study and adopt recommendations concerning better rulemaking procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of alternative means of dispute resolution. For example, the exploding use of the Internet

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ACUS *continued from page 27*

and other forms of electronic communication present wonderful opportunities for increasing the information available to our citizens and their participation in our affairs. But tapping these resources and making sure they work effectively and efficiently is itself a daunting task. A recent conference on e-rulemaking held at American University pointed out many potential problems that could arise if the procedures used for e-rulemaking were not carefully developed; the public at large could effectively be disenfranchised. Moreover, a strong recommendation was made that, since much of the work on e-rulemaking is being done in the name of enhancing public participation, it would help if those in the government actually consulted with interested parties in the private sector. Yet, multiple requests to leaders of the e-rulemaking effort for the establishment of an advisory committee that could provide such advice and make recommendations to protect against abuse went unanswered. That experience alone points to the dire need for an oversight body.

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

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

We also lack a repository on administrative processes that the various state governments could call upon for high-quality administrative procedural advice. ACUS could consider ways to improve federal, state, and local relations in different areas, including those in which state and local agencies administer federal programs. The organization could attempt to promote cooperation and coordination on interstate administrative procedural matters to foster a responsible and efficient administrative process among the several states. The entity would be equipped to advise state agencies and their staffs of significant legal developments and emerging trends occurring in the area of administrative procedure.

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

This mix of research and operational/coordinative functions is what made ACUS valuable in the past, and it is what ACUS needs to pursue in the future. Procedural improvements can produce substantial savings for the government. Some of these savings can be quantified. For example, a simple change the Administrative Conference devised in 1985 to end the once notorious "race-to-the courthouse" procedure has probably saved over $1 million since it was implemented.[24] Alternative dispute resolution processes that ACUS recommended and furthered in the last 15 years of its existence also saved millions of dollars.[25] Streamlined civil penalty procedures resulting from a recommendation ACUS made in 1972 under the chairman at the time, Antonin Scalia, have produced tens of millions of additional dollars for the U.S. Treasury since then.[26] Even tiny adjustments in our bureaucracy can generate large savings; for example, a $6 savings in each case adjudicated by the Social Security Administration's administrative law judges would pay for the entire proposed new ACUS budget.[27]

In addition, there are intangible but real benefits of simply promoting consensus and dialogue — two features that are in short supply in Washington these days. The Administrative Conference of the United States was a true public-private partnership, in which partisan politics were checked at the door. This mechanism allowed experts from opposite ends of the political spectrum in Washington — such as James Miller of Citizens for a Sound Economy and Alan Morrison of the Public Citizen Litigation Group — to conduct cordial and productive discussions of

(hasn't happened yet!)

administrative reform, and they did so.

These benefits can be reaped again now that Congress has followed Chairman Cannon's initiative to revive ACUS, if the authorized funds are appropriated, and if the President appoints a respected and nonpartisan chair, who can command respect among all sectors of the legal community both in and outside of Washington. **TFL**

Jeffrey S. Lubbers is a fellow in law and government at American University's Washington College of Law and a former research director of the Administrative Conference from 1982 to 1995.

Endnotes

[1]*See* Treasury, Postal Service, and General Government Appropriations Bill, 1994, H. Rep. No. 103–127 (1993) at 76.

[2]Toni Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19 (1998).

[3]Jeffrey S. Lubbers, *"If It Didn't Exist, It Would Have To Be Invented" — Reviving the Administrative Conference*, 30 ARIZ. ST. L.J. 147, 161 (1998).

[4]*See* thomas.loc.gov/cgi-bin/query/z?c108:H.R.+4917:.

[5]Justice Scalia was chairman of ACUS from 1972 to 1974; Justice Breyer served as the Judicial Conference's liaison representative to ACUS from 1981 to 1995. For a description of Justice (and Judge) Breyer's activities as a member of ACUS, see Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 ADMIN. L.J. AM. U. 775 (1995).

[6]Antonin Scalia, 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 Congress (May 20, 2004), available at www.house.gov/judiciary/scalia052004.htm.

[7]Stephen Breyer, Testimony, *id.*, available at www.house.gov/judiciary/breyer052004.htm.

[8]The two letters are reprinted as an appendix in Lubbers, *"If It Didn't Exist, It Would Have To Be Invented," supra* note 3, at 162–67.

[9]Gray was a member of the Council of ACUS, which was appointed by the President, from 1993 to 1995; Payton was a public member of ACUS from 1980 to 1988.

[10]Harter was senior staff attorney at the conference in the late 1970s and subsequently a consultant on several major research projects undertaken by ACUS. Edles was the conference's general counsel from 1987 to 1995.

[11]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 Congress (June 24, 2004), available at www.house.gov/judiciary/gray062404.htm.

[12]Sallyanne Payton, Testimony, *id.*, available at www.house.gov/judiciary/payton062404.pdf.

[13]Philip J. Harter, Testimony, *id.*, available at www.house.gov/judiciary/harter062404.htm.

[14]Gary J. Edles, Testimony, *id.*, available at www.house.gov/judiciary/edles062404.htm.

[15]*See, e.g.*, the following 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, 104th Congress (May 11, 1995): statement of Boyden Gray at 31–34, statement of Peter Shane at 34–39, statement of David Vladeck at 39–43, and statement of Richard Wiley at 44–48. *See also*, Fine, *A Legislative Analysis of the Demise of the ACUS* at 306, note 82.

[16]Symposium — Administrative Conference of the United States ("ACUS"), 30 ARIZ. ST. L.J. 1–204 (1998). *See*, especially, Betty Jo Christian, *Penny-Wise and Pound Foolish: The Demise of the Administrative Conference, id.* at 11, and Alan B. Morrison, *Farewell Fond ACUS, We Loved You Well, id.* at 169.

[17]*See* William Funk, chair of the ABA's Section on Administrative Law and Regulatory Practice, Letter to Chairman Chris Cannon, May 20, 2004, reiterating the ABA's long-standing support for reauthorizing ACUS.

[18]For example, while some administrative law judges (ALJ) in the early 1990s expressed antipathy toward ACUS at the time because of some of its recommendations, current leaders of the ALJ community, such as Chief Judge John Vittone of the Department of Labor and Judge Ronnie Yoder of the Department of Transportation, have assured me that they support reviving ACUS.

[19]*See, e.g.*, U.S. Senate, 105th Congress, S. 886, § 111, Health Care Liability Reform and Quality Assurance Act of 1997 (stating that "the Attorney General, in consultation with ... [ACUS], shall develop guidelines with respect to alternative dispute resolution mechanisms that may be established by States for the resolution of health care liability claims"); S. 1613, Equal Access to Justice Reform, Amendments of 1998, § 1(g) (requiring ACUS to file a report to Congress on the Equal Access to Justice Act); S. 2097, Indian Tribal Conflict Resolution and Tort Claims and Risk Management Act of 1998 (requiring consultation with ACUS in establishing the Intergovernmental Alternative Dispute Resolution Panel's rosters of mediators and arbitrators); U.S. House of Representatives, 105th Congress, H.R. 4863, Government Regulatory Improvement and Performance Act of 1998, § 4(c) (establishing a Regulatory Working Group and providing that it may commission analytical studies and reports by ACUS); U.S. Senate, 107th Congress, S.

ACUS *continued on page 30*

ACUS *continued from page 29*

1370, Common Sense Medical Malpractice Reform Act of 2001, § 12(d)(2) (stating that "the Attorney General, in consultation with ... [ACUS], shall monitor and evaluate the effectiveness of State alternative dispute resolution mechanisms established or maintained under this section").

[20]Pub. L. No 88–499, as amended, codified at 5 U.S.C. §§ 591–96.

[21]H.R. 4917, Federal Regulatory Improvement Act of 2004, § 3. These amounts seem reasonable, considering the conference's highest budget was just over $2 million in the early 1990s. The legislation contains one additional condition: "Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries."

[22]The existing section dealing with "powers and duties," 5 U.S.C. § 594, provides ample authority to undertake each of the items emphasized by the change in § 591. It provides as follows:

> To carry out the purpose of this subchapter, the Administrative Conference of the United States may —
>
> 1. study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;
> 2. arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure;
> 3. collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure;
> 4. enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in this section; and
> 5. provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State, the Administrator of the Agency for International Development, or the Director of the United States Information Agency, as appropriate, except that —
>
> A. such assistance shall be limited to the analysis of issues relating to administrative procedure, the provision of training of foreign officials in administrative procedure, and the design or improvement of administrative procedure, where the expertise of members of the Conference is indicated; and
>
> B. such assistance may only be undertaken on a fully reimbursable basis, including all direct and indirect administrative costs.

[23]For more information on these initiatives, *see* the Web site of the Office of Management and Budget's Office of Information and Regulatory Affairs. For "prompt" letters, see, www.whitehouse.gov/omb/inforeg/prompt_letter.html; for data quality and peer review issues, *see* www.whitehouse.gov/omb/inforeg/infopoltech.html.

[24]*See* ACUS Recommendation 80–5, "Eliminating or Simplifying the 'Race-to-the Courthouse' in Appeals from Agency Action," 45 Fed. Reg. 84, 954 (Dec. 24, 1980). The recommendation was implemented by Pub. L. No. 100–236, Selection of Court for Multiple Appeals, 101 Stat. 1731. It was estimated that the cost of each such race resulted in $100,000 in unnecessary litigation costs.

[25]*See* Administrative Conference of the United States, *Toward Improved Agency Dispute Resolution: Implementing the ADR Act* (Feb. 1995) (documenting savings). *See also* Sally Katzen, former acting ACUS chair, Testimony before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Administrative Law and Government Relations, Hearing on the Reauthorization of the Administrative Conference of the United States, 103rd Congress (April 21, 1994), published in 8 ADMIN. L.J. AM. U. 649 (citing letter from Robert Coulson, president of the American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993) about "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs").

[26]See ACUS Recommendation 72–6, "Civil Money Penalties as a Sanction," available at www.law.fsu.edu/library/admin/acus/305726.html. Later statistics were published in Colin Diver, *The Assessment and Mitigation of Civil Money Penalties*, 79 COLUM. L. REV. 1435 (1979), and showed a dramatic increase in U.S. Treasury receipts.

[27]There are over 500,000 requests for hearings by the Social Security Administration's administrative law judges annually. *See* Paul R. Verkuil and Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 759 (2003).

30 ARIZ. ST. L. REV 149 (1998

"IF IT DIDN'T EXIST, IT WOULD HAVE TO BE INVENTED"—REVIVING THE ADMINISTRATIVE CONFERENCE

Jeffrey Lubbers*

With the demise of the Administrative Conference of the United States ("ACUS") in October 1995, the federal government, for the first time in nearly thirty years, lacks a center for advice, research, consensus-building, and information dissemination concerning administrative agency practices and procedures.

The concept of an "administrative conference" goes back before the 1964 Administrative Conference Act,[1] to the "temporary" administrative conferences (of two years' duration) in the Eisenhower[2] and Kennedy[3] Administrations. In each case the temporary conference recommended the establishment of a permanent conference.[4] The Congress in 1964 heeded the

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* Fellow in Administrative Law and Visiting Professor of Law, Washington College of Law, American University. Former Research Director, Administrative Conference of the United States (1981-1995). J.D., University of Chicago. Portions of this article were included in remarks at an ABA Section of Administrative Law and Regulatory Practice Program, Privatizing ACUS and its Alternatives, ABA Annual Meeting, Orlando, Florida (August 2, 1996). I would like to thank Gary Edles and Charles Pou for their helpful contributions to this piece.

1. Pub. L. No. 88-479, 78 Stat. 615 (codified at 5 U.S.C. §§ 591-596 (1994)).

2. The President's Conference on Administrative Procedure, created by Presidential Memorandum on April 29, 1953. *See* Report of the Conference on Administrative Procedure Called by the President of the United States on April 29, 1953 (undated but presumably 1955 because it contains President Eisenhower's reply, dated March 3, 1955) (on file with author).

3. *See* Exec. Order No. 10,934, 26 Fed. Reg. 3233 (1961), "Establishing the Administrative Conference of the United States," April 13, 1961, *reprinted in* S. DOC. NO. 24, *Selected Reports of the Administrative Conference of the United States, Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary* (1963) [hereinafter *Selected Reports*].

4. The final action of the 1953-54 Eisenhower Conference was to adopt a resolution recommending that a similar conference be established on a permanent basis. This history is recounted in 1961-62 KENNEDY CONFERENCE, REPORT ON THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 6. Similarly, in 1962 the Chairman and Counsel Members of the Kennedy Conference wrote a letter to the President recommending "the creation on a permanent footing of

In recent years, ACUS had been in the forefront of evaluating regulatory reform initiatives and in encouraging agency use of alternative dispute resolution ("ADR"). The Administrative Conference's work in promoting ADR in the government included applied research, giving policy advice to agencies, educating agency personnel, offering legislative drafting and technical aid to Congress, and providing individual agencies with systems design and other implementation help. In the 1980s, ACUS developed theoretical underpinnings—helping agencies begin to think in terms of adapting unfamiliar ADR concepts to their various activities, or even creating new ones, such as negotiated rulemaking.[15] ACUS then took a lead role in drafting, and getting introduced, the Administrative Dispute Resolution Act[16] and Negotiated Rulemaking Act,[17] and then working (with others, notably the American Bar Association) to obtain passage of these laws in 1990. The laws encouraged ADR use, mandated appointment of dispute resolution specialists in each agency, and named the Administrative Conference as the lead agency for implementation. After enactment of the Acts, ACUS worked to build agencies' capacity to implement them—it organized and maintained a roster of neutrals; helped newly appointed agency dispute resolution specialists develop policies and start new ADR programs; and brought them together in interagency working groups, staffed by the Administrative Conference, to present materials, seminars, and training that no single agency would have done on its own.[18]

Despite a great deal of support from the bar,[19] members of Congress

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1993: Hearings on the House Comm. on the Judiciary, 102d Cong. (1993) (statement of Jeffrey S. Lubbers, ACUS Research Director); Letter from Gary J. Edles, ACUS Gen. Counsel to Staff Dir., Sen. Comm. on Banking, Housing and Urban Affairs (June 2, 1992), *reprinted in* 138 CONG. REC. S9353 (July 1, 1992).

15. *See generally* Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1 J. DISP. RESOL. 1 (1992).

16. Pub. L. No. 101-552, 104 Stat. 2736 (codified at 5 U.S.C. §§ 571-583). The Act was permanently reauthorized and amended by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (1996).

17. Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-70). The Act was permanently reauthorized by the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873 (codified at 5 U.S.C. § 569 (1996)).

18. *See* OFFICE OF THE CHAIRMAN, ACUS, TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT (February 1995) (Report to Congress); OFFICE OF THE CHAIRMAN, ACUS, BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT (October 1995) (Report to Congress).

19. The ABA, and especially its Section of Administrative Law and Regulatory Practice, was historically a strong supporter of ACUS. It supported ACUS' creation in the 1960s and it was always solicitous of its role within the government. In 1989, the House of Delegates adopted a resolution supporting "the reauthorization of [ACUS] and the provision of funds sufficient to permit

from both parties,[20] the academic community,[21] and unusual letters of support from Justices Breyer and Scalia,[22] ACUS ran afoul of budget cutters in the appropriations subcommittees and rather suddenly, after an appropriations conference committee failed to follow the Senate's earlier floor vote to restore its budget,[23] had to close down in one month (October

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ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform." ABA, 1989 MIDYEAR MEETING, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 35.

20. *See* examples cited in Edles, *supra* note 5, at 604 n.144. One of the more remarkable testimonials came after-the-fact by Representative Steny H. Hoyer (D. Md.) who was Chair of the Appropriations Subcommittee on Treasury, Postal Service and General Government in the 103rd Congress and ranking minority member in the 104th:

> As you know, initially I was not a proponent of the Conference and felt that its work could be done either in the agencies themselves or in the private sector. However, I became convinced that the Conference did, in fact, perform a very valuable and important service. . . .
>
> Unfortunately, as you are well aware, the Republican Leadership was very desirous of having notches on its gun barrel of agencies that it had eliminated. . . . As a result, for a very small savings we have given up a very valuable agency supported by a broad bi-partisan coalition of individuals who know of the quality of its work.

Letter from Rep. Steny H. Hoyer to Thomasina V. Rogers, last Chair of ACUS (Nov. 1, 1995).

21. *See, e.g.*, Statement of Shane, *supra* note 10, at 4 ("I can tell you that universities, think tanks, and even Congressional staffs could not hope to fulfill ACUS's current role."). *See also* Statement of Katzen, et al., *supra* note 5, at 687 (statement of Professor Thomas O. Sargentich). In 1993, a letter in support of ACUS was signed by 97 law school deans and professors of administrative law. *See* Letter from Professor Ronald M. Levin, Washington University in St. Louis School of Law to Rep. Steny H. Hoyer (Sept. 10, 1993) (on file with author).

22. *See* Edles, *supra* note 5, at 603 n.143. Justice Scalia had served as ACUS Chairman from 1972-74. For a description of Justice (then-Judge) Breyer's activities as a member of ACUS, see Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 ADMIN. L.J. AM. U. 775 (1995).

23. *See* Amendment No. 2249, 141 CONG. REC. S11,547 (daily ed. Aug. 5, 1995); *see also* Letter from Sens. William S. Cohen, John Glenn, Charles E. Grassley, Orrin Hatch, Howell Heflin, Herb Kohl, Carl Levin, and William V. Roth, Jr. to Sen. Richard Shelby, Chairman, Treasury, Postal Serv. and Gen. Gov't Subcomm. of the Senate Comm. on Appropriations (Sept. 8, 1995) (reiterating "strong support for the Senate position providing [full] funding" for ACUS). Notwithstanding this letter, Senator Shelby did not support the Senate's position in the conference committee.

The Senate's overall support for ACUS was also reflected in the fact that the three major regulatory reform bills pending in the Senate at that time (S. 291, S. 343, and S. 1001) mandated studies by ACUS of the implementation of the legislation. The Governmental Affairs Committee, in reporting out S. 343, wrote:

> Because ACUS is comprised of respected experts and practitioners representing a wide range of perspectives and interests, and has a record of developing unbiased, practical solutions to regulatory problems, the Committee believes that this agency is well suited to producing the studies and recommendations needed to fulfill the intent . . . [of the bill].

REGULATORY REFORM ACT OF 1995, REPORT OF THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, S. REP. NO. 104-88, at 57 (1995). Indeed, two years after ACUS' closing, proposed

1995).[24] Its resources and archives were distributed rather hurriedly, its members left hanging, and its staff unceremoniously "riffed."[25] Its functions went unassigned by the Congress—not surprisingly leaving a fragmented approach to administrative law reform and resource sharing.[26]

To be sure, a few aspects of ACUS' functions have been picked up by other agencies. The Federal Mediation and Conciliation Service has stepped up its involvement in agency ADR efforts.[27] It, along with the Department of Justice and the General Services Administration, has each hired a former ACUS staff attorney to help with administrative-law-related issues. With the backing of Presidential Executive Orders, OMB's Office of Information and Regulatory Affairs ("OIRA") has served as a coordinating body on regulatory issues (albeit with an "Administration" point of view).[28] A rather unstructured Regulatory Working Group, also chaired by the OIRA Administrator,[29] has undertaken occasional efforts to coordinate agency regulatory activities. The National Performance Review, working for the Vice President, and once thought to be a temporary management review effort, has also continued to look at "reinvention" initiatives and management reforms.[30]

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legislation still contains assignments to ACUS. *See* Health Care Liability Reform and Quality Assurance Act of 1997, S. 886, 105th Cong. § 111(b) (requiring the Attorney General to consult with ACUS in developing guidelines for state-based alternative dispute resolution mechanisms); Equal Access to Justice Reform Amendments of 1998, S. 1613, 105th Cong. § 1(g) (mandating that ACUS report to Congress on fee awards in administrative proceedings).

24. Because of the historical importance of these unusual letters, I have reproduced them in the Appendix.

25. I.e., subject to removal via a "reduction in force."

26. For example, when Congress reauthorized the Administrative Dispute Resolution Act in 1996, the Conference's key role of promotion of ADR under the 1990 Act was assigned to an unnamed "agency designated by, or the interagency committee designated or established by the President." Pub. L. No. 104-320, § 4, 110 Stat. 3870 (1996). The provision that also reauthorized the Negotiated Rulemaking Act also contained a similar provision. *See id.* § 11.

27. Among other things, the FMCS now maintains the "ADR Reading Room" created and maintained by ACUS, and has taken over sponsorship of the ACUS Interagency ADR Working Groups, now called the Federal ADR Network. *See* Deborah Schick Laufer, *Whither Federal ADR? Here To Stay!*, NIDR NEWS (Nov./Dec. 1996), at 11.

28. For a report on OIRA's recent activities, see OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET, MORE BENEFITS FEWER BURDENS—CREATING A REGULATORY SYSTEM THAT WORKS FOR THE AMERICAN PEOPLE, A REPORT TO THE PRESIDENT ON THE THIRD ANNIVERSARY OF EXECUTIVE ORDER 12,866 (1996).

29. *See* Exec. Order No. 12,866, 3 C.F.R. § 638 (1993). The membership of the RWG does not include representatives of independent regulatory agencies, although representatives have been allowed to attend upon request. The members are listed in OFFICE OF MANAGEMENT AND BUDGET, REPORT TO THE PRESIDENT ON EXECUTIVE ORDER 12866, REGULATORY PLANNING AND REVIEW, app. B, *reprinted in* 59 Fed. Reg. 24,293 (1994).

30. As Vice President Gore recently wrote, "[E]ven before the second inauguration, President Clinton and I called the new Cabinet to Blair House to give them their reinvention marching

In the private sector there are also organizations that at least partially share ACUS' interest in administrative law reform. Most obvious, of course, is the ABA's Section of Administrative Law and Regulatory Practice. The Federal Bar Association and D.C. Bar have similar but smaller committees. In the academic world, American University's Washington College of Law ("WCL") has helped preserve the ACUS legacy in an accessible place, by agreeing to maintain the ACUS archive (i.e., that portion not mandated for inclusion into the National Archives) in its new law library.[31] The WCL also has a Law and Government Program and has recruited two former senior ACUS officials to affiliate with it. Other private sector organizations, foundations, and think tanks in Washington also have an interest in government procedures, ranging from the National Academy of Public Administration, Urban Institute, Brookings Institution, American Enterprise Institute, and Heritage Foundation.

Obviously, none of these agencies or private organizations is, or could be, clones of ACUS. They all lack one or more of the following attributes of ACUS: (1) the public/private membership structure, (2) direct ties to both the President and the Congress (including the ability to accept special assignments with or without budget augmentation),[32] (3) a determination to maintain a non-partisan, unbiased approach to issues, (4) a permanent career staff that could organize research and implement activities and serve as a central repository for administrative law and related expertise, (5) the ability to attract the participation of federal judges, or (6) an exclusive focus on administrative procedure.

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orders." Al Gore, Introduction to "Blair House Papers," National Performance Review, Jan. 1997, at viii. The National Performance Review did, however, work closely with ACUS on administrative law matters and its leadership wrote in support of ACUS' continued funding. *See* Letter from Elaine Kamarck, Senior Policy Advisor to the Vice President to Rep. Steny H. Hoyer (Mar. 7, 1994) ("Among the agencies I encountered for the first time was ACUS, and I was much impressed with its work. . . . We look forward to continuing to use the unique expertise and consensus-building capabilities of ACUS in bringing about the management efficiencies and administrative improvements of the NPR.").

31. For information contact: Law Library, Washington College of Law, American University, 4801 Massachusetts Ave., NW, Washington, D.C. 20016; (202) 274-4330.

32. *See supra* note 26 for examples. In addition, Congress specifically asked ACUS to study and make recommendations for reform of the Federal Aviation Administration civil penalty program in Pub. L. No. 101-370, 104 Stat. 451 (1990). The ultimate ACUS recommendations were incorporated into Pub. L. No. 102-345, 106 Stat. 923 (1992). *See* Edles, *supra* note 5, at 593-94. Congress also, in 1978, mandated an ACUS study of the FTC's Trade Regulation Rulemaking provisions in Pub. L. No. 93-637 (1974). *See* Statement of Katzen et al., *supra* note 5, at 671 n.87. Also, the Equal Access to Justice Act, 5 U.S.C. § 504(c)(1) (1994), and the Government in the Sunshine Act, 5 U.S.C. § 552b(g) (1976), required agencies to consult with ACUS before issuing regulations. *See* Statement of Katzen et al., *supra* note 5, at 671 n.88.

But ACUS also had some drawbacks: a somewhat unwieldy structure, inflexible bureaucratic responsibilities (personnel and procurement restrictions, annual budget/appropriation cycles, and a myriad of reporting requirements) that come with being a federal agency (and are especially burdensome for small agencies), and the buffeting that inevitably goes on with changes in the control of Congress and the White House.

Still, as the title of this piece indicates, many of ACUS' supporters argued that ACUS was needed "now more than ever"[33] and would be needed again.[34] So it may be appropriate to consider several different options for recreating an ACUS-like entity to resume the coordination of the federal administrative law and its reform.

OPTION 1: RESUSCITATE ACUS

The Administrative Conference Act, 5 U.S.C. §§ 591-96, was not repealed. If Congress wished, it could simply reauthorize ACUS and appropriate funds. The President would presumably have to nominate a new Chairman and appoint a new Council, and the agency would have to start over.

But as a former ACUS General Counsel has observed, "In a climate of government retrenchment, ACUS is not likely simply to be re-established. Rather, to employ the jargon of the day, it would have to be 'reinvented.'"[35] He went on to sketch a possible vision of an acceptable "reinvented" Conference, using the extant Administrative Conference Act as the foundation:

> There is no reason why employees from other agencies (or even the private sector) could not augment a small ACUS staff on a temporary basis, with their salaries paid by their employing entities. The existing statute already permits this type of arrangement and, for a number of years, ACUS had an active 'visiting executive' program that allowed a number of talented government employees to join the ACUS staff for temporary

33. Statement of Katzen, et al., *supra* note 5, at 677 (statement of Thomas M. Susman entitled "Now More Than Ever: Reauthorizing the Administrative Conference, Reforming Regulation and Reinventing Government").

34. As former Counsel to Vice President Bush and President Reagan put it, avoiding the cliché, "My guess is that if Congress terminates ACUS now, it will have to recreate it some time in the future, at considerable extra expense." *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Admin. Laws of the Comm. of the Judiciary*, 104th Cong. 33 (May 11, 1995) (statement of C. Boyden Gray, Council Member, ACUS).

35. Edles, *supra* note 5, at 609.

> periods. ACUS might even be authorized to have a formal affiliation with a law school, whose students and faculty could assist in conducting research and drafting recommendations. If need be, a law school, or consortium of law schools and schools of public administration, might even provide financial or logistical support for ACUS's operations.[36]

Given the passage of enough time, it is still quite possible that a future Congress will recognize the error of the 104th and breathe new life into the Administrative Conference Act. Until that time it is advisable to think of other options for reviving its needed activities in another form.

OPTION 2: CREATE AN ADVISORY COMMITTEE ON ADMINISTRATIVE PROCEDURE IN THE DEPARTMENT OF JUSTICE

If the functions of the Administrative Conference were to be revived in an existing department or agency, the leading contender would be the Department of Justice. The Department, of course, is the legal affairs center of the government and the Office of the Associate Attorney General already contains the Office of Information and Privacy, charged with overseeing agency implementation of the Freedom of Information Act and Privacy Act, and a small Office of Alternative Dispute Resolution. In addition, the Legal Education Institute, which trains federal lawyers in, among other things, administrative law, is housed within the Department.[37]

There also is some precedent for lodging the responsibility in the Department. Pursuant to the terms of the Executive Order creating it, the Kennedy Temporary Conference received research and staff support from the Department's Office of Administrative Procedure.[38] After the temporary conference ended its operations in 1963, that small office continued to perform some research and statistics-gathering activities on administrative proceedings until ACUS was activated in 1968.

Proposed structure: Probably the most efficient and effective means would be an "Advisory Committee on Administrative Procedure" established

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36. *Id.*

37. ACUS lawyers regularly participated in LEI's administrative law courses as instructors.

38. *See* Exec. Order No. 10,934, *supra* note 3, § 5. The Office of Administrative Procedure was created as a unit within the Office of Legal Counsel, Department of Justice, in 1957. *See* Att'y Gen. Order 142-57, 22 Fed. Reg. 998 (1957), *reprinted in* 1957 ANNUAL REPORT OF THE OFFICE OF ADMINISTRATIVE PROCEDURE at v. Its creation had been recommended by the Eisenhower Temporary Conference. *See supra* note 2. Its primary activity was to collect and publish statistics on agency proceedings. *See* 1957 and 1958 ANNUAL REPORTS OF THE OFFICE OF ADMINISTRATIVE PROCEDURE at v.

by the Attorney General. Recommendations from the Committee would be made to the Attorney General, who would determine whether to forward them to Congress or other agencies as appropriate. Alternatively, recommendations could also be made directly to the agencies and/or Congress, without AG approval. My suggested model would reduce the size of the Committee from the ACUS model to forty-five[39] with three subcommittees: Adjudication and Dispute Resolution, Rulemaking and Regulation, and Governmental Processes and Oversight (which would include judicial review issues).

Membership: I would begin with a ratio of twenty-five government members to twenty non-government members.[40] The Attorney General would select the non-government members with the government members selected by agencies in the same way as was done with ACUS. The Attorney General would select the agencies to be represented—with some requirement of rotation among agencies and with some requirement that independent agencies be represented. She would also appoint the Committee Chair from among the government members and the chairs of the three subcommittees. The Chair would preside over plenary meetings. The Attorney General would receive recommendations on membership issues from a full-time Executive Director. For continuity's sake, she would select the Executive Director who would be a career SES member within the Department of Justice.[41]

Staff: The permanent staff would be minimal. I would suggest the following: Executive Director (SES Level), Deputy Director (GS-15 level), Staff Attorney (GS-12-14 level), Staff Assistant (GS-8-9). This skeletal staff housed within DOJ, could be supplemented by Visiting Executives (like ACUS was able to attract for 1-2 year stints) and detailees (for shorter stints). The staff would support Committee activities, provide clearinghouse assistance on administrative procedure issues, and promote implementation of Committee recommendations.

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39. ACUS' statute allows up to 101 members. *See* 5 U.S.C. § 593 (1994). The 1962 Temporary Conference had 88 members. *See Selected Reports*, *supra* note 3, at 2. In my experience, the large membership was not particularly costly but it did require more staff attention and created an unwieldy appearance. If the Committee were placed in an existing agency, its size should probably be reduced.

40. This follows the example of the ACUS model which also created a slight predominance of government members, partly I believe because it was thought that the non-government members, individually, would be able to devote a bit more energy and intellectual capital to the enterprise. *See* 5 U.S.C. § 593(b)(6).

41. This would guarantee the Executive Director some degree of tenure in the SES, but would allow the Attorney General to transfer him to other positions in the Department.

Budget: The proposed budget could be limited to about $650,000. (E.g., $325,000 for staff salaries and benefits, $100,000 for overhead; $60,000 for membership support [travel and committee meeting expenses]; $100,000 for research contracts, and $65,000 for publications.) Some of the funds could likely be attracted from other agencies.

Status within DOJ: A crucial attribute to making the Advisory Committee model work is providing for independent preparation of recommendations to the Attorney General. The Executive Director should report directly to either the Deputy AG or Associate AG. Some sort of clearance/approval process would be developed to approve new projects recommended by the Executive Director, but after that the Committee, subcommittees and consultants should be allowed leeway to develop recommendations as ACUS did.[42] As with ACUS, there would presumably be considerable self-generated incentives to come up with a defensible, persuasive product at that point. Of course, the Advisory Committee would be subject to the openness requirements of the Federal Advisory Committee Act.[43]

OPTION 3: SIMILAR TO OPTION 2, EXCEPT PLACED IN GENERAL SERVICES ADMINISTRATION

There would be several advantages to situating the Advisory Committee on Administrative Procedure in the General Services Administration ("GSA"). First, GSA, although an executive branch agency, has a much lower level of involvement with policy matters (with less of an Administration perspective) than the Department of Justice. Second, GSA already has numerous government-wide, apolitical oversight responsibilities and already has two related administrative law functions: it has responsibility for Federal Advisory Committee Act oversight[44] and also houses the Regulatory Information Service Center which, among other things, organizes and publishes the semi-annual Unified Agenda of Federal

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42. For a good description of the process used by ACUS to develop its recommendations, see Breger, *supra* note 5, at 825-28. *See also* Edles, *supra* note 5, at 583 ("ACUS never attempted to dictate the results of consultant research but consultant products were subjected to an interactive peer review process . . . .").

43. 5 U.S.C. app. §§ 1-15 (1982). ACUS was also subject to FACA and had few problems operating within its strictures.

44. The Act vests the coordination function to the President and the OMB Director, but the function was transferred to GSA by Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (1977). The function is now performed by the GSA Office of Administration, Committee Management Secretariat.

Regulatory and Deregulatory Actions.[45] Third, placement in GSA would be more likely to allow participation by federal judges who might feel it inappropriate to advise the Department of Justice because of its role as the government's litigator. Offsetting these advantages, however, is a very big disadvantage: GSA clearly lacks the clout the Justice Department enjoys. It would probably be more difficult to attract high-level participation in Committee activities or sufficient attention to Committee recommendations without the Attorney General's imprimatur. Moreover the GSA Administrator is normally chosen for managerial acumen and has historically not been involved or interested in administrative law reform or regulatory procedure issues.

OPTION 4: PRIVATIZATION IN AN EXISTING WELL-FINANCED ENTITY

As an alternative to reviving ACUS *within* the government, an existing private entity (American Bar Association, National Academy of Public Administration, The Brookings Institution, Urban Institute or American Enterprise Institute) could be approached with a plan to recreate the "Conference" aspect of ACUS—modeled perhaps on the smaller "Advisory Committee" described in Option 2. A part-time Conference Chair and full-time Executive Director could be appointed to direct the activities of the Conference, which would operate loosely within the organization. Recommendations might be made to a Board of Directors or equivalent (e.g., the ABA's Board of Governors). Funding would come from the organization's budget, foundations, federal research grants, book sales, and training fees. Corporate funding might also be considered, although the risks of actual or perceived bias would obviously counsel caution in that area.

The overriding weakness of this option is that the non-government nature of the entity would inevitably reduce the stature and official nature of the recommendations. A related worry is that this privatized Conference might also inevitably be viewed as reflecting the political or policy orientation of the parent entity. The real strength of ACUS was that it was not only *in* the government, it *was* the government. A recommendation emanating from ACUS was inevitably referred to by headline writers as

45. For more information, see Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions, 62 Fed. Reg. 21,406 (1997).

"Federal Panel recommends X."[46] This not only added the *gravitas* with which all participants approached the issues, it made its recommendations more influential, especially with "member" agencies. Moreover, the participation of the government members was *intra*governmental. It was clearly official business for the assistant general counsel of the Department of Agriculture to grab a cab and spend several hours participating as an ACUS Committee member. On the other hand, the ability of such officials to take time to travel to and participate in bar activities, for example, is clouded.[47]

Nevertheless there is some precedent for such an effort within the bar association. In the 1970s, the ABA's Section of Administrative Law (as it was then named) did organize the Center for Administrative Justice. According to the original proposal for the Center made in 1972, although the Center was not intended to duplicate the sort of applied research recommendations that ACUS specialized in,[48] it was supposed to maintain an administrative law library and "provide training opportunities for those engaged or interested in the administrative decision-making process in the federal and local governments, assemble and disseminate information in this area, conduct and support research projects, both theoretical and empirical,

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46. *See, e.g.*, *Tort Claims Exception Repeal Tabled By Blue Ribbon Panel*, 36 FOOD CHEM. NEWS, Apr. 4, 1994; Cass Peterson, *Agency Calls for Harmonizing Laws on Protection of Whistle-Blowers*, WASH. POST, June 11, 1987, at A21.

47. *See, e.g.*, Memorandum from the Deputy Attorney General, Subject: Participation in Bar Activities by Justice Department Employees, to Department of Justice Attorneys, Mar. 27, 1997, at 2 ("Ordinarily bar activities should not be conducted at the expense of the government in terms of time or money. . . . Occasionally, when the work of a bar committee is closely related to a employee's official responsibilities, the Department may determine that an employee may serve on that committee in his or her official capacity as the representative of the Department."). *See generally* Lisa G. Lerman, *Symposium on Mandatory Pro Bono: Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1192-1208 (1991) (describing criminal statutes and agency regulations governing "outside activities" of employees).

48. As the first ACUS Chairman, Professor Jerre Williams, stated, in lauding the creation of this Center in the ABA:

> Certain limitations in [ACUS] and its functions should be noted. The most important is that its activities relate solely to the federal government. A second limitation is that a majority of the members of the Conference must be government officials. While this is a valuable and proper limitation for this organization, because it means that the government itself is undertaking reform, the Conference nevertheless for this reason remains a government agency and this limitation must be frankly recognized. A third possible limitation upon the Conference is that, to maintain congressional and Presidential backing it must be specific and precise in much of its activities. This means that there is less room for general scholarship or "radical" inquiry.

Jerre S. Williams, *A National Institute of Justice and the Administrative Process*, NAT'L CENTER FOR ST. CTS 114, 120-21 (undated).

in order to illuminate the dark areas of the subject, and to provide consulting and drafting services to governmental units of agencies."[49] The Center was established and did some worthwhile work[50] before going out of business due to funding difficulties in the early 1980s.

OPTION 5: CREATE A NEW PRIVATE ACUS

If adequate start-up funds and a prestigious Chair could be attracted, a private Conference on Administrative Procedure might be viable. Of course without an adequate "endowment" from a respected foundation, funding problems would likely be more acute in a start-up organization, and the lure of corporate sponsorship correspondingly greater.

It should be noted here that the *Washington Post* recently reported that staff members from the Office of Technology Assessment (a larger congressional agency that also lost its funding about the same time as did ACUS) have succeeded ("after six months of often frustrating efforts") in obtaining donated office space and a $50,000 grant from an anonymous donor as seed money for an Institute for Technology Assessment.[51]

OPTION 6: TRY A ONE YEAR REVIVAL

As a short term experimental step, given the difficulty of a true revival—at least while the appropriators who failed to appreciate ACUS' value are still in charge—it might be advisable to try a low-budget temporary ACUS in an academic setting. One way to try this would be for a law school to sponsor an "Administrative Law Plenary Session" in 1998 or 1999. As a foundation for such a setting, the Dean could appoint a group of volunteers, some perhaps drawn from ACUS' most recent membership, to identify the most pressing administrative law issues in today's government. For instance, many new laws were passed in 1995-96 affecting the administrative process.[52] Committees such as the ones suggested above in

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49. Proposal for Center for Administrative Justice, Apr. 24, 1972, at 5, *quoted in* Williams, *supra* note 48, at 121.

50. For example, see the Center's influential empirical study of the social security appeals process, JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS (1978).

51. *An Agency's Private Return*, WASH. POST, May 6, 1996, at F19. No listing for the Institute was found in the Washington phone directory, however.

52. *See, e.g.*, *Recent Developments: Regulatory Reform & the 104th Congress*, 49 ADMIN. L. REV. 95 (1997) (discussing congressional review of agency regulations, the Paperwork Reduction Act of 1995, the Small Business Regulatory Enforcement Fairness Act, and the Unfunded Mandates Reform Act of 1995).

Option 1 could be formed to discuss these issues, develop reports, and draft and circulate recommendations to ready them for a Plenary Session. If properly organized and staffed with faculty and student assistance, such a Conference would at least continue the chain (unbroken from 1968 to 1995) of ACUS recommendations to Congress and the agencies on administrative law reform.

CONCLUSION

I believe it is only a matter of time before Congress and the President recognize this country's need for objective, non-partisan expertise on the crucial, but not always politically "sexy," issues of administrative procedure implementation and reform. I also, not surprisingly, believe an "administrative conference," as reflected in the Eisenhower and Kennedy "temporary conferences" and as enacted by the Administrative Conference Act, is basically sound. The three main attributes of this model—a public/private partnership, an entity that is a part of the government, and one with at least a small staff to follow up and encourage real-world implementation of recommended reforms—are of great importance to its practical success. I have tried to present alternatives to the stand-alone, independent agency model that proved to be too precarious to withstand a politicized appropriations cycle. I have also suggested possible streamlining changes. Finally, if the in-house approach proves to be unrealistic for a while, I suggest ways of keeping the idea (and the momentum built up by ACUS for almost thirty years) alive in the private sector. However it may happen, having an independent, expert entity to conduct research, provide consensus-based recommendations, and assist Congress and agencies on matters of administrative process is an idea whose time will come again.

Ms. SÁNCHEZ. Thank you, Professor Lubbers. We will now begin our round of questionings. And I will begin by recognizing myself first for 5 minutes.

Mr. Rosenberg, if ACUS were reconstituted, what, if anything, would you recommend be changed about the conference?

Mr. ROSENBERG. I think there should be a broadening of the people that make up the assembly so that there is more representation from States and localities, more representation from management and public administration types, and perhaps more in employment law and personnel kinds of people to reflect those areas that are now coming to the fore, and perhaps the kinds of issues that are raised by the reorganization of DHS, and some of the civil liberties kinds of issues that are coming up now.

Ms. SÁNCHEZ. And how important would it be to preserve the bipartisan and nonpolitical nature of ACUS, especially given the topics that you have just given?

Mr. ROSENBERG. Absolutely essential, and also to lend to the credibility of opening doors for—just by the fact that ACUS is neutral and does open those doors to get the information that they need.

Ms. SÁNCHEZ. Professor Freeman, I am going to give you an opportunity, as the time ran out, so that you could talk about what ACUS could have done but wasn't allowed to do. I am going to give you that opportunity now, during questions.

Ms. FREEMAN. Thank you. I suppose that a highlight for me is the creation of DHS in the wake of September 11th. And this, of course, was the most important, massive creation of a Government bureaucracy in over 50 years. And not to have had some bipartisan and neutral advice for Congress and for others, the agencies themselves, to make that transition work smoothly, to try to harmonize the national security concerns of those agencies with the need for accountability, public access. That would have been a great service ACUS could have provided. That is just one in a long list.

The other I would mention is that outsourcing has grown over the last couple of decades, but particularly in the last several years, there is need for a significant amount of study and attention to the implications of outsourcing. There was a New York Times blitz on outsourcing over the last year or 2. And you have seen this really come to the fore in the wake of Hurricane Katrina, as well as Iraq. Those two issues to me are things that ACUS could have helped out.

Ms. SÁNCHEZ. Thank you. I appreciate your answers.

I have more time remaining, but I am going to yield it back. We have been called across the street to vote. My understanding is there is one vote. So we will run across to do that and come back and resume questioning, unless the Ranking Member would like to maybe ask a quick question.

Mr. CANNON. Madam Chair, I only have one question that I can just ask for the record.

Ms. SÁNCHEZ. I will yield. I will yield my time to you, my remaining time to you, Mr. Cannon.

Mr. CANNON. Thank you. And then hopefully we can just let the panel go.

I appreciate you being here. We have been in this business together for a long time.

And just a few, Dr. Freeman. And this is not urgent. But in your study, you have got EPA being reversed about 54 percent of the time. That seems to be way disproportionate to the other agencies involved. You have also got, I guess, the FCC as being reversed 43 percent and then others, I think, are averaging about 28.

I actually was wondering why EPA, primarily, and then FCC are so far statistically out of line with the others. But again, that is not urgent. If you want to just give us something in writing.

Ms. FREEMAN. I am happy to address it in writing. But just very, very briefly, actually, I don't think those numbers—I wouldn't necessarily agree exactly with that read of the numbers. It turns out that EPA is upheld in whole or part actually 74 percent of the time. But you are right that they have a lower rate of being upheld in their entirety. They are the lowest at 46 percent.

But just to make one comment about this, we did some more analysis. And I don't think it is correct at the moment to assume that this means there is something wrong with how EPA writes its rules. It turns out that most of the cases, 66 percent of the cases, in which EPA's rules are invalidated in whole or part, 66 percent, are Clean Air Act cases. And Clean Air Act implementation is extremely complicated, very likely to be subject to litigation.

It may point to the need for Congress to revisit some of the most difficult issues in the Clean Air Act. It may not be the fault of EPA.

Mr. CANNON. All right. Thank you.

I yield back, Madam Chair, to you.

Ms. SÁNCHEZ. Thank you. I am going to ask unanimous consent to enter into the record letters that we have received by Justice Breyer and Justice Scalia and also the American Bar Association to be made part of the record. Without objection, so ordered. Those will be made part of the record.

[The information referred to follows:]

LETTER FROM JUSTICE STEPHEN BREYER, SUPREME COURT OF THE UNITED STATES, SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE STEPHEN BREYER

August 21, 1995

Hon. Charles E. Grassley
Chairman
Subcommittee on
Administrative Oversight
and the Courts
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Grassley,

Thank you for the invitation to submit a few comments about the Administrative Conference of the United States. As a "liaison" to the Administrative Conference (from the Judicial Conference), I have participated in its activities from 1981 to 1994. I believe that the Conference is a unique organization, carrying out work that is important and beneficial to the average American, at rather low cost.

The Conference primarily examines government agency procedures and practices, searching for ways to help agencies function more fairly and more efficiently. It normally focuses upon achieving "semi-technical" reform, that is to say, changes in practices that are general (involving more than a handful of cases and, often, more than one agency) but which are not so controversial or politically significant as to likely provoke a general debate, say, in Congress. Thus, it may study, and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of negotiation, or ways of making judicial review of agency action less technical and easier for

ordinary citizens to obtain. While these subjects themselves, and the recommendations about them, often sound technical, in practice they may make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that may harm them.

The Administrative Conference is unique in that it develops its recommendations by bringing together at least four important groups of people: top-level agency administrators; professional agency staff; private (including "public interest") practitioners; and academicians. The Conference will typically commission a study by an academician, say, a law professor, who often has the time to conduct the study thoughtfully, but may lack first-hand practical experience. The professor will spend time with agency staff, which often has otherwise unavailable facts and experience, but may lack the time for general reflection and comparisons with other agencies. The professor's draft will be reviewed and discussed by private practitioners, who bring to it a critically important practical perspective, and by top-level administrators such as agency heads, who can make inter-agency comparisons and may add special public perspectives. The upshot is likely to be a work-product that draws upon many different points of view, that is practically helpful and that commands general acceptance.

In seeking to answer the question, "Who will control the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, technical agency practices. In some countries, ombudsmen, in dealing with citizen complaints, will also recommend changes in practices and procedures. Sometimes, as in France and Canada, expert tribunals will review decisions of other agencies and help them improve their procedures. Sometimes, as in Australia and the United Kingdom, special councils will advise ministries about needed procedural reforms. Our own Nation has developed this rather special approach

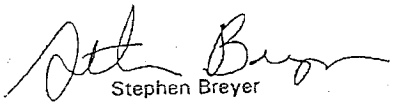
(drawing together scholars, practitioners, and agency officials) to bringing about reform of a sort that is more general than the investigation of individual complaints yet less dramatic than that normally needed to invoke Congressional processes. Given the Conference's rather low cost (a small central staff, commissioning academic papers, endless amounts of volunteered private time, and two general meetings a year), it would be a pity to weaken or to lose our federal government's ability to respond effectively, in this general way, to the problems of its citizens.

I do not see any other institution readily available to perform this same task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons. The American Bar Association's Administrative Law Section, while a fine institution, cannot call upon the time and resources of agency staff members and agency heads as readily as can the Administrative Conference. Congressional staffs cannot as easily conduct the technical research necessary to develop many of the Conference's more technical proposals. The Office of Management and Budget does not normally concern itself with general procedural proposals.

All this is to explain why I believe the Administrative Conference performs a necessary function, which, in light of the cost, is worth maintaining. I recognize that the Conference is not the most well known of government agencies; indeed, it is widely known only within a fairly small (administrative practice oriented) community. But, that, in my view, simply reflects the fact that it does its job, developing consensus about change in fairly technical areas. That is a job that the public, whether or not it knows the name "Administrative Conference," needs to have done. And, for the reasons I have given, I believe the Administrative Conference well suited to do it.

I hope these views will help you in your evaluation of the Conference.

Yours sincerely,



Stephen Breyer

LETTER FROM JUSTICE ANTONIN SCALIA, SUPREME COURT OF THE UNITED STATES, SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTONIN SCALIA

July 31, 1995

Hon. Charles E. Grassley
Chairman
Subcommittee on Administrative Oversight and the Courts
United States Senate
Committee on the Judiciary
Washington, D.C. 20510–6275

Dear Senator Grassley:

Thank you for the invitation to appear at the hearing on "The Reauthorization of the Administrative Conference" scheduled for August 2. I will be unable to do so, but your staff has advised me that a letter would be appropriate.

I am not a good source of information concerning recent accomplishments of the Conference. I have not followed its activities closely since stepping down as its Chairman in 1974. I can testify, however, concerning the nature of the Conference, and its suitability for achieving its objectives.

The Conference seeks to combine the efforts of scholars, practitioners, and agency officials to improve the efficiency and fairness of the thousands of varieties of federal agency procedures. In my judgment, it is an effective mechanism for achieving that goal, which demands change and improvement in obscure areas where bureaucratic inertia and closed-mindedness often prevail. A few of the Conference's projects have had major, government-wide impact—for example, its recommendation leading to Congress's adoption of Public Law 94–574, which abolished the doctrine of sovereign immunity in suits seeking judicial review of agency action. For the most part, however, each of the Conference's projects is narrowly focused upon a particular agency program, and is unlikely to attract attention beyond the community affected by that program. This should be regarded, not as a sign of ineffectiveness, but as evidence of solid hard work: for the most part, procedural regimes are unique and must be fixed one-by-one.

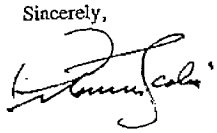
One way of judging the worth of the Conference without becoming expert in the complex and unexciting details of administrative procedure with which it deals, is to examine the roster of men and women who have thought it worthwhile to devote their time and talent to the enterprise. Over the years, the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

have served as members have been, by and large, prominent and widely respected lawyers in the various areas of administrative practice.

- I was the third Chairman of the Administrative Conference. Like the first two (Prof. Jerre Williams of the University of Texas Law School, and Prof. Roger Cramton of the University of Michigan Law School), and like my successor (Prof. Robert Anthony of Cornell Law School) I was an academic—on leave from the University of Virginia Law School. The Conference was then, and I believe remains, a unique combination of scholarship and practicality, of private-sector insights and career-government expertise.

I would not presume to provide the Subcommitte advice on the ultimate question of whether, in a time of budget constraints, the benefits provided by the Administrative Conference are within our Nation's means. But I can say that in my view those benefits are substantial: the Conference has been an effective means of opening up the process of government to needed improvement.

Sincerely,



LETTER FROM THE AMERICAN BAR ASSOCIATION (ABA), SUBMITTED BY THE HONORABLE LINDA T. SÁNCHEZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRWOMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

STATEMENT OF

THE AMERICAN BAR ASSOCIATION

to the

SUBCOMMITEEE ON COMMERCIAL AND ADMINISTRATIVE LAW

of the

COMMITTEE ON JUDICIARY

of the

UNITED STATES HOUSE OF REPRESENTATIVES

concerning its hearing on

"H.R. ---, THE REGULATORY IMPROVEMENT ACT OF 2007"

SEPTEMBER 19, 2007

Madam Chairwoman, Ranking Member Cannon, and Members of the Subcommittee:

The American Bar Association, with more than 410,000 members nationwide, appreciates the opportunity to present this statement to the Subcommittee regarding today's hearing on "H.R. ---, the Regulatory Improvement Act of 2007" and the need to reauthorize and fund the Administrative Conference of the United States (ACUS). We ask that this statement be included in the official record of today's hearing.

The ABA strongly supports renewed reauthorization and adequate funding for ACUS, which was previously reconstituted and reauthorized by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly H.R. 4917). Once ACUS is newly reauthorized and provided with the very modest funding that it needs to restart its operations, it can begin addressing the many important tasks that may be assigned to it by Congress, including for example, assessing and recommending possible administrative reforms within the Department of Homeland Security ("DHS") and its Federal Emergency Management Agency ("FEMA").

BACKGROUND AND RECENT DEVELOPMENTS REGARDING ACUS

ACUS was originally established in 1964 to serve as the federal government's permanent 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. ACUS was a bargain. It employed a permanent staff of just a few people while also retaining a number of academic consultants, on an as-needed basis, who received very modest payment for engaging in massive research tasks. ACUS also leveraged the volunteer efforts of a large number of administrative law luminaries—government officials, private lawyers, judges, and academics—who served in a variety of capacities and attended the bi-annual meetings for no compensation (other than travel reimbursement). Yet as more fully discussed below, ACUS had a stellar track record of

initiating government improvements and saving both the government and private sectors large sums of money.

In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. The written statements of Justices Breyer and Scalia are available online at http://www.abanet.org/poladv/documents/acusfunding_resources.pdf.

Following those hearings in 2004, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT)—then-Chairman of this Subcommittee and now its Ranking Member—for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 35 cosponsors—including the current Chairman and Ranking Member of the House Judiciary Committee, Reps. John Conyers (D-MI) and Lamar Smith (R-TX), before being approved unanimously by the House at the end of the 108th Congress. The Senate companion bill, S. 2979, was cosponsored by the current Chairman of the Senate Judiciary Committee, Sen. Patrick Leahy (D-VT), and by Sen. Orrin Hatch (R-UT), and it was approved in the Senate by unanimous consent. President Bush then signed the legislation into law on October 30, 2004 as P.L. 108-401.

Although ACUS was reauthorized with overwhelming bipartisan support with the passage of P.L. 108-401, that statute only reauthorized the agency through fiscal year 2007. Therefore, the ABA supports H.R. ---, the "Regulatory Improvement Act of 2007," which would renew ACUS' reauthorization through fiscal year 2011.

BENEFITS OF REAUTHORIZING ACUS

The ABA believes that a reauthorized and adequately funded ACUS would provide many benefits to the American people at minimal cost. At the request of Rep. Cannon, the Congressional Research Service ("CRS") prepared two studies in October 2004 and September 2005 describing the prior successes of ACUS and the many benefits that could be realized once the agency is

reconstituted.[1] As CRS explained in those studies, ACUS proved to be an extremely useful agency for many years, and once it receives the modest funding that it needs to resume its operations, it will provide many valuable benefits to the American people, including the following.

First, a reactivated and operational ACUS could objectively review and assess the relationship between DHS and FEMA and recommend possible administrative reforms designed to help both agencies better prepare for and respond to future terrorist or natural disaster incidents. As CRS noted in its September 15, 2005 memorandum, "the Katrina catastrophe has raised a number of questions as to the organization, authority and decision-making capability of…FEMA." Although FEMA previously existed as an independent, cabinet-level agency, the agency was folded into DHS when the Department was created in 2002. As part of that process, FEMA was made subordinate to DHS and lost certain functions and resources. These and other administrative operating deficiencies contributed to ineffective planning and responses by Federal, State and local officials with regard to Katrina and other natural disasters. Therefore, CRS concluded, "a reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's role, where it should play that role [e.g., within DHS, as an independent agency, etc.], and the authorities it needs to fulfill that role."

Second, a newly-reconstituted ACUS could 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. In response to the 9/11 attacks, Congress created DHS in November 2002 by consolidating all or part of 22 existing federal agencies. As CRS noted in its September 15, 2005 memorandum, "each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure…(and) many of the agencies

[1] The CRS Memorandum dated October 7, 2004 and titled "Points in Support of H.R. 4917, Bill to Authorize Appropriations for the Administrative Conference of the United States," is available at http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf. CRS also issued an updated memorandum on the merits of ACUS on September 15, 2005, which is available at: http://www.abanet.org/poladv/documents/acus_crs_15sep05.pdf.

transferred have a number of different types of adjudicative responsibilities." Unfortunately, the statute creating DHS is silent as to how these agencies' adjudicatory programs should be combined and all of the transferred agencies have their own statutory and administrative rulemaking requirements that still need to be integrated. As a result, CRS concluded in its memorandum that the ongoing "process of integration and implementation of the various parts of the [DHS] legislation…is likely to need administrative fine tuning for some time to come…(and) ACUS has a clear role to play here." As the debate over the current 9/11 Commission implementation legislation has shown, these issues remain problematic.

Third, a revived ACUS also could provide valuable analysis and guidance on a host of other administrative issues. In addition to helping DHS and FEMA to work more effectively, CRS noted in its September 2005 memorandum that ACUS could provide useful guidance on a number of other important administrative law issues. These include public participation in electronic rulemaking, the peer review process, agency avoidance of notice and comment rulemaking through the use of "non-rule rules," possible codification of the process of presidential review of rulemaking instead of using executive orders, and possible refinements to the Congressional Review Act. A reauthorized and 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.

Fourth, a reconstituted ACUS would continue to enjoy the strong bipartisan support and cost-effectiveness that all observers agree characterized the original agency. CRS noted in its September 2005 memorandum that "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." ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars 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 also explained in its October 2004 memorandum, 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." Once it is reconstituted, ACUS will continue to provide these same benefits.

Fifth, ACUS has a proven track record of success that the new agency will be able to expand and build upon. 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, in its October 2004 memorandum, 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." ACUS also produced numerous reports and recommendations on a wide variety of national

security, civil liberties, information security, organizational, personnel, and contracting issues. A listing and description of 28 such reports is attached to the September 2005 CRS study as Appendix A. A reconstituted ACUS will continue to build on these earlier successes.

ACUS' ROLE IN THE REGULATORY PROCESS IS 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 the roles that ACUS and OIRA play in the regulatory process.

As CRS explained in its detailed August 3, 2005 memorandum regarding the differing roles of ACUS and OIRA[2], there are fundamental differences between the agencies with respect to their structures, missions, and "the nature and manner of their respective assessments of agency performance in the administrative process." CRS noted that while ACUS always had been "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," OIRA is "responsible for effectuating a given administration's regulatory agenda." For these and other reasons outlined by CRS, the activities of a reconstituted ACUS would not be duplicative of those conducted by OMB or OIRA.

CONCLUSION

The ABA has long supported ACUS and the role it played in advancing administrative procedural reform. In our view, ACUS proved itself to be highly-effective in promoting efficiency in government for over 25 years, and it was able to do so at a minimal cost. Now that the reauthorization for the agency is set to expire at the end of the current fiscal year, we urge you to support the pending legislation that would reauthorize the agency thorough fiscal year 2011. In

[2] The detailed August 3, 2005 CRS memorandum comparing and contrasting the respective duties and objectives of OIRA and ACUS is available online at http://www.abanet.org/poladv/documents/acus_crs_3aug05.pdf.

addition, once ACUS is reauthorized, we urge all members of the Subcommittee to support full funding for the agency, beginning with an appropriation of $1 million for fiscal year 2008.[3]

Thank you for considering the views of the American Bar Association. If you have any questions regarding the ABA's views on these issues or need more information, please feel free to contact R. Larson Frisby of the ABA Governmental Affairs Office at (202) 662-1098 or frisbyr@staff.abanet.org.

[3] The "Regulatory Improvement Act of 2007" would authorize $1 million of start-up funds for ACUS for fiscal year 2008. The draft legislation also would authorize an additional $3.3 million for fiscal year 2009, $3.4 million for fiscal year 2010, and $3.5 million for fiscal year 2011.

Ms. SÁNCHEZ. My understanding is that there are no further questions of the witnesses. So I would like to thank the witnesses for their testimony today. Without objection, Members of the Subcommittee will have 5 legislative days to submit any additional written questions, which we will forward to the witnesses and ask that you answer as promptly as you can so that they can be made a part of the record. And without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

I realize this has been a bit of a quick and dirty hearing, but we do appreciate your attendance and your testimony. You will be receiving, as I said, probably additional questions to be answered in writing. I thank you for your patience and for your time. And with that, the hearing on the Subcommittee of Commercial and Administrative Law is adjourned.

[Whereupon, at 3:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Today's hearing allows us to consider H.R. 3564, the "Regulatory Improvement Act of 2007," a measure that would simply reauthorize the Administrative Conference of the United States for an additional 4 years.

There are few entities that enjoyed more bipartisan support than the Administrative Conference. It is also one of the few subject matters that both Justices Breyer and Scalia wholeheartedly agree upon, as evidenced by their enthusiastic testimony in support of the Conference before this Subcommittee in the 108th Congress.

Let me just mention a few reasons why there has been and continues to be such broad bipartisan support for the Administrative Conference.

First, the Conference helped agencies implement procedures that, in turn, saved taxpayers *many millions of dollars*. It proposed numerous recommendations to eliminate excessive litigation costs and long delays. Just one agency alone—the Social Security Administration—estimated that the Conference's recommendation to change that agency's appeals process would result in approximately $85 million in savings.

Indeed, Justice Breyer described the "huge" savings to the public resulting from the Conference's recommendations, while Justice Scalia concurred that it was "an enormous bargain."

Second, the Administrative Conference promoted innovation among agencies and how they function. To that end, the Conference successfully convinced 24 agencies to use Alternative Dispute Resolution to resolve issues with the private sector. It also spearheaded the implementation of the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Magnuson-Moss Warranty Act, governing consumer product warranties.

Third, the Conference played a major role in helping agencies promulgate "smarter" regulations. It did this by working to improve the public's understanding of and participation in the rulemaking process, promoting judicial review of agency regulations, and reducing regulatory burdens on the private sector.

After we proceed to markup of the legislation reauthorizing the Administrative Conference later this afternoon, I will recommend to House leadership that this measure be considered on the floor promptly in the coming weeks. I also intend to urge our colleagues on the Appropriations Committee to fund the Conference as soon as possible.

RESPONSE TO POST-HEARING QUESTIONS FROM MORT ROSENBERG, ESQ., SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE (CRS), WASHINGTON, DC

MEMORANDUM January 29, 2009

To: The Honorable Linda T. Sanchez, Chairwoman of the Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary

From: Curtis W. Copeland, Specialist in American National Government, (202) 707-0632

Subject: **Answers to Post-Hearing Questions**

This memorandum responds to your request for answers to questions posed to Morton Rosenberg of CRS after hearings held during the 110th Congress. Because Mr. Rosenberg has now retired from CRS, I am providing responses to your questions on his behalf. If you have any questions regarding these responses, please do not hesitate to call me.

Questions Regarding HR 3564: The Regulatory Improvements Act of 2007

1. Can you estimate for us how many excess costs have been imposed by the federal government on the private sector, incurred by the federal government itself, or imposed by the federal government on state and local governments since the Administrative Conference of the United States (ACUS) was defunded, specifically because ACUS has not been around to point out new ways in which to save costs?

Answer: Even a rough estimate of those costs is beyond the capabilities of CRS. That said, I do believe those costs could be considerable.

2. What do you believe are the three most important initiatives identified by our Administrative Law, Process and Procedure Project for the 21st Century that ACUS could lead between now and the end of Fiscal Year 2011?

Answer: Three such initiatives could be (1) an examination of a range of possible changes to the Congressional Review Act (e.g., clarifying what happens when agencies fail to submit covered rules); (2) a review of the role of science advisory committees in rulemaking, focusing on such issues as how they avoid conflicts of interest; and (3) the implementation of electronic rulemaking, and whether it has had the effects anticipated on public participation and the content of rules developed through that process.

3. Can you estimate how many costs might be saved by the private sector and the federal government by those initiatives? Where applicable, can you estimate how many costs might be saved by state and local governments in connection with their participation in federal programs?

Answer: Even a rough estimate of those savings with any degree of precision is impossible. That said, a report by the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis indicated that the combined budgets of federal regulatory agencies in FY2008 was about $48 billion.[1] If that figure is correct, and if the initiatives could make these agencies 1% more efficient in their operations, the savings that would result would be $480 million.

4. Our 21st Century Project has produced many recommendations. How do you propose that we prioritize our action on those recommendations, and how could ACUS help in sorting that out? In your view, would an entity like ACUS be ideally situated to help us bring these recommendations to life, or might there be some other, better entity to do that?

Answer: One approach would be to focus on those recommendations with the most immediate financial effect, thereby demonstrating their relevance and laying the groundwork for future action. ACUS would be well suited to assist in this effort, and could convene a panel of experts to identify those recommendations.

5. In your written testimony, you highlight that ACUS might have a particularly useful role to play in the post-9/11 world. Could you please explain that more for us?

Answer: ACUS could have been helpful to agencies in identifying ways to issue needed regulations quickly while still meeting the requirements of the Administrative Procedure Act and other rulemaking statutes. Specifically, ACUS could have drawn on case law and its expertise to offer advice regarding the "good cause" exception to notice and comment rulemaking, and ways to avoid delays associated with other phases of the rulemaking process.

[1] See [http://wc.wustl.edu/09-regulator/wc-regulators_budget_09.pdf] for a copy of this study.

RESPONSE TO POST-HEARING QUESTIONS FROM JODY FREEMAN, PROFESSOR, HARVARD LAW SCHOOL, CAMBRIDGE, MA

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

JODY FREEMAN
Professor of Law

Hauser Hall 412
(617) 496-4142
Fax: (617) 496-4947
freeman@law.harvard.edu

To: The Honorable Linda Sanchez, Chair
Re: Hearing on H.R. 3564, the "Regulatory Improvement Act" on September 19, 2007/Response to Questions
Date: November 13, 2007

Responses to Majority Questions

1. *Over the course of the Administrative Law, Process and Procedure Project, we heard many times about the lack of empirically-grounded research and writing on the subject of administrative procedure and process. Why is there such a paucity of academic interest in this subject?*

Empirical work is time consuming and expensive and results are not guaranteed. It typically requires reading and coding hundreds of cases, which must be done by trained researchers and research assistants in a careful and systematic manner that ensures the findings are valid and replicable. Most legal scholars lack the expertise necessary to design or carry out such a study. Moreover, at law schools, the study of administrative law and process has traditionally emphasized qualitative analyses of judicial decisions (in order to explain legal principles or rationalize a line of cases) instead of empirical analysis.

Over time, we have come to realize that much of our thinking about the administrative state requires a firmer empirical grounding (i.e., we need to know more about the reality of agency process before we can theorize about it). As a result, interest in empirical work has grown. Still, because the inferences one can draw from individual studies can be limited, relatively few law professors are willing to undertake the work. Most law schools do not reward professors for this kind of research, making it especially risky for pre-tenure faculty. This helps to explain why an institution such as ACUS, which can sponsor a *body* of empirical research and feed it into the policymaking process, is so important.

2. *Could a reactivated Administrative Conference of the Unites States (ACUS) serve as a clearinghouse for such research and writing?*

Yes, a reactivated and funded ACUS could develop a coherent research program, establish priority projects, and solicit scholars to participate. It could also hire in-

house researchers to do individual projects and guide academic researchers. ACUS could provide funding to support particularly important studies. It could also ensure that the results are published in Reports designed to be useful to agency and congressional staff.

3. *Why should anyone care about the percent of rules invalidated upon judicial review?*

The percentage of rules invalidated by courts is an indicator of the health of the rulemaking process. It is a limited indicator, as it tells us how well the agencies perform in those cases that are challenged and appealed and cannot tell us anything about rules that are not challenged. Nevertheless, if a high percentage of challenged agency rules are invalidated by the court, we might suspect that something is wrong with the entire rulemaking process. If most survive judicial review, we might think that the rulemaking process is functioning fairly well (in the sense that courts do not see reason to overturn the rules) since appellants are likely to challenge those rules that are least likely to withstand appeal.

One often hears assertions about how well or poorly the agency rulemaking process works, and sometimes hears claims that one or another agency is "out of control." Such claims are usually followed by calls for reform. Empirical study allows us to treat such assertions as testable hypotheses, and by testing them we can avoid making two different kinds of errors: adopting unnecessary measures to fix a process that is not broken (which would waste Congress's time and the public's resources); or alternatively, *failing* to adopt reform measures that could respond to some failure in the system.

Knowing the rate of invalidation of rules is best viewed as a first step. Ideally, we want to know *why* agency rules are struck down, in addition to the rate of invalidation (e.g., is the agency using faulty analysis or missing procedural steps? Are the statutes exceedingly complicated so even an agency operating in good faith is bound to make errors?). And we would want to do a cross-agency comparison to see if some agencies do better than others when their rules are challenged. If this were the case, perhaps the difference would be attributable to something the better performing agency was doing especially well; perhaps it would be attributable to differences in the statutory mandates. In addition, we would want to know whether the process that generates rules that are not challenged differs in any meaningful way from those that reach the appellate courts. Only once we have empirical information like this can we explore whether Congress should adopt particular reforms that could improve the agency rulemaking process.

4. *Based on the results of your study, it appears that only 11% of rules are invalidated. Can one conclude that the system is therefore working?*

We would draw a more careful conclusion: that the system is certainly not in crisis. First, our study shows an 11% outright invalidation rate (meaning invalidation

without remand to allow the agency to repair the error), and a 9% invalidation rate with remand, totaling 20%. This rate of invalidation suggests that agencies are not generally promulgating fatally flawed rules. However, our data also show that 42% of rules are invalidated *at least in part*. This suggests that courts find *something* wrong with a larger percentage of rules, though not a majority. All of these figures (11%, 9%, and 42%) should be viewed, however, in the context of all rules that are promulgated by agencies; only a very small percentage of those are ever challenged, let alone invalidated.

Our sense, based on reading the cases in this study, is that rules that are invalidated at least in part are often very complicated rules with multiple parts, which increases the risk that a court will be unsatisfied with at least some part of the rule. These rules are promulgated pursuant to statutes that are themselves very complicated, and the data reflect this. For example, of the EPA cases in which a rule was invalidated at least in part, 66% involve the Clean Air Act; among the EPA cases in which a rule was upheld in its entirety, 70% involve the Clean Air Act. This result suggests that there is something in particular about the Clean Air Act that leads to complicated rules. In the absence of new data, however, we cannot speculate what that is.

5. *Your study also concluded that 42% of challenged rules are invalidated in whole or in part. Can one conclude that the system is therefore broken?*

Based on our study, we would not conclude that the system is broken. A very healthy majority of rules survive judicial review in whole or part, and a much larger percentage of rules are never challenged in the courts. But we concede that this judgment depends on how one defines "broken." Clearly, our data do not support alarmist claims that the major rulemaking agencies are incompetent, or that most agency rules are struck down on judicial review. Nevertheless, we see a significant enough rate of invalidation, whether in whole or part, that we would like to know more about why courts strike down all or part of a rule. The appropriate response to our data is to inquire further into what makes rules fail, before rushing into reform proposals.

6. *Based on your study, why do you think the Environmental Protection Agency (EPA) and the Federal Communications Commission (FCC) have the greatest number of challenged rules?*

We are not certain why, but we suspect that both FCC and EPA rules are subject to challenge in part because they involve regulatory decisions that are technically, scientifically and economically complex. Environmental statutes such as the Clean Air Act are notoriously complicated and difficult for EPA to implement because of the many considerations the agency must take into account when exercising its discretion to set standards, approve plans and permits, and enforce the numerous other requirements of the Act. The agency must routinely make tradeoffs between regulatory stringency and economic cost, for example, but in many instances it lacks sufficient guidance from Congress about how to do so. It must consider scientific

evidence that is relevant but rarely conclusive. This invites litigation. In addition, many of the regulatory decisions made by both the FCC and EPA likely attract legal challenges to the extent they impose costs on relatively concentrated and highly organized interest groups that would be adversely affected by regulation, and which thus benefit from regulatory delay. It may be that a certain amount of litigation surrounding agency rulemaking is inevitable and even salutary given the complexity of the statutes involved, the breadth of the delegated power, the regulatory challenges faced by the agency, and the incentives facing interest groups subject to regulation. Further empirical study can help us determine whether that hypothesis is accurate.

7. *Among all agencies considered, your study indicated that EPA rules are more likely to be overturned than any other agency.*

   Does that mean that EPA rules are poorly written, or that they are just more commonly challenged? Or that the subject matter makes them more vulnerable?

Our data do not suggest that EPA rules are poorly written. Our study does indicate that more EPA rules are challenged, but this may be more attributable to the complexity of the statutes EPA implements, or the willingness of the regulated industries affected by EPA rules to sue, than to anything the agency is doing or not doing in the rulemaking process. In addition to our quantitative results, our qualitative review of a subset of the cases reveals that both EPA and FCC rules are often very complicated and involve either multiple rules in the same lawsuit, or multiple issues raised by a single rule. This means that there are more opportunities in a single case for a reviewing court to find at least something wrong with the rulemaking, even if the Court upholds the bulk of the rule. *Our study is thus biased towards a conclusion of "invalidation" when it says that 54% of EPA rules are invalidated in whole or part.* Rules that fall into our "invalidated in part" category (28%), may in fact be *primarily upheld* on the most important issues. We would need to do further empirical analysis to know what percentage of rules fall into this category. The bottom line is that the percentage of cases in which EPA rules contain a serious flaw is very likely to be lower than 54%.

8. *What are some of the key possible findings from your study that you think could be helpful to us in Congress?*

Our study is useful to Congress because it cautions against the conclusion that there is a crisis in agency rulemaking and because it raises important new questions. It is helpful for Congress to know that there is not an alarmingly high rate of outright invalidations of agency rules. To put this in context, of the many hundreds of cases filed in the federal courts each year challenging agency action, only about 10% are challenges to agency rules; of these only 11% are invalidated outright (with no remand to the agency to fix the problem), 9% are invalidated and remanded, while 58% are upheld in their entirety. Our data refute crude speculations about the extent to which rules are challenged and invalidated by courts—most of which suggest that

the rulemaking system is broken. In the absence of reliable data, such speculation can lead to bad policymaking.

Another way our study helps Congress is that it raises important new questions that merit further investigation. For example, our study shows that a significant percentage of rulemaking challenges result in "mixed" outcomes, in which the rule is partly invalidated and partly upheld. We need to know more about these cases so that we can determine whether they are properly viewed as cases in which the rule is *primarily upheld* or *primarily invalidated*. It is possible that the more issues an agency addresses in a single rulemaking, the greater likelihood of judicial invalidation on at least one issue, not because the agency is doing poorly at rulemaking, but simply because there are many more bases on which to challenge the agency. This is one example of an important question that we cannot answer without further study. This, in turn, helps to make the case for an agency like ACUS, which could sponsor such research and direct it into the policymaking process.

9. *If you could personally address the Congressional appropriators who have jurisdiction over ACUS, what would be your principal and most persuasive arguments for funding the Conference?*

As I made clear in my testimony before this Subcommittee, the principal arguments for funding ACUS are these: it provides a service no other agency (including the Office of Management and Budget and the Congressional Research Service) or private sector organization (including the American Bar Association) can provide; it has a strong historical record of adding value to congressional reform efforts by providing sound and timely advice; it has a strong historical record of improving the quality and efficiency of agency decision making by persuading agency officials of the utility and soundness of particular reforms; it has always attracted bipartisan support from policymakers, academics and judges (including from judges as ideologically different as Justices Scalia and Breyer); and, at funding levels being considered by the current Congress, ACUS is an indisputable bargain.

10. *Please explain the role that ACUS could play on the issue of government outsourcing?*

Government outsourcing is a topic of great interest at the moment, and a number of reforms are being considered by Congress. ACUS could play an instrumental role in this process by soliciting studies and analyses of the contracting process and serving as a clearinghouse for possible reform proposals, particularly those that involve amending administrative law requirements. Among other things, ACUS could examine whether the exemption of agency contracts from the notice and comment requirements of the Administrative Procedure Act should be reconsidered. (ACUS has made recommendations in the past about similar exemptions from the public participation requirements of the APA). There are a variety of ways in which government sunshine laws and other accountability mechanisms that currently apply only to agencies might be extended to private contractors. These reforms range from

relatively minor extensions of existing statutory requirements to major revisions of whole areas of law. ACUS could help Congress sift through these proposals to select those that are most likely to make a real difference by improving contractor accountability and increasing the potential for meaningful government oversight of outsourced work while maximizing opportunities for the efficiency gains, technical innovation, and other benefits the Congress expects from outsourcing.

11. Please explain how ACUS could address the issue of reconciling the principles of administrative law with the imperatives of national security.

The reference I made to this in my testimony concerned the fact that the Department of Homeland Security—the most massive bureaucratic reorganization of the federal government since the creation of the Department of Defense fifty years ago—has led to some significant integration and coordination problems that might benefit from the input of an objective agency like ACUS, which is expert at government organization and administrative process. Among other things, ACUS could study the potential benefits of reconsidering the incorporation of agencies such as the Federal Emergency Management Agency into DHS. ACUS could also study the rulemaking processes undertaken by the various agencies that comprise DHS, to study whether DHS rules are subject to an appropriate level of scrutiny (including analytic requirements such as cost-benefit analysis), compared to the rules promulgated by other agencies. In some instances, it may make sense to forgo some of the traditional expectations of openness and transparency that Congress demands of other agencies; in some instances forgoing them may be either unlawful or poor policy. ACUS can be a helpful to Congress in its efforts to strike an appropriate balance.

Responses to Minority Questions

1. *What are the three most important things that your study of judicial review suggests need to be improved in the administrative process, and why are they the most important?*

Please refer to the answer to majority question #8 above. Most importantly, our study might *prevent* Congress from rushing to impose additional requirements upon agencies without sufficient information about why agency rules are invalidated in the first place. These reforms might impose costs with no potential benefits for improving the rulemaking process. Our study does not point to specific reforms but instead sheds light on the rate of invalidation of agency rules and the reasons for those invalidations. This may seem like a modest contribution, but it is a preliminary step we must take before we can diagnose why rules fail and before we can responsibly recommend reforms.

However, based on our experience with this study, we can suggest one improvement that would help us study the agency decision making process: it would be helpful if the administrative process within agencies were more transparent. For example, it would facilitate empirical research if agencies had the capacity to match court

challenges with their internal data. This would enable researchers to obtain docket numbers from cases filed in the federal courts and to match them with procedural and substantive records related to rulemaking that may be held by the agencies but not submitted to the court.

2. *Would a reauthorized and refunded ACUS be the best situated to help agencies address those issues with appropriate reforms?*

As I stated in my testimony, because of its unique expertise, ACUS would be well positioned to help agencies address a wide range of issues, including not just rulemaking (the subject of our study) but also adjudication, and other informal means of making policy. ACUS could certainly help recommend procedural reforms (such as docket-keeping and database requirements) that could render agency decisions more transparent and easier to study.

3. *Your study results point to three classes of agencies: (1) the EPA out there by itself, being reversed in whole or in part a whopping 54% of the time; (2) the FCC running in a class by itself in second, being reversed in whole or in part 43% of the time; and (3) all other agencies, being reversed in whole or in part 28% of the time on average. What is going on to produce these disparate results, particularly at EPA, which imposes a huge percentage of the total federal regulatory costs on the economy? And how could ACUS best help with that?*

It is not accurate to say that our data point to three "classes" of agencies. We classified the cases in our database into three categories (EPA, FCC and Other) for the purpose of statistical analysis, which requires a certain number of cases in each bin in order to derive valid inferences. Had there been fewer EPA or FCC cases, or more IRS cases, we would likely have created a different taxonomy. The third category (Other) exists as a catch-all of those agencies that individually have too few cases for statistical analysis, and it has no substantive meaning beyond that. In addition, the invalidation rates are dependent upon the number and nature of challenges. We might expect that challenges would be made only in cases where the outcome is highly uncertain, where the best estimate of affirmance or reversal is 50/50. In this context, the 28% invalidation rate of "Other" agencies would be considered the outlier, and the 54% and 43% rates for EPA and FCC would be considered closer to the norm.

To respond to your query about EPA, however, as noted in the answer to majority question #6, both FCC and EPA rules are subject to challenge in part because they involve regulatory decisions that are technically, scientifically and economically complex. In addition, many of the regulatory decisions made by both the FCC and EPA likely attract legal challenges to the extent they impose costs on relatively concentrated and highly organized interest groups. In addition, we observed in our qualitative review of the cases that challenges to both FCC and EPA rules tend to involve either multiple rules or rules with multiple issues, which may increase the chance that a reviewing court will find something wrong with the rule.

Moreover, the "whopping" 54% referred to in the question is likely to be overstated for reasons described in our answer to majority question #7: rules that fall into our "invalidated in part" category (28%), may in fact be *primarily upheld* on the most important issues. We would need to do further empirical analysis to know what percentage of rules fall into this category. The bottom line is that the percentage of cases in which EPA rules contain a serious flaw is very likely to be lower than 54%. ACUS could help resolve this kind of empirical question by sponsoring empirical research, including follow-ups to our study.

Finally, our data say nothing about the percentage of total federal regulatory costs imposed on the economy by EPA compared to other agencies, so we cannot comment on that claim. But our data do suggest that EPA rules are complicated in part because of the statutory mandates that Congress has given to the agency. The evidence for this, as stated in the answer to majority question #7, is that of the EPA cases in which a rule was invalidated at least in part, 66% involve the Clean Air Act; among the EPA cases in which a rule was upheld in its entirety, 70% involve the Clean Air Act. This result suggests that there is something in particular about the Clean Air Act that leads to complicated rules. To know more, we would need to do additional study, which underscores the need for an organization like ACUS which can initiate and support a body of coherent research.

4. *How well do you think ACUS could help to promote and to implement the results of our Administrative Law, Process and Procedure Project for the 21st Century?*

Based on the past performance of ACUS, I would expect it to do an excellent job. Over the last twelve years, while the agency has been defunct, a backlog of important questions and issues have emerged, from electronic rulemaking to regulation by consent decree to the role of science in rulemaking, and there would be no shortage of work for a revitalized ACUS to do. Perhaps the greatest challenge will be prioritizing among projects as ACUS gets up and running.

5. *Some have suggested that, in addition to providing substantial quantifiable benefits through cost savings, ACUS also provided substantial intangible benefits, such as by fostering fairness in the federal administrative process. Could you take a stab at describing for us the magnitude or extensiveness of those benefits? And can't we say that fairness also helps, in the end, to assure costs savings, in that it helps to assure the best rationalization or allocation of resources at stake in the administrative process?*

Fairness to regulated parties, as well as to beneficiaries of regulation, is a major component of the administrative process, and it has independent value apart from efficiency. It is crucial for the legitimacy of government institutions that agencies conduct their decision making, and be perceived to conduct their decision making, in a fair, unbiased and professional manner. It is exceedingly hard to quantify the value of such perceptions of fairness, but if it could be quantified, that value would be very

high. As the question suggests, fairness also has a more instrumental value, which might be described in terms of saving agency resources: if decisions are perceived to be fair, they may be subject to fewer legal challenges. And since fairness typically involves broad consultation, it also serves the instrumental goal of generating important information for agencies, which can help improve the quality of decision making, which in turn can ultimately result in cost-savings.

RESPONSE TO POST-HEARING QUESTIONS FROM CURTIS COPELAND, PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE (CRS), WASHINGTON, DC

Memorandum December 19, 2007

TO: Honorable Linda Sánchez
Attention: Adam Russell

FROM: Curtis W. Copeland
Specialist in American National Government
Government and Finance Division

SUBJECT: Post-Hearing Questions from the Subcommittee

This memorandum responds to your request that I provide answers to questions posed by the majority and minority of the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary for inclusion in the record of the September 19, 2007, hearing on H.R. 3564, the "Regulatory Improvement Act of 2007." If you have any questions about my responses, please do not hesitate to call me at (202) 707-0632.

Majority Questions

Question 1 — How much do federal regulations cost regulated entities?

Answer 1 — Although federal regulations cost regulated entities tens if not hundreds of billions of dollars, the exact number is difficult to determine. A frequently quoted study by W. Mark Crain of Lafayette College for the Small Business Administration's Office of Advocacy concluded that the cumulative total was $1.1 trillion in 2005.[1] However, that study (and previous studies by Crain and Thomas D. Hopkins) used approaches that tend to maximize regulatory costs.[2] Also, the study provided no estimate of the benefits of federal regulations. Since 1997, the Office of Management and Budget (OMB) has been required to issue an annual report containing an estimate of the aggregate costs and benefits of federal regulations. OMB's approach has consistently yielded lower estimates of regulatory costs — in part because it focuses only on major regulations issued in the previous 10 years. (OMB has said that estimates prepared for rules adopted more than 10 years earlier are of

[1] W. Mark Crain, *The Impact of Regulatory Costs on Small Firms*, for the Small Business Administration's Office of Advocacy, Sept. 2005, available at [http://www.sba.gov/advo/research/rs264tot.pdf].

[2] For a critical analysis of the Crain and Hopkins approach, see CRS Report RL32339, *Federal Regulations: Efforts to Estimate Total Costs and Benefits of Rules*, by Curtis W. Copeland.

"questionable relevance." For example, in its draft 2007 report, OMB estimated that the annual benefits of major federal regulations issued between October 1, 1996, and September 30, 2006, ranged from $99 billion to $484 billion, while the estimated annual costs ranged from $40 billion to $46 billion.[3]

Question 2 — According to a report by the Mercatus Center at George Mason University and the Weidenbaum Center at Washington University in St. Louis, the combined budgets of federal regulatory agencies in FY2008 will be about $47 billion. If we assume that the Administrative Conference of the United States (ACUS) could make these agencies 1% more efficient in their operations, what would you estimate to be the savings that would result?

Answer 2 — If ACUS could reduce the budgets of regulatory agencies by 1%, and if the cited estimates of those budgets are correct, then the savings would be about $470 million.

Question 3 — The *New York Times* had a front-page article last Sunday [Oct. 7] indicating that some industries are advocating the issuance of federal regulations in part to fend off state regulations that may be more stringent. The Senate Judiciary Committee had a hearing last week on regulatory preemption. Is this something that ACUS could look into — whether federal agencies can preempt state laws?

Answer 3 — Yes. To shed light on this issue, ACUS could commission empirical studies to determine whether the number or percentage of agency regulatory actions preempting state laws or regulations has increased over time, and whether such actions were particular to certain subject areas (e.g., product liability laws). ACUS could also convene panels of legal experts to explore the implications of federal preemption, or to lay out options should Congress want to curb the ability of federal agencies to issue preemptive rules.

Question 4 — I'm interested in the notion of ACUS serving as a vehicle by which innovations can be more rapidly spread throughout the government. Can you give me an example of a rulemaking or administrative process innovation that could have been adopted more quickly in the last 10 years?

Answer 4 — As I noted in my written testimony, electronic rulemaking (or "e-rulemaking") began in the mid-1990s, but its implementation in the federal government has been slower than some had anticipated. One problem has to do with funding; Congress has provided less than the Administration has requested since 2001 for all e-government projects, and it is unclear whether the Economy Act (31 U.S.C §1535) allows agencies to transfer their appropriations for the construction of an electronic rulemaking docket. Congress has also required agencies to consult with the Appropriations Committees before making such transfers. ACUS could have advised Congress and the Administration on the best ways for cross-cutting programs like e-rulemaking to be funded. ACUS could have also played a role in deciding how the e-rulemaking initiative should be structured (e.g., centralized versus

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[3] U.S. Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, available at [http://www.whitehouse.gov/omb/inforeg/2007_cb/2007_draft_cb_report.pdf].

decentralized), and could have suggested ways to make the electronic docket system more user friendly and useful.

ACUS could have also played a more general, information dissemination role in this area. In 2001, GAO issued a report indicating that individual federal and state agencies were implementing new ways to provide regulatory compliance assistance and perform other administrative functions, but federal agencies were frequently unaware of each other's activities.[4] GAO recommended that OMB's Office of Information and Regulatory Affairs (OIRA) develop a systematic process for agencies to share information on these innovations, but OIRA declined to comment on the recommendations. According to the legislation that originally established ACUS in 1964, one of its functions was to "arrange for interchange among agencies of information useful in improving administrative procedures."[5]

Question 5 — As highlighted by the September 11, 2006, symposium, the President – as opposed to the Congress or the courts – actually controls agency rulemaking behavior. What accounts for this imbalance? What are the pros and cons of the Executive Branch controlling agency rulemaking?

Answer 5 — Presidential control of rulemaking has increased in part because, under Executive Order 12291 and its successor, Executive Order 12866, OIRA reviews at least all "significant" rules that are issued by executive departments and independent agencies (but not independent regulatory agencies) before they are published in the *Federal Register* as proposed or final rules. OIRA reviews primarily reflect the perspective of the President; the office is within the Executive Office of the President, and the President is viewed as its chief client.[6] Congressional involvement in agency rulemaking may be limited to the development of broad statutory authorities under which regulations are developed. On occasion, Congress will conduct oversight of particular rules, but not in the systematic fashion that is done at OIRA for the President. The Congressional Review Act was intended to give Congress more authority over agency rules, but has been used only once in 11 years to overturn a regulation.[7] Judicial involvement in rulemaking is even more episodic, and is dependent upon litigants with standing to challenge particular rules in court.

A complete accounting of the advantages and disadvantages of executive control of rulemaking versus congressional or judicial control would require a significant amount of time and effort, and has been addressed in numerous books and journal articles.[8] However,

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[4] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232, Feb. 12, 2001.

[5] Administrative Conference Act of 1964, P.L. 88-499.

[6] See 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. 22, 2003, pp. 40-41, in which a previous OIRA administrator said the President was OIRA's chief client, and the then-current administrator said that OMB's actions "necessarily reflect Presidential priorities."

[7] CRS Report RL30116, *Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After A Decade*, by Morton Rosenberg.

[8] For example, see Erik D. Olson, "The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," (continued...)

one of the possible advantages of executive control is to ensure consistency across federal agencies in their rulemaking efforts, particularly within subject areas where the jurisdictional lines often overlap. One of the potential disadvantages is that, in determining the consistency of agency regulations with their statutory underpinnings, Congress may be better suited to the task than OIRA.

Question 6 — In your written testimony, you describe a recent controversy involving a letter issued by the Centers for Medicare and Medicaid Services (CMS) and whether this document was a "rule," and therefore subject to the Administrative Procedure Act. Why isn't something as fundamental as whether this document constitutes a rule subject to controversy? Please explain why this issue should be of concern to the Congress.

Answer 6 — As I indicated in my testimony, the issue of whether the CMS letter should have been issued as a rule was, in fact, controversial. Some health care advocacy groups asserted that the letter would effectively establish a new income limit for SCHIP at 250% of the federal poverty level, eliminate the discretion that states have traditionally had to tailor their SCHIP programs, and eliminate health coverage for tens of thousands of children in at least 18 states.[9] If the letter had been issued as a rule, a draft of the proposal would have been required to be published in the *Federal Register* for public comment before being made final, and the rule would have been subject to a host of other statutory and executive order rulemaking requirements (e.g., the Regulatory Flexibility Act of 1980, the Unfunded Mandates Reform Act of 1995, and Executive Order 12866). As a rule, it would have also been clearly covered by the Congressional Review Act, which requires rules to be sent to both houses of Congress and the Government Accountability Office before they can become final. Because the new requirements were issued as a guidance letter, none of these congressionally established requirements applied.

Question 7 — Can you explain the difference between a "guidance document" and a rule? Why is this issue of significance to the Congress?

Answer 7 — As I stated in my written testimony, some courts have ruled that agency guidance documents, unlike regulations, cannot have a binding effect on the public.[10] Also, as I indicated in the answer to the previous question, a guidance document does not have to go through the "notice and comment" requirements of the Administrative Procedure Act (APA), and is not covered by any number of statutory or executive order rulemaking requirements. If an agency issues a guidance document that contains new requirements and the agency enforces the requirements as a rule, then the public has been denied its statutory opportunity to comment on the agency's actions and more than 50 years of congressional and presidential rulemaking requirements will have been evaded.

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[8] (...continued)
Virginia Journal of Natural Resources Law, vol. 4 (fall 1984), pp. 1-80.

[9] Steve Teske, "CMS Tells States to Adopt More Ways To Stop Insurance 'Crowd-Out' From SCHIP," *BNA Daily Report for Executives*, Aug. 21, 2007, p. A-15.

[10] See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Agencies Use Them to Bind the Public?" *Duke Law Journal*, vol. 41 (1992), p. 1311.

Question 8 — As you may recall, our Subcommittee earlier this year held an oversight hearing on Executive Order 13422, which made significant revisions to the rulemaking process. As you may know, I supported a measure that would restrict certain agencies from expending federal funds to implement this EO. In light of the highly controversial aspects of EO13422, what role, if any, could ACUS have played in resolving the issues it presented?

Answer 8 — Executive Order 13422 made a number of changes to the regulatory review process established by Executive Order 12866, including: (1) a requirement that agencies identify in writing the specific market failure or problem that warrants a new regulation, (2) a requirement that each agency head designate a presidential appointee within the agency as a "regulatory policy officer" who can control upcoming rulemaking activity in that agency, (3) a requirement that agencies provide their best estimates of the cumulative regulatory costs and benefits of rules they expect to publish in the coming year, (4) an expansion of OIRA review to include significant guidance documents, and (5) a provision permitting agencies to consider whether to use more formal rulemaking procedures in certain cases.[11]

ACUS could have played a role in resolving the controversies surrounding several of these changes. For example, one of the more controversial changes involved agency regulatory policy officers; some contended that this change represented the establishment of "a gatekeeper in each agency to analyze the costs and the benefits of new rules and to make sure the agencies carry out the president's priorities."[12] However, others said that these policy officers had existed for years, and already performed many of the tasks that were considered to be potentially disruptive.[13] ACUS could have been viewed as a neutral arbiter, providing factual information on those already serving as agency regulatory policy officers and whether the changes made by the order would change how their roles are carried out. ACUS could have also provided information on agencies' generally negative experience with formal rulemaking. Thirty-five years ago, ACUS recommended that Congress should not require procedures beyond informal rulemaking, and should never require trial-type procedures for resolving questions of policy or fact.[14] One administrative law scholar has referred to formal rulemaking as a "discredited" procedure that allows regulated entities to slow down the rulemaking process.[15]

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[11] For a discussion of these changes, see CRS Report RL33862, *Changes to the OMB Regulatory Review Process by Executive Order 13422*, by Curtis W. Copeland.

[12] Robert Pear, "Bush Directive Increases Sway on Regulation,"*New York Times*, Jan. 30, 2007, p. A1.

[13] Testimony of Steven D. Aitken in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Changes to OMB Regulatory Review by Executive Order 13422*, Feb. 13, 2007, available at [http://judiciary.house.gov/media/pdfs/Aitken070213.pdf].

[14] ACUS Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 38 *Federal Register* 19782, 1972; Jeffrey S. Lubbers, ed., *A Guide to Federal Agency Rulemaking, Fourth Edition* (Chicago: American Bar Association, 2006), pp. 309-310.

[15] Testimony of Peter Strauss, Betts Professor of Law, Columbia Law School, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, hearing on Executive Order 13422, Feb. 13, 2007, available at [http://judiciary.house.gov/media/pdfs/Strauss070213.pdf].

Question 9 — A 1998 GAO study found that about half of all final rules were published without an opportunity for public comment. Please explain how agencies are able to avoid the notice and comment requirements of the Administrative Procedure Act.

Answer 9 — The 1998 GAO study indicated that about half of the more than 4,500 final rules issued in 1997 did not have an associated proposed rule, and that the most common reason was agencies' use of the APA's "good cause" exception.[16] Although the APA generally requires agencies to publish a proposed rule (also known as a "Notice of Proposed Rulemaking" or NPRM) before promulgating a final rule, the act provides exceptions to this requirement. For example, the APA states that the notice and comment procedures generally do not apply when an agency finds, for "good cause," that those procedures are "impracticable, unnecessary, or contrary to the public interest." When agencies use the good cause exception, the act requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. GAO found that, in many cases, agencies' use of the good cause exception appeared questionable (e.g., saying that an NPRM was impracticable because of a deadline that had been established years earlier).

The legislative history of the APA makes it clear that Congress did not believe that the act's good cause exception to the notice and comment requirements should be an "escape clause." According to the Senate committee's report accompanying the APA, a "true and supported or supportable finding of necessity or emergency must be made and published" when the agency uses the good cause exception.[17] The legislative history also indicates that Congress envisioned agencies using the notice and comment procedures even in some cases in which the APA's exceptions applied.

The APA also provides explicit exceptions to the NPRM requirement for certain categories of regulatory actions, such as rules dealing with military or foreign affairs; agency management or personnel; or public property, loans, grants, benefits, or contracts. Further, the APA says that the NPRM requirements do not apply to interpretative rules; general statements of policy; or rules of agency organization, procedure, or practice.[18] However, these rules do have to be published in the *Federal Register*.

A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review. After having reviewed the totality of circumstances, the courts can and sometimes do determine that an agency's reliance on

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

[17] Senate Committee on the Judiciary, "Administrative Procedure Act: Legislative History," S. Doc. 248, 79th Cong., 2nd sess. (1946).

[18] In addition to the APA exceptions, Congress sometimes includes specific exemptions from notice and comment procedures in other statutes. For example, Section 161(d) under Title I of the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127, 110 Stat. 934-935) instructed the Secretary of Agriculture and the Commodity Credit Corporation to issue regulations not later than 90 days after the date of enactment of the title, without regard to the notice and comment provisions of the APA.

the good cause exception was not authorized under the APA.[19] The case law has generally reinforced the view that the good cause exception should be "narrowly construed."[20]

Two procedures for noncontroversial and expedited rulemaking were designed not to involve NPRMs. "Direct final" rulemaking involves agency publication of a rule in the *Federal Register* with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (e.g., 30 days). However, if an adverse comment is filed, the direct final rule is withdrawn, and the agency may publish the rule as a proposed rule under normal NPRM procedures. Direct final rulemaking can be viewed as a particular application of the APA's good cause exception in which agencies claim NPRMs are "unnecessary."[21] Both Vice President Gore's National Performance Review and ACUS encouraged agencies to use direct final rulemaking for noncontroversial rules.[22]

ACUS also endorsed the use of what is known as "interim final" rulemaking, in which an agency issues a final rule without an NPRM that is generally effective immediately, but with a post-promulgation opportunity for the public to comment. If the public comments persuade the agency that changes are needed in the interim final rule, the agency may revise the rule by publishing a final rule reflecting those changes. Interim final rulemaking can be viewed as another particular application of the good cause exception in the APA, but with the addition of a comment period after the rule has become effective.[23]

Question 10 — The Information Quality Act (IQA) has generated much debate and controversy. Please explain the issues presented by the IQA.

Answer 10 — The IQA, sometimes referred to as the Data Quality Act, was enacted in December 2000 as Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554). The act required OMB to issue guidance to federal

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[19] For discussions of these court cases, see Ellen R. Jordan, "The Administrative Procedure Act's 'Good Cause' Exemption," *Administrative Law Review*, vol. 36 (spring 1984), pp. 113-178; and Catherine J. Lanctot, "The Good Cause Exception: Danger to Notice and Comment Requirements Under the Administrative Procedure Act," *Georgetown Law Journal*, vol. 68 (Feb. 1980), pp. 765-782.

[20] See *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir 1981); and *Mobay Chemical Corp. v. Gorsuch*, (682 F.2d 419, 426 (3rd Cir.), cert. denied, 459 U.S. 988 (1982). In another case (*Action on Smoking and Health v. CAB*, 713 F.2d 795, 800 [D.C. Cir 1983]), the court said that allowing broad use of the good cause exception would "carve the heart out of the statute."

[21] For more, see Ronald M. Levin, "More on Direct Final Rulemaking: Streamlining, Not Corner Cutting," *Administrative Law Review*, vol. 51 (summer 1999), pp. 757-766.

[22] See Office of the Vice President, *Improving Regulatory Systems: Accompanying Report of the National Performance Review* (Washington: Sept. 1993). The Administrative Conference was established by statute in 1964 as an independent agency to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions. It was abolished in 1995.

[23] For more, see Michael Asimow, "Interim Final Rules: Making Haste Slowly," *Administrative Law Review*, vol. 51 (summer 1999), pp. 703-755.

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. Although some observers said the IQA would improve the quality of agency information, others viewed the act as a tool by which regulated parties could slow or even stop new health, safety, and environmental standards.[24]

Because of the scant legislative history of the IQA and its lack of detail, OMB's guidance interpreting key provisions in the act has had a major effect on its implementation. In those guidelines, OMB noted that the act applies to virtually all federal agencies and established the broad scope of the guidelines by defining "information" as "any communication or representation of knowledge such as facts or data, in any medium or form."[25] Similarly, the guidelines define "dissemination" as any "agency initiated or sponsored distribution of information to the public." OMB indicated that "quality" encompasses elements of utility, objectivity, and integrity, and said agencies can generally presume that data are "objective" if they have been subject to an independent peer review process.

A major test of the importance of the IQA is whether agencies' denials of information correction requests are subject to judicial review. In March 2006, the U.S. Court of Appeals for the Fourth Circuit ruled that the act does not permit judicial review.[26] Specifically, 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 held, "appellants cannot establish injury in fact and, therefore, lack Article III standing to pursue their case in the federal courts." Two district courts had previously reached a similar conclusion, and the Department of Justice had issued a brief stating that the IQA does not permit judicial review. In light of this decision, some of the IQA's chief proponents have argued that the act is of little real value.[27] However, if OMB implements its IQA guidance as part of the regulatory review process, the act may still be having an effect on agency rulemaking.[28]

Question 11 — Please explain some of the issues presented by peer review as applied to the regulatory process.

Answer 11 — In September 2003, OMB published in the *Federal Register* a proposed bulletin on "Peer Review and Information Quality" that sought to establish a process by

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[24] For a discussion of this issue, see Rick Weiss, "'Data Quality' Law is Nemesis of Regulation," *Washington Post*, Aug. 16, 2004, p. A-1.

[25] To view a copy of these guidelines, see [http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf].

[26] *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.

[27] For example, William Kovacs of the U.S. Chamber of Commerce said at a May 2006 conference on science and rulemaking that, in the wake of the court decision, the IQA "is a really nice academic exercise," and that unless OMB wants to enforce it, "there are no teeth to it."

[28] For a more complete discussion of the IQA, see CRS Report RL32532, *The Information Quality Act: OMB's Guidance and Initial Implementation*, by Curtis W. Copeland.

which all "significant regulatory information" would be peer reviewed.[29] The scope of the proposed bulletin was very broad, covering virtually all agencies and defining regulatory information as "any scientific or technical study that ... might be used by local, state, regional, federal, and/or international regulatory bodies." Such information would be subject to peer review if the agency could determine that it could have a "clear and substantial impact on important public policies or important private sector decisions" when disseminated. The proposed bulletin placed additional peer review requirements on "especially significant regulatory information," and said agencies were required to notify OMB in advance of any studies that might require peer review and specify how any such reviews would be conducted.

The proposed bulletin aroused 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. OMB received nearly 200 comments on the proposal, and published a "substantially revised" peer review bulletin in April 2004 that was broader in scope than the proposed bulletin in that it applied to "influential scientific information" (which includes, but is not limited to, regulatory information) and "highly influential scientific assessments."[30] However, agencies were given substantial discretion to decide whether information is "influential" and therefore requires a peer review. The revised bulletin also allowed agencies to use the National Academy of Sciences for peer reviews or to use other procedures that had been approved by OMB. It also provided exemptions for certain classes of information, such as information related to national security, products by government-funded scientists that are not represented as views of a federal agency, and routine statistical information. However, OMB retained significant authority to decide when information is "highly influential" (and, therefore, requires more specific peer review procedures) and to approve alternative peer review procedures.

OMB received more than 50 comments on the revised peer review bulletin, many of which were supportive of the changes made to the proposal. However, some commenters believed the changes did not go far enough, while others believed that OMB had significantly weakened the bulletin. In January 2005, OMB published a final version of the bulletin with what it described as "minor revisions" to the version published in April 2004 (e.g., requiring agencies to disclose the identities of peer reviewers and to prepare an annual report on their peer review activities).[31] A number of issues regarding the implementation of the bulletin remain unclear (e.g., how much discretion agencies will be given to decide when and what kind of peer review is required).[32]

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[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).

[30] Office of Management and Budget, Executive Office of the President, "Revised Information Quality Bulletin on Peer Review," 69 *Federal Register* 23230 (Apr. 28, 2004). This revised bulletin had been released to the public via OMB's website on April 15, 2004. To view a copy, see [http://www.whitehouse.gov/omb/inforeg/peer_review041404.pdf].

[31] Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 *Federal Register* 2664 (Jan. 14, 2005).

[32] For more on this issue, see CRS Report RL32680, *Peer Review: OMB's Proposed, Revised, and Final Bulletins*, by Curtis W. Copeland and Eric A. Fischer.

Question 12 — Why does public participation in the rulemaking process matter?

Answer 12 — In *Rulemaking: How Government Agencies Write Law and Make Policy*, Cornelius M. Kerwin offers several reasons why public participation in rulemaking is important.[33] For example, he notes that those who write the law embodied in rules are unelected, and suggests that public participation can contribute to both the perceived legitimacy of the rulemaking process and the authority of the rule. Kerwin quotes Phillip Harter, a prominent observer of rulemaking, as saying that the political legitimacy of rulemaking "derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision."[34] Kerwin also points out that agencies rely on the public to provide real-world information that they need to formulate and amend rules, so public participation has a practical element as well. Finally, he points out that public comments can help agencies gauge the amount of acceptance or resistance to a rule under development, which can help them decide whether to go forward with a rule or how to design monitoring and enforcement systems.

Question 13 — How do you respond to the concern that the Internet/e-government rulemaking promotes "junk" comments as part of the notice and comment process?

Answer 13 — The issue of "junk" comments or "spam"comments in relation to electronic rulemaking has been recognized for some time. As one author noted in 2004:

> Transposing the notice-and-comment process as is on the Internet so that anyone can post a comment reduces the costs of participation. Unifying disparate agency procedures into a centralized "portal" removes the hurdle of learning agency practices. Automating the comment process makes it simpler for interest groups to participate using bots — small software "robots" — to generate instantly thousands of responses from stored membership lists. Suddenly, anyone or anything can participate from anywhere. And that is precisely the problem. Without the tools and methods to coordinate participation, quality input will be lost; malicious, irrelevant material will rise to the surface, and information will not reach those who need it.[35]

However, some studies indicate that the Internet and e-rulemaking have not markedly increased the number of comments provided on proposed rules.[36] Also, although the Regulations.gov website was constructed to handle up to 16,000 comments per hour, by July 2007, after more than four and one-half years of implementation, it had processed an average

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[33] Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy, Third Edition* (Washington: CQ Press, 2003), pp. 158-160.

[34] Phillip Harter, "Negotiating Regulations: A Cure for the Malaise," *Georgetown Law Journal*, vol. 71 (1982), p. 31.

[35] Beth Noveck, "Pubic Participation in Electronic Rulemaking: Electronic Democracy or Notice and Spam," *Administrative and Regulatory Law News* (2004), p. 7. See also Beth Simone Noveck, "The Electronic Revolution in Rulemaking," *Emory Law Journal*, vol. 53 (spring 2004), pp. 433-518.

[36] For a summary of this research, see testimony of Cary Coglianese, Director, Penn Program on Regulation, University of Pennsylvania Law School, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *The 60th Anniversary of the Administrative Procedure Act: Where Do We Go From Here?*, hearing, 109th Cong., 2nd sess., July 25, 2006.

of about three comments per hour, and about half of those comments were submitted in the last two months of the period.[37] To the extent that agencies receive numerous electronic comments on proposed rules, that effect seems to be confined to a very small number of rules each year, and (as predicted in 2004) appears to be stimulated by interest groups providing form e-mails to send. In those instances, some assert that mass e-mailings may be counterproductive, reducing the agencies' estimation of the role of public comments and inhibiting the ability of the agencies to identify comments providing useful information.[38] On the other hand, while comments on proposed rules are not supposed to be plebiscites, if an agency receives hundreds of thousands of comments saying "no" or "yes" to a proposed rule — even "junk" or "spam" comments — that volume of comments will likely be hard for an agency to ignore. Agencies and researchers are currently developing ways for agencies to sort through and catalogue mass comments, thereby enabling them to better handle the increased workload for the occasional high-profile rule.

Question 14 — What are some of the issues presented by the Administration's e-rulemaking initiative? Please explain the role, if any, that ACUS could play in resolving these issues.

Answer 14 — As I indicated in my response to an earlier question, the major issues related to the e-rulemaking initiative involve how it has been funded, how it was organized (in a highly centralized manner), and certain issues related to the functionality of the new electronic rulemaking docket system. ACUS could have helped address all three of these kinds of issues. For example, in relation to the issue of organization, ACUS could have provided a check on some of the assumptions underlying the Administration's decision to use a centralized docket system (e.g., that the public needs to be able to search across all rulemaking dockets in all agencies simultaneously, and that a centralized system would be more cost-effective than a distributed system). ACUS could have also made suggestions regarding ways to improve the consistency of data put into the new docket system, and to improve searches in that system.

Question 15 — Please explain what role ACUS could play with respect to personal information privacy protection.

Answer 15 — Just as it has done in the past with regard to Freedom of Information Act operations, ACUS could review the Privacy Act of 1974 (5 U.S.C §552a), a cornerstone of current legal guarantees about the privacy of personally identifiable information in the possession of the federal government, with a view to its present-day adequacies. For example, in the view of some analysts, a longstanding weakness of the Privacy Act is its routine use provision. The statute permits certain disclosures of personal information to persons and agencies outside of the collecting agency, including those for a "routine use," which is understood as a use that is compatible with that for which the data were originally collected. The term "compatible" is not defined in the statute. Moreover, for reasons of efficiency, agency officials have interpreted the routine use clause broadly, to the detriment,

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[37] See CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

[38] See, for example, Stuart W. Shulman, "The Internet Still Might (but Probably Won't) Change Everything," available at [http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf].

in the view of some, of privacy considerations. Similarly, the Privacy Act might be evaluated with a view to recent data mining practices and their proper regulation relative to privacy values. Other provisions of the statute may merit reconsideration in the developing homeland security environment.[39]

Question 16 — Why is it important to study how agencies develop proposed rules?

Answer 16 — By the time an agency publishes a proposed rule in the *Federal Register*, it may have spent months or even years developing that proposal. By that time, the agency (and OMB, if the rule is significant) will have approved the proposal, will have developed lengthy economic or scientific supporting materials, will have invested substantial resources in the project, and will likely view the proposal as representing their best thinking on the issue. As Professor William West of Texas A&M University testified in 2006, "scholars have practically ignored the informal processes that precede the APA's notice and comment requirements, and most other controls on rulemaking. This, despite the fact that the most important policy decisions in rulemaking are arguably made as proposals are being developed."[40] Professor West also pointed out that, for various reasons, agencies have a variety of incentives to develop proposals that will not need to be changed — further underscoring the importance of studying how rules are developed before the issuance of an NPRM.

Question 17 — What are the benefits and detriments of soliciting input from interested parties prior to the formal promulgation of a proposed rule?

Answer 17 — As my answer to the previous question suggests, one obvious benefit is the ability of the public to be involved in the rulemaking process when the most important policy decisions are being made. Another benefit is that agencies can receive important information from interested parties while the proposals are being developed. If such information about a rule is not available until after a proposed rule is published, and if the information is so important that it substantively changes the proposed rule, then the agency may have to re-publish the proposed rule. On the other hand, a detriment of soliciting input pre-NPRM is the additional time required as part of the rulemaking process. Rulemaking can already take years, so adding another stage to the process can even further delay the issuance of a final rule.

Question 18 — With the availability of the Internet, why can't an agency engage in proposal solicitation by general invitation?

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[39] The answer to this question was provided by Harold C. Relyea, Specialist in American National Government, at CRS. For more on the Privacy Act, see CRS Report RS21851, *Privacy Protection: Mandating New Arrangements to Implement and Assess Federal Privacy Policy and Practice*, by Harold C. Relyea.

[40] Testimony of Professor William West, the Bush School of Government and Public Service, Texas A&M University, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *The 60th Anniversary of the Administrative Procedure Act: Where Do We Go From Here?*, hearing, 109th Cong., 2nd sess., July 25, 2006.

Answer 18 — Although agencies must meet the minimal legal requirements for publishing a proposed rule in the *Federal Register*, agencies also often solicit comments on at least their most significant proposals through the Internet. Some agencies have established list servers in which members of the public are personally notified by e-mail when proposed rules or other documents are placed in the agencies' rulemaking dockets. (See, for example, the Department of Transportation list server at [http://dms.dot.gov/emailNotification/].) In addition, each proposed rule that is open for comment is available via the Regulations.gov website at [http://www.regulations.gov/fdmspublic/component/main]. The website also lists rules published each day for comment, and rules for which the comment is closing each day.

Question 19 — If you could personally address the Congressional appropriators who have jurisdiction over ACUS, what would be your principal and most persuasive arguments for funding ACUS?

Answer 19 — As I noted in my written testimony, CRS does not take policy positions on any legislative options. However, others at the September 19 hearing indicated that Congress should fund ACUS because it will actually save money in the long run. As my answers to some of the previous questions suggest, a minor improvement in the efficiency of rulemaking agencies could yield significant benefits (e.g., assuming a 1% improvement in the estimated $47 billion operating costs of the agencies). Similarly, a 1% improvement in the effectiveness of the regulations issued by those agencies could mean significant savings to regulated entities (e.g., a 1% reduction in the estimated $40 billion to $46 billion in annual compliance costs of rules issued in the last 10 years, or a 1% increase in the at least $99 billion in estimated benefits).

Question 20 — Do you see any role that ACUS could play with respect to asbestos litigation?

Answer 20 — I am not familiar enough with the asbestos litigation to comment on what role ACUS might be able to play.

Minority Questions

Question 1 — In your written testimony, you suggest that ACUS could particularly help agencies sort out the "rule-vs-guidance" issues that have come to beset the federal administrative process. What are the key ways in which ACUS could do that?

Answer 1 — As I stated in my written testimony, some courts have ruled that agency guidance documents, unlike regulations, cannot have a binding effect on the public.[41] OMB and some agencies have also developed policies and standards regarding guidance documents.[42] Analyzing these court decisions and agency efforts, ACUS could develop its

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[41] See, for example, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Agencies Use Them to Bind the Public?" *Duke Law Journal*, vol. 41 (1992), p. 1311.

[42] See, for example, U.S. Office of Management and Budget, "Final Bulletin on Agency Good (continued...)

own "guidance on guidance," explaining the difference between rules and guidance, more clearly delineating when each tool is appropriate and inappropriate, and describing how the public can most easily tell the difference. ACUS could also sponsor training and informal consultation on this issue, allowing agencies to contact administrative law experts directly and ask questions in a non-threatening atmosphere.

Question 2 — Can you estimate how many additional costs are being incurred by and imposed by regulatory agencies specifically because of the burgeoning of guidance, as opposed to rules, in the federal regulatory process?

Answer 2 — No. An estimation of costs imposed by regulatory agencies through guidance documents would require identification of all instances in which guidance has been used to impose requirements on regulated entities. To my knowledge, no such compilation exists.

Question 3 — You also highlight in your written testimony ways in which ACUS could contribute to the advancement of e-rulemaking. What are the three most important kinds of contributions ACUS could make in this area, and what are the most important reasons to believe that ACUS would be well situated to make them?

Answer 3 — Three issues that have affected the development of e-rulemaking in the federal government have involved funding, organization, and functionality. As I describe more fully in my report on this issue,[43] it is unclear whether the Economy Act (31 U.S.C §1535) allows agencies to transfer their appropriations for the construction of an electronic rulemaking docket. Congress has expressed concerns about this funding strategy, and has required agencies to consult with the Appropriations Committees before making such transfers. ACUS could have advised Congress and the Administration on the best ways for cross-cutting programs like e-rulemaking to be funded. ACUS could have also played a role in deciding how the e-rulemaking initiative should be structured, examining the underlying data and assumptions used to conclude that the centralized approach was, in fact, the most cost effective option. Finally, ACUS could have analyzed how the new electronic docket system operated, and suggested ways to make the system more user-friendly and useful.

More generally, ACUS could have played a role in disseminating information about individual agencies' e-rulemaking efforts. In 2001, GAO issued a report indicating that individual federal and state agencies were implementing new ways to provide regulatory compliance assistance and perform other administrative functions, but federal agencies were frequently unaware of each other's activities.[44] GAO recommended that OIRA develop a systematic process for agencies to share information on these innovations, but OIRA declined to comment on the recommendations. According to the legislation that originally

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[42] (...continued)
Guidance Practices," 72 *Federal Register* 3432, Jan. 25, 2007, available at [http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf].

[43] See CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

[44] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232, Feb. 12, 2001.

established ACUS in 1964, one of its functions was to "arrange for interchange among agencies of information useful in improving administrative procedures."[45]

The primary reason for believing that ACUS would be well suited to make these kinds of contributions stems from the fact that ACUS was generally regarded as a neutral arbiter of these kinds of issues. For example, ACUS has no vested interest in the establishment of an electronic rulemaking docket, so its conclusions and recommendations regarding the docket would presumably have a level of credence that others' opinions might not have.

Question 4 — How far behind in fostering e-rulemaking do you think we are because ACUS has not been around to contribute since 1995? And isn't that virtually the whole timeframe in which e-rulemaking has become a possibility?

Answer 4 — As I noted in my written testimony, e-rulemaking in the federal government began within individual federal agencies in the mid-to-late 1990s — about the time that ACUS ceased to exist. As I also indicated, it is impossible to know with any certainty what would have happened regarding e-rulemaking or any other issue had ACUS been available. However, it is not far fetched to say that ACUS could have made a difference, and that e-rulemaking could be more developed and less contentious than it is today.

Question 5 — You also highlight in your written testimony how ACUS might contribute to improving public participation, the use of science, and the effectiveness of congressional review in the federal regulatory process. Please identify for us the key, concrete contributions you think ACUS might have been able to make in these areas since 1995, had it been funded during that timeframe. How many costs do you think we might have saved, and how much better might the federal regulatory process have been, if we had been able, through ACUS, to have already been working on these issues?

Answer 5 — Again, it is impossible to know with any certainty what role ACUS would have been able to play in these areas. However, with regard to public participation, ACUS might have sponsored research on a variety of topics, including who participates at various stages of the rulemaking process (e.g., during the development of NPRMs, during public comment periods, and during OIRA review); and what effect participation has on the rules during development. As a result, ACUS would have been well positioned to offer suggestions for improving public access without further "ossifying" the rulemaking process. With regard to the use of science, ACUS could have contributed to the debates on OMB initiatives in the areas of data quality, peer review, and risk assessment, providing authoritative, unbiased, and non-partisan perspectives on each of these issues. ACUS could have also examined the influence of science advisory panels, and offered suggestions on how agencies could ensure balance and the absence of conflicts of interest. Finally, with regard to congressional review, ACUS could have examined the operation of the Congressional Review Act, or more generally examined how Congress exerts influence on agency rules.

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[45] Administrative Conference Act of 1964, P.L. 88-499.

RESPONSE TO POST-HEARING QUESTIONS FROM JEFFREY S. LUBBERS, PROFESSOR, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, WASHINGTON, DC

Majority Questions for Jeffrey Lubbers, Washington College of Law at American University

1. *Some have asserted that OMB currently performs much of what ACUS used to perform when it existed. What is your response to this assertion?*

Answer:

As you know, OMB and its Office of Information and Regulatory Affairs (OIRA) serve as the President's team in coordinating regulatory policy, and in implementing presidential executive orders and directives. For the most part OIRA acts as a regulator—of the executive branch regulatory agencies themselves.

ACUS had and would have a very different role. Unlike OIRA, ACUS had no power, other than the power to persuade. Its recommendations were consensus-based. Its research agenda was forward looking and extended to all aspects of government procedures—beyond the regulatory area that OIRA itself regulates. And its ability to follow up on its recommendations was a continuing one.

ACUS also provided a degree of independence from the Administration, and a degree of closeness to Congress that distinguished it from OIRA. Although the ACUS Chair and Council are appointed by the President, it is not a White House entity; its membership is finely balanced with members from all the key agencies in the government as well as different interest groups. It also, unlike OIRA, can have close affiliations with independent regulatory agencies.

This is not to say that ACUS and OIRA cannot work together. Executive Order 12,866, was partly based on ACUS recommendations, and it also promotes agency use of negotiated rulemaking, and the just-issued OIRA Bulletin on Good Guidance Principles cites two ACUS recommendations on that subject. And to some extent, OIRA can be a clearinghouse for best practices in the regulatory area.

Of course OIRA and ACUS can be mutually supportive. OIRA can play an influential role in ACUS projects and debates, and ACUS can review and study the impact of OIRA initiatives.

2. *What were some of the Conference's most significant accomplishments?*

Personally, I think ACUS's most significant accomplishment was its "body of work"—its 191 Recommendations and 17 Statements it adopted from 1968 to 1995. As an Administrative Law professor, I now can see from a different perspective just how much ACUS influenced and rationalized administrative procedure in the United States.

Some of ACUS's recommendations resulted in major changes in the federal administrative process, others led to significant improvements in the procedures of individual agencies.

Early recommendations (68-7, 69-1, and 70-1) led to significant amendments to the Administrative Procedure Act's (APA's) judicial review provisions—removing several technical hurdles to suits challenging agency actions.

ACUS's 1988 recommendation (88-9), *Presidential Review of Agency Rulemaking*, was very influential in validating (and in removing much of the controversy concerning) the practice of presidential review of agency regulations begun in the Nixon Administration. The recommendation suggested specific improvements in the process—an enhanced openness of that review, adding a requirement for the review of existing rules, and including independent agencies within the presidential review mechanism. The Clinton Administration, in Executive Order No. 12866 (1993), adopted most of these proposals and these provisions remain in effect in the current Bush Administration.

In the mid-1970s, ACUS undertook a comprehensive study of the procedures of the Internal Revenue Service (IRS). ACUS produced seventy-two separate proposals in six principal areas of IRS activity, including the confidentiality of taxpayer information, the IRS' settlement procedures, the handling of citizen complaints, methods to ensure fair and consistent treatment in selecting returns for audit, and the availability of information to the public. The IRS adopted fifty-eight of the recommendations entirely, endorsed another five partially, and disagreed with only nine.

ACUS also produced several recommendations advocating a more streamlined way of enforcing statutes with flexible civil money penalties. These recommendations (72-6 and 79-3) led to numerous statutory provisions that not only increased enforcement of important health, safety and environmental laws, but produced millions of additional dollars for the federal treasury.

Because of ACUS's expertise in this area, Congress, in the early 1990's, asked ACUS to study the Federal Aviation Administration's civil money penalty demonstration program. The resulting study and recommendation resolved a jurisdictional dispute between the FAA and the National Transportation Safety Board. In 1992, Congress passed, and the President signed, Public Law 102-345, the Federal Aviation Administration civil penalty legislation, that expressly adopted the ACUS recommendations and made permanent the transfer of authority over adjudication of civil penalty cases affecting pilots and flight engineers from the FAA to the National Transportation Safety Board.

Finally, in the 1980's and 1990's ACUS led the way to widespread adoption of alternative dispute resolution (ADR) principles in federal agencies. In this arena, ACUS produced more than a dozen separate recommendations. ACUS's principal recommendation was issued in 1986. *See Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution*). ACUS then worked closely with the American Bar Association (ABA) in an effort that led to enactment of the 1990 Administrative Dispute Resolution Act and Negotiated Rulemaking Act, both of which established a statutory framework for the use of ADR. Both statutes also included major oversight and coordination roles for the Conference. In furtherance of its government-wide coordinating responsibility, ACUS assisted agencies in implementing their ADR policies, and provided support for interagency working groups to help ensure uniform compliance with the statute throughout government and address problems that were beyond the capability of a single

department or agency. ACUS's commitment to ADR brought about a thorough integration of ADR into agency programs government-wide and continues to result in significant cost savings to both the government and the private sector.

ACUS also published some heavily used books and guides on administrative procedure and, at the behest of Congress performed special consultative and oversight roles relating to several important government-wide statutes such as the Government in the Sunshine Act, Equal Access to Justice Act, Congressional Accountability Act of 1995, and the ADR laws mentioned above.

3. *How was the Conference able to attract such high caliber members, staff, and fellows?*

I think ACUS was able to attract high-caliber members, because of its reputation as a truly independent, non-partisan, agency. I watched the various Chairmen appoint private sector members and those selected—even very busy lawyers and academics--were highly honored to serve. Government agencies tended to appoint very capable senior career and political appointees with a special interest in administrative procedure. And ACUS could attract federal judges, who would have been precluded from associating with an agency tied to an incumbent Administration.

ACUS was similarly able to attract very able staff members because they were given a considerable degree of freedom to suggest projects and work on interesting assignments with high level ACUS members. I'll never forget my own first assignment in 1978 as a new staff attorney assigned to ACUS's Committee on Judicial Review. The Chair of the Committee, a partner from Covington & Burling, asked me to attend a meeting with the academic consultant (Stephen Williams) in the chambers of the legendary DC Circuit Judge Harold Leventhal who was a liaison member of the Committee. (Professor Williams later was appointed to D.C. Circuit himself.) There are few such opportunities elsewhere in the federal government for young career lawyers.

Even though small stipends were the norm, ACUS was also able to attract talented consultants who were a mixture of distinguished administrative law experts and young academics. Because they worked for ACUS, these scholars were not concerned that their research would be perceived as being influenced by any sponsoring agency. Moreover, researchers knew that, working under the auspices of the Administrative Conference, they would receive unprecedented access to government documents and officials. Their work was also subject to peer review by an ACUS committee composed of knowledgeable academic authorities, private lawyers, judges and government officials. Furthermore, ACUS not only allowed consultants to publish their final products in academic journals, but encouraged them to do so, so their research work furthered their careers. Finally, ACUS' research consultants knew that formal ACUS recommendations, based on their work would be pursued by the permanent staff, and that these recommendations stood a reasonable chance of adoption by the President, Congress, or the affected departments or agencies.

4. *What were the principle reasons why ACUS was defunded?*

Although the House Appropriations Committee provided simply a one-sentence explanation that ACUS had "fully accomplished its mission," the issue was obviously a bit more complicated than that. The most thorough analysis of the reasons for ACUS' abolition is contained in Professor Toni Fine's 1998 article, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 Ariz. St. L. J. 19 (1998). Professor Fine had no association with ACUS and her article is considered to be the most authoritative and impartial scholarly source of information on ACUS' rise and fall.

I would agree with her that a confluence of events led to ACUS' abolition. In brief—my own recollection of the sequence of event is as follows: In 1992, ACUS issued a recommendation concerning the federal Administrative Law Judge (ALJ) program. Among other things, it recommended increased performance evaluation of judges, and the report (which I worked on) was also skeptical of then-pending legislation to separate the ALJs from their employing agencies and place them in an "independent corps." A few powerful ALJs who disliked these recommendations orchestrated a campaign (and hired a lobbyist) to discredit ACUS after this study in 1993-94. Before this effort was discovered and properly responded to, some influential Democratic members temporarily were affected by this, and the Conference suffered a reduced budget as a result. (We also had a Republican-appointed acting Chair at the time, who may have been less able to communicate with Congress at this critical time.)

As these problems were getting solved with the support of the Clinton Administration, and an appointment of a new Chair, the election of 1994 led to a surprise changeover in Congress. This led some think tanks to quickly draw up a lengthy "hit list" of departments and agencies that were dispensable in the era of the Contract With America. ACUS, unfortunately was at the top of that list alphabetically, and with the Clinton Administration having "bigger fish to save from frying," ACUS was defunded by the Appropriations Conference Committee (despite full funding in the Senate). Only two other agencies on the hit list also were defunded—both of which were also advisory agencies—the Advisory Commission on Intergovernmental Relations, and Congress's own Office of Technology Assessment.

5. *Is there any way to estimate the savings in taxpayer dollars that resulted from the Conference's recommendations?*

Although there are no hard data on this point, my own educated guess is that ACUS probably saved, directly or indirectly, hundreds of millions of dollars during its 28 year existence—certainly far more than the $30-40 million dollars of cumulative appropriations it received over those years.

One reason I say this is that ACUS saved Congress from having to earmark numerous special appropriations for expensive contract research studies in the area of government procedure. Experience has shown that such special individual studies themselves often cost millions of dollars each. As I mentioned in my testimony I was personally involved in a congressionally mandated study of just one aspect of the Social Security program that cost $8.5 million. *See*

Public Law No. 108-203, "The Social Security Protection Act of 2004," 42 USC § 1305 note, Section 107(b).

The ability of ACUS to undertake studies inexpensively due to its volunteer membership and its ability to attract low-cost academic consultants provided a cost-effective alternative to such earmarks. ACUS also provided no-cost training to agency lawyers and commissioners, and a continuous stream of informal consultations to agency lawyers on procedural matters of concern to their agencies.

Second, there were some ACUS recommendations that directly saved the government millions of dollars. One for example was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action.* Enactment of Public Law No. 100-236 in 1988 was directly based on this recommendation, and it has ever since prevented large number of expensive and costly court battles over which court should hear an appeal.

Other ACUS recommendations have stimulated reforms that have saved the government a great deal of money. The most notable such reform was in the area of "alternative means of dispute resolution," or ADR. ACUS issued over a dozen recommendations in the 1980s and early 1990s that encouraged and facilitated agency use of ADR. While it is hard to quantify these savings, former Acting Chair Sally Katzen's April 21, 1994 testimony before this Subcommittee quoted from the President of the American Arbitration Association, who cited "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs." Another set of recommendations, ACUS Recommendations 72-6, and 79-3, concerning the procedures in agency enforcement actions, led to congressional enactment of numerous streamlined civil money penalty adjudication laws that ultimately resulted in a huge increase of penalty collections into the federal treasury.

6. *Given the fact that the recommendations of ACUS were only advisory in nature, how were the agencies encouraged to adopt them?*

First, I would say that because the recommendations were developed in a consensus-building process, those that were directed to agencies also had the benefit of extensive participation by the targeted agency or agencies. Thus, it was easier to persuade the agencies to accept them once they were adopted. Knowledge that the recommendations represented a consensus position of government and private sector members, including, importantly, members from the White House and the Office of Management and Budget, also created peer pressure. Of course we also notified oversight committees in Congress about the recommendations and agencies sometimes preferred to implement a recommendation rather than explain to Congress why it had declined to do so. In addition we published all the "active" recommendations in the Code of Federal Regulations each year.

The recommendations directed to the Congress were somewhat harder to implement in general. But our process for seeking implementation was the same in both instances. Basically the Chair

and staff tried to be proactive in seeking implementation. The ACUS Chair actively lobbied the agency to implement a recommendation, often meeting personally with agency political appointees or senior career staff. ACUS staff kept active binders on each recommendation containing communications and related information. The staff looked for opportunities to file comments with agencies and Congress about proposals that would serve to implement them.

7. *Some have suggested that a private sector version of ACUS would be just as efficient as an independent, federally-subsidized ACUS. What are your thoughts about this proposition?*

ACUS's statute is a flexible one that allows the agency to accept intergovernmental transfers, outside donations or grants, and voluntary services. These augmentations can be quite useful. But ACUS would not be ACUS in my opinion if it were not an agency of the federal government with an annual appropriations.

I say this for two main reasons. First, if ACUS were entirely dependent on outside funders, there would be at least a perception of undue influence by the outside funder. Even foundations these days are often identified as aligned with narrow or partisan interests. Second, agency members of ACUS, would have a much harder time attending meetings, participating in studies, and cooperating with research consultants, if ACUS were not a federal agency. And it would likely be impossible for federal judges to participate regularly in a privately-funded institution.

8. *What benefits can the public at large expect to receive from the funding of ACUS? Will the public receive a tangible benefit? Will the public view ACUS as just another waste of taxpayer funds? And if so, how can ACUS overcome that?*

ACUS represents a minimum outlay of taxpayer funds. ACUS's role is to oversee procedural fairness and efficiency of the Executive Branch of the U.S. Government. Compare, for example, the budget of the Federal Judicial Center (FJC) which performs a similar role for the much smaller Judicial Branch. The FJC's budget request for 2007 was for $23,787,000, over seven times as much as the proposed authorized budget for ACUS.
(see http://www.uscourts.gov/testimony/budgetfederaljudicialcenter040506.pdf)

Apart from this comparison, ACUS in the past was able to leverage this small expenditure by attracting as members individuals from the private sector who, if paid, would command substantial fees. It also attracted top flight consultants who agreed to work for well below "market rates." For this reason, as explained in my answer to Question #5, ACUS would actually save the taxpayers money because it would (1) lessen the number of "earmarked" studies, which have historically been more expensive, and (2) ACUS's recommendations have been shown to save the government more money than its budget costs.

It is true that the while the "cognoscenti" such as agency general counsels, the administrative law bar, and law professors understood ACUS's importance and rallied behind it, the general public (and even more unfortunately many Members of Congress) were unaware of ACUS's role. I would hope that if the public knew about ACUS's work on such important issues as streamlining

the procedures in the social security disability program, reducing needless paperwork, improving the public's access to information under the Freedom of Information Act, promoting alternatives to costly litigation, promoting the rights of small businesses to receive attorney's fees when they prevail against the government, protecting the rights of private sector whistleblowers, etc., the public would strongly support the small expenditures needed to fund this sort of watchdog.

There is also no question that ACUS could have done a better job of promoting its mission among the public and to the Congress. I would hope that a revived ACUS would regularly ask the public and its representatives in Congress for suggestions as to potential research projects. ACUS's past incarnation was in the pre-Internet era, so ACUS did not even have the benefit of a website to use for such purposes.

Minority Questions for Jeffrey Lubbers, Washington College of Law at American University

1. *What are the three best examples of how ACUS in the past produced major cost savings in the federal government's administration of its programs?*

Perhaps the clearest example is ACUS Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action.* This study was designed to promote solutions to costly "races to the courthouse" by forum-shopping lawyers who were seeking to challenge agency action in the circuit that was most congenial to their challenge. The law at that time provided for a first-to-file rule, which led to these races. These races sometimes came down to a matter of minutes and some of the litigation over this turned on proof of whether the courthouse clocks were correct. This wasteful litigation was estimated to cost about $100,000 per case. ACUS's recommendation for a random lottery in such situations, presided over by the Judicial Panel on Multidistrict Litigation, was enacted in Public Law No. 100-236 in 1988, and it has ever since prevented a large number of these expensive and costly court battles over which court should hear an appeal, thus saving millions of dollars.

Another Recommendation, ACUS Recommendations 72-6 supplemented later by 79-3, suggested a modernization of agency penalty statutes. Under the old statutory ("court collection") model, agencies had to file a suit (represented by the Department of Justice) in federal district court to collect an assessed but unpaid penalty. It was a cumbersome process—DOJ did not like to "prosecute" relatively small cases involving complicated regulatory statutes, and such cases, often involving jury trials, were expensive for all parties. The ACUS recommendation suggested an "administrative imposition" scheme whereby the alleged violator would be offered a formal agency hearing before an Administrative Law Judge with appeal to the agency head and then a right to appeal to federal court based on the administrative record. This was much more efficient, while also preserving fairness, and the Supreme Court approved the constitutionality of the process in 1977. This subsequently led to congressional enactment of numerous streamlined civil money penalty adjudication laws that ultimately resulted in a huge increase of penalty collections into the federal treasury.

Finally, the series of ACUS recommendations in the 1980s and early 1990s that encouraged and facilitated agency use of ADR resulted in huge savings for the government and for private litigants. While it is hard to quantify these savings, former Acting Chair Sally Katzen's April 21, 1994 testimony before this subcommittee quoted from the President of the American Arbitration Association, who cited "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs."

2. *Was it only ACUS that could have produced that level of cost savings in that way, or could another federal entity, such as OMB, have done it just as well or better?*

Some have suggested that other agencies like OMB (in the Executive Office of the President) or the Government Accountability Office (GAO) (in the Legislative Branch) could have produced the same type of cost savings as ACUS. I disagree.

Of course both of these agencies serve important functions, but neither of them have the same focus as ACUS did and would again. OMB and its Office of Information and Regulatory Affairs (OIRA) serve the President in coordinating regulatory policy, and in implementing presidential executive orders and directives. For the most part OIRA acts as a regulator—of the executive branch regulatory agencies themselves. GAO has a wide range of responsibilities, especially in reviewing financial and management issues, at the behest of congressional members and committees.

ACUS had and would have a very different role. Unlike OIRA, ACUS had no power, other than the power to persuade. Its recommendations were consensus-based. Its membership was drawn from the best and the brightest of the government and the private sector as well as the judiciary. Its research agenda was forward looking and extended to all aspects of government procedures—beyond the regulatory area that OIRA itself regulates, and beyond the managerial area that GAO specializes in. And ACUS's ability to follow up on its recommendations was a continuing one.

ACUS also provided a degree of independence from the Administration, and a degree of closeness to Congress that distinguished it from OIRA. Although the ACUS Chair and Council are appointed by the President, it is not a White House entity; its membership is finely balanced with members from all the key agencies in the government as well as different interest groups. It also, unlike OIRA, can have close affiliations with independent regulatory agencies.

GAO, for its part, with its managerial focus does not focus so much on the legal aspects of government procedures or the crucial aspects of judicial review of agency action.

This is not to say that ACUS cannot work well together with both OIRA and GAO. Executive Order 12,866, was partly based on ACUS recommendations, and it also promotes agency use of negotiated rulemaking, and the just-issued OIRA Bulletin on Good Guidance Principles cites two ACUS recommendations on that subject. ACUS and GAO cooperated on many issues in the past and would do so again.

3. *What is your estimate of the total cost savings ACUS achieved for the federal government over the 30 years of its active existence?*

Although there are no hard data on this point, my own educated guess is that ACUS probably saved, directly or indirectly, hundreds of millions of dollars during its 28 year existence—certainly far more than the $30-40 million dollars of cumulative appropriations it received over those years.

One reason I say this is that ACUS saved Congress from having to earmark numerous special appropriations for expensive contract research studies in the area of government procedure. Experience has shown that such special individual studies themselves often cost millions of dollars each. The ability of ACUS to undertake studies inexpensively due to its volunteer

membership and its ability to attract low-cost academic consultants provided a cost-effective alternative to such earmarks. ACUS also provided no-cost training to agency lawyers and commissioners, and a continuous stream of informal consultations to agency lawyers on procedural matters of concern to their agencies.

Second, some ACUS recommendations directly saved the government millions of dollars.

4. *What are the three most promising areas for ACUS to contribute to federal cost savings as we speak, and is ACUS the best-situated agency to achieve them?*

In my November 2005 testimony to this Subcommittee, I provided a rather lengthy list of potential issues and areas for a new ACUS to study.

If I had to choose three areas that might lead to cost savings, I would focus on (1) e-rulemaking, (2) how to handle mass adjudication programs, and (3) new approaches to enforcement.

E-rulemaking. The Internet revolution has begun to transform federal rulemaking system. The federal government has spent millions of dollars to create a central rulemaking portal (regulations.gov) and a centralized rulemaking docket system. But many legal and practical questions remain to be solved before the informational and participatory goals of e-rulemaking can be fulfilled. There are issues concerning data integration, docketing, scanning, archiving, copyright, authentication, security, censorship, privacy, etc. that need to be solved. ACUS could focus on these issues and produce huge savings if they were solved.

Mass Adjudication Programs. A recurring issue is how to handle high-volume benefits programs such as the Social Security Disability Program, which now has upwards of 600,000 hearings a year with no sign of slowing down, immigration adjudication, which is burgeoning at a very fast rate, the Black Lung Benefits program, Veterans benefits adjudication, and the new Medicare appeals adjudication program. Which cases are best assigned to agencies and which are best assigned to Article III courts or the more specialized Article I courts? Can administrative tribunals handle mass tort cases? These are all questions that I think should be on the research agenda in coming years.

New Approaches to Enforcement. At the time of its shutdown, ACUS had just begun to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation. For example, the Securities and Exchange Commission (SEC) relies on intermediaries such as the stock exchanges to do the front-line regulating, while the SEC serves as a backstop and overseer of the way the stock exchanges do the regulating. ACUS also began to look at what was called cooperative enforcement—reliance on the employees of the regulated entity itself rather than a third-party intermediary. The best known example of this is the method that is now used in food safety regulation, called Hazard Analysis and Critical Control Point (HACCP) in which the agency approves the company's plan, reviews operating records, and verifies that the program is working. EPA and OSHA also undertook experiments in cooperative regulation as well, and subsequent research has shed new light on the pros and cons of this. There is a lot more that needs to be done in this area of alternative enforcement. What about qui

tam actions under the False Claims Act, often referred to as the "bounty hunter" provisions? What about insurance-based regulation or contract-based regulation, or the continued development of systems for trading of pollution credits and other marketable rights? Creative approaches in this area can benefit the government by easing its enforcement burden, without lessening overall compliance with legal requirements.

5. *How easy do you think it will be to find a new ACUS chair and new ACUS membership – capable of producing equivalent or better results than ACUS realized in the past – if we reauthorize and refund ACUS now?*

The ACUS chair is appointed by the President and confirmed by the Senate for a five-year term. As such it is a prestigious position and I do not think it would be hard for any President to fill that post. There are numerous administrative law experts both in and out of Washington who would be good candidates for that position.

The chair appoints the private members with an eye to diversity of viewpoints and my experience at ACUS was that it was not hard to find qualified private members. The agencies themselves choose their own representatives, and typically chose high-ranking career or political officers to serve.

Thus, I have no doubt that a new ACUS chair and membership would be capable of producing equivalent or better results than ACUS realized in the past.