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# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## HEARING

BEFORE THE

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

MAY 20, 2010

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# CONTENTS

MAY 20, 2010


Page

OPENING STATEMENTS

The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Chairman, Subcommittee on Commercial and Administrative Law ..... 1
The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Ranking Member, Subcommittee on Commercial and Administrative Law ..... 2
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 ..... 3
The Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary ..... 4

WITNESSES

The Honorable Stephen G. Breyer, Associate Justice, U.S. Supreme Court, Washington, DC
Oral Testimony ..... 14
Prepared Statement ..... 16
The Honorable Antonin G. Scalia, Associate Justice, U.S. Supreme Court, Washington, DC
Oral Testimony ..... 20
Prepared Statement ..... 21
Mr. Paul R. Verkuil, Chairman, Administrative Conference of the United States
Oral Testimony ..... 44
Prepared Statement ..... 47
Ms. Sally Katzen, Executive Managing Director, Podesta Group
Oral Testimony ..... 60
Prepared Statement ..... 62
Mr. Jeffrey S. Lubbers, Professor of Practice in Administrative Law, American University Washington College of Law
Oral Testimony ..... 68
Prepared Statement ..... 71
Curtis W. Copeland, Ph.D., Specialist in American National Government, Congressional Research Service
Oral Testimony ..... 77
Prepared Statement ..... 79

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Lamar Smith, a Representative in Congress from the State of Texas, and Ranking Member, Committee on the Judiciary ..... 6
Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Member, Subcommittee on Commercial and Administrative Law ..... 12

Page

## APPENDIX

### Material Submitted for the Hearing Record

Letter from the American Bar Association (ABA) ..... 95

# ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**THURSDAY, MAY 20, 2010**

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

The Subcommittee met, pursuant to notice, at 2:33 p.m., in room 2141, Rayburn House Office Building, the Honorable Steve Cohen (Chairman of the Subcommittee) presiding.

Present: Representatives Cohen, Conyers, Delahunt, Johnson, Franks, Smith, Coble, and King.

Staff present: (Majority) Carol Chodroff, Counsel; Michone Johnson, Subcommittee Chief Counsel; Susan Jensen, Counsel; Reuben Goetzl, Staff Assistant; and Daniel Flores, Minority Counsel.

Mr. COHEN. And the red coats are here, as I earlier announced. The red coats are coming. This hearing of the Committee on the Judiciary, Subcommittee on Commercial Administrative Law and place of the redcoats will now come to order. Without objection, the Chair will be authorized to declare a recess of the hearing. I recognize myself for a short statement.

Exactly 6 years ago today, Justice Breyer and Justice Scalia testified before the Subcommittee on reauthorizing ACUS, the Administrative Conference of the United States, and thus I would like to welcome you both back, along with the newly appointed chair of ACUS and our other prominent witnesses.

ACUS is an agency of the United States Federal Government charged with making recommendations for the improvement of administrative agencies and their procedures, particularly with respect to efficiency and fairness in the rulemaking process. It is considered both an independent agency and a Federal advisory committee and develops recommendations for improving the fairness and effectiveness of rulemaking, education, licensing, investigative and other functions by which Federal agencies administer government programs.

Over the course of its 28-year history, ACUS has issued more than 200 recommendations, some of which were government-wide, and others were agency specific. It issued a series of recommendations eliminating a variety of technical impediments to the judicial review of agency action and encouraging less costly consensual alternatives to litigation.

The proofs of these efforts include the enactment of the Administrative Dispute Resolution Act of 1990, which established a framework for the use of ADR. ACUS also serves as a resource for Members of Congress, congressional committees, Internal Revenue Service, the Department of Transportation and the Federal Trade Commission.

ACUS has been praised for yielding tremendous cost savings and promoting efficiency by obtaining expert legal advice from private sector lawyers that would otherwise cost hundreds or thousands of dollars, as inflation has increased per hour. It also may save significant funds through some of its recommendations.

But the true value of ACUS is that it promotes greater fairness in the promulgation of agency rules in the administrative process. Every individual in this country depends in one way or another upon Federal agencies and scientific evidence informed regulations that protect the Nation's health, safety and welfare.

We are facing significant issues in the country now, issues concerning the environment, health care, national security, privacy, public participation in the Internet, and the economy, among others. We have a tremendous need for effective, fair and strong regulations based on sound evidence and science. Through its work and recommendations, ACUS helps to promote and ensure fairness in the administrative process.

It is my hope that today's hearing will serve as a welcoming forum and a launching pad as ACUS begins its second incarnation. I look forward to hearing from all of our witnesses today about how Congress can help support ACUS and its work. I also look forward to hearing from our esteemed witnesses what issues ACUS might prioritize in this new Administration.

I would like to note that ACUS is currently authorized through 2011, and I intend to introduce legislation in this Congress to ensure that ACUS is reauthorized in a timely fashion, all of which is subject to the whims and caprices of the Chair of the Committee.

I now recognize my colleague, Mr. Franks, the distinguished Ranking Member of the Subcommittee, for his opening remarks.

Mr. FRANKS. Well, thank you, Mr. Chairman. I just want to extend a sincere and hearty welcome to Justice Scalia and Justice Breyer, Chairman Verkuil, and really any other witnesses that may be here today. It is not often that a sitting Supreme Court justice graces our hearing chamber, let alone two, and I couldn't be happier to hear from both of you very distinguished panelists, to say the least.

From its beginnings in the 1960's, the Administrative Conference of the United States was a constant source of innovation in administrative law and practice. It actively sought out the best ideas from the private sector and public sector to make our government work better. It helped government in important ways to be more efficient, more effective and more responsive.

Starting in the mid-1990's, the conference was authorized by legislation, but it lacked the funding to carry out operations. And now, thanks to the bipartisan leadership of the Judiciary Committee and this Commercial and Administrative Law Committee, Mr. Chairman, it has come back to life. And we all look forward to the con-

tributions the conference can make to administrative reform in the years to come.

Today we have an opportunity to explore a number of questions. Two sets of questions are really at the top of my own list. First, what should the conferences policy agenda be as it resumes operations? And second, what practical challenges does the conference confront as it begins anew from scratch, and how can Congress help the conference to overcome those fundamental challenges?

Now, with regard to the first set of questions, I believe that the conference priorities should be clear. It has been the better part of a century since the Administrative Procedure Act became law in 1946. And since then, while the basic structure of the APA has been maintained, the size, the scope and nature of the regulatory state has expanded beyond the 79th Congress' wildest imaginations, to say the least.

It is time to modernize the APA to keep pace with the times and make the regulatory bureaucracy more transparent, more responsive and, of course, more accountable. In the 108th and 109th Congresses, our Subcommittee engaged this task through the Administrative Law Process and Procedure Project for the 21st Century. In 2006 we issued an interim report that identified nearly 75 issues in seven key areas for further investigation and possible legislation. These issues were identified with the hope that the conference could be revived, study them further, and help us to identify the best possible reforms.

Now, I believe that the issues specified in our 2006 report present the conference with a ready-made charter of its priorities as it resumes operations. I don't want to sound presumptuous here. That is what they wrote.

With regard to the second set of APA questions, Chairman Verkuil has identified in his written statement a number of operational challenges that the conference confronts as it gets off the ground. I hope that each of our witnesses today can help us determine whether there are any legislative remedies or oversight activities with which the Congress can help the conference. And certainly, we are here to lend our support in whatever way that we can.

And as others have said before, the government that governs best governs least. And when the government does govern, it should govern at its best, of course. And to help us achieve that goal is the conference's vital mission, and I certainly wish it every success.

And I welcome both of you again here today.

Thank you, Mr. Chairman.

Mr. COHEN. I thank the gentleman for his comments and statement and remarks.

And I would like to ask the Members who have opening statements to submit them for the record, although we always recognize our distinguished Chairman, Mr. Conyers, if he would choose to make a statement.

Mr. CONYERS. Thank you. Thank you, Chairman.

It is always a privilege when members of the court join us for the discussion, and the two that are before us are becoming well known in terms of the kinds of discussions that we engage in. And

now that this conference is up and running—we have got a chairman—I think it is being looked at with fresh sets of eyes.

That is, the role of the conference is different from nearly every other part of the government, and under these circumstances that exist, it is very important in terms of what possibilities that are in front of it and that are open to it. And we couldn't start this examination off with two people that have been more intimately connected with the conference.

And so I am always pleased when the Judiciary Committee and members of the highest court can join us in the way that we are brought together today. So we all welcome your appearance and look forward to the discussion ahead.

Mr. COHEN. Thank you, Mr. Chairman.

And for the last Member to make a statement, I will recognize the Ranking Member, my friend from Texas, Mr. Smith

Mr. SMITH. Thank you, Mr. Chairman.

Justice Scalia, Justice Breyer, we are truly honored by your presence, and we look forward to your comments today as well.

The Administrative Conference of the United States is an important institution recently revived by Congress. As a tightly focused, historically successful nonpartisan body, it offers an outstanding forum for innovation in administrative law and practice. I am glad that it will once again be able to make unique contributions to administrative reform.

Since the conference last operated in the mid-1990's, a number of things have changed. Important Supreme Court precedents on administrative law have been handed down. New challenges have come before administrative agencies. And the economy has entered a period of difficulty we hardly could have foreseen 15 years ago.

One thing, however, has not changed. It has always been important for administrative agencies to be open, efficient, effective and accountable. That has never been truer than today, as regulated individuals and companies fight intense economic headwinds. Now more than ever we need administrative reform to ensure that our administrative agencies are responsive, do not excessively burden our economy, and do not kill jobs. The Subcommittee on Commercial and Administrative Law and the Administrative Conference of the United States can and must be on the front lines of that effort.

In the last two Congresses, the Subcommittee undertook a major reform project called the Administrative Law Process and Procedure Project for the 21st Century. In its 2006 interim report on this subject, a Subcommittee identified a host of issues for further investigation and potential legislation. These included topics ranging from electronic rulemaking to negotiating rulemaking to congressional, presidential and judicial review of rules. They also included regulatory analysis and accountability requirements, the role of science, and the agency adjudicatory process.

I hope that in this Congress and in the next one, with the conference's help, we will continue and complete our examination of these issues and produce the needed legislation. I have invited the Office of Management and Budget (OMB) and its Office of Information and Regulatory Affairs to work with us on these issues as well. Today, these overtures have not been returned, and that is greatly disappointing. It must not, however, delay our work.

With the conference up and running, perhaps OMB will find a renewed enthusiasm to join us in this effort. OMB surely can help us, and both the Committee and the conference surely can help OMB as it evaluates its role in Federal rulemaking under Executive Order 12866.

Mr. Chairman, I would like to ask unanimous consent to submit my letters to OMB and the Office of Information and Regulatory Affairs for the record.

Mr. COHEN. Without objection, it will be done.

[The information referred to follows:]

MATERIAL SUBMITTED BY THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

JOHN CONYERS, JR., Michigan
CHAIRMAN

LAMAR S. SMITH, Texas
RANKING MINORITY MEMBER

**U.S. House of Representatives**
**Committee on the Judiciary**
Washington, DC 20515–6216
One Hundred Eleventh Congress

March 30, 2009

BY FASCIMILE AND POST

The Honorable Peter R. Orszag
Director
The Office of Management and Budget
Washington, D.C. 20503

Dear Director Orszag,

I recently read with interest of your initiative to review the Office of Management and Budget's procedures to oversee the development and review of federal regulations. I support OMB's role in the federal regulatory process. I also applaud you for your February 26, 2009 solicitation of public comment to assist you as you consider this important topic.

In addition to the public input which you will receive, I also want you to have the benefit of my views as Ranking Member of the Committee on the Judiciary. The Judiciary Committee, as you know, has jurisdiction over the Administrative Procedure Act. Since its inception over 50 years ago, the Act has preserved a role for the American people in the regulatory process, and – to the extent that changes must be made in the APA and related statutes – the Committee is committed to ensuring that public participation remains viable and effective.

During the 109th Congress, the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary conducted extensive oversight of the rulemaking process. This effort included symposia on the rulemaking process, studies by academic experts, and numerous hearings. My staff and I have reviewed the report for this effort as well as many of the comments provided in response to the ongoing effort to review the current regulatory review process. As we in government proceed with legislative and administrative reforms of the regulatory review process over the next four years, I believe it is important that certain principles be upheld. I look forward to working with you and other members of the Administration in a cooperative spirit toward these goals.

Economic Growth

The American people are facing difficult economic times, and governmental actions must not further exacerbate the current recession. Poorly considered regulations cannot be allowed to increase costs borne by Americans or to prevent entrepreneurs from creating new jobs. To this end, I urge the Administration to avoid the adoption of costly regulations without a careful examination that demonstrates that the public benefits justify the very real compliance costs. This analysis, moreover, should ensure that the least restrictive means possible to solve the problem is adopted. Indeed, this analysis should be completed before agency employees even draft a proposed regulation. Important economic analysis must contribute at conception to the framework within which regulation is considered. It cannot be left as an afterthought, to be completed at the agency's convenience. Consistent with this view, during this difficult economic time, agencies should be required to develop thoughtful Regulatory Flexibility analyses for every rulemaking, and they should be discouraged from resorting to Interim Final Rules that are exempt from this requirement.

Transparency

The American people are entitled to know about regulations before they are adopted, and they must have a meaningful opportunity to influence the final product. Many of the recent reforms adopted by President Bush thus should be continued and expanded. Agency rulemaking dockets, including all comments on rules, should be on the Internet and easy to locate. Guidance documents should continue to be subject to OMB review. Guidance documents and other sub-regulatory actions should be easily accessible to the public before they are effective.

While the Executive branch has adopted numerous procedures over the past 25 years in the name of transparency, not all of these reforms have fulfilled their goals. In part, this is because members of the public and their representatives are rarely involved when an agency first begins the regulatory process. Too often, by the time the agency publishes a notice of proposed rulemaking, the agency officials have already made up their mind about the final rule. Public participation should be meaningful, and agencies should identify the relevant supervisors for each rule and ensure that these individuals are available to interested parties, able to explain the agency's proposals, and responsive to public input.

Furthermore, agencies should be transparent with their scientific data. While some protection should exist for the deliberative policy process, agencies should disclose the scientific data they expect to consider before the final policy decisions have been made and sent to the Federal Register, and agencies should make every effort to avoid the use of confidential data to justify decisionmaking.

Finally, agencies should make every effort to oppose actions, such as lawsuits by interest groups, that seek to impose substantive or procedural restrictions on the

rulemaking process through the courts. This is particularly important when lawsuits provide select members of the outside community a significant and outsized role in the regulatory process. The truncated deadlines that result from consent decrees and settlement agreements, for example, too often limit the opportunity for broader public engagement. At a minimum, OMB should be required to approve all agency consent decrees and settlement agreements that call for the issuance of new regulations, and this approval should be withheld until after the agency has sought public comment on the proposed resolution of the case.

Scientific Integrity

The Administration should make certain that scientific merit undergirds technical regulations. Any outside consultants retained by the agency should be disclosed immediately in the rulemaking docket, as well as the specific scientific questions that the agency will ask that consultant. Moreover, technical rulemakings should incorporate peer review by disinterested parties outside of the agency. In order to ensure that agency officials have not pre-selected panel members to obtain a favorable evaluation, OMB and the Office of Science and Technology Policy should play a central role in the selection of panel members.

Further, OMB should ensure that agencies standardize their approach to risk-based decisionmaking and fully embrace risk analysis. Incomplete scientific evidence must be put into its larger context, so the public and its leaders can evaluate the effects of changes in assumptions on decisions and any needs for more research to close uncertainty gaps. Moreover, OMB needs to continue to ensure that scientific agencies throughout the federal government reach consensus before agencies impose significant costs.

Finally, agencies must develop effective mechanisms to ensure that inaccurate scientific information is corrected quickly. As our scientific understanding proceeds, we should not retain regulations that were based on incorrect or flawed knowledge. With the Data Quality Act and its implementing guidelines, the Administration currently has a process to ensure the integrity of regulatory science. This process must not be allowed to fall into disuse because of an unwillingness to admit error.

Accountability

Any effective regulatory system must ensure that the American people have ultimate control over the decisions made in their name. Some of this effort must come through the legislative process and the Congressional Review Act. Nevertheless, review of new regulations by OMB is essential as well. Regulatory policies and priorities appropriately may change as the Presidency changes, and the President must have the procedural tools to ensure that his values and priorities are implemented by the administrative state. This is doubly true for independent agencies that regulate such a large part of the American economy, including, for example, the Securities and Exchange Commission (SEC). Several individuals have asserted that the actions of the SEC have

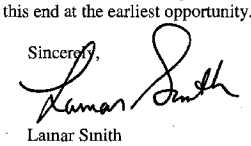
contributed to America's existing financial difficulties. If the President believes additional regulation is necessary to prevent a recurrence of these events, then the President must be accountable for any future regulations by that agency. It is not sufficient to appoint some experts from the financial industry and then trust that they will lead the agency to wise policies without further consultation. Instead, agencies such as the SEC should be brought under the umbrella of OMB review.

In addition, agencies should be held accountable for providing real outcome measures that tell the American public what they are trying to accomplish and for achieving those outcomes. These outcome measures should be derived from measures agencies are now required to use as a result of the Government Performance and Results Act.

Academic Research

Finally, I would like to work with your office to ensure that additional research on the regulatory process continues. Congress has now re-authorized and funded the Administrative Conference of the United States. In its previous incarnation, this agency provided invaluable research on the administrative state, the regulatory process, and suggestions for further reform. Now that the Congress has provided funds for the resumption of this important work, OMB must ensure that the new agency is staffed and continues to be funded at operational levels commensurate with the tasks placed before it. I look forward to learning of your efforts toward this end at the earliest opportunity.

Sincerely,



Lamar Smith
Ranking Member
Committee on the Judiciary

cc: Hon. John Conyers, Jr.

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ONE HUNDRED ELEVENTH CONGRESS

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**BY FACSIMILE AND POST**

September 25, 2009

The Honorable Cass R. Sunstein
Administrator
Office of Information and Regulatory Affairs
The Office of Management and Budget
Washington, D.C. 20503

Dear Administrator Sunstein,

Please accept my warm congratulations on your confirmation as Administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs. I strongly support OMB's and OIRA's roles in the federal regulatory process. With great interest, I look forward to your tenure at OIRA, particularly due to your forceful past advocacy of risk assessment and cost-benefit analysis in the development and evaluation of federal regulations.

As you know, OMB recently initiated an important review of its procedures to oversee the development and review of federal regulations and guidance documents. At the outset of that review, I shared with OMB Director Peter Orzag my views on a number of issues that should be central to the review. These include cost-benefit analysis, more important than ever during these difficult economic times; transparency; scientific integrity; agency accountability to Congress and the President; and the important role to be played by the newly reauthorized Administrative Conference of the United States. For your convenience, I attach a copy of my March 30, 2009, letter to Director Orzag on these matters.

Hon. Cass R. Sunstein
September 25, 2009
Page 2

As OIRA Administrator, you are now at the helm of OMB's review. I therefore take this opportunity to highlight my views for you. In my position as Ranking Member of the Committee on the Judiciary, I hope to work with you on these and other administrative law issues within the Committee's jurisdiction. I welcome the opportunity to discuss these matters with you at the earliest possible time. Please feel free to contact me or my staff to arrange for a meeting. The appropriate contact on my staff is Daniel Flores, Minority Chief Counsel for the Subcommittee on Commercial and Administrative Law. Mr. Flores may be reached at (202) 226-8685.

Sincerely,

Lamar Smith

Lamar Smith
Ranking Member
Committee on the Judiciary

cc: The Honorable John Conyers, Jr.

Enclosure

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Mr. SMITH. Thank you, Mr. Chairman.

The call from the public is clear. The people who bear the weight imposed by Federal agencies want agencies to be transparent, to listen, and not impose unfair burdens. They also want to hold Federal agencies accountable. Congress' and the conference's efforts, particularly their efforts on major reform, must serve those interests.

Thank you, Mr. Chairman. Yield back and look forward to the justices' testimony.

Mr. COHEN. Thank you, sir. Appreciate your statement.

Without objection, other Members' statements, their opening statements, will be included in the record.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

**Congressman Henry C. "Hank" Johnson, Jr.**

**Statement for the Hearing on the**
**Administrative Conference of the United States**
**May 20, 2010**

Thank you, Mr. Chairman, for holding this important hearing on the Administrative Conference of the United States.

Today we will examine the role of the Conference, and consider ways in which the Conference may assist Congress, the Executive Branch, and the Judiciary oversee and improve the effectiveness of administrative law procedures.

It is an honor to have witnesses here from the highest court in the land today. The presence of Justices Breyer and Scalia underscore the significance of this hearing on the Conference.

Through the years, the Conference has been a valuable resource.
It has provided information on the efficiency, adequacy, and fairness of the administrative procedures used by administrative agencies in carrying out their programs.

The Conference's key strength is in bringing together people of great distinction from both the public and private sectors to think carefully and systematically about administrative issues.

It has been vital in providing non-partisan practical assessments with respect to a wide range of agency procedures.

The Conference has had many accomplishments over the years. It has issued a number of recommendations eliminating a variety of technical impediments to the judicial review of agency action.

The Conference has encouraged less costly alternatives to litigation. The fruits of these efforts led to the enactment of the Administrative Dispute Resolution Act in 1990, which established the framework for the use of ADR.

Indeed, the conference provides an invaluable service to Congress. I look forward to hearing about our witnesses' experiences with the Conference. I am eager to hear from our witnesses about what Congress can do to ensure that the Conference does not become defunct again.

I thank the chairman for holding this hearing, and I look forward to hearing from our witnesses today.

2

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Mr. COHEN. I am now pleased to introduce our first panel of witnesses.

And I want to thank all the witnesses for your willingness to participate in today's hearing. Without objection, your written

statements will be placed in the record. We would ask you to limit your oral remarks to 5 minutes. We have a lighting system that starts with the green light. That means that you are in the first 4 minutes of your comments. At the 4-minute mark, it becomes yellow, and at the 5-minute mark, it goes red, and that means you are supposed to have ended your speech.

After each witness has presented his or her testimony, Subcommittee Members will ask questions, subject to the same 5-minute limit.

We have a very distinguished panel before us. Our first witness is Associate Justice Stephen Breyer. In 1994 he was appointed to the Supreme Court by President William Jefferson Clinton. Prior to that appointment, Justice Breyer taught law for quite a few years at Harvard, and he has worked as a Supreme Court law clerk, Justice Department lawyer, and assistant Watergate special prosecutor, chief counsel of the Senate Judiciary Committee, and judicial conference liaison to ACUS.

In 1990 he was appointed an appellate court judge—my script says by President Carter. That is not right. Was it 1980 or was it President—I would think it was 1980. 1980? Court of Appeals. Excellent. I knew 1990 would have been quite a trick for President Carter.

Justice Breyer has written books and articles about administrative law, regulation, the Constitution, and is an expert on his own biography.

Thank you, Justice Breyer, for being here, and please begin your testimony.

You need to turn your microphone—

**TESTIMONY OF THE HONORABLE STEPHEN G. BREYER, ASSOCIATE JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC**

Justice BREYER. Oh, I see. Well, thank you very much for inviting me. And I think my colleague, Justice Scalia, feels the same, and he was actually the chairman of the Administrative Conference. I was a member of it, representing the judiciary, for a few years.

We have a long history of excellent chairmen. He was an excellent chairman. Sally Katzen, whom you will hear from, was an excellent chairman. Now your new chairman, Paul Verkuil, has loads of experience in administrative law, technical matters, as well as having run large institutions like William and Mary. And so it is a good history have here.

Now, I think I can speak for him in this.

All right?

Justice SCALIA. Absolutely. You usually——

Justice BREYER. You don't know what I am going to say.

Justice SCALIA. You usually——

Justice BREYER. Gotcha. No, just it is——

Justice SCALIA [continuing]. Even though I disagree with you.

Justice BREYER. Never.

What is terribly good, I think, is that you are here and that you are interested in this subject, because almost by definition the subject matter of the Administrative Conference is somewhat technical and usually below the radar of those who are elected public offi-

cials. And in a way that is why it can be effective, and that is why it is important.

The subject that they are a part of to me is a question that has bothered human beings in democracies and even before. How do we control the regulator? Who is going to regulate the regulator? How do we assure that a system of regulation or administration is efficient? How do we assure that it is fair? How do we assure that it is effective?

Now, those are three questions that are just as important today as they were 1,000 years ago. And they are just as important today as they were 6 years ago when we testified. Now, what part of this big question does this group of the Administrative Conference of the United States answer?

Well, sometimes people get very bad treatment in the agencies of the government, and then they go to you as individuals, or maybe they go to an inspector general or maybe they go to somebody in the agency they complain to that isn't their job. Or maybe sometimes the policy at issue is just people think the wrong policy, or maybe you think that. And then they are back here again, and they are back asking you to change the legislation.

But in between those two things there is a whole layer of terribly important decisions to be made, and those are administrative agency decisions. And that is how Justice Scalia, who taught administrative law for a long time, and I, who also did, made our living for quite a while. And it wasn't good just for that reason. It was good and important, because they affect millions and millions and millions of Americans.

So the question that often is too technical or too nonpolitical for it to force itself onto your agenda, but where there is often quite a lot of work to be done, is on the fairly technical questions of improving the procedures within the administrative agency. And different nations have different ways of going about it. Different ones have different councils or groups. Well, our way of going about it is called the Administrative Conference of the United States at the Federal level, and it often helps. How?

Well, first they brought together four groups of people, who do not always talk to each other so often or over such a wide range of subject matter. Those were staff of different agencies, heads of different agencies, outside lawyers and others who are not to do with the government but practice before those agencies and knew something about it, and academics.

And they would say to the academic, "Write a study." And the academic could actually go and ask these people, who knew a lot of the practical things about it, and didn't just have to look at books. So they would get a study, and then the study would be criticized. And then it would be ending up with some recommendations maybe on some subject matter such as how do we improve notice and comment rulemaking.

You know, you can say the words and a lot of people fall asleep by the time you finish the word "rulemaking." But if you go to a foreign country and you say, "You know, we have a system in the United States which means the public doesn't vote on every detail, because it can't, but it also is a way of getting the public involved so people in the agencies, who may be too insulated, can find out

what they think and can learn something about their experience—it is called notice and comment rulemaking," their ears pick up, because they want to know how it works.

So they will do studies. How do we make it not too long? How do we actually get public involvement without dragging the whole thing not forever? How can we be sure the agency listens to relevant things without having to listen to every single individual, because there might be 5 million of them. That is where the studies come in.

Now, Justice Scalia has listed several instances from history. Our history is 6 years ago and more. I have listed some. I think they are important. He thinks they are important. So all we can say is where I started. I am really very, very glad indeed that you are here, because it shows support for this institution, and I think that institution, the Administrative Conference, is important to the ordinary American, even if he has never heard its name.

Mr. COHEN. Thank you, sir, and although you have a red light, if you would like to talk further, you would certainly—permission is granted.

Justice BREYER. I think I will stop, because I have made my point.

[The prepared statement of Justice Breyer follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN BREYER

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STATEMENT OF

STEPHEN BREYER
ASSOCIATE JUSTICE
SUPREME COURT OF THE UNITED STATES

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

WASHINGTON, D. C.
MAY 20, 2010

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Mr. Chairman and Members of the Subcommittee. Thank you for the invitation to comment upon the Administrative Conference of the United States. I participated in its activities from 1981 to 1994 as a "liaison" from the Judicial Conference to the Administrative Conference. As I testified before this Committee six years ago, I believe that the Conference served an important purpose—improving our government, in many ways beneficial to the average American—at low cost. This statement, which I give in my capacity simply as a former participant in and observer of the Conference's activities, describes my recollections of the Conference's unique function and contributions.

The Conference primarily examined government agency procedures and practices, searching for ways to help agencies function more fairly and more efficiently. It generally focused on achieving "semi-technical" reform. That is to say, it focused on changes in practices involving more than a handful of cases and, frequently, more than one agency—but changes that were neither so controversial nor so politically significant as likely to provoke a general debate, say, in Congress. Thus, it would study and adopt recommendations concerning better rule-making procedures, or ways to avoid unnecessary legal technicalities, controversies, and delays through agency use of negotiation. While these subjects themselves and the related recommendations often sound technical, in practice they often simply make it easier for citizens to understand what government agencies are doing, to challenge arbitrary government actions that could cause harm, and to prevent such arbitrary decisions in the first place.

The Administrative Conference developed its recommendations by bringing together at least four groups of people: top-level agency administrators; professional agency staff; private practitioners (including practitioners from "public interest"

organizations); and academicians. The Conference would typically commission a study by an academician, say, a law professor, who would have the time to conduct the study thoughtfully, but who might lack first-hand practical experience. The professor would spend time with agency staff, who often have otherwise-unavailable facts and experience, but might lack the time for general reflection and comparisons with other agencies. The professor's draft would be reviewed and discussed by private practitioners, who typically brought a critically important practical perspective, and by top-level administrators such as agency heads, who could add further practical insights, make inter-agency comparisons, and add special public perspectives. The upshot was frequently a work-product drawing upon many different points of view, both practically helpful and commanding general acceptance.

In seeking to answer the question, "Who will regulate the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, 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. And in Australia and the United Kingdom, special councils will advise ministries about needed procedural reforms. Our own nation developed this rather special approach—drawing together scholars, practitioners, and agency officials—to bring 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 per year), it is indeed a pity that, in allowing the Conference to lie dormant for years, we have weakened our federal government's ability to respond effectively, in this general way, to the problems of its citizens.

I have not found other institutions 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 could the Administrative Conference. Congressional staffs cannot as easily conduct the 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 of this is to explain why I believe the Administrative Conference performed a necessary function, which, in light of the modest cost, should have been maintained. I recognize that the Conference was not the most well known of government agencies. But that, in my view, simply reflects the fact that it did 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 that the Administrative Conference was well suited to do it.

I am, therefore, delighted that Congress authorized funding for the Conference last year. I hope the Conference will have sufficient resources to undertake the work it once did. And I hope my views on that work may provide some assistance as the Conference begins again.

Mr. COHEN. Thank you, sir. You certainly have.

Our second witness is Associate Justice Antonin Scalia. He was nominated as associate justice of the Supreme Court of the United States by President Ronald Reagan, assumed that office September 26 of 1986. Prior to that appointment, he was in private practice in Cleveland, Ohio, and served as professor of law at the University of Virginia and the University of Chicago and as a visiting professor of law at both Georgetown and Stanford.

He served as chairman of the ABA section of administrative law and as conference of section chairman. Justice Scalia served as general counsel of the Office of Telecommunications Policy, as chairman of the Administrative Conference of the United States, and as assistant attorney general for the Office of Legal Counsel. He served as a judge on the U.S. Court of Appeals for the District of Columbia circuit in 1982.

Thank you, Justice Scalia, for being here. Please begin your testimony.

**TESTIMONY OF THE HONORABLE ANTONIN G. SCALIA, ASSOCIATE JUSTICE, U.S. SUPREME COURT, WASHINGTON, DC**

Justice SCALIA. Thank you, Mr. Chairman. I am very glad to be here.

As you noted, Justice Breyer and I were here 6 years ago to the day. And to tell you the truth, I was not—well, I was at best guardedly optimistic that on that occasion the Committee would succeed in reinvigorating or reauthorizing and re-funding the Administrative Conference. As I told you then, I thought it was a good idea. I am just delighted to see that it has come to fruition.

I am probably happier than most people at the reemergence of the Administrative Conference, because I had three offices in the executive branch before I went back to teaching. Of those three, two of the agencies had been abolished. I had begun to feel I was something of a governmental Typhoid Mary, and I was afraid the Justice Department would be next, because that was my third job.

So I am delighted to see the conference back. I think it was one of the best bargains, results for the buck, that the government had during the years while it was in existence. It is impossible to tell you or to get you to appreciate how expert the private lawyers were, who donated their time to considering the studies done by the consultants for the conference. And all of that was gratis, of course. The other members of the conference were academics and government officials, usually general counsels.

I have in my prepared testimony described to you some of the accomplishments of the conference. I am sure there is a lot more work to be done, and I share with you the hope that the new conference will improve the administrative process for all of us.

I could not be more pleased at the selection of Paul Verkuil to be one of my successors. Paul was in fact one of the consultants to the old conference, did one of the studies that resulted in recommendations by the conference.

I will just make one other comment, and then do what I really came here for, which is to answer whatever questions you might have.

Justice Breyer mentioned, and I think he is quite correct, that ordinarily these matters of administrative procedure are too technical to attract anybody's attention, and they tend to be under the radar. To tell you the truth, I am not sure that is all bad. One of the things I worried about with the conference was the danger of its being politicized of its studies being directed to helping business or not helping business, that one interest group or another would come to dominate either the conference assembly or the recommendations that were presented to the assembly.

I think that didn't happen during most of its previous existence, and I hope that that will continue, because this is technical stuff. And there is a good, fair way to do it. It should not be done in such a way as to push the substantive results in one direction or another.

And that is all I have by way of introductory remarks. Thank you, Mr. Chairman.

[The prepared statement of Justice Scalia follows:]

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

STATEMENT OF

THE HONORABLE ANTONIN SCALIA

ASSOCIATE JUSTICE

SUPREME COURT OF THE UNITED STATES

AT

HEARING ON THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

MAY 20, 2010

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

May 20, 2010

Mr. Chairman and Members of the Subcommittee:

I am happy to accept your invitation to testify once again about the Administrative Conference of the United States. As when I testified before (six years ago to the day), I am here to offer my perspective on the Conference and its work, not in my capacity as a member of the judiciary, but as the Conference's third Chairman, a post I held from September 1972 to August 1974. Although your focus is of course on the role of the recently reactivated Conference going forward, my prepared remarks will pertain primarily to the period in which I served.

Before discussing how the Conference worked and what it accomplished, let me begin by briefly describing why it was created. Within a few years of the passage of the Administrative Procedure Act in 1946, the need was recognized for expert advice and informed deliberation on how to improve administrative procedure. Several short-lived entities were established to that end—including the temporary administrative conferences convened by Presidents Eisenhower and Kennedy, as well as the Office of Administrative Procedure in the Justice Department. But support soon grew for a permanent independent agency, composed of agency officials as well as administrative-law practitioners and scholars, to study and recommend improvements in the administrative state on an ongoing basis. The Administrative Conference of the United States came into being in 1964 with Congress's passage and President Johnson's approval of the Administrative Conference Act, and it began operations four years later. The Conference's purpose, set forth in the Act, is to enable "Federal agencies, assisted by outside experts, . . . cooperatively [to] study mutual problems, exchange information, and develop recommendations

. . . 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." Pub. L. No. 88-499, 2(e), recodified as amended at 5 U. S. C. §591(1). As President Johnson said when swearing in its first Chairman, the Conference was designed to be "a forum for the constant exchange of ideas between the agencies and the legal profession and the public," and "the vehicle through which we can look at the administrative process and see how it is working and how it could be improved and how it could best serve the public interest." Remarks at the Swearing in of Jerre S. Williams as Chairman, Administrative Conference of the United States, *Pub. Papers* 68 (Jan. 25, 1968).

The Conference's structure and composition were tailored to that objective. The Conference is divided like Gaul into three parts: a Chairman, a Council, and an Assembly. The Chairman is appointed by the President, subject to Senate confirmation, for a term of five years. He is, by statute, the Conference's Chief Executive. His duties include presiding at plenary sessions of the Assembly and at Council meetings and serving as spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. His most important responsibility, however, is (or was when I served) to identify subjects appropriate for study by the Conference, and—if the relevant Committee of the Assembly agrees—to line up an academic consultant qualified to assist in the research. It also fell to the Chairman to seek implementation of Conference recommendations—a task that requires tact and diplomacy. The Conference, after all, has no enforcement powers over other agencies—let alone over the President and Congress, whose action is often needed to turn recommendations into reality. The Chairman was assisted in those days by a small permanent staff, whose duties included providing research and administrative support to the Assembly and its Committees, following and aiding

the work of consultants, and helping the Chairman in securing implementation of recommendations.

The statute establishes no eligibility requirements for the Chairman, but those who have held the post (excluding those who served on an interim or acting basis) have come from one of two places. Most came from academia. Like both of my predecessors (Jerre Williams, who was at the time of his appointment a professor at the University of Texas Law School, and Professor Roger Cramton, then of the University of Michigan Law School), as well as the newly appointed Chairman (Paul Verkuil, of Cardozo Law School), before my appointment I had been a law professor, at that time on leave from the University of Virginia Law School. The remaining chairmen, I believe, came straight from high-level government service in an agency or the White House.

The Council of the Conference is comprised of the Chairman and 10 other members appointed by the President for three-year terms, no more than half of whom may be employees of Federal agencies. Its functions resemble those of a corporate board of directors. It can call plenary sessions of the Conference and set their agenda, recommend subjects for study, propose bylaws and committees, receive committee reports and recommendations (and forward them to the Assembly with its own comments), and exercise general budgetary and policy supervision.

The Assembly consists of the Conference's entire membership, which can now range from 75 to 101 members. The Chairman and the Council account for 11 of that number. The rest fall into several groups: the chairman of each independent regulatory board or commission (or an individual designated by the board or commission); the head of each Executive Department or other administrative agency (or his designee) named by the President; with the Council's permission, additional delegates from independent or executive agencies; members

picked by the President; and up to 40 public members, who are appointed by the Chairman with the approval of the Council for two-year terms, who must comprise between one-third and two-fifths of the total membership, and who are chosen from among the practicing bar, prominent scholars in the field of administrative law, and others specially qualified by knowledge and experience to deal with matters of federal administrative procedure. Although as a practical matter the Chairman and Council managed the Conference's day-to-day work, the statute endows the Assembly with "ultimate authority over all activities of the Conference." 5 U. S. C. §595(a). Its primary responsibility, of course, is the adoption of Conference recommendations; it alone has that power. The Assembly can also adopt bylaws and regulations to govern the Conference's procedure, and can create standing committees to study particular issues. The names and number of the committees varied over time. During my tenure there were nine: (1) Agency Organization and Personnel, (2) Claims Adjudications, (3) Compliance and Enforcement Proceedings, (4) Grant and Benefit Programs, (5) Informal Action, (6) Judicial Review, (7) Licenses and Authorizations, (8) Ratemaking and Economic Regulation, and (9) Rulemaking and Public Information.

The Conference pursued its mission of improving the efficiency and fairness of the countless varieties of federal agency procedures primarily by studying problem areas and making recommendations to the President, Congress, or the Judicial Conference. As in Congress, the work really began in the Conference's committees, which were of necessity the real workhorses. The committees met periodically to direct and supervise research by academic consultants and by the Conference's professional staff. Based on that research, the committees framed proposals for the Assembly to consider at its annual meetings. Once a study or tentative recommendation was prepared, it was circulated to the affected agencies for their reaction, after which it was

reexamined by the committee in light of the comments received. After final committee approval, a proposed recommendation would be considered by the Council, before being forwarded to the Assembly for final action in plenary session. The Assembly could adopt the recommendation as proposed, amend it, refer it back to the committee, or reject it entirely.

Despite the Conference's lack of leverage in encouraging reform—it has, in the parlance of administrative law, only the "power to persuade," *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)—its efforts met with considerable success over the years. All told, it made roughly 200 recommendations from 1968 to 1995, many of which were eventually implemented in whole or in part. By one count, as many as three-fourths were implemented to some degree. See Katzen, *The Role of the Administrative Conference in Improving the Regulatory Process*, 8 Admin. L. J. Am. U. 649, 665 (1994). Some of its proposals were ultimately embodied in legislation. A few early examples include Public Law 94-574, which adopted Recommendation 69-1 to abolish the doctrine of sovereign immunity in suits seeking judicial review of agency action; the Parole Commission and Reorganization Act of 1976, P.L. 94-233, which implemented Recommendation 72-3's call for a right to counsel in parole proceedings, and other procedural guarantees recommended by the Conference; and the 1974 Freedom of Information Act Amendments, Pub. L. No. 93-502, which adopted many of the Conference's suggestions for improving FOIA. Some recommendations were implemented in more than one statute. The Conference's encouragement of according agencies the authority to impose civil money penalties has had a significant (and in my view laudable) impact, and many separate statutes implemented the Conference's recommendation regarding the appropriate standard of pre-enforcement judicial review of rules of general applicability. (Courts too looked to that recommendation for guidance. See *Ass'n of Data Processing Service Organizations, Inc.* v. *Board of Governors of*

*Federal Reserve System*, 745 F. 2d 677, 684 (CADC 1984); *Home Box Office, Inc.* v. *F. C. C.*, 567 F. 2d 9, 57 n. 130 (CADC 1977).) The Conference's success continued in later years. In Public Law No. 100-236, Congress adopted the Conference's proposed solution (in Recommendation 80-5) to the "race to the courthouse" problem in appeals from agency action. And the Administrative Dispute Resolution Act, Pub. L. No. 101-552, the Negotiated Rulemaking Act, Pub. L. No. 101-648, and several other important statutes embodied Conference proposals.

Other recommendations were implemented directly by the affected agencies. During my tenure, these included among others the Justice Department's nearly verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act (Recommendation 71-2); the Civil Service Commission's publication of proposals substantially applying the Conference's recommendation concerning adverse actions against Federal employees (Recommendation 72-8); and the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures (Recommendation 72-3). Agencies that used publicity as a regulatory tool also adopted procedures conforming to the Conference's recommendations for protecting against unfair publicity that could harm a private party. And recommendations regarding procedures for resolution of environmental issues in licensing proceedings were embodied in regulations adopted by five of the six affected agencies.

Still other recommendations were effectively implemented through a combination of congressional and agency action. For example, the Department of Treasury agreed to carry out most of the provisions of Recommendation 73-4, which called for increased access to customs representatives, greater disclosure, and written findings; and 1974 legislation implemented the suggested improvements in coordination between Customs and other relevant agencies. Of

course some recommendations suggested not what to do, but what to avoid—for example, the recommendation cautioning against Congress's imposition of complex rulemaking procedures, which has been followed with few exceptions.

The Conference's contributions, moreover, extended beyond formal proposals for legislative or administrative action. As Chairman, I testified before Congress on legislation pertaining to the Freedom of Information Act, the procedures of the U. S. Board of Parole, the establishment of a Consumer Protection Agency, amendments to the Federal Food, Drug, and Cosmetics Act and the Fair Packaging and Labeling Act, and the opening of the administrative process to the public. The Conference responded to numerous informal requests for advice from congressional committees and committee staffs on a wide variety of procedural matters.

Agencies also sought the Conference's informal advice and assistance. Sometimes they did so at Congress's insistence. See, *e.g.*, 5 U. S. C. §§504(c)(1), 552b(g). But they often did so on their own, particularly in connection with their initiation of new programs or procedures. I regarded this sort of pre-implementation advice as especially beneficial; it is always much better to help get things started on the right foot than to criticize the defects of a program already in operation. During my first year alone, the staff and consultant resources of the Conference were called upon for advice with respect to several programs under development—for example, the Department of Transportation's program to facilitate public participation in their rulemaking process, and the Justice Department's congressionally mandated study into the feasibility of a special court for environmental matters. Especially noteworthy was the study which the Chairman's Office prepared, at the request of the Office of Management and Budget, covering the procedural provisions of what was then the most significant piece of regulatory legislation that had been adopted in years, the Consumer Product Safety Act. This study was completed

before the members of the new Consumer Product Safety Commission had yet been named, and was therefore a prime example of applying the Conference's expertise at the point where it is most useful—before procedures have been adopted and institutional commitments made. The Conference also conducted seminars for agency attorneys, emphasizing those aspects of administrative procedure that had special relevance to the attorneys' agency, but also refreshing the attorneys' recollection of basic administrative law principles to which they had had no systematic exposure since law school.

The Conference also conducted studies that, while not producing recommendations in and of themselves, were useful in enabling particular administrative functions to be understood and evaluated. An example of this is the study completed during the first year of my chairmanship by the Committee on Informal Action, systematically examining, for the first time, the agencies' practices in providing advice to the public. Or the study by the Chairman's Office concerning the various means by which agencies handle citizen complaints.

One way of judging the worth of the Conference without becoming expert in the complex and unexciting details of administrative procedures 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, a number of academics who served as consultants to or members of the Conference have become household names in the arcane world of administrative law; during the years of my involvement, for example, Professors Jerry Mashaw, Richard Merrill, and Peter Strauss were each consultants. The practitioners who have served as members have also been, by and large, prominent and respected attorneys in the various areas of administrative practice.

What accounted for the Conference's success during its previous incarnation? No doubt the caliber of scholars, government officials, and private practitioners who took part in its

work—most on a *pro bono* basis—went a long way. But several other attributes stand out, in my view. Its permanence was pivotal. Longevity not only preserved institutional memory—a valuable commodity in a world of constantly changing administrations and even faster changing personnel—but also enabled the Conference patiently to pursue implementation of its proposals. Equally critical was the Conference's access to other agencies' information—due to its status as a Federal agency, its composition of officials from many or most of the agencies it studied, and a statutory provision requiring agencies to share information if not barred by another law, 5 U. S. C. §595(c)(3). No private think-tank or individual scholar could count on the cooperation the Conference enjoyed; agencies, after all, have no incentive to go the extra mile (or to travel it at more than a snail's pace) in responding to outside requests from groups scrutinizing their work. The Conference's independence from other Executive Branch entities also avoided injecting the agency into longstanding interagency feuds, and helped to preserve its image as an impartial observer seeking only to improve the administrative process, not to arrogate more power to itself. And success, of course, breeds success: The respect the Conference earned over time for its careful work, and its corresponding ability to attract able members to volunteer their time (which would otherwise come at an extraordinary price), enabled it to continue its successful course. I hope the Conference enjoys equal or greater success in this next phase of its existence.



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Mr. COHEN. You are welcome, Justice Scalia. And we appreciate your testimony and for your being here.

We will now begin the questioning. And I want to remind my colleagues that our witnesses are guided by Canon 3 of the Code of Conduct for United States Judges, which advises the judiciary to

avoid making public comments with respect to the merits of pending or impending actions. We should endeavor to respect those constraints and limit our questions to the subject matter of our hearing. Adherence to this guidance will promote greater dialogue at this hearing and encourages the judiciary to participate in future hearings. No questions should be entertained that relate to any particular cases or tennis.

Justice SCALIA. Wouldn't answer anyway, Mr. Chairman. [Laughter.]

Mr. COHEN. I will begin by the first volley myself.

Justice Breyer, you refer to practices that other countries used to regulate the regulators. Are there lessons you believe ACUS might take from some of these international examples?

Justice BREYER. It is interesting. One of the things I think maybe the judicial system and maybe the administrative system could think about is in—sometimes when highly technical matters, of which there are more and more—scientific matters, for example, does this kind of brake work properly, or does this kind of, you know, device have certain amount of polluting qualities or danger of product, et cetera—it is awfully important to get good science. And there are systems where the lists of sciences from the academies, say, in different European countries will be made available to judges so that the judges can call their own expert from those lists.

Now, I suspect that probably some agencies are perfectly able to do that, and other agencies are not quite as able to do that or quite as used to doing that. I am 6 years, at least, out of date on this, but one of the things that I have looked forward to in the Administrative Conference is when you get different groups of staff and agency heads and private lawyers, who know something about several agencies, say, in that respect, they start talking about it, and they do studies, and one will say, "Well, we couldn't get the right experts on this," and some will say, "Well, we could."

And what was the difference and how did you get them? And then suddenly you see in one of the heads of one of the administrations the look which suddenly says the light is dawning, which means he has learned something from somebody else. That may not be quite the right topic, but a lot of these things are international.

And what your suggestion puts into my mind, but it is more important to have in Paul Verkuil's mind, is in today's world it isn't such a bad idea to get someone from the EU or to get someone from somebody else's—from some of these other countries to ask, "How are you doing this thing—you, who have the same kinds of problems—and what are your procedures?" And there is some interchange there internationally, which I would be pretty interested in finding out if the Administrative Conference can look to those things, too.

So that is what your question triggers in my mind when you ask it.

Mr. COHEN. Thank you, Justice Breyer. Are there are issues that you hope that ACUS will prioritize this year?

Justice BREYER. That is up to them. And I think that an age-old question, and I know you are working on this, and one of the prob-

lems is there is something now, I think, called quasi-final rules or something. Does that ring any bells—a quasi-final rule, or what is it called? An interim final rule, where there is less procedure.

And I imagine that one of the things they are going to go into is how does that work? And how does the agency—people in agencies, in my experience, and I am sure it is still true, they might be given a job like set a consumer-oriented labeling rule for tires. Well, they don't have anyone in their agency who knows what the right rule is, and they have tire companies who will tell them, "Our tires better, because it goes faster and doesn't skid on the straightaway." And somebody else will say, "No, no. It is the curves that matter." "No, it is the rain—rain. It has got to hold during rain." And so they get lots of conflicting advice.

Well, in those circumstances there is likely to be no absolute answer. There is likely to have to be a weighing of different factors. And they will want to get some people in who aren't just the staff working on it, nor just the interest groups that are talking to the agency. How? When? Under what circumstances? How do you prevent this process from going on forever? How can we do better and get to the right rule?

Well, I am sure those problems are there double, and they haven't met for 6 years. And so from my outside position on this, and just seeing cases that are failures, because that is what comes to us as a court—somebody is saying it is a failure—I would say that that is a huge area, which they will, I suspect, want to go into.

And then I go back to your first question and say, let us look what they are doing on this in the EU. Let us look what they are doing on this in other countries. And maybe we will all learn something, because that is the bottom line, I think, for ACUS. Can we all learn something? And quite often, you do.

Mr. COHEN. Thank you, sir.

Justice Scalia, you are former chair and you have now got another successor in Chairman Verkuil. As he begins his chairmanship, would you be kind enough to offer him some suggestions or recommendations on how we should proceed?

Justice SCALIA. Do good and avoid evil—— [Laughter.]

The only thing for sure.

Well, of course, the first thing that Chairman Verkuil is going to have to do is to identify talented workers, which is by and large academics who are interested in the field of administrative law and can do out and go out and do the legwork that is necessary to any serious study of administrative procedures. Fortunately, he is in academia, as most of the chairman of the conference have in the past been, and I think he will be able to identify them readily enough.

As to particular subjects, that is—frankly, the hardest job of the chairman is to figure out what to study. What is it that really needs doing? I agree with Justice Breyer that surely one of the areas focused on—it is always focused on—is rulemaking, especially since the courts' manner of reviewing rulemaking has seemingly changed in recent years.

I am not as sanguine as Justice Breyer is that we are going to learn much from foreign countries. I have no antagonism toward studying the best around the world, but—I used to teach compara-

tive law—but, frankly, I don't think administrative law is an area where we have much to learn as opposed to teach, because I think we have probably—and probably you would agree, wouldn't you, Justice Breyer?—the most open and efficient system of administrative law in the world. I don't know any country that—well, many of them don't have a rulemaking, basic rulemaking system of the sort that we do.

Other advice for Chairman Verkuil. No, I think that is about it. He has to select good people—I don't know—and good members of the conference, of course. It is up to the chairman to appoint the lay members of the conference. And that, again, requires a good deal of judgment. But I am sure Chairman Verkuil knows where the good ones are.

Mr. COHEN. Thank you, Mr. Justice. As you might have noticed, our lighting system is not without the ability to fail, and—but I know my 5 minutes are up, and so I will recognize the Ranking Member of the Subcommittee, Mr. Franks, for his 5 minutes.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And again, thank both of you.

Justice Scalia, if it is all right, I will begin with you. And I want to certainly defer to the restraints that you have, and so if I get caught sideways, just ignore me, okay?

In the Subcommittee's 21st Century Project report, we identified several issues for study and potential reform to make judicial review more effective. And so I guess I ask you what do you think are the top challenges the judiciary confronts in providing effective judicial review of agency action?

Justice SCALIA. Currently—and there are some "Law Review" articles that will substantiate this—currently, part of their problem is to know when it is that they should and when it is that they not defer to the judgment of the agency. It is really—the answer to that question is quite vague, and maybe that is our fault, but that is the reality. That is the biggest problem that the lower Federal courts face—and for that matter, our court. I am not sure that I know the answer either.

Mr. FRANKS. Justice Breyer, do you have anything to——

Justice BREYER. Well, it could be a problem for you. I think it is a very, very big problem. It sounds technical but, look, we live today in a world where 300 million Americans want a say in what happens. And this is the difficulty. The same is the difficulty for every one of us. It is called time. It is called time is limited. We have a lot to do, and a lot of these decisions require some degree of expertise.

So people know what they want. They want a cleaner environment or they want better health care, whatever those things are that they vote for. And they are put at a general level. Now, you, then, legislate at a pretty general level. But you have to decide to what extent you want the agency to write the details. And if you give them too much power, well, then you have taken power away from the ordinary American. But if you give them too little power, they won't be able to achieve those general objectives. You don't tell the Army what hill to take.

Mr. FRANKS. Yes.

Justice BREYER. So, ultimately, you are trying to make that decision. But you don't focus on it when you write the bill.

Mr. FRANKS. Yes.

Justice BREYER. So we have to interpret these statutes on an issue that is inevitably important to you, but you haven't told us. And that, I think, as Justice Scalia said, is a very difficult problem, because it comes down to the question of how much we interfere with the agency.

Mr. FRANKS. Mr. Chairman, I don't know about trying to coalesce many different voices. That sounds like something Members of Congress might be more challenged with than members of the court, but that is just a thought.

Justice Scalia, could ACUS help, do you think, identify the most promising legislative actions that could help the judiciary in the area that—the question I asked? Do you think that is something that they might focus on or have any thoughts on?

Justice SCALIA. That is one of the authorized functions of the agency is to make recommendations not just to the agencies, to the President and to the courts, but to the Congress. And some problems in administrative process could not be fixed except with the cooperation of Congress.

Perhaps the most significant change made by the old Administrative Conference was eliminating the doctrine of sovereign immunity in the review of administrative actions. The Justice Department used to have canned briefs, you know—give them the sovereign immunity brief, you know. You just pull it off the shelf and file it.

And with the help of Congress, the statute was amended to make it very clear that sovereign immunity does not apply to challenges to administrative action where you are not seeking money damages, but you are seeking to get the agency to do it right. So, yes, absolutely.

Another area that occurs to me that—well, I don't want to get sideways with Verkuil. I don't know what Verkuil wants to do. But what I would be interested in some statutes Congress requires the agency to act by rulemaking. It says the agency shall issue rules on this or that. In other areas the Congress does not require the agency to act by rule, but authorizes the agency to act by rule. And in yet other areas, Congress says nothing about it. And so the question is does the agency have inherent rulemaking power or not.

The courts have held that an agency, where it has power to act by rule or by adjudication, does not have to act by rule. It can just have case-by-case hearings and make its law through those case-by-case hearings, just the way the courts do. I mean, we don't have rulemaking, but we, in effect, make law by case-by-case.

Now, people have often commented that there are some areas where that case-by-case process is not good, and maybe the agency ought to be required to act by rule. If there was one area where I would look into as to whether Congress should take some action, it might be in that group.

Mr. FRANKS. Well, I guess my time is up, but can I toss this last one out, Mr. Chairman, to Justice Scalia?

I wanted to see if you had any follow up on Justice Breyer's comments related to how clearly Congress writes statutes. And I am

not trying to draw you into a war here, but do you have any thoughts along those lines? I mean, is there things you could offer Congress in the clarity of our statutes?

Justice SCALIA. I am much too diplomatic, Congressman, to be drawn into that subject.

Mr. FRANKS. Yes, sir.

Well, it sounds like the gentleman may know the difference between a judge and a legislator as well, so that is great.

Thank you, sir. Thank you.

Thank you both.

Mr. COHEN. Thank you, Mr. Franks.

I now recognize the distinguished Chairman of the full Committee, the dean of the Judiciary Committee, and my leader, John Conyers.

Mr. CONYERS. Thank you, Chairman.

What I think we have here is some amazing agreement over the importance of this conference, a welcome to a new chair. And I think that we are going to have to have the time spent in which the conference starts acting for us to draw conclusions about what we think about it.

We are all in agreement about its undervalued importance. We think it is on the right track. It is re-stimulated. And I think from that point on, we will have to see what they actually do before we begin to volunteer recommendations in terms of process or even substance. And so I think this gets us off to a good start.

Rulemaking is extremely complicated, and for the Congress to be relieved of that task and to have it vested in this conference is probably a very good thing, because this leads to consistency and makes it much easier for us to do the substantive legislation.

Now, is there some area you might think that we might be looking at before the new chairman really gets in the saddle?

Justice SCALIA. I would give him a chance to get his footing rather than push him in one direction or another. You know, he is likely to take a suggestion by Congress as a command, and if I were you, I would—he is a good man, and I would let him survey the territory and maybe come to you with the suggestions, and then you can pick the ones that seem the best.

Mr. CONYERS. And after all, Mr. Chairman, we can have him come before the Committee from time to time himself.

Now, there is a subject that I am anxious to raise with you, but every member of the staff has recommended strongly that I did not raise it, that it fails the minimum, the warning, the admonitions of the Subcommittee Chair.

Justice SCALIA. Mr. Chairman, we are both friends of Elena Kagan, and I don't—— [Laughter.]

I don't think we are willing to go beyond that. [Laughter.]

Mr. CONYERS. Well, I am sure you will be relieved to know that that was not what I had in mind. [Laughter.]

But I think that these kinds of discussions between the two parts of the Federal system should be encouraged. You know, after all, there are two levels to every subject matter. One is the substantive part, the matter, the entitled matter that we are considering, but there is another psychological area, and that area is the personal feelings about human beings that we all have toward one another.

And what that means to me is that if you really understand if you really have a disagreement on the substance that is not personal and does not go beyond the agreements or the differences that exist, we are all in a much better position to come to a probably more reasonable conclusion when we are operating on that level.

And all too frequently in the only system I know, a democracy like this, it is so easy to move from the substantive to the subjective. And once that happens, again, just from my experience, that affects the reasoning processes about the substantive. And it is for that reason that I applaud the Chairman and his ranking colleague for doing what we are doing and urge that wherever it is appropriate that it be engaged in more.

I have come to appreciate it at the opening of every one of the judicial conferences, the Chairman of both Judiciary Committees and their Ranking Members are invited to join the chief justice with some of the leaders from the various circuits. And it has come to be something that I look forward to.

It is not a long time, but you can talk about whatever you want, and the views, of course, of the two Chair and the two Ranking Members, their presentations are all unrehearsed and are quite different from each other in terms of the subjects that they pick as well as their point of view on the subjects that they pick.

And we think that that practice and this practice both make it more likely that regardless of whether our agreements or disagreements result, that it is done in a more thoughtful way and a less subjective way. And for that I am very grateful that you have chosen to come back again and again to be with us. Thank you for that.

Thank you, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Chairman. And while we——

Justice SCALIA. I agree with that.

Mr. COHEN [continuing]. We can't violate Canon 3, you did volunteer, and that opens the door to guessing what Chairman Conyers' question was by admitting that you both were friends of Ms. Kagan. Would you like to continue on with other thoughts of what his question might have been? [Laughter.]

Justice BREYER. But I thank you for the Chairman's remarks, too, and because I couldn't—we live in an institution where we disagree about a lot of things, and we also agree about a lot of things. And by keeping our discussions always at the substantive, professional level and doing our absolute best not to make them subjective or personal, we remain good friends, and we discover that in a lot of cases, which could go either way, you know, it is just much easier to reach agreement. So your remarks struck a chord in my mind, for which I thank you.

Justice SCALIA. I agree with that. Somehow the press sometimes portrays the Supreme Court as nine scorpions in a bottle, you know, all that. That is not what we are at all. We are all friends. And how close our friendship is has nothing to do with how much we agree on particular substantive issues. And the fact that we are friends makes it easier to listen to one another on the substantive matters, which is what you are saying, Mr. Chairman.

I wish that we had more contact with other people on the Hill. I think the world was much different when this was a smaller town, when it was a one-company town and all of the social interaction was essentially between members from the three branches. My colleague here has a lot of contacts on the Hill, having worked there for a long time. He has friends on the staff, and I am sure with the members.

I don't have that advantage and, frankly, I wish that I did know more people on the Hill and associate with them not just in formal hearings like this, but even socially. And I don't know—maybe there ought to be a Take a Congressman to Lunch Program. [Laughter.]

Mr. COHEN. Where? [Laughter.]

Thank you, sir.

Mr. Coble from the great state of North Carolina?

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, good to have you both on this side of the Hill. Gentlemen, from your past experience with the administrative council—Administrative Conference—what are some of the important—strike that. What are some of the significant difficulties that it faced in identifying and making effective recommendations on some of the important areas for administrative law?

And I will be glad to hear from each of you.

Justice SCALIA. Well, I would have a better perspective on that. Sometimes you would find an agency that was very reluctant to take any advice or guidance—not often, but sometimes. And that would make it hard to get our recommendations adopted.

Ordinarily, though, since the general counsel of that agency would normally be part of our operation, and since the agency would have cooperated with the whole study, that is not ordinarily the problem. But that can be one problem.

And needless to say, getting Congress, if our recommendation is one for legislation, you know how easy it is to get legislation through, right?

Mr. COHEN. Lots of things pass the House, sir. [Laughter.]

Mr. COBLE. Justice Breyer, do you want to be heard further?

Justice BREYER. No, I suspect that the problem on something like that is to say it is a problem for many of us, and you might have it. It is a question of where can you be effective.

And, for example, if you have a—there are a large number of different subjects that you personally as a legislator, wherever you are, might deal with. And you are trying to look to see, well, where can we make a difference here? And that depends on what the cooperation is from other people. And also you would like it to be something significant.

And so I think the Chairman, who has lots of experience in this area, will have to see, well, let us see what those agencies—what are they being bothered with? And where do we think we can make some progress on this? And then do we find the academic?

You know, I was an academic for a long time, and just being there is a strong temptation to just sit in your office. But in this area—and it is wonderful for the academic—they will go out and talk to people who actually are involved in the process and would actually have some experience. And so their work will be better.

You have got to get the right academic, and you have got to get to understand from the practitioners what they want and need, and you have to understand what is likely in the agency. So there we are, that—just anyone who is trying to be effective in an area.

Mr. COBLE. Let me put one more question to each one of you. One key area of reform the Subcommittee identified in its 21st Century Project was electronic rulemaking. And can you all identify ways in which Congress both promote a rulemaking and better ensure that documents agencies make electronically available are redacted to protect all personal information? That is a long question, but could you illuminate on that?

Justice SCALIA. Well, ordinarily, the agencies' rulemaking process is a written process now. Whether it is written on a typewriter or on a word processor or electronically, it doesn't seem to me to make a whole lot of difference. Where the new electronic age might make a difference is the agency posting its proposed regulations so that they will be available to everybody readily. That will be a great help.

But as far as the receipt of recommendations, I, you know, I don't know that it would—going to make a whole lot of difference whether they do it electronically or by mail. It is something the conference ought to look into. What difference does the new electronic age make on the agency's rulemaking?

Justice BREYER. Because I suspect it will. There we were pleased at the court, because the Congress provided a year ago a small amount of extra money to put our proceedings instantly online. So everything goes instantly online, the opinions, within a matter of minutes. And the result of that is we got about a million hits a day—I mean, huge. And that to me is wonderful because, you know, people can instantly find out what it is that we have done or are saying, and so forth.

But if you are on the opposite side, of course, if you can have a million or 2 million or 10 million hits, i.e., you could have a 10 million comments, and people, if they can, they might, and suddenly you have got to figure out how do we separate the wheat from the chaff here. And then people can get annoyed if they feel they didn't get a good response, and there are perhaps millions of people who—you can't answer everybody. You answer the kind of comment, not necessarily the individual.

Well, I think it would be pretty interesting, as Justice Scalia says, to find out what is going on, what could go on, what do we put online, how do we separate wheat from chaff, and so forth.

Justice SCALIA. Well, I mean, that is a good point that Justice Breyer makes. Since the agency under normal rulemaking procedures must consider all of the comments received, you don't want to make it too easy to give comments to the agency. I mean, you don't want to sift through a lot of garbage that has come through on the Internet. So maybe it is better to leave the comment process in writing. But that is something that I think the conference ought to look into.

Mr. COBLE. Thank you, gentlemen, for being with us.

I want to beat the red light so the Chairman won't—you won't keelhaul me. Yield back, Mr. Chairman.

Mr. COHEN. Thank you, Mr. Coble. Never would happen.

Have either of you all ever considered tweeting or twitting?

Justice SCALIA. I don't even know what it is, Mr. Chairman, to tell you the truth. [Laughter.]

I have heard it talked about, but, you know, my wife calls me Mr. Clueless. I don't know what you—with tweeting.

Justice BREYER. Well, I had no personal experience with that. I didn't know how it worked. And then, remember when they had disturbance in Iran?

Mr. COHEN. That is true.

Justice BREYER. Well, for my son said, "Go look at this." And, oh, my goodness. I mean, there were some twitters, they called them. But there were people there with photographs as it went on, and I sat there for 2 hours absolutely hypnotized. And I thought, "My goodness, this is now for better or for worse." I think maybe in many respects for better—in that instance, certainly.

It is not the same world, and it is instant. And people react instantly. And there we are. I will just say there is quite a difference there, and it is not something that is going to go away.

Mr. COHEN. I would now like to recognize a former district attorney general and a long-term serving Member of this Committee, a man who has been hypnotized on several occasions by many different current events and national events, and a lame duck, so you never know what he will say, Honorable Bill Delahunt.

Mr. DELAHUNT. I, too, shall be diplomatic, Mr. Chairman. I can't really add anything to what has already been said other than to extend a note to the both of you of gratitude for providing impetus, if you will, for the resurrection of the conference. I think you both deserve unrestrained praise for again bringing back to life what will be a useful tool. And this will be part of your collective legacy.

And I guess my one observation would be that we hear much about accountability and transparency in government, and government being out of control. This is a very significant vehicle to ensure accountability, another check that, if you will, is under the radar screen. Even with your presence here, one doesn't see a mass of cameras here today. There might be one or two members of the press, but this kind of—the availability of the conference, really, I consider something of immense value in terms of how government functions.

But I would hope, with the advent of the new leadership, and we all welcome the new director here, there is an understanding that it is important to have a profile. Maybe I can make this into a question to see whether you concur with this judgment. But we ought to be able to, you know, demonstrate to the American people that this is—I think maybe it was you, Justice Scalia, that said this is a good bargain. This is a real good investment.

And maybe within the conference itself there is an opportunity to establish in very real and practical terms the cost savings that are effected by the work of the conference over an extended period of time. Do you have a comment?

Justice SCALIA. Yes. You know, a good way to do it would be to have the private lawyers keep track of the hours that they expend in committee meetings and in the assembly, and then to charge 500 bucks an hour or whatever their normal rate is, and add it up and

see what it comes to at the end of the year. You will find that you are getting an awful lot of very——

Mr. DELAHUNT. I am not even talking about those kind of savings. What I am talking about is the benefit of the recommendations——

Justice SCALIA. That is a little——

Mr. DELAHUNT [continuing]. In terms of the functioning of government.

Justice SCALIA. That is a little harder to quantify. I mean, that is why most of this stuff is under the radar. It is hard to quantify most of it.

Mr. DELAHUNT. Really?

Justice Breyer?

I mean, I would encourage it, because I think that, you know, much of what we do here, really, its importance and significance goes entirely unnoticed. And this would be an opportunity to say to the American people government is working. It can function in an efficient, effective way.

And here's the bottom line. Now, maybe we have to guess somewhat. Maybe it has to be a range, but I see it as a small step in terms of restoring what clearly is a—I don't want to become, you know, I don't want to indulge in hyperbole here—but restoring some confidence in government, that it can function and it can work, as far as the American people are concerned.

Yes?

Justice BREYER. Congressman, I am glad that we are hearing you ask that. It might be on some things. For example, suppose you change some of these processes so the bottom line, which it would be a rule coming out, comes out more quickly. Well, there you can make an estimate with that, because a longer time takes a lot of money. And then you could see there's some measurement of satisfaction.

And there might be ways that Sally Katzen—I don't want to put her on the spot, but she has been over running OIRA. And in OIRA they have ways in OIRA of measuring that they save the country X billion dollars, for example. And some of what the Administrative Conference, but not all, would lend itself to that.

And then how many people actually file court cases as a result of the rule? If, on balance, fewer people do, because there is greater satisfaction, that might be quantifiable, too. So I suspect with some of the things that there will be some methods of quantifying some of them as minimal savings, and maybe more. And I think that might help.

Justice SCALIA. The conference publishes an annual report—I am sure it will continue to do that—which tries to set forth the most important recommendations it has come up with in the previous year and also the most important accomplishments of prior recommendations from the previous year. And I am sure that will continue, but I am also sure that it will not make the front page of the Washington Post.

Mr. DELAHUNT. Right.

Justice SCALIA. Most of this stuff is very incremental. It is very technical. It is hard to grab the public's attention with it.

Mr. DELAHUNT. Yes. Thank you, gentlemen.

Mr. COHEN. Thank you, Mr. Delahunt.

I now recognize the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

Thank you, Justices, for your testimony here and your engaging response to the questions that have been offered by the members of this panel. I happened to notice that there were 13 people that came through the gallery here that had been in my office within the last 2 hours. They are quite interested in the dialogue that is taking place here today, and as am I.

And I am wondering—this is kind of a personal curiosity—how broad the comments might come from the conference on when we are looking at comments that would go in on the executive branch of government, certainly, and the rulemaking process. Would those comments also have the view from the judicial branch and of the legislative branch?

Justice SCALIA. I am sure that we never—well, I do not recall during my tenure as chairman, nor am I aware that during any other chairman's tenure, views were requested from the courts. I am not aware that that ever happened. And I am not sure—I am unaware of soliciting views from the Congress either. When Congress had views, I am sure it made them known, but I don't think we have solicited them.

Mr. KING. Thank you.

Justice Breyer?

Justice BREYER. In the Administrative Conference itself, which is really not the rulemaking body, but it is considering the rulemaking procedures, for example, of other agencies, I was the judicial liaison. So there there was a method of finding out what judges thought of the processes that they were considering.

And also from time to time there were people from Congress, it is my recollection. And I know that Congress has often provided a comment on rulemaking by different agencies, it used to be, whether it was EPA or other things. It is rare that the judiciary will do that.

Mr. KING. Well, here is what brings about my curiosity and within this context that as rules are proposed by the agencies, if the conference is taking a look at those rules before they have the force and effect of law, they—and they are perhaps making a recommendation as to looking at it from all three branches of government, perhaps an evaluation of where constitutional problems might arise, or in the legislative branch—now, let me say that that would be the judicial branch—the executive branch on whether and how the executive branch might administer these rules, and maybe recommendations to the legislative branch as well as far as the input that might come from the public on the policy side.

I bring all of these up because I watch us pass legislation here that turns into rules that have the force and effect of law, and once it leaves the Congress and goes to the President's desk, it is completely out of our control, and yet our constituents have to live with the consequences.

And so I am looking for a way that—I have in the past introduced legislation, and I am currently an original co-sponsor of legislation that the lead sponsor on it is Congressman Davis of Kentucky, H.R. 3765, which the legislation that I introduced requires

all the rules to come before Congress before they have—and they can be voted in block or separated out and amended, but before they have the force and effect, so that Congress could vote them up or down.

And it seems to me that if we could pass the legislation of that type in this Congress, that would allow all of us with our 306 million constituents to have input sorted through each of our Members. And then that kind of input could go to the conference to be evaluated and perhaps be coupled with a recommendation before we would vote on such rules before the Congress.

And I see Justice Scalia with an answer to that idea.

Justice SCALIA. Please, please don't do it, Congressman. [Laughter.]

We didn't, and I don't think we should, get into the substance of rules. I think it would be the kiss of death for the Congress to have it review the substance of agency rulemaking.

The only thing we look to, and that is why it is so—what should I say—so unpopular and dull and under the radar, all we look to are the procedures that the agencies use. They may come out with real garbage, but that is none of our business. That is your business, I understand, but it is not the conference's.

And I think if you tried to make it the conference's, it would alter the character of the organization enormously. I think it would ultimately be ineffective, because it would inevitably become politicized, the substance, you know, getting into what people favor or don't favor, whereas procedures are pretty much, you know, people—but whatever procedures are passed, efficient, fair, you can get people to agree on those things. But when you get into the substance, you are going to politicize. We have never done that in the past, and I hope that that that won't happen.

Mr. KING. Justice Breyer?

Justice BREYER. It is a very big topic with a history. And I would bet if you go back a hundred years, you will find people with the same concern and a hundred years from now, because your concern is, well, we have to delegate a lot of authority to the President or to the agency, and then we really don't have much of a check on how they exercise it.

And one of the ways of solving that for a while was something called the legislative veto. And there was a two-House veto, and there was no one-House veto, and then in a case called Chadha, which was decided before I was on the court, the court said that that is unconstitutional. I didn't do it, but the court——

Justice SCALIA. I did. And I wrote one of the briefs in the case.

Justice BREYER. Yes.

Justice SCALIA. Entirely correct.

Justice BREYER. I am sure it was. I wasn't there, so I don't——

And then are there ways of replicating procedures like that? Well, that is a big question and difficult to do, and so I will leave you with the problem. But I will note, yes, of course, it is a problem.

And by the way, interestingly enough, there have been complaints in a famous article written by Lloyd Cutler years ago that just as you are in the position of, well, we give this power to this agency and then we don't know what they will do with it and we

have no check, so is the President, said Lloyd Cutler, and because he actually doesn't run the agencies, and he has limited time, and how does he bring them into a check?

Hence, OIRA. Hence, OIRA, in an effort to do this, and this is bipartisan. They have different names under different Presidents, but it is the same effort. And now you are trying to figure out a way how to do that in Congress, and you do it some with hearings, you do it some with budgets and so forth. But so I won't say don't do it——

Mr. KING. But I——

Justice SCALIA. I would say yes——

Justice BREYER. You know, good luck, and it is important——

Mr. KING. I mean, my comment was really in an advisory capacity on this, and I think in the end we could agree that this default needs to go back to the voice of the people as heard by the Members of Congress, and it is our responsibility in the end to take care of that here at——

Justice BREYER. Because what I had said—it is a very interesting topic for me, because I—what I said before was not a criticism of Congress. But I don't know how I would write a statute which says we want to give the agency just this much power, and we want the courts to dive in just this much. Well, what is the "this much?" And how do you write that? And that is why it is so difficult.

So it is a huge problem, and it is not as if you can't make any progress. Maybe you can. But I could just make the trite observation that it is no less of a problem today than it was 6 years ago or 60 years ago. And that is what we are trying to find out.

Mr. KING. Well, in conclusion, Mr. Chairman, I would just comment that the Endangered Species Act and the Clean Water Act mean something entirely different today than they did when they were passed, and that is one way to illuminate this problem that we have.

Thank you, Justices. I appreciate it.

And I yield back.

Mr. KING. Thank you, Mr. King.

And I want to thank each of the members of the panel, in particular the justices on the panel, for their time, their interest in the subject matter, their testimony today.

And we are going to recess this hearing, because we have votes. We will come back.

The justices are, within the powers that I have, dismissed. And I want to thank you for your testimony.

And, Justice Breyer, I want to thank—you give me a lot of new ideas on how to buy my new tires. Thank you. Thank you very much.

Justice SCALIA. Thank you, Mr. Chairman. Enjoyed being here.

[Recess.]

Mr. COHEN. [Presiding.] This panel is now reconvened and open for business. Thank you for participating today. And we have the same instructions that we had previously—red, blue, yellow, green lights. Hopefully, they work.

Our first witness is Mr. Paul Verkuil, who has had much recommendations and advice today from distinguished scholars, confirmed by the Senate as chairman of the administrative office—Ad-

ministrative Conference of the United States, aka ACUS, sworn in by the Vice President April 6, 2010, served as president of the College of William and Mary, where Rip Scherer went to school and might have coached as well, dean of Tulane, where Richie Petitbon went to school and may have coached as well, and Cardozo Law Schools, where Bike Haas went to school, the acting dean of the University of Miami Law School, where George Meyer went to school, and CEO of the American Automobile Association.

Legal activities include appointment as special master by the U.S. Supreme Court in the original jurisdiction case of New Jersey versus New York, not in the NBA, and appointment as special master by the Fifth Circuit in U.S. versus Louisiana higher education desegregation case.

As senior counsel to Boies, Schiller & Flexner, Mr. Verkuil oversaw the firm's pro bono program of anti-trust and corporate governance matters, published over 60 articles on administrative law and regulation topics, chair of the administrative law and regulatory practice section of the ABA, and a consultant to and member of the Administrative Conference of the United States, ACUS.

Thank you, Mr. Verkuil, for your participation. And will you proceed with your testimony, sir?

You have to turn yourself on there. There you go.

**TESTIMONY OF PAUL R. VERKUIL, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

Mr. VERKUIL. I am sorry. Can you hear me?

Mr. COHEN. Yes, sir.

Mr. VERKUIL. Am I on? Okay, good.

I am sorry Justice Scalia has left, because I wanted to assure him——

Mr. COHEN. We can call him back.

Mr. VERKUIL. No, no, that is all right.

Mr. COHEN. Somebody issue a subpoena quickly. [Laughter.]

Mr. VERKUIL. I just wanted to assure him and assure you, too, that I am definitely here to do good and avoid evil.

Mr. COHEN. Good.

Mr. VERKUIL. As you can tell.

Mr. COHEN. We are all, you now, waiting to hear.

Mr. VERKUIL. I know this was a question to be answered first.

As you can tell, we are an agency with many friends in government, on the Hill and on both sides of the aisle. It tempts me to recall the words of Daniel Webster, who told the Supreme Court in the Dartmouth College case that we are a small college, but there are those who love us. Well, we are a small agency, but we have many friends. We are big in friends. And this is so for a reason.

ACUS represents an ideal in government administration, a thoughtful balance politically and ideologically, and consensus-driven. It is no exaggeration to say that the best of our recommendations contain a kind of moral as well as logical force. They are followed or adopted because they are the product of deliberation and are persuasive. They are not ukases issued from above.

It is my hope that during my time as chair these qualities will distinguish each of our recommendations and all of the work of the conference, whether it be colloquia, research reports or informal ad-

vice. I am also sensitive to the charge that we not become too esoteric, too law professor-like, if you will, in our work. We need to think without being a think tank. We need also to do. So let us call it a think and do tank.

Informal advice on short notice should be one of our strengths. Solving sticky, small procedural problems quickly should be as important as deliberating carefully over large questions of the administrative process.

My written testimony sets out a potential list of topics, some big, some small, but rather than dwell on these in my short time, let me tell you what I have in mind and have been doing to get us up and running. Currently, I am the only employee of ACUS, but I have been assisted by some effective consultants and a former conference senior staff attorney, who has been detailed from GSA. I have undertaken the following activities to get it started again.

First, prospective members of the council are in the final stages of approval and will be announced shortly by the White House. OMB has reestablished an account for the conference from which appropriations can be drawn, and we have established the budget mechanisms and authorities necessary to commence operations.

Steps have been taken to reclaim old conference files from the national archives and from unlikely places like law school libraries and even basements of former employees. In fact, I have my eyes out everywhere for old ACUS documents and memorabilia, one of which I can show you. We found the original seal in, I must say, David Pritzker's basement.

While I was in Thomasina Rogers' office last week. She is the last chair of the conference and is now chair of the Occupational Safety and Health Review Commission, and I spied some old green conference volumes on her shelf, which I hope to recover, or at least borrow. And so it goes.

Mr. COHEN. Have you been to Justice Scalia's office?

Mr. VERKUIL. No. I have, but I haven't looked on the shelves. I am going to do that. Thank you for the tip.

We have been using temporary space made available by the Federal Trade Commission under an interagency agreement until our permanent space is available sometime in July, and we are in the process of getting our appointments through OPM, as required.

We started the process of filling up the membership by determining the independent regulatory agencies that are statutorily entitled to membership, consulting with the White House on the departments and agencies that require presidential designations, identifying departmental subagencies that might deserve their own members, and beginning the process of identifying a diverse group of nongovernmental members and liaison representatives, whose appointment will be subject to approval by the council.

I have met with GSA to discuss the requirements of the Federal Advisory Committee Act as they apply to the conference. We are working together to finalize a charter, which under FACA must be filed before any meetings can take place. A copy of that charter will also be filed with the standing committees of the Senate and House committees with jurisdiction over ACUS.

I met with DOJ's Office of Legal Counsel to request review of a prior OLC opinion concerning the application of the Emoluments

Clause of the Constitution to the office, to our members and to our council membership. I met with the U.S. Government Ethics Office to review, update and simplify our prior procedures for monitoring potential conflicts of interest, particularly among nongovernmental members of the conference. And I have been reviewing and considering updates to conference bylaws to conform with changes in law and reestablish our committee structure.

I am working to reconnect with Federal agencies, the bar, public interest groups, the academic community and, of course, with the Hill and with this Committee to solicit input on issues that might make the most sense to address first. In order to gain momentum, I have met with several academic researchers to undertake specific studies in some of the areas mentioned in my written testimony.

I am engaged in planning for a Web site that will be easily accessible to the public and the agencies alike and help us provide a useful forum to discuss and propose best practices. Finally, I have submitted our fiscal year 2011 budget to the House Appropriations Committee through OMB.

I can tell you, Mr. Chairman, that we are very happy to be in business. I am very proud to be part of the agency that you have permitted to come back to life, and I want you to know that I will work as hard as I can to make this Subcommittee and this Committee proud that you have been the driving force to reestablish the Administrative Conference. Thank you very much.

[The prepared statement of Mr. Verkuil follows:]

PREPARED STATEMENT OF PAUL R. VERKUIL

**STATEMENT OF PAUL R. VERKUIL**

**CHAIRMAN**
**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

**HEARING**

**BEFORE THE**

**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW**

**COMMITTEE ON THE JUDICIARY**
**U.S. HOUSE OF REPRESENTATIVES**

**ON**

**MAY 20, 2010**

Mr. Chairman and Members of the Subcommittee:

I am very pleased to be here today as the Chairman of the revived Administrative Conference of the United States ("ACUS" or "Conference"). I first want to thank the Subcommittee for its leadership in this bipartisan and persistent effort to reauthorize the Conference after a 14½-year hiatus. Without your support, and that of many other key proponents such as Justices Scalia and Breyer, it would not have been possible to have this hearing today.

I have studied and taught Administrative Law for almost 40 years and had the opportunity to work closely with ACUS during its previous incarnation. My first consultant project for the Conference involved judicial review of informal rulemaking,[1] completed when Justice Scalia was Chairman. I found ACUS to be a remarkable forum for developing thoughtful and broadly based consensus solutions. Its recommendations produced real improvements in both the fairness and efficiency of federal agency operations. It was a blow to good government when ACUS lost its funding in 1995.

When President Obama offered me the opportunity to lead ACUS back, I readily agreed. I'm honored to have the chance to develop a full program of applied research to improve federal administrative processes.

Between 1968 and 1995, when ACUS was in operation, the Conference adopted a wide range of recommendations for improving procedures and reducing the costs by which federal agencies administer regulatory, benefit, and other government programs. In addition, the Conference facilitated the interchange of information among federal administrative agencies potentially useful in improving their procedures. These activities included publications, colloquia, training

[1] *See* ACUS Rec. 74-4; Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185 (1974).

programs, and the establishment of interagency working groups to help achieve the implementation of Conference recommendations. The Conference also collected information and statistics from administrative agencies and published reports evaluating various administrative procedures.

ACUS's work received consistent support from a broad range of knowledgeable sources. At a hearing in 2007 to reauthorize ACUS, the Congressional Research Service (CRS) concluded:

> "ACUS's 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. . . . ACUS evolved a structure to develop objective, nonpartisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence."[2]

Perhaps most notably, the ACUS members who voted on Conference recommendations were drawn from a wide variety of backgrounds and interests in government and the private sector. It was heartening to see public members who are normally strong opponents in politics and practice come together to achieve consensus on ways to improve agency performance and effectiveness.

At similar hearings in 2004, both Justice Scalia (a former Chairman of ACUS) and Justice Breyer (a former liaison representative from the Judicial Conference) provided strong support for restoring ACUS. Justice Scalia viewed the agency as "a unique combination of talents from the academic world, from within the Executive Branch . . . and . . . from the private bar, especially lawyers particularly familiar with administrative law."[3] He further observed: "I did not know another organization that so effectively combined the best talent from each of those areas."[4]

Justice Breyer described ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at low cost." He noted that: "in practice [ACUS recommendations] can make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that could cause harm."[5]

I thank the Justices for their continued support here today.

Of course, it is a challenge to revive an agency that has not operated for over 14 years. Fortunately, the Administrative Conference Act provides us with an excellent foundation, and given the support of Congress and the White House, and the advice and guidance I am receiving

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[2] Regulatory Improvement Act: Hearing on H.R. 3564 Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 110th Cong. (2007) (prepared statement of Mort Rosenberg, Specialist in American Public Law, Congressional Research Service).

[3] Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 108th Cong. 10 (2004).

[4] *Id.* at 21.

[5] Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 108th Cong. (2004). For more on Justice Breyer's participation in Conference activities while he serving as a liaison representative from the Judicial Conference, see Jeffrey Lubbers, *Justice Breyer: Purveyor of Common Sense in Many Forums*, 9 ADMIN. L. J. AM. U. 775 (1995).

from many former Chairmen, members, and others who are enthusiastic about helping, I think ACUS can be fully functioning soon.

But restarting an agency is no instant proposition. I was confirmed on March 4, 2010 and sworn in by Vice President Biden on April 6, 2010. Since then, I have been working to set up shop and hire staff. The General Services Administration is overseeing our lease arrangements, purchasing furniture and equipment, creating IT solutions and dealing with organizational issues. Working in coordination with OMB and GSA, FTC has provided us with a small amount of temporary space under an interagency agreement. Several job descriptions have been posted by the Office of Personnel Management. We have secured the domain name "acus.gov" and have email. Our website should be activated soon.

Once the members of the Council are fully cleared and appointed by the President, which I understand is imminent, we can re-establish the membership. With any luck, we will be ready for our first plenary session by the fall.

Let me take this opportunity to provide some background on ACUS before discussing my plans and hopes as Chairman.

**Mission of the Administrative Conference**

Under the Administrative Conference Act ("the Act"), 5 U.S.C. §§591-596, the agency's statutory responsibilities 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.
>
> (5 U.S.C. §591)

The Conference develops recommendations for improving the fairness and effectiveness of the rulemaking, adjudication, licensing, investigative, and other functions by which federal agencies administer government programs. Conference members include federal officials from Executive branch departments and agencies, as well as from independent regulatory boards and commissions; private lawyers; professors; and other experts in administrative and regulatory law and government. The membership, which reflects diverse points of view, meets to consider studies of, and to recommend solutions to, selected problems involving administrative law and the regulatory process. As an agency subject to the Federal Advisory Committee Act, as well as

the Freedom of Information Act, ACUS provides public access to Conference meetings, minutes, and reports.

**ACUS's Organization**

By statute, the Conference has no fewer than 75 and no more than 101 members, a majority of whom are federal government officials. It is composed of a Chairman, a 10-member Council that functions as an executive board, representatives from "each independent regulatory board or commission," and from "each Executive department or other administrative agency which is designated by the President," [see 5 U.S.C. 593(b)(3)] and non-governmental members who may not constitute less than one-third nor more than two-fifths of the total number of members.

The Chairman is appointed by the President with the advice and consent of the Senate for a five-year term, and is the only full-time compensated member. The other ten members of the Council, which acts as an executive board, are appointed by the President for three-year terms. Federal officials named to the Council may constitute no more than one-half of the ten Council members.

Apart from the Council members, who are appointed by the President, the government members of the Conference as a whole serve by virtue of their positions in executive departments or independent agencies and compose more than half of total Conference membership. Non-governmental members of the Conference are appointed by the Chairman, with the approval of the Council, for two-year terms. The Act (5 U.S.C. §593(b)(6)) specifies that these members "shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure." They are to be selected "in a manner which will provide broad representation of the views of private citizens and utilize diverse experience." As noted, these non-government members may not constitute less than one-third nor more than two-fifths of the total number of members.

In addition to the overall membership (capped at 101), ACUS's bylaws have permitted the Chairman with the approval of the Council to appoint non-voting liaison "representatives of the Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations."[6] This has permitted ACUS to have the thoughtful participation of federal judges (like Justice Breyer), the GAO, and the Federal Administrative Law Judges Association, just to name a few.

For many years, the entire membership of ACUS (including the liaison representatives) was divided into committees, each assigned a broad area of interest. When ACUS closed in 1995, these included the following standing committees:

- Adjudication (agency adjudicatory processes);
- Administration (alternative dispute resolution and other procedures utilized by federal agencies to implement assistance, procurement, and other administrative programs);
- Government Processes (techniques used by federal agencies to implement federal

[6] ACUS Bylaws, 1 C.F.R. §302.4 (1995).

programs);
- Regulation (administrative procedures applicable to oversight of private economic activities);
- Rulemaking (processes used by federal agencies to issue rules and regulations);
- Judicial Review (aspects of administrative law or practice relating to the availability and effectiveness of judicial review of agency decisions).

Under the Act, the ACUS membership (the "Assembly") meets in plenary session at least once each year to consider adoption of recommendations that have been developed through the committee process and to take such other actions as may further the mission of the Conference. The deliberations of the committees and the plenary sessions are all public.

In my experience as a public member, the way in which the Conference formulated its recommendations proved to be a very effective one. Subjects for inquiry were identified by the Chairman and approved by the Council. The committees, with the aid of expert consultants who prepared supporting reports, conducted thorough studies of these subjects, and proposed recommendations. Recommendations were evaluated by the Council and, if ready for Assembly consideration, were distributed to the membership with the supporting reports and placed on the agenda of the next plenary session.

The Chairman is authorized to encourage the departments and agencies to adopt the recommendations of the Conference and is required to transmit to the President and to Congress an annual report and such interim reports as he or she considers desirable concerning the activities of the Conference, including reports on the implementation of its recommendations.

Upon the request of the head of a department or agency, the Chairman is authorized to furnish advice and assistance on matters of administrative procedure. The Conference may collect information and statistics from departments and agencies and publish such reports as it considers useful for evaluating and improving administrative processes. In addition, consultants often publish their reports as books or articles. The Conference also serves as a forum for the interchange of information among departments and agencies that may be useful in improving administrative practices and procedures.

**History of the Administrative Conference**

ACUS can trace its antecedents[7] to a prominent list of non-partisan special committees established to study and make recommendations on improvements in federal government procedures, beginning with President Franklin Roosevelt's Committee on Administrative Management (the "Brownlow Commission") in 1936 and his 1939 Attorney General's Committee on Administrative Procedure that led to enactment, after World War II, of the Administrative Procedure Act in 1946. This was followed by President Truman's Commission on Organization of the Executive Branch of the Government (known as the "Hoover Commission" after its Chair, President Herbert Hoover) in 1947-50, and a congressionally

[7] The following summary was gleaned from DAVID B. H. MARTIN, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: AN HISTORICAL EVOLUTION 17 (Draft March 21, 1978). Mr. Martin was ACUS Research Director when he drafted this report.

requested study by the Judicial Conference to study "time-saving" procedures on agency adjudications completed in 1951. Each of these reports suggested establishment of something along the lines of a federal office of administrative procedure.

President Eisenhower responded to the Judicial Conference recommendation by organizing a temporary "Conference on Administrative Procedure" in 1953-54, and this was followed by a second temporary "Administrative Conference of the United States" during the Kennedy Administration in 1961-62.[8] Each of these Conferences recommended the establishment of a permanent agency to study federal administrative procedures and develop recommendations for improvement.[9] As the report of the Eisenhower Conference stated: "This is not a new idea. It has been advocated by every group which has made a careful study of administrative procedure."[10]

These recommendations were consistent with those set forth in a report to President-elect Kennedy by James M. Landis, former Dean of the Harvard Law School and former Chairman of both the Securities and Exchange Commission and the Civil Aeronautics Board.[11] The Administrative Conference Act was enacted in 1964 for such purposes.[12]

ACUS began operations with the appointment and confirmation of its first Chairman, Jerre Williams, in 1968.[13] Over the next 27 years, through October 1995, the Conference brought together experts from both public and private sectors to review and critique basic research leading to specific and practical ways to improve regulatory and administrative processes. ACUS adopted approximately 200 such recommendations. A complete list of these recommendations was published at 60 Fed. Reg. 56,312 (1995). I am pleased to report that they will be republished by the Office of the Federal Register in the near future, and made available on our upcoming website.

Funding for the Conference was eliminated in 1995, but the statutory provisions establishing ACUS were not repealed. The agency was reauthorized twice since then, in 2004 and 2008. The 2004 legislation expanded the responsibilities of ACUS to include specific attention to achieving more effective public participation and efficiency in rulemaking, reducing unnecessary litigation, and improving the use of science in the regulatory process.

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[8] *See Memorandum Convening the President's Commission on Administrative Procedure*, Pub. Papers 219-22 (Apr. 29, 1953); Exec. Order No. 10,934, 26 Fed. Reg. 3233 (April 13, 1961).

[9] *See* REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953 46 (1954); Report of the Administrative Conference of the U.S. (Dec. 17, 1962), quoted in Statement of E. Barrett Prettyman, Chairman, in Hearings Before the Subcomm. of Admin. Practice & Procedure, House Comm. on the Judiciary on S.1664, 88th Cong, 1st Sess. 15, 22 (1963).

[10] *See* REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953 46 (1954).

[11] JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Dec. 21, 1960).

[12] Pub. L. No. 88-499, 5 U.S.C.A. §§591-96 (2006).

[13] Pub. L. 108-401, §2(a), Oct. 30, 2004, 118 Stat. 2255; and Pub. L. 110-290, §2, July 30, 2008, 122 Stat. 2914.

**Past Successes of the Administrative Conference**

Some of ACUS's recommendations resulted in major changes in the federal administrative process generally; others led to significant improvements in the procedures of individual agencies. Still others made important recommendations to Congress and the Judiciary.

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

Another judicial review recommendation that directly saved the government millions of dollars was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*. Enactment of Public Law 100-236 in 1988 was directly based on this recommendation, and it has ever since prevented a large number of expensive and costly court battles over which court should hear an appeal.

In the mid-1970s, ACUS undertook a comprehensive study of the procedures of the IRS. ACUS produced seventy-two separate proposals in six principal areas of IRS activity, including the confidentiality of taxpayer information, the IRS's 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's 1988 recommendation (88-9), *Presidential Review of Agency Rulemaking*, based in part on a study I conducted for the Conference,[14] was influential in validating (and in removing much of the controversy concerning) the practice of presidential review of agency rules that had begun in the Nixon Administration. The recommendation suggested ways to increase the openness and timeliness of that review, and also suggested adding a requirement for the review of existing rules. The Clinton Administration, in Executive Order No. 12866 (1993), took account of these proposals and these provisions remain in effect today.

The Conference 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 also 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, which expressly adopted the ACUS recommendations and made permanent

[14] *See* Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980).

the transfer of authority over adjudication of civil penalty cases affecting pilots and flight engineers from the FAA to the NTSB.

In the 1980's and 1990's ACUS led the way to widespread adoption of alternative dispute resolution (ADR) principles and practices in federal agencies. In this arena, ACUS produced more than a dozen separate recommendations. ACUS worked closely with the American Bar Association in an effort that led to enactment in 1990 of the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, which established a statutory framework for the use of a variety of ADR techniques for resolving or managing conflicts. Both statutes also included major oversight and coordination roles for the Conference. ACUS subsequently assisted agencies in creating and implementing their ADR policies and provided support for interagency working groups to help ensure uniform compliance with the statute throughout government. The president of the American Arbitration Association cited the importance of ACUS 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."[15]

Congress also gave ACUS statutory responsibilities for studying aspects of the Equal Access to Justice Act, the Congressional Accountability Act, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, the Government in the Sunshine Act of 1976, and the Railroad Revitalization and Regulatory Reform Act of 1976, just to name a few.

The Conference provided low-cost training programs for independent agency commissioners and agency general counsels. It also produced useful publications such as sourcebooks, guides, and hundreds of specific subject-matter studies.

**What Has Changed in the Last 15 Years?**

Obviously, the work of federal agencies assigned to them by Congress changes dramatically over time. Thus, as President Kennedy advised Congress in April 1961, "The process of modernizing and reforming administrative procedures is not an easy one. It requires both research and understanding. Moreover, it must be a continuing process, critical of its own achievements and striving always for improvement."[16]

Since October 31, 1995, when ACUS shut its doors, there have been many changes in the administrative law landscape. New issues and concerns have emerged, and old ones remain but may have been neglected. Without committing the Conference to firm directions before the Council has been installed, I see the following developments deserving of attention from a reconstituted ACUS:

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[15] Letter from Robert Coulson, President, American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993) (on file with ACUS).

[16] *See* Administrative Conference of the United States: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 12 (1963) (quoted in statement of Judge Prettyman).

1. Assistance to Newly Reorganized Agencies. During the time the Conference was out of operation, several new agencies were created that might request ACUS's advice and counsel on organization and procedural effectiveness. The Department of Homeland Security (DHS) is one such agency, formed from 22 existing agencies, that has within it agencies such as FEMA, ICE, and USCIS, which might benefit from our guidance and support. With the creation of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) in the Inspector General Reform Act of 2008, we also now have a new entity devoted to development of policies, standards, and approaches by Inspectors General, and it may be useful for ACUS to consult with CIGIE in identifying best practices for agencies in this field of growing importance.

2. E-Rulemaking. The Information Age clearly is having a great impact on the ability to "promote more effective public participation and efficiency in the rulemaking process" (5 U.S.C. §591). The use of Internet platforms in rulemaking has transformed the rulemaking process. The changes ushered in by the E-Government Act of 2002, including the federal government's central portal for public participation in rulemaking, *www.regulations.gov*, have great potential for democratizing the rulemaking process, but they also carried risks and special legal problems that did not exist when rulemaking dockets were paper files in agency basements. A recent ABA report specifically recognized that ACUS could play a pivotal role in this regard.[17] The White House's open government initiative, which emphasized transparency and participation, should also be a central player in our rulemaking efforts.

3. Increased Reliance on Contracting Out. The number of federal contractor employees reportedly now far exceeds the number of federal employees. One question is whether legal limitations on this sort of outsourcing are being respected sufficiently. Another is the extent to which existing government-wide laws (ethics, FOIA, privacy, etc.) do and should apply to such activities. The Office of Federal Procurement Policy is preparing government-wide rules concerning agency use of contractors that could benefit from ACUS study.

4. Federal Preemption of State Regulation. In recent years there have been increasing controversy and litigation over whether and when state regulation or state tort law is preempted by federal law or regulation. A study of the procedures, practices, and policies of executive departments and agencies in making determinations regarding preemption of state law would be helpful. This would include consideration of (a) the legal and policy considerations in making such determinations and (b) the process for making such determinations, including the process of consulting with state and local officials in making them.

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[17] *See* COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 59 (2008), http://resource.org/change.gov/ceri-report-web-version.fixed.pdf. ("Historically, the Administrative Conference of the United States (ACUS) provided agencies with data, assessment and recommendations about their processes that were difficult for them otherwise to obtain. Current progress towards reviving ACUS represents an opportunity for e-rulemaking to benefit from this same type of expert evaluation and advice.")

5. Cooperative Federalism. On the other hand, many health, safety, and environmental regulatory programs rely on optional state implementation. How has that been working? What are the implications when states "opt out"? These seem to be ACUS-type research questions worthy of study.

6. FOIA and Other Developments in Government Transparency. The Office of Government Information Services (OGIS), created by the 2007 FOIA amendments as the "FOIA Ombudsman," began operations in 2009. OGIS will be mediating and resolving agency-requester disputes to avoid litigation. Meanwhile the Justice Department's Office of Information Policy continues to coordinate overall FOIA policy within the Executive Branch. We could study how OGIS has worked and its mission jibes with GSA's coordination of Federal Advisory Committee Act implementation and with the current lack of coordination of Government-in-the-Sunshine Act implementation.

7. Sunshine Act Review. ACUS had a commitment to the Sunshine Act that can now be revived. For many years, both members of and practitioners before multi-member boards and commissions have pointed to problems posed by the limits on the exchange of policy views among members of these boards and commissions other than at open meetings. A special committee established by ACUS concluded in 1995 that the result had been less rather than more open decisionmaking. Decisions were often announced at open meetings that had already been made in advance. Agencies had also begun to rely more on "notation" or "circulation" voting, which avoided meetings completely. The committee proposed a pilot program permitting some flexibility to deliberate in private, subject to disclosure of the substance of the deliberations, and open meetings to record votes. The closure of ACUS prevented the Conference from concluding this proposal, which may now warrant revisiting if the same problems have continued since 1995.

8. Collaborative Regulation. Federal regulators have increased their use of collaborative programs by which industry groups or other private organizations undertake self-regulation, receive dispensation for self-reporting of violations, and "certify" best industry practices (e.g., in environmentally sustainable building or operations). Some of these programs have proven to be controversial (e.g., post-Enron and post-Gulf of Mexico oil spill). It would be timely for ACUS to evaluate these programs to see how they have performed and how they could be improved.

9. Dispersal of ACUS's role in Government ADR Programs. When ACUS ended its operations, some of its ADR activities were reassigned by Executive Order and seemed to have received less attention. One apparent by-product is a significant decrease in the use of negotiated rulemaking. With ACUS poised to reassert its leadership role in this area, it is time to reassess opportunities to "reduce unnecessary litigation in the regulatory process" as the 2004 amendment to our Act suggests.[18]

10. Increased Complexity of Rulemaking. The streamlined APA model of notice-and-comment rulemaking has become much more complex and time-consuming. In response,

[18] 5 U.S.C. §591, quoted at p.3 *supra*.

agencies have appeared to have increased their reliance on other less open and transparent ways of making policies—through use of letters, interpretations and other "guidance" documents; consent decrees; and contractual provisions to effect regulatory change. What if anything can and should be done about this? In addition, what effect has "hard look" review of the courts had on the so-called "ossification" of the rulemaking process?

11. Reviewing Decisionmaking by Executive Office for Immigration Review (EOIR). In recent years, immigration decisionmaking by immigration judges and the Bureau of Immigration Appeals has been confronted with an increasingly high case load. Analyzing reversal rates and studying the causes of delay have long been analyzed by ACUS in the Social Security disability and Veterans Administration disability contexts. There may well be comparable opportunities to apply these lessons to the immigration context.

12. Information Quality, Peer Review, and Risk Assessment. A significant trend in regulation has been the increasing use of peer review of scientific and economic analyses, risk assessment, and legislation and OMB guidelines requiring resolution of disputes concerning the integrity and accuracy of regulatory information disseminated by federal agencies under the Data Quality Act. Agencies have devoted increased resources to these activities, and there are questions about how well they are being carried out, the role of public participation in doing so, how strict these requirements should be, and who should be enforcing them.

13. Midnight Regulations. The last few times an incumbent Administration left office knowing that the other party would soon be taking charge, a flurry of activities and legal issues have arisen concerning the departing Administration's so-called "midnight rules." What can and should a departing Administration be able to do to insulate its late-term rules from reversal by an incoming Administration, and what can and should the incoming Administration be able to do? Given the unpredictability of future elections, there should be principles on which both parties should be able to agree before the situation arises again.

14. Congressional Review Act. Enacted since ACUS's closure, the Congressional Review Act provides a process by which Congress may review and possibly disapprove agency regulations. Since 1996, although agencies have transmitted tens of thousands of rules, Congress has invoked this procedure sparingly and has in fact disapproved of only one rule. ACUS could lead a review of this Act and determine how its effectiveness can be improved.

15. Agency Authority to Issue Waivers. The Katrina and Rita hurricane disasters focused attention on agency authorities and procedures for issuing waivers from existing statutes and regulations. What process is required for waivers? How should third-party beneficiaries of existing laws and regulations be heard in such proceedings? Are granting and denying waivers and exceptions rulemaking or adjudication, and what should follow from the appropriate characterization?

These developments provide fertile areas for Conference study. The Council will also have ideas for research projects. In addition, we have the benefit of receiving many suggestions in the several hearings this Subcommittee has held during the authorizations process, including from researchers at the CRS. Other suggestions were examined and distilled by the ABA Section of Administrative Law and Regulatory Practice into a letter sent to OMB last August, shortly before I was nominated.[19]

The ABA letter also makes several intriguing suggestions that we will consider seriously: First, that ACUS could serve as a "Best Practice Forum" for agencies' administrative procedures—a sort of "innovation clearinghouse"—and second, that ACUS could attempt a comprehensive review of recommendations made in the last 15 years by other organizations within and outside of government (e.g., the Government Accountability Office, the National Academy of Public Administration, and the ABA) to improve the efficiency and effectiveness of federal operations. Of course, we will be very attentive to suggestions from the Congress and the President as well.

This stockpile of topics after 15 years is only suggestive and will have to be prioritized carefully. There are of course a myriad of other start-up tasks, including hiring a professional staff, filling out the government and private membership, re-establishing and updating the bylaws, and evaluating which of the nearly 200 ACUS recommendations from 1968-95 still need to be implemented.

**Current Status of Start-up Activities**

Currently, I am the only employee of ACUS, but I have been assisted by some effective consultants and a former ACUS senior staff attorney who has been detailed from GSA. I have undertaken the following activities to get ACUS started again:

- OMB has re-established an account for ACUS from which appropriations can be drawn and we have established the budget mechanisms and authorities necessary for commencing operations.

- Prospective members of the Council have been approved and are in final stages of being announced for appointment by the President.

- Steps have been taken to reclaim old ACUS archives and to hire staff with the help of OPM and GSA's Agency Liaison Division. Until we can occupy our designated office space, we have been using office space made available by the Federal Trade Commission under an interagency agreement.

- I have started the process of filling out the membership by determining the independent regulatory agencies that are statutorily entitled to membership, consulted with the White House on the departments and agencies that require presidential designations, identified departmental sub-agencies that might deserve their own members, and begun the process

[19] *See* letter from Section Chair William V. Luneburg on behalf of the ABA Section of Administrative Law and Regulatory Practice, dated August 18, 2009.

of identifying a diverse group of non-government members and liaison representatives whose appointment will be subject to approval by the Council.

- I have met with GSA to discuss the requirements of the Federal Advisory Committee Act (FACA) as they apply to ACUS. We are working together to finalize a charter, which under FACA must be filed before any meetings of a federal advisory committee may take place. A copy of that charter will be filed with the standing committees of the Senate and House of Representatives with jurisdiction over ACUS.

- I met with DOJ's Office of Legal Counsel to request review of a prior OLC opinion concerning the application of the Emoluments Clause of the Constitution to the ACUS Council and membership.

- I met with the U.S. Office of Government Ethics to review, update and simplify our prior procedures for monitoring potential conflicts of interest, particularly among nongovernmental members of the Conference.

- I have been reviewing and considering updates to ACUS's bylaws to conform to changes in law and reestablish our committee structure.

- I am working to reconnect with federal agencies, the bar, public interest groups, and the academic community to discuss membership issues and solicit their input on issues that make the most sense to address first. In order to gain momentum, I have met with several academic researchers to undertake specific studies in the areas mentioned earlier.

- I am engaged in planning for a website that will be easily accessible to the public and the agencies alike in helping us provide a useful forum for best practices.

As soon as possible, I hope we will be able to hold a Council meeting, get the broader Conference membership named, and then convene an opening plenary session. I will work as hard as I can to make this Subcommittee proud that it has been the driving force to re-establish ACUS.

I would be pleased to answer any questions you may have.



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Mr. COHEN. Thank you. You make me feel like Dr. Frankenstein. [Laughter.]

Something like that. Thank you for your testimony, Mr. Verkuil.

Our second witness is Ms. Sally Katzen. And Justice Breyer referred to her at least three times in his testimony. We noticed that,

and I think Mary Ann Akers will comment on that in her gossip column tomorrow.

Ms. Katzen has testified before Congress over 65 times on a broad range of Federal Government activity and has served on panels at the National Academy of Science. Her career in the Federal Government includes 8 years in the Clinton administration as deputy director for management of the OMB, as deputy assistant for the President for economic policy and deputy directory of the National Economic Council and is administrator of the Office of Information and Regulatory Affairs in OMB, where she was the senior advisor to the President on regulatory policy and process.

Ms. Katzen was the first female partner at Wilmer Cutler & Pickering and is a well-respected professor, having taught at GW, Michigan, George Mason, Pennsylvania and Georgetown law schools, in addition to Smith College, Johns Hopkins University and the Michigan and Washington program.

Welcome back.

**TESTIMONY OF SALLY KATZEN, EXECUTIVE MANAGING DIRECTOR, PODESTA GROUP**

Ms. KATZEN. Thank you very much, sir.

Chairman Cohen, Ranking Member Franks, if I may echo Justice Breyer, thank you so much for having a hearing on this subject. It sends a very strong message that will resonate throughout the town.

Now, the witnesses today—and you have assembled a most impressive group of ACUS supporters—have submitted written testimony about the importance of ACUS, the significant substantive contributions it made in its first incarnation, and an array of contributions it can make in the future. And rather than go down that now well-worn path, I thought I would try to take a stab at the question of what you can do now, what Congress can do to help advance the ball.

And this Committee, as everyone has recognized, has been very instrumental in reauthorizing ACUS and in prevailing upon your colleagues for the appropriations. And I emphasize the latter, because it was because of the lack of appropriations in 1995 that ACUS was closed.

I want to take just 1 minute to just talk about the question that invariably comes up when you are talking about funding using taxpayer money for an institution or an entity like ACUS. And they always say, "Why does ACUS have to exist? Isn't there some other entity, if not in the Federal Government, then in the private sector?"

And in my written testimony I go on at some length about the various things I have done over the last four decades in the field of administrative law in the private sector, in the public sector and in the academy. And so I say with some confidence categorically that no other entity can do what ACUS can do. And I am not saying that no one can't do it as well or as efficiently. I am saying no one can do it, period. And so to keep ACUS alive and well is really critically important.

And I know you are working on reauthorization. I would urge the Committee to think about permanent reauthorization so that you

can set an example and send again a message for the appropriators that this is a critical thing. We have had a 15-year hiatus, and while Chairman Verkuil has talked about the steps he has taken, you hear how difficult it is to start out even an agency that has all the files and the seal in place. And I would just urge that we do not have to go through that again by having Congress send the signal that this is here to stay.

I also would encourage you to send a message to the White House. Chairman Verkuil said that they are going to announce the council. Great. Let us get on with it and be able to have the chair and the council convene an assembly so that the important work can be done.

I talked about all the different institutions in my written testimony. I would be happy to answer any questions, but again, I want to just thank you so much for doing what you have done.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Testimony of Sally Katzen
before
The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
May 20, 2010
on the
"Administrative Conference of the United States"

Chairman Cohen, Members of the Subcommittee. Thank you for inviting me to testify today about ACUS -- the Administrative Conference of the United States.

As you know, I have spent the greater portion of my professional life over the last four decades in the field of administrative law. I was in private practice, as an associate and then a partner, at Wilmer Cutler & Pickering, here in Washington, specializing in communications law. During the Carter Administration, I was the General Counsel and then Deputy Director of the President's Council on Wage and Price Stability. I then returned to Wilmer Cutler & Pickering, continuing my practice in administrative and regulatory law. In 1988, I became the Chair of the American Bar Association's (ABA) Section on Administrative Law and Regulatory Practice. In 1993, I was confirmed by the Senate to be the Administrator of the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget (OMB), where I served for over five years as the person responsible for developing and implementing the Clinton Administration's regulatory policy. I then served as the Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council, and then as the Deputy Director for Management of OMB until January 20, 2001. After leaving the federal government, I taught administrative law and related subjects at the University of Michigan Law School, George Washington University Law School, George Mason University Law School, and the University of Pennsylvania Law School, and I also taught seminars in American Government to undergraduates at Smith College, Johns Hopkins University, and the University of Michigan in Washington Program.

More relevant to today's hearing is my experience with ACUS. I was first appointed a Public Member in 1988 while I was in private practice. I served on several of the ACUS committees, eventually chairing the Committee on Judicial Review. As a result of my committee membership, I was actively involved in the preparation and presentation of various ACUS reports

and recommendations in the late 80's and early 90's. In l993, President Clinton appointed me as one of the five government members of the Council (the governing board of ACUS) and designated me as the Vice Chairman. I served in that capacity (and for a time as Acting Chairman) until ACUS was closed in 1995.

I was privileged to testify before this Committee on April 21, 1994, in my capacity as Acting Chairman in support of reauthorization of ACUS. [A copy of that testimony was reprinted in 8 Admin.L.J.Am.U.649(1994)] I testified here again on ACUS on June 24, 2004, applauding this Committee's efforts -- which were ultimately successful -- in securing the reauthorization and then appropriations for ACUS. And I was honored to be asked to Chair a briefing on ACUS for Congressional staff and other interested individuals, which was convened by this Committee on April 15, 2009.

There is a most extraordinary group of people who are testifying today about the importance of ACUS, the significant substantive contributions it made during its first incarnation (both jurisprudentially and in terms of increasing the efficiency of administrative processes without decreasing fairness for the participants), and the array of contributions it can make in the future. Rather than dwell on those matters, I thought I could speak, with some credibility, to a question that has been asked from time to time: Why do we need ACUS to do what it does? Or, more pointedly, aren't there other entities that can do what ACUS does, if not in the federal government, then in the private sector?

Based on my experience in the private sector, the public sector and the academy, I firmly believe that no other entity can do what ACUS can do. I am not simply saying that no other entity can do it as well or as efficiently; I am saying that no other entity can do it period. To understand why there is no real alternative to ACUS, it may be helpful to set out, in some detail, how ACUS was structured and how it operated, on the assumption -- which I believe to be the case – that the past will be the model for the newly reconvened ACUS in most significant respects.

As you have heard from others, ACUS consisted of a Chairman (nominated by the President and confirmed by the Senate), supported by a very small staff, a Council (similar to a board of directors), and an Assembly. Both the Council and the Assembly included government officials and so-called Public Members drawn from the private sector. The government officials were typically high-level agency political appointees with responsibility for their agencies' administrative programs and senior career civil servants (professional staff) who had first-hand experience with, and institutional knowledge of, their agencies' processes and procedures. The

Public Members were private practioners (including those from the public interest community) and scholars in the field of administrative law from the best universities.

The composition of the Council and the Assembly meant that a relatively modest amount of taxpayer funding (less than $3 million annual appropriations) was leveraged by the far greater contributions in kind by practicing lawyers and academics; in other words, it was a very good deal for the taxpayers and, as others have testified, the federal funds were more than paid back by the savings generated by implementing ACUS recommendations. But more importantly from my perspective was the benefit that the mix of government officials and private sector representatives brought to the deliberative process that produced ACUS recommendations. The officials from the agency or agencies that were the subject of the recommendation(s) saw the process from the inside; the practioners saw it from the outside; and those from the academy (who usually did not have hands-on experience with the program(s)) had the ability (and the time) to do in-depth thorough studies and evaluations, including empirical research on difficult (entrenched or systemic) problems. The latter was critically important because while agency staff and/or practioners had the facts, they simply lacked the time (or inclination) for thoughtful reflections and comparisons among different agencies. Finally, the contributions of other government officials could not be overstated. I remember several occasions when a proposal to address an agency-specific problem was debated in the Assembly and an official from another agency would say "actually, we tried that [in this context] and it worked" or "we tried that and it didn't work because . . .." These exchanges, among people who came from and brought with them varied perspectives, were invaluable in reaching a sensible recommendation.

Another critically important feature of ACUS was the long-standing and time-honored tradition of appointing members of both the Council and the Assembly (and committee membership) across party and philosophical lines. ACUS was thus one place where Democrats and Republicans worked together, regardless of which party controlled the White House. We might have disagreed (strenuously) on the threshold question of whether there should (or should not) be a government program in an area – but if, in the wisdom of Congress, there was to be such a program, we could all agree that it should be conducted fairly and efficiently – whether in rule making, or licensing, or adjudication.

Invariably, administrations change, and with each new administration there are some bright new ideas about how to conduct or carry out administrative processes. Some of these ideas are fresh and productive and welcome. Some, however, may sound good or appear simple at first

look, but they have in fact been tried before and failed or are seriously flawed for one reason or another. What ACUS provided was a forum for those who worked and wrote in the field – those who were in the current administration and those who had been in past administrations, and those who had never been in government service and may never have aspired to government service - to discuss, evaluate, provide constructive suggestions and eventually reach consensus. In short, ACUS was unique in both its structure and its approach to its mandate, and this was, and will be, its strength.

So returning to the question: why can't another entity do what ACUS does? First, look at the Executive Branch. Having spent considerable time there in various capacities, I am convinced there is no other agency that can undertake the necessary analysis, debate the merits of the resulting proposal, and reach considered consensus informed by real life experience but not influenced by partisan politics.

Surley, an individual agency cannot address in such a constructive way the issues that might arise from its own administrative procedures or practices. Apart from the fact that the agency may have an investment in the way it designed its programs and may well be reluctant to concede that it did not do it right in the first instance, an agency has limited discretionary resources and agency officials are understandably reluctant to commit those resources to looking back and studying how the agency does its business, whatever the criticisms that might arise from interested parties appearing before the agency. Instead, agency officials generally are focused, as they should be, on advancing the agency's mission (whether it be pro-regulatory or deregulatory) and in anticipating or reacting to the problems within its jurisdiction that get traction with the administration or the public. Moreover, senior officials at one agency rarely have any experience with how other agencies conduct their business and are therefore not well suited to make any cross-agency comparisons.

An agency that has been mentioned as a possible alternative to ACUS is OMB, and specifically OIRA. As a former Administrator of OIRA, I can attest to its unsuitability for such an assignment. It does not have the staff, the resources, or the time to devote to in-depth study of agency administrative practices – let alone undertake any empirical research -- even with respect to those practices that are demonstrably problematic and contributing to less than optimal decision-making by the agencies. OIRA also does not have the first-hand experience that agency staff has with the problems that plague various programs, nor does OIRA have the real life experience of those practicing before the agency. Another oversight agency that gets mentioned as a possible

alternative to ACUS is the Department of Justice (DOJ). While I have not worked at DOJ (since the summer following my freshman year in law school), I do not know of any natural home (Division or Office) for such a function at DOJ or any reservoir of expertise in the types of administrative law issues that have been the staple of ACUS recommendations. Also, I cannot imagine that DOJ (or even OMB for that matter) could command the attention and resources of other Executive Branch agencies (let alone, the independent regulatory commissions whose representation on ACUS is statutorily mandated) or of people in the private sector (either private practioners or academics) to help it understand and address these issues. And OMB or DOJ or any other Executive Branch agency will surely be seen as reflecting the policies and preferences of the President, rather than a bi-partisan or non-partisan consensus.

So let's turn to the private sector, where there are academic institutions, think tanks and bar associations familiar with – indeed, engaged in studying and commenting on -- administrative practices. To be sure, these entities work on these issues from time to time, but they are often self selected projects chosen on the basis of considerations other than administrative efficiency or fairness; for example, academics may choose subjects they think are likely to lead to publishable articles – the coin of their realm -- and think tanks may undertake projects that reflect the preferences of their contributors. In any event, while those associated with universities and think tanks can do in-depth studies (including empirical research), they do not have guaranteed access to the underlying data, the practical experience of those at the agencies, or the ability to secure the attention or involvement of other government officials.

With respect to bar associations, the most likely candidate would be the ABA Section on Administrative Law and Regulatory Practice, which I Chaired in the late 1980's. The Ad law Section has a mandate similar to ACUS and includes among its members those with government experience, private practioners and administrative law professors. It is a volunteer organization, and while members of the Section devote their time and talents, it is rare that any are able to make the extended contributions necessary to conduct empirical studies or do a thorough analysis of the subject matter being considered. Also, despite aggressive outreach over the years, the Section has only a limited number of government officials, and it has no means (other than courtesy and/or persuasion) to obtain the cooperation or input of agency personnel who may be directly affected, or the views of senior government officials from across the government. In addition, recommendations from the Ad Law Section must be approved by the Association as a whole (typically through debate and votes in the House of Delegates). Regrettably, administrative law is

not easily understood by those who are not engaged in it (Justice Scalia has called it "arcane," which may be an understatement), and the subject does not command much interest compared to more sexy topics such as individual rights or national security.

For these reasons, I would state categorically, based on my experience, that there is no viable alternative for ACUS. Therefore, if you are persuaded, as I am, that the function ACUS performs is important and contributes to good government, you should agree that the Administration must quickly stand up ACUS and the Congress must do everything in its power not only to encourage the resumption of a fully functioning ACUS but also to ensure that we do not have another unhappy hiatus in its operations as has been the case for the last 15 years.

I recognize that the Administration has a lot on its plate, but this is wholly within its hands at this point. The President showed exceedingly good judgment in selecting a prominent person with exceptional credentials in the field of administrative law to be the Chair; and fortunately Paul Verkuil was relatively quickly confirmed by the Senate. It is now time for the President to name the Council and let the Chair and the Council convene the Assembly so that important work can be done.

For the Congress, the task is equally straightforward but less in your control. This Committee was instrumental in reauthorizing ACUS and persuading your colleagues to provide funding. But unlike authorizations, appropriations are almost always on an annual basis, and it was the inability to be funded in 1995 that led to ACUS' being closed down. This Committee has heard on several occasions about the cost of that shutdown – including the absence of ACUS recommendations, the lost opportunities for more efficient and effective administrative practices, and the loss of ACUS's sentient institutional memory. Given the lead time necessary to stand it up again, the hiatus continues and we are all the poorer for that. To the extent you can set an example by permanent authorization for ACUS, to the extent you can prevail on your colleagues to support ACUS funding, and to the extent you remain staunch supporters of ACUS, those of us who care about good government and sound and sensible administrative procedures will be deeply grateful.

Thank you and I would be happy to answer any questions you may have.

Mr. COHEN. You are welcome, Ms. Katzen. I appreciate your testimony.

Our third witness is Professor Jeffrey Lubbers. Professor Lubbers is a professor of practice in administrative law and active in the WCL's law and government program. He has expertise in administrative law, government structure and procedures, and regulatory policy and procedures, among other things, I am sure.

From 1982 to 1995, Professor Lubbers was the research director of the Administrative Conference of the United States. He has published two books on agency rulemaking and administrative procedure in addition to teaching. Professor Lubbers is also administrator of law consultant, whose clients include numerous Federal agencies, law firms, public interest groups and international organizations.

Professor Lubbers, will you proceed with your testimony? I hope I got that right the last three times.

**TESTIMONY OF JEFFREY S. LUBBERS, PROFESSOR OF PRACTICE IN ADMINISTRATIVE LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW**

Mr. LUBBERS. Yes, you did.

Thank you very much, Mr. Chairman and Mr. Franks. It is a great pleasure for me to be here today.

As you said, I was an attorney at the Administrative Conference, actually, from 1975 to 1995. I was the research director for the last 13 years of that period, so I am really thrilled to be here today to mark the rebirth of the Administrative Conference, which is happening primarily because of the Subcommittee's steadfast bipartisan support for reauthorizing the conference.

Now, needless to say, it is very unusual for an agency to go on a 14-year hiatus. And this presents some interesting challenges to get it going again. But, fortunately, the Administrative Conference Act as amended still offers an excellent blueprint and foundation for the conference's work, and I am confident that Chairman Verkuil will provide the leadership necessary to meet those challenges. And I would say that even if he hadn't asked me to be a consultant in helping him to begin this effort.

Now, of course, today's problems and the landscape of today's government are somewhat different from those of 1995, but the basic tensions in our administrative procedure between fairness and efficiency, discretion and accountability, formality and informality, and openness and confidentiality continue to exist. And it is a big part of ACUS's mission to help find the right balance between those poles in various contexts.

I thought I would say a few words about how the Office of the Chairman and its small staff functioned in practice. Of course, we recognize that the full assembly members, including savvy experts like Sally Katzen, was the great resource of the conference.

The debates in ACUS meetings were almost always civil. It was striking how interest group lawyers, who are normally strong opponents in the world of litigation, lobbying and politics, could come together in a spirit of cooperation to seek consensus on process. I firmly believe that the connections forged in ACUS meetings

helped increase civil discourse and reduce the level of partisanship in legal Washington. And it can do so again.

Our role in the Office of the Chairman, which had never more than 20 employees, was to serve both the chairman and the membership and to undertake all the different operational responsibilities that come with being an agency.

We were very fortunate to have a dedicated and stable group of staff attorneys during my tenure at ACUS. They had to do a little bit of everything—take minutes at conference meetings, help write Office of the Chairman sourcebooks, critique consultants' reports, wordsmith draft recommendations, interact with high-level and high-powered members of the conference, work on implementation of ACUS's body of recommendations, and carry out special statutory assignments under the Administrative Dispute Resolution Act, Equal Access to Justice Act, and several other statutes.

All of ACUS's employees, except for the chairman and his confidential assistant, were career civil servants, so we had to be, and I think we were, scrupulously nonpartisan, and we supported the chairman's agenda regardless of his or her political ideology.

I thought I might mention a few of the biggest operational challenges we had, from my point of view. One was that the large body of ACUS recommendations issued over the years needed appropriate follow-up. These recommendations were not issued as helium balloons let loose in the wild blue yonder. They were issued to persuade recipients—the agencies, Congress and the President—to take the actions suggested.

In that regard ACUS's lack of enforcement power was both a strength and a weakness. The fact that ACUS is purely advisory meant that agency members in the assembly could participate in deliberations frankly and without concern that the group's conclusions were binding on them. And this willingness was the key to obtaining consensus.

On the other hand, because ACUS cannot order anyone to do anything, it was up to the Office of the Chairman to do everything it could to cajole and advocate for the recommendations. This meant that we had to not only monitor a lot of developments, but we also had to prioritize and concentrate on the ones that were either the most pressing or had the best chance of being adopted.

It was difficult to measure success in this area. If Congress enacted the recommended legislation, which does happen fairly often, we could check that one off. But sometimes only a part of the recommendation would be enacted, or if the recommendation were addressed to the agencies, some might take the suggested action and some might not. We felt the need to measure our success in this area, and we did keep a running tally, but it was a challenge.

In terms of new research, we didn't just want studies that could be done in a law library. We wanted what former Chairman Robert Anthony, who is in our audience today, called eyeball and shoe leather research. This meant that we wanted our researchers to interview agency and congressional staff and affected stakeholders. One of the Office of the Chairman's major attributes was that it could facilitate these interviews.

Another challenge was to find the funds to undertake larger and more empirically-based studies. Occasionally, Congress specifically

asked ACUS to undertake projects that required rather large empirical inquiries without providing additional funding. This meant that other research had to take a back seat to those projects.

On the other hand, sometimes Congress did include a supplemental appropriation for a project. Often agencies would ask us to undertake projects, and sometimes we had to ask for funds to do them. Thankfully, ACUS's statute made it possible to accept these contributions, but doing so meant that we had to make doubly sure that these projects could go forward without undue influence from the funding sources.

I believe we were successful in doing that, but in those instances I was concerned about appearances and would have much preferred it if we could have counted on having enough of our own funds for research.

I firmly believe that ACUS is equipped to do research projects at a much lower cost than other entities, so I hope that as ACUS moves forward, this Committee will continue to support funding that allows ACUS to really take on the important administrative process issues of today, some of which you might want to request of ACUS, because doing so will produce even bigger savings and payoffs for the government in the future.

In closing, let me say that I plan to do everything I can to help ACUS resume its essential activities. I, too, have a lot of old files in my basement, and had them for 14 years, and I am looking forward to returning them to their rightful place when the new office is up and running. So thank you very much for your support over these years.

[The prepared statement of Mr. Lubbers follows:]

PREPARED STATEMENT OF JEFFREY S. LUBBERS

**STATEMENT OF JEFFREY S. LUBBERS***

**HEARINGS BEFORE THE**

**SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW**
**COMMITTEE ON THE JUDICIARY,**
**U.S. HOUSE OF REPRESENTATIVES**

**ON**

**THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**
**MAY 20, 2010**

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the revived Administrative Conference (ACUS). I was a career attorney at ACUS from 1975 until 1995 and served as its Research Director for the last 13 years of that period. Since 1996 I have been on the faculty of American University's Washington College of Law, where I am now Professor of Practice in Administrative Law. I was invited to testify by this Committee in 2005 and 2007 at hearings in which I supported ACUS's reauthorization,[1] so I am thrilled to be here today to mark ACUS's rebirth—an event that is happening thanks primarily to this Committee's bi-partisan support. The support of Justices Scalia and Breyer was also invaluable in shining a spotlight on the need for ACUS, the American Bar Association provided steadfast support, and the Congressional Research Service has compiled a legislative record that has helped all of us to make a compelling case for ACUS's return.

Needless to say, it is very unusual for an agency to go on a 14-year hiatus, and this presents some interesting challenges to get it going again. Fortunately the Administrative Conference Act, as amended, still offers an excellent blueprint and foundation for the Conference's work and Chairman Verkuil is an excellent choice to provide the leadership necessary to meet these challenges. I would say that even if he had not asked me to serve as a consultant to assist him in beginning this effort.

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* Professor of Practice in Administrative Law, Washington College of Law, American University. (ACUS Staff Attorney (1975-82); ACUS Research Director (1982-1995). I am currently serving as a consultant to the Office of the Chairman, assisting in the agency's re-establishment.

[1] *See* Statement of Jeffrey S. Lubbers, Hearings Before the H. Subcomm. on Commercial & Admin. Law, Comm. on the Judiciary, on "The Administrative Process and Procedures Project," (Nov. 1, 2005) and Statement of Jeffrey S. Lubbers, Hearings Before the H. Subcomm. on Commercial & Admin. Law, Comm. on the Judiciary, on "The "Regulatory Improvement Act of 2007" (Sept. 19, 2007).

In that regard I should say that the views I express in this testimony are my own and do not necessarily represent Chairman Verkuil's or the agency's and I have not cleared this testimony with anyone.

As your staff knows, I was an advocate for keeping the Administrative Conference Act fundamentally as it was in 1995—and I appreciate that you have done that. Like the Administrative Procedure Act, it is a remarkably flexible and adaptable law—perhaps because the legendary Administrative Law Professor Walter Gellhorn had a big role in drafting each of them. Of course, today's problems, and the landscape of today's government are somewhat different from those of 1995, so there may be a need for a tweak or two in the statute as ACUS goes forward, but the basic tensions in our administrative procedure between fairness and efficiency, discretion and accountability, formality and informality, and openness and confidentiality continue to exist. And it is a big part of ACUS's mission to help find the right balance between those poles in various contexts.

This Committees' excellent December 2006 Committee Print,[2] provides a wealth of information about ACUS's past operations and accomplishments, as well as numerous suggestions for possible topics for ACUS to undertake, and Chairman Verkuil's statement provides a good summary of some of these matters as well. I myself provided a long list of possible topics back in 2005, and would be happy to talk about them in the question period, but what I thought I might contribute today is sort of an insider's look at how ACUS and its small staff functioned in practice.

Of course the real *raison d'être* of this agency is the public-private partnership—the membership that is so carefully delineated in the Administrative Conference Act. These (maximum) 101 members form a diverse group of experts—each of whom brings something to the table when considering recommendations for improvement in government procedures. The Chairman and the Council provide the policy direction, but the full Assembly of members—including savvy experts like Sally Katzen—is the great resource of the Conference.

The government members in this Assembly—a mix of political appointees and career civil servants—were for the most part the best and the brightest in their agencies. And the 40 or so non-government "public members" were chosen both for their expertise and their diversity. The five Senate-confirmed Chairmen that I served under—three Republicans and two Democrats—each took this responsibility seriously and chose people from the full political spectrum. But ACUS members often left their political affiliations at the door. ACUS's bylaws stated that "Each member is expected to participate in all respects according to his [or her] own views and not necessarily as a representative of any agency or other group or organization, public or private." 1 C.F.R. § 302.2(a)(1) (1995). This may have been a little unrealistic in some situations, but I think that ethos did permeate Conference deliberations. The debates were nearly always civil, and what persuaded people was the force of the speaker's arguments and not whom they represented. It is also worth remembering that the time of all these members is donated, and if one calculated the billable hours of these members for each year, it would probably exceed

[2] H. SUBCOMM. ON COMMERCIAL & ADMIN. LAW, 109TH CONG. INTERIM REPORT ON THE ADMINISTRATIVE PROCEDURE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY, (Comm. Print No. 10) (Dec. 2006).

ACUS's appropriations. I would reiterate something I said in my 2007 testimony: nowhere else would you 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.[3] I firmly believe that the connections forged in the ACUS meetings helped increase civil discourse and reduce the level of partisanship in legal Washington.

The role of the Office of the Chairman's staff—never more than 20 FTEs—was to serve the membership, and to undertake all the other operational responsibilities that come with being an agency. I'm sure you realize that every agency, no matter how big or small, has to draft a continuous stream of budget and appropriations documents, various annual reports, and responses to correspondence and information requests. These duties can be burdensome for an agency with a very small staff, so everyone must pitch in.

And the mission-related work for the staff was also a mix of various duties. Obviously in order for the Conference to produce recommendations, there must be a research program producing authoritative research reports. We relied heavily on academic consultants to undertake these projects. We could recruit them for fairly small stipends because we could also offer them a large measure of academic freedom along with invaluable access to key government experts followed by peer review by ACUS members. So a big part of the Research Director's job was to develop proposed project topics for the Council and then find and recruit these consultants to undertake them.

Each ACUS committee was assigned a staff attorney to serve it. Once the research projects were underway and tentatively earmarked for one of the committees, the assigned ACUS staff attorney and I monitored the progress of the research, and offered critiques of the draft reports. When the reports and tentative recommendations were ready for review, the committee would begin its consideration. The ACUS staff attorney worked closely with the committee chair and the consultant to schedule meetings, which were noticed in the Federal Register and open to the public. These meetings were held in order to consider and hopefully reach consensus on recommendations to be sent to the next plenary session of the Assembly. Typically the draft recommendations were put out for public comments as well.

At the plenary sessions—also open to the public—the Committee Chair, with the consultant as a resource person, presented the committee's recommendation for approval. The debate that followed was according to Robert's Rules of Order and often resulted in changes or in some instances a remand to the Committee for more work. We normally had anywhere from two to five recommendations up for consideration at each plenary session.

Once a recommendation was officially approved, it was given a number such as for example "Recommendation 92-2," and then it was the job of the Office of the Chairman to work on "implementation." If possible, this was normally spearheaded by the staff attorney who worked on the project during the committee process. It involved meetings and correspondence with the Congress or executive branch recipients of the recommendation. The staff was expected to

[3] For a few examples of this kind of debate, see my article about Justice Breyer's participation in the plenary sessions, Jeffrey Lubbers, *Justice Breyer: Purveyor of Common Sense in Many Forums*, 1 ADMIN. L. J. AM. U. 775 (1995).

continually be on the lookout for targets of opportunity such as congressional hearings, agency rulemakings, etc.[4]

We were very fortunate to have a dedicated and stable group of staff attorneys during my tenure at ACUS. They had to do a little of everything—take minutes at Committee meetings, critique reports, wordsmith draft recommendations, help write Office of the Chairman sourcebooks and guides, interact with high-level or high-powered members of the Conference and then work on implementation of ACUS's body of recommendations. And on top of this, ACUS staff had to carry out special statutory responsibilities under the Administrative Dispute Resolution Act, Negotiated Rulemaking Act, Equal Access to Justice Act, and several other laws. All of ACUS's employees, except for the Chairman and his or her confidential assistant, were career civil servants, so we had to be, and I think we were, scrupulously non-partisan and supported the Chairman's agenda regardless of his or her political ideology.

The two other senior staff members—both career SES—also played key roles. The Executive Director made sure that all the budget and appropriations materials were prepared in a timely fashion and that all the administrative details of the operation were carried out. The General Counsel superintended the other relations with Congress and, and handled the many legal questions that came up.

I thought I would close by mentioning the biggest operational challenges we had from my point of view.

First, ACUS's membership is a quite a large one and that creates a lot of administrative responsibilities—just keeping up with the rosters, travel reimbursements, and professional communications with the members.

Second, the large body of ACUS recommendations issued over the years needed appropriate follow-up. These recommendations were not just issued as helium balloons let loose into the atmosphere to deflate somewhere in the blue yonder. No, they were issued to persuade the recipients—the agencies, Congress, sometimes the President or the Judicial Conference—to take the action suggested. In that regard, ACUS's lack of enforcement power was both its greatest strength and greatest weakness. The fact that ACUS is purely advisory meant that the agency members in the Assembly could participate in deliberations frankly and without concern that the group's conclusions were binding on them—and this willingness was a key to obtaining consensus. Now that I am teaching Administrative Law, I can look more dispassionately at ACUS's work product and conclude that ACUS has over its history produced a really excellent body of work—that has not only improved government operations, but also has influenced generations of administrative law scholars and their students.

On the other hand ACUS has no actual power. It cannot order anyone to do anything, so it was up to the Office of the Chairman to do everything it could to cajole and advocate for the recommendations. With nearly 200 recommendations, this meant that we had to not only

[4] For example, one of our staff attorneys co-authored an article with a Senator, see Sen. Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1 J. DISP. RESOL. 1 (1992).

monitor a lot of developments, but we also had to prioritize and concentrate on the ones that were either the most pressing or that had the best chance of being adopted. It was also somewhat difficult to measure success in this area. Of course, if Congress enacted the recommended legislation—as did happen fairly often—we could check that one off. But sometimes only a part of the recommended law would be enacted, or in the case of a recommendation addressed to all agencies, some may take the suggested action and some not. We felt the need to measure our success in this area, and we did keep a running tally, but it was a challenge.

Third, in terms of new research, the challenges were to maintain a solid agenda of projects, both internally and externally generated, to keep the committees busy but not too busy, and to find the funding for empirically based studies. Attracting highly qualified academic consultants was not too difficult—there are many well-qualified administrative law professors who want to conduct studies and write articles. But we didn't just want studies that could be done in the law library—we wanted what former Chairman Robert Anthony called "eyeball and shoe-leather" research. That meant we wanted our consultants to interview agency and congressional staff and affected stakeholders. One of the Office of the Chairman's major attributes was that it could facilitate those interviews.[5]

Fourth, a part of the programmatic challenge was to find the funds to undertake larger, more empirically based, studies. ACUS did not have a line item in its budget for research, so, in inflationary times, operational expenses started to eat into the funds that we tried to set aside each year for research. And even in the best of times ACUS had difficulty in funding large-scale empirical research projects without extra assistance. Several times Congress specifically asked ACUS to undertake projects that required rather large empirical inquiries without providing additional funds.[6] This meant that other research had to take a back seat to those projects. On the other hand sometimes Congress did include a supplemental appropriation for a project.[7] Similarly, when other agencies asked us to undertake projects for them we sometimes had to ask them for funds to do them. Especially in the last years before ACUS closed, when our appropriation was reduced, we became dependent on outside funding for most of our research.

Thankfully, ACUS's statute made it possible to accept such contributions, but doing so also presented challenges in the sense that we had to make doubly sure that these projects could go

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[5] The Chairman has the statutory power to "request agency heads to provide information needed by the Conference, which information shall be supplied to the extent permitted by law." 5 U.S.C. § 595(c)(3).

[6] *See, e.g.*, ACUS's "IRS Project," resulting in Recommendations 75-5 to 75-10, and published in "REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, Sen. Doc. 94-286 (Oct. 1975). The study was "undertaken at the request and with the continuing cooperation and encouragement of Senator Joseph M. Montoya of New Mexico, Chairman of the Senate Appropriations Subcommittee on Treasury, Postal Service and General Government. *Id.* at III. Another example is ACUS's "FTC Rulemaking Study," resulting in Recommendations 79-1, 79-5, & 80-1, mandated by Pub. L. No. 93-637 § 202(d) (1975).

[7] *See* Pub. L. No. 101-370 § 3 (1990) (appropriating $50,000 and mandating that ACUS "shall conduct a study and evaluation of the administrative adjudicatory procedures of the Federal Aviation Administration and the National Transportation Safety Board and shall make a recommendation not later than 18 months after the date of the enactment of this Act as to whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation, should be transferred to the National Transportation Safety Board, or should be otherwise modified").

forward without undue influence from the funding sources. I believe we were successful in doing that, but I was always concerned about appearances and would have much preferred it if we could have counted on having enough of our own funds for research. In that regard, let me repeat a point I made in 2007. Because of its ability to attract researchers at bargain rates, and its in-place body of peer reviewers, ACUS is equipped to do research projects at a much lower cost than other entities. This is shown by one example of a project that Congress funded in 2004 when ACUS was in its hiatus—an $8.5 million study conducted by the National Research Council of the National Academies of just one aspect of the Social Security disability program.[8] I served as a member of the committee that oversaw that project and we spent about half of that amount on a nationwide empirical survey conducted under contract by a private firm. In my opinion, the result of that project, while useful, was not much better than what ACUS could have done for 2% of that amount. But 2% of that amount would still be $170,000—more than ACUS's typical annual research budget in the past. So I hope that as ACUS moves forward, this Committee will support funding that allows ACUS to really take on the important administrative process issues of today—because doing so will produce even bigger savings and payoffs for the government in the future.

In closing let me say that I plan to do everything I can do to help ACUS resume its essential activities. I have kept a lot of old files in my basement for 14 years and I am looking forward to returning them to their rightful place when the new office is up and running.

Thank you Mr. Chairman. I look forward to any questions you may have.

[8] *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 Minimizing Misuse* (2007).



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Mr. COHEN. Thank you, Professor, and appreciate your returning the materials.

Our final witness is Dr. Curtis Copeland, a specialist in American national government at CRS, Congressional Research Services. Dr. Copeland's expertise is Federal rulemaking and regulatory policy. He has testified numerous times before the Subcommittee.

Prior to joining CRS, he held a variety of positions in the Government Accountability Office during his 23 years there.

Dr. Copeland, welcome. And will you begin your testimony?

**TESTIMONY OF CURTIS W. COPELAND, Ph.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE**

Mr. COPELAND. Mr. Chairman, thank you very much.

Mr. Franks, thank you for inviting me here today.

As I described in detail in my written statement, dozens of suggestions have been made over the last 6 years particularly as to what issues ACUS could address, now that it is up and running. However, because the agency's authorization for appropriation expires in less than 17 months, some have suggested that ACUS focus on one or two short-term projects that could quickly prove its value to Congress and the American people.

Several observers have noted, and several did today, that previous ACUS recommendations have saved the government much more than their appropriation. There seems to be widespread agreement that this trend could continue into the future.

For example, 6 years ago today, Justice Breyer said that implementation of ACUS recommendations to shorten the rulemaking process could save millions or even billions of dollars. Based on recent estimates of Federal expenditures on regulatory activities, if ACUS could make rulemaking agencies even one-tenth of 1 percent more efficient, the savings would be nearly $60 million a year, about 40 times the $1.5 million that ACUS has been appropriated for fiscal year 2010.

In August 2009, the ABA Section on Administrative Law and Regulatory Practice recommended two projects for ACUS that it said could produce substantial savings in the near as well as the long term. The first was that ACUS sponsor a best practices forum at which agencies could share information and obtain advice from experts, thereby preventing them from having to reinvent the wheel each time they changed policies. Such a forum could help the diffusion of innovative practices, improve results, and potentially provide substantial savings.

The ad law section also recommended that ACUS review what it termed the plethora of unimplemented administrative law recommendations by GAO, the ABA and others during the 14 years since ACUS was discontinued in 1996. By leading certain recommendations to implementation, the section said ACUS could potentially improve government operations and could save the government "tens of millions of dollars each year."

ACUS could also demonstrate its value by leading improvements on the revenue side of the ledger. For example, in 2003 GAO discovered that changes made to the Civil Penalties Inflation Adjustment Act of 1996 sometimes actually prevented agencies from adjusting their penalties for inflation. As a result the penalties that Congress set were losing their deterrent value, and the government was losing revenues.

In 2007, GAO said that if just civil tax penalties had kept pace with inflation, IRS collections from 2000 to 2005 would have increased by $61 million. ACUS could provide a renewed basis for

congressional consideration of this issue, potentially leading to annual revenue increases that are many times the conference's appropriation.

ACUS could also prove its value to Congress and the public in other ways. For example, the recently enacted health care legislation has more than 40 provisions requiring or permitting agencies to issue implementing regulations. ACUS could guide the agencies in this process, serving as a central repository of expertise on such issues as the Administrative Procedure Act, the Paperwork Reduction Act and a host of other regulatory statutes and executive orders.

The health care legislation also establishes dozens of new government organizations and advisory bodies. ACUS could offer valuable advice to agencies on the establishment of these entities, particularly with regard to the applicability of certain general management laws like the Freedom of Information Act, the Federal Advisory Committee Act, and so forth.

In short, ACUS could quickly prove its value in several ways, potentially making it easier for Congress to justify future conference authorizations or a permanent authorization and appropriation.

Mr. Chairman, thank you very much, and I appreciate it. And I will answer any questions that you have for me.

[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**

**May 20, 2010**

**on**

**"The Administrative Conference of the United States"**

**Mr. Chairman and Members of the Subcommittee:**

I am pleased to be here today to discuss the recently re-established Administrative Conference of the United States (ACUS). As you requested, my testimony will focus on what issues ACUS might address in the coming months and years. As you know, however, CRS takes no position on any legislative or other policy option.

## *A Brief History of ACUS*

Congress created ACUS in 1964, but did not provide an appropriation for the agency until 1968. In 1995, Congress eliminated ACUS, and it went out of existence the next year.[1] During its 28 years of operations, ACUS issued nearly 200 recommendations to improve federal administrative processes, most of which were at least partially

[1] See P.L. 104-52 (November 19, 1995, 109 Stat. 480), which appropriated $600,000 to ACUS with the proviso that the funds "shall only be available for the purposes of the prompt and orderly termination of the Administrative Conference of the United States by February 1, 1996." For a detailed explanation of why ACUS was eliminated, see Toni M. Fine, "A Legislative Analysis of the Demise of the Administrative Conference of the United States," *Arizona State Law Journal*, vol. 30 (1998), pp. 19-116.

implemented.[2] For example, ACUS recommended that agencies (1) increase their use of alternative means of dispute resolution (e.g., mediation and arbitration); (2) improve mechanisms to allow the public to petition for rulemaking; (3) consider using negotiated rulemaking to develop regulations; and (4) allow the public to provide comments when agencies invoke the "good cause" exception to notice and comment rulemaking. Other recommendations addressed conflict of interest requirements for participation in federal advisory committees, peer reviews in the award of discretionary grants, and exemptions under the Freedom of Information Act. While these may not be considered riveting issues for most people,[3] they are nevertheless the kinds of issues that many consider essential to a properly functioning administrative democracy.

In October 2004, after efforts initiated by this Subcommittee, Congress reauthorized appropriations for ACUS during fiscal years 2005 through 2007, but no appropriations were subsequently provided for those years.[4] In July 2008, ACUS was again reauthorized for appropriations — $3.2 million per year for fiscal years 2009 through 2011.[5] In March 2009, Congress appropriated $1.5 million for ACUS to use during the remainder of FY2009 (i.e., until about six months later at the end of September 2009).[6] However, Professor Paul Verkuil's nomination as chairman of ACUS was not received in the Senate until November 2009, and he was not confirmed until March 2010. Therefore, due to the absence of agency leadership, the $1.5 million appropriated for ACUS during FY2009 could not be spent during the fiscal year.

In December 2009, Congress appropriated $1.5 million for ACUS to use during the remainder of FY2010, which the legislation said could remain available for expenditure by the Conference until September 30, 2011.[7] The July 2009 report by the Senate Committee on Appropriations for the legislation that had included the FY2010 funding reminded ACUS that

> pursuant to section 609 of division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), not to exceed 50 percent of unobligated balances from salaries and expenses remaining available at the end of fiscal year 2009 shall remain available until September 30, 2010. The Committee expects ACUS to use these carryover funds, in addition to the recommended funds, for fiscal year 2010 operating expenses.[8]

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[2] See http://www.law.fsu.edu/library/admin/acus/305726.html for links to ACUS recommendations.
[3] At a hearing in May 2004, Congressman Delahunt said that the reauthorization of ACUS was "not an issue that's attracting a standing-room only crowd. You know, it's tough to keep your eyes open." In response, Justice Antonin Scalia said "I'd worry for our country if it did, Congressman." 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 and June 24, 2004 (Washington: GPO, 2004), p. 21.
[4] P.L. 108-401, October 30, 2004, 118 Stat. 2255.
[5] P.L. 110-290, July 30, 2008, 122 Stat. 2914.
[6] P.L. 111-8, March 11, 2009, 123 Stat. 656.
[7] P.L. 111-117, December 16, 2009, 123 Stat. 3183.
[8] U.S. Congress, Senate Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2010*, report to accompany S. 1432, 111th Cong., 1st sess., S.Rept. 111-43 (Washington: GPO, 2009), p. 75.

Therefore, it appears that ACUS has up to $2.25 million to spend this fiscal year ($1.5 million for FY2010 plus $750,000 carried over from FY2009).

## *Suggested Topics for the New ACUS*

The statutory powers and duties of ACUS are delineated in 5 U.S.C. §594, and permit the agency to:

> (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.

During the last six years, a variety of suggestions have been offered by numerous parties regarding what issues ACUS could address once it was re-established.

### May 2004 ACUS Reauthorization Hearing

Exactly six years ago today, for example, at a hearing before this Subcommittee on whether ACUS should be reauthorized, then-Chairman Chris Cannon said that a reconstituted ACUS could help establish a coherent approach among agencies with respect to emerging issues such as privacy, national security, public participation, and the Freedom of Information Act.[9] At the same hearing, Supreme Court Justice Stephen Breyer, when asked what he considered the top priorities of a reconstituted ACUS, said

> we in our Court have divided about five ways about the meaning of a case called *Chevron*, which has significance. And if I were running that now, I think maybe one thing I might like to do is ask the agencies whether the five different things that we have said have mattered. Has it hurt them? Has it helped them? That's a subject they might look into.[10]

In his response to the same question, Justice Antonin Scalia suggested that ACUS examine whether agencies are using teleconferences as much as they could to solicit the views of the public.[11]

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[9] 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), pp. 1-4.
[10] Ibid., p. 25. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (467 U.S. 837, 1984).
[11] Ibid., pp. 25-26.

Other witnesses at the May 2004 hearing suggested numerous other topics for a reconstituted ACUS to address. For example:

- C. Boyden Gray, testifying on behalf of the American Bar Association (ABA), identified several issues that he believed would be "very useful subjects of study by ACUS if it were to be reauthorized," including (1) the role of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in rulemaking, particularly with regard to such innovations as prompt letters; (2) peer review of agency rulemaking documents; (3) data quality (and the related implementation of the Data Quality Act); and (4) administrative law procedures in the United States versus the European Union.[12]
- Gary J. Edles of American University's Washington College of Law, and formerly ACUS General Counsel, noted several potentially fruitful areas of inquiry, including (1) agencies' use of electronic communications; (2) immigration procedures in light of 9/11; (3) the proper roles of public-private partnerships, self-regulatory organizations, and government contractors; and (4) problems in government organization or interagency coordination that may impede America's ability to compete in world markets.[13]
- Philip Harter of the University of Missouri Law School suggested that ACUS examine (1) issues related to electronic rulemaking (e.g., procedures for interactive communications during rulemaking, how agencies can cope with a million electronic comments, and how the web can be used to generate responsible information); (2) how to improve public-private collaboration (noting problems with the Federal Advisory Committee Act); and (3) issues related to the "harmonization" of U.S. decisions with international institutions.[14]

### October 2004 CRS Memorandum

In response to a request from the then-Chairman of this Subcommittee, CRS prepared an October 7, 2004, memorandum summarizing the arguments in favor of authorizing ACUS.[15] In addition to describing the Conference's past accomplishments, CRS noted that ACUS had a "clear role to play" in helping to integrate the 22 agencies or parts of agencies that were transferred when the Department of Homeland Security (DHS) was created. Many of these agencies had their own special organizational rules and rules of practice and procedure, many had different adjudicative responsibilities, and all had their own statutory and administrative requirements for rulemaking. CRS noted that the

[12] Ibid., pp. 59-61.
[13] Ibid., pp. 63-71.
[14] Ibid., pp. 75-79.
[15] Memorandum from Morton Rosenberg, Specialist in American Public Law, and T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service, to the Honorable Chris Cannon, Chairman, House Subcommittee on Commerce and Administration, Committee on the Judiciary, "Points in Support of H.R. 4917, Bill to Authorize Appropriations for the Administrative Conference of the United States, October 7, 2004. See http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf for a copy of this memorandum. Per the Chairman's request, CRS did not include any possible arguments to the contrary.

integration of these various elements was "likely to need administrative fine tuning for some time to come" — a prediction that still seems valid nearly six years later.[16]

CRS also said that ACUS could help implement the restructuring and reorganization of the intelligence community in response to the recommendations from the 9/11 Commission. In particular, CRS said the following:

> ACUS could serve to identify measures that will slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and 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.[17]

Although Congress enacted reforms to the intelligence community in 2004,[18] many of the intelligence restructuring issues that CRS identified remain unresolved.

In addition, the CRS memorandum listed more than a dozen other possible study topics for ACUS, including the peer review process, challenges to the quality of scientific data used in the rulemaking process, "midnight" rules issued near the end of a presidential administration, and the avoidance by agencies of notice-and-comment rulemaking by issuing "non-rule rules." Finally, CRS said that the procedures used in electronic rulemaking and the implications of those procedures for public participation "would appear ripe for ACUS-like guidance."[19]

## November 2005 Hearing on Administrative Law Project

On November 1, 2005, this Subcommittee held a hearing on its Administrative Law, Process, and Procedure Project, which had been initiated in an effort to identify issues that a reauthorized and appropriated ACUS could examine.[20] At that hearing, several of the witnesses identified possible topics that a re-established ACUS could address. For example:

- Morton Rosenberg, then of CRS, listed a total of 57 potential research topics within the seven general project areas: (1) public participation in the rulemaking process; (2) congressional review of rules; (3) presidential review of agency rulemaking; (4) judicial review of rulemaking; (5) the agency adjudicatory process; (6) the utility of regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process. He also noted that ACUS could be tasked with reviewing and making recommendations regarding the Federal

[16] Ibid., p. 3.
[17] Ibid., p. 4.
[18] Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, December 17, 2008.
[19] Memorandum from Morton Rosenberg, op. cit., p. 4.
[20] U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Administrative Law, Process and Procedure Project*, 109th Cong., 1st sess., November 1, 2005 (Washington: GPO, 2006). See http://www.access.gpo.gov/congress/house/pdf/109hrg/24282.pdf for a copy of this hearing record.

Emergency Management Agency's role, including where it should be located, the authorities it needs, and other issues.

- Jeffrey Lubbers of American University's Washington College of Law presented a similar potential research agenda for ACUS. His list included some of the topics that Morton Rosenberg mentioned, but also included several new areas, including (1) what is holding back greater use of negotiated rulemaking, (2) standards for "midnight" rulemaking, (3) requirements that agencies review their existing regulations, (4) procedures for agencies to provide waivers and exceptions from regulatory requirements (e.g., after disasters), and (5) regulatory federalism.

## September 2007 ACUS Reauthorization Hearing

On September 17, 2007, this Subcommittee held another hearing on the reauthorization of ACUS, at which several witnesses mentioned possible roles and studies for ACUS. For example:

- Jody Freeman of Harvard Law School noted several issues that ACUS could have addressed in recent years (e.g., electronic rulemaking and congressional review). She also said that a reconstituted ACUS could focus on such issues as (1) outsourcing (e.g., whether there is a need for administrative law reform to address issues raised by contracting out government functions); and (2) how principles of administrative law can be reconciled with the imperatives of national security (e.g., whether Department of Homeland Security rules should be subject to cost-benefit analysis requirements).
- Jeffrey Lubbers of the Washington College of Law noted that newly-created agencies like the U.S. Election Assistance Commission were covered by a range of cross-cutting procedural statutes like the Administrative Procedure Act, the Privacy Act, the Government in the Sunshine Act, and the Paperwork Reduction Act, but agency officials were often given no orientation to these laws. He said that ACUS could perform that role when new agencies are established.
- I also testified at that hearing, noting several recent controversial rulemaking issues that ACUS might have been able to address, such as (1) determining whether an August 2007 letter that the Centers for Medicare and Medicaid Services (CMS) sent to state health officials changing the State Children's Health Insurance Program was a "rule" under the CRA;[21] (2) helping to improve the structure, function, and funding of the Bush Administration's electronic rulemaking initiative;[22] and (3) overseeing changes to Federal Civil Penalties

[21] To view a copy of this letter, see [http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf].
[22] For more information, see CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

Inflation Adjustment Act, which (as I will discuss in more detail later in this testimony) actually *prevents* penalties from being adjusted for inflation.[23]

## April 2009 Roundtable Discussion

At the invitation of the Chairman and Ranking Minority Member of the House Committee on the Judiciary, a roundtable discussion was held in the Committee's hearing room to identify issues that the recently-reauthorized and re-appropriated ACUS could profitably address.[24] Many of the issues discussed at the roundtable had been mentioned in the earlier venues, including electronic rulemaking and the use of science in rulemaking. However, several new issues were also raised as possible topics for ACUS to study.

For example, David Vladeck, who had just been appointed to head the Federal Trade Commission's Bureau of Consumer Protection, suggested that ACUS examine open government issues, noting that the Freedom of Information Act had been amended twice since the Conference's demise with no real study of how agencies were implementing the amendments. He also said that the absence of ACUS during the previous 14 years had degraded the effectiveness of federal agencies and had a "devastating impact on the development of administrative law."

Another participant at the meeting noted the lack of a clear, governmentwide policy on waivers during emergencies, and said that rebuilding after Hurricane Katrina could have gone faster had such a policy been in existence. Although a number of agencies issued such waivers, no central repository of the waivers existed, and it was not always clear what authority agencies had to issue them.

## August 2009 ABA Letter

On August 18, 2009, the Chair of the ABA Section of Administrative Law and Regulatory Practice wrote a letter to the then-acting administrator of OIRA recommending study topics for ACUS.[25] The Section's recommendations began with two projects that it said would take advantage of ACUS's "unique capabilities," and that "could well produce substantial, cross-government savings in the near, as well as the long, term."

The first project that the Section recommended was an "agency best practices forum" at which federal agencies could "share best practices, obtain sound advice regarding them,

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[23] See U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, March 14, 2003.
[24] Ralph Lindeman, "House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference," *BNA Daily Report for Executives*, April 16, 2009, p. A-18.
[25] Letter from William V. Luneburg, Chair, Section of Administrative Law and Regulatory Practice, American Bar Association, to Michael A. Fitzpatrick, Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, "Recommended Study Topics for a New Administrative Conference of the United States," August 18, 2009. A copy of this letter is available from the author.

and formulate proposals facilitating their broader adoption." Because agencies currently lack even a forum in which share information, they often "reinvent the wheel" in their efforts to innovate in such areas as rulemaking, adjudication, enforcement, compliance assistance, and dispute resolution. The Section said that ACUS is "ideally constituted" to serve as a best practices forum in that it is statutorily required to include representation from all federal departments and agencies, and because it has access to leading academics and private practitioners. Also, as noted earlier, ACUS is statutorily authorized to "arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure."

The second project that the Section recommended was a retrospective look at the "plethora" of administrative law recommendations issued by GAO, the ABA, the National Academy of Public Administration, and other reputable groups during the nearly 14 years since ACUS became inactive. By surveying those recommendations, highlighting the most meritorious of them that have not been implemented, and then leading those recommendations to implementation, the Section said that ACUS "could greatly improve government operations and potentially save the federal government tens of millions of dollars each year."

The Section also recommended nine specific topics that it considered "particularly high priorities for ACUS's initial work." These nine topics were:

- legal issues implicated in electronic rulemaking, including archiving requirements, privacy issues, whether electronic commenting on rules should be mandated, and the value of "reply comment periods" for those who participate in a first comment round;
- executive review of agency action, which would be particularly relevant if actions are taken to revise or replace Executive Order 12866;
- congressional review of agency action, including whether the Congressional Review Act is warranted and whether the appropriations process is inappropriately employed through the use of earmarks, riders, and report language;
- science and information quality, which could evaluate the effect of the Information Quality Act and OMB's Peer Review Bulletin on agencies' use of science in rulemaking;
- regulatory preemption, including whether a consistent understanding could be developed regarding when preemption is appropriate and how it should be expressed;
- "midnight rules" that are issued at the end of a presidential administration, examining what standards should govern the issuance and reconsideration of such rules;
- agencies' use of guidance documents, including examining the implementation of the Bush Administration's Bulletin on Good Guidance Practices;
- regulatory impact analysis, examining the costs and benefits of the variety of required assessments as part of the rulemaking process; and

- "lookbacks" at existing regulations, and whether a requirement that agencies do so in general or in specific cases would be worth the resources consumed.

## ACUS and Health Care Reform

The list of issues that ACUS could address grows longer with each issue that Congress, the President, federal agencies, or the courts address. For example, although Congress enacted the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) on March 23, 2010, the act contains numerous provisions stating that federal agencies "shall promulgate regulations," or "shall, by regulation" take certain actions to implement the legislation.[26] PPACA also contains dozens of provisions establishing, or requiring the President or cabinet secretaries to establish, governmental entities (e.g., offices within cabinet departments and agencies) and advisory bodies. Therefore, as one article put it, "the war isn't over."[27]

ACUS could play a role in these rulemaking and other implementation processes by advising agencies as to proper procedures and the applicability of certain laws. For example, in developing regulations, agencies must be cognizant of a host of relevant statutes and executive orders, including the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Order 12866. Failure to comply with the requirements in these statutes and orders can put any resultant regulations in jeopardy. By consulting with ACUS before or during the development of these rules, agencies could potentially avoid significant delays or legal entanglements.

## *Demonstrating the Value of ACUS*

As I mentioned earlier, it appears that ACUS has up to $2.25 million to spend this fiscal year ($1.5 million for FY2010 plus $750,000 from FY2009). ACUS is authorized to be appropriated up to $3.2 million in FY2011, currently the final year of its authorized appropriations. Therefore, ACUS currently has about 18 months before its authorization for appropriations expires. At the April 2009 roundtable discussion initiated by this Committee, Sally Katzen, former administrator of OIRA and moderator of the roundtable, recommended that ACUS focus on "one little, crucial project" to demonstrate its value.[28] One way for ACUS to demonstrate value in the short term would be to focus on an issue that is likely to produce financial "net benefits" greater than its appropriation through either budgetary savings in other agencies or increased revenues for the

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[26] For a list of these provisions, see CRS Report R41180, *Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148)*, by Curtis W. Copeland.
[27] Henry J. Aaron and Robert D. Reischauer, "The War Isn't Over," *New England Journal of Medicine*, Health Care Reform Center, March 24, 2010, available at http://healthcarereform.nejm.org/?p=3223&query=home.
[28] Ralph Lindeman, "House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference," *BNA Daily Report for Executives*, April 16, 2009, p. A-18

government as a whole. Alternatively, or additionally, ACUS could demonstrate its value by addressing issues that produce non-financial benefits.

## Savings

A consistent theme in many of the comments leading up to the reauthorization of ACUS was the value that the Conference represented for its relatively small appropriation, and/or the potential of the Conference to save the government and the private sector money well in excess of its appropriation through the implementation of its recommendations. For example, at the May 2004 reauthorization hearing, Justice Breyer testified that implementation of ACUS recommendations could save millions, or perhaps even billions, of dollars by reducing the time needed to develop regulations.[29] At the same hearing, Gary J. Edles of the Washington College of Law said that the money saved by the government and the private sector as a result of ACUS's work on alternative dispute resolution alone "far exceeds its annual budget."[30]

In the October 2004 memorandum that I mentioned earlier, CRS also noted the savings that ACUS could provide:

> All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. But all have agreed that it was an entity that throughout its existence paid for itself many times over through cost saving recommended administrative innovations, legislation and publications.[31]

According to the most recent "Regulators' Budget Report" prepared by scholars at the Mercatus Center at George Mason University and the Murray Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis, President Obama's 2010 budget calls for expenditures on regulatory activities of $55.8 billion.[32] If this estimate is correct, and if ACUS recommendations (when implemented) could make these agencies even one-tenth of 1% more efficient in their operations, then the savings would be nearly $60 million — 40 times the $1.5 million appropriated for ACUS in FY2010.

To identify potential money-saving ideas, the "best practices forum" that the ABA Section of Administrative Law and Regulatory Practice's recommended that ACUS hold could be oriented to this purpose, with agencies coming together to share ideas of how they could be more efficient and/or eliminate unnecessary expenses. Similarly, the Section's recommendation that ACUS scour previous recommendations by GAO and others could also be at least initially focused on money-saving recommendations.

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[29] Ibid., p. 22.
[30] Ibid., p. 64.
[31] See http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf for a copy of this memorandum.
[32] See http://mercatus.org/publication/regulators-budget-report for a copy of this report.

## Revenues

ACUS could also have a positive impact on the revenue side of the ledger. For example, in 1996 (the year that ACUS was discontinued), Congress amended the Federal Civil Penalties Inflation Adjustment Act of 1990 and required that federal agencies adjust their civil penalties for inflation, thereby maintaining the deterrent effect of those penalties and improving federal collections. However, in 2003, GAO determined that several elements of the Inflation Adjustment Act had actually *prevented* federal agencies from fully adjusting their civil penalties for inflation.[33] For example, the "rounding rules" in the act can prevent agencies from adjusting certain penalties until cumulative inflation has increased by nearly 50% — which, at recent rates of inflation, could take more than 20 years. Also, although inflation had increased hundreds of percent since some penalty amounts were set by Congress, the first adjustments were capped at 10%, and subsequent adjustments were not permitted to make up the difference. In addition, penalties under statutes such as the Internal Revenue Code of 1986 and the Occupational Safety and Health Act of 1970 were totally exempted from adjustment. In 2007, GAO said that if just civil tax penalties had been adjusted for inflation, IRS collections would have increased by as much as $61 million from 2000 to 2005.[34]

In 2003, GAO recommended that Congress amend the Inflation Adjustment Act to ensure that civil penalties keep pace with inflation, and to give one or more entities in the Executive Branch the authority and responsibility to monitor the act's implementation and provide guidance to the agencies. If ACUS were to review and make recommendations regarding this issue, it could provide a renewed basis for congressional consideration. If Congress decided to act on ACUS's recommendations, the increase in revenues from civil penalties could far exceed the Conference's authorized appropriation.

## Other Values

At the May 2004 reauthorization hearing, Justice Scalia characterized ACUS as an "enormous bargain" because it obtained expert legal advice from private sector lawyers that would otherwise cost hundreds of dollars per hour.[35] He also said that he "wouldn't be surprised if it ended up having saved money overall in its recommendations." But he also said that Congress should not just judge ACUS based on how much money it saves, "because not all of its recommendations are money-saving recommendations." He went on to say that "There are two values involved here: one is efficiency, the other is fairness.

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[33] U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, March 14, 2003.
[34] U.S. Government Accountability Office, *Tax Compliance: Inflation Has Significantly Decreased the Real Value of Some Penalties*, GAO-07-1062, August 23, 2007.
[35] 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. 21.

Sometimes you have agencies' procedures that are just unfair, and it might take a little more money to make them fair. But you'd want to do that.[36]

At the same hearing, Philip J. Harter of the Columbia School of Law at the University of Missouri said that he had just completed a negotiated rulemaking for the Occupational Safety and Health Administration on building steel buildings. One part of this rule had been on the agency's docket for 20 years, but by using the negotiated rulemaking procedures that ACUS had recommended, the rule came to fruition. After the rule was in place, he said fatalities in steel construction were reduced by one-third, which he estimated at about 20 deaths prevented per year.[37] Professor Harter and others also mentioned that ACUS could facilitate public participation in rulemaking and other venues, enhancing civic values in America. Therefore, implementation of ACUS recommendations could provide significant public policy benefits or "value," even if they saved no money or generated no additional revenues for the government.

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

[36] Ibid., p. 22.
[37] Ibid., p. 88.

Mr. COHEN. Thank you, Dr. Copeland. I appreciate your testimony, as the other folks'.

We will now go into a questioning period, and I will recognize myself for questions.

The first thing is, Dr. Verkuil—Verkuil, excuse me—what factors do you believe led to ACUS's demise? And how do you plan to address or avoid these issues in this newly reborn ACUS?

Mr. VERKUIL [continuing]. Combination of events at the time. The idea of saving government money by reducing the number of agencies ironically fell upon maybe the one agency that was making the government money, but we were symbolic of a mood, I think, that perhaps is what led to our demise then.

And, I think, almost instantly on both sides of the aisle, everyone reflected on this and said, "This doesn't make any sense," and so the fight to come back, while it has taken some years, was begun and persisted and now has achieved success.

All I can say to you, Mr. Chairman, is that I am going to try to make sure that we do effective work, and do it well and carefully, and communicate with all the constituencies that we have so that we will be in a position to flourish and not be in jeopardy any longer. And, of course, it is if we want to make sure that we have a permanent appropriation and that you will take advantage of us, really as an agency of government that wants to help improve the quality and the efficiency and the fairness of government process.

Mr. COHEN. You were a victim, I guess, of the Contract on America?

Mr. VERKUIL. Well, you know, the contract—that was the time of the Contract with America, and it did have important points to make, and I think it was not just that. It was the whole reinventing government movement came along, and we somehow got in the midst of it. And I don't remember exactly why. I wasn't there.

Mr. COHEN. Does anybody else have any ideas on why ACUS demised—the demise of ACUS?

Yes, Ms. Katzen?

Ms. KATZEN. I was the acting chair at the time of the end of ACUS, and I think it was just a perfect storm. It was the Contract on America had said we had to have a smaller government, and that was a rallying cry that was taken up. And unfortunately, the only two agencies that were eliminated, one of them was ACUS. But I think the fault, dear Brutus, lay with us as well in that there was not a lot of communication with the Hill as to what we did or why we did it.

You heard Justice Scalia say earlier that these kinds of issues are below the radar. That is good in one sense, but it means that they can be misunderstood. The importance of them cannot be appreciated, because no we knew what we were doing, and when we realized that this was happening, and I, among others, started running around the Hill, saying, "Wait. Wait a second. This is a good organization. This is not what you want to do," people had no clue what the Administrative Conference of the United States did. They had no idea about the savings that we could render to the government. And I think that was the fault of those of us who had thought, "Sure, we will stay below the radar and just discuss this."

Mr. COHEN. Anybody else want to offer any new material?

Mr. LUBBERS. Well, I would just mention that at the time that the conference lost its funding, it was also undergoing reauthorization in the two Judiciary Committees in both houses, and that process was proceeding normally and going well, so this was an appropriations issue.

I recall that on the Senate side there was actually a letter from eight senators, four Republicans and four Democrats, urging the Senate Appropriations Committee to maintain the funding that the Senate had voted for, and during the course of the conference committee, it didn't happen. So it was sort of caught up in the appropriation bowels of the time.

Mr. COHEN. Do each of you think that ACUS should be more visible, or remain under the radar?

Mr. VERKUIL. Well, it seems to me the lesson is—excuse me—the lesson is that we should be more visible, if only to make sure that we are secure in our future and that we can continue to do our work, so I take Ms. Katzen's observations very seriously.

I don't think we should, you know, we don't have to look for things to gain great visibility, but we are going to have a Web site, for example, which didn't exist when we stopped 14 years ago, a Web site which will link us to other agencies, which I hope will be a home that people will come to to find good programs.

We are going to use the advantages of electronic rulemaking internally. We are going to turn ourselves into—when we do recommendations, we want to have input from other agencies, from the Hill, and from the public so that we will be known and seen maybe better, even if we are still doing things that by themselves don't generate, you know, a high degree of visibility. That is how I would begin to approach it.

Mr. COHEN. Anybody else want to contribute to that response—visible, not visible, better?

Mr. LUBBERS. I think the more visibility, the better.

Ms. KATZEN. So long as it is visibility for educative purposes rather than visibility for calling attention to one's self. And given the caliber of the chair and the people who I suspect will be appointed to the council and the plenary session, the assembly, I don't think that will be a difficulty.

I think keeping the lines of communications open to the Hill are critical. They should be partners in this. It should be bipartisan, bicameral, actually nonpartisan. But there should be those channels open.

Mr. COHEN. Thank you.

I now yield to the Ranking Member, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Thank all of you for being here.

I know sometimes to add some commitment to making the bureaucracy run not only smoothly but efficiently and effectively is a big challenge, because that is, you know, it is something that there is almost ubiquitous comment about, and so I appreciate what you do.

In our Subcommittee's 21st Century Project, we identified seven areas, along with a number of issues within them, for study in potential administrative reform. And I see from your written statement that your suggestions for ACUS's initial agenda overlap to a

very significant degree with that agenda that we identified in our report. And this Subcommittee invested, obviously, a great deal of time and effort and a great deal of a number of hearings in the 21st Century Project.

So I am going to ask something incredibly presumptuous. Would you be prepared to at least consider making the agenda we identified in the project report ACUS's first agenda, or agenda for the first year? Mr. Verkuil, I will throw that at you. Again, forgive the presumption here.

Mr. VERKUIL. To make sure that the 21st agenda report would be part of our own agenda is the——

Mr. FRANKS. Or at least be considered as the agenda of your first year.

Mr. VERKUIL. I think so. I think we are looking at it, and we have observed some very good thoughts already. We have—I would say, not exclusively relying on that, because we have—the ABA administrative law section has made some good ideas, proposed some good ideas, too. But we are certainly using those as the two key documents in terms of structuring ourselves in the first year. And I would hope we would select out, you know, once we decide.

It is a kind of a combination of the best idea, how quickly we can do some of these things, because you would like to take some that are easier off-the-shelf kind of ideas and some longer terms, some of the ones you mentioned in your earlier testimony, that are more theoretical and looking at changes, let us say, in the Administrative Procedure Act, or something like that, take a combination of short and long-term projects, find the good people to do the work to help us as consultants, and mesh them all together, and then present them to the council and get this thing going.

I mean, I, as you know, I am sure, I am anxious to roll it out. And I will be—I promise you we will be guided very much by what is going on here.

Mr. FRANKS. Well, in your written statement you identify a number of challenges you are facing as you restart ACUS, and I don't envy you, but these include issues with the applicability of the Federal Advisory Committee Act and the, you know, Constitution's Emoluments Clause, and your own review, updating and simplifying the ethics procedures.

Are there any potential legislative reforms to the Federal Advisory Committee Act or the Administrative Conference Act or any of the statutes that might help you with these issues? Is there any congressional oversight activity that you think might help sort out any of the issues that you are confronting—in other words, legislation or oversight in these areas? What would you think would help you the most?

Mr. VERKUIL. I would like to be able to come back to you with an answer to that, Mr. Franks. I do think that right now in the Federal advisory committee area, we must commit a lot of our time to making sure it works well in this new electronic age. I think that is one of the questions. So we have made some successful contacts with GSA, who does manage the FACA process. We have worked on the Emoluments Clause issue, I think, hopefully, to good effect. We will hear back from the Office of Legal Counsel.

And so we are in a position not yet to say we can't function within what we have, but the more we learn, the more we will be able to tell you, really, very closely, whether we need legislative help in that. Thank you, though, for asking.

Mr. FRANKS. Well, listen, those are the questions I had, Mr. Chairman.

Ms. Katzen, I appreciate your past support.

All of you for what you have done here, and, Mr. Verkuil, all of you, I wish you the very best. You have got a tall challenge ahead of you. Thank you.

Mr. VERKUIL. Thank you, sir.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. COHEN. You are welcome. Thank you, Mr. Franks. I appreciate your participation in this hearing and all the members of the panel.

I thank everybody for their participation.

Without objection, Members will have 5 legislative days to submit any additional written questions, which we will forward to you and ask that you promptly respond. They will be made part of the record. Without objection, the record will remain open 5 legislative days for the submission of any additional materials.

Again, I thank everyone for their time and patience.

The hearing of the Subcommittee on Commercial and Administrative Law is adjourned.

[Whereupon, at 5:24 p.m., the Subcommittee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD

### LETTER FROM THE AMERICAN BAR ASSOCIATION (ABA)

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May 20, 2010

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

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

Re: Today's Hearing on the Administrative Conference of the United States

Dear Chairman Cohen and Ranking Member Franks:

On behalf of the American Bar Association ("ABA"), I am writing to say how extremely pleased we are that your Subcommittee is holding today's hearing on the Administrative Conference of the United States ("ACUS" or "the Conference"). We ask that this letter be included in the record of today's hearing.

For over 25 years, ACUS advised the federal government on, and coordinated important improvements to, the administrative procedural law that is the backbone of federal regulation and management. ACUS cost-effectively leveraged expert academic consultants and volunteer luminaries of the administrative bar to produce an impressive set of recommendations, roughly three-quarters of which were adopted in whole or in part by Congress or the Executive Branch. For that reason, the ABA was proud to help lead the effort that resulted in ACUS being reauthorized during the 110th Congress, and then refunded and ultimately reestablished during the current Congress. This Subcommittee originated (twice) the legislation that reauthorized ACUS, and we again thank the Subcommittee for its leadership.

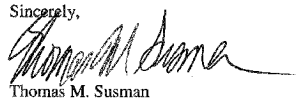
There is no shortage of pressing issues and valuable projects that ACUS should take on. The ABA's Section of Administrative Law & Regulatory Practice submitted to OMB an 18-page list of recommended study topics for ACUS last August, and a copy of that list is attached. We are happy to learn that it is currently serving as a helpful resource to the new Conference. As others will no doubt testify today, the new health care legislation and pending financial reform legislation (if enacted into law) will, by themselves, generate a broad range of questions that ACUS could beneficially address.

We are especially proud that the Senate has confirmed as ACUS Chairman Paul Verkuil, a former Chair of the Section. We know that Chairman Verkuil's leadership will continue to exemplify the creativity and prescience that has

characterized his scholarship and service as a law school dean and university president. We recently met with him and know that he is moving as rapidly as he can to start up ACUS and begin producing useful work product this year.

We also know that ACUS will continue to benefit from this Subcommittee's oversight, support, and input, and we commend the Subcommittee for holding this hearing so early in the new Conference's existence. We also thank the Subcommittee's able staff for reaching out to the ABA in this connection and others. As always, we stand ready and eager to assist on the issues before you.

Sincerely,



Thomas M. Susman

Attachment

cc: Members of the House Judiciary Subcommittee on Commercial and Administrative Law

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The Honorable David Ray Glenapp
YOUNG LAWYERS DIVISION LIAISON
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August 18, 2009

Michael A. Fitzpatrick
Acting Administrator
Office of Information & Regulatory Affairs
Office of Management & Budget
1650 Pennsylvania Ave., NW
Washington, DC 20503

Re: *Recommended Study Topics for a New Administrative Conference of the United States*

Dear Mr. Fitzpatrick:

We understand, and sincerely hope, that the Obama Administration will shortly announce a nominee to chair a new Administrative Conference of the United States (ACUS) after a hiatus of over a decade. The reestablishment of ACUS will come none too soon -- the Administration and Congress are actively considering how the federal government should best address a range of important issues facing the Nation, and in most, if not all, cases effective implementation of the chosen measures will involve questions of administrative law. ACUS will be well-positioned to offer constructive, consensus-based recommendations on these questions.

The Section of Administrative Law & Regulatory Practice is the ABA body with special expertise regarding administrative law issues; it includes former ACUS members and staff among its leadership. The Section has given considerable thought in recent months to the questions and projects that most warrant consideration by a new ACUS. Building on excellent work commissioned this spring by the House Judiciary Committee, the Section offers a list of such topics. The full list is attached and is summarized below.

Our recommendations begin with two projects that would take advantage of ACUS's unique capability as a convening forum for government and private lawyers concerned with the full range of administrative law issues:

- An "*Agency Best Practices Forum*" through which federal agencies could share best practices, obtain sound advice regarding them, and formulate proposals for facilitating their broader adoption. Nothing currently serves this function, while ACUS is ideally constituted to do so.

- A *retrospective look at administrative law recommendations issued since ACUS became inactive*. The GAO, the ABA, and other reputable groups have made a plethora of such recommendations over the past fourteen years. ACUS could assess the merits of those that have not yet been adopted.

Both of these undertakings could well produce substantial, cross-government savings in the near, as well as the long, term.

The rulemaking process is the focus of much of this document and its attachment. From among the many worthwhile topics in this area, we have identified nine that we believe are particularly high priorities for ACUS's initial work:

- *Legal issues implicated in e-rulemaking*. These include archiving requirements, privacy issues, whether e-commenting could be mandated, and the value of having "reply comment periods" for those who participate in a first comment round.
- *Executive review of agency action*. This project should commence upon the Administration's issuance of its replacement for E.O. 12866, and could evaluate the revised order's effectiveness.
- *Congressional review of agency action*. Questions ACUS could address include whether (1) the Congressional Review Act is warranted, and (2) the appropriations process is inappropriately employed in general or in particular types of cases through the use of earmarks, riders and report language.
- *Science and information quality*. ACUS could evaluate the effect of the Information Quality Act (IQA) and OMB's Peer Review Bulletin, both of which have particular applicability to agency use of science. ACUS could also address issues going beyond the IQA, such as how to assess the reliability of privately-funded science.
- *Regulatory preemption*. ACUS could help agencies formulate a consistent understanding of when assertions of preemption may be appropriate and how they should be expressed.
- *"Midnight" rules*. As the Administration emerges from the inherited body of late-term Bush Administration regulations, it would be timely for ACUS to consider what standards should govern the issuance and reconsideration of such rules.
- *Agency use of guidance documents*. The previous administration issued a Bulletin on Good Guidance Practices, the continued viability of which is uncertain. ACUS could evaluate the Bulletin and related 'rulemaking-by-guidance' issues.
- *Regulatory impact analyses*. With the federal budget – and the private sector – under unprecedented financial pressure, it would be useful for ACUS to evaluate the costs and benefits of the myriad impact assessments required of agency rulemakings.
- *"Lookbacks" at existing regulations*. Agencies do not regularly evaluate the effectiveness of existing rules. Would a requirement to do so, in general or in specific cases, be worth the resources it would consume?

Our list also describes many other worthwhile rulemaking projects. It then addresses issues arising under the headings of:

- *Regulatory policy*. These include reassessing the value currently being provided by the Federal Advisory Committee Act and the Paperwork Reduction Act.
- *Administrative adjudication*. These include whether OPM should continue to administer the ALJ program and how best to handle mass adjudication programs.
- *Judicial review of agency action*. These include the effects of justiciability doctrines like standing and ripeness, and the effects of courts' remanding rules without vacating them.
- *Openness & transparency*. These include reviewing post-9/11 statutory exemptions from FOIA and reviving ACUS's prior effort to evaluate the Government in the Sunshine Act.
- *Contingent & other projects*. These include administrative law issues implicated in legislation, assuming it is enacted, to reform financial services regulation, improve health care, and mitigate global warming.

The Section eagerly anticipates the re-establishment of ACUS and stands ready to assist it in considering these recommendations and in any other way that it can provide support. You can reach me at 412-648-1380 and wvl@pitt.edu.

Sincerely,

William V. Luneburg
Chair, Section of Administrative Law
and Regulatory Practice

Attachment

# Recommended Study Topics for a New Administrative Conference of the United States

American Bar Association
Section of Administrative Law & Regulatory Practice

August 2009

## I. Cross-Cutting, Short-Term Projects

### A. "Agency Best Practices Forum"

Federal agencies have a variety of missions, but the tools and methods that they use to accomplish them are often quite similar. Agencies are continually seeking more efficient and effective ways of operating, but they currently lack any means to systematically identify and highlight those "best practices," or even a forum in which to share them. As a result, agencies often "reinvent the wheel" in their efforts to innovate and can needlessly repeat mistakes or learning steps. Because ACUS is required by statute to include representation from all federal departments and agencies, including independent agencies, it could naturally serve as an innovation clearinghouse regarding better approaches to rulemaking, adjudication, enforcement, compliance assistance, dispute resolution, and countless other administrative processes. Moreover, because ACUS will also include leading academics and private practitioners and will have access to many more, ACUS would not be limited to serving as a facilitator, but could add value by serving as an expert evaluator and consultant regarding best practices and their broader adoption.

Such an "Agency Best Practices Forum" could be an integral aspect of ACUS's functioning, or it could be an affiliated, but stand-alone, operation. In either case, the Forum could also formulate proposals for presidential memoranda or executive orders or legislation where it concluded that such actions were required to enable particular best practices to be implemented broadly. By helping agencies improve their administrative operations by as little as 1 percent, ACUS could save the federal government hundreds of millions of dollars each year – many times the size of its appropriation.

### B. Reviewing Recommendations Since ACUS Ceased Operation

During the almost 14 years that ACUS has been out of operation, organizations within and outside of government (e.g., the Government Accountability Office, the National Academy of Public Administration, and the ABA) have made numerous recommendations to improve the efficiency and effectiveness of federal operations. ACUS would be ideally qualified to survey those recommendations and highlight the most meritorious of those that have not been implemented. By leading those recommendations to implementation, ACUS could greatly improve government

operations and potentially save the federal government tens of millions of dollars each year.

## II. The Rulemaking Process

### A. Top Priority Issues

#### 1. Legal Issues Implicated in Electronic Rulemaking

Acting under the auspices of the Section, a blue-ribbon committee has produced a landmark report to Congress and the President entitled *Achieving the Potential – The Future and Status of Federal E-rulemaking* (Oct. 2008). That report sets out recommendations for the optimal governance, management, funding, and architecture of the federal e-rulemaking effort, as well as recommendations on public access and participation, good e-rulemaking practice, and innovation. The report was not designed, however, to grapple with the many potential legal questions which confront the current effort to institutionalize e-rulemaking and with which any reforms will inevitably have to grapple. The following is a detailed list of such questions, all of which ACUS could help answer.

##### a. Transparency and access issues

*Integration of existing sources of information.* As www.regulations.gov evolves, it should be a one-stop shop for all agency rules and related documents. This should include related guidance documents as well—a sort of "C.F.R. Annotated."

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

- *Scanning issues.* Optimally, written (paper) comments should be scanned immediately so that a complete online docket is available. Agencies may have the assistance of the Government Printing Office in some of these matters, including scanning, high-level scanning, OCR processing, long-term docket storage for paper, microform and other tangible items, and the ability to establish contracts for retrospective and supplemental scanning services. In any event, agencies are faced with the need to develop a strategy for handling a combination of electronic and paper comments.
- *Archiving issues.* Do (redundant) paper copies need to be kept due to federal archiving requirements? How about cover e-mails? As part of its implementation of the E-Government Act, the National Archives and Records Administration began an "Electronic Records Archives" project to "efficiently and effectively address the challenges presented by the increasing volume and complexity of records (in particular, electronic records) which it must manage, preserve, and make available." What has been the outcome of this project?
- *Attachments.* How should exhibits, forms, photographs, etc., be dealt with? Attachments can pose a risk of viruses and of overloading systems, and electronic

technology makes it all too easy for commenters to "dump" huge files or links within their electronic comments. What should the agency's responsibility be to sift through everything that is "sent over the transom"?

- *Copyright concerns.* As public comments have been transformed from easily controlled physical files in Washington DC to internet-accessible digitized documents, copyright issues have emerged—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission. The submission of others' materials raises difficult issues. Intellectual property experts should be consulted to help address the legal issues involved as well as the various technological fixes that have been suggested, such as software controls that would code such documents so that downloading and copying can be regulated.
- *Different levels of user classifications.* In some circumstances might it be appropriate for one type of participant (like agency staff) to see everything, while others have more limited access? Should agencies be allowed to ask viewers to register?
- *Security issues.* In a post 9/11 world, security issues have become of heightened concern—both in terms of preventing unauthorized tampering and in making sure that sensitive information is not made available to potential terrorists.
- *Privacy issues.* Should anonymous comments be permitted? Ought commenters be identified or searchable by name?
- *Mandating e-comments.* What legal impediments prevent agencies from requiring e-comments to the exclusion of paper comments? The "digital divide" continues to exist—not everyone owns or is comfortable using a computer, so agencies still continue to accept mailed and hand-delivered comments. On the other hand, problems with the mail, especially in Washington after 9/11 and the anthrax scare, have made e-mail even more effective by comparison. Have other countries and states moved toward mandating e-comments? If so, how has it worked?

b. Participation issues

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

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

- Should all agencies be required to make comments received (other than confidential ones) immediately available to the public electronically (to allow comments on the comments)? Or, alternatively, should agencies experiment with "reply comment periods" to discourage commenters from waiting until the end of the comment period?

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

- What are the impacts of technology on the regulatory process? This could be the subject of a broad study effort.

2. Executive Review of Agency Rules

The Administration has initiated a reassessment of Executive Order 12866, issued at the beginning of the Clinton Administration and largely maintained by the Bush Administration. Once a new or revised order has been issued, ACUS could help with the implementation process. This could include maintaining statistics regarding that implementation. ACUS could also explore larger questions extending beyond the four corners of the document. These could include an extensive study of what the overall impact of OIRA review has been on agency rulemaking—e.g., what kinds of changes have agencies made in proposed rules at the behest of OIRA, how the length of the rulemaking process has been affected, has the process been "balanced," and how has the OIRA "prompt letter" process worked? ACUS could also address whether Congress should codify presidential review of agency rulemaking.

3. Congressional Review of Agency Rules

The House has passed a bill to lessen the burdens imposed on Congress by the Congressional Review Act, but the statute would continue to burden agencies and Congress would retain its constitutional form of the "legislative veto." Only one rule has been disapproved under the CRA's procedures and relatively few resolutions of disapproval have been introduced. ACUS could evaluate whether the CRA has improved congressional oversight of the rulemaking process and whether it needs to be further amended or replaced. For example, should the "legislative day" measure be clarified since it is so unpredictable in terms of calendar days?

ACUS could also look beyond the CRA to evaluate other options Congress has to affect agency action. These could include:

- The appropriations process (earmarks, riders forbidding spending on particular activities, and directions in appropriations reports). How commonly used are such approaches? Are they effective?

- Should Congress establish a "Congressional Office of Regulatory Analysis" to help it oversee agencies' compliance with various rulemaking requirements?

4. Science and Information Quality

Major rulemakings, particularly those involving health, safety and the environment, often depend on an extensive scientific foundation. Complicating matters, in many cases the science involved in rulemaking (or adjudication) is initially evaluated by agencies in prior, non-regulatory processes. This science is often uncertain and highly contested. Some agencies have responded to these circumstances by convening or consulting with ad hoc or standing scientific advisory boards. Agency use of science in policymaking and the operations of scientific advisory bodies have become quite controversial in recent years. ACUS could help reduce this controversy by addressing questions such as:

- Are there ways to assess the reliability of scientific work apart from its funding source?
- What constitutes "weight of evidence" in making risk-based regulatory decisions, and is it implicitly required by the APA or other statutes? Should Congress define the term or should it be left up to agencies within specific statutory contexts?
- Should the "Shelby Amendment" be extended so that any person submitting scientific information to an agency for policy purposes will be required to make underlying data publicly available?
- Do informal "stakeholder" processes actually promote meaningful discussion among agency officials and external experts?
- How should scientific advisory panels be constructed to maximize their usefulness and minimize concerns about conflict of interest and bias?
- Should the Paperwork Reduction Act or Federal Advisory Committee Act be modified to allow agencies to gather scientific information more efficiently?
- Can and under what circumstances should political and career agency personnel deviate from the recommendations of their scientific staff and advisory bodies?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?

Under OMB's Peer Review Bulletin, agencies must peer review all "influential" scientific information that they intend to disseminate; i.e., data, models, assessments, etc., that the agency "reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions." The Peer Review Bulletin was an outgrowth of the Information Quality Act (IQA), a 2000 statute that required every agency to issue guidelines, with OMB oversight, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency. Under the IQA, agencies also established administrative mechanisms ostensibly allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency. ACUS could also evaluate questions arising under the IQA, such as:

- Are agencies complying with OMB's Peer Review Bulletin? If so, what is the current effect of the Peer Review Bulletin on the length of time it takes agencies

to issue rules? On the quality of agency scientific disseminations? Are government-wide standards for peer review needed?

- What effect has the IQA had on the length of time it takes agencies to issue rules or non-rule determinations? Do agencies have too much discretion to deny IQA correction requests? Should agencies' correction denials be subject to judicial review?

5. Regulatory Preemption

The Supreme Court has recently established that the weight it will accord agency assertions of regulatory preemption, absent express authorization to do so, will depend on the thoroughness, consistency, and persuasiveness of the agency's explanation. The Administration has provided further direction to agencies in a memorandum issued in May. ACUS could help federal agencies formulate a consistent and nuanced understanding of when assertions may or may not be appropriate in light of these authorities and how to explain such assertions effectively.

6. "Midnight" Rules

Outgoing presidential administrations have characteristically issued a large number of important rules at the very end of their administrations. When the new President is from a different party, the incoming administration generally attempts to freeze, delay, or withdraw these "midnight rules." This can create some practical and legal difficulties for the agencies and the courts. It would be good to have a set of standards for how both outgoing and incoming administrations (and organs like the Office of Federal Register) should behave in these situations. Should a new President be authorized to stay the effectiveness of "midnight rules" that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed and should those efforts be subject to notice and comment?

7. Guidance documents

Concerns regularly recur regarding "guidance documents" that agencies issue instead of rules. The Bush Administration sought to address these concerns by amendments to E.O. 12866 and a related Bulletin on Good Guidance Practices. The E.O. amendments have been rescinded and the status of the Bulletin remains uncertain. ACUS could address this uncertainty and more broadly could seek to establish consensus standards to distinguish between the rules and guidance documents.

8. Analysis of Impact Analysis Requirements

Agencies are required to prepare about a dozen separate analyses in rulemaking (e.g., environmental impacts, costs and benefits, paperwork, small business impacts, unfunded mandates, federalism, tribal impacts, "takings" of private property, litigation impacts, environmental justice, impacts on families, environmental health impacts on children, and energy impacts) — all at a time when many agencies' budgets in real dollar terms are

being reduced. A study of the costs and benefits of these impact analyses and whether they should be abolished, or at least be consolidated, would be useful. Such a study could also address:

- Should Congress reassess statutory requirements that prohibit agencies' consideration of costs in setting health and safety standards?
- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?
- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act)? Do they give federal agencies too much discretion in their application?
- How effective have been the regulatory requirements designed to protect federalism (e.g., Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., "significant federalism implications")? Or should there even be special protections for federalism?

9. "Lookbacks" at Existing Regulations

In recent years, there has been a new emphasis on agency review and reevaluation of their existing regulations. The Regulatory Flexibility Act requires agencies to undertake periodic reviews of regulations that have "a significant economic impact upon a substantial number of small entities." E.O. 12866 required agencies to review existing regulations to ensure that they are still timely, compatible, effective, and do not impose unnecessary burdens. In the Bush Administration, OIRA regularly solicited nominations of rules that should be reviewed for ineffectiveness or inefficiency. ACUS could evaluate whether:

- Agencies should be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden.
- Congress should take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress). Relatedly, should agencies' final rules include a "sunset" provision that requires them to be reexamined and republished?

B. Other Rulemaking Process Issues

1. Unified Agenda

ACUS could consider how effective the Unified Agenda of Federal Regulatory and Deregulatory Actions has been in identifying future rulemaking (thereby giving the public advance warning of forthcoming regulatory actions). It could make recommendations on what changes could make the Agenda a more effective means of notification. Also, can and should it be extended to significant pending adjudications?

2. Comment periods

The APA does not specify how long public comment periods should be (although E.O. 12866 suggests 60 days). ACUS could consider whether there should be a minimum comment period specified in the statute, and if so, what it should be. A related question would be under what circumstances agencies can or should extend comment periods.

3. Agency duty to reply to comments

Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments become too "stale" to permit issuance of a rule based on those comments (without further public comments)? ACUS could address these questions.

4. Rulemaking records

Currently, there are no government-wide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? ACUS could discuss whether there should be such standards, and if so, who should establish them (OMB, NARA, others)?

5. Ex parte Communications

Courts have clarified that there is no categorical bar on "ex parte" contacts in informal rulemaking, but agencies generally maintain policies implementing some degree of restriction on such contacts at various stages of the process. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?

6. Consent decrees and rulemaking

ACUS could study consent decrees entered into by government agencies with private parties to settle challenges to rules and that effect substantive changes in the rules. Questions it could evaluate include whether these undermine the APA's notice-and-comment process and public participation opportunities and whether they raise separation of powers issues.

7. Expedited Rulemaking

In 1993, the National Performance Review, chaired by the Vice President, proposed that agencies undertake direct final rulemakings. ACUS conducted a study of direct final rulemaking and interim final rulemaking, which led to a recommendation supporting their use in appropriate circumstances. In the intervening decade and a half, agencies have continued to employ these tools, generally relying on the APA's "good cause" exception to notice and comment requirements. Congress has not amended the APA to endorse or prohibit these practices, although it has authorized a particular agency to employ direct final rulemaking in at least one instance. It would be appropriate for ACUS to revisit

this topic, reviewing actual experience over the last 15 years and assessing whether Congress should expressly codify or limit these forms of expedited rulemaking.

8. What's Holding Back Negotiated Rulemaking?

One of ACUS's most trumpeted achievements (at the time) was the development of a more participatory and consensus-based form of rulemaking known as negotiated rulemaking. With the passage of the Negotiated Rulemaking Act of 1990 and its permanent reauthorization in 1996, negotiated rulemaking seemed on the verge of taking off. Congress still requires it from time to time in specific statutes, but since the mid-1990s its use has leveled off or even fallen despite its great apparent promise. One reason may be the absence of ACUS's support and assistance to the agencies in undertaking these proceedings. But there are cost, timing, and effectiveness questions as well. It would be useful to mount a major study of why it is faltering and what could be done to revive it.

**III. Regulatory Policy**

A. Regulatory Prioritization

Many regulatory agencies have limited budgets and broad jurisdictions, and thus must devote much more attention to prioritization. They will have to develop better ways to decide on the best targets for regulation, standard setting, and enforcement. Some pioneering work was done by the EPA Science Advisory Board in trying to set priorities among all the environmental hazards that EPA might choose to combat. Studies could determine whether such efforts need to be expanded.

B. Retrospective Assessment of Agency Cost-Benefit Predictions

Under E.O. 12866, agencies have routinely estimated the projected cost-benefit impacts of economically significant rules. Rarely, however, have they gone back and compared those estimates with the actual costs and benefits from the rules after they have been in effect for a period of time. The conventional wisdom is that agencies overestimate the benefits and regulated industries overestimate the costs. OMB discussed this growing body of literature in its 2005 Report to Congress and signaled its intention to release a report on this issue soon. ACUS could oversee a coordinated effort to make such comparisons, using a methodology that had broad acceptance.

C. Alternative Approaches to Regulation

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

D. New Approaches to Enforcement

At the time of its shutdown, ACUS had just begun to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation. 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. Other possibilities include *qui tam* actions under the False Claims Act, insurance-based regulation or contract-based regulation, and the continued development of systems for trading of pollution credits and other marketable rights.

E. Paperwork Reduction Act

The PRA requires agencies and OMB to expend significant resources to develop, review and finalize information collection requests, a process that also slows down agency activities, discourages agencies from gathering information, and may lead to rules being based on old or poor-quality information. Noncompliance with the PRA renders agency rules unenforceable. Private parties and agencies have both complained in particular about having to comply with the PRA for voluntary collections. ACUS could evaluate how well-founded the concerns were that gave rise to the PRA and whether (i) the PRA is still needed, (ii) its purposes could be served in a more targeted manner, (iii) voluntary collections should be exempted, and (iv) OIRA should continue to be tasked with enforcing the PRA.

F. Federal Advisory Committee Act

ACUS was shut down before it could consider the last study that it commissioned of FACA. Since then, numerous court decisions have addressed topics, like FACA's applicability to subcommittees of advisory committees, that have proven controversial. Critics bave also raised questions about why the use of advisory committees should be "kept to the minimum necessary" and whether the burdens of FACA compliance have encouraged agencies to circumvent it. ACUS should evaluate these issues.

G. Waivers and Exceptions

The Katrina and Rita disasters focused attention on agency authorities and procedures for issuing waivers from existing statutes and regulations. What process is required for waivers? How should third-party beneficiaries of existing laws and regulations be heard in such proceedings? Are granting and denying waivers and exceptions rulemaking or adjudication and what should follow from the appropriate characterization?

H. Alternative Dispute Resolution

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

I. Cooperative Federalism

The aftermath of Katrina and Rita showed just how important it is to have cooperative linkage between federal, state, and local governments. Moreover, many important regulatory programs involve state implementation of federal environmental and safety standards—the Clean Air Act, the Clean Water Act, the Surface Mining Control Act, and the Occupational Health and Safety Act, just to name a few. This approach of "cooperative federalism" is seen as an alternative to direct federal enforcement. But, inevitably, tensions arise as the federal agency retains the ultimate authority to oversee and even veto state implementation activities. Because this model is so prevalent, it deserves a close study—with all the stakeholders represented in the study. Also, the movement over the last few decades to devolve more responsibility onto state and local governments in federally funded assistance programs such as Medicaid, Medicare, public housing, supplemental security income, food stamps, and welfare has required the states, with their fifty different administrative procedure acts, to deal with an influx of rulemaking and adjudication responsibilities. What administrative problems have the states thereby confronted and how might those be remedied or minimized?

J. Federal Civil Penalties Inflation Adjustment Act

This Act was enacted the year after ACUS went out of existence, and (its title notwithstanding) actually prevents penalties from being adjusted for inflation. Had ACUS been around in 1996, it might have prevented problems before they were written into the statute. Now it can recommend necessary changes to the Act to improve its operation.

K. Agency Structure

Is the multi-member board or commission an expensive anachronism? Why does Congress create three-member agencies like the Occupational Safety and Health Review Commission (OSHRC), or even worse, six-member commissions, like the Federal Election Commission and the International Trade Commission, with too many opportunities for paralysis? Does it really make any difference if the EPA becomes a Cabinet department? How well does the "holding company" model of a Department, like the Department of Transportation or the Department of Homeland Security, function? What about all the hybrids, such as government-sponsored enterprises, government corporations, and administrative quasi-courts, like OSHRC and the National Transportation Safety Board, that are split off from their rulemaking agencies? And what

about all the independent power centers developing within agencies: presidentially appointed general counsels, division heads, inspectors general, chief financial officers, and so on?

L. Privatization/Outsourcing of Regulation

What are the proper roles of public-private partnerships, self-regulatory organizations, and government contractors in carrying out government programs?

M. Requirements for Agency "Planning" in Natural Resource Regulation

In 1998, the Supreme Court in *Ohio Forestry v. Sierra Club* made it difficult to challenge the sort of agency planning documents that are required under many natural resources statutes. As a result, agencies can insulate themselves from judicial review of their plans by keeping them as general as possible—a strategy that undercuts the value of the planning process itself. While perhaps an understandable reaction to the decision, this new approach deserves examination.

N. Administrative Procedure and National Security

Since 9/11, federal agencies have frequently invoked "national security" as a basis for exempting themselves from requirements for, inter alia, cost-benefit analysis. How should principles of administrative law be reconciled with the imperatives of national security? Should some Department of Homeland Security rules be exempt from some procedural requirements?

O. International Harmonization

Many U.S. rules and decisions must be "harmonized" with international institutions and their directives, decisions, and other issuances. This can create some procedural problems if the international negotiations have to be coordinated with public participation requirements. This is an area that will become increasingly important and deserves special attention.

## IV. Administrative Adjudication

A. Who Should Oversee the Administrative Law Judge Program?

The Office of Personnel Management (OPM) is widely viewed (correctly or incorrectly) as being hostile to Administrative Law Judges (ALJs). ALJs and other critics argue that OPM has sought to undermine ALJ independence and downgrade ALJs' level of experience and competence, and has failed to act as an effective ombudsman for the ALJ program. ACUS should assess these claims. It should also evaluate the proposal that Congress create a new independent agency -- the Administrative Law Judge Conference of the United States -- which could be responsible for the functions currently assigned to OPM, including testing, selection, and appointment of ALJs and maintenance of an ALJ

register. This proposal is supported by the ABA and the two largest federal ALJ organizations, and legislation to accomplish it has twice been introduced in Congress. In addition to the functions that OPM now performs, the Conference could also assume additional responsibilities for the purpose of improving the administrative hearing process, including reviewing rules of procedure and rules of evidence, adopting measures to ensure compliance with ethical standards, and reporting agency compliance with the Administrative Procedure Act.

B. Expansion of the Administrative Law Judge Program

Congress seems little concerned about the state of administrative adjudication, even though agencies seem to be using all sorts of non-ALJ adjudicators instead of ALJs. In fact, other than the nearly 1,300 ALJs assigned to Social Security and Medicare Programs, the numbers at other agencies have fallen from 410 in 1978 to 184 in September 2008. Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, etc. ACUS should consider whether this trend is desirable.

C. Administrative Appeal Boards

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

D. Uniform Federal Rules of Administrative Procedure

Each federal agency has its own procedural rules for each subject area that requires administrative adjudication. ACUS could review whether the rules of practice before administrative agencies could and should be standardized so that there is one set of Federal Rules of Administrative Procedure (FRAP--though not to be confused with the Federal Rules of Appellate Procedure) for all agencies. Agencies might be permitted to add their own rules that are not in conflict with the FRAP. Some statutory changes to achieve standardization may be necessary, such as eliminating specialized procedural rules, adding subpoena power to statutes that require hearings but lack a subpoena power provision, and removing provisions that limit discovery.

E. Mass Adjudication Programs

How should we handle high-volume benefit programs such as the Social Security Disability Program, which now has about 600,000 hearings a year with no sign of slowing down, or immigration adjudication, which is burgeoning at a rapid pace? The Black Lung Benefits program is another high caseload program, and a new Medicare appeals adjudication program shows signs of becoming the next large mass justice scheme. 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 effectively handle mass tort cases? Should they? What are the limitations imposed by the Seventh Amendment jury trial guarantee?

F. Reform of the Immigration Adjudication System

The ABA has a major study of this underway and ACUS is ideally suited to evaluate its recommendations.

G. Split Enforcement Model

In a few cases Congress has created separate agencies to adjudicate enforcement cases brought by another agency. The rationale is to provide more fairness to the regulated parties. But critics have pointed to inefficiencies. Examples include OSHA-OSHRC, MSHA-FMSHRC, and FAA-NTSB. What are the benefits and problems of this model? Should it be used more often?

H. Informal Adjudication

Some years ago the ABA attempted to draft a section on informal adjudication to add to the APA. Although this effort was ultimately not successful, is there anything more that can and should be done to at least codify judicial "due process" decisions and incorporate that set of standards into the APA?

**V. Judicial Review of Agency Action**

A. *Chevron*-Related Issues

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

Justice Breyer, when asked what he considered the top priorities of a reconstituted ACUS, said "we in our Court have divided about five ways about the meaning of a case called *Chevron*, which has significance. And if I were running that now, I think maybe one thing I might like to do is ask the agencies whether the five different things that we have said have mattered. Has it hurt them? Has it helped them? That's a subject they might look into."

B. Access to the Courts

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

C. Attorney Fees

One of ACUS's key responsibilities was to review agency rules implementing the Equal Access to Justice Act's attorney fee provisions concerning administrative adjudication. This function has not been assumed by any other agency. Another key attorney fee issue concerns what is meant by the term "prevailing party." The Supreme Court ruled in 2001 that to fall within that category—which is crucial under many statutes' fee authorization provisions—a party must have prevailed on the merits through a judgment or a consent decree, thus precluding an award of fees for favorable (to the plaintiff) non-judicially approved settlements and other changes in the defendant's conduct. The impact of this decision should be of great interest to Congress, which could, of course, make its intent clear if it so wished. Congress did so in its 2007 amendments to the Freedom of Information Act, but the question still affects other statutes with attorney fees provisions.

D. How Intensive Is (or Should Be) Judicial Review?

Studies have shown that appellate courts are overturning a fairly high percentage of challenged agency rules. Scholars and a few judges have criticized the courts' "hard look" test for review of agency fact-finding and policy choice in rulemaking as too intensive and subjective. Should Congress statutorily modify the "reasonable decisionmaking" standard or limit judicial review in some other way?

E. Remand Without Vacatur

Panels of the D.C. Circuit have frequently engaged in disputes among themselves regarding when the court should remand a rule without vacating it. Proponents of doing so argue that it maintains the beneficial public purposes of the remanded rules, while opponents argue that it gives neither successful challengers any relief from illegal rules

nor agencies any incentive to correct them. ACUS could study the issue and address whether the APA should be amended to make the answer clearer than it currently is.

F. SBA Amicus Briefs

The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. It has rarely, if ever, done so. Why not, and is that authority something that needs reconsideration or refinement?

**VI. Openness and Transparency**

A. Coherence Among the Openness Statutes

Chris Cannon, former Chairman of the House Judiciary Committee's Subcommittee on Commercial & Administrative Law, said that ACUS could help establish a coherent approach among agencies with respect to emerging issues such as privacy, national security, public participation, and the Freedom of Information Act.

B. Finish ACUS's Sunshine Act Project

The Government in the Sunshine Act is widely regarded as having some self-defeating flaws. Among other things, it tends to discourage public deliberation among the officials to which it applies. Before ACUS closed, it created a special committee, headed by Randolph May, that produced a well-thought out recommendation on reforming the Act, but it was never officially approved by the ACUS plenary session. It could be easily revived.

C. NARA's New Role Under FOIA

The 2007 amendments to the Freedom of Information Act gave the National Archives and Records Administration the additional responsibility of operating a new Office of Government Information Services to review all federal agencies' FOIA policies and compliance with FOIA, to make recommendations to the President and Congress, and to serve as a FOIA ombudsman, all without additional funding. This legislation ignored the historical existence of the Justice Department's Office of Information & Privacy, and the previous administration unsuccessfully attempted to transfer the new office's responsibilities to DOJ. ACUS could help formulate a reasonable division of responsibilities among these two offices and ways in which the new office can discharge its functions.

**VII. Contingent & Other Projects**

A. Issues Raised by Government Ownership of Corporations

What are the implications of the federal government's newly-acquired ownership of a majority position in private companies as a result of "bailout" actions? Does the ownership relationship trigger administrative responsibilities, liability under the Federal Tort Claims Act, due process constraints, etc.? Does the current set of takeovers result in a new class of "government corporation"? These and other issues should be explored, along with whether supplementary legislation is warranted to address immunities, responsibilities and requirements applicable to government officials for temporarily managing private entities.

B. Financial Services Regulation

The Administration has asked Congress to enact a dramatic overhaul of the Nation's system of financial services regulation. While not as sweeping as initially conceived, the President's proposal would still lead to major changes in the nature of the Federal Reserve Board's and other agencies' responsibilities and practices. Immediately upon enactment of any such legislation, ACUS should initiate a project to identify the changes most warranting expedited study and recommendations.

C. Health Care Reform

The health reform bills before Congress call for major regulatory changes in the private health insurance markets and expansion of existing public programs. To accomplish these reforms, new ageneies, advisory boards and various quasi-public bodies would be created and given extensive authority to make policy on mandates and other requirements. In addition, the health reform bills assign states and private bodies with great responsibilities and authority. The implicated administrative law issues pertaining to rule- and policy-making, enforcement of mandates and other requirements, and adjudication of anticipated disputes are extensive. ACUS study could be of immense value for a variety of purposes, mcluding assuring effective implementation.

D. Global Warming

If climate change legislation is enacted, ACUS could help in the effective design and enforceability of an emissions trading program. Projects could focus on, among other areas, the coordination of EPA and other agencies (e.g., the Departments of Agriculture and Energy) that are given roles under the statute, evaluation of current emission trading and carbon offset programs, and coordination of existing state and regional cap-and-trade programs with the federal program.

E. Orientation for Newly Created Agencies

Congress regularly establishes new agencies and these agencies typically struggle to identify and become capable of managing the range of cross-cutting procedural statutes that apply to them (e.g. the Administrative Procedure Act, the Privacy Act, the Government in the Sunshine Act, and the Paperwork Reduction Act). Agency officials are often given no orientation with regard to these laws and do not have access to a network of their experienced counterparts in older agencies. ACUS could help in both of these areas.