

**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**

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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,<sup>1</sup> 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

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<sup>1</sup>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.”<sup>2</sup>

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.”<sup>3</sup> He further observed: “I did not know another organization that so effectively combined the best talent from each of those areas.”<sup>4</sup>

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.”<sup>5</sup>

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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<sup>2</sup> 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).

<sup>3</sup> 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).

<sup>4</sup> *Id.* at 21.

<sup>5</sup> 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."<sup>6</sup> 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

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<sup>6</sup> 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<sup>7</sup> 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

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<sup>7</sup> 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.<sup>8</sup> Each of these Conferences recommended the establishment of a permanent agency to study federal administrative procedures and develop recommendations for improvement.<sup>9</sup> 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.”<sup>10</sup>

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.<sup>11</sup> The Administrative Conference Act was enacted in 1964 for such purposes.<sup>12</sup>

ACUS began operations with the appointment and confirmation of its first Chairman, Jerre Williams, in 1968.<sup>13</sup> 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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<sup>8</sup> 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).

<sup>9</sup> 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, 1<sup>st</sup> Sess. 15, 22 (1963).

<sup>10</sup> See REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE CALLED BY THE PRESIDENT OF THE UNITED STATES ON APRIL 29, 1953 46 (1954).

<sup>11</sup> JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Dec. 21, 1960).

<sup>12</sup> Pub. L. No. 88-499, 5 U.S.C.A. §§591-96 (2006).

<sup>13</sup> 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,<sup>14</sup> 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

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<sup>14</sup> 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."<sup>15</sup>

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."<sup>16</sup>

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

<sup>16</sup> See Administrative Conference of the United States: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 88<sup>th</sup> Cong., 1<sup>st</sup> 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.<sup>17</sup> 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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<sup>17</sup> 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/cei-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.<sup>18</sup>
10. Increased Complexity of Rulemaking. The streamlined APA model of notice-and-comment rulemaking has become much more complex and time-consuming. In response,

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<sup>18</sup> 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.<sup>19</sup>

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

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<sup>19</sup> 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.