

MEMORANDUM

TO: Neil Eisner and Alissa Ardito

FROM: Gary D. Bass

DATE: April 25, 2016

RE: ACUS position on ABA proposal for Administrative Procedure Act amendments

I apologize that I have not been able to attend either of the meetings to discuss the ABA proposal to amend the APA and the related draft ACUS statement. As a member of the Committee on Rulemaking, I strongly support a motion that ACUS should: (a) stop discussion of the ABA proposal, and (b) not issue any statement on ABA Resolution 106B.

I align myself with the comments made in the letter from the Department of Homeland Security, Environmental Protection Agency, Department of Health and Human Services, and the Coast Guard. Along with others who have commented, I would note that:

1. Consideration of the ABA resolution has not followed the traditional ACUS approach. ACUS traditionally bases its actions on independent research that is reviewed by committee(s). Through that process, statements or resolutions are developed for ACUS, as a whole, to consider. That has not been the process here. The back and forth between Ron Levin and Cynthia Farina highlight the importance of conducting such research before debating, let alone drafting, a statement on the ABA resolution.
2. As noted by Farina and Jerry Mashaw, the ACUS recommendations that overlap with the ABA resolution were not directed to Congress or specific amendments to the APA. An ACUS statement that makes legislative reform recommendations would be a big mistake, opening ACUS, an entity operating under FACA, to strong criticism particularly since ACUS has not done the appropriate research to address such changes. Additionally, as noted by Mashaw, proposing these legislative changes, regardless of whether or not you support the ABA resolution, opens up the door for much greater mischief in Congress. Opening up the APA at this time invites a number of other proposals that could obstruct, delay, or otherwise hamstring agency rulemakings.
3. ACUS regulatory reform recommendations should be based on empirically verifiable ideas that will improve the regulatory process and the substance of the regulations themselves. There is no evidence that the ABA resolution meets these standards. In fact, some of the proposals may actually result in more delay. As the Center for Progressive Reform comments indicate, the ABA proposal on retrospective review is not consistent with ACUS's 2014 recommendations on the subject. ACUS noted the need to balance retrospective review with the availability of agency resources, for example. Farina notes other portions of the ABA resolution also are not consistent with ACUS recommendations. She captures the situation perfectly in describing the ABA proposal as a "blunt-edged approach..." This is not the ACUS way.
4. Farina and Mashaw provide a number of substantive concerns with the ABA proposal. I agree with most of their points.

Thus, on process and substance, I oppose the draft ACUS statement on ABA Resolution 106B to amend the Administrative Procedure Act. I urge the committee to put aside discussion of the ABA resolution and move on to other subjects.