

MEMORANDUM

TO: Committee on Rulemaking

FROM: Gary Bass

DATE: October 23, 2017

RE: Regulatory Experimentation

This memo provides some reactions to the proposed ACUS recommendation on Regulatory Experimentation.

1. The first paragraph of the recommendation needs significant reworking. There are several items being conflated that should not be and some factual corrections:
 - a. Lines 1-3: The first sentence needs citations.
 - b. Lines 3-4. The second sentence about executive orders on retrospective review of regulations speaks to the executive branch, not Congress. Moreover, retrospective review of regulations is not normally framed in the context of evidence-based policy making.
 - c. Lines 4-9: The discussion of the Commission on Evidence-Based Policy Making is extremely misleading. The Commission recommendations do not discuss government-wide regulations or retrospective review of regulations. Instead, the Commission addressed topics such as improving secure, private and confidential data access, modernizing privacy protections for data, creating a new “National Secure Data Service,” and strengthening the federal agency capacity for evidence-building.

The sentence in the recommendation about the Commission refers to the statutory language, but the recommendations from the Commission did not call for “institutional[ing] randomized controlled trials (RCTs)” and certainly not for regulations. Rec. 5-2 from the Commission’s report does reference RCTs, but when talking about assessing program impacts and only “when appropriate and feasible” (pg. 102). More broadly, the report states: “Policy decisions should be reviewed using a broad set of methodologies, including descriptive statistics, process studies, implementation evaluations, impact evaluations, using randomized control trials where appropriate, and meta-analysis” (pg. 93-94).

The Commission also warns about putting too much stock into evaluation and suggests approaching “evidence with humility.” On page 94, the Commission notes, “Even when evaluated using methods appropriate to stated questions, contexts may differ, circumstances can change, and fidelity to program design may diminish over time while conducting an evaluation.” More to the point, the Commission’s comments about RTCs are not about evaluation of government regulations.

The Commission’s conclusion (echoed in the opening and ending of the report) is that whether the government decision is about funding allocations, new regulations, or improving services, “evidence is needed in every decision made by government

officials” (pg. 106). To use the Commission’s report as evidence of “reinforce[ing] the requirements of the executive orders,” particularly when the ACUS draft recommendation seems to refer to executive orders about retrospective reviews, seems very tenuous at best. And to imply that the Commission is suggesting RTCs should be applied to government regulations is more than tenuous.

2. It is striking that the draft ACUS recommendation continues to reference retrospective review of regulations given that the consultant’s report does not mention retrospective review. What is the basis for the text in the draft recommendation?
3. While the notion of experimentation is a healthy exercise, the text from lines 54-71 are written from the perspective of the regulated industry, not the beneficiaries of the rule. The mentioning of “fairness” in Line 69 comes the closest to discussion of the beneficiaries, but even this seems to be in the context of fairness for the “firms.”
4. Neither the consultant’s report nor the draft recommendations address whether experimentation, particularly RCTs, or the notion of temporary rules should be extended to health and safety regulations. There is a passing reference in the consultant’s report to agencies trying to use regulatory experimentation to determine how many hours you should permit truckers to drive (e.g., if you started with a 10-hour limit, and there was no drop in accidents, you’d move to eight hours.) But none of the case studies looked at health and safety, unless you include the GHG EPA tailoring rule, and that was examined just to consider judicial review.
5. In recommendation #2 (line 102), ACUS notes that experimentation should only be done “where appropriate.” But shouldn’t ACUS be more affirmative in noting that there may be moral, legal, and ethical issues raised by withholding treatment in health and safety rules? Again, the consultant’s report did not address evaluation in health and safety rules.
6. Would it not be useful to remind everyone of the consultant’s comment about the advisability of the regulatory experiment. It should only be done “as long as that expected benefit relative to the status quo.... exceeds the expected loss relative to the status quo.... and that that excess is greater than the costs of the experiment itself.”
7. I was under the impression that ACUS did not make recommendations regarding congressional actions, such as in #3. Is that incorrect?