

TO: Alissa Ardito

FROM: Jerry L. Mashaw

RE: Potential ACUS Statement Concerning the ABA Proposal for Amending the Administrative Procedure Act

DATE: April 11, 2016

I begin with a very general skepticism about joining the ABA in attempting to put amendments to the Administrative Procedure Act on the legislative agenda. Over the past decade, and probably more, the administrative process “reforms” that have appealed to Congress (or some parts of it) have largely been proposals that would obstruct, delay, or otherwise hamstring agency action rather than make improvements of the type suggested in the ABA resolution or in prior ACUS statements and recommendations. Adding the weight of two respected bodies with considerable expertise to the general idea that the Administrative Procedure Act needs amending carries considerable risks that well-intended reforms will be hijacked by people with different agendas.

Second, the heterogeneity of agency mandates, resources, modes of action, affected clienteles and the like suggests that the ACUS approach of recommendations to agencies (with some exceptions) is generally sound. Codifying “best practices” in legislation is a very tricky business. Unintended consequences and significant operational difficulties for at least some agencies are likely to ensue. This seems to be recognized in ABA Resolution 2, for example, which, unlike the other numbered resolutions, does not codify, establish, clarify, authorize, require or mandate anything. The resolution looks much like the ACUS recommendation from which it was drawn. I have some difficulty imagining what legislative language would be appropriate for implementing it that did not mandate something, thus running the risks suggested above.

Finally, I have some considerable doubt concerning the wisdom of codifying generally accepted principles that are virtually uniform in the jurisprudence and in agency practice. This concern relates primarily to Resolutions 1 and 2. That there are some outliers given current doctrine and practice does not seem to me a sufficient rationale to overcome the risk that codification will produce new rounds of interpretation that unsettle rather than solidify what are already generally accepted policies.

I have no difficulties with Resolutions 3, 4, and 8 which follow well-researched and well-considered ACUS recommendations. Resolution 5 seems to me perfectly sound policy but rather badly drafted. The proposed legislative language in the report that accompanies the resolutions seems much clearer, and its inclusion of time limits for delay seem to me critical. Not knowing the whole universe of rules that have been finalized, but are not yet effective, new administrations are almost certain to act with blanket delaying actions. Without time limits on the delay authorization unobjectionable rules could remain ineffective interminably.

Resolution 6 seems to me potentially very burdensome and without a substantial factual predicate. Persons and organizations burdened by anachronistic rules are, in my experience, hardly shy about petitioning for amendments or repeal. In the conventional political science vernacular this resolution seeks to substitute police patrols for fire alarms, without establishing that fire alarms are not effective means of calling an agency's attention to excessively burdensome or dysfunctional rules. If agencies were to take this responsibility seriously, and if not why mandate it, it could be very expensive. Without some showing that there would be real gains from such a mandate I do not think it should be supported.

Resolution 7, notwithstanding its obvious attractiveness in an ideal world, has similar problems. As an ACUS best practices recommendation I would happily support it, but it does not seem to me an appropriate topic for legislation.

Both Resolutions 6 and 7 seem to anticipate the objection that they are better as suggestions than as mandates by prohibiting judicial review of compliance. The same is true of Resolution 9, which to some degree tracks a prior ACUS recommendation. It would be peculiar for ACUS not to support the basic public comment suggested in its prior recommendations. The further provisions of Resolution 9, however, seem problematic. Resolution 9 goes on to require target dates for successor rules, thus setting the stage for reintroducing judicial review by the back door. The cases in which reviewing courts have the easiest time determining that there has been "an undue delay" are those cases in which there has been a date certain set for agency action. It is far from clear to me why an agency's failure to adopt a successor rule by its target date would not presumptively be undue delay in adopting the successor rule.

I should add that these are tentative positions. I express them only because I sense that I have a deeper skepticism about the wisdom of some of these resolutions than was being expressed in the committee meeting. Of course, as I say, not being in the room and missing some of the statements I may have misjudged the tone of the meeting.