Bob Coakley

Comments on the Draft Report to

The Administrative Conference of the United States

on the Paperwork Reduction Act

Dear Mr. Cooney:

I applaud the Conference's and the Committee on Administrative and Management's attention to the Paperwork Reduction Act (PRA). The need for better understanding and improvement of the procedural requirements of the PRA established by statutory law is fundamental to more effective functioning of the administrative state and strikes at the core of ACUS revitalized mission. Growing confusion and the lack of awareness of the Act's procedural requirements intended to meet its purposes and provide the public protection from the cumulative burdens of federally sponsored collections of information is a major concern for maintaining a common sense integrity for the regulatory process.

I have participated in the development and operation of Act and of the regulations implementing the Act since June of 1978 until the present day. Lawton Chiles inspired me. As a United States Senator, private citizen, and Governor he championed and was central to the 1980, 1986, and 1995 Acts. He persuaded me to undertake with him the odyssey he referred to as the "Paperwork Walk".

Together with Frank Horton ,Sam Nunn, and Bill Roth he is among the only original Congressional sponsors of the 1980 Act who were central the Congressional oversight and development of all three Acts. Together with Frank Horton, then Comptroller General Elmer Staats, and President Carter he was critical to enabling the consensus that enabled House Chairman Jack Brooks to enthusiastically support passage of the 1980 and 1986 Acts. Together with Sam Nunn and Bill Roth, he was essential to enabling his friend John Glenn, a Chairman of the Senate Governmental Affairs to enthusiastically support the 1995 Act that explicitly overturned the Supreme Court's decision in *Dole vs. United Steelworkers*. (1990) Significantly, the 1995 Paperwork Reduction Act which Chiles championed underwent considerable deliberation in Congress and was passed on unanimous roll call votes in both the House and Senate. President Clinton himself arranged with Sam Nunn to ensure then

Governor Lawton Chiles stand by his side when he enthusiastically signed the Paperwork Reduction Act of 1995.

Pemit me certain observations on the draft report. They are based on my experiences from the vantage point of the legislative branch and the private sector as both an individual respondent and the Executive Director of the Council on Information and Regulatory Management (C-RIM) where I directed the public comments and participation of hundreds of individuals, businesses, universities, and state and local governments in the collection of information clearance process. Regretfully, I will not be able to attend the meeting tomorrow but look forward to participating at the next publicly scheduled meeting on Wednesday, March 28th.

1. Original source documents of legislative history were not reflected in the methodolgy employed by the Report.

In order to establish the context for addressing the Conference's inquiries with proposed recommendations the report provides a brief history of the Act, a description of its structure, and a description of the procedural requirements of the collection of information process. The methodology employed was to review: (1) the "scant" academic literature which presumably included the author's own contributions, (2) selected works of the Government Accountability Office (GAO) and the Congressional Research Service (CRS), (3) OIRA's annual Information Collection Budgets (ICB) which presumably included all 30 such budgets and, (4) the responses to OIRA's request for comments on the PRA. For data on the PRA approval process, the methodology employed was to utilize the resident data on the website http://www.reginfo.gov/public/do/PRAsearch together with data from the ICB's.

Once the author's reviews were completed 21 anonymous interviews, largely by telephone were conducted. Twenty were with individuals and one was with a group of OIRA officials. Five of the 21 interviews were with representatives of outside interests.

The author coupled this research with his five year experience as a desk officer in OIRA.

The Reports methodology does not reflect any review of the legislative history associated with PRA development and the associated Congressional oversight of the Executive Office's and the agencies conduct pursuant to responsibilities delegated by Congress to both the Executive office and agencies. (Unlike the definition of "agency" contained in the Administrative Procedure Act, the definition of "agency" that applies to the procedural requirements of the clearance process contained in the PRA and applicable to federal sponsored collections of

information explicitly include the Executive Office). Review of Congressional oversight of the Act would reveal that the implementing regulations to the Act found at 5 CFR 1320 were promulgated and then amended each time the 1980, 1986, and 1995 Acts were enacted. Prior to the Act's passage and until 1983 OMB circular A-40 guided agency activities regarding federally sponsored collections of information.

The meaning of the term "collection of information" was elaborated upon and changed in the rule on each occasion. I can assert with comfort that the founders of the Act, including President Carter who signed the law after being defeated in the 1980 elections and against veto recommendations from four different Cabinet agencies, viewed the persistent agency resistance to what the President's Executive Office deemed to be a "collection of information" as a significant challenge and tension threatening the ability of the Executive office to manage and direct the Agencies to follow the procedural requirements of the law. Agency activities to avoid and resist the scope of what regulatory activities are encompassed by the statutes definition regarding collection of information has been and remains contentious. It is a salient consideration in considering improvements to the Act's administration.

For example, what regulatory agencies chose to include in their collection of information inventories and how they aggregate these choices impacts burden reduction estimates. The value of budget oriented totals and "baseline" considerations which take account of paperwork mandates initiated by new laws has eroded. The 1995 Act's aspirational, non-binding burden reduction goals expired in fiscal 2001.

How the ICB process is used by OMB and the agencies as a means to respond to the Act's annual reporting requirement by the Executive branch is totally at the discretion of the Executive office and the agencies. The capabilities of using the ICB process as a tool for information resources management has diminished as well. The purpose of estimating burdens, a practice developed and evolved in the Executive branch was encouraged and highlighted by the Congress in all three Acts as a means to enable an accountability for the evaluation of technology alternatives.

<u>The relevance of the Report's discussion of the Act's purpose, history, and structure to the recommendations made by the report could benefit considerably if the legislative history underpinning the Act were considered. This is particularly true for those recommendations which contemplate legislative action to enact.</u>

2. Congressional deliberations as well as Executive Office and agency deliberations with the Congress regarding the Reports identification of issues can be easily found and readily accessed in digitally published legislative history.

One need not rely on secondary and anonymous sources to serve as the basis to evaluate the draft reports recommendations. Steps by the Committee to consider these instances of legislative history can better inform the Committee. The merits of the author's conclusion that the Act increases requirements of federal agencies "*hoping*" to collect regulatory information from the public on the premise that it does so "*in the hope*" that the burden on the public will be reduced, or at least the information collected from the public will be of "*sufficent*" utility to the government to justify the burden can be better informed. (Page 51 of draft Report)

Similarly, such Committee consideration could enable a better informed evaluation of the merits of the draft reports emphasis and conclusive assertion that the PRA "almost certainly deters the pursuit of useful collections" on the last page of the report. As the legislative history will repeatedly reveal the standard of Section 3508 that the Act requires of agencies and the director of OMB is one of "necessity" as opposed to "usefulness". That is a higher standard that has remained unaltered in the Act and its predecessor since 1942. Future Congresses will likely come to same conclusion.

3. An example of legislative history that directly addresses issues raised by the draft report that was not reviewed or cited is the Joint Explanatory Statement of the Committee of the Conference Conference Report associated with the Paperwork Reduction Act of 1995.

Thirty-three items are discussed. Nearly every issue raised by the draft report is addressed. Several address the clearance process directly. Item 7 addresses the relationship of the clearance process to "Burden reduction as an objective of information resources management." The Administrator of OIRA in 1995, Sally Katzen, participated in the Conference and was directly aware of all issues deliberated upon. The nuances of the Administration's positions were fully contemplated by the Conferees. There were no Senate or House dissents from the Conference Report. (H.Report 104-99) Both the House and Senate passed the resulting legislation on roll call votes. Despite the legislation's protracted deliberation upon the impact of the 1990 Supreme Court Case in *Dole* and other issues no member in either the House or Senate or on either side of the aisle voted against overturning it. The President signed the law. The Executive Office of the President rewrote the regulation to conform.

Of particular note regarding the draft report's recommendations on time delays in the clearance process is *Item 27. Public Information collection activities; submission to Director; approval and delegation--Improved "Fast Track" procedures.*

The House adopted the "good cause" exemption lifted from the Administrative Procedure Act.. The Senate had amended the existing fast track procedures in the PRA to provide for more flexibility beyond emergency considerations in the clearance process while maintaining the requirement that final approval authority for agency use of fast track be retained in the Director of OMB, not agency heads. (See Item 15)

The House Receded after a full discussion which included the Administration presenting its views.

The Conferees noted "that no instance has been identified in the 15 years of experience under the Act in which its "Fast Track" review procedures have not been made available to an agency under the current version of section 3507(j), or the proposed collection information has not been cleared on an schedule that completely accommodated the agency's exigent circumstances."

The draft report does not speak specifically as to whether examples contrary of this circumstance have occurred since 1995. Committee deliberations can evaluate the draft reports data as well as other data to see the extent to which present practices merit a statutory change to the time periods in the clearance process. As part of this evaluation consideration should be given to whether instances of concern meet the PRA's standard of "necessity", including practical utility found in Section 3508 and to whether the instances of concern and avoidance cited by the draft report do not constitute violations of law protected under the Acts public protection section. (3512)

4. The Act covers the independent regulatory agencies. The Committee should consider how the clearance process has or has not jeopardized their ability and independence to use information resources management, including the reduction of burden. The draft report could be supplemented to specifically address collections of information by Independent Regulatory Bodies that are or are not included in Information Collection Budgets. Transaction data for disapprovals and approvals are readily available.

From 1942 to 1973 independent regulatory agencies were covered by the Federal Reports Act and subject to Director of OMB's approval authority. Most of the collections of information by

independent regulatory bodies, including recordkeeping requirements were specifically contained in rules. Ralph Nader influenced the Congress with his belief that Congress had made a mistake in 1942 and had unconstitutionally delegated authority to the Director of OMB to substitute the Executive office's judgment for that of the independent agencies on substantive policy matters. Congress sent the central approval authority to the Comptroller General of the GAO, Elmer Staats where the dispute continued.

The Commission on Paperwork Reduction studied the issue and recommended to Congress that the dispute be resolved and the clearance process be restored. At the time the Paperwork Reduction Act was being considered all of the independent regulatory bodies formally opposed the legislation. They objected to Chairman Ribicoff, Senator Chiles and Chairman Brooks and Congressman Horton, the co-chair of the Paperwork Commission. The Director of OMB's authority and responsibility to approve proposed collections of information by independent regulatory bodies was restored by the new law. An override mechanism and a savings provision were incorporated. There has now been thirty years of operation.

Historically, the ACUS has been a venue for the independent regulatory bodies. All of them have representation on the Conference. The Committee could review the data on approvals, disapprovals, overrides, time delays, and the use of "fastrack" to determine whether how the draft report relate to their implementation of the Paperwork Reduction Act.

Consider recent controversies regarding (1) the FCC's adherence to the Paperwork Reduction Act on the net neutrality rule and (2) the National Labor Relations Board recent rule requiring some six million employers to post and maintain physical and electronic postings on the worksite.

The NLRB itself estimates the first time burden of this rule to be some 386.4 million dollars with ongoing annual costs of under 100 million. It has avoided determining the "necessity" of this admittedly duplicative posting and maintenance requirement by simply declaring it is not subject to the scope of the Paperwork Reduction Act's definition of recordkeeping. There are potential penalties for failing to maintain the postings.

A review of the applicability of the PRA's collection of information process to these two examples by independent regulatory bodies to address the public burdens of their rulemaking by ACUS could be timely.