

Alan Morrison's Comments on Projects for Consideration at June 2012 Plenary Session
Submitted on June 5, 2012

I am submitting my comments and possible amendments to the five recommendations for the upcoming plenary. Unless otherwise specifically noted, they are all suggestions and not formal amendments.

Immigration: One of the major barriers to obtaining representation for persons in detention is that the detention facilities are generally located some distance (or more) from major cities where pro bono representation is most likely to be obtained. They are also inconvenient to law schools which may have clinics or pro bono programs that could provide much needed assistance. These facts make it unlikely that recommendation 1c (p. 3) will be realized unless those locations are changed or recommendation 34a (p. 18) on the use of video conferencing is adopted. The recommendation would be strengthened if the connection were made and if some reference were made in 1c to the use of law schools to augment other pro bono efforts. The comment about law students also apply to recommendation 16 on page 9 and they should be specifically mentioned there.

Page 4, line 79: For those like me who don't know how "biometrics" is relevant, a brief explanation (using footnotes like note 12 on "oral advisals") would be helpful.

Page 6 recommendation 7: is there some reason why the law should bar the agency from identifying judges who have been formally disciplined? If not, then ACUS should recommend that EOIR urge Congress to change the law.

Page 7, recommendation 10b. I have not read the report, which may explain why I do not understand the problem to which this recommendation is addressed or what it will change etc. Clarification and/or explanation seems advisable.

Page 10 - the draft drifts into italics for a while, which I doubt is intentional.

Improving Coordination

Page 7, recommendation 3(b), lines 134-35. I urge that the phrase "consistent with statutory disclosure requirements" be changed to "unless precluded by law" so that the presumption favors disclosure unless Congress says no, which should be almost never in this situation. Besides, this is only a "should" and the current draft waters that down even more. I might make a motion on this one.

Midnight Rules

When I saw the title, I feared an all-out assault, but was pleased to find a nuanced set of recommendations. On that score (and in the background section on page 1) I have a couple of thoughts. The draft suggests (line 14) that extend an Administration's policies into the future is a bad thing, but that is the essence of rulemaking: to have future effect on policy. I would delete or modify that phrase. As for page 2, I would also point out that some (significant) rules are subject to statutory and/or court deadlines, often timed to the end of an administration, often after there has already been considerable delay. It would be nice if that thought could be conveyed also. I doubt that there is much evidence that many rules are timed until after the election (which is only arguable real problem), and even for those rules, I doubt that few if any votes would turn on their outcome, even if they came down in October instead of December. Finally, in line 38, the draft suggests that it may be "desirable" to defer certain rules, and my question is, "to whom or for whom"? Instead of "desirable" what about saying something like this as an intro and deleting the "although" clause: "Whatever net benefits there may be from deferring rules until a new Administration is in place".

Page 4, recommendation 6: How does the delay concept here fit with the reality that there will be appeals to the courts for most rules and with the reality that significant rules are rarely effective anytime soon, especially midnight rules, and that courts are often asked to issue stays before there is a new administration? Also, most rules have several effective dates, with the earlier ones being easiest to satisfy and least often subject to serious challenge. This fact needs to be considered in this recommendation.

Pages 4-5, recommendation 7, especially note 5. I have no problem with ACUS not opining on the legal issue presented there, but I think the note should also make clear that the reasons for not having notice and comment on the temporary suspension of the effective date and a statement of the legal basis for that action must be included in such suspension.

Page 5, recommendation 8: First, the same point made regarding note 5 should also apply if Congress decides to enact such an exception. Second, as written, this recommendation (line 93) appears to apply to all "published rules" and not just midnight rules. Is that the intention? Also, the effective date language does not include the likelihood of multiple, staggered effective dates.

Paperwork Reduction Act

I was disappointed not to see a recommendation that Congress review the cost-benefit of the PRA after 30 + years and whether the number of respondents (now 10) and how that number is determined (subs and members are added in, I think) are sensible in light of the delay and costs imposed on agencies and the public from not getting rules in place sooner. Is there some reason

why ACUS does not at least urge OMB to do a re-evaluation and report to Congress?

Page 6, recommendation 5: What about having Congress authorize OMB to do this without the need for Congress to approve each of those decisions?

Regulatory Analysis Requirements

Similar to my PRA comment, I think we should ask Congress (OMB) to do a cost-benefit analysis as to whether the cumulative impact of these analyses is worth it. I find the discussion of this topic on page 3 less than convincing, not because ACUS will not take a position, but because it does not urge Congress to do a full review of these requirements. Indeed, recommendation 3 on page 4, I would add to the final sentence "or eliminated" and would not object if someone with opposing views wanted to add "or expanded." Just so someone thinks about this beyond the issue of duplication. I do not think that recommendation 8 is strong enough or covers my concerns.

Thanks for looking into these. Alan