May 20, 2010

The Honorable Steve Cohen
Chairman
Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Trent Franks
Ranking Member
Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Today's Hearing on the Administrative Conference of the United States

Dear Chairman Cohen and Ranking Member Franks:

On behalf of the American Bar Association (“ABA”), I am writing to say how extremely pleased we are that your Subcommittee is holding today’s hearing on the Administrative Conference of the United States (“ACUS” or “the Conference”). We ask that this letter be included in the record of today’s hearing.

For over 25 years, ACUS advised the federal government on, and coordinated important improvements to, the administrative procedural law that is the backbone of federal regulation and management. ACUS cost-effectively leveraged expert academic consultants and volunteer luminaries of the administrative bar to produce an impressive set of recommendations, roughly three-quarters of which were adopted in whole or in part by Congress or the Executive Branch. For that reason, the ABA was proud to help lead the effort that resulted in ACUS being reauthorized during the 110th Congress, and then refunded and ultimately reestablished during the current Congress. This Subcommittee originated (twice) the legislation that reauthorized ACUS, and we again thank the Subcommittee for its leadership.

There is no shortage of pressing issues and valuable projects that ACUS should take on. The ABA’s Section of Administrative Law & Regulatory Practice submitted to OMB an 18-page list of recommended study topics for ACUS last August, and a copy of that list is attached. We are happy to learn that it is currently serving as a helpful resource to the new Conference. As others will no doubt testify today, the new health care legislation and pending financial reform legislation (if enacted into law) will, by themselves, generate a broad range of questions that ACUS could beneficially address.

We are especially proud that the Senate has confirmed as ACUS Chairman Paul Verkuil, a former Chair of the Section. We know that Chairman Verkuil’s leadership will continue to exemplify the creativity and prescience that has
characterized his scholarship and service as a law school dean and university president. We recently met with him and know that he is moving as rapidly as he can to start up ACUS and begin producing useful work product this year.

We also know that ACUS will continue to benefit from this Subcommittee’s oversight, support, and input, and we commend the Subcommittee for holding this hearing so early in the new Conference’s existence. We also thank the Subcommittee’s able staff for reaching out to the ABA in this connection and others. As always, we stand ready and eager to assist on the issues before you.

Sincerely,

[Signature]

Thomas M. Susman

Attachment

cc: Members of the House Judiciary Subcommittee on Commercial and Administrative Law
August 18, 2009

Michael A. Fitzpatrick
Acting Administrator
Office of Information & Regulatory Affairs
Office of Management & Budget
1650 Pennsylvania Ave., NW
Washington, DC 20503

Re: Recommended Study Topics for a New Administrative Conference of the United States

Dear Mr. Fitzpatrick:

We understand, and sincerely hope, that the Obama Administration will shortly announce a nominee to chair a new Administrative Conference of the United States (ACUS) after a hiatus of over a decade. The reestablishment of ACUS will come none too soon -- the Administration and Congress are actively considering how the federal government should best address a range of important issues facing the Nation, and in most, if not all, cases effective implementation of the chosen measures will involve questions of administrative law. ACUS will be well-positioned to offer constructive, consensus-based recommendations on these questions.

The Section of Administrative Law & Regulatory Practice is the ABA body with special expertise regarding administrative law issues; it includes former ACUS members and staff among its leadership. The Section has given considerable thought in recent months to the questions and projects that most warrant consideration by a new ACUS. Building on excellent work commissioned this spring by the House Judiciary Committee, the Section offers a list of such topics. The full list is attached and is summarized below.

Our recommendations begin with two projects that would take advantage of ACUS’s unique capability as a convening forum for government and private lawyers concerned with the full range of administrative law issues:

- An “Agency Best Practices Forum” through which federal agencies could share best practices, obtain sound advice regarding them, and formulate proposals for facilitating their broader adoption. Nothing currently serves this function, while ACUS is ideally constituted to do so.
A retrospective look at administrative law recommendations issued since ACUS became inactive. The GAO, the ABA, and other reputable groups have made a plethora of such recommendations over the past fourteen years. ACUS could assess the merits of those that have not yet been adopted.

Both of these undertakings could well produce substantial, cross-government savings in the near, as well as the long, term.

The rulemaking process is the focus of much of this document and its attachment. From among the many worthwhile topics in this area, we have identified nine that we believe are particularly high priorities for ACUS's initial work:

- **Legal issues implicated in e-rulemaking.** These include archiving requirements, privacy issues, whether e-commenting could be mandated, and the value of having "reply comment periods" for those who participate in a first comment round.

- **Executive review of agency action.** This project should commence upon the Administration's issuance of its replacement for E.O. 12866, and could evaluate the revised order's effectiveness.

- **Congressional review of agency action.** Questions ACUS could address include whether (1) the Congressional Review Act is warranted, and (2) the appropriations process is inappropriately employed in general or in particular types of cases through the use of earmarks, riders and report language.

- **Science and information quality.** ACUS could evaluate the effect of the Information Quality Act (IQA) and OMB's Peer Review Bulletin, both of which have particular applicability to agency use of science. ACUS could also address issues going beyond the IQA, such as how to assess the reliability of privately-funded science.

- **Regulatory preemption.** ACUS could help agencies formulate a consistent understanding of when assertions of preemption may be appropriate and how they should be expressed.

- **"Midnight" rules.** As the Administration emerges from the inherited body of late-term Bush Administration regulations, it would be timely for ACUS to consider what standards should govern the issuance and reconsideration of such rules.

- **Agency use of guidance documents.** The previous administration issued a Bulletin on Good Guidance Practices, the continued viability of which is uncertain. ACUS could evaluate the Bulletin and related "rulemaking-by-guidance" issues.

- **Regulatory impact analyses.** With the federal budget — and the private sector — under unprecedented financial pressure, it would be useful for ACUS to evaluate the costs and benefits of the myriad impact assessments required of agency rulemakings.

- **"Lookbacks" at existing regulations.** Agencies do not regularly evaluate the effectiveness of existing rules. Would a requirement to do so, in general or in specific cases, be worth the resources it would consume?
Our list also describes many other worthwhile rulemaking projects. It then addresses issues arising under the headings of:

- **Regulatory policy.** These include reassessing the value currently being provided by the Federal Advisory Committee Act and the Paperwork Reduction Act.
- **Administrative adjudication.** These include whether OPM should continue to administer the ALJ program and how best to handle mass adjudication programs.
- **Judicial review of agency action.** These include the effects of justiciability doctrines like standing and ripeness, and the effects of courts’ remanding rules without vacating them.
- **Openness & transparency.** These include reviewing post-9/11 statutory exemptions from FOIA and reviving ACUS’s prior effort to evaluate the Government in the Sunshine Act.
- **Contingent & other projects.** These include administrative law issues implicated in legislation, assuming it is enacted, to reform financial services regulation, improve health care, and mitigate global warming.

The Section eagerly anticipates the re-establishment of ACUS and stands ready to assist it in considering these recommendations and in any other way that it can provide support. You can reach me at 412-648-1380 and wvl@pitt.edu.

Sincerely,

William V. Luneburg  
Chair, Section of Administrative Law and Regulatory Practice

Attachment
Recommended Study Topics for a New Administrative Conference of the United States

American Bar Association
Section of Administrative Law & Regulatory Practice
August 2009

I. Cross-Cutting, Short-Term Projects

A. “Agency Best Practices Forum”

Federal agencies have a variety of missions, but the tools and methods that they use to accomplish them are often quite similar. Agencies are continually seeking more efficient and effective ways of operating, but they currently lack any means to systematically identify and highlight those “best practices,” or even a forum in which to share them. As a result, agencies often “reinvent the wheel” in their efforts to innovate and can needlessly repeat mistakes or learning steps. Because ACUS is required by statute to include representation from all federal departments and agencies, including independent agencies, it could naturally serve as an innovation clearinghouse regarding better approaches to rulemaking, adjudication, enforcement, compliance assistance, dispute resolution, and countless other administrative processes. Moreover, because ACUS will also include leading academics and private practitioners and will have access to many more, ACUS would not be limited to serving as a facilitator, but could add value by serving as an expert evaluator and consultant regarding best practices and their broader adoption.

Such an “Agency Best Practices Forum” could be an integral aspect of ACUS’s functioning, or it could be an affiliated, but stand-alone, operation. In either case, the Forum could also formulate proposals for presidential memoranda or executive orders or legislation where it concluded that such actions were required to enable particular best practices to be implemented broadly. By helping agencies improve their administrative operations by as little as 1 percent, ACUS could save the federal government hundreds of millions of dollars each year – many times the size of its appropriation.

B. Reviewing Recommendations Since ACUS Ceased Operation

During the almost 14 years that ACUS has been out of operation, organizations within and outside of government (e.g., the Government Accountability Office, the National Academy of Public Administration, and the ABA) have made numerous recommendations to improve the efficiency and effectiveness of federal operations. ACUS would be ideally qualified to survey those recommendations and highlight the most meritorious of those that have not been implemented. By leading those recommendations to implementation, ACUS could greatly improve government
operations and potentially save the federal government tens of millions of dollars each year.

II. The Rulemaking Process

A. Top Priority Issues

1. Legal Issues Implicated in Electronic Rulemaking

Acting under the auspices of the Section, a blue-ribbon committee has produced a landmark report to Congress and the President entitled *Achieving the Potential – The Future and Status of Federal E-rulemaking* (Oct. 2008). That report sets out recommendations for the optimal governance, management, funding, and architecture of the federal e-rulemaking effort, as well as recommendations on public access and participation, good e-rulemaking practice, and innovation. The report was not designed, however, to grapple with the many potential legal questions which confront the current effort to institutionalize e-rulemaking and with which any reforms will inevitably have to grapple. The following is a detailed list of such questions, all of which ACUS could help answer.

a. Transparency and access issues

*Integration of existing sources of information.* As www.regulations.gov evolves, it should be a one-stop shop for all agency rules and related documents. This should include related guidance documents as well—a sort of “C.F.R. Annotated.”

*Docketing issues.* The new integrated federal rulemaking docket needs to incorporate (i) consistent data fields, both across agencies and over time, (ii) flexibility of search, and (iii) ease of downloading. Other docketing issues include:

- **Scanning issues.** Optimally, written (paper) comments should be scanned immediately so that a complete online docket is available. Agencies may have the assistance of the Government Printing Office in some of these matters, including scanning, high-level scanning, OCR processing, long-term docket storage for paper, microform and other tangible items, and the ability to establish contracts for retrospective and supplemental scanning services. In any event, agencies are faced with the need to develop a strategy for handling a combination of electronic and paper comments.

- **Archiving issues.** Do (redundant) paper copies need to be kept due to federal archiving requirements? How about cover e-mails? As part of its implementation of the E-Government Act, the National Archives and Records Administration began an “Electronic Records Archives” project to “efficiently and effectively address the challenges presented by the increasing volume and complexity of records (in particular, electronic records) which it must manage, preserve, and make available.” What has been the outcome of this project?

- **Attachments.** How should exhibits, forms, photographs, etc., be dealt with? Attachments can pose a risk of viruses and of overloading systems, and electronic
technology makes it all too easy for commenters to “dump” huge files or links within their electronic comments. What should the agency’s responsibility be to sift through everything that is “sent over the transom”?

- **Copyright concerns.** As public comments have been transformed from easily controlled physical files in Washington DC to internet-accessible digitized documents, copyright issues have emerged—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission. The submission of others’ materials raises difficult issues. Intellectual property experts should be consulted to help address the legal issues involved as well as the various technological fixes that have been suggested, such as software controls that would code such documents so that downloading and copying can be regulated.

- **Different levels of user classifications.** In some circumstances might it be appropriate for one type of participant (like agency staff) to see everything, while others have more limited access? Should agencies be allowed to ask viewers to register?

- **Security issues.** In a post 9/11 world, security issues have become of heightened concern—both in terms of preventing unauthorized tampering and in making sure that sensitive information is not made available to potential terrorists.

- **Privacy issues.** Should anonymous comments be permitted? Ought commenters be identified or searchable by name?

- **Mandating e-comments.** What legal impediments prevent agencies from requiring e-comments to the exclusion of paper comments? The “digital divide” continues to exist—not everyone owns or is comfortable using a computer, so agencies still continue to accept mailed and hand-delivered comments. On the other hand, problems with the mail, especially in Washington after 9/11 and the anthrax scare, have made e-mail even more effective by comparison. Have other countries and states moved toward mandating e-comments? If so, how has it worked?

b. Participation issues

- How can we best reach the goal of better, more targeted notices? Agencies are increasingly offering an opportunity to join listservs. How well has this worked?

- Can we also provide easier, more convenient comment opportunities? Can agencies efficiently segment a proposed rule to allow for comment on a specific part as well as on the whole? Should they use numbered questions or numbered issues to help organize the comments?

- Should all agencies be required to make comments received (other than confidential ones) immediately available to the public electronically (to allow comments on the comments)? Or, alternatively, should agencies experiment with “reply comment periods” to discourage commenters from waiting until the end of the comment period?
• What rules should govern rulemaking “chatrooms”? First Amendment issues are tricky in this area. What rules should pertain to archiving of chats? To be consistent with informational goals, archiving should be done, but how much flexibility should there be and should there be opportunity for correction, disclaimers, etc.? Should participants be permitted to send attachments to their e-mails in such chat rooms? Do the Paperwork Reduction Act and the Privacy Act prevent agencies from collecting demographic and interest group affiliation data on participants? Finally, what about electronic “negotiated rulemaking”? Would this just become a more formalized, more highly moderated, version of “regular” electronic rulemaking? Or would it add value by liberating negotiated rulemaking from the up-front cost concerns (of convening meetings) that seem to be holding it back now?

• What are the impacts of technology on the regulatory process? This could be the subject of a broad study effort.

2. Executive Review of Agency Rules

The Administration has initiated a reassessment of Executive Order 12866, issued at the beginning of the Clinton Administration and largely maintained by the Bush Administration. Once a new or revised order has been issued, ACUS could help with the implementation process. This could include maintaining statistics regarding that implementation. ACUS could also explore larger questions extending beyond the four corners of the document. These could include an extensive study of what the overall impact of OIRA review has been on agency rulemaking—e.g., what kinds of changes have agencies made in proposed rules at the behest of OIRA, how the length of the rulemaking process has been affected, has the process been “balanced,” and how has the OIRA “prompt letter” process worked? ACUS could also address whether Congress should codify presidential review of agency rulemaking.

3. Congressional Review of Agency Rules

The House has passed a bill to lessen the burdens imposed on Congress by the Congressional Review Act, but the statute would continue to burden agencies and Congress would retain its constitutional form of the “legislative veto.” Only one rule has been disapproved under the CRA’s procedures and relatively few resolutions of disapproval have been introduced. ACUS could evaluate whether the CRA has improved congressional oversight of the rulemaking process and whether it needs to be further amended or replaced. For example, should the “legislative day” measure be clarified since it is so unpredictable in terms of calendar days?

ACUS could also look beyond the CRA to evaluate other options Congress has to affect agency action. These could include:

• The appropriations process (earmarks, riders forbidding spending on particular activities, and directions in appropriations reports). How commonly used are such approaches? Are they effective?
• Should Congress establish a “Congressional Office of Regulatory Analysis” to help it oversee agencies’ compliance with various rulemaking requirements?

4. Science and Information Quality

Major rulemakings, particularly those involving health, safety, and the environment, often depend on an extensive scientific foundation. Complicating matters, in many cases the science involved in rulemaking (or adjudication) is initially evaluated by agencies in prior, non-regulatory processes. This science is often uncertain and highly contested. Some agencies have responded to these circumstances by convening or consulting with ad hoc or standing scientific advisory boards. Agency use of science in policymaking and the operations of scientific advisory bodies have become quite controversial in recent years. ACUS could help reduce this controversy by addressing questions such as:

• Are there ways to assess the reliability of scientific work apart from its funding source?
• What constitutes “weight of evidence” in making risk-based regulatory decisions, and is it implicitly required by the APA or other statutes? Should Congress define the term or should it be left up to agencies within specific statutory contexts?
• Should the “Shelby Amendment” be extended so that any person submitting scientific information to an agency for policy purposes will be required to make underlying data publicly available?
• Do informal "stakeholder" processes actually promote meaningful discussion among agency officials and external experts?
• How should scientific advisory panels be constructed to maximize their usefulness and minimize concerns about conflict of interest and bias?
• Should the Paperwork Reduction Act or Federal Advisory Committee Act be modified to allow agencies to gather scientific information more efficiently?
• Can and under what circumstances should political and career agency personnel deviate from the recommendations of their scientific staff and advisory bodies?
• What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?

Under OMB’s Peer Review Bulletin, agencies must peer review all “influential” scientific information that they intend to disseminate; i.e., data, models, assessments, etc., that the agency “reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” The Peer Review Bulletin was an outgrowth of the Information Quality Act (IQA), a 2000 statute that required every agency to issue guidelines, with OMB oversight, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency. Under the IQA, agencies also established administrative mechanisms ostensibly allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency. ACUS could also evaluate questions arising under the IQA, such as:

• Are agencies complying with OMB’s Peer Review Bulletin? If so, what is the current effect of the Peer Review Bulletin on the length of time it takes agencies
to issue rules? On the quality of agency scientific disseminations? Are government-wide standards for peer review needed?

- What effect has the IQA had on the length of time it takes agencies to issue rules or non-rule determinations? Do agencies have too much discretion to deny IQA correction requests? Should agencies’ correction denials be subject to judicial review?

5. Regulatory Preemption

The Supreme Court has recently established that the weight it will accord agency assertions of regulatory preemption, absent express authorization to do so, will depend on the thoroughness, consistency, and persuasiveness of the agency’s explanation. The Administration has provided further direction to agencies in a memorandum issued in May. ACUS could help federal agencies formulate a consistent and nuanced understanding of when assertions may or may not be appropriate in light of these authorities and how to explain such assertions effectively.

6. “Midnight” Rules

Outgoing presidential administrations have characteristically issued a large number of important rules at the very end of their administrations. When the new President is from a different party, the incoming administration generally attempts to freeze, delay, or withdraw these “midnight rules.” This can create some practical and legal difficulties for the agencies and the courts. It would be good to have a set of standards for how both outgoing and incoming administrations (and organs like the Office of Federal Register) should behave in these situations. Should a new President be authorized to stay the effectiveness of “midnight rules” that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed and should those efforts be subject to notice and comment?

7. Guidance documents

Concerns regularly recur regarding “guidance documents” that agencies issue instead of rules. The Bush Administration sought to address these concerns by amendments to E.O. 12866 and a related Bulletin on Good Guidance Practices. The E.O. amendments have been rescinded and the status of the Bulletin remains uncertain. ACUS could address this uncertainty and more broadly could seek to establish consensus standards to distinguish between the rules and guidance documents.

8. Analysis of Impact Analysis Requirements

Agencies are required to prepare about a dozen separate analyses in rulemaking (e.g., environmental impacts, costs and benefits, paperwork, small business impacts, unfunded mandates, federalism, tribal impacts, “takeings” of private property, litigation impacts, environmental justice, impacts on families, environmental health impacts on children, and energy impacts) — all at a time when many agencies’ budgets in real dollar terms are
being reduced. A study of the costs and benefits of these impact analyses and whether they should be abolished, or at least be consolidated, would be useful. Such a study could also address:

- Should Congress reassess statutory requirements that prohibit agencies’ consideration of costs in setting health and safety standards?
- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?
- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act)? Do they give federal agencies too much discretion in their application?
- How effective have been the regulatory requirements designed to protect federalism (e.g., Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., “significant federalism implications”)? Or should there even be special protections for federalism?

9. “Lookbacks” at Existing Regulations

In recent years, there has been a new emphasis on agency review and reevaluation of their existing regulations. The Regulatory Flexibility Act requires agencies to undertake periodic reviews of regulations that have “a significant economic impact upon a substantial number of small entities.” E.O. 12866 required agencies to review existing regulations to ensure that they are still timely, compatible, effective, and do not impose unnecessary burdens. In the Bush Administration, OIRA regularly solicited nominations of rules that should be reviewed for ineffectiveness or inefficiency. ACUS could evaluate whether:

- Agencies should be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden.
- Congress should take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress). Relatedly, should agencies’ final rules include a “sunset” provision that requires them to be reexamined and republished?

B. Other Rulemaking Process Issues

1. Unified Agenda

ACUS could consider how effective the Unified Agenda of Federal Regulatory and Deregulatory Actions has been in identifying future rulemaking (thereby giving the public advance warning of forthcoming regulatory actions). It could make recommendations on what changes could make the Agenda a more effective means of notification. Also, can and should it be extended to significant pending adjudications?

2. Comment periods
The APA does not specify how long public comment periods should be (although E.O. 12866 suggests 60 days). ACUS could consider whether there should be a minimum comment period specified in the statute, and if so, what it should be. A related question would be under what circumstances agencies can or should extend comment periods.

3. Agency duty to reply to comments

Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments become too “stale” to permit issuance of a rule based on those comments (without further public comments)? ACUS could address these questions.

4. Rulemaking records

Currently, there are no government-wide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? ACUS could discuss whether there should be such standards, and if so, who should establish them (OMB, NARA, others)?

5. Ex parte Communications

Courts have clarified that there is no categorical bar on “ex parte” contacts in informal rulemaking, but agencies generally maintain policies implementing some degree of restriction on such contacts at various stages of the process. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?

6. Consent decrees and rulemaking

ACUS could study consent decrees entered into by government agencies with private parties to settle challenges to rules and that effect substantive changes in the rules. Questions it could evaluate include whether these undermine the APA’s notice-and-comment process and public participation opportunities and whether they raise separation of powers issues.

7. Expedited Rulemaking

In 1993, the National Performance Review, chaired by the Vice President, proposed that agencies undertake direct final rulemakings. ACUS conducted a study of direct final rulemaking and interim final rulemaking, which led to a recommendation supporting their use in appropriate circumstances. In the intervening decade and a half, agencies have continued to employ these tools, generally relying on the APA’s “good cause” exception to notice and comment requirements. Congress has not amended the APA to endorse or prohibit these practices, although it has authorized a particular agency to employ direct final rulemaking in at least one instance. It would be appropriate for ACUS to revisit
this topic, reviewing actual experience over the last 15 years and assessing whether Congress should expressly codify or limit these forms of expedited rulemaking.

8. What’s Holding Back Negotiated Rulemaking?

One of ACUS’s most trumpeted achievements (at the time) was the development of a more participatory and consensus-based form of rulemaking known as negotiated rulemaking. With the passage of the Negotiated Rulemaking Act of 1990 and its permanent reauthorization in 1996, negotiated rulemaking seemed on the verge of taking off. Congress still requires it from time to time in specific statutes, but since the mid-1990s its use has leveled off or even fallen despite its great apparent promise. One reason may be the absence of ACUS’s support and assistance to the agencies in undertaking these proceedings. But there are cost, timing, and effectiveness questions as well. It would be useful to mount a major study of why it is faltering and what could be done to revive it.

III. Regulatory Policy

A. Regulatory Prioritization

Many regulatory agencies have limited budgets and broad jurisdictions, and thus must devote much more attention to prioritization. They will have to develop better ways to decide on the best targets for regulation, standard setting, and enforcement. Some pioneering work was done by the EPA Science Advisory Board in trying to set priorities among all the environmental hazards that EPA might choose to combat. Studies could determine whether such efforts need to be expanded.

B. Retrospective Assessment of Agency Cost-Benefit Predictions

Under E.O. 12866, agencies have routinely estimated the projected cost-benefit impacts of economically significant rules. Rarely, however, have they gone back and compared those estimates with the actual costs and benefits from the rules after they have been in effect for a period of time. The conventional wisdom is that agencies overestimate the benefits and regulated industries overestimate the costs. OMB discussed this growing body of literature in its 2005 Report to Congress and signaled its intention to release a report on this issue soon. ACUS could oversee a coordinated effort to make such comparisons, using a methodology that had broad acceptance.

C. Alternative Approaches to Regulation

Agencies must develop regulations that are more effective, yet less burdensome and more acceptable to the regulated community. This need fueled ACUS’s work in the area of negotiated rulemaking. ACUS also looked at the need to take advantage of voluntary industry consensus standards and the need to achieve international harmonization of regulations. Much more research is needed in all those areas.
D. New Approaches to Enforcement

At the time of its shutdown, ACUS had just begun to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation. ACUS also began to look at what was called cooperative enforcement—reliance on the employees of the regulated entity itself rather than a third-party intermediary. The best known example of this is the method that is now used in food safety regulation, called Hazard Analysis and Critical Control Point (HACCP) in which the agency approves the company’s plan, reviews operating records, and verifies that the program is working. EPA and OSHA also undertook experiments in cooperative regulation as well. Other possibilities include qui tam actions under the False Claims Act, insurance-based regulation or contract-based regulation, and the continued development of systems for trading of pollution credits and other marketable rights.

E. Paperwork Reduction Act

The PRA requires agencies and OMB to expend significant resources to develop, review and finalize information collection requests, a process that also slows down agency activities, discourages agencies from gathering information, and may lead to rules being based on old or poor-quality information. Noncompliance with the PRA renders agency rules unenforceable. Private parties and agencies have both complained in particular about having to comply with the PRA for voluntary collections. ACUS could evaluate how well-founded the concerns were that gave rise to the PRA and whether (i) the PRA is still needed, (ii) its purposes could be served in a more targeted manner, (iii) voluntary collections should be exempted, and (iv) OIRA should continue to be tasked with enforcing the PRA.

F. Federal Advisory Committee Act

ACUS was shut down before it could consider the last study that it commissioned of FACA. Since then, numerous court decisions have addressed topics, like FACA’s applicability to subcommittees of advisory committees, that have proven controversial. Critics have also raised questions about why the use of advisory committees should be “kept to the minimum necessary” and whether the burdens of FACA compliance have encouraged agencies to circumvent it. ACUS should evaluate these issues.

G. Waivers and Exceptions

The Katrina and Rita disasters focused attention on agency authorities and procedures for issuing waivers from existing statutes and regulations. What process is required for waivers? How should third-party beneficiaries of existing laws and regulations be heard in such proceedings? Are granting and denying waivers and exceptions rulemaking or adjudication and what should follow from the appropriate characterization?

H. Alternative Dispute Resolution
Another area of heavy ACUS involvement was in the encouragement of agency use of alternative dispute resolution (ADR). With increasing budget stringency, ADR is one way of avoiding costly enforcement adjudication. Every enforcement case that is mediated saves the government many times the cost of the mediation. Thus ACUS should pick up where it left off in terms of its concentrated studies of ADR use in the government. A major issue is the need for confidentiality in such proceedings—an issue that must, of course, be balanced by the needs for open government.

I. Cooperative Federalism

The aftermath of Katrina and Rita showed just how important it is to have cooperative linkage between federal, state, and local governments. Moreover, many important regulatory programs involve state implementation of federal environmental and safety standards—the Clean Air Act, the Clean Water Act, the Surface Mining Control Act, and the Occupational Health and Safety Act, just to name a few. This approach of “cooperative federalism” is seen as an alternative to direct federal enforcement. But, inevitably, tensions arise as the federal agency retains the ultimate authority to oversee and even veto state implementation activities. Because this model is so prevalent, it deserves a close study—with all the stakeholders represented in the study. Also, the movement over the last few decades to devolve more responsibility onto state and local governments in federally funded assistance programs such as Medicaid, Medicare, public housing, supplemental security income, food stamps, and welfare has required the states, with their fifty different administrative procedure acts, to deal with an influx of rulemaking and adjudication responsibilities. What administrative problems have the states thereby confronted and how might those be remedied or minimized?

J. Federal Civil Penalties Inflation Adjustment Act

This Act was enacted the year after ACUS went out of existence, and (its title notwithstanding) actually prevents penalties from being adjusted for inflation. Had ACUS been around in 1996, it might have prevented problems before they were written into the statute. Now it can recommend necessary changes to the Act to improve its operation.

K. Agency Structure

Is the multi-member board or commission an expensive anachronism? Why does Congress create three-member agencies like the Occupational Safety and Health Review Commission (OSHRC), or even worse, six-member commissions, like the Federal Election Commission and the International Trade Commission, with too many opportunities for paralysis? Does it really make any difference if the EPA becomes a Cabinet department? How well does the “holding company” model of a Department, like the Department of Transportation or the Department of Homeland Security, function? What about all the hybrids, such as government-sponsored enterprises, government corporations, and administrative quasi-courts, like OSHRC and the National Transportation Safety Board, that are split off from their rulemaking agencies? And what
about all the independent power centers developing within agencies: presidentially appointed general counsels, division heads, inspectors general, chief financial officers, and so on?

L. Privatization/Outsourcing of Regulation

What are the proper roles of public-private partnerships, self-regulatory organizations, and government contractors in carrying out government programs?

M. Requirements for Agency “Planning” in Natural Resource Regulation

In 1998, the Supreme Court in *Ohio Forestry v. Sierra Club* made it difficult to challenge the sort of agency planning documents that are required under many natural resources statutes. As a result, agencies can insulate themselves from judicial review of their plans by keeping them as general as possible—a strategy that undercuts the value of the planning process itself. While perhaps an understandable reaction to the decision, this new approach deserves examination.

N. Administrative Procedure and National Security

Since 9/11, federal agencies have frequently invoked “national security” as a basis for exempting themselves from requirements for, inter alia, cost-benefit analysis. How should principles of administrative law be reconciled with the imperatives of national security? Should some Department of Homeland Security rules be exempt from some procedural requirements?

O. International Harmonization

Many U.S. rules and decisions must be “harmonized” with international institutions and their directives, decisions, and other issuances. This can create some procedural problems if the international negotiations have to be coordinated with public participation requirements. This is an area that will become increasingly important and deserves special attention.

IV. Administrative Adjudication

A. Who Should Oversee the Administrative Law Judge Program?

The Office of Personnel Management (OPM) is widely viewed (correctly or incorrectly) as being hostile to Administrative Law Judges (ALJs). ALJs and other critics argue that OPM has sought to undermine ALJ independence and downgrade ALJs’ level of experience and competence, and has failed to act as an effective ombudsman for the ALJ program. ACUS should assess these claims. It should also evaluate the proposal that Congress create a new independent agency -- the Administrative Law Judge Conference of the United States -- which could be responsible for the functions currently assigned to OPM, including testing, selection, and appointment of ALJs and maintenance of an ALJ
register. This proposal is supported by the ABA and the two largest federal ALJ organizations, and legislation to accomplish it has twice been introduced in Congress. In addition to the functions that OPM now performs, the Conference could also assume additional responsibilities for the purpose of improving the administrative hearing process, including reviewing rules of procedure and rules of evidence, adopting measures to ensure compliance with ethical standards, and reporting agency compliance with the Administrative Procedure Act.

B. Expansion of the Administrative Law Judge Program

Congress seems little concerned about the state of administrative adjudication, even though agencies seem to be using all sorts of non-ALJ adjudicators instead of ALJs. In fact, other than the nearly 1,300 ALJs assigned to Social Security and Medicare Programs, the numbers at other agencies have fallen from 410 in 1978 to 184 in September 2008. Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, etc. ACUS should consider whether this trend is desirable.

C. Administrative Appeal Boards

The Administrative Procedure Act (APA) does not prescribe how agencies must organize their internal appeal procedures for review of ALJ initial decisions. This has resulted in many different variations, ranging from a single “Judicial Officer” at the Department of Agriculture, to an Appeals Council at the Social Security Administration, to appeal boards at EPA and the Department of Labor. In other large-volume non-APA adjudication programs involving patent and trademark appeals and immigration appeals, agencies have also set up appeal boards. Most of these boards lack the independence and stature of the judges whose decisions are being reviewed. In some agencies the agency head controls the make-up and assignments of these boards. This seems to undercut the adjudicative model, but it also recognizes the policymaking accountability of the agency head. This is a neglected area that needs focused study.

D. Uniform Federal Rules of Administrative Procedure

Each federal agency has its own procedural rules for each subject area that requires administrative adjudication. ACUS could review whether the rules of practice before administrative agencies could and should be standardized so that there is one set of Federal Rules of Administrative Procedure (FRAP—though not to be confused with the Federal Rules of Appellate Procedure) for all agencies. Agencies might be permitted to add their own rules that are not in conflict with the FRAP. Some statutory changes to achieve standardization may be necessary, such as eliminating specialized procedural rules, adding subpoena power to statutes that require hearings but lack a subpoena power provision, and removing provisions that limit discovery.
E. Mass Adjudication Programs

How should we handle high-volume benefit programs such as the Social Security Disability Program, which now has about 600,000 hearings a year with no sign of slowing down, or immigration adjudication, which is burgeoning at a rapid pace? The Black Lung Benefits program is another high caseload program, and a new Medicare appeals adjudication program shows signs of becoming the next large mass justice scheme. Which cases are best assigned to agencies and which are best assigned to Article III courts or the more specialized Article I courts? Can administrative tribunals effectively handle mass tort cases? Should they? What are the limitations imposed by the Seventh Amendment jury trial guarantee?

F. Reform of the Immigration Adjudication System

The ABA has a major study of this underway and ACUS is ideally suited to evaluate its recommendations.

G. Split Enforcement Model

In a few cases Congress has created separate agencies to adjudicate enforcement cases brought by another agency. The rationale is to provide more fairness to the regulated parties. But critics have pointed to inefficiencies. Examples include OSHA-OSHRC, MSHA-FMShRC, and FAA-NTSB. What are the benefits and problems of this model? Should it be used more often?

H. Informal Adjudication

Some years ago the ABA attempted to draft a section on informal adjudication to add to the APA. Although this effort was ultimately not successful, is there anything more that can and should be done to at least codify judicial "due process" decisions and incorporate that set of standards into the APA?

V. Judicial Review of Agency Action

A. Chevron-Related Issues

The APA essentially creates an agency-court partnership. Agencies make rules and decide cases, and the Article III courts review these actions with a careful, but deferential, scope of review. This relationship is of obvious concern to all three branches of government, as exemplified by the Chevron case, in which the Supreme Court basically told the judiciary to defer to reasonable interpretations of legislative statutes made by executive agencies. This simple directive has spawned a plethora of cases concerning what this deference should consist of and to what types of interpretations it should be applied. There is no shortage of scholarly commentary on these cases, but there is an absence of consensus-building around these issues. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.
Justice Breyer, when asked what he considered the top priorities of a reconstituted ACUS, said “we in our Court have divided about five ways about the meaning of a case called Chevron, which has significance. And if I were running that now, I think maybe one thing I might like to do is ask the agencies whether the five different things that we have said have mattered. Has it hurt them? Has it helped them? That’s a subject they might look into.”

B. Access to the Courts

Just as the Chevron doctrine has become prohibitively complex, so have the courts’ decisions on private rights of action, standing, ripeness, finality, and exhaustion of remedies—the key doctrines governing the ability of people to challenge administrative agency action. Moreover, some of these doctrines seem to be asymmetric, tending to favor challenges by regulated interests and to disfavor challenges by plaintiffs seeking stronger regulation.

C. Attorney Fees

One of ACUS’s key responsibilities was to review agency rules implementing the Equal Access to Justice Act’s attorney fee provisions concerning administrative adjudication. This function has not been assumed by any other agency. Another key attorney fee issue concerns what is meant by the term “prevailing party.” The Supreme Court ruled in 2001 that to fall within that category—which is crucial under many statutes’ fee authorization provisions—a party must have prevailed on the merits through a judgment or a consent decree, thus precluding an award of fees for favorable (to the plaintiff) non-judicially approved settlements and other changes in the defendant’s conduct. The impact of this decision should be of great interest to Congress, which could, of course, make its intent clear if it so wished. Congress did so in its 2007 amendments to the Freedom of Information Act, but the question still affects other statutes with attorney fees provisions.

D. How Intensive Is (or Should Be) Judicial Review?

Studies have shown that appellate courts are overturning a fairly high percentage of challenged agency rules. Scholars and a few judges have criticized the courts’ “hard look” test for review of agency fact-finding and policy choice in rulemaking as too intensive and subjective. Should Congress statutorily modify the “reasonable decisionmaking” standard or limit judicial review in some other way?

E. Remand Without Vacatur

Panels of the D.C. Circuit have frequently engaged in disputes among themselves regarding when the court should remand a rule without vacating it. Proponents of doing so argue that it maintains the beneficial public purposes of the remanded rules, while opponents argue that it gives neither successful challengers any relief from illegal rules
nor agencies any incentive to correct them. ACUS could study the issue and address whether the APA should be amended to make the answer clearer than it currently is.

F. SBA Amicus Briefs

The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. It has rarely, if ever, done so. Why not, and is that authority something that needs reconsideration or refinement?

VI. Openness and Transparency

A. Coherence Among the Openness Statutes

Chris Cannon, former Chairman of the House Judiciary Committee’s Subcommittee on Commercial & Administrative Law, said that ACUS could help establish a coherent approach among agencies with respect to emerging issues such as privacy, national security, public participation, and the Freedom of Information Act.

B. Finish ACUS’s Sunshine Act Project

The Government in the Sunshine Act is widely regarded as having some self-defeating flaws. Among other things, it tends to discourage public deliberation among the officials to which it applies. Before ACUS closed, it created a special committee, headed by Randolph May, that produced a well-thought out recommendation on reforming the Act, but it was never officially approved by the ACUS plenary session. It could be easily revived.

C. NARA’s New Role Under FOIA

The 2007 amendments to the Freedom of Information Act gave the National Archives and Records Administration the additional responsibility of operating a new Office of Government Information Services to review all federal agencies’ FOIA policies and compliance with FOIA, to make recommendations to the President and Congress, and to serve as a FOIA ombudsman, all without additional funding. This legislation ignored the historical existence of the Justice Department’s Office of Information & Privacy, and the previous administration unsuccessfully attempted to transfer the new office’s responsibilities to DOJ. ACUS could help formulate a reasonable division of responsibilities among these two offices and ways in which the new office can discharge its functions.
VII. Contingent & Other Projects

A. Issues Raised by Government Ownership of Corporations

What are the implications of the federal government’s newly-acquired ownership of a majority position in private companies as a result of “bailout” actions? Does the ownership relationship trigger administrative responsibilities, liability under the Federal Tort Claims Act, due process constraints, etc.? Does the current set of takeovers result in a new class of “government corporation”? These and other issues should be explored, along with whether supplementary legislation is warranted to address immunities, responsibilities and requirements applicable to government officials for temporarily managing private entities.

B. Financial Services Regulation

The Administration has asked Congress to enact a dramatic overhaul of the Nation’s system of financial services regulation. While not as sweeping as initially conceived, the President’s proposal would still lead to major changes in the nature of the Federal Reserve Board’s and other agencies’ responsibilities and practices. Immediately upon enactment of any such legislation, ACUS should initiate a project to identify the changes most warranting expedited study and recommendations.

C. Health Care Reform

The health reform bills before Congress call for major regulatory changes in the private health insurance markets and expansion of existing public programs. To accomplish these reforms, new agencies, advisory boards and various quasi-public bodies would be created and given extensive authority to make policy on mandates and other requirements. In addition, the health reform bills assign states and private bodies with great responsibilities and authority. The implicated administrative law issues pertaining to rule- and policy-making, enforcement of mandates and other requirements, and adjudication of anticipated disputes are extensive. ACUS study could be of immense value for a variety of purposes, including assuring effective implementation.

D. Global Warming

If climate change legislation is enacted, ACUS could help in the effective design and enforceability of an emissions trading program. Projects could focus on, among other areas, the coordination of EPA and other agencies (e.g., the Departments of Agriculture and Energy) that are given roles under the statute, evaluation of current emission trading and carbon offset programs, and coordination of existing state and regional cap-and-trade programs with the federal program.
E. Orientation for Newly Created Agencies

Congress regularly establishes new agencies and these agencies typically struggle to identify and become capable of managing the range of cross-cutting procedural statutes that apply to them (e.g. the Administrative Procedure Act, the Privacy Act, the Government in the Sunshine Act, and the Paperwork Reduction Act). Agency officials are often given no orientation with regard to these laws and do not have access to a network of their experienced counterparts in older agencies. ACUS could help in both of these areas.