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HEARINGS BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY,
U.S. HOUSE OF REPRESENTATIVES
ON
THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT
NOVEMBER 1, 2005

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss with you the Committee's Administrative Law, Process and Procedure Project. I first want to applaud the Committee's leadership, especially that of Chairman Cannon, in leading the successful effort last year to reauthorize the Administrative Conference of the United States (ACUS).[1] I spent 20 years of my professional career working at ACUS from 1975 until it lost its funding in 1995—exactly ten years ago. I truly believe it was one of the federal government's most cost-effective institutions, and it has been sorely missed.[2]

Unfortunately the first year of the three-year reauthorization has now occurred without the necessary appropriations to actually re-start ACUS, and I view this hearing as an opportunity to suggest a research agenda for ACUS that would help convince the appropriators that the relatively small investment in ACUS would be repaid many times over. I do this with the perspective of having served as ACUS's Research Director from 1982-1995 and from having taught Administrative Law at American University's Washington College of Law since 1996.[3]

I also applaud the Committee for sponsoring a series of empirical research projects that would provide reliable data for a reconstituted ACUS to use in making recommendations for improvements in the administrative process. The two projects already under way—research to

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[1] The Federal Regulatory Improvement Act of 2004, Pub. L. 108-401.

[2] *See* Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAWYER 26 (Nov./Dec. 2004); Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005).

[3] When I first joined American University I was asked to undertake a similar effort for a Symposium on "The Future of the American Administrative Process." My resulting article, *The Administrative Law Agenda for the Next Decade*, 49 ADMIN. L. REV. 159 (1997), contained a list of proposed future research topics—many of which are still in need of attention today.

be carried out by Professor William West at Texas A &M on the early-stage development of proposed rules and by Professor Jody Freeman at Harvard on the judicial review of rulemaking—should be invaluable to those of us who wish to make the U.S. regulatory process a more efficient, fair and effective process.

The recent bureaucratic problems we have seen in the aftermath of the Gulf Coast hurricanes are symptomatic of the need to think about administrative problems before crises occur, not after. For example, did federal, state, and local officials lack (or think that they lacked) the ability to make emergency rules or waivers of existing statutes or rules? What sorts of procedures are appropriate for granting (or denying) such waiver requests? Were there recordkeeping or liability concerns that impeded the overall relief efforts? Are there intra-departmental or inter-governmental coordination problems that need to be solved? These matters obviously bear on homeland security in its various meanings.

With that preface, let me suggest a menu of topics that I believe might form the research agenda of a revived ACUS.

I would group the topics into several broad areas:

I. The Rulemaking Process.

The Committee's own proposed projects focus primarily on rulemaking, and I think with good reason. The federal rulemaking process is the preferred way for most agencies to make policies under their delegated authority from Congress. Over three decades ago, my own Administrative Law Professor, Kenneth Culp Davis, one of the drafters of the Administrative Procedure Act (APA), characterized notice-and-comment rulemaking as "one of the greatest procedural inventions of modern government."[4] However, this process has become much more complicated in the last 35 years, due to additional procedural and analytical requirements—to the point where some commentators are worried that the process has become too difficult ("ossified"),[5] and agencies seem to be increasingly trying to avoid these requirements by making binding policy through less visible types of issuances such as guidance documents that are not subject to public notice and comment.[6] To some extent these additional requirements are a by-product of "regulatory reform" initiatives—some of which have had some unintended consequences.[7]

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[4] 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 6.15 (Supp. 1970).

[5] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). One example of how rulemaking is taking longer is illustrated by a recent report by the Inspector General of the Department of Transportation, which found that the time taken to complete a rule increased from an average of 1.8 years and a median of 10 months in 1993, to an average of 3.8 years and a median of 2.8 years in 1999. Moreover the number of significant rules issued fell from 54 in 1993 to 20 in 1999. DOT, OIG AUDIT REPORT: THE DEPARTMENT OF TRANSPORTATION'S RULEMAKING PROCESS 7, Report No. MH-2000-109 (July 20, 2000).

[6] *See, e.g.*, Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1 (1990).

[7] *See* U.S. GEN ACCOUNTING OFFICE, PRIOR REVIEWS OF FEDERAL REGULATORY PROCESS INITIATIVES REVEAL OPPORTUNITIES FOR IMPROVEMENT, Testimony of J. Christopher Mihm, before the House Subcomm. of Regulatory Affairs, Comm. on Govt. Reform (GAO-05-939T) (JULY 27, 2005).

A. The Increasing Complexity of the Rulemaking Process. Therefore I believe that one area researchers should pursue is the increasing complexity of the rulemaking process. The following projects might be considered:

1. Analysis of Impact Analyses. Agencies are required to prepare about a dozen separate analyses in rulemaking. These include analyses concerning cost and benefits, paperwork, regulatory flexibility (small business impacts), unfunded mandates, federalism (state and local government impacts), tribal impacts, "takings" of private property, litigation impacts, environmental justice, impacts on families, environmental health impacts on children, energy impacts, and the granddaddy of all impact analyses, environmental impact statements—all at a time when many agencies' budgets in real dollar terms are being reduced.[8] A study of the costs and benefits of these impact analyses and how they could at least be consolidated would be useful.

2. White House Review of Agency Rules. Executive Order 12,866, issued at the beginning of the Clinton Administration, seems to have achieved bipartisan support, as witness the willingness of the current Bush Administration to continue to use it with only a minor amendment.[9] The current Administrator of the Office of Information and Regulatory Affairs (OIRA), in OMB, Dr. John Graham, has brought some of his own emphases and strategies in implementation of the Order and is generally credited with improving the Office's website and information dissemination. But there has not been an extensive study of what the overall impact of OIRA review has been on agency rulemaking—for example, what kinds of changes have agencies made in proposed rules at the behest of OIRA, how has the length of the rulemaking process been affected, etc.

3. Congressional Review. Similar questions could be asked about the congressional-review-of-rules provisions enacted in 1996.[10] The law requires agencies to submit all final rules to Congress before they become effective—a constitutional form of the "legislative veto." While tens of thousands of rules have been transmitted to Congress and GAO for review,[11] only one has been disapproved under the procedures and relatively few resolutions of disapproval have been introduced.[12] "Major" rules are subject to a delayed effective date—normally for at least 60 days—under these provisions. And there is a special problem that can develop at the end of each

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[8] The ABA has urged that Congress and the President show restraint in establishing analytical requirements. ABA House of Delegates recommendation on Rulemaking Impact Analyses, (Feb. 1992). *See also* U.S. GEN. ACCOUNTING OFFICE, FEDERAL RULEMAKING: PROCEDURAL AND ANALYTICAL REQUIREMENTS AT OSHA AND OTHER AGENCIES (GAO-01-852T) (June 14, 2001) (testimony of Victor Rezendes, Managing Director, Strategic Issues Team, before the House Comm. on Education and the Workforce) (describing the many requirements and their impact on OSHA rulemaking).

[9] President Bush did amend the Order to remove the Vice President from the process. Executive Order 13,258 (Feb. 26, 2002), 67 Fed. Reg. 9384 (Feb. 28, 2002).

[10] 5 U.S.C. §§ 801—(part of the Small Business and Regulatory Enforcement Fairness Act).

[11] As of February 2001, the Comptroller General had submitted reports on 336 major rules under section 801(a)(2)(A) and GAO had cataloged the submission of 21,249 non-major rules as required by Section 801(a)(1)(A). Morton Rosenberg, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment After Five Years, CRS Report for Congress*, American Law Division (Mar. 6, 2001).

[12] *See* Pub L. 107-5, overturning the controversial OSHA ergonomics rule issued at the end of the Clinton Administration.

Congress because any final rule promulgated in the last sixty "legislative" days of a congressional term must be considered, for the purpose of this new law, as being introduced fifteen days into the subsequent Congress. But since this is a rather indeterminate deadline, agencies might feel the need to manipulate their rulemaking schedule to issue rules before this time limit goes into effect. What have been the costs and benefits of this law?

4. The Nexus of Science and Rulemaking. Major rulemakings often depend on a sound scientific foundation. Some agencies have recognized this by convening scientific advisory boards, or outside advisory committees to assist them. OMB has recognized this by issuing (after notice and comment) a Peer Review Bulletin that requires administrative agencies to conduct a peer review of "scientific information disseminations that contain findings or conclusions that represent the official position of one or more agencies of the federal government."[13] This followed enactment of the Information Quality Act (IQA), enacted in 2000 as an undebated amendment of the Paperwork Reduction Act inserted into an omnibus appropriations bill.[14] The IQA requires every agency, to issue guidelines, with OMB oversight, to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by the agency. Agencies must also establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency.

These two OMB-overseen initiatives require significant agency implementation activities, but it is unclear at this point how they have affected the rulemaking process or whether they have provided any improvements in regulatory science.

5. What's Holding Back Negotiated Rulemaking? One of ACUS's proudest achievements was the development of a more participatory and consensus-based form of rulemaking known as negotiated rulemaking.[15] With the passage of the Negotiated Rulemaking Act of 1990[16] and its permanent reauthorization in 1996,[17] negotiated rulemaking seemed on the verge of taking off. Congress still requires it from time to time in specific statutes,[18] but since the mid-90's its use has plateaued or even fallen, despite its great promise. One reason, of course, may be the absence of ACUS's support and assistance to the agencies in undertaking these proceedings.[19] But there are cost, timing, and effectiveness questions as well. Perhaps the advent of electronic rulemaking (discussed below) will help breathe new life into the idea, but it would be useful to mount a major study of why it is faltering and what should be done to revive it.

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[13] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW, published in the Federal Register at 70 Fed. Reg. 2664 (Jan 14, 2005).

[14] Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A154 (2000) (codified at 44 U.S.C.A. § 3516 Note).

[15] ACUS Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,708 (1982); ACUS Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52, 895 (1985).

[16] Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570).

[17] *See* the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320 § 11, 110 Stat. 2870, 3873.

[18] *See, e.g.*, Pub. Law No. 108-458 § 7212 (requiring the Secretary of Transportation to convene a negotiated rulemaking concerning driver's licenses and personal identification cards).

[19] *See, e.g.*, Administrative Conference of the United States, NEGOTIATED RULE-MAKING SOURCEBOOK (2D ED. 1995).

6. "Midnight" Rules. Outgoing presidential administrations have characteristically issued a large number of important rules at the very end of their administrations. In some circumstances, (where the new President is from a different party), the incoming administration attempts to freeze, delay, or withdraw these "midnight rules." This can create some practical and legal difficulties for the agencies and the courts.[20] 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.

7. "Lookback" 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."[21] President Bush I mandated a "top to bottom review" of existing regulations in 1992 when he ordered a 90-day moratorium on new regulations.[22] President Clinton institutionalized that mandate in Executive Order 12,866, which required agencies to review existing regulations to ensure that they are still timely, compatible, effective, and do not impose unnecessary burdens.[23] In the Bush II Administration, OIRA has regularly solicited nominations of rules that should be reviewed for ineffectiveness or inefficiency.[24] These efforts should be evaluated.

B. E-Rulemaking. The other major change to the rulemaking process has been the impact of the Internet—leading to what is called "e-rulemaking."[25]

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[20] *See, e.g.*, William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions under the Bush Administration's Card Memorandum*, 54 ADMIN. L. REV. 1479 (2002).

[21] 5 U.S.C. § 610.

[22] *State of the Union Address* (Jan. 28, 1992), 1 PUB. PAPERS 156, 159 (1992-1993). *See also Letter to Congressional Leaders Transmitting a Report on Federal Regulatory Policy* (Jan. 15, 1993), 1 PUB. PAPERS 2258 (1992-1993).

[23] *See* Exec. Order 12,866 § 5. The Order requires agencies to "submit to OIRA a program" to undertake such a review. *Id.* Agencies are also directed to "identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances." *Id.*

[24] *See* OFFICE OF MGMT. & BUDGET, DRAFT 2004 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS, Notice of availability and request for comments, 69 Fed. Reg. 7987 (Feb. 20, 2004). *See also* Cindy Skrzycki, *Charting Progress of Rule Reviews Proves Difficult*, WASH. POST, (Dec. 7, 2004) E-1 (reporting that OIRA received 71 nominations in 2001, 316 in 2002, and 189 in 2004; it did not solicit in 2003); OIRA, REGULATORY REFORM OF THE U.S. MANUFACTURING SECTOR: A SUMMARY OF AGENCY RESPONSES TO PUBLIC REFORM NOMINATIONS (Mar. 9, 2005), *available at* http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf; *Regulatory Reform, Hearing before the House Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs* 108th Cong. (Nov. 17, 2004) (statement of John D. Graham, Administrator of OIRA), *available at* http://www.whitehouse.gov/omb/legislative/testimony/graham/111704_graham_reg_reform.html.

[25] The following discussion is derived from Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Program Paper RPP-2002-04, (Mar. 2002), Kennedy School of Government, Harvard University, *available at* http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf; *reprinted in* 27 ADMIN. & REG. L. NEWS 6 (Summer 2002).

Since ACUS's defunding in 1995, there have been enormous developments in the e-rulemaking area. Government websites have become enormously useful. The online *Federal Register*, *Code of Federal Regulations* (C.F.R.), and *Unified Agenda of Federal Regulatory and Deregulatory Actions* have eclipsed the paper versions in a few short years. And the Electronic Freedom of Information Act Amendments of 1996 geometrically increased the amount of information provided proactively by agencies.

Technology is moving at its usual rapid clip. But legal developments are moving more slowly, and there are many e-rulemaking issues for administrative law scholars, with the help of their technologically adept colleagues to study. In trying to catalog and perhaps order these issues for future researchers, I believe the main goal should be nothing less than how to design a transformation of the rulemaking process as a whole.

This transformation has two main goals in my opinion. The first is an *informational* one of providing a seamless view of each rulemaking. This would include a chronological window to every meaningful step in the generation of a rule, from the statute enacted by Congress that authorizes the rule, to the earliest agency action (perhaps an "advance notice of proposed rulemaking"), to the last step in the process—whether it be the final rule, a decision in a court challenge, or later agency amendments, interpretations, guidelines, or enforcement actions. It would also allow for a "drilling down" into the rulemaking so that one can see the meaningful agency and outside studies and analyses that are now found in the docket, along with the public comments, and the links to secondary studies and analyses referenced in the primary studies.

The second goal of the transformation of rulemaking is a *participatory* one—making it possible for the general public to participate in agency rulemaking from their computers—via electronic comments that can be addressed to a government-wide rulemaking portal. We are well on the way to achieving that with *www.regulations.gov*. But the next step is to make it possible for participants to participate in real time with other stakeholders in a rulemaking process (a glorified "chatroom"), that will allow a more rational, interactive, and less adversarial path to an optimum final rule.

The flip side of increased public participation, of course, is increased responsibilities on agencies to digest and react to a higher volume of comments. Blizzards of comments have already become increasingly common in controversial traditional rulemakings, and e-rulemaking will only further this trend. On the other hand, technology may also make it possible for agencies to efficiently sort and categorize voluminous comments.

Both the informational and the participatory goals raise issues which require further research and experimentation.

1. Issues Concerning the Informational Goal.

a. How should we best integrate existing sources of information? The Office of Federal Register now is able to constantly update the electronic C.F.R.—which in itself is a great boon to anyone who needs to know what government regulations are in effect at the moment. 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*."

b. Docketing issues. The planned 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.[26] Other docketing issues include:

- *Scanning issues*. Optimally, written (paper) comments should be scanned immediately so that a complete online docket is available. Apparently agencies will soon have the assistance of the Government Printing Office in some of these issues, "including scanning, high-level scanning, OCR processing, long-term docket storage for paper and microform, and other tangible items, and the ability to establish contracts for retrospective and supplemental scanning services."[27] 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 has an "Electronic Records Archives" project underway 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."[28]

- *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. Various technological fixes have been suggested such as software controls that would code such documents so that downloading and copying can be regulated.[29]

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

- *Authentication issues.* Agencies now have some benchmarks on the subject of electronic signatures because, as required by the Government Paperwork Elimination Act, in 2003,

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[26] These recommendations were included in a letter to OMB signed by 55 academics (myself included), reprinted in Cary Coglianese, Stuart Shapiro & Steven J. Balla, *Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System*, 57 ADMIN. L. REV. 621, 634-645 (2005).

[27] Statement of Oscar Morales, director of the interagency e-rulemaking team, American University E-Rulemaking Conference (Jan. 2004), at 11, *available at* http://www.american.edu/rulemaking/panel4_05.pdf.

[28] *See* National Archives & Records Administration, FY 2004 Implementation of the E-Government Act (Dec. 6, 2004), available at http://www.archives.gov/about/plans-reports/e-gov.

[29] *See* Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 487 (2004).

the General Services Administration, in cooperation with OMB, issued a policy directive concerning authentication issues, including digital signatures, presented by electronic communications to the government.[30]

- *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 will have to continue to accept mailed, messengered, or 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 effective by comparison.

2. Issues Concerning the Participatory Goal.

a. 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?

b. 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?[31]

c. 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 the above informational goals, this should be done, but how much flexibility should there be, opportunity for correction, disclaimers, etc.? Should participants should 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.[32]

II. Broader Regulatory Issues.

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

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[30] General Services Administration, *E-Authentication Policy for Federal Agencies*, Request for Comments, 68 Fed. Reg. 41,370 (July 11, 2003) (issued in cooperation with OMB).

[31] *See* Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31, ADMIN. & REG. L. NEWS, ____ (2005) (forthcoming).

[32] *See, e.g.*, Matthew J. McKinney, *Negotiated Rulemaking: Involving Citizens In Public Decisions*, 60 MONT. L. REV. 499, 511 (1999) (citing as a reason for not using negotiated rulemaking, "the costs to an agency, in both time and money").

develop better ways to decide on the best targets for regulation, for standard setting, and for 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.[33] Such efforts need to be expanded.

B. Retrospective Reviews of Agency Rulemakings. A related topic is the need for studies comparing the projected cost-benefit impacts of agency rules (when issued) with the actual cost-benefit impact or 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 has discussed this growing body of literature in its 2005 Report to Congress,[34] and signaled its intention to release a report on this issue soon.[35]

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.[36] ACUS also looked at the need to take advantage of voluntary industry consensus standards[37] and the need to achieve international harmonization of regulations.[38] A lot 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.[39] For example, the Securities and Exchange Commission (SEC) relies on intermediaries such as the stock exchanges to do the front-line regulating, while the SEC serves as a backstop and overseer of the way the stock exchanges do the regulating. ACUS also began to look at what was called cooperative enforcement—reliance on the employees of the regulated

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[33] *See* ENVIRONMENTAL PROTECTION AGENCY, UNFINISHED BUSINESS: A COMPARATIVE RISK ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987); ENVIRONMENTAL PROTECTION AGENCY, REDUCING RISKS: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION (1990).

[34] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, *Draft 2005 Report to Congress on the Costs and Benefits of Federal Regulations* 39-44, *available at* http://www.whitehouse.gov/omb/inforeg/regpol-reports_congress.html.

[35] *Id.* at 39 ("OMB is in the process of reviewing this body of literature to determine whether overall inferences or lessons can be drawn for analysts and/or regulators."); and at 40 ("OMB intends to explore regulatory reforms that would promote rigorous validation studies."). See also GAO Report, *supra* note 7, at 10 (suggesting the need for more retrospective analysis).

[36] *See* note 15, *supra*.

[37] *See* ACUS Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1357 (Jan. 5, 1979).

[38] *See* ACUS Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*, 56 Fed. Reg. 33,842 (July 24, 1991). *See also* George A. Bermann, *Regulatory Cooperation Between the European Commission and the U. S. Administrative Agencies*, 9 ADMIN. L.J. AM. U. 933, 954-83 (1996) (examining European Commission practices and policies concerning regulatory dialogue with United States and concluding with prescriptions for more effective regulatory cooperation).

[39] *See* ACUS Recommendation 94-1, *The Use of Audited Self-Regulation as a Regulatory Technique*, 59 Fed. Reg. 44,701 (1994) (suggesting that agencies delegate power to private self-regulatory organizations, provided conditions promote effectiveness and organization operates fairly). *See also* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 181 (1995) (listing advantages of audited self-regulation).

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.[40] EPA and OSHA also undertook experiments in cooperative regulation as well, and subsequent research, led by Professor Freeman, has shed new light on the pros and cons of this.[41]

There is a lot more that needs to be done in this area of alternative enforcement. What about qui tam actions under the False Claims Act,[42] often referred to as the "bounty hunter" provisions? What about insurance-based regulation or contract-based regulation, or the continued development of systems for trading of pollution credits and other marketable rights?[43]

E. Waivers and Exceptions. The Gulf Coast disaster has 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? Is it rulemaking or adjudication? This is a neglected area.

F. 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.[44] 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.

G. Cooperative Federalism. Another major issue bearing on regulation and the provision of government services is federalism. The aftermath of Katrina 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, Clean Water Act, Surface Mining Control Act, and the Occupational Health and Safety Act, just to name a few. Under these Acts,

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[40] *See* Dept. of Agriculture, Food Safety & Inspection Service, Hazard Analysis and Critical Control Point (HACCP) Systems, 9 C.F.R. pt. 417.

[41] *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997); Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

[42] 31 U.S.C. §§ 3729-3733.

[43] *See, e.g.*, Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7651-7651 (establishing allowance trading system for sulfur dioxide emissions from utilities).

[44] *See* ADMINISTRATIVE CONFERENCE OF THE U.S., TOWARD IMPROVED AGENCY DISPUTE RESOLUTION: IMPLEMENTING THE ADR ACT (Feb. 1995) (documenting savings). *See also* Testimony of former Acting ACUS Chair Sally Katzen, quoting from the President of the American Arbitration Association, as pointing to "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs." Sally Katzen, *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States* (Apr. 21, 1994), 8 ADMIN. L.J. AM. U. 649 (citing Letter from Robert Coulson, President, American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993)).

states retain the ability to leave enforcement to the feds, but most states prefer to administer these programs themselves. This approach of "cooperative federalism"[45] 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.

Finally, 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. In part, the Unfunded Mandates Reform Act of 1995 was an attempt to address this.[46]

During ACUS's time it had a sister agency, the Advisory Commission on Intergovernmental Relations (ACIR), which worked on these issues from 1959 1996, when it too was abolished.[47] A revived ACUS could focus on these issues.

H. Requirements for Agency "Planning" in Natural Resource Regulation. In 1998, the Supreme Court in *Ohio Forestry v. Sierra Club*,[48] made it difficult to challenge the sort of agency planning documents that are required under many natural resources statutes.[49] The case concerned the ripeness for immediate review of a Forest Plan adopted by the Forest Service authorizing the cutting of timber in a national forest in Ohio. The Court denied review on ripeness grounds, saying that many steps had to take place under the plan before trees were actually cut, including the approval by the Forest Service of permits for particular logging projects. The upshot of this decision is that the Forest Service can insulate itself from judicial review of its plans by keeping them as general as possible—a tack that undercuts the value of the planning process. The Forest Service, citing this decision, subsequently crafted a forest planning process that was designed to produce the most general of plans, exempted from NEPA,[50] and with the important decisions made at the site-specific level by the Forest Supervisor.[51] While perhaps an understandable

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[45] *See, e.g.*, Connecticut v. EPA., 696 F.2d 147, 151 (2d Cir. 1982) (referring to the Clean Air Act's State Implementation Plan approach as a "bold experiment in cooperative federalism").

[46] Pub. L. No. 104-4, 109 Stat. 48 (1995) (codified at 2 U.S.C. Chs. 17A, 25).

[47] For more on the ACIR, see its preserved website at http://www.library.unt.edu/gpo/acir/default.html.

[48] 523 U.S. 726 (1998).

[49] The statute involved in this case, the National Forest Management Act of 1976 requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 90 Stat. 2949, as renumbered and amended, 16 U.S.C. § 1604(a). *See also* "habitat conservation plans" approved by the Secretary of the Interior under the Endangered Species Act, § 10, 16 U.S.C. § 1539(a)(2); state "coastal zone management programs" subject to the approval of the Secretary of Commerce under the Coastal Zone Management Act, § 306, 16 U.S.C. § 1455(d).

[50] This exemption is important because the courts have held that NEPA challenges and Regulatory Flexibility challenges are ripe for review immediately.

[51] *See* Department of Agriculture, Forest Service, Final Rule, National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005) codified at 36 CFR Part 219. (preamble describes the final rule as "a paradigm shift," designed to make forest planning "more strategic and less prescriptive in nature").

reaction to the decision, this new approach—which could easily be applied to all the other natural resource conservation statutes requiring formal agency planning—deserves examination.

I. Agency Structure. Is the multi-member board or commission an expensive anachronism? Is there such a thing as an independent agency, or should there be? Why does Congress create three-member agencies like the Occupational Safety 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,[52] government corporations,[53] 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,[54] chief financial officers,[55] and so on?

III. Administrative Adjudication

A. The Administrative Law Judge Program. I mentioned expensive anachronisms. Sometimes I think that agencies believe that administrative law judges (ALJs) fit that description. I believe the state of administrative adjudication is something that also needs to be addressed again. It was in 1979 that then-Professor Antonin Scalia began an article by saying "the subject of administrative hearing officers is once again on the agenda of federal regulatory reform."[56] Today 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 over 1100 ALJs in the Social Security Administration, the numbers at the other agencies have fallen from 410 in 1978 to 209 in March 2002.[57] Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, etc.[58]

In my opinion, many agencies have come to see ALJs as too expensive, too difficult to appoint, and too hard to manage; therefore, they seek to avoid using them.[59] I think this is a shame

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[52] *See, e.g.*, Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565 (2005); Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 ADMIN. L.J. AM. U. 395 (1986).

[53] *See, e.g.*, A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543.

[54] *See* Inspector General Act of 1978, 5 U.S.C. app. (1994). *See also* PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTOR GENERALS AND THE SEARCH FOR ACCOUNTABILITY (1993).

[55] *See* 31 U.S.C. §§ 901, 903 (creating position of chief financial officer in all departments and other enumerated agencies).

[56] Antonin Scalia, *The ALJ Fiasco—A Reprise*, 47 U. CHI. L. REV. 57 (1979).

[57] Chart supplied to the author by the Office of Personnel Management in 2002.

[58] *See* John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261 (1992) (detailing use of non-ALJ presiding officers by agencies).

[59] *See* Jeffrey S. Lubbers, *APA-Adjudication: Is the Quest for Uniformity Faltering?*, 10 ADMIN. L.J. AM. U. 65, 72-74 (1996) (describing the reasons agencies are moving away from using ALJs).

because it undermines the consistency, uniformity, and independent adjudicative values that are at the heart of the APA.

Finally the Office of Personnel Management, which has the statutory responsibility for administering the ALJ program, has abolished its separate Office of ALJs, and has seen its register of eligible candidates for the ALJ position frozen during a lengthy period of litigation over the agency's implementation of the veterans' preference laws within the ALJ hiring program.[60]

B. Administrative Appeal Boards. The 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.[61] 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 some rethinking.

C. Mass Adjudication Programs. How should we handle high-volume benefits programs such as the Social Security Disability Program, which now has upwards of 500,000 hearings a year with no sign of slowing down,[62] or immigration adjudication, which is burgeoning at a very fast rate? The Black Lung Benefits program is another high caseload program, and a new Medicare appeals adjudication program[63] shows signs of becoming the next big program. 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 handle mass tort cases?[64] These are all questions that I think should be on the research agenda in coming years.

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[60] The litigation began in 1997 and was not resolved until 2003, see Meeker v. MSPB, 319 F.3d 1368 (Fed. Cir. 2003).

[61] *See* Russell L. Weaver, *Appellate Review in Executive Departments and Agencies*, 48 ADMIN. L. REV. 251 (1996).

[62] The Social Security Administration has recently proposed a complete overhaul of the disability adjudication process, see Notice of Proposed Rulemaking, "Administrative Review Process for Adjudicating Initial Disability Claims," 70 Fed. Reg. 43,590 (July 27, 2005). *See also* Frank S. Bloch, Jeffrey S. Lubbers and Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversarial Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1 (2003); also *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf.

[63] See the Medicare Prescription Drug, Improvement and Modernization Act of 2003, § 931, Pub. L. No. 108-173, 117 Stat. 2066 (2003) (directing SSA and DHHS to submit a Plan for the Transfer of Responsibilities for Medicare Appeals).

[64] Such as victim compensation process created for the victims of the September 11 attacks, or the ongoing debate over compensation for asbestos-related illnesses. For an early ACUS examination of this issue, see Wendy K. Mariner, *Innovation and Challenge: The First Year of the National Vaccine Injury Compensation Program*, 1991 ACUS 409 (examining effectiveness of administrative tribunal in handling tort cases arising from vaccinations required by state law).

IV. Judicial Review of Administrative 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.[65] This simple dictum 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 this issue. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.

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.[66] This function has not been picked up anywhere else. Another key attorney fee issue concerns what is meant by the term "prevailing party." The Supreme Court ruled in 2001 that to meet that test—which is crucial in many statutes' attorney fee provision—a party must have prevailed on the merits through a judgment or a consent decree, thus precluding an award of fees for favorable settlements and other favorable changes in the defendant's conduct.[67] The impact of this decision should be of great interest to Congress, which could, of course, make its intent clear if it so wished.

In conclusion, let me first say that this is hardly a complete list of projects that could be tackled by a revived ACUS. It is a collection of issues that have accumulated in the past decade. The new ACUS Chairperson and his or her Council would obviously have their own priorities. But I hope that this listing does show the need for a revived and continuing focus on the administrative procedural issues that often get short shrift in the day-to-day needs of legislating and administration of programs, but can make or break the success of these programs. For 27 years ACUS provided a low-cost center of research, scholarship, and consensus-building on administrative law within the federal government. And I believe that now that ACUS has been reauthorized, it should be funded as soon as possible.

Thank you Mr. Chairman, and I look forward to your questions.

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[65] Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

[66] When Congress enacted the EAJA in 1980, it directed agencies to consult with the Chairman of ACUS and then to establish uniform procedures for the submission and consideration of fee applications in their administrative proceedings. *See* Pub. L. No. 96-481, Title II, § 203, 94 Stat. 2326 (Oct. 21, 1980). ACUS developed Model EAJA Rules to guide the individual agencies in drafting their own EAJA rules. *See* 46 Fed. Reg. 32,900 (June 25, 1981).

[67] Buckhannon Bd. & Care Homes, Inc., v. West Virginia Dep't of Health & Human Servs., 532 U.S. 598 (2001).