STATEMENT

OF

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BEFORE THE

HOUSE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY

CONCERNING

THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

PRESENTED ON

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Mr. Chairman and Members of the Subcommittee

My name is Morton Rosenberg. I am a Specialist in American Public Law in the American Law Division of the Congressional Research Service. Among my areas of professional concern at CRS are issues relating to the efficiency, effectiveness, fairness and accountability of the administrative processes, procedures and practices established under congressional authority to implement the laws mandating agency missions and programs. Over the years I have had occasion to advise Committees and Members about matters involving the Administrative Procedure Act's (APA) provisions regarding public participation and its exceptions, and judicial review of final agency actions, among others, presidential and congressional review of agency rulemaking, proposals for regulatory and adjudicatory reform, and questions relating to reorganization, appointments and removal of executive officers and employees, and structural organizations.

You have asked me here today to discuss and describe the background, development, and goals of your Committee's Administrative Law, Process and Procedure Project (Project), CRS' role in that Project, what we have done so far, and what we hope will be accomplished in the future.

The genesis of the Project may be traced to the preparations by myself and my ALD colleague, T.J. Halstead, for a briefing of the full Committee staff on emerging issues in administrative law and process in May 2004. Shortly before the briefing we were advised by the Committee's Chief Counsel that coincident with our session a hearing would be held by your Subcommittee on the reauthorization of the Administrative Conference of the United States (ACUS) at which Supreme Court Justices Scalia and Breyer would be the principal witnesses. T.J. and I thought it would be appropriate and useful to alter the focus of our presentation from a simple review of significant current administrative law and process issues to one that we believed highlighted the fact that many of the issues we were identifying were of the type that ACUS had addressed with success during its 28 year history, and that in the now decade-long hiatus since its demise no institution or consortium of public and private resources had emerged with a comparable blend of expertise, non-partisanship and presumptive professional authority that ACUS had represented. The disparate, though excellent, work of individual academics, public interest groups, bar associations, and the episodic inquiries of jurisdictional committees appeared to us not to have been a sufficient substitute for the focus, comprehensiveness and inherent authority and respect that ACUS's studies and recommendations carried. While we did not suggest that an ACUS revival would lead us out of the desert, it did appear to us that a new ACUS held some promise of again becoming a focal point and resource for federal agency and legislative advice and guidance for significant emerging administrative law and process issues.

Our remarks apparently resonated with the Committee, and working with your Subcommittee staff, a CRS team, which now includes Curtis Copeland of our Government and Finance Division, assisted in a two-track effort: providing it with background materials and information to inform the bi-partisan effort to reauthorize ACUS; and identifying the issues that might be the subject of either future study by a revived ACUS and/or legislative action by the Committee during the 109th Congress. Success was achieved by the Subcommittee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, P.L. 108-401, on October 30, 2004. But, as of this date, funding legislation has not been passed.

The Subcommittee anticipated the possibility of an extended delay in the operational start-up of ACUS after passage of the reauthorization legislation and directed its staff to consider, with the assistance of the CRS team, the options available to it to accumulate the information and data necessary to determine whether action on a particular issue required immediate legislative attention or was best referred to ACUS for further in-depth studies and recommendations. One option was to hold a series of informational hearings over the course of the 109th Congress on particular topics and themes (public participation in rulemaking, judicial review of rulemaking, presidential review of rulemaking, "midnight rules," consent decrees, etc.) to which academics, judges, executive branch officials, think tank experts, and industry spokespersons, among others, would be invited to present their views and suggestions for reform. This traditional approach to such a broad-ranging inquiry was seen as putting an unreasonable burden on Subcommittee Members and staff, as well as the commitment of substantial Subcommittee time and resources over a lengthy period during which it was likely that unforeseen legislative issues would arise which could distract and divert from the project.

Another past model considered is reflected in the legislative creation of the two Hoover Commissions (1947-49, 1953-55) and the National Commission on Reform of Federal Criminal Laws (1966) whose findings and recommendations led to a major congressional restructuring of administrative departments and agencies and the reformation of federal criminal laws, respectively. The reauthorization of ACUS, however, appeared to render the establishment of a study commission, with its attendant costs, superfluous.

A third option was the model of the comprehensive study of federal regulation directed by Senate Resolution 71 (1975) to the Senate Committee on Government Operations to assess the impact of regulatory programs and the need for change. The ultimate product, a six volume study, entitled "Study on Federal Regulation," was completed in 1978 and was conducted by a staff of 14 operating separate and apart from the Senate committee permanent staff, and was overseen by an outside advisory board. The effort therefore entailed authorization by the Senate and required a significant expenditure of funds for salaries and support.

Ultimately, it was determined that the Committee should not be bound by such past models, although they are suggestive of techniques and approaches. The discussion indicated that consideration of cost, the possible availability of resources outside of Congress and the Committee, such as academic institutions, think tanks, CRS, and the Government Accountability Office (GAO), among others, and the potentiality of utilizing forums for the airing of issues outside of Washington, were important. In light of these considerations, and breadth of the issue areas, staff proposed and the Committee adopted the following course of action.

Pursuant to House Rule X, 2(d)(1), requiring Committee adoption of an oversight plan for the 109th Congress, the Committee made a study of emergent administrative law and process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. Among the benefits of so identifying the study as a Subcommittee priority was to give it the imprimatur of official legislative legitimacy and importance which might, in turn, be useful in enlisting the voluntary assistance and services of individuals and institutions throughout the nation. The oversight plan identified seven general areas for study: "(1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of rulemaking; (5) the agency adjudicatory process; (6) the utility regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process."

The CRS team was designated by the Chairman and Ranking Minority Member to coordinate the Project. Its first task was to take these seven broad study areas and identify and define potential questions or issues for research. The thought was not to limit research to those matters within the combined experience and expertise of the team members, but to develop theme packages in order to "sell" a package or a particular issue to a law school, a university graduate school, a public agency, or a consortium of such institutions that would arrange for systematic, in-depth studies by means of empirical studies and papers conducted and prepared by leading experts in the particular areas, which might be followed with public presentations of findings in symposia that would reflect competing views. The location of the participating entities and institutions could be scattered throughout the country to insure diversity of thoughts, and broad themes could be addressed at more than one location. Members of the Committee could participate as keynoters at the public forums. Federal agencies could be encouraged to cooperate with the researchers. Based on the ACUS experience, that is likely to occur in any event since the agencies will perceive if they are to be either the beneficiaries or targets of any adopted recommendations with respect to any administrative law or process change in which they would want to have an input.

The end product of the exercise is hoped be a compilation of the papers and transcripts of the various public symposia similar to the two volume "Working Papers of the National Commission on Reform of Federal Criminal Laws" published by the House Judiciary Committee in 1970 which contained 59 studies covering all aspects of the then current issues in criminal law reform. Those studies informed Congress' subsequent reform actions.

No study is likely to be conducted the same way. For example, an important aspect of the current state of judicial review of agency rulemaking is the purported high rate of successful challenges of agency rulemakings in the federal appellate courts. Anecdotal evidence reported by commentators since the 1980's is that over 50% of rule challenges have been upheld by appeals courts. Some limited studies (e.g., EPA cases in the District of Columbia Circuit over a 8 year period in the 1990's) appear to support the proposition. A limited, unsophisticated CRS study of a number of circuits over a six year period in the 1990's appeared to confirm the 50% overturning rate. If the appellate failure rate is accurate, there are important implications of, and perhaps a confirmation of the contentions of the so-called "ossificationists" who argue that a major reason agencies have been attempting to evade notice and comment rulemaking through "non-rule rules" is because of the high incidence of appellate rejection of agency rules on review. Among the many questions raised by such statistics is whether it is because the agencies simply aren't doing their job or are the appellate courts in fact substituting (improperly) their own policy judgments for those of the agencies, using the vehicle of the rather subjective "reasoned decisionmaking" standard of review. Or is there some other explanation? Some commentators have raised the question whether judicial review of rulemaking is necessary at all.

The first task of a study of judicial review, then, would be the conduct of a sophisticated study of appellate rulemaking rulings in all circuits over an extended period (at least 10 years), which would answer certain basic questions such as: How many overrulings were there? Were the overrulings of an entire rule or part of a rule? Which agencies had the least amount of success; which the best success? Is there any correlation in the overruling between political affiliation of the judges and particular issues or subject matter? The results of the study would then be considered by a panel of experts who would evaluate the results and data and present analyses, conclusions and recommendations to the Committee. It is likely that a number of the "theme" areas may require basic empirical studies to provide a basis for issue assessment.

The CRS team's tentative compilation of research topics within the Committee's review is as follows:

1. <u>Public Participation in the Rulemaking Process</u>

- Should efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., negotiated rulemaking, SBREFA panels) be expanded? How much do these processes currently add in terms of public participation?

- How effective is the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in identifying future rulemaking (thereby giving the public advance warning of forthcoming regulatory actions)? What changes could make this *Agenda* a more effective means of notification?

- What has been the impact of agencies' use of "nonrulemaking" approaches (e.g., guidance documents, notices, etc.) and attenuated rulemaking approaches (e.g., use of the APA's "good cause exception to skip notices of proposed rulemaking) on the public's opportunities for participation? Should the public be able to comment on those approaches before they become final?

- Should all agencies be required to make comments received immediately available to the public (to allow comments on the comments)? Or, alternatively, should agencies provide "reply comment periods" (to discourage waiting to the end of the comment period)?

- What effect has "e-rulemaking" (including the use of e-mail comments and "comments on comments," on-line dialogues, the new Regulations.gov web site, agency-specific and the new governmentwide electronic dockets) had on the amount and nature of public participation in the rulemaking process, and how do agencies view those comments? Specifically:
  - How should agencies deal with the sometimes hundreds-of-thousands of e-mail comments generated by special interest groups?
  - Should all agencies be required to offer "list serves" that allow members of the public to be notified of certain rules being available for comment?
  - Has e-rulemaking allowed more people to participate in the rulemaking process, or simply facilitated access to traditional commenters?

- The APA does not specify how long public comment periods should be (although EO 12866 suggests 60 days). Should there be a minimum comment period specified in the statute? If so, what should it be? Also, under what circumstances can/should agencies extend comment periods?

- 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)?

- Currently, there are no governmentwide 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? Should there be such standards? If so, who should establish them (OMB, NARA, other)?

- Under what circumstances is it appropriate for agencies to allow commenters to file confidential comments? How should this procedure be regularized?

- Currently, the Administrative Procedure Act prohibits *ex parte* contacts in formal rulemaking, but is silent about such contacts in the much more common informal "notice and comment" rulemaking. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?

- Currently, the Administrative Procedure Act does not mention two relatively common forms of rulemaking that avoid traditional notice and comment requirements — interim final rulemaking and direct final rulemaking. Should Congress codify these forms of rulemaking and how they should (and should not) be used? More generally, should Congress revisit agencies' use of all forms of the "good cause" exception?

- Currently, some of the statutory analytical requirements in rulemaking (e.g., the Regulatory Flexibility Act and the Unfunded Mandates Reform Act) do not apply to rules for which there is no notice of proposed rulemaking. Should these incentives for agencies to avoid NPRMs be eliminated? At a minimum, should the exemptions for interim final and direct final rules be eliminated?

- OMB's new peer review bulletin allows agencies to decide whether to permit public comment on their peer review processes. Should agencies have that discretion, should agencies be required to permit public comments, or should public comments on what is supposed to be an "expert" process not be permitted (because, among other things, it could slow down rulemaking)?

- To what extent does public participation in its various forms (e.g., comment periods, public meetings, SBREFA panels, etc.) have an effect on agency decisionmaking during the rulemaking process? What empirical evidence is there of that effect?

- What is the proper role of consultants in the development stage of a rulemaking? Should there be a balance of views of competing stakeholders in the pre-NPRM period? Should agencies be required to invite competing views to ensure "balance"?

2. Congressional Review of Rules

- How effective has the Congressional Review Act been in improving congressional oversight of the rulemaking process? Does the Act need to be amended/replaced? For example:
  - Should agencies still be required to send all rules to the House, Senate, and GAO?
  - Should more rules be exempt from this process?
  - How are GAO's reports handled by Congress? Do they need refinement?
  - Should there be an expedited procedure for House consideration of rules?
  - Should Congress clarify how not to run afoul of the "substantially the same" prohibition in the CRA?
  - Should the "legislative day" measure be clarified since it is so unpredictable in terms of calendar days?
  - Should Congress adopt the changes in the CRA process that were contemplated by H.R. 3356 in the 108th Congress, including the proposal to establish a joint congressional committee to screen and recommend proposed rules for disapproval?

- Other than the Congressional Review Act, what other options does Congress have to prevent the implementation of an agency rule (e.g., appropriations riders)? How common are such approaches? Are they effective?

- Should Congress establish a "Congressional Office of Regulatory Analysis" to help it oversee the agencies' compliance with various rulemaking requirements? If so, should it follow the format envisioned in the Truth in Regulation Act (e.g., be established within the Government Accountability Office, require assessment of all rulemaking requirements, etc.)? If so, should Congress simply reauthorize and fund TIRA?

- Should Congress affirmatively approve all major rules (e.g., those with a $100 million annual impact on the economy) before they take effect?

3. Presidential Review of Rules

- To remove any question of its legitimacy, should Congress codify presidential review of agency rulemaking? If so, how detailed should that codification be? For example, should it simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay? Or should the codification spell out in detail the process by which Presidents should review rules before they are published?

- Should independent regulatory agencies' rules be subject to presidential review (as they are now under the Paperwork Reduction Act)? Or would presidential review adversely affect the independence intended for these agencies?

- What role should OMB play in the presidential rule review process? Should OMB be a "counselor" to the agencies (as during the Clinton Administration), suggesting improvements to the agencies but generally deferring to agencies' statutory expertise? Or should it be more of a "gatekeeper" (as during the current Bush Administration) establishing strict standards and ensuring that regulations meet certain standards before publication?

- What rules should govern OMB's contacts with outside parties during the presidential review process? For example, should OMB be allowed to meet with regulated entities outside of the period when agencies are not permitted to do so (because of restrictions on *ex parte* communications)? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) to provide an administrative record for any subsequent changes?

- How transparent should the presidential review process be to the public? Are improvements in review transparency currently needed (either administratively or by statute)? Specifically:
  - Should OMB clearly define what types of "substantive" changes to rules need to be disclosed?
  - Should agencies or OMB be required to disclose substantive changes made to rules during "informal" reviews (when OMB says it can have its greatest effect)?
  - Should OMB clearly indicate in its database which rules were changed at its suggestion?

- A number of actions by OMB during the Bush Administration have had the effect of centralizing rulemaking authority in the Executive Office of the President. For example, within the past four years OMB has revitalized the regulatory review function under EO 12866 (emphasizing cost-benefit analysis, returning rules to the agencies); and issued governmentwide guidelines on data quality and peer review (with OMB able to determine when agencies' rules should be peer reviewed and at what level). Have these executive actions taken too much authority away from the agencies in whom Congress vested rulemaking authority, thereby upsetting the balance of power between Congress and the President in this area?

- How has the OIRA "prompt letter" process worked in the past four years?

- How is the OIRA logging provision in EO 12866 working?

- 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?

4. Judicial Review of Rules

- Should Congress clarify whether the Information Quality Act permits judicial review?

- In light of the Supreme Court's 2001 ruling in *U.S. v. Meade*, is it time for Congress to establish rules of "deference" when a court finds a statutory delegation "ambiguous?"

- If studies showing that appellate courts are overturning more than 50% of challenged agency rules prove accurate, should Congress statutorily modify the "reasonable decisionmaking" standard, or limit judicial review in some other way?

- Should the APA be amended to make more clear when the courts can remand a rule without vacating it?

- 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. How effective/problematic has this been?

- Should Congress address the increasing use of consent decrees that modify or alter the substantive content of agency rules?

5. The Agency Adjudicatory Process

- Is there a need to reassess the role of ALJs and how they are selected and evaluated? Should regulatory ALJs be treated differently from benefits ALJs?

- Should the notion of a centralized ALJ corps be revisited?

- Is there a need to examine and review the role of non-ALJ hearing officers?
- Should the split-enforcement model of agency adjudication (e.g., OSHA-OSHRC) be used more often?

- Should the APA contain a provision regarding informal adjudication?

- Should the APA's adjudication provisions be extended to all evidentiary hearings required by statute?

6. The Utility of Regulatory Analysis and Accountability Requirements

- Should Congress reassess statutory requirements that prohibit agencies' considerations of cost 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?

- Executive Order 12866 requires agencies to assess the costs and benefits of all significant rules, and requires a full cost-benefit analysis of all "economically significant" rules. Does OMB apply these requirements and use cost-benefit information in a balanced way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain rules exempt (e.g., Homeland Security rules)? Does OMB use cost-benefit analysis to prompt rulemaking or to increase regulatory requirements, or only to stop or limit rulemaking?

- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act)? Do they give federal agencies too much discretion in their application? Should SBA or some other entity be required to define key terms (e.g., "significant economic impact on a substantial number of small entities")? Or should there even be special protections for small businesses and other small entities?

- 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?

- Should agencies be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden? (Currently, agencies are only required to do so for rules that had/have a "significant economic impact on a substantial number of small entities.") Or, should Congress 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?

- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?

- To what extent have the analytical and accountability requirements contributed to what is called by some the "ossification" of the rulemaking process?

- How accurate are agencies' pre-promulgation cost and benefit estimates?

- How much does it cost for agencies to conduct cost-benefit analyses, risk assessments, regulatory flexibility analyses, federalism assessments, etc.?

7. <u>The Role of Science in the Regulatory Process</u>

- How should scientific advisory panels be constructed to ensure that they are unbiased?

- Under what circumstances should agencies' regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?

- In February 2002, OMB published governmentwide standards for information quality (as required by the Information Quality Act). Do agencies have too much discretion to deny correction requests? Should agencies' correction denials be subject to judicial review? What effect has the act had on the length of time it takes agencies to issue rules? Do the Shelby Amendment and the Information Quality Act, in tandem, potentially restrict the release of research findings that would have significant social impact?

- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?

- In December 2004, OMB published governmentwide standards for peer review of scientific information. Are governmentwide standards for peer review needed? Does OMB have the authority to issue such standards? What effect will these requirements have on the length of time it takes agencies to issue rules?

- What has been the effect of the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (regarding the acceptance and understanding of scientific evidence to be used in the legal system) on regulatory policymaking?

As of this date two major empirical studies are underway. One, conducted under the direction of Professor Jody Freeman of the Harvard Law School, is looking at the nature and impact of judicial review of agency rulemaking over a 10 year period in the 11 federal circuit courts of appeal. Professor Freeman is a fellow panelist today and will describe her plan for this daunting and important undertaking. The second study is being led by Professor William West of the Bush School of Government and Public Service, Texas A&M University at College Station, Texas, and will be looking into influence on the initiation, design, and development of new rules at 20 agencies during the period prior to the publication of a notice of proposed rulemaking for public comment in the Federal Register. Professor West will be assisted by eight graduate students. The study will be in part funded by a Capstone Program Grant from the Congressional Research Service. Both studies are expected to provide at least preliminary results by Spring 2006. Exploratory contacts for the conduct of several other studies are under way. It is hoped that this hearing will spur independent proposals for studies to be considered by the CRS team.

Finally, I have previously suggested that ACUS being in operation was not essential, at least initially, to the success of the Committee's Project. It is anticipated that many of the results of the studies will be directly useful in supplying the basis for possible legislative action. Other results should be available to affected agencies and may inform or influence action to remedy administrative process shortcomings. In the view of many, however, the value in the long term of an operational ACUS for a fairer, more effective, and more efficient administrative process is inestimable , but sure, and is evidenced by the strongly supported congressional reauthorization in 2004. As you are aware, CRS does not take a position on any legislative options, and it is not my intent to espouse such a position on behalf of CRS. It may be useful, however, for this public record to re-state the rationale that appears to have been successful in supporting the passage of the ACUS reauthorization measure.

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices is well documented.[1] During the hearings considering ACUS' reauthorization, C. Boyden Gray, a former White House Counsel in the George H.W. Bush Administration, testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: "Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist." [2] Further evidence of the widespread respect of, and support for, ACUS' continued work at the hearings was presented by Supreme Court Justices Antonin Scalia and Stephen Breyer. Justice Scalia stated that ACUS "was a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost."[3] Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.[4]

During the period of its existence Congress gave ACUS facilitative statutory responsibilities for implementing, among others, the Civil Penalty Assessment Demonstration Program; the Equal Access to Justice Act; the Congressional Accountability Act; the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act; provision of administrative law assistance to foreign countries; the Government in the Sunshine Act of 1976; the Railroad Revitalization and Regulatory Reform Act of 1976; the Administrative Dispute Resolution Act; and the Negotiated Rulemaking Act.

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related to issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance. A listing and brief description of 28 such products may be found in Appendix A of this submission.

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[1] See *e.g.*, Gary J. Edles, The Continuing Need for An Administrative Conference, 50 Adm. L. Rev. 101 (1998); Toni M. Fine, A Legislative Analysis of the Demise of ACUS, 30 Ariz. St. L.J. 19 (1998); Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented."–Reviving the Administrative Conference, 30 Ariz. St. L.J. 147 (1998); Paul R. Verkuil, Speculating About the Next Administrative Conference: Connecting Public Management to the Legal Process, 30 Ariz. St. L.J. 187 (1998).

[2] C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

[3] Reauthorization Hearings, *supra* note 5 (May 20, 2004).

[4] Fine, *supra*, note 1 at 46. See also Gary J. Edles, The Continuing Need for an Administrative Conference, 50 Admin. L. Rev. 101, 117 (1998); Jeffrey Lubbers, Reviving the Administrative Conference of the United States, 51 Dec. Fed. Law 26 (2004).

ACUS evolved a structure to develop objective, non-partisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification has never been static and need not be. Hearing witnesses and commentators on the revival of ACUS have strongly suggested that the contemporary problems facing a new ACUS will include management as well as legal issues. The Committee can assure that ACUS's roster of experts will include members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. It could also encourage that state interests be included in the entity's membership.

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of $1.8 million. But all have agreed that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation and publications. At the heart of this cost saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in huge monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it $9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of $320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee Justice Scalia commented, when asked about the cost-effectiveness of the Conference, that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures.

According to this view, prompt funding to make ACUS operational would come at an opportune time. The Departments of Homeland Security's (DHS) response to Hurricane Katrina and its continuing efforts to stabilize and adjust its organizational units to achieve optimum efficiency and responsiveness in planning for and successfully dealing with terrorist or natural disaster incidents are receiving considerable congressional attention and criticism. Both these issues, and the role ACUS might play in resolving them, are closely related.

The Katrina catastrophe has raised a number of questions as to the organization, authority and decisionmaking capability of DHS' Federal Emergency Management Agency (FEMA). Previously an independent, cabinet-level agency reporting directly to the President, FEMA was made a subordinate agency in the creation of DHS and saw some of its authority withdrawn and

placed elsewhere and its funding reduced. Suggestions have been made that these and other administrative operating deficiencies contributed to ineffective planning and responses that included communications break-downs among Federal, State and local officials, available resources not being used, and official actions taken too late or not taken at all, among others.[5] It has also been suggested that FEMA revert to its previous independent status outside of DHS.

Moreover, it is not clear at present, for example, which laws provide authority to grant regulatory waivers or extensions of time for reports or applications to assist victims of a catastrophic terrorist or natural disaster incident or to ease the economic effects of such incidents. There appears to be no central coordinating authority for such situations or even a complete catalogue of such waiver or extension authorities that can serve as a guide.[6]

A reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's role, where it should play that role, and the authorities it needs to fulfill that role, as well as assessing the need for a comprehensive waiver and extension authority for such emergency situations.

The terrorist attacks of September 11, 2001, have had and will continue to have a profound effect on governmental processes. One of the initial responses to the 9/11 attacks was the creation in November 2002 of the Department of Homeland Security (DHS), a consolidation of all or parts of 22 existing agencies. Each of the agencies transferred to DHS had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications and have need for ALJs; and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs; and the transferred Immigration and Naturalization Service units which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures are still required. Similarly, all the agencies transferred have their own statutory and administrative requirements for rulemaking that likely will have to be integrated. Also, the legislation gives broad authority to establish flexible personnel policies. Further, provisions of the DHS Act eliminated the public's right of access under the Freedom of Information Act and other information access laws to "critical infrastructure information" voluntarily submitted to DHS. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. An operational ACUS has a clear role to play here.

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[5] See, *e.g.*, Susan B. Glassner and Michael Grunwald, Hurricane Katrina- What Went Wrong, Wash. Post., Sept. 11, 2005, A1, A6-A8.

[6] CRS has produced at least seven reports directly or indirectly addressing the issue: "Regulatory Waivers and Extensions Pursuant to Hurricane Katrina," RS22253, Sept. 19, 2005; "Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina," RL33107, Sept. 29, 2005; "Hurricane Katrina: The Response by the Internal Revenue Service," RS22261, Sept. 14, 2005; "Hurricane Katrina: Medicaid Issues," RL33083, Oct. 11, 2005; "Katrina Relief: U.S. Labor Department Exemption of Contractors from Written Affirmative Action Requirements," RS22282, Sept. 27, 2005; "Hurricane Katrina: Education and Training Issues," RL33089, Sept. 22, 2005; "Natural Emergency Powers," 98-505 GOV, Sept. 15, 2005. One bill has been introduced to "clarify" EPA's authority. See S. 1711.

The recommendations of the 9/11 Commission with respect to reforms and restructuring of the intelligence community were recognized by the Commission as having the potential of profoundly affecting government openness and accountability. It noted:

> Many of our recommendations call for the government to increase its presence in our lives– for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.
>
> At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also to assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market. At present DHS is engaged in effecting its first agency-wide reorganization effort since its establishment in 2002. Its proposal, announced in July 2005, was scheduled to become effective on October 1, 2005, and is not subject to formal congressional review and approval or disapproval.[7]

Finally, in addition to the impact of 9/11, the decade-long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government

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[7] The DHS reorganization is discussed in CRS Report No. RL 33042, "Department of Homeland Security Reorganization: The 2SR Initiative," and deals with issues concerning the means for realizing the proposed 2 SR reorganizations; the efficiencies and effectiveness that will result with the proposed flatter, but more sprawling, restructuring and how new leadership positions will be established, filed, compensated, and situated in the DHS hierachy.

information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies have suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than having the effect of enhancing public participation. The issue would appear ripe for ACUS-like guidance. Among other public participation issues that may need study include the peer review process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued problem of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? Is there an effective way to review, assess and modify or rescind "old" rules? Is the time ripe for codification of the process of presidential review of rulemaking that is now guided by executive order. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. Is it appropriate for Congress to consider statutorily modifying the "reasonable decisionmaking standard" now prevailing, or to limit judicial preview of rulemaking by, for example, having all "major" rules come to Congress and be subject to joint resolutions of approval? These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

Appendix A*

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A SELECTED BIBLIOGRAPHY OF RECOMMENDATIONS PERTINENT TO NATIONAL SECURITY, CIVIL LIBERTIES, INFORMATION SECURITY, AGENCY ORGANIZATION AND REORGANIZATION, PERSONNEL AND CONTRACTING ISSUES

This bibliography identifies ACUS Recommendations that either directly or indirectly focus on issues pertinent to national security and related civil liberties issues, and issues related to information security, agency organization and reorganization, personnel and contracts issues. The bibliography is broken down into categories, with a brief statement explaining the relevancy of each entry.

National Security/Civil Liberties Issues

1. **Anderson, David R., and Diane M. Stockton.** Ombudsmen in Federal agencies: the theory and the practice. 1990 ACUS 105. *Also:* Federal ombudsmen: an underused resource. 5 ADMIN. L.J. AM. U. 275 (1991).
   Recommendation 90-2: "The Ombudsman in Federal Agencies." 1 C.F.R. § 305.90-2 (1993), and 55 FED. REG. 34,211 (Aug. 22, 1990). Reason for inclusion: Ombudsman mechanisms might be useful at DHS to deal with other tensions arising from national security/protection of civil liberties issues.

2. **Bonfield, Arthur E.** "Military and foreign affairs function" rulemaking under the APA. 3 ACUS 226 (1975), and 71 MICH. L. REV. 221 (1972).
   Recommendation 73-5: "Elimination of the `Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements." 1 C.F.R. § 305.73-5 (1993), and 39 FED. REG. 4,847 (Feb. 7, 1974). Reason for inclusion: Early recommendations concerning how to accommodate public participation with military and foreign affairs needs.

3. **Fenton, Howard N., III.** Recommendations for injecting needed openness and due process reforms into the U.S. export control procedures. 1991 ACUS 173. *Also:* Reforming the procedures of the Export Administration Act: a call for openness and administrative due process. 27 TEX. INT'L L.J. 1 (1992).
   Recommendation 91-2: "Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings." 1 C.F.R. § 305.91-2 (1993), and 56 FED. REG. 33,44 (July 24, 1991). Reason for inclusion: The need to review export control procedures is arguably greater than ever.

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* The information in this Appendix was supplied by Professor Jeffrey S. Lubbers, Fellow in Administrative Law, American University, Washington College of Law. Professor Lubbers was Research Director of ACUS from 1982 to 1995.

4. **Kress, Jack M., and Carole D. Iannelli.** Administrative search and seizure: whither the warrant? 31 VILL. L. REV. 705 (1986). Reason for inclusion: Touches upon issues that are of particular importance in the national security and civil liberties contexts.

5. **Legomsky, Stephen H.** Forum choices for the review of agency adjudication: a study of the immigration process. 1985 ACUS 505, and 71 IOWA L. REV. 1297 (1986). Recommendation 85-4: "Administrative Review in Immigration Proceedings." 1 C.F.R. § 305.85-4 (1993) and 50 FED. REG. 52,894 (Dec. 27, 1985). Reason for inclusion: With the substantial changes that have occurred at INS, the need to rationalize the appeals process is arguably greater than ever.

6. **Nafziger, James A. R.** Report on reviewability of visa denials by consular officers. 1989 ACUS 587. *Also:* Review of visa denials by consular officers. 66 WASH. L. REV. 1 (1991).
Recommendation 89-9: "Processing and Review of Visa Denials." 1 C.F.R. § 305.89-9 (1993), and 54 FED. REG. 53,496 (Dec. 29, 1989). Reason for inclusion: While focused primarily on due process issues, this study is pertinent to the extent that Visa processes have become increasingly controversial.

7. **Perritt, Henry H., Jr.** Electronic acquisition and release of Federal agency information. 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989). *Also:* Federal electronic information policy. 63 TEMPLE L. REV. 201 (1990). *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 961 (1992). *Partially reprinted:* At Appendix 7H *in:* Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information." 1 C.F.R. § 305.88-10 (1993), and 54 FED. REG. 5,209 (Feb. 2, 1989). Reason for inclusion: this study considers electronic FOIA and privacy concerns, an issue of particular importance in the national security and civil liberties contexts.

8. **Perritt, Henry H., Jr.** Federal agency electronic records management and archives. 1990 ACUS 389. *Also:* Electronic records management and archives. 53 U. PITT. L. REV. 963 (1992).
Recommendation 90-5: "Federal Agency Electronic Records Management and Archives." 1 C.F.R. § 305.90-5 (1993) and 55 FED. REG. 53,270 (Dec. 28, 1990). Reason for inclusion: As with the previous recommendation, this study considers FOIA and privacy issues of particular importance in the national security and civil liberties contexts.

9. **Shane, Peter F.** Negotiating for knowledge: administrative responses to Congressional demands for information. 1990 ACUS 611. *Also:* Administrative responses to Congressional demands for information. 44 ADMIN. L. REV. 197 (1992).
Recommendation 90-7: "Administrative Responses to Congressional Demands for Sensitive Information." 1 C.F.R. § 305.90-7 (1993), and 55 FED. REG. 53,272 (Dec. 28, 1990). Reason for inclusion: The need for better ways to resolve executive/legislative disputes over access to information is a pressing issue in the national security context.

10. **Stevenson, Russell B., Jr.** Protecting business secrets under the Freedom of Information Act: managing Exemption 4. 1982 ACUS 81 (Vol. 1), and 34 ADMIN. L. REV. 207 (1982).

Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." 1 C.F.R. § 305.82-1 (1988), and 47 FED. REG. 30,702 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those recommended by ACUS]. Reason for inclusion: This Recommendation precipitated an Executive Order on the issue by President Reagan, but the protection of such information remains an important issue.

11. **Verkuil, Paul R., Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey S. Lubbers**. The Federal administrative judiciary. 1992 ACUS 773. *Also:* Verkuil, Paul R. Reflections upon the Federal administrative judiciary. 39 UCLA L. REV. 1341 (1992). *An extract of this report also published as:* Lubbers, Jeffrey S. The Federal administrative judiciary: establishing an appropriate system of performance evaluation for ALJs. 7 ADMIN. L.J. AM. U. 589 (1994). *Supra* no. 234.
Recommendation 92-7: "The Federal Administrative Judiciary." 1 C.F.R. § 305.92-7 (1993), and 57 FED. REG. 61,760 (Dec. 29, 1992). Reason for inclusion: This recommendation was the result of a major study by ACUS on ALJs and AJs, and included information on the need for performance evaluation. Similar issues adhere in the national security and civil liberties contexts given the expanded authority of certain agencies in this regard.

12. **Wright, Ronald F.** The right to counsel during agency investigations. 1993 ACUS 509. Statement 16: "Right to Consult with Agency Counsel in Agency Investigations." 59 FED. REG. 4,677 (Feb. 1, 1994). Reason for inclusion: Agency investigative procedures are relevant to both national security and civil liberties concerns.

Health/Safety Issues

13. **Aman, Alfred C., Jr.** Institutionalizing the energy crisis: some structural and procedural lessons. 1980 ACUS 205, and 65 CORNELL L. REV. 491 (1980).
Recommendation 80-2: "Enforcement of Petroleum Price Regulations." 1 C.F.R. § 305.80-2 (1982), and 45 FED. REG. 46,774 (July 11, 1980). Reason for inclusion: Responsive to the energy crisis of the 1970's.

14. **Baram, Michael S.** Risk communication by regulatory agencies in protecting health, safety, and the environment. 1990 ACUS 207.
Recommendation 90-3: "Use of Risk Communication by Regulatory Agencies in Protecting Health, Safety, and the Environment." 1 C.F.R. § 305.90-3 (1993), and 55 FED. REG. 34,212 (Aug. 22, 1990). Reason for inclusion: Risk communication has taken on new urgency.

15. **Hamilton, Robert W.** Role of nongovernmental standards in the development of mandatory Federal standards affecting safety or health. 1978 ACUS 247, and 56 TEX. L. REV. 1329 (1978).
Recommendation 78-4: "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation." 1 C.F.R. § 305.78-4 (1993), and 44 FED. REG. 1,357 (Jan. 5, 1979). Reason for inclusion: The use of outside standard setting organizations is especially important in the national security arena.

16. **Shapiro, Sidney A**. Biotechnology and the design of regulation. 1989 ACUS 475, and 17 ECOLOGY L.Q. 1 (1990).
Recommendation 89-7: "Biotechnology and the Design of Regulation." 1 C.F.R. § 305.89-7. Reason for inclusion: Biotechnology has become particularly relevant as a national security issue.

17. **Shaw, William R.** The procedures to ensure compliance by Federal facilities with environmental quality standards. 4 ACUS 283 (1979), and 5 ENVTL. L. REP. 50,211 (1975). Recommendation 75-4: "Procedures to Ensure Compliance by Federal Facilities with Environmental Quality Standards." 1 C.F.R. § 305.75-4 (1993), and 40 FED. REG. 27,928 (July 2, 1975). Reason for inclusion: The tension between the conduct of military activities and training an environmental protection goals is arguably greater than ever.

Personnel and Contracting Issues

18. **Fidell, Eugene R.** Federal protection of private sector health and safety whistleblowers. 1987 ACUS 219, and 2 ADMIN. L.J. AM. U. 1 (1988), and 134 CONG. REC. S1447 (Daily ed., Feb. 23, 1988).
Recommendation 87-2: "Federal Protection of Private Sector Health and Safety Whistleblowers," 1 C.F.R. § 305.87-2 (1993), and 52 FED. REG. 2363 (June 24, 1987). Reason for inclusion: Whistleblowers serve an effective and valuable function in providing the government with information regarding security breakdowns, etc.

19. **Grad, Frank P.** Contractual indemnification of government contractors. 1988 ACUS 103, and 4 ADMIN. L.J. AM. U. 433 (1991).
Recommendation 88-2: "Federal Government Indemnification of Government Contractors." 1 C.F.R. § 305.88-2 (1993), and 53 FED. REG. 26,027 (July 11, 1988), and 53 FED. REG. 39,588 (Oct. 11, 1988). Reason for inclusion: The need to provide for optimum protection of government contractors is arguably greater than ever.

20. **Luneburg, William V.** The Federal personnel complaint, appeal and grievance system: a structural overview and proposed revisions. 1989 ACUS 895, and 78 KEN. L.J. 1 (1989-90).
Statement 15: "Procedures for Resolving Federal Personnel Disputes." 1 C.F.R. § 310.15 (1993)and 54 FED. REG. 53,498 (Dec. 29, 1988). Reason for inclusion: The need to upgrade civil service appeal and grievance procedures is arguably greater than ever.

21. **Michael, Douglas C.** Federal agency use of audited self-regulation as a regulatory technique. 1994-1995 ACUS 65, and 47 ADMIN. L. REV. 171 (1995).
Recommendation 94-1: "The Use of Audited Self-Regulation as a Regulatory Technique." 59 FED. REG. 44,701 (Aug. 30, 1994). Reason for inclusion: Provides an overview of issues pertaining to self-regulating organizations.

Organizational/Regulatory Issues

22. **Asimow, Michael.** When the curtain falls: separation of functions in Federal administrative agencies. 1981 ACUS 141, and 81 COLUM. L. REV. 759 (1981). Reason for inclusion: With the creation of DHS, special problems of separating investigatory and adjudicative functions might arise.

23. **Bermann, George A.** Regulatory cooperation with counterpart agencies abroad: the FAA's aircraft certification experience. 1991 ACUS 63, and 24 LAW & POL'Y INT'L BUS. 669 (1993).
Recommendation 91-1: "Federal Agency Cooperation with Foreign Government Regulators." 1 C.F.R. § 305.91-1 (1993), and 56 FED. REG. 33,842 (July 24, 1991). Reason for inclusion: The need for international cooperation in regulatory activities is arguably greater than ever, and this study was one of the first to focus on the issue.

24. **Fallon, Richard H., Jr.** Imposing civil money for violations of Federal aviation regulations: implementing a fair and effective system. 1990 ACUS 43. *Also:* Enforcing aviation safety regulations: a case for the split-enforcement model of agency adjudication. 4 ADMIN. L.J. AM. U. 389 (1991).
Recommendation 90-1: "Civil Money Penalties for Federal Aviation Violations." 1 C.F.R. § 305.90-1 (1993), and 55 FED. REG. 34,209 (Aug. 22, 1990). Reason for inclusion: This study recommended a fair, restructured process for dealing with FAA/NTSB enforcement of aviation penalties and could thus serve as a model for DHS related activities.

25. **Gellhorn, Ernest.** Public participation in administrative proceedings. 2 ACUS 376 (1973), and 81 YALE L.J. 359 (1972).
Recommendation 71-6: "Public Participation in Administrative Hearings." 1 C.F.R. § 305.71-6. Reason for inclusion: An early study touching upon public participation issues.

26. **Kovacic, William E.** The choice of forum in bid protest disputes. 1994-1995 ACUS 507. *Also:* Procurement reform and the choice of forum in bid protest disputes. Forthcoming ADMIN. L.J. AM. U., Vol. 9, no. 3 (1995).
Recommendation 95-6. "Government Contract Bid Protests." 60 FED. REG. 43,113 (Aug. 18, 1995). Reason for inclusion: The importance of fair and efficient bid protest procedures is especially important in wartime.

27. **Szanton, Peter L.**, ed. Federal reorganization: what have we learned? Chatham, N.J.: Chatham House, 1981. Reason for inclusion: This publication, sponsored by ACUS, provides information on how to carry out effective executive reorganizations.

28. **Weaver, Russell L.** Organization of adjudicative offices in executive departments and agencies. 1993 ACUS 547. *Also:* Management of ALJ offices in executive departments and agencies. 47 ADMIN. L. REV. 303 (1995). Reason for inclusion: Provides information relating to the organization of departments and agencies.