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Before

The Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
House of Representatives

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on

"The Regulatory Improvement Act of 2007"

Madam Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the proposed "Regulatory Improvement Act of 2007," which would reauthorize the Administrative Conference of the United States (ACUS). As you requested, my testimony will focus on what role ACUS might have played in relation to several recent issues in rulemaking and administrative law. As you know, however, CRS takes no position on any legislative option.

I should begin, however, with a caveat. At this subcommittee's hearing on ACUS in May 2004, Associate Justices Steven G. Breyer and Antonin Scalia were asked a similar question — what problems might have been avoided had ACUS not been eliminated in 1995. Both indicated that it was impossible to know.[1] It is the perennial problem of describing the counterfactual; what would have happened if certain events had been different. Perhaps ACUS would have had no effect on these rulemaking and administrative law issues, and all of them would be as unclear or as difficult as they are today. But it is not far fetched to say

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[1] U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Reauthorization of the Administrative Conference of the United States*, hearing, 108th Cong., 2nd sess., May 20, 2004 (Washington: GPO, 2004), p. 18.

that ACUS could have made a difference, and as a result we would be further down the road to understanding and dealing with these issues than we are now.

What is a "Rule"?

One such issue occurred within the past month, and serves as an illustration of how ACUS could have addressed elements of a current controversy. On August 17, 2007, the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services sent a letter to state health officials requiring them to use five specific procedures to ensure that the State Children's Health Insurance Program (SCHIP) does not substitute for coverage under group health plans.[2] CMS said the letter simply clarified how the agency applies existing statutory and regulatory requirements in reviewing state requests to extend SCHIP. Some health care advocacy groups, however, asserted that the letter would effectively establish a new income limit for SCHIP at 250% of the federal poverty level, eliminate the discretion that states have traditionally had to tailor their SCHIP programs, and eliminate health coverage for tens of thousands of children in at least 18 states.[3]

The CMS letter is part of an ongoing policy debate regarding how the SCHIP program should be administered and which children should be covered.[4] However, it also raised a separate, more narrowly focused, yet important issue of administrative law — was the August 17 CMS letter really a "rule" under the Administrative Procedure Act (APA) of 1946 (5 U.S.C. 551 *et seq.*) that should have been published in the *Federal Register* for public comment? Also, was this document a "rule" for purposes of the Congressional Review Act (CRA) (5 U.S.C. 801-808), and therefore subject to a congressional resolution of disapproval? The potential implications of these questions are significant for the SCHIP program. The CRA says that federal agencies must submit their covered rules to each house of Congress and the Comptroller General before they can take effect, and that any resolution of disapproval has to be introduced within 60 days after Congress receives the rule. In the case when a document is not sent to Congress, can Congress consider a resolution of disapproval under the CRA? Can the August 17 letter be challenged? Who understands these issues and can provide advice on them?

ACUS was eliminated in 1995 — the year before the CRA was enacted. Had ACUS been in existence during the past decade, it could have been the source of authoritative, nonpartisan guidance regarding the coverage of the act. ACUS could have convened expert panels or commissioned authoritative studies of the act's implementation to provide ongoing information to decisionmakers both in executive branch agencies and in Congress. As a result, ACUS arguably would have been well positioned to advise CMS in regard to the requirements in the August 17 letter, and to advise Congress as to its oversight role.

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[2] To view a copy of this letter, see [http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf].

[3] Steve Teske, "CMS Tells States to Adopt More Ways To Stop Insurance 'Crowd-Out' From SCHIP," *BNA Daily Report for Executives*, Aug. 21, 2007, p. A-15.

[4] For information on legislative proposals in the 110th Congress, see CRS Report RL34129, *Medicaid and SCHIP Provisions in H.R. 3162 and S. 1893/H.R. 976*, by Evelyne Baumrucker (coordinator), Bernadette Fernandez, April Grady, Jean Hearne, Elicia J. Herz, and Chris Peterson.

Rules Versus Guidance. More generally, ACUS could have helped address what has become a major issue in administrative law, and an issue that has been of considerable interest to Members of Congress from both parties in recent years — what is the difference between an agency "guidance document" and a "rule"? Just as Congress sometimes enacts broad legislation and leaves the specific requirements to be developed through regulations, agencies sometimes publish regulations that require further delineation in subsequent guidance documents. That is essentially what CMS said it was doing in the August 17 SCHIP letter — issuing guidance to the states to clarify what the existing regulations (42 C.F.R. 457.805) mean when they say that states must have "reasonable procedures" to prevent substitution of public SCHIP coverage for private coverage. Some courts have ruled that agency guidance documents, unlike regulations, cannot have a binding effect on the public.[5] Some may question whether the CMS letter — when it said that states would be expected to include five general "crowd out" strategies in their SCHIP procedures,[6] make three specific types of assurances regarding the program,[7] and amend their state plans within 12 months "or CMS may pursue corrective action" — crossed the line into rulemaking. Currently, it is unclear. But it is clear that guidance documents, unlike rules, do not have to be published for public comment, and are not subject to a host of statutory and executive order rulemaking requirements.

This certainly is not the first time that questions have been raised regarding agencies' "guidance" documents. In 2000, the Committee on Government Reform published a report that raised questions regarding a number of guidance documents issued by the Environmental Protection Agency, the Department of Labor, and other agencies.[8] The report indicated that agencies issue thousands of guidance documents each year that are intended to clarify the requirements in related statutes and regulations. For example, the Occupational Safety and Health Administration reported that it had issued 3,374 guidance documents in the previous four years.[9] EPA reported it had issued 3,653 guidance documents in that period. If ACUS had been in existence during the past 12 years, it could have supported studies, convened panels, and otherwise provided information to agencies that might have brought greater clarity to this situation.

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[5] See, for example, *Appalachian Power Co. v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000); *Chamber of Commerce v. Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999); Robert A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Agencies Use Them to Bind the Public?" *Duke Law Journal*, vol. 41 (1992), p. 1311.

[6] Those five policies are: (1) imposing waiting periods between dropping private coverage and enrollment; (2) imposing cost sharing in approximation to the cost of private coverage; (3) monitoring health insurance status at the time of application; (4) verifying family insurance status through insurance databases; and (5) preventing employers from changing dependent coverage policies that would favor a shift to public coverage.

[7] These three assurances were that: (1) the state has enrolled at least 95% of the children in the state below 200% of the federal poverty level who are eligible for either SCHIP or Medicaid; (2) the number of children in the target population insured through private employers has not decreased by more than two percentage points over the prior five year period; and (3) the state is current with all reporting requirements in SCHIP and Medicaid and reports on a monthly basis relating to the crowd-out requirements.

[8] U.S. Congress, House Committee on Government Reform, *Non-Binding Legal Effect of Agency Guidance Documents*, 106th Cong., 2nd sess., H.Rept. 106-1009 (Washington: GPO, 2000).

[9] Ibid., p. 5.

Presidential Review of Rulemaking

ACUS could have also been a player in a recent and ongoing controversy involving presidential review of rulemaking. On January 18, 2007, President Bush issued Executive Order (E.O.) 13422, making the most significant amendments to the review process in almost 14 years.[10] Among those changes were requirements that each agency head designate one of the agency's presidential appointees as the "regulatory policy officer" or RPO. The order also eliminated the provision requiring the RPO to report to the agency head, and appeared to give the RPO significant new authorities. For example, it said that unless specifically permitted by the agency head, "no rulemaking shall commence" in the agency without the policy officer's approval. (Previously, the RPOs were only supposed to "be involved" in the regulatory process, and to "foster the development" of sound rules.)

This change, and other changes made by E.O. 13422, generated strong differences of opinion between rulemaking experts and interest groups, and were characterized by critics as a "power grab" by the White House that undermines public protections and lessens congressional authority,[11] and by proponents as "a paragon of common sense and good government."[12] Congressional concerns about the executive order led to the addition of a provision to the FY2008 Financial Services and General Government appropriations bill (H.R. 2829, which funds the Office of Management and Budget (OMB) and other agencies) stating that "None of the funds made available by this Act may be used to implement Executive Order 13422." The amendment was agreed to as Section 901 of the legislation as passed by the House. In the wake of this action, the Director of OMB sent a letter to the chairmen and ranking members of the House and Senate Appropriations Committees stating that "If the President were presented with a bill that contained a restriction on the implementation of Executive Order 13422, the President's Senior Advisors would recommend that he veto the bill."[13] In the Senate, the provision was taken out when the bill was reported by the Appropriations Committee, but some media reports indicate that the issue may be taken up during a House-Senate conference on the legislation this fall.[14]

What could ACUS have added to this discussion? Perhaps what supporters argue that it often did best — provide what was viewed as unbiased, objective information to

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[10] Executive Order 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review," 72 *Federal Register* 2763, Jan. 23, 2007.

[11] Public Citizen, "New Executive Order Is Latest White House Power Grab," available at [http://www.citizen.org/pressroom/release.cfm?ID=2361]. See also Margaret Kriz, "Thumbing His Nose," *National Journal*, July 28, 2007, pp. 32-34.

[12] Attributed to William Kovacs, Vice President of Environment, Energy, and Regulatory Affairs, U.S. Chamber of Commerce, in John Sullivan, "White House Sets Out New Requirements for Agencies Developing Rules, Guidance," *BNA Daily Report for Executives*, Jan. 19, 2007, p. A-31.

[13] Letter to Senators Robert C. Byrd and Thad Cochran, and to Representatives Jerry Lewis and David Obey, from Rob Portman, Director, Office of Management and Budget, July 12, 2007.

[14] "Durbin Vows to Block Funds for White House Regulatory Review Order," *Inside EPA*, Sept. 6, 2007, available at [http://www.insideepa.com/secure/docnum.asp?f=epa_2001.ask&docnum=CLEANAIR-18-18-18].

decisionmakers. For example, during the subcommittee's hearing last February, the acting administrator of OMB's Office of Information and Regulatory Affairs (OIRA) said that most RPOs were already presidential appointees, and also said that the executive order did not substantively change the policy officers' duties or reporting relationships. However, it appeared that little was known — even by OIRA — about who the agency RPOs were or what they actually did. When OIRA published the list of newly designated RPOs in July 2007, it was not clear how many of the incumbents had changed because OIRA did not have a list of the policy officers before the executive order was issued.[15] Had ACUS been available to examine this issue, it might have been able to provide real-time information on the RPOs, noting whether they already were presidential appointees, whether they were usually in positions subject to Senate confirmation, and whether the new RPO designees represented a change in these positions. That information may not have defused the controversy, but it might well have led to more informed discussion of the issues.

An ACUS examination of E.O. 13422 would not have been the first time that the agency weighed in on presidential review of rulemaking. In 1988, ACUS examined the practice, generally validated its exercise, and made certain recommendations to improve its openness and public acceptability.[16] In 1993, E.O. 12866 (which E.O. 13422 amended) incorporated ACUS's recommendations for more openness in the process, requiring agencies to disclose the changes made to draft rules that are submitted to OIRA.[17] However, OIRA now wields considerable influence over agencies' rules *before* they are formally submitted to OMB. In fact, OIRA has said that this "informal review" period is when it can have its *greatest* influence on agency rulemaking.[18] Therefore, GAO recommended in 2003 that agencies be required to disclose changes made at OIRA's suggestion during both formal and informal review, but OIRA said doing so would inappropriately intrude on the deliberative process.[19] A reconstituted ACUS could examine this issue and make recommendations as to whether more openness is in the public interest. ACUS could also weigh in on whether the transparency provisions of E.O. 12866 should apply to guidance documents that may now have to be submitted to OIRA because of the changes made by E.O. 13422.[20]

Electronic Rulemaking

Another ongoing issue in administrative law is electronic rulemaking — i.e., the use of information technology (IT) to facilitate a range of activities related to the process of developing regulations. "E-rulemaking" in the federal government began within individual

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[15] The July 2007 list of RPO designees can be found at [http://www.whitehouse.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf].

[16] ACUS Recommendation 88-9, *Presidential Review of Rulemaking* (1 C.F.R. 305.88-9).

[17] Executive Order 12866, "Regulatory Planning and Review," *58 Federal Register* 51735, Oct. 4, 1993. To view a copy of this order, see [http://www.whitehouse.gov/omb/inforeg/eo12866.pdf].

[18] U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, 03-929, Sept. 22, 2003.

[19] Ibid.

[20] E.O. 13422 requires agencies to notify OIRA of upcoming significant guidance documents, and to submit those documents to OIRA if requested by the administrator. It appears that those guidance documents are not covered by the transparency provisions in E.O. 12866.

agencies in the mid-to-late 1990s, but current government-wide initiatives can be traced to both congressional and presidential sources. For example, the E-Government Act of 2002 (P.L. 107-347) requires federal agencies, "to the extent practicable," to accept public comments on their rules electronically and to ensure that one or more federal websites contain those comments and other materials normally maintained in rulemaking dockets. E-rulemaking is also one of 24 e-government projects launched as part of the Bush Administration's President's Management Agenda. The Administration established a website (www.regulations.gov) in January 2003 through which the public could identify all federal rules that were open for comment, and provide comments on those rules. The second phase of the Administration's initiative is currently underway, and is intended to create a centralized electronic docket (the "Federal Docket Management System," or FDMS) to allow the public to review agency rulemaking materials (e.g., agencies' legal and cost-benefit analyses for their rules) and the comments of others.

E-rulemaking has been described by proponents as a way to increase democratic legitimacy, improve regulatory policy decisions, decrease agencies' administrative costs, and increase regulatory compliance. However, the implementation of e-rulemaking in the federal government has been controversial. Congress has objected to how e-rulemaking and several other e-government projects have been funded (through transfers of appropriations), and has voiced strong concerns about the centralized management of the initiatives.[21] To date, more than two dozen federal agencies have transferred nearly $50 million to the Environmental Protection Agency (EPA) to build FDMS.[22] (In a 2003 business case, EPA estimated the cost of constructing the docket at about $20 million.) OMB officials have said these transfers are being done under the Economy Act (31 U.S.C. 1535), which allows agencies to purchase goods and services from one another. However, it is unclear whether the Economy Act allows agencies to transfer their appropriations primarily for the construction of the docket without receiving ongoing, FDMS-related goods and services.[23]

Also, some observers have criticized the functionality of some of the applications being used in the new docket system. For example, Thomas R. Bruce, director of Cornell University's Legal Information Institute, said most of the problems with the FDMS website

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[21] For example, Section 841 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act for FY2006 (P.L. 109-115) prohibited the transfer of funds to e-government projects without the approval of the House and Senate Committees on Appropriations. In explaining the rationale for this provision, the House report for the legislation (H.R. 3058) noted "serious concerns about the continued forced implementation of this initiative on Departments and Agencies," and said "many aspects of this initiative are fundamentally flawed, contradict underlying program statutory requirements and have stifled innovation by forcing conformity to an arbitrary government standard. Most importantly, the implementation of this initiative has forced departments and agencies and offices and bureaus within each to transfer funds without the consent of the Committee and has used funds for activities for which funding was not specifically appropriated."

[22] See U.S. Government Accountability Office, *Electronic Government: Funding of the Office of Management and Budget's Initiatives*, GAO-05-420, Apr. 25, 2005; and OMB's *Report to Congress on the Benefits of the President's E-Government Initiatives* for FY2006 and FY2007, available at [http://www.whitehouse.gov/omb/egov/documents/FY07_Benefits_Report.pdf].

[23] See, for example, Jason Miller, "Providers look for a level playing field; OMB has not decided how to resolve inequities in the 1932 Economy Act," *fcw.com*, Feb. 19, 2007.

"stem from the amount of knowledge you need to have to make it work effectively."[24] He said the site requires users to be familiar with the rulemaking process and to know which government entity regulates specific subjects. Other concerns have focused on a reported lack of consistency in how key data are submitted into the docket system. Robert Carlitz, director of Information Renaissance, said that although e-rulemaking program managers provided a few standard fields, they also allowed agencies to add any additional fields they wanted. He said this "led to a certain amount of anarchy because you can have the same information submitted in different ways by the agencies."[25] Still other concerns center on the limited search capability in FDMS. Currently, the system allows only searches within certain data fields (e.g., the titles of documents), not throughout the text of the documents in the docket. Barbara Brandon, a law librarian at the University of Miami School of Law, has been quoted as saying that if the system is not going to provide full text searching, "then it has really been oversold."[26] EPA officials said they are aware of this limitation, and that full-text searching would likely be added in 2007.

ACUS might have been able to improve the implementation of e-rulemaking in the federal government. As was pointed out during this subcommittee's hearing in May 2004, ACUS played a key role in the Clinton Administration's National Performance Review recommendations on regulatory systems, one of which was that agencies should "Use information technology and other techniques to increase opportunities for early, frequent and interactive public participation during the rulemaking process and to increase program evaluation efforts."[27] Regarding funding of the initiative, ACUS could have advised Congress and the Administration on the best ways for cross-cutting programs like e-rulemaking to be funded by vertically organized and appropriated executive branch agencies. ACUS might have also played a role in ensuring that the centralized approach that OMB selected was, in fact, the most cost-efficient way to provide docket services to the agencies and the public. Regarding the functionality of the system, it might have brought together leading experts in Web design and suggested ways to make FDMS and the regulations.gov website more user friendly and useful.

More generally, ACUS might serve as a mechanism through which agencies learn about innovative uses of IT in rulemaking and regulatory management. In 2001, the General Accounting Office (GAO, now the Government Accountability Office) issued a report indicating that individual federal and state agencies were implementing new ways to provide regulatory compliance assistance and perform other administrative functions, but federal agencies were frequently unaware of each other's activities.[28] GAO recommended that OIRA develop a systematic process for agencies to share information on these innovations, but OIRA declined to comment on the recommendations. According to the legislation that

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[24] Ralph Lindeman, "Structural, Other Flaws Said to Impede Effectiveness of E-Rulemaking Website," *BNA Daily Report for Executives*, Mar. 30, 2007, p. C-5.

[25] Ibid.

[26] Ibid.

[27] Office of the Vice President, *From Red Tape to Results: Creating a Government That Works Better and Costs Less*, Report of the National Performance Review (Washington: GPO, 1993), p.168.

[28] U.S. General Accounting Office, *Regulatory Management: Communication About Technology-Based Innovations Can Be Improved*, GAO-01-232 (Washington: Feb. 12, 2001).

originally established ACUS in 1964, one of its functions was to "arrange for interchange among agencies of information useful in improving administrative procedures."[29]

Civil Penalties

ACUS might have also played a positive role regarding civil penalties, and it would not have been the first time that the conference would have done so. ACUS made recommendations in the past about particular agencies' penalties, and suggested the establishment of a regime of administratively imposed civil penalties. In fact, as former OIRA administrator Sally Katzen testified before the predecessor to this subcommittee in 1994, ACUS's prototype civil penalty statute became the model for more than 200 civil penalty laws.[30]

A current issue, in this regard, concerns the Federal Civil Penalties Inflation Adjustment Act. As amended in 1996 (the first year ACUS was no longer in business), the act requires agencies with covered civil penalties to examine and, if necessary, adjust those penalties for inflation at least every four years. However, GAO reported in 2003 that federal agencies were often not adjusting their penalties, and one reason was how the act itself was written.[31] Among other things, the act contains complicated rounding formulas that prevent agencies from capturing all the inflation that occurs between adjustments and that apparently prevents agencies from increasing certain penalties until inflation has increased by 45% or more. Therefore, its name notwithstanding, GAO concluded that the Inflation Adjustment Act may actually *prevent* agencies from adjusting some of their penalties for 15 years or more. Meanwhile, the deterrent power of those civil penalties decreases year after year. GAO also reported the following:

> The act does not give any agency the authority or responsibility to monitor agencies' compliance or provide guidance on its implementation. Lack of monitoring and guidance may have contributed to the widespread lack of compliance with the act's requirements and the numerous questions raised to us regarding its provisions.[32]

Had ACUS been available in 1996, it might have been able to call attention to these problems while the Inflation Adjustment Act amendments were being written, perhaps suggesting improvements before enactment. Had ACUS been available after 1996, it might have been able to identify the flaws more rapidly.

Other Areas

ACUS might have been able to play a significant role in a number of other areas of administrative law that have arisen in the past 12 years, and if Congress so chooses, could prospectively play a role in a range of issues currently facing Congress and federal agencies.

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[29] Administrative Conference Act of 1964, P.L. 88-499.

[30] Testimony of Sally Katzen before the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, Apr. 21, 1994, p. 4.

[31] U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, Mar. 14, 2003.

[32] Ibid., p. 3.

In fact, those areas match almost exactly the areas delineated in this subcommittee's "Administrative Law, Process, and Procedure Project for the 21st Century."[33]

Public Participation. For example, within the area of public participation in rulemaking, ACUS could examine:

- whether efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., the review panels established by the Small Business Regulatory Enforcement Fairness Act of 1996) are working and should be retained or expanded;[34]
- the effectiveness of the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in giving the public advance notice of upcoming rules;[35]
- whether agencies are appropriately using the "good cause" exception to notice and comment rulemaking, which can effectively eliminate public input to the rulemaking process;[36]
- whether agencies should be able to avoid the analytical requirements in the Unfunded Mandates Reform Act and the Regulatory Flexibility Act by skipping publication of a proposed rule;[37] and
- whether Congress should extend the APA prohibitions regarding *ex parte* contacts during formal rulemaking to informal "notice and comment" rulemaking.

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[33] For more information and to view a copy of the committee print of this initiative, see [http://judiciary.house.gov/Media/PDFS/Printers/110th/31505.pdf].

[34] The requirement for these panels is codified at 5 U.S.C. 609. GAO examined the initial implementation of this requirement, and generally concluded that the panels were worthwhile. See U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, Mar. 18, 1998.

[35] The Unified Agenda is published twice each year by the Regulatory Information Service Center (RISC) and provides for uniform reporting of data on regulatory activities under development throughout the federal government. In 2001, GAO reported that the Unified Agenda was not always accurate. See U.S. General Accounting Office, *Accuracy of Information in the Unified Agenda*, GAO-01-1024R, July 27, 2001.

[36] In 1998, GAO determined that about half of all final rules were published without a proposed rule, including some actions with a $100 million impact on the economy. The most common reason was agencies' use of the "good cause" exception, which allows agencies to not issue a proposed rule if doing so is "unnecessary, impracticable, or not in the public interest.". See U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

[37] GAO determined that the lack of proposed rules has affected the coverage of both statutes. See, for example, U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

Science and Rulemaking. Regarding the role of science in the regulatory process, a reconstituted ACUS might examine:

- how science advisory committees should be constructed to ensure they are not biased;
- whether agencies have too much discretion to deny correction requests under the Information Quality Act,[38] and whether those denials should be subject to judicial review;[39]
- whether government-wide standards for peer review are needed, whether OMB had the authority to issue such standards in 2004,[40] and the effect of the standards on the time agencies take to issue rules;
- what constitutes the "weight of the evidence" in making risk-based regulatory decisions, and whether government-wide standards on risk assessment would be feasible or useful.[41]

Congressional Review. In addition to the issues discussed earlier in this testimony, ACUS might examine a number of issues related to the Congressional Review Act, such as:

- whether agencies should still be required to send all their final rules to the House, the Senate, and GAO, or just those rules that are not published in the *Federal Register*; and
- whether there should be an expedited procedure for House consideration of rules reported for review (as there is in the Senate).[42]

Finally, if requested, ACUS could examine the pro's and con's of establishing a "Congressional Office of Regulatory Analysis" (essentially, a legislative branch OIRA) to help Congress oversee agencies' compliance with rulemaking requirements.

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[38] The Information Quality Act (sometimes referred to as the Data Quality Act) is a two-paragraph provision added to the 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554), and is codified at 44 U.S.C. 3504(d)(1) and 3516.

[39] Courts have indicated that these decisions are not currently subject to judicial review. See *Salt Institute; Chamber of Commerce of the United States of America v. Michael O. Leavitt, Secretary of Health and Human Services*, No. 05-1097, Mar. 6, 2006.

[40] Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, Dec. 15, 2004, available at [http://www.whitehouse.gov/omb/inforeg/peer2004/ peer_bulletin.pdf].

[41] OMB issued proposed standards in 2006, but the National Academy of Sciences concluded they were "fundamentally flawed" and should be withdrawn. OMB has not indicated whether it will publish final risk assessment standards. To view a copy of the proposed standards, see [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

[42] For a discussion of this issue, see CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, by Richard S. Beth.

Analytical Requirements. Another possible area of inquiry for ACUS could be the analytical and implementation requirements that Congress and various Presidents have placed on rulemaking agencies. For example, ACUS could examine:

- whether cost-benefit analysis is inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize,[43] and if not, what steps can be taken to ensure that regulatory costs and benefits are fairly and accurately measured;

- whether agencies are adhering to the cost-benefit analysis requirements in E.O. 12866 and OMB Circular A-4;[44]

- whether OIRA applies those cost-benefit analysis requirements in a consistent way, or whether certain types of rules, or rules from certain agencies (e.g., the Department of Homeland Security), are essentially exempt from these requirements;

- the accuracy of agencies' pre-promulgation estimates of regulatory costs and benefits;[45]

- whether cost-benefit requirements themselves would pass a cost-benefit test;

- whether Congress or the Administration should define key terms in the Regulatory Flexibility Act (e.g., "significant economic impact on a substantial number of small entities") and other analytic requirements;[46]

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[43] See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002); and Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

[44] Previous studies suggest that agencies are often not doing so. See, for example, Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996); and Robert W. Hahn and Patrick Dudley, *How Well Does the Government Do Cost-Benefit Analysis?*, Working Paper 04-01 (Washington: AEI-Brookings Joint Center for Regulatory Studies, Jan. 2004). To view a copy of OMB Circular A-4, see [http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf].

[45] See Winston Harrington, Richard D. Morgenstern, and Peter Nelson, "On the Accuracy of Regulatory Cost Estimates," *Journal of Policy Analysis and Management,* vol. 19 (2000), pp. 297-322. In 2005, OMB reviewed the literature on *ex ante* cost and benefit estimates, and concluded that federal agencies tend to overestimate both benefits and costs. See U.S. Office of Management and Budget, Office of Information and Regulatory Affairs, *Validating Regulatory Analysis: 2005 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, pp. 41-52, available at [http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf].

[46] GAO has repeatedly said that the lack of clarity regarding "significant economic impact on a substantial number of small entities" in the act has affected its implementation. See, for example, U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary*, GAO/GGD-99-55, Apr. 2, 1999; U.S. General Accounting Office, *Regulatory*

(continued...)

- whether agencies should be required to develop "plain language" compliance guides for all significant rules, and whether existing compliance guide requirements are having the desired effect;[47]

- whether the numerous analytical and accountability requirements in various statutes and executive orders should be rationalized and codified in one place; and

- whether the analytical and accountability requirements have contributed to better rulemaking, and their effect on what has been called the "ossification" of the rulemaking process.[48]

Personal Information Privacy Protection. There may be several non-rulemaking areas that a reconstituted ACUS could review and assess. One such area is the adequacy of the Privacy Act regarding such issues as:

- "routine use" disclosure of personally identifiable information, or a disclosure that is "compatible" (undefined in the statute) with that for which the data were originally collected; and

- "data mining," or the use of sophisticated data analysis tools, including statistical models, mathematical algorithms, and machine learning methods, by federal agencies to discover previously unknown, valid patterns and relationships in large data sets.

Improved Information Access. ACUS could explore ways that public access to unpublished federal agency records might be improved under the Freedom of Information Act (FOIA) through:

- alternative dispute resolution arrangements that might be utilized after an administrative appeal has failed to result in the disclosure of requested records, but before litigation for such records is initiated; and

- reducing the variety of information control markings (other than those authorized by Executive Order for security classification purposes) in use, clarifying the authority for their issuance, and clarifying their relationship to the exemptions of the FOIA.

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[46] (...continued)
Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule, GAO/GGD-00-193. Sept. 20, 2000.

[47] GAO reported in 2001 that the compliance guide requirement in the Small Business Regulatory Enforcement Fairness Act was not working as Congress intended. See U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

[48] Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process, *Duke Law Journal*, vol. 41 (1992), pp. 1385-1462.

Presidential Directives. Finally, ACUS might be tasked to explore improved management of presidential directives, such as National Security Presidential Directives and Homeland Security Presidential Directives, including:

- their variety, purpose, and legal status; and
- their accountability and public availability.

A Profession of Rulemaking

All these issues have been raised by scholars, federal agencies, and others since ACUS was eliminated in 1995. All could be examined by a reconstituted ACUS in the same objective, nonpartisan, and influential way that it was widely viewed as exhibiting prior to its demise. But ACUS could also play a more general role within the regulatory arena, bringing about what Cornelius M. Kerwin of American University has termed "the professionalization of rulemaking." In a recent white paper, Professor Kerwin highlighted the importance of the field of regulation management, but also stated that it lacks visibility, focused attention, and support.[49] If Congress instructed it to do so, ACUS could help identify "best practices" among regulatory agencies, and could help establish a defined career path and training for regulatory managers.

Who Else Could Play This Role?

Existing federal agencies or other entities may be considered candidates to perform the functions discussed herein. One possible candidate is OMB's Office of Information and Regulatory Affairs (OIRA), which is required in E.O. 12866 to be "the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency."[50] The executive order also requires the administrator of OIRA to "provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency."[51] However, OIRA is a relatively small office, and is annually responsible for reviewing about 700 draft proposed and final agency rules before they are published in the *Federal Register*, and for reviewing thousands of agency information collection requests. Also, OIRA is located within the Executive Office of the President, and its actions reflect presidential priorities. As the current OIRA administrator wrote in an article 10 years ago this fall, "OIRA is supposed to simultaneously provide independent and objective analysis, and report to the president on the progress of executive policies and programs. When those functions conflict, the presidential agenda will most certainly prevail over independent and objective

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[49] Cornelius M. Kerwin, *The Management of Regulation Development: Out of the Shadows*, IBM Center for the Business of Government, 2008 Presidential Transition Series, p. 33. In addition to being a professor of public administration and president of American University, Professor Kerwin is also director of the university's Center for the Study of Rulemaking.

[50] Executive Order 12866, "Regulatory Planning and Review," 58 *Federal Register* 51735, Oct. 4, 1993, Sec. 2(b).

[51] Ibid., Sec. 6(b).

analysis."[52] Therefore, OIRA would likely not be viewed by many as an independent and objective arbiter regarding the kind of issues that would come before ACUS.

The Government Accountability Office might also be a candidate, given it has published numerous studies on regulatory issues in the past 10 to 15 years.[53] Also, because of its role in the Congressional Review Act, GAO has rendered numerous decisions during the past 10 years on what constitutes a "rule" under the CRA.[54] However, while independent and nonpartisan, GAO is at heart an investigative organization, and (as noted on its website) "studies how the federal government spends taxpayers' dollars." Therefore, GAO may not be the appropriate organization to take on ACUS-like functions, and agencies may not welcome GAO auditors in the same way that they would an organization like ACUS.

Other possible candidates include professional associations like the National Academy of Public Administration, or the American Bar Association. However, as Justices Breyer and Scalia testified at a hearing before this subcommittee three years ago, a strong argument could be made that ACUS should be a government entity, and should be independent of any cabinet department or other agency.[55]

Although a variety of academic and governmental entities has examined many of the issues that ACUS could have addressed, none of these entities appears to have the institutional memory of an ACUS, and none appears to be as capable of serving as a respected forum to which Congress, the President, the courts, and federal agencies could turn to obtain objective, reliable information. In that regard, ACUS appears to have been unique.

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Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the subcommittee might have.

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[52] Susan E. Dudley and Angela Antonelli, "Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?," *Regulation* (fall 1997), pp. 17-23.

[53] For a compendium of these reviews, see U.S. Government Accountability Office, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-06-228T, Nov. 1, 2005.

[54] For a compendium of these decisions, see [http://www.gao.gov/decisions/cra/index.html].

[55] For example, when asked whether the functions of ACUS should be privatized, Justice Scalia said "I think it has to be within the Government because ... you have an entree to the agencies... [I]f you have an agency that has the respect of other agencies ... your chances of being able to do a thorough study with the cooperation of the agency are vastly increased. That could not be done by a private corporation." See U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Reauthorization of the Administrative Conference of the United States*, 108th Cong., 2nd sess., May 20, 2004 (Washington: GPO, 2004), p. 17.