



**Statement of
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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 Administrative Conference of the United States”

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the recently re-established Administrative Conference of the United States (ACUS). As you requested, my testimony will focus on what issues ACUS might address in the coming months and years. As you know, however, CRS takes no position on any legislative or other policy option.

A Brief History of ACUS

Congress created ACUS in 1964, but did not provide an appropriation for the agency until 1968. In 1995, Congress eliminated ACUS, and it went out of existence the next year.¹ During its 28 years of operations, ACUS issued nearly 200 recommendations to improve federal administrative processes, most of which were at least partially

¹ See P.L. 104-52 (November 19, 1995, 109 Stat. 480), which appropriated \$600,000 to ACUS with the proviso that the funds “shall only be available for the purposes of the prompt and orderly termination of the Administrative Conference of the United States by February 1, 1996.” For a detailed explanation of why ACUS was eliminated, see Toni M. Fine, “A Legislative Analysis of the Demise of the Administrative Conference of the United States,” *Arizona State Law Journal*, vol. 30 (1998), pp. 19-116.

implemented.² For example, ACUS recommended that agencies (1) increase their use of alternative means of dispute resolution (e.g., mediation and arbitration); (2) improve mechanisms to allow the public to petition for rulemaking; (3) consider using negotiated rulemaking to develop regulations; and (4) allow the public to provide comments when agencies invoke the “good cause” exception to notice and comment rulemaking. Other recommendations addressed conflict of interest requirements for participation in federal advisory committees, peer reviews in the award of discretionary grants, and exemptions under the Freedom of Information Act. While these may not be considered riveting issues for most people,³ they are nevertheless the kinds of issues that many consider essential to a properly functioning administrative democracy.

In October 2004, after efforts initiated by this Subcommittee, Congress reauthorized appropriations for ACUS during fiscal years 2005 through 2007, but no appropriations were subsequently provided for those years.⁴ In July 2008, ACUS was again reauthorized for appropriations — \$3.2 million per year for fiscal years 2009 through 2011.⁵ In March 2009, Congress appropriated \$1.5 million for ACUS to use during the remainder of FY2009 (i.e., until about six months later at the end of September 2009).⁶ However, Professor Paul Verkuil’s nomination as chairman of ACUS was not received in the Senate until November 2009, and he was not confirmed until March 2010. Therefore, due to the absence of agency leadership, the \$1.5 million appropriated for ACUS during FY2009 could not be spent during the fiscal year.

In December 2009, Congress appropriated \$1.5 million for ACUS to use during the remainder of FY2010, which the legislation said could remain available for expenditure by the Conference until September 30, 2011.⁷ The July 2009 report by the Senate Committee on Appropriations for the legislation that had included the FY2010 funding reminded ACUS that

pursuant to section 609 of division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), not to exceed 50 percent of unobligated balances from salaries and expenses remaining available at the end of fiscal year 2009 shall remain available until September 30, 2010. The Committee expects ACUS to use these carryover funds, in addition to the recommended funds, for fiscal year 2010 operating expenses.⁸

² See <http://www.law.fsu.edu/library/admin/acus/305726.html> for links to ACUS recommendations.

³ At a hearing in May 2004, Congressman Delahunt said that the reauthorization of ACUS was “not an issue that’s attracting a standing-room only crowd. You know, it’s tough to keep your eyes open.” In response, Justice Antonin Scalia said “I’d worry for our country if it did, Congressman.” 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 and June 24, 2004 (Washington: GPO, 2004), p. 21.

⁴ P.L. 108-401, October 30, 2004, 118 Stat. 2255.

⁵ P.L. 110-290, July 30, 2008, 122 Stat. 2914.

⁶ P.L. 111-8, March 11, 2009, 123 Stat. 656.

⁷ P.L. 111-117, December 16, 2009, 123 Stat. 3183.

⁸ U.S. Congress, Senate Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2010*, report to accompany S. 1432, 111th Cong., 1st sess., S.Rept. 111-43 (Washington: GPO, 2009), p. 75.

Therefore, it appears that ACUS has up to \$2.25 million to spend this fiscal year (\$1.5 million for FY2010 plus \$750,000 carried over from FY2009).

Suggested Topics for the New ACUS

The statutory powers and duties of ACUS are delineated in 5 U.S.C. §594, and permit the agency to:

(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate; (2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; (3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure; (4) enter into arrangements with any administrative agency or major organizational unit within an administrative agency pursuant to which the Conference performs any of the functions described in this section; and (5) provide assistance in response to requests relating to the improvement of administrative procedure in foreign countries, subject to the concurrence of the Secretary of State, the Administrator of the Agency for International Development, or the Director of the United States Information Agency, as appropriate.

During the last six years, a variety of suggestions have been offered by numerous parties regarding what issues ACUS could address once it was re-established.

May 2004 ACUS Reauthorization Hearing

Exactly six years ago today, for example, at a hearing before this Subcommittee on whether ACUS should be reauthorized, then-Chairman Chris Cannon said that a reconstituted ACUS could help establish a coherent approach among agencies with respect to emerging issues such as privacy, national security, public participation, and the Freedom of Information Act.⁹ At the same hearing, Supreme Court Justice Stephen Breyer, when asked what he considered the top priorities of a reconstituted ACUS, said

we in our Court have divided about five ways about the meaning of a case called *Chevron*, which has significance. And if I were running that now, I think maybe one thing I might like to do is ask the agencies whether the five different things that we have said have mattered. Has it hurt them? Has it helped them? That's a subject they might look into.¹⁰

In his response to the same question, Justice Antonin Scalia suggested that ACUS examine whether agencies are using teleconferences as much as they could to solicit the views of the public.¹¹

⁹ 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), pp. 1-4.

¹⁰ *Ibid.*, p. 25. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council* (467 U.S. 837, 1984).

¹¹ *Ibid.*, pp. 25-26.

Other witnesses at the May 2004 hearing suggested numerous other topics for a reconstituted ACUS to address. For example:

- C. Boyden Gray, testifying on behalf of the American Bar Association (ABA), identified several issues that he believed would be “very useful subjects of study by ACUS if it were to be reauthorized,” including (1) the role of the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA) in rulemaking, particularly with regard to such innovations as prompt letters; (2) peer review of agency rulemaking documents; (3) data quality (and the related implementation of the Data Quality Act); and (4) administrative law procedures in the United States versus the European Union.¹²
- Gary J. Edles of American University’s Washington College of Law, and formerly ACUS General Counsel, noted several potentially fruitful areas of inquiry, including (1) agencies’ use of electronic communications; (2) immigration procedures in light of 9/11; (3) the proper roles of public-private partnerships, self-regulatory organizations, and government contractors; and (4) problems in government organization or interagency coordination that may impede America’s ability to compete in world markets.¹³
- Philip Harter of the University of Missouri Law School suggested that ACUS examine (1) issues related to electronic rulemaking (e.g., procedures for interactive communications during rulemaking, how agencies can cope with a million electronic comments, and how the web can be used to generate responsible information); (2) how to improve public-private collaboration (noting problems with the Federal Advisory Committee Act); and (3) issues related to the “harmonization” of U.S. decisions with international institutions.¹⁴

October 2004 CRS Memorandum

In response to a request from the then-Chairman of this Subcommittee, CRS prepared an October 7, 2004, memorandum summarizing the arguments in favor of authorizing ACUS.¹⁵ In addition to describing the Conference’s past accomplishments, CRS noted that ACUS had a “clear role to play” in helping to integrate the 22 agencies or parts of agencies that were transferred when the Department of Homeland Security (DHS) was created. Many of these agencies had their own special organizational rules and rules of practice and procedure, many had different adjudicative responsibilities, and all had their own statutory and administrative requirements for rulemaking. CRS noted that the

¹² Ibid., pp. 59-61.

¹³ Ibid., pp. 63-71.

¹⁴ Ibid., pp. 75-79.

¹⁵ Memorandum from Morton Rosenberg, Specialist in American Public Law, and T.J. Halstead, Legislative Attorney, American Law Division, Congressional Research Service, to the Honorable Chris Cannon, Chairman, House Subcommittee on Commerce and Administration, Committee on the Judiciary, “Points in Support of H.R. 4917, Bill to Authorize Appropriations for the Administrative Conference of the United States, October 7, 2004. See http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf for a copy of this memorandum. Per the Chairman’s request, CRS did not include any possible arguments to the contrary.

integration of these various elements was “likely to need administrative fine tuning for some time to come” — a prediction that still seems valid nearly six years later.¹⁶

CRS also said that ACUS could help implement the restructuring and reorganization of the intelligence community in response to the recommendations from the 9/11 Commission. In particular, CRS said the following:

ACUS could serve to identify measures that will slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also 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.¹⁷

Although Congress enacted reforms to the intelligence community in 2004,¹⁸ many of the intelligence restructuring issues that CRS identified remain unresolved.

In addition, the CRS memorandum listed more than a dozen other possible study topics for ACUS, including the peer review process, challenges to the quality of scientific data used in the rulemaking process, “midnight” rules issued near the end of a presidential administration, and the avoidance by agencies of notice-and-comment rulemaking by issuing “non-rule rules.” Finally, CRS said that the procedures used in electronic rulemaking and the implications of those procedures for public participation “would appear ripe for ACUS-like guidance.”¹⁹

November 2005 Hearing on Administrative Law Project

On November 1, 2005, this Subcommittee held a hearing on its Administrative Law, Process, and Procedure Project, which had been initiated in an effort to identify issues that a reauthorized and appropriated ACUS could examine.²⁰ At that hearing, several of the witnesses identified possible topics that a re-established ACUS could address. For example:

- Morton Rosenberg, then of CRS, listed a total of 57 potential research topics within the seven general project areas: (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 of regulatory analyses and accountability requirements; and (7) the role of science in the regulatory process. He also noted that ACUS could be tasked with reviewing and making recommendations regarding the Federal

¹⁶ Ibid., p. 3.

¹⁷ Ibid., p. 4.

¹⁸ Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, December 17, 2008.

¹⁹ Memorandum from Morton Rosenberg, op. cit., p. 4.

²⁰ U.S. Congress, House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, *Administrative Law, Process and Procedure Project*, 109th Cong., 1st sess., November 1, 2005 (Washington: GPO, 2006). See <http://www.access.gpo.gov/congress/house/pdf/109hrg/24282.pdf> for a copy of this hearing record.

Emergency Management Agency's role, including where it should be located, the authorities it needs, and other issues.

- Jeffrey Lubbers of American University's Washington College of Law presented a similar potential research agenda for ACUS. His list included some of the topics that Morton Rosenberg mentioned, but also included several new areas, including (1) what is holding back greater use of negotiated rulemaking, (2) standards for "midnight" rulemaking, (3) requirements that agencies review their existing regulations, (4) procedures for agencies to provide waivers and exceptions from regulatory requirements (e.g., after disasters), and (5) regulatory federalism.

September 2007 ACUS Reauthorization Hearing

On September 17, 2007, this Subcommittee held another hearing on the reauthorization of ACUS, at which several witnesses mentioned possible roles and studies for ACUS. For example:

- Jody Freeman of Harvard Law School noted several issues that ACUS could have addressed in recent years (e.g., electronic rulemaking and congressional review). She also said that a reconstituted ACUS could focus on such issues as (1) outsourcing (e.g., whether there is a need for administrative law reform to address issues raised by contracting out government functions); and (2) how principles of administrative law can be reconciled with the imperatives of national security (e.g., whether Department of Homeland Security rules should be subject to cost-benefit analysis requirements).
- Jeffrey Lubbers of the Washington College of Law noted that newly-created agencies like the U.S. Election Assistance Commission were covered by a range of cross-cutting procedural statutes like the Administrative Procedure Act, the Privacy Act, the Government in the Sunshine Act, and the Paperwork Reduction Act, but agency officials were often given no orientation to these laws. He said that ACUS could perform that role when new agencies are established.
- I also testified at that hearing, noting several recent controversial rulemaking issues that ACUS might have been able to address, such as (1) determining whether an August 2007 letter that the Centers for Medicare and Medicaid Services (CMS) sent to state health officials changing the State Children's Health Insurance Program was a "rule" under the CRA;²¹ (2) helping to improve the structure, function, and funding of the Bush Administration's electronic rulemaking initiative;²² and (3) overseeing changes to Federal Civil Penalties

²¹ To view a copy of this letter, see [<http://www.cms.hhs.gov/smdl/downloads/SHO081707.pdf>].

²² For more information, see CRS Report RL34210, *Electronic Rulemaking in the Federal Government*, by Curtis W. Copeland.

Inflation Adjustment Act, which (as I will discuss in more detail later in this testimony) actually *prevents* penalties from being adjusted for inflation.²³

April 2009 Roundtable Discussion

At the invitation of the Chairman and Ranking Minority Member of the House Committee on the Judiciary, a roundtable discussion was held in the Committee's hearing room to identify issues that the recently-reauthorized and re-appropriated ACUS could profitably address.²⁴ Many of the issues discussed at the roundtable had been mentioned in the earlier venues, including electronic rulemaking and the use of science in rulemaking. However, several new issues were also raised as possible topics for ACUS to study.

For example, David Vladeck, who had just been appointed to head the Federal Trade Commission's Bureau of Consumer Protection, suggested that ACUS examine open government issues, noting that the Freedom of Information Act had been amended twice since the Conference's demise with no real study of how agencies were implementing the amendments. He also said that the absence of ACUS during the previous 14 years had degraded the effectiveness of federal agencies and had a "devastating impact on the development of administrative law."

Another participant at the meeting noted the lack of a clear, governmentwide policy on waivers during emergencies, and said that rebuilding after Hurricane Katrina could have gone faster had such a policy been in existence. Although a number of agencies issued such waivers, no central repository of the waivers existed, and it was not always clear what authority agencies had to issue them.

August 2009 ABA Letter

On August 18, 2009, the Chair of the ABA Section of Administrative Law and Regulatory Practice wrote a letter to the then-acting administrator of OIRA recommending study topics for ACUS.²⁵ The Section's recommendations began with two projects that it said would take advantage of ACUS's "unique capabilities," and that "could well produce substantial, cross-government savings in the near, as well as the long, term."

The first project that the Section recommended was an "agency best practices forum" at which federal agencies could "share best practices, obtain sound advice regarding them,

²³ See U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, March 14, 2003.

²⁴ Ralph Lindeman, "House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference," *BNA Daily Report for Executives*, April 16, 2009, p. A-18.

²⁵ Letter from William V. Luneburg, Chair, Section of Administrative Law and Regulatory Practice, American Bar Association, to Michael A. Fitzpatrick, Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, "Recommended Study Topics for a New Administrative Conference of the United States," August 18, 2009. A copy of this letter is available from the author.

and formulate proposals facilitating their broader adoption.” Because agencies currently lack even a forum in which share information, they often “reinvent the wheel” in their efforts to innovate in such areas as rulemaking, adjudication, enforcement, compliance assistance, and dispute resolution. The Section said that ACUS is “ideally constituted” to serve as a best practices forum in that it is statutorily required to include representation from all federal departments and agencies, and because it has access to leading academics and private practitioners. Also, as noted earlier, ACUS is statutorily authorized to “arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure.”

The second project that the Section recommended was a retrospective look at the “plethora” of administrative law recommendations issued by GAO, the ABA, the National Academy of Public Administration, and other reputable groups during the nearly 14 years since ACUS became inactive. By surveying those recommendations, highlighting the most meritorious of them that have not been implemented, and then leading those recommendations to implementation, the Section said that ACUS “could greatly improve government operations and potentially save the federal government tens of millions of dollars each year.”

The Section also recommended nine specific topics that it considered “particularly high priorities for ACUS’s initial work.” These nine topics were:

- legal issues implicated in electronic rulemaking, including archiving requirements, privacy issues, whether electronic commenting on rules should be mandated, and the value of “reply comment periods” for those who participate in a first comment round;
- executive review of agency action, which would be particularly relevant if actions are taken to revise or replace Executive Order 12866;
- congressional review of agency action, including whether the Congressional Review Act is warranted and whether the appropriations process is inappropriately employed through the use of earmarks, riders, and report language;
- science and information quality, which could evaluate the effect of the Information Quality Act and OMB’s Peer Review Bulletin on agencies’ use of science in rulemaking;
- regulatory preemption, including whether a consistent understanding could be developed regarding when preemption is appropriate and how it should be expressed;
- “midnight rules” that are issued at the end of a presidential administration, examining what standards should govern the issuance and reconsideration of such rules;
- agencies’ use of guidance documents, including examining the implementation of the Bush Administration’s Bulletin on Good Guidance Practices;
- regulatory impact analysis, examining the costs and benefits of the variety of required assessments as part of the rulemaking process; and

- “lookbacks” at existing regulations, and whether a requirement that agencies do so in general or in specific cases would be worth the resources consumed.

ACUS and Health Care Reform

The list of issues that ACUS could address grows longer with each issue that Congress, the President, federal agencies, or the courts address. For example, although Congress enacted the Patient Protection and Affordable Care Act (PPACA, P.L. 111-148) on March 23, 2010, the act contains numerous provisions stating that federal agencies “shall promulgate regulations,” or “shall, by regulation” take certain actions to implement the legislation.²⁶ PPACA also contains dozens of provisions establishing, or requiring the President or cabinet secretaries to establish, governmental entities (e.g., offices within cabinet departments and agencies) and advisory bodies. Therefore, as one article put it, “the war isn’t over.”²⁷

ACUS could play a role in these rulemaking and other implementation processes by advising agencies as to proper procedures and the applicability of certain laws. For example, in developing regulations, agencies must be cognizant of a host of relevant statutes and executive orders, including the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and Executive Order 12866. Failure to comply with the requirements in these statutes and orders can put any resultant regulations in jeopardy. By consulting with ACUS before or during the development of these rules, agencies could potentially avoid significant delays or legal entanglements.

Demonstrating the Value of ACUS

As I mentioned earlier, it appears that ACUS has up to \$2.25 million to spend this fiscal year (\$1.5 million for FY2010 plus \$750,000 from FY2009). ACUS is authorized to be appropriated up to \$3.2 million in FY2011, currently the final year of its authorized appropriations. Therefore, ACUS currently has about 18 months before its authorization for appropriations expires. At the April 2009 roundtable discussion initiated by this Committee, Sally Katzen, former administrator of OIRA and moderator of the roundtable, recommended that ACUS focus on “one little, crucial project” to demonstrate its value.²⁸ One way for ACUS to demonstrate value in the short term would be to focus on an issue that is likely to produce financial “net benefits” greater than its appropriation through either budgetary savings in other agencies or increased revenues for the

²⁶ For a list of these provisions, see CRS Report R41180, *Regulations Pursuant to the Patient Protection and Affordable Care Act (P.L. 111-148)*, by Curtis W. Copeland.

²⁷ Henry J. Aaron and Robert D. Reischauer, “The War Isn’t Over,” *New England Journal of Medicine*, Health Care Reform Center, March 24, 2010, available at <http://healthcarereform.nejm.org/?p=3223&query=home>.

²⁸ Ralph Lindeman, “House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference,” *BNA Daily Report for Executives*, April 16, 2009, p. A-18

government as a whole. Alternatively, or additionally, ACUS could demonstrate its value by addressing issues that produce non-financial benefits.

Savings

A consistent theme in many of the comments leading up to the reauthorization of ACUS was the value that the Conference represented for its relatively small appropriation, and/or the potential of the Conference to save the government and the private sector money well in excess of its appropriation through the implementation of its recommendations. For example, at the May 2004 reauthorization hearing, Justice Breyer testified that implementation of ACUS recommendations could save millions, or perhaps even billions, of dollars by reducing the time needed to develop regulations.²⁹ At the same hearing, Gary J. Edles of the Washington College of Law said that the money saved by the government and the private sector as a result of ACUS's work on alternative dispute resolution alone "far exceeds its annual budget."³⁰

In the October 2004 memorandum that I mentioned earlier, CRS also noted the savings that ACUS could provide:

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.³¹

According to the most recent "Regulators' Budget Report" prepared by scholars at the Mercatus Center at George Mason University and the Murray Weidenbaum Center on the Economy, Government, and Public Policy at Washington University in St. Louis, President Obama's 2010 budget calls for expenditures on regulatory activities of \$55.8 billion.³² If this estimate is correct, and if ACUS recommendations (when implemented) could make these agencies even one-tenth of 1% more efficient in their operations, then the savings would be nearly \$60 million — 40 times the \$1.5 million appropriated for ACUS in FY2010.

To identify potential money-saving ideas, the "best practices forum" that the ABA Section of Administrative Law and Regulatory Practice's recommended that ACUS hold could be oriented to this purpose, with agencies coming together to share ideas of how they could be more efficient and/or eliminate unnecessary expenses. Similarly, the Section's recommendation that ACUS scour previous recommendations by GAO and others could also be at least initially focused on money-saving recommendations.

²⁹ Ibid., p. 22.

³⁰ Ibid., p. 64.

³¹ See http://www.abanet.org/poladv/documents/acus_crs_7oct04.pdf for a copy of this memorandum.

³² See <http://mercatus.org/publication/regulators-budget-report> for a copy of this report.

Revenues

ACUS could also have a positive impact on the revenue side of the ledger. For example, in 1996 (the year that ACUS was discontinued), Congress amended the Federal Civil Penalties Inflation Adjustment Act of 1990 and required that federal agencies adjust their civil penalties for inflation, thereby maintaining the deterrent effect of those penalties and improving federal collections. However, in 2003, GAO determined that several elements of the Inflation Adjustment Act had actually *prevented* federal agencies from fully adjusting their civil penalties for inflation.³³ For example, the “rounding rules” in the act can prevent agencies from adjusting certain penalties until cumulative inflation has increased by nearly 50% — which, at recent rates of inflation, could take more than 20 years. Also, although inflation had increased hundreds of percent since some penalty amounts were set by Congress, the first adjustments were capped at 10%, and subsequent adjustments were not permitted to make up the difference. In addition, penalties under statutes such as the Internal Revenue Code of 1986 and the Occupational Safety and Health Act of 1970 were totally exempted from adjustment. In 2007, GAO said that if just civil tax penalties had been adjusted for inflation, IRS collections would have increased by as much as \$61 million from 2000 to 2005.³⁴

In 2003, GAO recommended that Congress amend the Inflation Adjustment Act to ensure that civil penalties keep pace with inflation, and to give one or more entities in the Executive Branch the authority and responsibility to monitor the act’s implementation and provide guidance to the agencies. If ACUS were to review and make recommendations regarding this issue, it could provide a renewed basis for congressional consideration. If Congress decided to act on ACUS’s recommendations, the increase in revenues from civil penalties could far exceed the Conference’s authorized appropriation.

Other Values

At the May 2004 reauthorization hearing, Justice Scalia characterized ACUS as an “enormous bargain” because it obtained expert legal advice from private sector lawyers that would otherwise cost hundreds of dollars per hour.³⁵ He also said that he “wouldn’t be surprised if it ended up having saved money overall in its recommendations.” But he also said that Congress should not just judge ACUS based on how much money it saves, “because not all of its recommendations are money-saving recommendations.” He went on to say that “There are two values involved here: one is efficiency, the other is fairness.

³³ U.S. General Accounting Office, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409, March 14, 2003.

³⁴ U.S. Government Accountability Office, *Tax Compliance: Inflation Has Significantly Decreased the Real Value of Some Penalties*, GAO-07-1062, August 23, 2007.

³⁵ 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. 21.

Sometimes you have agencies' procedures that are just unfair, and it might take a little more money to make them fair. But you'd want to do that.³⁶

At the same hearing, Philip J. Harter of the Columbia School of Law at the University of Missouri said that he had just completed a negotiated rulemaking for the Occupational Safety and Health Administration on building steel buildings. One part of this rule had been on the agency's docket for 20 years, but by using the negotiated rulemaking procedures that ACUS had recommended, the rule came to fruition. After the rule was in place, he said fatalities in steel construction were reduced by one-third, which he estimated at about 20 deaths prevented per year.³⁷ Professor Harter and others also mentioned that ACUS could facilitate public participation in rulemaking and other venues, enhancing civic values in America. Therefore, implementation of ACUS recommendations could provide significant public policy benefits or "value," even if they saved no money or generated no additional revenues for the government.

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

³⁶ Ibid., p. 22.

³⁷ Ibid., p. 88.