ACUS: The Rebirth

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Two Temporary Conferences

- Eisenhower Administration: 1953-54
- Kennedy Administration 1961-62

Both temporary Conferences recommended a permanent Conference.

- Administrative Conference Act enacted in 1964, 5 U.S.C §§ 591-596
- LBJ appoints first Chair in 1967; operations begin in 1968.
“A Public-Private Partnership” to Promote Federal Administrative Procedure Reform

• Council (11 members)
  – Presidentially appointed, Senate-confirmed Chair (5-year term). (Only paid member.)
  – 10 other presidentially appointed members. (No more than half can be executive officials) (3-year terms)

• 64-90 other “members”
  – Government members—appointed from designated agencies, by agency head
  – “Public” members—no more than 40, but number must be between 1/3-2/5 of total number of members. (Appointed by the Chair for 2-year terms.)

• (Non-voting) “liaison” members
Office of the Chairman

In 1995, it had 19 career civil service employees and a budget of under $2 million.

By comparison, its counterpart in the judicial branch, the Federal Judicial Center—created in the same year as ACUS with only a slightly larger budget--had grown to have a budget ten times larger.
Statutory Mandate

• (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 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;
Broad Definition of “Administrative Procedure”

“administrative procedure” means procedure used in carrying out an administrative program and is to be broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.
Operations

• ACUS sponsored considerable research in administrative law, leveraging a small research budget to hire academic consultants who sacrificed market-based fees for the sake of enhanced peer review, access to government decisionmakers, and a chance to affect agency activities.

• Their research reports became the basis for formal recommendations, drafted in the open with substantial public participation by committees of members.

• Semi-annual plenary sessions considered committee recommendations for adoption.
Operations (cont.)

- ACUS’ adopted recommendations were published in the Federal Register and Code of Federal Regulations, widely disseminated around the government, and actively promoted by the Conference's staff.
- Due to the consensus-based process used by ACUS, it managed to achieve a high rate of implementation for its (non-binding) recommendations.
- ACUS also sponsored basic research (e.g., on agency caseload statistics), and published numerous guides, sourcebooks, and manuals for agency (and public) use.
- The Chairman and professional staff regularly presented testimony and advice on pending legislation.
ACUS Recommendations

http://www.law.fsu.edu/library/admin/acus/acustoc.html

ABA ADMINISTRATIVE PROCEDURE DATABASE

SITE SPECIFIC DIGITAL TEXTS

Recommendations of the Administrative Conference of the United States

The Administrative Conference of the United States (ACUS), an independent agency and advisory committee created in 1968, studied U.S. administrative processes with an eye to recommending improvements to Congress and agencies. From 1968 to 1995, the ACUS issued approximately 200 recommendations, most of which have been at least partially implemented. Congressional funding for ACUS was terminated in 1995. ACUS and its achievements, are described further here.

ACUS's recommendations were published periodically in the Code of Federal Regulations.
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: A BIBLIOGRAPHY, 1968-1995+

Revised and updated (June 2007)

This bibliography is a list of reports, articles, and papers wholly or partially funded or sponsored by the Administrative Conference, or written by ACUS Chairs and staff members throughout its existence from 1968 to October 31, 2005. (Some entries also reflect continued publication activity beyond October 1995.) Many reports were written by a consultant performing research for the Conference in the process of developing recommendations. In addition, there are guides, sourcebooks, and manuals prepared by the staff of the Office of the Chairman, journal articles written by the staff, published transcripts of colloquia, seminars and other meetings, and papers prepared by committees or working groups. Many reports were also reprinted privately, so titles vary. Entries for reports that lead to a recommendation contain an annotation with additional bibliographic information about the recommendation. The titles used for this bibliography are the titles that appear in ACUS’s series, Recommendations and Reports. All known published versions are noted in each entry.

Associated Recommendations themselves can be found in the Federal Register, the Annual Report of the Administrative Conference for the year of adoption, and in the Code of Federal Regulations through 1993. Due to budgetary constraints only the titles, not the text, of recommendations were printed in the CFR in 1994 and 1995. The first 35 recommendations were originally sequentially numbered. In 1973, recommendations began to be numbered by calendar year, then sequentially, e.g., 73-1, and the original recommendations were re-numbered accordingly. Though they should be cited in the renumbered format, both versions are given here for clarity. A complete listing of all recommendations and statements, was published in the Federal Register at 60 Fed Reg. 56,312 (Nov. 8, 1995). Selected ACUS Recommendations continue to be available on the website of Florida State University College of Law at
Significant Projects—ADR

• ACUS was in the forefront in encouraging agency use of alternative dispute resolution (“ADR”).

• Its work in promoting ADR in the government included applied research, giving policy advice to agencies, educating agency personnel, offering legislative drafting and technical aid to Congress, and providing individual agencies with systems design and other implementation help.

• ACUS took a lead role in drafting, and getting introduced, the Administrative Dispute Resolution Act and Negotiated Rulemaking Act, and then working (with others, notably the ABA) to obtain passage of these laws in 1990. The laws encouraged ADR use, mandated appointment of dispute resolution specialists in each agency, and named the Administrative Conference as the lead agency for implementation.
ADR (cont.)

• After enactment of the Acts, ACUS worked to build agencies' capacity to implement them—it organized and maintained a roster of neutrals; helped newly appointed agency dispute resolution specialists develop policies and start new ADR programs; and brought them together in interagency working groups, staffed by the Administrative Conference, to present materials, seminars, and training that no single agency would have done on its own.
Rulemaking Recommendations

• ACUS adopted numerous recommendations designed to streamline and improve the rulemaking process.

• In 1969, it proposed the elimination of certain exemptions from the APA’s rulemaking requirements for rules involving grants, benefits, loans and contracts. Although Congress never statutorily eliminated the exemptions from the APA, the recommendation was highly influential because most major rulemaking agencies agreed to follow it and have voluntarily adopted policies declining to employ the APA exemption. In addition, Congress in many subsequent statutes expressly required the use of notice-and-comment rulemaking for grant, benefit, loan and contract programs.

• ACUS also successfully urged Congress not to mandate “formal” or “hybrid” procedures, and promoted agency openness in issuing non-binding guidance.
Rulemaking (cont.)

• In 1988 ACUS adopted Recommendation 88-9, entitled *Presidential Review of Agency Rulemaking*. This highly influential recommendation validated the practice of presidential review of agency regulations begun in the Reagan Administration, suggested guidelines for the enhanced openness of that review, recommended the reconsideration of existing rules looking toward the repeal of unnecessary regulations, and proposed inclusion of independent agencies within the presidential review mechanism.

• The Clinton Administration, in Executive Order No. 12866 (1993), adopted the openness proposals suggested by ACUS, required each executive department and agency to undertake an examination of its existing regulations to determine if they are unjustified or unnecessary as a result of changed circumstances as proposed by ACUS, and partially brought the independent agencies within the presidential review mechanism.

• The Bush Administration carried over the Clinton Executive Order in substantial measure.
Openness

• FOIA: several ACUS recommendations were very influential in four key reforms
  • the strengthening of the Act in 1974,
  • the issuance of Executive Order 12,600 creating the process for allowing submitters to designate confidential business information,
  • the amendments to the fee provisions in 1986, and
  • the passage of the Electronic FOIA amendments in 1996.

• ACUS also conducted studies of the Sunshine Act and FACA, and had a statutory responsibility to review agency Sunshine Act regulations.
Enforcement

• A 1972 recommendation led Congress to begin using the “administrative enforcement” model for civil penalties, rather than the more cumbersome “court collection” model.

• In the early 1990s, Congress asked ACUS to study the Federal Aviation Administration’s civil money penalty demonstration program. It did so and resolved some previously intractable jurisdictional differences between the FAA and the National Transportation Safety Board. In 1992, Congress passed, and the President signed, Public Law 102-345, the Federal Aviation Administration civil penalty legislation, that expressly adopted the ACUS recommendations and made permanent the transfer of authority over adjudication of civil penalty cases affecting pilots and flight engineers from the FAA to the National Transportation Safety Board.
Judicial Review

- During its early days as a permanent agency, ACUS adopted three of its most influential government-wide recommendations. These recommendations urged elimination of a variety of technical impediments to judicial review of agency action.
  - The first recommendation proposed a modification to the judicial review requirements to eliminate the $10,000 jurisdictional threshold for suits.
  - The second urged abolition of the doctrine of sovereign immunity.
  - The third proposed that plaintiffs' claims not be dismissed merely because a particular agency official had been improperly identified or could not be joined as a defendant.
  - Congress implemented all three proposals in 1976 when it passed Public Law 94-574.

- Elimination of the “race to the courthouse.”
The Defunding in 1995


• After a major study of Administrative Law Judges that recommended changes in the ALJ program, certain politically connected ALJs lobbied House Appropriators (Rep. Hoyer D-MD) to eliminate FY 1994 funding for ACUS. Hoyer reverses course, but ACUS’s budget was reduced to $1.8 million.

• FY 1995—ACUS survives initial floor amendment by Rep. Istook (R-OK) to defund agency. Senate and Clinton Administration come to the rescue.

• October, 1994, Clinton finally appoints a new Chairman—political ally of Rep. Hoyer.

• November 1994, GOP takes over after election. Hoyer loses power; Istook becomes key appropriator in House.
The Defunding in 1995 (cont.)

• House and Senate Appropriations Committee zero out ACUS budget for FY 1996, despite ongoing reauthorization action by Judiciary Committees.

• Key Senate members succeed with floor amendment to restore ACUS funding. Bi-partisan group of 8 Senators write letter to Senate Appropriations Committee Chairman Shelby (R-AL) to stick to this on Conference Committee.

• September 1995--During Appropriations Conference Committee deliberation, Shelby “recedes” to House. This means ACUS must shut down by October 31.
First Congressional Attempt at Revival—2004

- In 2004, Congress held hearings on ACUS reauthorization during which all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. (The statements of Justices Breyer and Scalia are available online at http://www.abanet.org/poladv/documents/acusfunding_resources.pdf.)

- Following those hearings, Congress overwhelmingly approved bipartisan legislation to reauthorize and resurrect the agency, which President Bush signed into law on October 30, 2004 as P.L. 108-401. Regrettably, funds were not appropriated before the reauthorization period expired at the end of FY 2007.

- Therefore, Rep. Chris Cannon (R-UT) introduced new legislation in September 2007 to renew ACUS’ reauthorization through FY 2011. The bipartisan bill was approved overwhelmingly by Congress, and President Bush signed it into law on July 30, 2008 as P.L. 110-290.
New Authorization


• New Sec. 596. Authorization of appropriations ``There are authorized to be appropriated to carry out this subchapter not more than $3,200,000 for fiscal year 2009, $3,200,000 for fiscal year 2010, and $3,200,000 for fiscal year 2011. Of any amounts appropriated under this section, not more than $2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.".
Latest News

• FY 2009 Appropriations: $1.5 Million—but went unspent due to lack of Chairman to receive funds.
• FY 2010 Appropriations: $2.25 million
• November 3, 2009—Professor Paul Verkuil nominated by President Obama
• December 10, 2009—Verkuil approved without Hearing by Senate Judiciary Committee.
• Senate adjourns without taking final action; nomination still pending on Senate floor.
• Apparently there is an anonymous hold placed on the nomination.
• In State of Union Obama announces a “freeze” on non-military, discretionary spending for FY 2011. Unclear whether this will affect ACUS.
Agenda for ACUS—Rulemaking Projects

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

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

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

- **Science and information quality.** ACUS could evaluate the effect of the Information Quality Act (IQA) and OMB’s Peer Review Bulletin, both of which have particular applicability to agency use of science. ACUS could also address issues going beyond the IQA, such as how to assess the reliability of privately-funded science.
Agenda for ACUS—Rulemaking Projects (2)

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

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

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

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

- **“Lookbacks” at existing regulations.** Agencies do not regularly evaluate the effectiveness of existing rules. Would a requirement to do so, in general or in specific cases, be worth the resources it would consume?
Agenda for ACUS—Other Projects

- **Regulatory policy.** These include reassessing the value currently being provided by the Federal Advisory Committee Act and the Paperwork Reduction Act.

- **Administrative adjudication.** These include whether OPM should continue to administer the ALJ program and how best to handle mass adjudication programs.

- **Judicial review of agency action.** These include the effects of justifiability doctrines like standing and ripeness, and the effects of courts’ remanding rules without vacating them.

- **Openness & transparency.** These include reviewing post - 9/11 statutory exemptions from FOIA and reviving ACUS’s prior effort to evaluate the Government in the Sunshine Act.

- **Contingent & other projects.** These include administrative law issues implicated in legislation, assuming it is enacted, to reform financial services regulation, improve health care, and mitigate global warming.