

**INTERIM REPORT ON THE ADMINISTRATIVE LAW,
PROCESS AND PROCEDURE PROJECT FOR THE
21ST CENTURY**

COMMITTEE PRINT

SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

DECEMBER 2006

Committee Print No. 10

Printed for the use of the Committee on the Judiciary



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Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century

Executive Summary

The Administrative Law, Process, and Procedure Project for the 21st Century (Project) has been a bi-partisan undertaking of the House Judiciary Committee, overseen and conducted by its Subcommittee on Commercial and Administrative Law (CAL Subcommittee). The Project has had two principle goals: to reauthorize and to substantiate the need to reactivate the Administrative Conference of the United States (ACUS), and, simultaneously, to set in motion a study process that would identify the important issues of administrative law, process, and procedure that have emerged in the eleven year hiatus since its demise that would serve as a basis for immediate legislative consideration and action by the Committee or the initial agenda for further studies by a reactivated ACUS.

Initial success was achieved by the Committee regarding the first goal with the enactment of the Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, on October 4, 2004, which reauthorized ACUS. As of the date of this Report, however, funding legislation has not been passed.

The second goal was initiated by the Committee's adoption of an oversight plan for the 109th Congress which made a study of emergent administrative law and process issues a priority oversight agenda item for the CAL Subcommittee. The oversight plan identified seven general areas for study: (1) public participation in the rulemaking process; (2) Congressional review of agency rulemaking; (3) Presidential review of agency rulemaking; (4) judicial review of agency 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. The Subcommittee, in turn, tasked the Congressional Research Service (CRS) with coordinating the research effort. Through hearings, symposia, and the commissioning of empirical studies, recommendations for legislative action or for further study were developed.

Hearings

Since 2004, the Subcommittee has held a series of hearings in anticipation of and as part of the Project. Following its May 20, 2004 oversight hearing on the proposed reauthorization of ACUS, at which Justices Scalia and Breyer testified, the Subcommittee conducted a second hearing on ACUS that examined further reasons why there is a need to reactivate ACUS. In November, 2005, the Subcommittee held a hearing on the status of the Project. In 2006, the Subcommittee held three hearings. The first, in March, 2006, focused on the Congressional Review Act in light of the Act's tenth anniversary. The second dealt with how the Regulatory Flexibility Act (RFA) has been implemented since its enactment in 1980 and whether proposed legislation, such as H.R. 682, the Regulatory Flexibility Improvements Act, would adequately address certain perceived weaknesses in the RFA. On July 14, 2006, the Subcommittee held a hearing on the 60th anniversary of the passage of the Administrative Procedure Act (APA), addressing the question of whether the APA is still effective in the 21st century. A final hearing was held on November 14, 2006, at which the CRS coordinators of the Project briefed the Committee on the results of their efforts.

Symposia

In addition to conducting hearings, the Subcommittee to date has sponsored three symposia as part of the Project. The first symposium, held on December 5, 2005, “E-Rulemaking in the 21st Century,” dealt with federal e-government initiatives. This program, chaired by Professor Cary Coglianese of the University of Pennsylvania Law School, examined the Executive Branch’s efforts to implement e-rulemaking across the federal government. A particular focus of this program was the ongoing development of a government-wide Federal Docket Management System (FDMS). Presentations at the symposium were given by government managers involved in the development of the FDMS as well as by academic researchers studying e-rulemaking. Representatives from various agencies, including the Office of Management and Budget (OMB), the United States Environmental Protection Agency, and the Government Accountability Office (GAO), discussed the current progress of e-rulemaking. In addition, academics reported on current and prospective research endeavors dealing with certain aspects of e-rulemaking. The program offered a structured dialogue that addressed the challenges and opportunities for implementing e-rulemaking, the outcomes achieved by e-rulemaking to date, and strategies that could be used in the future to improve the rulemaking process through application of information technology.

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted a day-long conference for the Subcommittee entitled, “The Role of Science in Rulemaking.” The four panels – The Office of Management and Budget’s Recent Initiatives on Regulatory Science, Science and Judicial Review of Rulemaking, Science Advisory Panels and Rulemaking, and Government Agencies’ Science Capabilities – reflected the current debate over whether “sound science” has been given sufficient weight in the development of regulatory standards. As part of that debate, questions have been raised about the quality of the data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can or should play in deciding what to regulate and at what levels.

On September 11, 2006, the CRS, on behalf of the CAL Subcommittee, sponsored a day-long seminar entitled, “Presidential, Congressional, and Judicial Control of Agency Rulemaking.” Consisting of four panels of academics, government officials and private sector public interest groups, the seminar addressed the following subjects: Conflicting Claims of Congressional and Executive Branch Legal Authority Over Rulemaking, Judicial Review of Rulemaking, Congressional Review of Rulemaking, and Presidential Review of Rulemaking: Reagan to Bush II.

Empirical Studies

Three empirical studies were initiated by CRS. The first, conducted by Professor William West of the Bush School of Government and Public Service at Texas A&M University, studied how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on regulatory agendas; how the rulemaking process is managed at inter- and intra-agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West presented his findings and conclusions at a hearing conducted by the CAL Subcommittee on March 30, 2006.

A second study commissioned by CRS sought to fill the void created by the absence of an authoritative, systematic empirical analysis of the effects of judicial review of agency rulemaking by federal appellate courts. Professor Jody Freeman of the Harvard Law School agreed to conduct the study, which will analyze the pertinent rulings of all federal circuit courts of appeal from 1995

to 2004 to determine the rate at which rules are invalidated in whole or in part, and the reasons for those invalidations. Professor Freeman's study is still on-going.

A third study arose out of the Role of Science in Rulemaking symposium, described earlier in this summary. It became apparent during a panel discussion on the role of science advisory bodies in agencies that there was no authoritative compilation of how many science advisory committees currently exist, how they were selected, how issues of neutrality and conflicts of interest were handled, how issues are selected for review, and the impact of advisory body recommendations on agency decisionmaking. To examine these questions, CRS commissioned a study to be conducted by Professor Stuart Bretschneider of The Maxwell School of Citizenship and Public Affairs at Syracuse University, which is expected to be completed by June 2007.

Preliminary Recommendations for Further Areas of Study and Possible Legislative Action

1. Public Participation in the Rulemaking Process.

- Should efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., negotiated rulemaking, Small Business Regulatory Enforcement Fairness Act [SBREFA] panels) be expanded? How much do these processes currently add in terms of public participation?
- How effective is the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in identifying future rulemaking (thereby giving the public advance warning of forthcoming regulatory actions)? What changes could make this *Agenda* a more effective means of notification?
- What has been the impact of agencies' use of "nonrulemaking" approaches (e.g., guidance documents, notices, etc.) and attenuated rulemaking approaches (e.g., use of the APA's "good cause exception to skip notices of proposed rulemaking) on the public's opportunities for participation? Should the public be able to comment on those approaches before they become final?
- Should all agencies be required to make comments received immediately available to the public (to allow comments on the comments)? Or, alternatively, should agencies provide "reply comment periods" (to discourage waiting to the end of the comment period)?
- What effect has "e-rulemaking" (including the use of e-mail comments and "comments on comments," on-line dialogues, the new Regulations.gov web site, agency-specific and the new governmentwide electronic dockets) had on the amount and nature of public participation in the rulemaking process, and how do agencies view those comments? Specifically:
 - How should agencies deal with the sometimes hundreds-of-thousands of e-mail comments generated by special interest groups?

- Should all agencies be required to offer “list serves” that allow members of the public to be notified of certain rules being available for comment?
- Has e-rulemaking allowed more people to participate in the rulemaking process, or simply facilitated access to traditional commenters?
- The APA does not specify how long public comment periods should be (although Executive Order 12866 suggests 60 days). Should there be a minimum comment period specified in the statute? If so, what should it be? Also, under what circumstances can/should agencies extend comment periods?
- Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments become too “stale” to permit issuance of a rule based on those comments (without further public comments)?
- There are no governmentwide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? Should there be such standards? If so, who should establish them (OMB, National Archives and Records Administration, or some other entity)?
- Under what circumstances is it appropriate for agencies to allow commenters to file confidential comments? How should this procedure be regularized?
- The APA prohibits *ex parte* contacts in formal rulemaking, but is silent about such contacts in the much more common informal “notice and comment” rulemaking. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?
- The APA does not mention two relatively common forms of rulemaking that avoid traditional notice and comment requirements — interim final rulemaking and direct final rulemaking. Should Congress codify these forms of rulemaking and how they should (and should not) be used? More generally, should Congress revisit agencies’ use of all forms of the “good cause” exception?
- Some of the statutory analytical requirements in rulemaking (e.g., the Regulatory Flexibility Act and the Unfunded Mandates Reform Act) do not apply to rules for which there is no notice of proposed rulemaking (NPRM). Should these incentives for agencies to avoid NPRMs be eliminated? At a minimum, should the exemptions for interim final and direct final rules be eliminated?
- OMB’s new peer review bulletin allows agencies to decide whether to permit public comment on their peer review processes. Should agencies have that discretion, should agencies be required to permit public comments, or should public comments on what is supposed to be an “expert” process not be permitted (because, among other things, it could slow down rulemaking)?

- To what extent does public participation in its various forms (e.g., comment periods, public meetings, SBREFA panels, etc.) have an effect on agency decisionmaking during the rulemaking process? What empirical evidence is there of that effect?
- What is the proper role of consultants in the development stage of a rulemaking? Should there be a balance of views of competing stakeholders in the pre-NPRM period? Should agencies be required to invite competing views to ensure "balance"?
- Do consent decrees entered into by government agencies with private parties to settle challenges to rules and that effect substantive changes in the rules undermine the APA's notice and comment requirements and public participation opportunities? Do they raise separation of powers issues?

2. Presidential Review of Rules.

- To remove any question of its legitimacy, should Congress codify Presidential review of agency rulemaking? If so, how detailed should that codification be? For example, should it simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay? Or should the codification spell out in detail the process by which Presidents should review rules before they are published?
- Should independent regulatory agencies' rules be subject to Presidential review (as they are now under the Paperwork Reduction Act)? Or would Presidential review adversely affect the independence intended for these agencies?
- What role should OMB play in the Presidential rule review process? Should OMB be a "counselor" to the agencies (as during the Clinton Administration), suggesting improvements to the agencies but generally deferring to agencies' statutory expertise? Or should it be more of a "gatekeeper" (as during the current Bush Administration) establishing strict standards and ensuring that regulations meet certain standards before publication?
- What rules should govern OMB's contacts with outside parties during the Presidential review process? For example, should OMB be allowed to meet with regulated entities outside of the period when agencies are not permitted to do so (because of restrictions on *ex parte* communications)? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) to provide an administrative record for any subsequent changes?
- How transparent should the Presidential review process be to the public? Are improvements in review transparency currently needed (either administratively or by statute)? Specifically:
 - Should OMB clearly define what types of "substantive" changes to rules need to be disclosed?

- Should agencies or OMB be required to disclose substantive changes made to rules during “informal” reviews (when OMB says it can have its greatest effect)?
- Should OMB clearly indicate in its database which rules were changed at its suggestion?
- A number of actions by OMB during the Bush Administration have had the effect of centralizing rulemaking authority in the Executive Office of the President. For example, within the past four years OMB has revitalized the regulatory review function under Executive Order 12866 (emphasizing cost-benefit analysis, returning rules to the agencies); and issued governmentwide guidelines on data quality and peer review (with OMB able to determine when agencies’ rules should be peer reviewed and at what level). Have these executive actions taken too much authority away from the agencies in whom Congress vested rulemaking authority, thereby upsetting the balance of power between Congress and the President in this area?
- How has the Office of Information and Regulatory Affairs (OIRA) “prompt letter” process worked? How many new regulations or improvements to existing rules can be traced to these letters?
- Should a new President be authorized to stay the effectiveness of “midnight rules” that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed?
- Does OIRA have legal authority to promulgate requirements or even guidelines regarding agencies’ use of peer reviews, risk assessments or guidance documents?
- Is Presidential review of rule cost beneficial? Is there an objective way to measure benefits that OIRA review provides?

3. Congressional Review of Rules.

- How effective has the Congressional Review Act (CRA) been in improving Congressional oversight of the rulemaking process? Does the Act need to be amended/replaced? For example:
 - Should agencies still be required to send all rules to the House, Senate, and GAO or should reporting be limited to just “major” or “significant” rules?
 - Should Congress amend the CRA to require electronic reporting of rules Congress and GAO?
 - How are GAO’s reports handled by Congress? Do they need refinement?
 - Should there be an expedited procedure for House consideration of rules reported for review?

- Should Congress clarify that an agency’s failure to report a covered rule renders the rule unenforceable and makes it subject to judicial Review?
 - Should Congress clarify how not to run afoul of the “substantially the same” prohibition in the CRA?
 - Should the “legislative day” measure be clarified since it is so unpredictable in terms of calendar days?
 - Should Congress adopt the changes in the CRA process that were contemplated by H.R. 3148 in the 109th Congress, including the proposal to establish a joint Congressional committee to screen and recommend proposed rules for disapproval? If so, should it provide the joint committee with authority envisioned in the Truth in Regulating Act to require the GAO to provide assessments of selected rules
- Other than the CRA, what other options does Congress have to prevent the implementation of an agency rule (e.g., appropriations riders)? How common are such approaches? Are they effective?
 - Should Congress establish a “Congressional Office of Regulatory Analysis” to help it oversee the agencies’ compliance with various rulemaking requirements? If so, should it follow the format envisioned in the Truth in Regulation Act (e.g., be established within the GAO, require assessment of all rulemaking requirements, etc.)? If so, should Congress simply reauthorize and fund TIRA?
 - Should Congress affirmatively approve all major rules (e.g., those with a \$100 million annual impact on the economy) before they take effect instead of the current scheme of making all final rules, major or minor, subject to review and possible disapproval?

4. Judicial Review of Rules.

- Should Congress clarify whether the Information Quality Act permits judicial review?
- In light of the Supreme Court’s 2001 ruling in *U.S. v. Meade*, is it time for Congress to establish rules of “deference” when a court finds a statutory delegation “ambiguous?”
- If studies showing that appellate courts are overturning more than 50% of challenged agency rules prove accurate, should Congress statutorily modify the “reasonable decisionmaking” standard, or limit judicial review in some other way?
- Should the APA be amended to make more clear when the courts can remand a rule without vacating it?

- The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. How effective/problematic has this been?
- Should Congress address the increasing use of consent decrees that modify or alter the substantive content of agency rules?

5. The Utility of Regulatory Analysis and Accountability Requirements.

- Should Congress reassess statutory requirements that prohibit agencies' considerations of cost in setting health and safety standards?
- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?
- Executive Order 12866 requires agencies to assess the costs and benefits of all significant rules, and requires a full cost-benefit analysis of all "economically significant" rules. Does OMB apply these requirements and use cost-benefit information in a balanced way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain rules exempt (e.g., Homeland Security rules)? Does OMB use cost-benefit analysis to prompt rulemaking or to increase regulatory requirements, or only to stop or limit rulemaking?
- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the RFA and SBREFA)? Do they give federal agencies too much discretion in their application? Should the Small Business Administration (SBA) or some other entity be required to define key terms (e.g., "significant economic impact on a substantial number of small entities")? Or should there even be special protections for small businesses and other small entities?
- How effective have been the regulatory requirements designed to protect federalism (e.g., Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., "significant federalism implications")? Or should there even be special protections for federalism?
- Should agencies be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden? (Currently, agencies are only required to do so for rules that had/have a "significant economic impact on a substantial number of small entities.") Or, should Congress take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress)? Relatedly, should agencies' final rules include a "sunset" provision that requires them to be reexamined and republished?
- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?
- To what extent have the analytical and accountability requirements contributed to what is called by some the "ossification" of the rulemaking process?

- How accurate are agencies' pre-promulgation cost and benefit estimates?
- How much does it cost for agencies to conduct cost-benefit analyses, risk assessments, regulatory flexibility analyses, federalism assessments, etc.?

6. The Role of Science in the Regulatory Process.

- How should scientific advisory panels be constructed to ensure that they are unbiased?
- Under what circumstances should agencies' regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?
- Do agencies have too much discretion to deny correction requests? Should agencies' correction denials be subject to judicial review? What effect has the act had on the length of time it takes agencies to issue rules? Do the Shelby Amendment and the Information Quality Act, in tandem, potentially restrict the release of research findings that would have significant social impact?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?
- Are government-wide standards for peer review needed? Does OMB have the authority to issue such standards? What effect will these requirements have on the length of time it takes agencies to issue rules?
- What has been the effect of the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (regarding the acceptance and understanding of scientific evidence to be used in the legal system) on regulatory policymaking?
- What constitutes the "weight of evidence" in making risk-based regulatory decisions? Should Congress define the term, or should it be left up to the agencies within a specific regulatory context?
- Are agencies complying with OMB's peer review and risk assessment bulletins?

7. The Agency Adjudicatory Process.

- Is there a need to reassess the role of the administrative law judge (ALJ) and how these officials are selected and evaluated? Should regulatory ALJs be treated differently from benefits ALJs?
- Should the notion of a centralized ALJ corps be revisited?
- Is there a need to examine and review the role of non-ALJ hearing officers?
- Should the split-enforcement model of agency adjudication (e.g., Occupational Safety and Health Administration [OSHA]-Occupational Safety and Health Review Commission) be used more often?

- Should the APA contain a provision regarding informal adjudication?
- Should the APA's adjudication provisions be extended to all evidentiary hearings required by statute?

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I. Public Participation in the Rulemaking Process

Section 553 of the Administrative Procedure Act (APA) establishes the general procedures that an agency must follow when promulgating a rule.¹ Rulemaking under this section is referred to as “informal,” or “notice and comment” rulemaking, and requires an agency to publish notice of a proposed rulemaking in the Federal Register, provide opportunity for the submission of comments by the public, and to publish a final rule and a general statement of basis and purpose in the Federal Register “not less than 30 days before its effective date.”²

Regarding public participation in this context, the APA specifically provides that an agency “shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without the opportunity for oral presentation.”³ Thus, the APA establishes that an informal rulemaking must, at a minimum, provide an opportunity for interested parties to submit written comments regarding the rule in question. The notice and comment process has been criticized as providing an inadequate forum for effective public participation, with some commentators asserting that the process does not further the public interest so much as provide a “forum for competition among interest groups,”⁴ and that it “fail[s] to encourage dialogue and deliberation among the parties most affected by [rulemaking].”⁵ Conversely, other commentators have suggested that there is ample evidence to support the proposition that agencies do in fact give serious consideration to comments received, oftentimes leading to significant changes in proposed rules.⁶ With these competing viewpoints in mind, the Project has focused on analyzing a broad spectrum of issues adhering to public participation in the rulemaking process, ranging from judicially derived participation requirements to recent innovations in electronic rulemaking.

Standards Governing Effective and Meaningful Public Participation in Informal Rulemaking Proceedings

The original model of informal rulemaking under the APA,⁷ which held sway from 1946 until the late 1960s, no longer exists. Fashioned to reflect the conception of administrative agencies as technically expert bodies capable of correctly finding and applying facts and law, only a subsidiary and minor role was accorded the interested public in agency policymaking proceedings. Since 1970, however, the Supreme Court and the federal courts of appeals have virtually singlehandedly reshaped the structure of informal rulemaking in a series of decisions

¹ 5 U.S.C. §553 (2000).

² 5 U.S.C. §553(c), (d) (2000).

³ 5 U.S.C. § 553(c) (2000).

⁴ See David Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 231-232.

⁵ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. Rev. 1, 12 (1997).

⁶ See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, American Bar Association, Fourth Edition at 296, n.5 (2006).

⁷ 5 U.S.C. § 553 (2000).

expanding both the obligations of agencies and the role of the reviewing courts. The result has been the transformation, without benefit of legislative amendment, of informal rulemaking into an on-the-record proceeding that has fostered widespread public participation in the process. These developments and the reasons for them are briefly recounted.

As originally conceived and practiced, an agency would develop a proposed rule under section 553 of the APA by drawing upon any sources of information or analysis, including business or consumer representatives, academicians, or the agency's own expertise. The agency then published a notice of proposed rulemaking (NPRM) in the Federal Register and opened the matter to written comment for an unspecified period, and any interested person could introduce into the record "data, views, or arguments"⁸ in support or opposition. The agency had discretion to hold oral hearings or take additional procedural steps to develop the rule further. After considering the proposal in light of the comments, the agency could withdraw the proposal, publish a revision, or promulgate a final rule accompanied by a concise statement of basis and purpose explaining its action. In this original APA model, the final statement could draw also upon sources of information or argument not previously raised or revealed.⁹ On review, a court would uphold the agency action if it found the rule within the scope of the agency's authority and not arbitrary and capricious. That is, the court would uphold the rule if the agency could construct a plausible supporting hypothesis. Agencies were put under no duty to consider all possible alternatives. They were expected to demonstrate that their policies were "rational" in only a minimal sense – more likely than not to promote a permissible goal.¹⁰ This standard of review gave an agency immense discretion and was mitigated only by the countervailing limitation that the supporting rationale had to be provided by the agency itself. A reviewing court would neither invent a hypothesis upon which the agency could have acted¹¹ nor accept inventions counsel might develop in the context of appeal.¹²

During this era, no one thought the comments required by section 553 were intended to constitute a complete record for decision either by the agency or the reviewing court.¹³ Under the original APA model, the agency acted primarily on the basis of its expertise, using whatever

⁸5 U.S.C. § 553(c) (2000). The APA does not specify the length of the comment period. Presidential executive orders since the Carter Administration have suggested a period of not less than 60 days "in order to afford the public a meaningful opportunity to comment on any proposed regulation." *See, e.g.*, Executive Order 12866, 58 Fed. Reg. 51735, Sec. 6(a)(1) (Oct. 4, 1993).

⁹*See, e.g.*, *Pacific Coast Eastern Conf. v. United States*, 350 F.2d 197, 205 (9th Cir. 1965), *cert. denied*, 382 U.S. 958 (1965).

¹⁰*See, e.g.*, *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953) (order will be upheld unless it can be shown that it is attempt to achieve ends other than those set forth in statute); *SEC v. Chenery Corp.*, 332 U.S. 194, 207 (1947) (order will be upset only if it lacks "any rational and statutory foundation").

¹¹*See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

¹²*See, e.g.*, *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-89 (1962).

¹³Nathaniel L. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 754-55 (1975).

internal processes and information it desired.¹⁴ Requiring comment simply gave the agency the opportunity to hear views of knowledgeable outsiders before exercising its own independent judgment.¹⁵ They were regarded solely as “instruments for the education of the administrator.”¹⁶ The agency was free, at the time of review, to support a rule with a “record” not based on the information available to various decisionmakers during the rule’s formation.¹⁷ While the courts at that time may have viewed *post hoc* rationalizations with suspicion,¹⁸ such rationalizations were acceptable. The agency could base its decision on expertise, unstated political considerations, or an inarticulable intuition.¹⁹ If the ultimate validity of the regulation turned on questions of fact, as opposed to agency policy judgments, then an enforcement proceeding was deemed an adequate forum for review.²⁰ In such proceedings, it was assumed the challenger could assail the rule as applied to his particular situation. Thus, under original APA model, settlement of issues of policy and fact were not based on the rulemaking record.

Professor Martin Shapiro has characterized the rule of the agencies and courts during this period and the reasons for this posture as follows:

In the early 1930's the New Deal created a government based on concentrating power in the hands of technically expert administrative agencies. By the early 1940's administrative law had been well shaped to express this theory. The new judges enunciated a theory of review that was a restatement of the progressive political theory. Power must be concentrated to be effective; and it must be wielded by experts in order to achieve rational results. Thus judges, who were not technically expert, must defer to agencies, who were. The central doctrines of the administrative law of the 1940's were the twin presumptions that agencies had correctly found the facts and had correctly found the law. Given such presumptions, there was nothing for the judges to do. They effectively transferred their power over regulation to the agencies at the same time they gave constitutional approval to the delegation of congressional regulatory power to the same agencies. Voila technocracy--rule by expert agencies.²¹

¹⁴Martin Shapiro, *On Predicting the Future of Administrative Law*, Regulation at 19-20 (May/June 1982).

¹⁵Nathanson, *supra* note 13, at 754-75.

¹⁶NLRB v. Seven-Up Bottling Co., 344 U.S. 349 (1953) (dictum); Pacific Coast Eastern Conf. v. United States, 350 F.2d 197, 205 (9th Cir. 1965), *cert. denied*, 382 U.S. 958 (1965).

¹⁷William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L. J. 38, 62-65 (1975).

¹⁸*See, e.g.*, FTC v. Sperry and Hutchinson Co., 405 U.S. 233, 246-50 (1972).

¹⁹James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 Va. L. Rev. 257, 272 (1979).

²⁰*See* Attorney General’s Comm. on Adm. Procedure, Final Report, S. Doc. No. 8, 77th Cong. 1st Sess. 115-20 (1941); Nathanson, *supra* note 13, at 755-57; Colin S. Diver, *Policy-making Paradigms in Administrative Law*, 95 Harv. L. Rev. 393, 405 (1981).

²¹Shapiro, *supra* note 14, at 19.

By the 1960s, however, criticism of the prevailing rulemaking model began to swell. Presidential commissions,²² jurists,²³ academics,²⁴ and so-called public interest protectors,²⁵ fueled in great measure by the immense growth in the role of the federal government, both in terms of the national resources allocated by the government and the degree of intrusiveness into individual decisions, expressed skepticism about both the substance and form of government decisionmaking. The product of many agencies' deliberations, these critics argued, was not a flexible policy, but no policy at all and which in some instances resulted in favoritism or uncertainty. The proliferation of the government's reach also raised questions as to the continued validity of the notion of the "expert" administrator.

The cumulative effect of these criticisms was a revolutionary overhaul of the whole structure of administrative regulation. Spearheaded by the courts, beginning in the mid-1960s and accelerating rapidly during the early years of the 1970s, a new consensus about agency policymaking began to emerge.²⁶ The key doctrinal shift was the enhanced emphasis on rulemaking as a method of formulating policy. Doubts about some agencies' legal authority to issue binding rules were erased by a series of judicial decisions.²⁷ Congress joined in this trend by granting broad rulemaking power in new regulatory statutes²⁸ and by increasingly resorting to "action-forcing" techniques to compel prospective adoption of policies.²⁹ Courts invoked a variety of legal grounds – due process,³⁰ organic statutes and internal agency procedures,³¹ or

²²See James M. Landis, *Report on Regulatory Agencies to the President Elect* (Washington, D.C.: Government Printing Office, 1960); *Report of the ABA Commission to Study the Federal Trade Commission* (Sept. 15, 1969); *Report of the President's Advisory Council on Executive Organization, A New Regulatory Framework* (1971) (Ash Report).

²³See, e.g., Henry J. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 75 Harv. L. Rev. 1263 (1962); Samuel Eistreich, *Pragmatic Justice: The Contributions of Judge Harold Leventhal to Administrative Law*, 80 Colum. L. Rev. 894 (1980).

²⁴See, e.g., Kenneth Culp Davis, *Discretionary Justice* (1969); Murray Edelman, *The Symbolic Use of Politics* 22-26 (1964); Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* 92-126 (2d ed. 1979).

²⁵See, e.g., Edward F. Cox, Richard C. Fellmeth and John E. Schulz, *The Nader Report on the Federal Trade Commission* (1969); Richard C. Fellmeth, *The Interstate Commerce Commission* (1970).

²⁶These developments are comprehensively treated in legal commentaries. See, e.g., Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669 (1975); Paul Verkuil, "The Emerging Concept of Administrative Procedure," 78 Colum. L. Rev. 258 (1978); James v. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 Va. L. Rev. 257 (1979).

²⁷*Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

²⁸See, e.g., *Consumer Product Safety Act*, 15 U.S.C. § 2059 (1998).

²⁹See Richard B. Stewart & James E. Krier, *Environmental Law and Policy: Readings, Materials, and Notes* 371-73 (2d ed. 1978).

³⁰See, e.g., *Soglin v. Kauffman*, 418 F.2d 163, 168 (7th Cir. 1969); *Holmes v. N.Y. Housing Authority*, 398 F.2d 262, 264-65 (2d Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir.

(continued...)

abuse of discretion³² – for finding an obligation to proceed by rulemaking. Informal rulemaking became the presumptive and judicially preferred mode of policymaking procedure.³³

The courts not only demanded greater use of rulemaking for elaborating policy, but also radically transformed the ways in which agencies make rules and courts review them. Led by the Court of Appeals for the District of Columbia, creative judicial interpretation of the APA and of the agencies' organic statutes made rulemaking dramatically more accessible and procedurally formal. First, the courts lowered the barriers to public access to both agencies and courts by relaxing the standing, ripeness, and exhaustion rules.³⁴ Those rules originally had been designed to exclude from agencies and the courts every one except those few individuals who had suffered direct legal injury by government action. Now any interest group may assert small or indirect potential injury and thereby claim access to the decisionmaking processes of government.

The next step the courts took was to ensure that access was meaningful. This was accomplished by engrafting muscle and substance on the heretofore spare and cryptic notice and comment requirements of section 553. The courts now required a rulemaking record which had to contain the material on which the agency bases its decision.³⁵ Thus the use of nonrecord material in a final statement of basis and purpose was found to be cause for remand.³⁶ Even if the record as it stood would support the agency decision, the court could find an abuse of discretion if other, unrevealed sources affected the rulemaking process.³⁷ The courts also required agencies to place the relevant materials, particularly those of a complicated or technical nature, on the record at a time and in a form that would allow other parties an opportunity to examine and appraise them.³⁸ Last minute additions to the record were held not to suffice since

³⁰(...continued)
1964).

³¹*See, e.g.,* Morton v. Ruiz, 415 U.S. 199, 231-36 (1974).

³²*See* Bokat v. Sureck, 637 F.2d 1315, 1317 (9th Cir. 1981).

³³ United States v. Florida East Coast Railway Co., 410 U.S. 224 (1973).

³⁴*See, e.g.,* Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Serv. Orgs. Inc., v. Camp, 397 U.S. 150 (standing); Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) (ripeness); *see generally*, Ralph F. Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 Ind. L.J. 817 (1976).

³⁵United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 251-252 (2d Cir. 1977); Industrial Union Dept. v. Hodgson, 499 F.2d 267, 475-76, 488 (D.C. Cir. 1974); Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375, 393 n. 67 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *see generally*, William F. Pederson, Jr., *Formal Records and Informal Rulemaking*, 85 Yale L. J. 38 (1975).

³⁶National Ass'n of Demolition Contractors v. Costle, 565 F.2d 748, 752 (D. C. Cir. 1977).

³⁷United States Lines, Inc. v. FMC, 584 F.2d 9, 51-59 (D.C. Cir.), *cert. denied*, 434 U.S. 229 (1977); Sangamon Valley TV Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959). *But c.f.* Action for Childrens' Television v. FCC, 564 F.2d 458, 477-78 (D.C. Cir. 1977).

³⁸Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 392-394, 402 (D.C. Cir. 1973), *cert denied*, 417 U.S. 921 (1974); Home Box Office, Inc. v. FCC, 567 F.2d 9, 54-55 (D.C. Cir. 1977); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252 (2d Cir. 1977); International
(continued...)

it deprived participants of the opportunity to comment or refute.³⁹ Interested parties had to have the opportunity to test the bases of the agency's position--factual, technical, analytical or theoretical.⁴⁰ Although the timely entry of material onto the record would suffice in most cases, some decisions stated that an agency should allow cross-examination or a specific opportunity for rebuttal if such procedures are the best method of illuminating issues.⁴¹

Finally, the courts imposed a series of requirements on the final statement of basis and purpose. The statement:

Must be sufficiently complete and detailed to enable the court to accomplish its reviewing function, assuring itself that the agency has engaged in reasoned decisionmaking, has given serious thought to alternative rulings, and has provided reasoned explanations for controversial normative and empirical determinations. In short, "the reviewing court must satisfy itself that the requisite dialogue occurred and that it was not a sham."⁴²

Thus, the statement must identify the major issues in the proceeding, explain the agency's reasoning on those issues, and establish that the agency has indeed identified and taken a hard look at all the relevant factors.⁴³ For important conclusions, the statement must point to specific materials in the record; vague allusions to material on file or to the agency's general expertise would not suffice.⁴⁴

³⁸(...continued)

Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631-32 (D.C. Cir. 1973).

³⁹United States Lines, Inc. v. FMC, 584 F.2d 519, 533-36, 541-42 (D.C. Cir. 1978); Environmental Defense Fund v. Blum, 459 F. Supp. 650, 658-60 (D.D.C. 1978).

⁴⁰See Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); Mobile Oil Corp. v. FPC, 483 F.2d 1238, 1259-60 (D. C. Cir. 1973).

⁴¹See, e.g., Bunker Hill Co. v. EPA, 572 F.2d 1286, 1305 n. 41 (8th Cir. 1978). In *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978), the Supreme Court precluded the invalidation of rules solely because an agency failed to use specific procedures not required by section 553. The decision, however, did not overturn all the law of informal rulemaking that had been developed by the lower courts, and did not affect continuing strict scrutiny of agency adherence to the procedural requirements in the APA or in agency regulations and the obligation of agencies to engage in "reasoned decisionmaking," which was to include the consideration of alternatives. See *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

⁴²NRDC, Inc. v. NRC, 547 F.2d 633, 658 n. 3 (D. C. Cir. 1976) (Tamm, J., concurring), *rev'd sub nom.*, *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519 (1978). The Supreme Court specifically approved Judge Tamm's characterization of the role of the reviewing court.

⁴³Automotive Parts Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968); United States v. Nova Scotia Food Prod. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977).

⁴⁴United States Line, Inc. v. FMC, 584 F.2d 519, 533-35 (D.C. Cir. 1978).

Agencies have also been held obligated to answer cogent comment and to do so in terms of the particular record in preparing the final statement.⁴⁵ A significant part of the statement's function is seen as responding to public comments and explaining how the agency resolved the problems raised. The obligation to respond to serious objections may even extend to criticisms that might have been made, but were not. The agency itself may have to refute serious arguments against its positions or contentions.⁴⁶

The judicial revolution effected between 1968 and 1983 remains in place today.⁴⁷ In essence, the courts now seek to ensure that agencies listen and respond to citizen comments by reading the "concise and general statement" language of the APA as a requirement that they conduct a dialogue with the public and that the agency's statement contains responses to the comments received. The point of the dialogue is that if the agency must respond to comments, it must listen to the comments. Thus, the courts have forced agencies to grant real access to the public by demanding that the agency prove it has listened by responding in detail to what the public has said to it.

Finally, these requirements for greater public access and procedural formality have been accompanied by more exacting review of substantive agency decisions. The very label used to describe modern review of judicial rulemaking – the "hard look doctrine" – captures the sense of transformation just described. Reviewing courts apparently are no longer content to affirm based upon the intuitive plausibility of the link between the policy announced and the statutory standard. An agency must be prepared to demonstrate the superiority of the choice made over others advanced by outside participants or conceived by the agency itself. To enforce that requirement, courts examine, often in painstaking detail, the agency's factual predicate, analytical methodology, and chain of reasoning. Rulemaking must be demonstrated to be an exercise in "reasoned decisionmaking."⁴⁸

Effective Public Participation During the Notice and Comment Phase. While the judicial maxims discussed above establish certain procedural and substantive safeguards designed to protect and foster effective public participation in rulemaking, significant issues continue to adhere to agency actions in the notice and comment phase that have the practical effect of minimizing or dispensing with public participation.

Sufficiency of the Notice. As touched upon above, the notice and comment procedures of the APA are designed "to allow the agency to benefit from the experience and input of the parties who file comments, and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules."⁴⁹ Further, the notice and comment procedure

⁴⁵Office of Communications of the United Church of Christ v. FCC, 560 F.2d 529, 532-33 (2d Cir. 1977).

⁴⁶Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

⁴⁷See generally, Lubbers, *supra* note 6, at 295-333.

⁴⁸Richard J. Pierce, Jr., *Seven Ways To Deossify Rulemaking*, 47 Admin. L. Rev. 59, 65 (1995).

⁴⁹National Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978).

“encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.”⁵⁰

To ensure that these goals are realized, courts have repeatedly held that a NPRM, in order to allow for meaningful public participation, must “fairly apprise interested persons” of the issues underlying the rulemaking proceeding.⁵¹ As such, if the differences between a proposed rule and a final rule are so substantial as to render ineffective the notice provided to the public, a reviewing court may vacate the final rule. It is important to note that this maxim does not establish that an agency may not alter a proposal in its final rule. Indeed, reviewing courts have declared that a final rule must differ from the proposed rule “when the record evidence warrants such a change,”⁵² and that a contrary position “would be antithetical to the whole concept of notice and comment.”⁵³ As was explained by the Court of Appeals for the District of Columbia, “a contrary rule would lead to the absurdity that in rule-making under the APA the agency can only learn from the comments on the proposals only at the peril of starting a new procedural round of commentary.”⁵⁴

In order to differentiate between permissible alterations to a final rule and those that would render a NPRM ineffective, reviewing courts have held that “a final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule.”⁵⁵ Referred to as the “logical outgrowth doctrine,” this standard “focuses on whether th interested parties reasonably could have anticipated the final rulemaking from the draft permit.”⁵⁶ In *National Mining Ass’n v. MSHA*,⁵⁷ the Court of Appeals for the District of Columbia stated:

Our cases offer no precise definition of what counts as a “logical outgrowth.” We ask “whether ‘the purposes of notice and comment have been adequately served.’” *American Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (quoting *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)). Notice was inadequate when “the interested parties could not reasonably ‘have anticipated the final rulemaking from the draft [rule].’” *Id.* at 1275 (quoting *Anne Arundel County v. EPA*, 963 F.2d 412, 418 (D.C. Cir. 1992)). “[W]e inquire whether the notice given affords ‘exposure to diverse public comment,’ ‘fairness to affected parties,’ and ‘an opportunity to develop evidence in the record.’”

⁵⁰*Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (citing *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980); *BASF Wyandotte Corp., v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980)).

⁵¹See *United Steelworkers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980); *American Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977).

⁵²*Marshall*, 647 F.2d at 1221.

⁵³*Natural Resources Defense Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002).

⁵⁴*International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632, n.51 (D.C. Cir. 1973); see also *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (noting that “[a]gencies should be free to adjust or abandon their proposals without having to start another round of rulemaking”).

⁵⁵*Natural Resources Defense Council v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988).

⁵⁶*Id.*

⁵⁷116 F.3d 520, 531 (D.C. Cir. 1997).

Association of Am. Railroads v. Dep't of Transp., 38 F.3d 582, 589 (D.C. Cir. 1994) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

Regarding the practical application of the logical outgrowth doctrine, the court in *National Ass'n of Psychiatric Health Sys., et al. v. Shalala*, stated that “[t]he question . . . ‘always requires careful consideration on a case-by-case basis.’”⁵⁸ The court went on to explain that “it is fair to say that it is hard to discern a clear rationale differentiating the holdings” of cases that have considered whether a particular rulemaking falls within the scope of the doctrine.⁵⁹ Upon providing a series of examples illustrating this point,⁶⁰ the court again stressed that it was “clear that [a logical outgrowth doctrine] inquiry must be undertaken on a case-by-case basis,” stating that a reviewing court “must look to the specific facts of [a] case in determining whether [a] final rule was the logical outgrowth of the one proposed.”⁶¹

In addition to issues adhering to the logical outgrowth doctrine, reviewing courts have also accepted the notion that notice, to be adequate, must provide interested parties with the opportunity to “challenge the factual assumptions on which [the agency] is proceeding and to show in what respect such assumptions are erroneous.”⁶² In *Portland Cement Ass'n v. Ruckelshaus*, for instance, the Court of Appeals for the District of Columbia reviewed new source performance standards established by the Environmental Protection Agency (EPA)

⁵⁸120 F. Supp.2d 33, 39 (D.D.C. 2000) (quoting *BASF Wayndotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

⁵⁹*Id.* at 39.

⁶⁰*Id.* at 39-40; *cf.* *National Mining Ass'n*, 116 F.3d 520, 532 (holding notice inadequate when final rule changed requirement for examination of mines, but proposed rule did not indicate that agency had considered changing the requirement); *American Water Works Ass'n v. EPA*, 40 F.3d 1266 (D.C. Cir. 1994) (holding notice inadequate when final rule adopted broader definition of the word ‘control,’ in reference to manner in which public water systems must take responsibility for controlling water quality under the Safe Drinking Water Act, than had been foreshadowed in proposed rule); *Horsehead Resource Development Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994) (holding notice was inadequate when proposed rule did not sufficiently foreshadow agency’s intent to regulate not only emissions of either carbon monoxide or total hydrocarbons, but also combined emissions of those two pollutants); with *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988) (holding notice adequate where proposed rule outlined plan where emissions requirements would depend on varying criteria, but final rule adopted uniform criteria for emissions); *United Steelworkers v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1989), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3148, 69 L.Ed.2d 997 (1981) (holding notice adequate even when final rule setting standard for allowable exposure of airborne lead in workplace was twice as stringent as proposed rule); and *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975) (holding notice adequate when proposed rule discussed EPA regulations for transportation control and mentioned alternate forms of transportation, but final rule created network of 60 miles of bicycle lanes and imposed requirements of bicycle storage facilities in certain parking lots).”

⁶¹*National Association of Psychiatric Health Systems et al. v. Shalala*, 120 F.Supp.2d at 40.

⁶²*Magnuson-Moss Warranty -Federal Trade Commission Improvement Act*, H.R. Rep. No. 93-1606, at 33 (1974) (Conference Report).

pursuant to the Clean Air Act regarding the operation of Portland cement plants.⁶³ Addressing a published statement from the EPA indicating that it had relied on test results that were not made available for public comment in formulating the final rule, the court stated, “We find a critical defect in the decision-making process in arriving at the standard under review in the initial inability of petitioners to obtain – in timely fashion – the test results and procedures used”⁶⁴ The court went on to conclude that “[i]t is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that, [in] critical degree, is known only to the agency.”⁶⁵

Based on these factors, it is apparent that reviewing courts have developed standards to ensure that the notice afforded to the public during an agency rulemaking proceeding is sufficient to satisfy the goals underlying the APA. As is indicated by the decisions noted above, however, any inquiry into the adequacy of notice is necessarily a fact-specific inquiry, lending a significant degree of uncertainty to an interested parties’ challenge to agency in this context. Furthermore, burdens associated with the prosecution of a challenge to an agency’s actions during the rulemaking process may be compounded by this uncertainty.

The Good Cause Exception. After the completion of the notice and comment process, an agency will occasionally decide that there is a need to suspend, amend, or revoke a final rule that may or may not have gone into effect. This determination may be motivated by a multitude of factors, such as the identification of new information or previously unconsidered consequences, suddenly altered economic or societal circumstances, or major shifts in governmental and/or regulatory policy.⁶⁶ Judicial decisions interpreting the APA’s requirements for informal rulemaking have established that a rule is final when published in final form, irrespective of whether the rule has actually gone into effect.⁶⁷ Likewise, related decisions have established that the effective date of a final rule is a substantive provision of a rule. As such, these decisions establish that any substantial modification to a final rule must be accomplished through additional notice and comment proceedings.⁶⁸

⁶³486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

⁶⁴*Id.* at 392.

⁶⁵*Id.* at 393; *see also* Lloyd Noland Hospital and Clinic v. Heckler, 762 F.2d 1561, 1565 (11th Cir. 1985) (“When a proposed rule is based on scientific data, the agency should identify the data and methodology used to obtain it.”); United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) (“When the basis for a proposed rule is a scientific decision, the scientific material which is believed to support the rule should be exposed to the view of the interested parties for their comment”).

⁶⁶*See* Peter D. Holmes, *Paradise Postponed: Suspensions of Agency Rules*, 65 N.C. L. Rev. 645 (1987).

⁶⁷Natural Resources Defense Council v. EPA, 683 F.2d 752, 760-761 (D.C. Cir. 1982).

⁶⁸Consumer Energy Council of America v. FERC, 673 F.2d 425, 446-446 (D.C. Cir. 1982); Natural Resources Defense Council v. EPA, 683 F.2d 752 (3rd Cir. 1982); Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983); Environmental Defense Fund, Inc. v. EPA, 716 F.2d 915 (D.C. Cir. 1983) (*per curiam*); Natural Resources Defense Council v. EPA, 725 F.2d 761 (D.C. Cir. 1984); Associated Builders and Contractors, Inc. v. Herman, 976 F. Supp. 1 (D.D.C. 1997).

Given that a substantive modification itself constitutes a rulemaking under the APA, it is axiomatic that the modifying agency is required to comply with the Act's notice and comment procedures in implementing any changes. Agencies, however, may issue "interim final rules" that become effective without prior notice and opportunity for public comment based upon the good cause exception to the APA, which provides that an agency may forgo general notice and comment procedures if the agency "for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."⁶⁹ This "good cause exception" to the APA is "narrowly construed and only reluctantly countenanced" by the courts.⁷⁰

While the validity of an agency's use of the good cause exception is a fact-specific inquiry, a review of the relevant decisions reveals common factors that influence judicial disposition of rule modifications pursuant to the good cause exception.

Given that the good cause exception allows an agency to avoid the principles of public participation undergirding the APA, courts generally require a showing that exigent circumstances have rendered traditional notice and comment procedures unduly burdensome. In particular, courts have held that notice and comment procedures may be bypassed in instances where implementation deadlines imposed by statute or court order have rendered such procedures impractical, or where formal compliance with the APA would run contrary to the public interest due to a public health or safety emergency.⁷¹

In *Council of the Southern Mountains v. Donovan*, for instance, the court considered the Mine Safety and Health Administration's (MSHA) six-month suspension, without notice and comment, of regulations that required "coal operators to equip all underground miners with self-contained self-rescuers (SCSRs)."⁷² The court upheld the suspension, identifying several factors supporting the MSHA's action. First, the court found it significant that the suspension was necessitated by circumstances beyond the agency's control. Specifically, the court determined that field tests of the SCSRs were not completed due to external delays in obtaining the necessary equipment and cooperation, and that the agency had made a good faith effort to resolve these problems.⁷³ Furthermore, the court gave weight to the fact that the suspension was limited to six months.⁷⁴

Likewise, in *National Federation of Federal Employees v. Devine*, the court validated the suspension by the Office of Personnel Management (OPM), without notice and comment, of the 1981 "open season" for health plan selection by federal employees, citing "unforeseen

⁶⁹5 U.S.C. § 553(b)(3)(B) (2000).

⁷⁰*New Jersey Dept. of Env'tl. Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. 1980). For a thorough review of the dynamics of the good cause exception, see Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 Admin. L.J. 317 (1989).

⁷¹See Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 720 (1999).

⁷²653 F.2d 573, 575 (D.C. Cir. 1981).

⁷³*Id.* at 581.

⁷⁴*Id.* at 582.

emergency circumstances, including last-minute benefit reductions and pending litigation in federal courts.⁷⁵ Analyzing the suspension, the court determined that OPM had properly suspended the rule in light of the fact that no accurate information regarding new contract terms was available.⁷⁶ Specifically, the court explained that the lack of this information could thwart the rule's goal of facilitating informed employee decisionmaking regarding health plans.⁷⁷ Furthermore, the court found the suspension was necessary to ensure the financial stability of the program, as Blue Cross-Blue Shield, which had suffered significant losses and was the predominant health care provider under the program, had threatened to withdraw completely unless the open season was postponed to allow it to solve actuarial problems.⁷⁸ Finally, the court also found it significant that the suspension was to be temporary.⁷⁹

These cases indicate that courts are willing to uphold modifications predicated upon the good cause exception in situations where external circumstances have compromised the safety or substantive goal of the regulation. As is shown below, however, the courts have been unwilling to accept unilateral suspensions when such concerns are absent.

In *Natural Resources Defense Council v. EPA*, the Court of Appeals for the Third Circuit considered the EPA's indefinite suspension, without notice and comment, of the effective date of a set of amendments to regulations establishing pretreatment standards for the introduction of pollutants into treatment works.⁸⁰ The EPA asserted that the suspension was necessitated by Executive Order 12291, which directed agencies to postpone the effective dates of not yet effective final rules to the extent necessary to allow for reconsideration of such rules' compliance with the newly imposed cost-benefit requirements of the order.⁸¹ The court held that the EPA did not have good cause to effectuate the suspension without complying with notice and comment requirements.⁸² Specifically, the court found that there was no reason why the agency could not have complied with the aforementioned order while also providing an abbreviated notice and comment period to meet the requirements of the APA.⁸³

In *Environmental Defense Fund v. Gorsuch*, the court invalidated the EPA's suspension, without notice and comment, of regulations pertaining to the treatment of hazardous waste under the Resource Conservation and Recovery Act (RCRA).⁸⁴ Although the EPA was directed to issue these standards by April of 1978, they were not promulgated until May of 1980 pursuant to a court order. The standards issued at this time constituted "Phase I" regulations establishing the basic regulatory structure of the RCRA's system of hazardous waste management. Phase II

⁷⁵671 F.2d 607 (D.C. Cir. 1982) (*per curiam*).

⁷⁶*Id.* at 611.

⁷⁷*Id.* at 611.

⁷⁸*Id.* at 611.

⁷⁹*Id.* at 612.

⁸⁰683 F.2d 752, 754 (3rd Cir. 1982).

⁸¹*Id.* at 755-756; *see also* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

⁸²683 F.2d at 767.

⁸³*Id.*

⁸⁴713 F.2d 802 (D.C. Cir. 1983).

regulations establishing the technical standards for hazardous waste treatment were issued in January of 1981, to become effective in July of 1981. Shortly after the Phase II regulations took effect, however, the EPA, suspended the regulations.⁸⁵ This action was clearly influenced by Executive Order 12291, with the EPA further asserting good cause for the suspension on the grounds that the regulations had been criticized as too costly and were likely to be changed in the near future.⁸⁶ The court nullified the suspension, finding no basis for the justifications offered by the agency and noting that the EPA's reversal regarding its approach to the regulations constituted a "danger signal" requiring closer scrutiny of the agency's actions.⁸⁷

In another case rejecting an EPA rule suspension of an RCRA regulation, the court again found that the agency did not meet the requirements of the good cause exception. In *Environmental Defense Fund v. EPA*, the EPA permanently suspended annual reporting requirements for 1980 for hazardous waste generators and various treatment facilities, asserting that the agency's "tremendous workload" would prevent it from being able to adequately analyze reports.⁸⁸ Shortly thereafter, the agency temporarily suspended all reporting requirements, based on the fact that the agency was in the process of altering the reporting requirements and "wished 'to prevent the regulated community from expending resources toward complying with them in their present form.'"⁸⁹ The court held that there was not good cause for the immediate suspension of the regulations, since no external pressures had necessitated the stays.⁹⁰ Specifically, the court noted that the agency had previously indicated its intent to suspend or eliminate the reporting requirements, indicating that it could have complied with notice and comment requirements.⁹¹ Given these factors, the court held that there was "no legitimate reason whatsoever for EPA to ignore the commands of the APA."⁹²

While the aforementioned cases focus on agency rule suspensions specifically, their underlying rationales provide a general framework for analyzing the validity of an agency's substantive modification of a rule without first providing notice and an opportunity for comment. Accordingly, it would appear that the key factor in any such modification, irrespective of whether it is a suspension, amendment or revocation, is the existence of an external justification for the suspension. As was shown in *Southern Mountains* and *Devine*, it appears that reviewing courts are accepting of modifications that are necessitated by external circumstances.

Conversely, the three EPA cases discussed above indicate that a reviewing court will invalidate agency suspensions or modifications that are not necessitated by external circumstances, or that could have been implemented effectively while complying with notice and comment requirements. Relatedly, the courts seem extremely hesitant to validate actions that appear to be motivated by an internal policy shift on the part of an agency. It is important to note

⁸⁵*Id.* at 808-809.

⁸⁶*Id.* at 807-808.

⁸⁷*Id.* at 817.

⁸⁸716 F.2d 915, 917 (D.C. Cir. 1983).

⁸⁹*Id.* at 917.

⁹⁰*Id.* at 921.

⁹¹*Id.*

⁹²*Id.*

that the invalidated EPA suspensions discussed above were all predicated to some degree upon a shift in regulatory policy, as evidenced by Executive Order 12291.⁹³ The court addressed this situation indirectly in *Natural Resources Defense Council v. EPA*, stating that “as with substantive review . . . it makes sense to scrutinize the procedures employed by the agency all the more closely where the agency has acted, within a compressed time frame, to reverse itself by the procedure under challenge.”⁹⁴

A natural corollary of the emphasis placed upon the existence of exigent circumstances as a justification for the proper use of the good cause exception is that reviewing courts will be hesitant to validate a good cause rulemaking occasioned only by an agency’s desire to issue immediately effective regulations to “provide guidance or simplify enforcement.”⁹⁵ In *Zhang v. Slattery*, for instance, the Court of Appeals for the Second Circuit rejected the notion that the good cause exception could be used to justify the issuance of an interim-final rule aimed at broadening the scope of individuals qualified for asylum and to make asylum eligibility requirements easier to understand.⁹⁶ Specifically, the court stressed that such justifications were insufficient to establish good cause, as “the notice and comment requirement would be a dead letter if compliance could be excused whenever the beneficial effect” of a rule could be realized sooner without following the formal requirements of the APA.⁹⁷ Similarly, in *Action on Smoking and Health v. Civil Aeronautics Board*, the Court of Appeals for the District of Columbia stressed that the mere fact that an existing regulation is onerous or confusing cannot justify the adoption of a new rule without prior notice and opportunity for public comment.⁹⁸

Based upon these factors, it seems that modifications necessitated by exigencies beyond an agency’s control are much more likely to withstand scrutiny than those that appear to be the product of internal agency deliberations or shifts in policy.⁹⁹

Midnight Rules. While the invocation of the good cause exception itself has implications for the realization of meaningful and effective public participation, it can also have a significant impact when used to justify an administration’s response to “midnight rules.” Specifically, it is common for outgoing Presidential administrations to issue a large number of important rules at the end of their administrations. In turn, the incoming administration, particularly in instances where there is a shift of party control of the executive branch, will characteristically take steps to counter those that can be viewed as procedurally suspect under

⁹³See Holmes, *supra* note 66, at 685.

⁹⁴683 F.2d at 760.

⁹⁵Asimow, *supra* note 71, at 721.

⁹⁶55 F.3d 732 (2d Cir. 1995).

⁹⁷*Id.* at 747.

⁹⁸713 F.2d 795, 801-802 (D.C. Cir. 1983) (In particular, the court stated that “the public interest exception to notice and comment requirements contemplates real harm to the public, not mere inconvenience to the agency.”).

⁹⁹This analysis addresses procedural issues pertaining to agency rule modifications. It should also be noted that such agency action may be challenged on a substantive as well as procedural basis. See Holmes, *supra* note 66, at 664. Furthermore, given that substantive modifications constitute rulemaking under the APA, they are also subject to the reporting and disapproval requirements of the Congressional Review Act, 5 U.S.C. §§ 801-808 (2000).

the APA. This dynamic manifested itself most recently during the transition from the Clinton to George W. Bush Administrations.

On January 20, 2001, President Bush's Chief of Staff, Andrew Card, issued a Memorandum for the Heads and Acting Heads of Executive Branch Departments and Agencies (Card Memo) that imposed a moratorium on regulatory activity until agency personnel appointed directly by the President were situated to make decisions and consult with the Office of Management and Budget (OMB). To accomplish this, the memo first directed that no proposed final regulations could be sent to the Federal Register for publication. Exceptions were provided for regulations addressing "emergency or other urgent situations relating to health and safety" or "regulations promulgated pursuant to statutory or judicial deadlines." Next, the Card Memo ordered that regulations that had been sent to the Office of the Federal Register (OFR), but not yet published, were to be withdrawn "for review and approval" by the new agency head. Finally, with respect to regulations that had been published in the Federal Register, but that had not yet become effective, agencies were directed to "temporarily postpone the effective date of the regulations for 60 days."

Agencies responded to the Card Memo by publishing a notice in the Federal Register adding 60 days to the effective dates of not yet effective rules, announcing that the change would be effective immediately under the "good cause" exception of the APA, the "good cause" being the necessity of a new administration to review and assess the efficacy and necessity of not yet effective rules. Although the matter is not without doubt, it is conceivable that the limited period of suspension and an inclination to afford deference to the transition difficulties of an incoming administration would militate a reviewing court to find good cause, while subsequent suspensions, without notice and comment, would presumably be deemed violative of the APA.

In *Natural Resources Defense Council v. Abraham*, the Court of Appeals for the Second Circuit addressed actions taken by the Department of Energy (DOE) in suspending a final rule imposing new efficiency standards for central air conditioners that was issued at the end of the Clinton Administration.¹⁰⁰ The DOE postponed the Clinton Administration rule on February 2, 2001 pursuant to the Card Memo, and then postponed the rule indefinitely on April 20, 2001. On July 25, 2001, the Department published a proposed rule to withdraw this regulation and replace it with a new rule imposing less stringent efficiency standards. DOE eventually published a new final rule that became effective on August 6, 2002, which provided for a less stringent efficiency standard than the rule that was twice delayed and ultimately revoked. The DOE's action on this rule was challenged by several State Attorneys General as well as the Natural Resources Defense Council. The Second Circuit struck down the Bush Administration rulemaking, both on substantive and procedural grounds. Regarding the initial delays of the rule, the court stated that its analysis would begin and end with the first delay which it found to be violative of the APA. In particular, the court rejected DOE's argument that it had good cause to suspend the effective date on the basis that it wished to "review and reconsider" the new standards, holding that there were no external circumstances cited by the DOE as justifying the delay. It is important to note, however, that the DOE did not cite the Card Memorandum as an external factor. Accordingly, while the decision in *NRDC v. Abraham* could be viewed as lessening the possibility that a court would accept such a rationale, it could nonetheless be argued that a discrete delay ordered by an incoming President might survive judicial scrutiny.

¹⁰⁰355 F.3d 179 (2nd Cir. 2004).

Irrespective of the issue of whether a reviewing court might be persuaded to validate a limited delay of midnight rules pursuant to the good cause exception, the potential for such executive action to vitiate effective and meaningful public participation is self-evident. Moreover, it is important to note that injury to principles of public participation in the midnight rules context is not limited to actions taken by an incoming administration. Outgoing administrations might also render effective public participation impossible by giving little attention to the thoughts of interested parties in the rush to finalize regulations before leaving office. Accordingly, the multitude of issues adhering in this context would appear to be ripe for consideration by a reconstituted ACUS.

Public Participation Prior to Notice and Comment. Another key issue in the public participation context has been whether efforts to include the public in the rulemaking process prior to the publication of a proposed rule should be expanded. Professor William West of the Bush School of Government and Public Services at Texas A&M University undertook an effort to study a specific aspect of this issue at the behest of the Committee, with the support of CRS.

Professor West formulated and conducted a project to analyze how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on agency regulatory agendas; how the rulemaking process is managed at inter- and intra-agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West has stated that the issue of public participation at this stage of agency rule formulation “may be especially relevant to the Congress as it considers possible amendments to the APA.” The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high level agency personnel with extensive experience in the rulemaking process. One of the hopes for the study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice regarding the scope, transparency, and inclusiveness of outside participation during this phase of rulemaking. A low response rate to the electronic questionnaire, however, prevented such a comparison. Nonetheless, the interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to outside participation in proposal development: (1) that agency officials noted that the submission of information by public interest groups, industry representatives, other affected interests, and other agencies was “frequently indispensable to intelligent decision making;” (2) that the character of such participation is variable, based on a number of factors; and, (3) finally, that such participation does not generally occur as the result of an inclusive agency approach, instead occurring by virtue of agency invitation or participant initiative.

While the West study has contributed significantly to Congressional and academic understanding of the complex issues surrounding public participation in the pre-notice and comment rulemaking context, the low response rate to the survey could be viewed as supporting the position that a reconstituted ACUS could serve an important role in facilitating research of this type. Professor West has related his view that the survey was hobbled by a general reluctance of agencies to share information, as illustrated by the fact that two agencies went so far as to explicitly order their staff not to respond to the survey. It is arguable that a similar study, if conducted by a reconstituted ACUS, would have greater success in generating the information necessary to enable the systematic comparisons envisioned by the West study by virtue of its non-partisan nature and organizational independence.

Negotiated Rulemaking

One of ACUS' most significant achievements in the legislative context was its role in encouraging increased participation and consensus in rulemaking as manifested by the Negotiated Rulemaking Act of 1990.¹⁰¹ Negotiated rulemaking, sometimes referred to as "reg-neg," provides an alternative to the traditional notice and comment rulemaking dynamic under the APA, whereby involved parties attempt to reach consensus on a regulatory issue through compromise and the evaluation of priorities, with the ultimate goal of formulating a draft rule that is widely supported. The concept of negotiated rulemaking arose from dissatisfaction with what some perceived as the complex and adversarial nature of traditional rulemaking procedures. Professor Philip J. Harter, a leading proponent of negotiated rulemaking, opined in 1982 that the regulatory process had become stifled by the defensive nature of the interactions between agencies and affected parties.¹⁰² Professor Harter suggested a different approach in which differences were acknowledged and resolved through face-to-face negotiations, and laid out a series of principles that could make those negotiations successful.

Also in 1982, ACUS recommended that agencies consider using negotiated rulemaking as a way to develop proposed rules, published criteria for determining when negotiated rulemaking was likely to be successful, and suggested specific procedures to be followed when implementing the approach.¹⁰³ For example, ACUS said agencies should use "conveners" to determine whether negotiated rulemaking is appropriate and to identify affected interests. ACUS also recommended that Congress pass legislation explicitly authorizing agencies to use negotiated rulemaking, but giving them substantial flexibility to adapt negotiation methods.

In 1983, the Federal Aviation Administration became the first federal agency to try negotiated rulemaking (regarding flight and rest time requirements for domestic airline pilots), followed by the EPA and the Occupational Health and Safety Administration. In 1985, ACUS recommended refinements to the procedures based on these agencies' experience with the approach.¹⁰⁴ For example, ACUS said that agencies sponsoring the effort should take part in the negotiations, and pointed out that negotiated rulemaking could be used at several stages of the rulemaking process.

Congressional Action. The Negotiated Rulemaking Act of 1990 (5 U.S.C. §§ 561-570), as amended and permanently authorized in 1996 by the Administrative Dispute Resolution Act of 1996 (110 Stat. 2870, 3873), essentially enacted the ACUS recommendations, establishing basic statutory authority and requirements for the use of the approach while giving agencies wide latitude in its implementation. The Act supplements (but does not supplant) APA

¹⁰¹5 U.S.C. §§ 561-570; *see also* Administrative Conference of the United States, *Procedures for Negotiating Proposed Regulations*, Conference Recommendation 82-4 (1982); Conference Recommendation 85-5 (1985).

¹⁰²Philip J. Harter, *Negotiated Regulations: A Cure for Malaise*, 71 *Georgetown L. J.* 1 (1982).

¹⁰³ACUS Recommendation 82-4, *supra* note 101. The Administrative Conference was established in 1968 to provide advice regarding procedural improvements in federal programs, and was eliminated by Congress in 1995.

¹⁰⁴ACUS Recommendation 85-5, *supra* note 101.

rulemaking procedures, and establishes a framework by which agencies are encouraged (but not required) to use negotiated rulemaking to develop proposed rules. The Act established public notice requirements and procedures by which affected parties can petition for inclusion in the process, and clarified that agencies must generally comply with the Federal Advisory Committee Act in establishing and administering the negotiating committee.¹⁰⁵ The negotiated rulemaking committee, composed of representatives of the agency and from the various non-federal interests that would be affected by the proposed regulation, addresses areas of concern in the hope that it can reach agreement on the contents of a proposed regulation. The agency can, if it agrees, then issue the agreement as a proposed rule, and eventually as a final rule, under existing APA procedures. The expectation is that any rule drafted through negotiated rulemaking would be easier to implement and less likely to be the subject of subsequent litigation.¹⁰⁶

Presidential Action. In September 1993, the Clinton Administration's National Performance Review (NPR) recommended (among other things) that federal agencies increase their use of negotiated rulemaking.¹⁰⁷ That same month, President Clinton issued Executive Order 12866, which, in part, directed federal agencies to "explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."¹⁰⁸ President Clinton also issued a separate memorandum in September 1993 directing each agency to identify at least one rulemaking for which the agency would use negotiated rulemaking during 1994, or to explain why the use of the approach was not feasible.¹⁰⁹

In May 1998, President Clinton issued another memorandum to the heads of executive branch departments and agencies intended to promote greater use of negotiated rulemaking.¹¹⁰ Specifically, he designated the Regulatory Working Group (which had been established by Executive Order 12866 and was composed of the heads of agencies with significant domestic regulatory responsibilities) as an interagency committee to "facilitate and encourage agency use of negotiated rulemaking."

¹⁰⁵The Federal Advisory Committee Act, 5 U.S.C. App. 2 (2000), regulates the formation and operation of advisory committees used by federal agencies that are not entirely composed of full-time federal employees.

¹⁰⁶Another process for early stakeholder involvement in rulemaking was established by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 5 U.S.C. § 609. The act required the Environmental Protection Agency and the Occupational Safety and Health Administration to convene a small business advocacy review panel before publishing any proposed rule that they determine may have a significant economic impact on a substantial number of small entities. Although the panels are required to be composed of federal employees, the panel must collect the advice and recommendations of representatives of affected small entities.

¹⁰⁷Vice President Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less* (Sept. 1993), recommendation REG03.

¹⁰⁸Exec. Order No. 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993). The order was issued on Sept. 30, 1993.

¹⁰⁹U.S. President (Clinton), "Negotiated Rulemaking," Sept. 30, 1993.

¹¹⁰U.S. President (Clinton), "Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking," May 1, 1998.

The Negotiated Rulemaking Process. The Negotiated Rulemaking Act permits agencies to establish a negotiated rulemaking committee if the head of the agency determines that doing so is “in the public interest.” In making that determination, the Act says the head of the agency must consider whether: (1) a rule is needed, (2) there are a limited number of identifiable interests that will be significantly affected by the rule, (3) there is a “reasonable likelihood” that a balanced committee can be convened that will adequately represent those identifiable interests and is willing to negotiate in good faith to reach consensus on a proposed rule, (4) there is a “reasonable likelihood” that the committee will reach a consensus on the proposed rule within a fixed period of time, (5) the negotiated rulemaking process will not delay the issuance of the proposed or final rule, (6) the agency has adequate resources that it is willing to commit to the committee, and (7) the agency will use the committee’s consensus as the basis of the proposed rule “to the maximum extent possible consistent with the legal obligations of the agency.” The Act also specifically permits the use of conveners to help the agency identify affected parties and to determine whether a committee should be established.

If the agency decides to establish a negotiated rulemaking committee, the Act requires the agency to publish a notice in the Federal Register (and, as appropriate, relevant trade or other specialized publications) containing (among other things) a description of the subject and scope of the rule, a list of affected interests, a list of those proposed to represent those interests and the agency, and a solicitation for comments.¹¹¹ The comment period must be for at least 30 calendar days. Membership on the committee is limited to 25 members (including at least one from the sponsoring agency), unless the agency head determines that more members are needed. The agency can select (subject to the approval of the committee by consensus) an impartial “facilitator” to chair meetings and oversee the administration of the committee. The facilitator does not have to be a federal employee, but agencies are required to determine whether a person under consideration to be a convener or a facilitator has any financial or other conflict of interest.

Any agreement on a negotiated rule must be unanimous, unless the negotiated rulemaking committee agrees to other conditions. If the committee reaches consensus, it must submit a report to the sponsoring agency containing the proposed rule and any other information it deems appropriate. Any proposal agreed to by the committee, however, is not binding on the agency or other parties; the agency may decide not to issue a proposed rule at all or not as designed by the committee, and interest groups represented on the committee may oppose the rule that they helped craft.¹¹²

The committee terminates not later than promulgation of the final rule. An agency may pay reasonable travel and *per diem* expenses, and reasonable compensation to negotiating committee members under certain conditions. Agency procedural actions related to establishing, assisting, or terminating the committee are not subject to judicial review, but any judicial review available regarding the rule resulting from negotiated rulemaking is unaffected.

Congressional Mandates to Negotiate. Although the Negotiated Rulemaking Act

¹¹¹ If the agency subsequently decides not to establish a negotiated rulemaking committee, the agency is required to publish another notice in the Federal Register explaining why it decided not to go forward. A copy of the notice must be sent to each person who applied for or nominated another person for membership on the committee.

¹¹² See *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996).

gives agencies substantial discretion as to whether the approach should be employed in rulemaking, Congress has sometimes mandated its use by rulemaking agencies and established specific procedures and time frames to follow. For example:

- Section 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108-458) required the Secretary of Transportation to use negotiated rulemaking in developing regulations establishing minimum standards for drivers licenses or personal identification cards.
- Section 222 of the “Consolidated Appropriations Act, 2004” (Pub. L. 108-199) required the Secretary of Housing and Urban Development to “conduct negotiated rulemaking with representatives from interested parties for purposes of any changes to the formula governing the Public Housing Operating Fund.”
- Section 1901(b)(3)(A) of the No Child Left Behind Act (Pub. L. 107-110) required the Secretary of Education to “establish a negotiated rulemaking process on, at a minimum, standards and assessments.” The section went on to stipulate that those involved in the process should be selected from among those that provided advice and recommendations on how the title should be carried out, and said that the process should follow the process outlined in the Negotiated Rulemaking Act (except that it should not be subject to the Federal Advisory Committee Act).
- Section 1125(a)(5) of the No Child Left Behind Act required the Secretary of Education to establish a negotiated rulemaking committee to prepare, for schools funded by the Bureau of Indian Affairs, a catalog of the condition of school facilities, a school replacement and new construction report, and a renovation repairs report. The Act specified the contents of each report and required that it be submitted to particular Congressional committees within 24 months.
- Section 106(b)(2) of the Native American Housing Assistance and Self-Determination Act of 1996 (Pub. L. 104-330) required that all regulations under the Act must be issued according to negotiated rulemaking procedures, and required that the negotiating committee be composed only of representatives of the federal government and “geographically diverse small, medium, and large Indian tribes.” Section 6 of the Native American Housing Assistance and Self-Determination Reauthorization Act of 2002 (Pub. L. 107-292) required negotiated rulemaking for any rules issued pursuant to amendments to the original Act.
- Section 490D(b)(3) of the Higher Education Amendments of 1998 (Pub. L. 105-244) required that negotiated rulemaking must be used for all subsequent regulations pertaining to the Act’s title on student assistance “unless the Secretary determines that applying such a requirement with respect to given regulations is impracticable, unnecessary, or contrary to the public interest.” The Secretary is required to publish such a determination in the Federal Register at the same time as the proposed rule.

Evaluations of Negotiated Rulemaking. According to ACUS and other advocates of the approach, negotiated rulemaking can have a number of beneficial effects, including the

following:

- reduced time, money and effort expended on developing and enforcing rules,
- earlier implementation of associated rules,
- better agency understanding of regulated parties' concerns,
- greater understanding by regulated parties of their responsibilities and higher compliance rates,
- more creative and effective regulatory solutions,
- less litigation associated with the rule, and
- more cooperative relationships between the agency and other parties.

ACUS and others have also identified a number of disadvantages of negotiated rulemaking.

- ACUS noted that the approach can be more resource-intensive than traditional rulemaking, at least in the short term, and does not work when the number of affected interests is too large (e.g., more than 25 negotiators).
- One author said that the approach has been used only rarely (reportedly for less than one-tenth of 1% of all rules), and he said only a few of those rules were considered “major” or “significant.”¹¹³ The author noted that the Negotiated Rulemaking Act instructs agencies to select rules based on their likelihood of consensus, not their importance.
- Another author said that negotiated rulemaking has been used sparingly “for the good reason that it represents a corporatist abdication of public authority to private interests,” and that even when used it only results in a proposed rule that is subject to the same procedural requirements as rules developed conventionally.¹¹⁴
- Another commandeer asserted that negotiated rulemaking does not work when developing regulations based on broad statutes, and may “inadvertently perpetuate the problem (of statutory vagueness) by facilitating efforts to shift blame for controversial public policies from legislators to bureaucrats.”¹¹⁵

¹¹³Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in Eric Orts & Kurt Deketelaere, eds., *Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe* (Kluwer Law International, 2001), at 93-113.

¹¹⁴William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 *Public Administration Rev.* Jan./Feb. 2004, at 66-80.

¹¹⁵Juliet A. Williams, *The Delegation Dilemma: Negotiated Rulemaking in Perspective*, 17 *Policy Studies Rev.*, Spring 2000, at 125-146.

- Yet another study concluded that “the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law — an agency’s pursuit of the public interest through law and reasoned decisionmaking. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law.”¹¹⁶

Nevertheless, a number of observers continue to view negotiated rulemaking favorably, with one regulatory expert describing it as offering the public “the most direct and influential role in rulemaking of any reform of the process ever devised.”¹¹⁷

Empirical Analyses. Studies of how negotiated rulemaking works in practice have reached substantially different conclusions about its effects and prospects.

- In 1990, eight agencies that had convened negotiation committees reportedly told ACUS that even though full consensus was not always possible, the information developed through the process contributed substantially to the rule that was produced.¹¹⁸
- A 1992 study of four EPA negotiated rulemaking efforts indicated that the approach reduced the time needed to develop rules (particularly during the period between proposed and final rulemaking).¹¹⁹ Another study five years later examining more EPA negotiations, however, reached the opposite conclusion. It found that conventional rules and negotiated rules took about the same amount of time and that negotiated rules were more likely to be challenged in court.¹²⁰ Similarly, a 1999 study also concluded that negotiated rulemaking had “no discernible effect” on the amount of time between proposed and final rulemaking.¹²¹
- Another study indicated that negotiated rulemaking can improve participants’ perception of the final rule and of the overall rulemaking process.¹²² Participants

¹¹⁶William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 Duke L.J. 1351, 1356 (1997).

¹¹⁷Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy* 179 (2nd ed., Washington: CQ Press, 1999).

¹¹⁸David Pritzer & Deborah Dalton, eds., *Negotiated Rulemaking Sourcebook* 327-44 (Washington: Administrative Conference of the United States 1990).

¹¹⁹Cornelius Kerwin & Scott Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. of Public Administration Research and Theory, at 113-138 (1992).

¹²⁰Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255, 1349 (1997).

¹²¹Steven J. Balla & John R. Wright, *Consensual Rulemaking and the Time it Takes to Develop Rules*, presented at the Fifth National Public Management Research Conference, College Station, TX, Dec. 3-4, 1999.

¹²²Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation versus Conventional Rulemaking: Claims, Counterclaims, and Empirical Evidence*, 10 J. of Public Administration (continued...)

in negotiated rulemaking were reportedly more pleased with the quality of the information the process generated than those who filed comments on conventional rules, and more likely to view their participation as having an effect on the final rule. The study also indicated, however, that negotiated rulemaking imposes substantial costs on participants, who are required to attend multiple meetings and interact with other stakeholders for long periods of time.

Substantial disagreements exist regarding how the effectiveness of negotiated rulemaking should be measured (e.g., timeliness and the amount of litigation).¹²³ Most researchers agree, however, that the approach is not appropriate for all rules, and that more research is needed to determine its effects on rules, the rulemaking process, and participants in that process.

Electronic Rulemaking

Another significant development in the context of public participation has been the increased use of electronic technology by federal agencies in the rulemaking process. In particular, agencies have introduced a number of initiatives to use information technology (IT) in their rulemaking and other regulatory processes. The impetus for some of these efforts were Congressional or Presidential directives to better utilize IT in a range of administrative areas, but many were started at the initiative of career officials involved in the rulemaking process.

Presidential Initiatives. In its September 1993 report, the National Performance Review recommended increased use of information technology to increase opportunities for early, frequent, and interactive public participation in the rulemaking process. Shortly thereafter, an interagency Regulatory Working Group (established by Executive Order 12866) created a subgroup on information technology and rulemaking. By December 1994, several agencies (including the Nuclear Regulatory Commission and the Department of Agriculture's Animal and Plant Health Inspection Service) were accepting comments on proposed rules through electronic bulletin boards. For example, the Department of Labor (DOL) used electronic bulletin boards to support a negotiated regulatory process developing rules to protect workers building steel structures.

In the next several years, many federal agencies used IT in the rulemaking process to varying degrees. Many of these efforts centered on the facilitation of public participation in rulemaking. Most notably, the Department of Transportation developed its "Docket Management System," an electronic, image-based database covering every agency and every rulemaking within the Department. The system permitted electronic comments and access to regulatory supporting materials (e.g., economic analyses, comments of others) for all rules. Other agencies' IT initiatives focused on alternative aspects of regulatory management (e.g., compliance assistance, information collection and dissemination, and regulatory enforcement). For example, DOL developed a sophisticated set of interactive advisors on the Internet to help workers and

¹²²(...continued)

Research and Theory, at 599-632 (2000); see also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. Envtl. L.J. 60, 151 (2000).

¹²³Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. Envtl. L.J. 32, 59 (2000); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. Envtl. L.J. 386, 447 (2001).

small businesses understand their rights and responsibilities under federal employment laws and regulations.

In July 2001, President Bush identified the expansion of e-government as one of the five priorities of his management agenda. To support this priority, OMB developed an implementation strategy that identified 24 e-government initiatives, one of which was e-rulemaking. This initiative is intended to provide a single portal for businesses and citizens to access the federal rulemaking process and comment on proposed rules. In May 2002, the Director of OMB sent a memorandum to the heads of executive departments and agencies advising them of “our intention to consolidate redundant IT systems relating to the President's on-line rulemaking initiative,” and indicated that consolidation of those systems could save millions of dollars. In late 2002, EPA was named lead agency for the e-rulemaking initiative. In January 2003, the Bush Administration launched the "Regulations.gov" website as the first module of its e-rulemaking initiative. The website permits the public to identify proposed rules that are open for comment government-wide, and permits the public to comment electronically on those rules. Although OMB indicated in March 2004 that Regulations.gov was being accessed by the public more than 15,000 times per month (e.g., to locate rules open for comment), other data indicated that fewer than 50 electronic comments per month were received from the public via the website in its first 10 months of operation. The second module of the e-rulemaking initiative is intended to create one or more electronic dockets for proposed and final rules, thereby allowing the public to access regulatory supporting materials and the comments of others from one website.

Congressional Initiatives. Congress has also taken numerous steps in recent years to encourage federal agencies to use IT in carrying out their missions. Some of these efforts have been specifically directed at the regulatory process, while others had an indirect effect on that process. For example, in 1998, Congress enacted the Government Paperwork Elimination Act (GPEA) (44 U.S.C. § 3504 note), which required that, by October 21, 2003, Federal agencies provide the public, when practicable, with the option of submitting, maintaining, and disclosing information electronically, instead of on paper. GPEA makes OMB responsible for ensuring that federal agencies meet the Act's implementation deadline. Although the act did not specifically mention rulemaking, both OMB and rulemaking agencies have indicated that its requirements provided an impetus for developing IT-based approaches to regulatory management.

The E-Government Act of 2002 (44 U.S.C.A. 3601 note) has been described as “the most far-reaching federal government effort to date for promoting online public involvement,” and contains requirements specific to rulemaking. Section 206 of the Act requires agencies, to the extent practicable, to accept public comments on proposed rules “by electronic means.” That section also requires agencies (again, to the extent practicable) to ensure that a publicly accessible federal website contains “electronic dockets” for their proposed rules containing all comments submitted on the rules as well as “other materials that by agency rule or practice are included in the rulemaking docket under (the APA), whether or not submitted electronically.” The E-Government Act also requires agencies to conduct a “privacy impact assessment” before initiating a new collection of information that uses information technology and contains individually identifying information. In addition, the Act established an Office of Electronic Government within OMB, headed by an Administrator appointed by the President. It requires the Administrator of that office to work with the Administrator of OIRA in establishing the strategic direction of the e-government program, and to oversee its implementation.

Assessment of E-Rulemaking. On December 5, 2005, the CAL Subcommittee sponsored a symposium, chaired by Professor Cary Coglianese of the University of Pennsylvania Law School, on “E-Rulemaking in the 21st Century” as part of the Project. This symposium brought together legislative and executive branch personnel, academic researchers, and non-governmental representatives for an in-depth discussion on e-rulemaking and the manner in which advances in information technology may impact the future of administrative rulemaking.

The symposium began by tracing the progress that has been made to date on the use of IT in the rulemaking process, as well as by noting the goals identified by Congress and the Executive Branch in their respective efforts to facilitate electronic rulemaking. While the participants at the symposium expressed broad support for expanding public participation and improving the substance of regulations through vehicles such as e-rulemaking initiatives, some participants voiced concerns that these two goals are not inherently compatible. In particular, it was suggested that while a certain level of public participation is essential in the rulemaking process, expansive participation does not ensure more effective regulation. As noted at the symposium, the potential for e-rulemaking to facilitate significant increases in the number of comments on a rule could lead to a dynamic where additional comments yield diminishing returns in relation to the increased burden on agencies to assess such comments. Furthermore, some participants suggested that increased participation could theoretically have a negative impact on agencies’ sound decisionmaking to the extent that an increased emphasis on public comments might deter an agency from giving appropriate weight to the value of expert judgment on complex regulatory matters.

Relatedly, other participants noted that an increase in public comments and the degree of consideration given thereto does not necessarily lead to the conclusion that the legitimacy of agency rulemaking efforts will be enhanced. A key aspect of this concern centers on the fact the possibility that even with advances in information technology, individuals and groups that file comments may not be representative of the general public. Some participants voiced the further concern that opposing interest groups could exploit the facilitative aspects of e-rulemaking to flood agencies with pre-formulate messages and thereby skew the utility and representativeness of any comments received.

In testimony presented before the Subcommittee on July 26, 2006, Professor Coglianese commented on the status of empirical research on e-rulemaking and noted that empirical data that has been obtained to date does not appear to support the initial expectation that advances in this context would facilitate a significant increase in public participation. Nonetheless, technological improvements may ultimately provide substantial benefits in this regard. Professor Coglianese also observed that ancillary benefits of e-rulemaking, such as increased transparency, enhanced ability for executive or Congressional oversight, administrative cost reduction, and greater ease of compliance provide additional justifications for continued efforts to improve agency utilization of electronic technology in rulemaking.

Areas for Additional Research

- Should efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., negotiated rulemaking, SBREFA panels) be expanded? How much do these processes currently add in terms of public participation?
- How effective is the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in identifying future rulemaking (thereby giving the public advance

warning of forthcoming regulatory actions)? What changes could make this *Agenda* a more effective means of notification?

- What has been the impact of agencies' use of "nonrulemaking" approaches (e.g., guidance documents, notices, etc.) and attenuated rulemaking approaches (e.g., use of the APA's "good cause exception to skip notices of proposed rulemaking) on the public's opportunities for participation? Should the public be able to comment on those approaches before they become final?
- Should all agencies be required to make comments received immediately available to the public (to allow comments on the comments)? Or, alternatively, should agencies provide "reply comment periods" (to discourage waiting to the end of the comment period)?
- What effect has "e-rulemaking" (including the use of e-mail comments and "comments on comments," on-line dialogues, the new Regulations.gov web site, agency-specific and the new governmentwide electronic dockets) had on the amount and nature of public participation in the rulemaking process, and how do agencies view those comments? Specifically:
 - How should agencies deal with the sometimes hundreds-of-thousands of e-mail comments generated by special interest groups?
 - Should all agencies be required to offer "list serves" that allow members of the public to be notified of certain rules being available for comment?
 - Has e-rulemaking allowed more people to participate in the rulemaking process, or simply facilitated access to traditional commenters?
- The APA does not specify how long public comment periods should be (although Executive Order 12866 suggests 60 days). Should there be a minimum comment period specified in the statute? If so, what should it be? Also, under what circumstances can/should agencies extend comment periods?
- Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments become too "stale" to permit issuance of a rule based on those comments (without further public comments)?
- There are no governmentwide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? Should there be such standards? If so, who should establish them (OMB, National Archive and Records Administration, or some other entity)?

- Under what circumstances is it appropriate for agencies to allow commenters to file confidential comments? How should this procedure be regularized?
- The APA prohibits *ex parte* contacts in formal rulemaking, but is silent about such contacts in the much more common informal “notice and comment” rulemaking. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?
- The APA does not mention two relatively common forms of rulemaking that avoid traditional notice and comment requirements — interim final rulemaking and direct final rulemaking. Should Congress codify these forms of rulemaking and how they should (and should not) be used? More generally, should Congress revisit agencies’ use of all forms of the “good cause” exception?
- Some of the statutory analytical requirements in rulemaking (e.g., the Regulatory Flexibility Act and the Unfunded Mandates Reform Act) do not apply to rules for which there is no NPRM. Should these incentives for agencies to avoid NPRMs be eliminated? At a minimum, should the exemptions for interim final and direct final rules be eliminated?
- OMB’s new peer review bulletin allows agencies to decide whether to permit public comment on their peer review processes. Should agencies have that discretion, should agencies be required to permit public comments, or should public comments on what is supposed to be an “expert” process not be permitted (because, among other things, it could slow down rulemaking)?
- To what extent does public participation in its various forms (e.g., comment periods, public meetings, SBREFA panels, etc.) have an effect on agency decisionmaking during the rulemaking process? What empirical evidence is there of that effect?
- What is the proper role of consultants in the development stage of a rulemaking? Should there be a balance of views of competing stakeholders in the pre-NPRM period? Should agencies be required to invite competing views to ensure “balance”?
- Do consent decrees entered into by government agencies with private parties to settle challenges to rules and that effect substantive changes in the rules undermine the APA’s notice and comment requirements and public participation opportunities? Do they raise separation of powers issues?

II. Presidential Review of Rules

The Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) reviews hundreds of significant proposed and final rules from all federal agencies (other than independent regulatory agencies) before they are published in the Federal Register. As a result of OIRA's review, many draft rules are changed before publication, withdrawn before a review is completed, or returned to the agencies because, in OIRA's analysis, certain aspects of the rule need to be reconsidered.

OIRA has been reviewing agencies' draft rules for more than 25 years, and those reviews have become an established and important part of the federal rulemaking process. While OIRA reviews clearly have an analytical component (e.g., ensuring compliance with legal and procedural requirements and conformance with principles of economic analysis), they are also a way to ensure that the agencies' regulatory programs are consistent with administration priorities. Although created by Congress, OIRA is located within the Executive Office of the President, and the President is OIRA's chief client. Because it represents the President and because it reviews hundreds of significant rules each year from dozens of federal agencies, OIRA can have a major influence on the direction of a wide range of public policies.

Presidential Review of Rules in the 1970s

Some form of centralized review of agencies' regulations within the Executive Office of the President has been part of the rulemaking process since the early 1970s. For example:

- In 1971, President Nixon established a "Quality of Life Review" program in which executive departments and independent agencies submitted all "significant" draft proposed and final rules pertaining to "environmental quality, consumer protection, and occupational and public health and safety" to OMB, which then circulated them to other agencies for comment.¹²⁴ In their submissions, agencies were to provide a summary of their proposals, including their principal objectives, the alternatives that they considered, and a comparison of the expected benefits and cost of those alternatives. Agencies were also required to submit a schedule showing estimated dates of proposed and final significant rules.
- In 1974, President Ford issued Executive Order 11821, which required agencies to prepare an "inflation impact statement" for each "major" proposed rule.¹²⁵ The statement was a certification that the inflationary impact of the rule had been evaluated in accordance with criteria and procedures developed by OMB. The executive order directed OMB to develop criteria for the identification of major rules that may have a significant impact on inflation, but specified that the office must consider costs, effects on productivity, effects on competition, and effects

¹²⁴This requirement was formally established through an October 1971 memorandum from then-OMB Director George Schultz. According to some observers, the requirements were routinely imposed only on the Environmental Protection Agency.

¹²⁵Exec. Order 11,821, *Inflation Impact Statements*, 39 Fed. Reg. 41,501 (Nov. 29, 1974). The order also required such statements for agency-proposed major legislation.

on supplies of important products and services. Before a major rule was published in the Federal Register, the issuing agency was required to submit the associated impact statement to the Council on Wage and Price Stability (CWPS). CWPS would then either provide comments directly to the agency or participate in the regular rulemaking comment process.

- In 1978, President Carter issued Executive Order 12044, which (among other things) required agencies to publish semiannual agendas of any significant rules under development or review, and to prepare a regulatory analysis for at least all rules with a \$100 million impact on the economy.¹²⁶ The analysis was to contain a succinct statement of the problem, a description of the alternative approaches considered, and the “economic consequences” of those alternatives. OMB was instructed to “assure the effective implementation of this Order,” but was not given specific review responsibilities. President Carter also established: (1) a “Regulatory Analysis Review Group” (RARG) to review the analyses prepared for certain major rules and to submit comments during the comment period, and (2) a “Regulatory Council” to coordinate agencies’ actions to avoid conflicting requirements and duplication of effort.

Creation of OIRA

Although OIRA is now often first thought of for its regulatory review responsibilities, its initial review responsibilities did not include the substance of agencies’ rules. OIRA was created within OMB by section 3503 of the Paperwork Reduction Act of 1980 (PRA) (44 U.S.C. Chapter 35).¹²⁷ The PRA provided that OIRA would be headed by an administrator, and designated the OIRA administrator as the “principal advisor to the Director on Federal information policy.” The Act also said that the Director of OMB “shall delegate to the [OIRA] Administrator the authority to administer all functions under this chapter.” Specific areas of responsibility in the PRA that were assigned to the Director (and later delegated to OIRA) included information policy, information collection request clearance and paperwork control, statistical policy and coordination, records management, privacy, and automatic data processing and telecommunications.¹²⁸ With regard to paperwork reduction, the Act generally prohibited agencies from conducting or sponsoring a collection of information until they had submitted their proposed information collection requests to OIRA and the office had approved those requests. The PRA’s requirements cover rules issued by virtually all agencies, including Cabinet departments, independent agencies, and independent regulatory agencies and commissions.¹²⁹

¹²⁶Exec. Order 12,044, *Improving Government Regulations*, 43 Fed. Reg. 12,661 (Mar. 24, 1978).

¹²⁷For a discussion of the PRA, see Harold Relyea, *Paperwork Reduction Act Reauthorization and Government Information Management Issues*, CRS Report RL30590.

¹²⁸The PRA was later amended in 1986 and again in 1995, and the list of OIRA’s duties changed somewhat. For example, the 1986 amendments sharpened the management focus of the Act and changed “information policy” to “information resources management.” As discussed later in this Report, the 1986 amendment also required the administrator of OIRA to be appointed by the President, subject to advice and consent of the Senate.

¹²⁹As used herein the term “independent regulatory agencies” refers to agencies established to
(continued...)

Although the PRA gave OIRA substantive responsibilities in many areas, the bulk of the office's day-to-day activities under the Act were initially focused on reviewing and approving agencies' proposed information collection requests. OIRA had 77 staff members when the PRA took effect in 1981, of which about half were involved in reviewing agencies' information collection requests. That year, OIRA took nearly 5,000 paperwork review actions — approving new and revised collections, extending existing collections, and reinstating expired collections. The office's paperwork clearance workload since then has generally been between 4,000 and 6,000 actions each year, although the number of OIRA staff overall and those reviewing proposed collections has declined substantially.¹³⁰ Although many federal regulations have an information collection component, the PRA did not authorize OIRA to review or comment on the non-paperwork elements of those regulations, or on regulations without an information collection component.¹³¹

Reagan Executive Orders on Regulatory Review

In 1980, President Reagan was elected on a platform critical of government's role in society in general and of federal regulations in particular. Shortly after taking office, he established a "Presidential Task Force on Regulatory Relief," headed by Vice President George H. W. Bush and composed of Cabinet officers (although the bulk of the task force's work was reportedly performed by OMB staff). The task force's responsibilities included: (1) monitoring the establishment of OMB's responsibility to coordinate and review new rules, (2) developing legislative changes to regulatory statutes, and (3) revising existing regulations. In relation to this last responsibility, the task force ultimately identified a total of 119 rules for alteration or cancellation by the issuing agencies, nearly half of which had been issued by the Department of Transportation or the Environmental Protection Agency. Although the task force said that implementation of the changes it recommended would save more than \$150 billion over the next 10 years, critics charged that this estimate ignored the benefits associated with the rules on what they referred to as the administration's regulatory "hit list." The task force's legislative efforts were less successful, failing to get Congress to enact revisions to clean air and water laws or to

¹²⁹(...continued)

be independent of the President, including the Federal Communications Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission. The term "independent agencies" refers to agencies that are independent of Cabinet departments but not independent regulatory agencies (e.g., the Environmental Protection Agency and the Office of Personnel Management).

¹³⁰For example, by 1989, OIRA's overall staffing had declined to fewer than 60 employees, of whom OIRA estimated 35 were reviewing information collection requests. By 1997, OIRA staffing declined 48 employees, of whom 22 were reviewing paperwork requests. See U.S. General Accounting Office, *Regulatory Management: Implementation of Selected OMB Responsibilities Under the Paperwork Reduction Act*, GAO/GGD-98-120, July 9, 1998.

¹³¹In some cases, though, the paperwork requirement may be the essence of the regulation. For example, EPA's Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses in order to inform the public about chemical hazards in their communities.

enact broad regulatory reform legislation that would have limited agencies' rulemaking powers.¹³²

In February 1981 — less than one month after taking office — President Reagan issued Executive Order 12291¹³³ on “Federal Regulation,” which greatly increased both the scope and importance of OIRA's responsibilities.¹³⁴ Specifically, the executive order generally required covered agencies (Cabinet departments and independent agencies, but not independent regulatory agencies) to:

- refrain from taking regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society,” identify regulatory objectives to maximize net benefits to society, and select the regulatory alternative that involves the least net cost to society;
- prepare a “regulatory impact analysis” for each “major” rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of \$100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a description of alternative approaches that could achieve the regulatory goal at lower cost (and why they were not selected), and a determination of the net benefits of the rule. The issuing agency was to make the initial determination of whether a rule was “major,” but the executive order gave OMB the authority to require a rule to be considered major; and
- send a copy of each draft proposed and final rule to OMB before publication in the Federal Register. The order authorized OMB to review “any preliminary or final regulatory impact analysis, notice of proposed rulemaking, or final rule based on the requirements of this Order.” Non-major rules were required to be submitted to OMB at least 10 days before publication, but major rules had to be submitted as much as 60 days in advance.

Executive Order 12291 authorized the director of OMB to review any draft proposed or final rule or regulatory impact analysis “based on the requirements of this Order.” The executive order indicated that the review should be completed within 60 days, but allowed the director to extend that period whenever necessary. It also authorized the director to exempt classes of regulations from any or all of the order's requirements,¹³⁵ and generally required agencies to

¹³²The task force was disbanded in August 1983 after issuing a final report.

¹³³Exec. Order 12,291, *Federal Regulation*, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

¹³⁴For a description of the effects of this order, see Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291*, 4 Va. J. Nat. Resources L. 1 (1984).

¹³⁵The exemptions that OMB granted fell into four broad categories: (1) rules that were essentially nonregulatory in nature, (2) rules that delegated regulatory authority to the States, (3) rules that generally affected individual entities and that did not involve broader policy issues, and (4) rules for which a delay of even a few days could have imposed substantial costs and that were unlikely to involve significant policy issues. OMB granted about 30 exemptions, most of which
(continued...)

“refrain” from publishing any final rules until they had responded to OMB’s comments. The executive order made OMB’s authority to review agencies’ draft rules subject to the overall direction of the Presidential task force on regulatory relief.¹³⁶

Although the executive order did not specifically mention OIRA, shortly after its issuance the Reagan Administration decided to integrate OMB’s regulatory review responsibilities under the executive order with the responsibilities given to OMB (and ultimately to OIRA) by the PRA. As a result, OIRA’s responsibilities for substantive review of rules under the executive order were added to the office’s substantial responsibilities under the PRA. In 1981, OIRA reviewed the substance of nearly 2,800 rules under Executive Order 12291 in addition to the nearly 5,000 paperwork review actions it took that year.

In 1985, President Reagan extended OIRA’s influence over rulemaking even further by issuing Executive Order 12498, which required Cabinet department and independent agencies (but not independent regulatory agencies) to submit a “regulatory program” to OMB for review each year that covered all of their significant regulatory actions underway or planned.¹³⁷ Previously, Executive Order 12291 required each of those agencies to publish semiannual “regulatory agendas” of proposed regulations that the agency “has issued or expects to issue,” and any existing rule that was under review.¹³⁸ These agendas were required to contain a schedule for completing action on any major rule for which the agency had published a notice of proposed rulemaking. The new executive order went further, saying that, except in “unusual circumstances,” OMB could return any rule submitted for review under Executive Order 12291 to the issuing agency for “reconsideration” if it was not in the agency’s regulatory program for that year, or was “materially different” from what was described in the program.

In other words, OIRA could return a draft rule to an issuing agency if the office did not have advance notice of the rule’s submission, even if the rule was otherwise consistent with the requirements in Executive Order 12291.¹³⁹ The regulatory agenda and program requirements in these executive orders also permitted OIRA to become aware of forthcoming agency actions well in advance of the submission of a draft proposed rule, thereby permitting the office to stop or alter an objectionable rule before the rulemaking process developed momentum. Although Reagan Administration officials compared this planning process to the process used to develop the President’s budget, critics noted that the budget process has a final step that the regulatory process lacks, namely, review and approval by Congress.

Executive Order 12291 in Context. In several ways, the analytical and review requirements in Executive Order 12291 were significantly different from previous efforts. For

¹³⁵(...continued)
were established in 1981 or 1982.

¹³⁶Although the task force was chaired by Vice President Bush, the executive director was the administrator of OIRA. Other members included the Director of OMB, the Attorney General, and the Secretaries of Commerce, Labor, and the Treasury.

¹³⁷Exec. Order 12,498, *Regulatory Planning Process*, 50 Fed. Reg. 1036 (Jan. 8, 1985).

¹³⁸As is touched upon later, President Carter first required the use of these agendas in 1978.

¹³⁹An OIRA representative said that although the office had this authority it never used it, noting that would have been difficult to defend the return of an agency’s rule for purely procedural reasons.

example, the requirement in the new executive order that agencies choose the least costly approach to a particular regulatory objective went further than the requirement in President Carter's Executive Order 12044, which simply required agencies to analyze and consider alternative regulatory approaches. Also, whereas the regulatory oversight functions were divided among many offices (OMB, CWPS, RARG, and the regulatory council) during the Carter Administration, Executive Order 12291 consolidated these functions within OIRA.¹⁴⁰ Another major difference was the amount of influence that OIRA had compared to its predecessors. Under previous executive orders, CWPS and RARG had primarily an advisory role. In contrast, under Executive Order 12291, OIRA could overrule agency determinations regarding whether the rule was "major" (and therefore required a regulatory impact analysis), and could delay the regulation until the agency had adequately responded to its concerns (e.g., if it believed the agency had not considered all reasonable alternatives, that its analysis was not sound, or that it was contrary to administration policy). OIRA's significant influence on rulemaking was underscored by its organizational position within OMB, the agency that reviews and approves the rulemaking agencies' budget requests. Finally, and perhaps most importantly, the nature and transparency of the review process was significantly different under Executive Order 12291. Under the Carter Administration's approach, RARG and CWPS prepared and filed comments on agencies' regulatory proposals during the formal public comment period, *after* they were published in the Federal Register. In the case of RARG filings, a draft of the comments was circulated to all RARG members, and the comments and any dissents were placed on the public record at the close of the comment period. In contrast, OIRA's reviews occurred *before* the rules were published for comment, and Executive Order 12291 did not require that OIRA's comments on the draft rule be disclosed. This pre-publication review process made OIRA's regulatory reviews under Executive Order 12291 qualitatively different than its predecessors.

Early Views Regarding OIRA Reviews. The expansion of OIRA's authority in the rulemaking process via Executive Orders 12291 and 12498 was highly controversial. Although some believed that the authority did not go far enough (e.g., did not cover independent regulatory agencies), most of the concerns were that the expansion had gone too far. For example, a number of the concerns raised by Members of Congress, public interest groups, and others focused on whether OIRA's role violated the constitutional separation of powers and the effect that OIRA's review had on public participation and the timeliness of agencies' rules.¹⁴¹ Some believed that OIRA's new authority displaced the discretionary authority of agency decision makers in violation of Congressional delegations of rulemaking authority, and that the President exceeded his authority in issuing the executive orders. Others indicated that OIRA did not have the technical expertise needed to instruct agencies about the content of their rules. Still other concerns focused on OIRA's ability to carry out its many responsibilities. In 1983, GAO concluded that the expansion of OIRA's responsibilities under Executive Order 12291 had

¹⁴⁰George Eads, *Harnessing Regulation: The Evolving Role of White House Oversight*, 5 Regulation, May/June 1981, at 19-26.

¹⁴¹*Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 97th Cong. (1981); see also Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981).

adversely affected the office's ability to carry out its PRA responsibilities, and recommended that Congress consider amending the Act to prohibit OIRA from carrying out other responsibilities like regulatory review.¹⁴²

Many of the early concerns about OIRA focused on the lack of transparency of the regulatory reviews, and specifically questioned whether OIRA had become a clandestine conduit for outside influence in the rulemaking process. Critics pointed out that in the first few months after the executive order was issued, OIRA met with representatives from dozens of businesses and associations seeking regulatory relief and returned dozens of rules to the agencies for reconsideration.¹⁴³ In response to these concerns, the OMB Director issued a memorandum in June 1981 stating that any factual material provided to OIRA regarding proposed rules should also be sent to the relevant rulemaking agency. The memorandum did not, however, apply to information provided to OIRA orally, and did not require that OIRA's meetings with outside parties be disclosed to the public.

OIRA's role in the rulemaking process remained controversial for the next several years. In 1983, Congress was so dissatisfied with OIRA's performance in the areas of regulatory and paperwork review that it permitted the office's appropriation authority to expire (although the office's statutory authority under the PRA was not affected and it continued to receive an appropriation via OMB).¹⁴⁴ In 1985, five House committee chairmen filed a friend-of-the-court brief in a lawsuit brought against the Department of Labor regarding the department's decision (reportedly at the behest of OMB) not to pursue a proposed standard concerning exposure to ethylene oxide, a sterilizing chemical widely used in hospitals and suspected of causing cancer. The chairmen claimed that OMB's actions represented a usurpation of Congressional authority.

Congress reauthorized OIRA in 1986, but only after making the administrator subject to Senate confirmation. By 1986, Congress began considering legislation to restrict OIRA's regulatory review role and to block OIRA's budget request. In an attempt to head off that legislation, in June 1986 the OIRA administrator issued a memorandum for the heads of departments and agencies subject to Executive Order 12291 describing new OIRA procedures to improve the transparency of the review process. For example, the memorandum said that only the administrator or the deputy administrator could communicate with outside parties regarding rules submitted for review, and that OIRA would make available to the public all written materials received from outside parties. OIRA also said that it would, upon written request after a rule had been published, make available all written correspondence between OIRA and the agency head regarding the draft submitted for review.¹⁴⁵

¹⁴²U.S. General Accounting Office, *Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain*, GAO/GGD-83-35, April 20, 1983.

¹⁴³Letter from James C. Miller III, administrator of OIRA, to the Honorable John D. Dingell, Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, April 28, 1981.

¹⁴⁴OIRA's authorization for appropriation also expired in 2001, and (as of the date of this report) has not been reestablished.

¹⁴⁵For further information on this policy, see Judith Havemann, *No 'Shade-Drawn' Dealings for OMB: Congress Gets Disclosure of Regulation-Review Procedures*, Wash. Post, June 17, 1986, at A21.

In 1987 the National Academy of Public Administration published a report on Presidential management of agency rulemaking that summarized the criticisms of the OIRA review process as well as the positions of its proponents.¹⁴⁶ The report also described a number of issues in regulatory review and offered recommendations for improvement. For example, the report recommended that “regulatory management be accepted as an essential element of presidential management.” It also recommended that regulatory agencies “log, summarize, and include in the rulemaking record all communications from outside parties, OMB, or other executive or legislative branch officials concerning the merits of proposed regulations.”

In 1988, ACUS also examined the issue of Presidential review of agency rulemaking and concluded that the reviews could improve coordination and resolve conflicts among agencies. ACUS also said, though, that Presidential review “does not displace responsibilities placed in the agency by law nor authorize the use of factors not otherwise permitted by law.”¹⁴⁷ The Conference recommended public disclosure of proposed and final agency rules submitted to OIRA under the executive order, communications from OMB relating to the substance of rules, and communications with outside parties, and also recommended that the reviews be completed in a “timely fashion.”¹⁴⁸

OIRA and the George H. W. Bush Administration

President George H. W. Bush continued the implementation of Executive Orders 12291 and 12498 during his administration, but external events significantly affected OIRA’s operation and, more generally, the federal rulemaking process. In 1989, President Bush’s nominee to head OIRA was not confirmed. Later, in response to published accounts that the burden of regulation was once again increasing, President Bush established the President’s “Council on Competitiveness” (also known as the Competitiveness Council) to review regulations issued by agencies. Chaired by Vice President Quayle, the council oversaw and was supported by OIRA, and reviewed particular rules that it believed would have a significant impact on the economy or particular industries. According to OIRA representatives, the council signified continued White House-level interest in the regulatory arena, and also represented a continuation of the type of role played by the Presidential Task Force on Regulatory Relief during the Reagan Administration.

Many of the Competitiveness Council’s actions were highly controversial, with critics assailing both the effects of those actions (e.g., rolling back environmental or other requirements) and the secrecy in which the council acted.¹⁴⁹ The council attempted to maintain strict secrecy regarding both its deliberations and those in the private sector with whom it

¹⁴⁶National Academy of Public Administration, *Presidential Management of Rulemaking in Regulatory Agencies* (Jan. 1987).

¹⁴⁷Administrative Conference of the United States, *Presidential Review of Agency Rulemaking*, Conference Recommendation 88-9 (1988).

¹⁴⁸The National Academy of Public Administration and the American Bar Association have also recognized the potential value of Presidential regulatory review. They also recommended reforms such as improved transparency and better communication between OIRA and agency staff.

¹⁴⁹Christine Triano & Nancy Watzman, *All the Vice President’s Men: How the Quayle Council on Competitiveness Secretly Undermines Health, Safety, and Environmental Programs* (Washington: OMB Watch/Public Citizen, 1991).

communicated or consulted.¹⁵⁰ Critics decried what they believed to be “backdoor rulemaking” by the Competitiveness Council, but the council continued its operations until the end of the Bush Administration in 1993. Meanwhile, OIRA continued its operations under Executive Order 12291, reviewing between 2,100 and 2,500 rules each year from 1989 through 1992.

Regulatory Review Under Executive Order 12866

In September 1993, President Clinton issued Executive Order 12866 on “Regulatory Planning and Review,” which revoked Executive Orders 12291 and 12498 and abolished the Council on Competitiveness.¹⁵¹ Although different from its predecessors in many respects, Executive Order 12866 (which is still in effect) continued the general framework of Presidential review of rulemaking. For example, it requires covered agencies (again, Cabinet departments and independent agencies but not independent regulatory agencies) to submit their proposed and final rules to OMB before publishing them in the Federal Register. The order also requires agencies to prepare cost-benefit analyses for their “economically significant” rules (essentially the same as “major” rules under Executive Order 12291). As discussed in detail below, however, Executive Order 12866 established a somewhat new regulatory philosophy and a new set of rulemaking principles, limited OIRA’s reviews to certain types of rules, and established transparency requirements that included but went beyond those that had been put in place by the administrator’s June 1986 memorandum. Section 2(b) of the order assigns responsibility for review of agency rulemaking to OMB, and specifically names OIRA as “the repository of expertise concerning regulatory issues.” The order also named the Vice President as principal advisor to the President on regulatory policy, planning, and review.¹⁵²

Specific Provisions in the Executive Order. In its statement of regulatory philosophy, Executive Order 12866 says, among other things, that agencies should assess all costs and benefits of available regulatory alternatives, including both quantitative and qualitative measures. It also provides that agencies should select regulatory approaches that maximize net benefits (unless a statute requires another approach). Where permissible and applicable, the order states that agencies should adhere to a set of principles when developing rules, including: (1) consideration of the degree and nature of risk posed when setting regulatory priorities, (2) adoption of regulations only upon a “reasoned determination that the benefits of the intended regulation justify its costs,” and (3) tailoring regulations to impose the least burden on society needed to achieve the regulatory objectives. Some of the stated objectives of the order are “to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public.” According to OIRA representatives, the “primacy” of the agencies provision signaled a significant change in regulatory philosophy, vesting greater control

¹⁵⁰See Bob Woodward & David Broder, *Quayle’s Quest: Curb Rules, Leave No Fingerprints*, Wash. Post, Jan. 9, 1992, at A1.

¹⁵¹Exec. Order 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

¹⁵²Executive Order 13258, issued in February 2002, amended Executive Order 12866 and reassigned all roles originally assigned to the Vice President to the President’s chief of staff. See Exec. Order 13,258, *Amending Executive Order 12866 on Regulatory Planning and Review*, 67 Fed. Reg. 9385 (Feb. 26, 2002).

of the rulemaking process with regulatory agencies and taking away authority from OIRA. Also, the requirement that the benefits of a regulation “justify” its costs was a noticeably lower threshold than the requirement in Executive Order 12291 that the benefits “outweigh” the costs.

Section 6 of Executive Order 12866 established agency and OIRA responsibilities in the centralized review of regulations. In contrast to the broad scope of review under Executive Order 12291, the new order limited OIRA reviews to actions identified by the rulemaking agency or OIRA as “significant” regulatory actions, which are defined in section 2(f) of the order as the following:

Any regulatory action that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

By focusing OIRA’s reviews on significant rules, the number of draft proposed and final rules that OIRA examined fell from between 2,000 and 3,000 per year under the Executive Order 12291 to between 500 and about 700 rules per year under Executive Order 12866.

Executive Order 12866 also differs from its predecessors in other respects. For example, the order generally requires that OIRA complete its review of proposed and final rules within 90 calendar days, and requires both the agencies and OIRA to disclose certain information about how the regulatory reviews were conducted. Specifically, agencies are required to identify for the public: (1) the substantive changes made to rules between the draft submitted to OIRA for review and the action subsequently announced; and (2) changes made at the suggestion or recommendation of OIRA. OIRA is required to provide agencies with a copy of all written communications between OIRA personnel and parties outside of the executive branch, and a list of the dates and names of individuals involved in substantive oral communications. The order also instructs OIRA to maintain a public log of all regulatory actions under review and of all of the above-mentioned documents provided to the agencies.¹⁵³

OIRA’s Formal Review Process. OIRA reviews agencies’ draft rules at both the proposed and final stages of rulemaking.¹⁵⁴ In each phase, the review process starts when the rulemaking agency formally submits a regulatory review package to OIRA consisting of the rule, any supporting materials, and a transmittal form. The OIRA docket librarian then logs the

¹⁵³For a discussion of the differences between the transparency requirements under Executive Order 12291 and Executive Order 12866, see William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 Admin. L. Rev. 611 (2002); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 Ark. L. Rev. 161 (1995).

¹⁵⁴OIRA may also formally or informally review other rulemaking documents before proposed rules (e.g., advance notices of proposed rulemaking).

receipt of the review package and forwards it to the appropriate desk officer. In some cases, agencies withdraw their rules from OIRA during the review period and the rules may or may not be subsequently resubmitted. At the end of the review period, OIRA either returns the draft rule to the agency “for reconsideration” or OIRA concludes that the rule is consistent with the executive order. OIRA codes the rule in its database as “consistent with change” if there had been any changes to the rule, regardless of the source or extent of the change. OIRA codes rules in its database as “consistent with no change” only if they are exactly the same at the end of the review period as the original submission. If the draft rule is a proposed rule and is judged by OIRA to be consistent with the executive order, the agency may then publish a notice of proposed rulemaking in the Federal Register, obtain comments during the specified comment period, review the comments received, and make any changes to the rule that it believes are necessary to respond to those comments. (Executive Order 12866 says that this comment period should, in most cases, be at least 60 days for significant rules reviewed by OIRA.) If the draft is a final rule, the agency may publish the rule after OIRA concludes its review and the rule will generally take effect either at that point or at some later date specified by the agency.

In most of the years since Executive Order 12866 was issued, more than 90% of the rules that OIRA reviewed were coded in the database as either “consistent with change” or “consistent without change.” (See **Table 1**.) Only a small percentage of rules were withdrawn, and even fewer were returned to the agencies. The proportion of rules coded as “changed” has varied somewhat over time, but the last several years of the Clinton Administration (1997 through 2000) were fairly similar to the most recent non-transition years of the George W. Bush Administration (2002 and 2003). The data indicate that there were a relatively large number of rules that were withdrawn and returned in 2001 compared to other years. The withdrawn rules reflect actions taken at the start of the George W. Bush Administration pursuant to a memorandum issued by Assistant to the President and Chief of Staff Andrew H. Card, which generally directed Cabinet departments and independent agencies to: (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the Federal Register, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.¹⁵⁵ As discussed in greater detail later in this report, OIRA returned a number of rules to the agencies for reconsideration shortly after a new administrator was appointed in 2001.

¹⁵⁵ Executive Office of the President, White House Office, “Regulatory Review Plan,” 66 Fed. Reg. 7702, (Jan. 24, 2001), at [http://www.whitehouse.gov/omb/info/eregreview_plan.pdf]. For a discussion of the rules whose effective dates were postponed, see U.S. General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s Jan. 20, 2001, Memorandum*, GAO-02-370R, Feb. 2002.

Table 1: Most Rules That OIRA Reviewed Were Coded in Database as Changed or Not Changed

Year	Percentage of rules OIRA reviewed that were coded:				
	Consistent with change	Consistent without change	Withdrawn	Returned	Other
1994	37.3	53.4	4.3	0.2	4.9
1995	39.0	53.1	5.2	0.5	2.3
1996	51.5	41.4	5.1	0.0	2.0
1997	56.0	37.4	5.1	0.8	0.6
1998	59.3	36.1	3.1	0.0	1.4
1999	62.2	31.5	3.1	0.0	3.2
2000	60.4	34.3	3.9	0.0	1.4
2001	45.6	28.1	22.0	2.6	1.7
2002	54.3	31.7	7.6	0.7	5.6
2003	60.5	30.1	6.9	0.3	2.2
2004	62.7	29.8	6.5	0.2	0.8
2005	65.4	27.0	6.6	0.2	1.0

Source: OIRA.

Note: "Other" includes rules that were sent improperly, emergency rules, and rules with a statutory or judicial deadline. Numbers do not total to 100.0 due to rounding.

The type of review that OIRA conducts under Executive Order 12866 sometimes depends on the type of draft rule submitted. For example, if the draft rule contains a collection of information covered by the PRA, the desk officer would also review it for compliance with that act. If the draft rule is "economically significant" (e.g., has an annual impact on the economy of at least \$100 million), the executive order requires agencies to prepare an economic analysis describing, among other things, the alternatives that the agency considered and the costs and benefits of those alternatives.¹⁵⁶ For those economically significant rules, OIRA desk officers are to review the economic analyses using the office's guidance on how to prepare regulatory analyses under the executive order.¹⁵⁷

An attachment to a September 20, 2001, memorandum to the President's Management Council described the general principles and procedures that OIRA reportedly uses in the

¹⁵⁶Section 3(f) of the executive order also defines an economically significant rule as adversely affecting "in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities."

¹⁵⁷This guidance was issued as OMB Circular A-4 in September 2003. For a copy of this guidance, see [<http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>].

implementation of Executive Order 12866.¹⁵⁸ For example, the attachment indicated that the office would, where appropriate: (1) include an evaluation of whether the agency has conducted an adequate risk assessment, (2) give “a measure of deference” to regulatory impact analyses and other supporting technical documents that have been peer reviewed in accordance with specified procedures, (3) ensure that regulatory clearance packages satisfy the requirements in other executive orders (e.g., include the certifications required by Executive Order 13132 on “Federalism” and Executive Order 13175 on “Consultation and Coordination with Indian and Tribal Governments”), (4) consult with the Small Business Administration (SBA) and the SBA Chief Counsel for Advocacy, and (5) ensure that agencies evaluate the possible impact of the draft rule on the programs of other federal agencies.

There is usually some type of communication during the review process (often via e-mail or telephone) between the OIRA desk officer and the rulemaking agency regarding specific issues in the draft rule. Briefings and meetings are sometimes held between OIRA and the agency during the review process, with OIRA branch chiefs, the deputy administrator, or the administrator involved in some of these meetings. According to OIRA representatives, the desk officers always consult with the resource management officers on the budget side of OMB as part of their reviews, and reviews of draft rules are not completed until those resource management officers sign off. If the draft rule is economically significant, the desk officer would also consult with a government economist to help review the required economic analysis. For other rules, the desk officer might consult with other OIRA staff on issues involving statistics and surveys, information technology and systems, or privacy issues. In certain cases, OIRA may circulate a draft rule to other parts of the Executive Office of the President (e.g., the Office of Science and Technology Policy or the Council on Environmental Quality) or other agencies (e.g. the Departments of Energy, the Interior, or Transportation for certain Environmental Protection Agency rules).

Executive Order 12866 requires OIRA to complete its regulatory reviews within certain time frames: (1) within 10 working days of submission for any preliminary actions prior to a notice of proposed rulemaking (e.g., a notice of inquiry or an advance notice of proposed rulemaking), or (2) within 90 calendar days of submission for all other regulatory actions (or 45 days if OIRA had previously reviewed the material). In some instances, however, agency officials said OIRA will ask the rulemaking agency to withdraw the rule and resubmit it, restarting the review period. The executive order does not permit OIRA to “approve” or “disapprove” a draft rule; it is up to the agency to decide whether to proceed with publication of a rule after it had been returned, or to accept OIRA’s suggested changes. OIRA representatives said it is often an iterative process in which the agencies and OIRA negotiate issues and clarify terms. Nevertheless, agencies very rarely publish rules that OIRA returns or ignore substantive OIRA “suggestions.” In some instances, agency officials will formally or informally appeal OIRA determinations to the White House.

OIRA’s Informal Reviews. For some rules, there is an additional phase of “informal review” before the rule is officially submitted to OIRA. In its December 2001 report on the costs and benefits of federal regulations, OIRA stated that the office’s original review process “was designed as an end-of-the-pipeline check against poorly conceived regulations.”¹⁵⁹ OIRA

¹⁵⁸For a copy of this September 20, 2001 memorandum and the attachment, see [http://www.whitehouse.gov/omb/inforeg/oira_review-process.html].

¹⁵⁹Office of Management and Budget, *Making Sense of Regulation: 2001 Report to Congress on the Cost and* (continued...)

also said, however, that by the time an agency formally submits a rule to OIRA for review there may be “strong institutional momentum” behind the proposal and, as a result, the agency may be reluctant to address certain issues that OIRA analysts might raise. Therefore, OIRA indicated “there is value in promoting a role for OIRA’s analytic perspective earlier in the process, before the agency becomes too entrenched.” OIRA went on to state the following:

A common yet informal practice is for agencies to share preliminary drafts of rules and/or analyses with OIRA desk officers prior to formal decision making at the agency. This practice is useful for agencies since they have the opportunity to educate OIRA desk officers in a more patient way, before the formal 90-day review clock at OMB begins to tick. The practice is also useful for OIRA analysts because they have the opportunity to flag serious problems early enough to facilitate correction before the agency’s position is irreversible.

OIRA cannot informally review each of the hundreds of significant proposed and final rules that are submitted to the office each year. Informal reviews are most common when there is a statutory or legal deadline for a rule or when the rule is extremely large and requires discussion with not only OMB but also other federal agencies. The Environmental Protection Agency (EPA) and the Departments of Agriculture, Health and Human Services, and Transportation often issue those types of rules, and therefore are more likely to have their rules reviewed informally before formal submission.

OIRA has informally reviewed agencies’ draft rules since its review function was established in 1981, but informal reviews reportedly became more common when Executive Order 12866 was adopted in 1993 and OIRA’s reviews were focused on “significant” rules. There have been some indications, though, that OIRA has increased its use of informal reviews even further in recent years. For example, in its March 2002 draft report to Congress on the costs and benefits of federal regulation, OIRA said “agencies are beginning to invite OIRA staff into earlier phases of regulatory development in order to prevent returns late in the rulemaking process. It is at these early stages where OIRA’s analytic approach can most improve on the quality of regulatory analyses and the substance of rules.” Separately, in 2002, the OIRA administrator said “an increasing number of agencies are becoming more receptive to early discussions with OMB, at least on highly significant rulemakings.”¹⁶⁰

The administrator has also indicated that agencies’ “receptivity” to informal reviews may be enhanced by the possibility of a returned rule. For example, in early 2002 he said that OIRA was trying “to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we’re going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us – well, in a sense, they’re rolling the dice.”¹⁶¹

(...continued)

Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities (Dec. 2001).

¹⁶⁰Dr. John D. Graham, remarks prepared for the American Hospital Association, July 17, 2002. Available at [http://www.whitehouse.gov/omb/inforeg/graham_ama071702.html].

¹⁶¹Rebecca Adams, *Regulating the Rulemakers: John Graham at OIRA*, CQ Weekly, Feb. 23, 2002, at 520-526.

Effects of OIRA's Reviews

Although a great deal has been written about OIRA's reviews of agencies' draft rules, few studies have systematically tried to determine the extent to which those reviews result in substantive changes to the rules. One such study (using data prior to the advent of Executive Order 12988) concluded that OIRA's reviews resulted in the rejection of some regulations that would have been economically inefficient, but did not appear to have improved the cost-effectiveness (e.g., costs-per-life saved) of many of the rules.¹⁶² Other studies have used OIRA's database showing the number of rules that were coded as "consistent with change" and "consistent without change" in an attempt to determine the significance of OIRA's effects on agencies' rules and whether those effects have changed over time.¹⁶³ As mentioned previously, however, the "consistent with change" code includes changes made at the initiation of the agencies as well as changes suggested by OIRA. Also, the code does not differentiate between minor editorial changes and changes that radically alter the effect of the rule. "Returns" and "withdrawals" in OIRA's database also need careful interpretation. A return may be for purely administrative reasons, not for substantive OIRA objections. Conversely, a withdrawal of a rule by an agency may have been initiated by OIRA. In order to use these data effectively, researchers should examine the associated documentation in the agencies' and OIRA's rulemaking dockets.

GAO's Analysis of OIRA's Effects. GAO published such an analysis in September 2003, supplementing information from OMB's database with information in the dockets and interviews with agency officials.¹⁶⁴ GAO reported that from July 1, 2001, through June 30, 2002, OIRA completed 642 reviews of agencies' draft proposed and final rules. Of these,

- About 33% (214) were coded in the database as "consistent with no change," indicating that OIRA considered the rules consistent with the executive order as submitted.
- About 50% (322) were coded as "consistent with change," indicating that the rules had changed after being submitted to OIRA, and that OIRA subsequently concluded that the rule was consistent with the executive order's requirements.
- About 8% (50) were coded as "withdrawn" by the agency.
- About 3% (21) were coded as "returned" to the agency by OIRA.
- About 5% (35) had some other disposition (e.g., "sent improperly," "emergency," or "statutory or judicial deadline").

In order to make its review manageable, GAO focused on 85 of those rules that were

¹⁶²Scott Farrow, *Improving Regulatory Performance: Does Executive Office Oversight Matter?* (Pittsburgh: Carnegie Mellon University, July 26, 2000).

¹⁶³See, e.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821 (2003).

¹⁶⁴U.S. General Accounting Office, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 2003.

coded as changed, withdrawn, or returned and that were submitted to OIRA by nine selected health, safety, or environmental agencies or offices: the Animal and Plant Health Inspection Service within the Department of Agriculture; the Food and Drug Administration within the Department of Health and Human Services; the Occupational Health and Safety Administration within the Department of Labor; the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration, and the National Highway Traffic Safety Administration (NHTSA) with the Department of Transportation (DOT); and the offices of air and radiation, water, and solid waste and emergency response within EPA. Seventy-one of the 85 rules had been coded “consistent with change,” nine were coded as “returned,” and five were coded as “withdrawn.”

GAO’s analysis of the underlying documents indicated that OIRA had a significant effect on at least 25 of the 85 draft rules. Specifically:

- Of the 71 “changed” rules, GAO concluded that OIRA had suggested significant changes to 17 of them — changes that affected the scope, impact, or estimated costs or benefits of the rules as originally submitted. In general, the focus of OIRA’s suggested changes appeared to be on reducing regulatory burden (and, in some cases, the expected benefits as well). Fourteen of the 17 significantly changed rules were from EPA’s office of air and radiation or its office of water. For example, at OIRA’s recommendation, EPA removed manganese from a list of hazardous wastes, deleted certain types of engines from coverage of a rule setting emissions standards, and delayed the compliance dates for two other types of emissions. Of the remaining 54 “changed” rules, the most significant changes made at OIRA’s suggestion involved adding explanatory language to the preambles of the rules and asking for comment on particular provisions. In 20 of the 54 rules, OIRA suggested only minor editorial changes (e.g., correcting spelling errors or citations) or made no suggestions at all.
- Of the nine rules that had been returned to the agencies by OIRA, two were returned because they had been improperly submitted, not because of substantive defect. OIRA returned the remaining seven rules because of concerns about the agencies’ regulatory analyses or a perceived lack of coordination between rulemaking agencies. For example, OIRA returned one EPA rule because the agency did not provide a quantitative analysis of costs and benefits, and returned a NHTSA rule because OIRA did not believe that the agency had demonstrated that it had selected the best available alternative. Five of the seven rules returned for substantive reasons had been submitted by the FAA.
- Of the five rules that were withdrawn, GAO determined that only one had been withdrawn at OIRA’s suggestion. The other four rules were withdrawn solely at the agencies’ initiative or as a result of a mutual decision by the agencies and OIRA.

If anything, GAO’s analysis understates the influence that OIRA has on agencies’ rules because its findings were often limited to the documentation that was available. If OIRA suggested a change to a rule before it was formally submitted to OIRA (e.g., during informal review), GAO’s analysis would not reflect those changes. In fact, the rule might not have even been in the universe of rules that GAO examined (i.e., those coded as changed, returned, or withdrawn during OIRA’s formal review). Other forms of OIRA influence may be even more

indirect and harder to document. For example, some agencies have indicated that they do not even propose certain regulatory provisions because they believe that OIRA would find them objectionable.

Regulated Entities' Contacts With OIRA. GAO also reported that regulated entities directly contacted OIRA either before or during its review process regarding 11 of the 25 rules that OIRA significantly affected.¹⁶⁵ Eight of those 11 cases involved EPA rules, and the nature of the contacts ranged from meetings with OIRA representatives to letters sent to OIRA. In 7 of the 11 cases, GAO concluded that what OIRA ultimately recommended to the rulemaking agencies was similar to what these regulated parties recommended to OIRA, in some cases, using similar language to that used by the regulated entities. For example, during OIRA's review of an EPA rule on identification and listing of hazardous waste, industry representatives met with and sent letters to OIRA opposing the listing of manganese as a hazardous waste constituent. (The industry representatives had made essentially the same argument to EPA during the public comment phase, but EPA did not agree.) The main focus of OIRA's comments to EPA at the conclusion of its review was that final action on listing manganese as a hazardous contaminant should be deferred. Notwithstanding the congruence between the comments of the regulated entities and OIRA's comments, GAO said it was impossible to determine the extent to which this or other suggestions made by the regulated entities might have influenced OIRA's actions, if at all.

Changes in OIRA's Policies and Practices During the George W. Bush Administration

The formal process by which OIRA reviews agencies' draft rules has changed little since Executive Order 12866 was issued in 1993.¹⁶⁶ There have, however, been several subtle yet notable changes in OIRA policies and practices in recent years, particularly since the OIRA Administrator John Graham took office in July 2001. In October 2002, the administrator said "the changes we are making at OMB in pursuit of smarter regulation are not headline grabbers: No far-reaching legislative initiatives, no rhetoric-laden executive orders, and no campaigns of regulatory relief. Yet we are making some changes that we believe will have a long-lasting impact on the regulatory state."¹⁶⁷

Return of the "Gatekeeper" Role. As noted previously, during the Reagan Administration, OIRA was often criticized for acting as a regulatory gatekeeper, actively overseeing and recommending changes to agencies' rules. During the Clinton Administration, however, the opposite concerns were expressed. A number of observers criticized OIRA for not overseeing the actions of the rulemaking agencies more aggressively. In September 1996, the then-administrator of OIRA testified that "we have consciously changed the way we relate to the agencies," and described OIRA's relationship with the rulemaking agencies as "collegial" and

¹⁶⁵Environmental and public interest groups also contacted OIRA regarding three of the rules.

¹⁶⁶There has been only one amendment to Executive Order 12866 since it was issued. As mentioned earlier in this Report, Executive Order 13258 reassigned all roles originally assigned to the Vice President in Executive Order 12866 (e.g., to be principal advisor to the President on regulatory policy, planning, and review) to the President's chief of staff.

¹⁶⁷John D. Graham, *Presidential Oversight of the Regulatory State: Can It Work?*, speech at the Heinz School, Carnegie Mellon University, Oct. 4, 2002.

“constructive.”¹⁶⁸ She also said she agreed with an article that said OIRA functioned during that period “more as a counselor during the review process than as an enforcer of the executive order.”¹⁶⁹

OIRA during the George W. Bush Administration has returned to the role it had during the Reagan Administration, even describing itself in an annual report as the “gatekeeper for new rulemakings.”¹⁷⁰ The administrator of OIRA has said one of the office’s functions is “to protect people from poorly designed rules,” and said OIRA review is a way to “combat the tunnel vision that plagues the thinking of single-mission regulators.” He has also compared OIRA’s review of agencies’ rules to OMB’s role in reviewing agencies’ budget requests. This return to the gatekeeper perspective of OIRA’s role has implications for an array of OIRA’s functions, and underlays many of the other changes described below.

Increased (and then Decreased) Use of Return Letters. As noted previously in **Table 1**, during the Clinton Administration, OIRA only rarely returned rules to the agencies for reconsideration. Specifically, according to OIRA’s database, of the more than 4,000 rules that OIRA reviewed from 1994 through 2000, OIRA returned only seven rules to the agencies — three in 1995 and four in 1997. OIRA administrators during that period said they viewed the use of return letters as evidence of the failure of the collaborative review process, since OIRA and the agencies were part of the same Presidential Administration.

In contrast, OIRA Administrator Graham referred to return letters as the office’s “ultimate weapon,” and views them as a way to make clear that the office is serious about the review process. In the first eight months after he took office in July 2001, OIRA returned 21 draft rules to the agencies for reconsideration. DOT had the most rules returned during 2001 and 2002 (eight), followed by the Social Security Administration (five) and the Department of Veterans Affairs (four).¹⁷¹ The letters commonly indicated that OIRA returned the rules because of concerns about the agencies’ analyses (e.g., whether the agencies had considered all reasonable alternatives or had selected the alternative that would yield the greatest net benefits).

Subsequently, however, the pace of OIRA’s return letters slowed. Although the average number of rules that OIRA reviewed each month stayed about the same, in the 26 months from March 2002 until March 2006, OIRA returned a total of six draft rules to the agencies — a dramatic decline from the 21 returns during the administrator’s first eight months in office.¹⁷² Only one rule was returned in 2004, and one more in 2005 — about the same pace as during the Clinton Administration. OIRA officials attributed the decline in return letters to the improved

¹⁶⁸*Oversight of Regulatory Review Activities of the Office of Information and Regulatory Affairs: Hearing before the Subcomm. on Financial Management and Accountability of the S. Comm. on Governmental Affairs, 104th Cong. (1996).*

¹⁶⁹William Niskanen, *Clinton’s Regulatory Record: Policies, Process, and Outcomes*, 19 Regulation, at 27-28 (1996).

¹⁷⁰Office of Management and Budget, *Stimulating Smarter Regulation: 2002 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, Dec. 2002.

¹⁷¹Copies of OIRA’s return letters are available on OMB’s website at [http://www.whitehouse.gov/omb/inforeg/return_letter.html].

¹⁷²Two of the five returns during this period involved the same DOT rule.

quality of agencies' regulatory submissions after the initial flurry of returns. For example, in November 2005 comments marking the 25th anniversary of OIRA, Administrator Graham said "we rarely need to issue a return letter" because agencies now "work with us to fix problems or they persuade us that there is no problem to fix."¹⁷³

Advent (and then Decline) of Prompt Letters. OIRA has traditionally been a reactive force in the rulemaking process, commenting on draft proposed and final rules that are generated by the agencies. Although OIRA occasionally suggested regulatory topics to the agencies during previous administrations, the practice was relatively uncommon and the discussions were not made public. In contrast, OIRA Administrator Graham was more publicly proactive, sending several agencies "prompt letters" (and posting them on the OIRA website) suggesting that they develop regulations in a particular area or encouraging the agencies' ongoing efforts.¹⁷⁴ For example, one such letter encouraged NHTSA to give greater priority to modifying its frontal occupant protection standard, and another letter suggested that OSHA make the promotion of automatic external heart defibrillators a higher priority. Other prompt letters recommended that the agencies better focus certain research or programs.

OIRA sent agencies four prompt letters in September 2001, six by the end of that year, and a total of at least 13 by the end of 2003. Since then, however, the number of prompt letter has diminished substantially. OIRA issued only two prompt letters in 2004, and none were issued in 2005. It is not clear why OIRA's use of prompt letters has declined so sharply. However, it is possible that OIRA may have reverted back to its previous approach of making more private rulemaking and regulatory suggestions to the agencies.

Increased Emphasis (Usually) on Economic Analysis. Although OIRA has always encouraged agencies to provide well-developed economic analyses for their draft rules, OIRA Administrator Graham expressed greater interest in this issue than his predecessors. Also, according to agency officials, there was a perceptible "stepping up the bar" in the amount of support required for their rules, with OIRA reportedly more often looking for regulatory benefits to be quantified and a cost-benefit analysis for every regulatory option that the agency considered, not just the option selected. In September 2003, OIRA published revised guidelines for economic analysis under the executive order and updated "best practices" guidance issued in January 1996.¹⁷⁵ The new guidelines were generally similar to the earlier guidance, but differed in several key areas — e.g., encouraging agencies to: (1) perform both cost-effectiveness and cost-benefit analyses in support of their major rules,¹⁷⁶ (2) use multiple discount rates when the

¹⁷³John Graham, *The 'Smart Regulation' Agenda: Progress and Challenges*, Nov. 7, 2005. Available at [<http://www.aei.brookings.org/admin/authorpdfs/page.php?id=1210>].

¹⁷⁴Copies of these prompt letters are available on OMB's website at [http://www.whitehouse.gov/omb/inforeg/prompt_letter.html].

¹⁷⁵As noted earlier in this report, this guidance (OMB Circular A-4) is available at [<http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>].

¹⁷⁶Cost-benefit analysis involves the systematic identification of all costs and benefits associated with a forthcoming regulation. Cost-effectiveness analysis seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and analyzing the costs of alternatives to reach that goal (e.g., dollars per life saved).

benefits and costs of rules are expected to occur in different time periods,¹⁷⁷ and (3) use a formal probability analysis of benefits and costs when a rule is expected to have more than a \$1 billion impact on the economy (unless the effects of the rule are clear).

OIRA, however, has also signaled that these analyses are sometimes difficult if not impossible to do for certain types of rules. For example, OIRA Administrator Graham said in November 2005, “Homeland security regulations account for about half of our major-rule costs in 2004 but we do not yet have a feasible way to fully quantify benefits. A moment’s reflection will reveal some of the perplexing issues: How do we identify targets of potential terrorist attacks, the probability of attacks and associated damages, and the effectiveness of various countermeasures in reducing risk?”¹⁷⁸ Administrator Graham reportedly said that cost-benefit analysis may not be appropriate for these homeland security rules, and that a more practical “soft” test was being used for them.¹⁷⁹

Increased (but not Total) Transparency. As noted previously, many of the longstanding concerns about OIRA’s role in the rulemaking process have centered on the perceived lack of transparency of its reviews. Executive Order 12866 attempted to address some of those concerns, requiring (among other things) that agencies disclose after the publication of a rule the changes made to the rule during OIRA’s review and the changes made at the suggestion or recommendation of OIRA. The executive order requires OIRA to maintain a publicly available log disclosing the status of all regulatory actions under review and the names and dates of those involved in substantive oral communications (e.g., meetings, telephone calls) between OIRA staff and parties outside of the executive branch. These requirements notwithstanding, concerns about the lack of transparency continued. For example, even after issuance of the executive order, OIRA disclosed contacts with outside parties only if they occurred during the office’s formal review period, not if they occurred during its informal reviews.

In October 2001, OIRA Administrator Graham published a memorandum to OIRA staff on the office’s website that extended the executive order’s disclosure requirements in several areas. For example, the memorandum said that OIRA would disclose substantive meetings and other contacts with outside parties about a rule under review even if OIRA was only informally reviewing the rule. OIRA also said it would disclose substantive telephone calls with outside parties that were initiated by the administrator, not just calls initiated by outside parties. OIRA has also posted on its website lists of regulations currently under review,¹⁸⁰ reviews concluded in the previous 30 days,¹⁸¹ and its contacts with outside parties.¹⁸²

¹⁷⁷Discounting can have a significant effect on the present value of future health benefits. For example, in a February 2003 speech the OIRA administrator noted that the present value of 1,000 lives saved 50 years in the future is only 34 lives in present value when evaluated at a 7 % discount rate.

¹⁷⁸Graham, *supra* note 173.

¹⁷⁹Nancy Ognanovich, *Head of OMB Regulatory Office Says Analyzing Homeland Security Rules Difficult*, BNA Daily Report for Executives, Nov. 8, 2005, at A39.

¹⁸⁰See [<http://www.whitehouse.gov/omb/library/OMBREGSP.html>].

¹⁸¹See [<http://www.whitehouse.gov/omb/library/OMBREGSC.html>].

¹⁸²A list of OIRA’s meetings with outside parties can be found at
(continued...)

These changes notwithstanding, OIRA's regulatory reviews are still far from transparent. Agencies are still instructed not to disclose changes that OIRA suggests during informal reviews, and the meeting log on OIRA's web site does not clearly delineate the subjects of OIRA's outside meetings or the affiliations of those present at the meetings. Also, as noted previously, OIRA's database showing rules "changed" during its review is not an accurate indication of the rules that were *substantively* changed by OIRA.

Changes in OIRA Staffing. When OIRA was created in FY 1981, the office had a "full-time equivalent" (FTE) ceiling of 90 staff members. By 1997, OIRA's FTE allocation had declined to 47, a nearly 50% reduction. Although Executive Order 12866 (issued in late 1993) permitted OIRA to focus its resources on "significant" rules, this decline in OIRA staffing also occurred during a period in which regulatory agencies' staffing and budgetary levels were increasing and OIRA was given a number of new statutory responsibilities. Specifically, as discussed later in this Report, OIRA was expected to perform various duties under the Unfunded Mandates Reform Act of 1995, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Regulatory Right-to-Know Act of 2001.

Starting in 2001, OIRA's staffing authorization began to increase; by 2002, it stood at 55 FTEs. Between 2001 and 2003, OIRA hired five new staff members in such fields as epidemiology, risk assessment, engineering, and health economics. OIRA indicated that these new hires reflected the increasing importance of science-based regulation in federal agencies, and would enable OIRA to ask penetrating technical questions about agency proposals.

OIRA's Other Responsibilities

In addition to its regulatory review responsibilities under Executive Order 12866 and its multiple responsibilities under the Paperwork Reduction Act (paperwork review, information resources management, statistical policy and coordination, records management, privacy and security, and information technology), Congress has assigned OIRA a number of other specific functions related to the rulemaking and regulatory process. For example:

- The Unfunded Mandates Reform Act of 1995 (2 U.S.C. §§ 1532-1538) generally requires agencies to prepare written statements describing the effects of their rules that are subject to the act's requirements. The Act requires the director of OMB to collect those written statements and provide them to the Congressional Budget Office, to establish pilot programs to test innovative regulatory approaches, and to prepare an annual report on the implementation of the act. The OMB director has delegated these responsibilities to OIRA.¹⁸³
- The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) (5 U.S.C. § 601 note) required EPA and OSHA to convene "advocacy review panels" before publishing proposed rules expected to have a significant

¹⁸²(...continued)

[<http://www.whitehouse.gov/omb/oirameetings.html>]. A list of its oral communications can be found at [<http://www.whitehouse.gov/omb/oirameetings.html>].

¹⁸³For a more complete discussion of UMRA, see Keith Bea & Richard S. Beth, *Unfunded Mandates Reform Act Summarized*, CRS Report RS20058.

economic impact on a substantial number of small entities.¹⁸⁴ The Act specifically requires the review panel to include full-time employees from OIRA as well as other agencies.

- SBREFA also contains provisions commonly referred to as the “Congressional Review Act,” which (among other things) requires agencies to delay the effective date of “major” rules, and requires GAO to submit a report on those rules within 15 days of their issuance. SBREFA defines a major rule as one that the OIRA administrator concludes has resulted or is likely to result in (among other things) a \$100 million annual effect on the economy.¹⁸⁵
- Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (44 U.S.C. §§ 3504 (d)(1) & 3516), generally known as the “Data Quality Act” or the “Information Quality Act,” directed OMB to take several actions (all of which were delegated to OIRA). Specifically, the Act required OMB to issue governmentwide guidelines that “provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies.” OMB published those guidelines in final form on February 22, 2002.¹⁸⁶ The act also required agencies to develop their own guidelines (which were reviewed by OMB), and to report to OMB on the number and nature of complaints received and how such complaints were handled by the agency.
- Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” requires OMB to prepare and submit with the budget an annual “accounting statement and associated report” containing an estimate of the costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth. Similar one-year requirements were in previous appropriations acts.
- The same legislation requires OMB to include “recommendations for reform” in its cost-benefit reports. Rather than rely on its own expertise, OIRA decided to solicit suggestions from the public. For example, in March 2002, OIRA asked the public for recommendations to eliminate or modify existing rules as well as to expand or extend existing programs. In response, OIRA received more than 300 suggestions, which OIRA turned over to the appropriate agencies for

¹⁸⁴This requirement is codified at 5 U.S.C. § 609 (2000).

¹⁸⁵For a more complete discussion of the Congressional Review Act, see Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Assessment After Nullification of OSHA’s Ergonomics Standard*, CRS Report RL30116.

¹⁸⁶Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Notice; Republication*, 67 Fed. Reg. 8451 (Feb. 22, 2002).

prioritization. In February 2004, OIRA asked the public for suggested reforms of rules affecting the manufacturing sector. OIRA said it was focusing on manufacturing because of the relatively large impact that regulations have on that sector.¹⁸⁷

- The Small Business Paperwork Relief Act of 2002 (Public Law 107-198) requires OMB to annually publish, in the Federal Register and on the Internet, a list of compliance assistance resources available to small businesses. The Act also requires OMB to convene and chair a task force to study the feasibility of streamlining paperwork requirements on small businesses. The task force was required to file an initial report by the end of June 2003, and is required to file a second report by the end of June 2004.
- The E-Government Act of 2002 (Public Law 107-347) requires the OIRA administrator to work with the administrator of the Office of Electronic Government to establish the strategic direction of the governmentwide e-government program and to oversee its implementation. OIRA has been particularly active in the Administration's e-rulemaking initiative.
- In the Treasury and General Government Appropriations Act, 2002 (Public Law 107-67), Congress stated that about \$6.3 million of OMB's \$70.7 million appropriation was for OIRA, but stipulated that nearly \$1.6 million of that amount should not be obligated until OMB "submits a report to the Committees on Appropriations that provides an assessment of the total costs and benefits of implementing Executive Order No. 13166."¹⁸⁸
- The conference report for OMB's appropriation for fiscal year 2004 (to accompany H.R. 2673) directed OIRA to submit a report to the House and Senate Committees on Appropriations by June 1, 2004, on "whether agencies have been properly responsive to public requests for correction of information pursuant to the (Data Quality Act)."¹⁸⁹

Congress also sometimes limits OIRA's actions through riders on OMB's appropriation. For example, since 1983, language has been included in OMB's appropriation stating that none of the funds appropriated to OMB could be used for the purpose of reviewing any agricultural

¹⁸⁷A similar requirement for "recommendations for reform" was included in section 628(a)(3) of the FY2000 Treasury and General Government Appropriations Act. OIRA received 71 suggestions from the public in response to its call for "suggestions on specific regulations that could be rescinded or changed that would increase net benefits to the public," most of which came from the Mercatus Center at George Mason University. OIRA reviewed these suggestions and identified 23 as a "high priority" for review. Eight of the 23 high priority recommendations involved EPA rules, and five involved rules from the Department of Labor. Although business groups generally applauded this effort, environmentalists and public interest groups characterized it as the development of a "hit list" of rules that the Bush Administration wanted to eliminate.

¹⁸⁸Exec. Order 13,166, *Improving Access to Services for Persons With Limited English Proficiency*, 65 Fed. Reg. 50,12 (Aug. 16, 2000)

¹⁸⁹OIRA submitted this report in April 2004. For a copy of the report, see [http://www.whitehouse.gov/omb/inforeg/fy03_info_quality_rpt.pdf].

marketing orders issued by the Department of Agriculture. Marketing orders, which cover dozens of commodities from lemons to milk, basically keep prices up by regulating supplies, and had been targeted for elimination or amendment by President Reagan's task force on regulatory relief in the early 1980s. In response, Members of Congress have inserted this restriction in each subsequent appropriation bill, asserting that the Department of Agriculture, not OMB, has statutory authority in this area.

OIRA's Actions to Expand Its Role. Although OIRA's workload has clearly increased as a consequence of a series of Congressional requirements, OIRA has also voluntarily taken on additional responsibilities, often basing its actions on the office's interpretation of previous statutory or executive order authority or requirements.

Reform Recommendations. For example, in addition to requiring an annual "accounting statement" of the costs and benefits of regulations, the above-mentioned "Regulatory Right-to-Know Act" (section 624 of the Treasury and General Government Appropriations Act, 2001) also requires OMB to include "recommendations for reform" in its cost-benefit reports.¹⁹⁰ Citing this requirement, in May 2001, OIRA asked for suggestions on specific regulations that could be "rescinded or changed that would increase net benefits to the public." In response, OIRA received 71 suggestions, which it placed into high, medium, and low priority categories.¹⁹¹ In March 2002, OIRA asked the public for recommendations to eliminate or modify existing rules as well as to expand or extend existing programs. In response, OIRA received more than 300 suggestions, which OIRA turned over to the appropriate agencies for prioritization. In February 2004, OIRA asked the public for suggested reforms of rules affecting the manufacturing sector. OIRA said it was focusing on manufacturing because of the relatively large impact that regulations have on that sector. In March 2005, OIRA reported that it received 189 reform nominations, of which federal agencies and OMB determined that 76 had "potential merit and justify further action."¹⁹²

Peer Review Bulletin. In September 2003, OIRA published a proposed bulletin in the Federal Register on "Peer Review and Information Quality" that would have, if made final, provided a standardized process by which all significant regulatory information would be peer reviewed. Issued under the authority of the Information Quality Act, the PRA, and Executive Order 12866, the bulletin would have required agencies to: (1) have all "significant regulatory information" that the agencies intend to disseminate peer reviewed, (2) have "especially significant regulatory information" peer reviewed according to even higher standards, and (3) provide OIRA at least once each year with information about upcoming significant regulatory disseminations and the agencies' plans for conducting peer reviews. The proposed bulletin aroused significant controversy, with some observers expressing concern that it could create a centralized peer review system within OMB that would be vulnerable to political manipulation

¹⁹⁰A similar one-year requirement for "recommendations for reform" was included in section 628(a)(3) of the Fiscal Year 2000 Treasury and General Government Appropriations Act. Although business groups generally applauded this "look back" effort, environmentalists and public interest groups characterized it as the development of a "hit list" of rules that the Bush Administration wanted to eliminate.

¹⁹¹Eight of the 23 suggestions that OIRA designated a "high priority" involved EPA rules, and five involved rules from the Department of Labor.

¹⁹²For a copy of OIRA's report on "Regulatory Reform of the Manufacturing Sector," see [http://www.whitehouse.gov/omb/inforeg/reports/manufacturing_initiative.pdf].

or control by regulated entities. In April 2004, OIRA published a revised version of the proposed bulletin in response to nearly 200 comments received from the public.¹⁹³ The revised bulletin was broader in scope than the proposed bulletin in that it applied to “influential scientific information” (not just regulatory information) and “highly influential scientific assessments.” Agencies, however, were given substantial discretion to decide whether information was “influential” and therefore required a peer review, and the bulletin provided exemptions for certain classes of information (e.g., routine statistical information and products by government-funded scientists that are not represented as the views of the agency). In January 2005, OIRA published a final version of the bulletin in the Federal Register that was similar in many respects to the revised version.¹⁹⁴ OMB still retained significant authority in certain areas (e.g., when information is “highly influential”), so it is unclear how much discretion agencies will be given to decide when and what kind of peer review is required.

Guidance Practice Bulletin. In November 2005, OMB published a “Proposed Bulletin for Good Guidance Practices.”¹⁹⁵ Noting that agencies have increasingly relied on guidance documents to inform the public about regulatory requirements and to provide direction to their staffs, OMB said it was concerned that these documents “may not receive the benefit of careful consideration accorded under the procedures for regulatory development and review.” OMB did not cite any specific statutes or executive orders as authorizing the issuance of the bulletin, but it did indicate that it was “responsible both for promoting good management practices and for overseeing and coordinating the Administration’s regulatory policy.” In essence, the proposed bulletin would require agencies (not including independent regulatory agencies) to develop written procedures for the approval of “significant” guidance documents (defined in essentially the same way as “significant” rules in Executive Order 12866), to maintain a list of those documents on its web site, and to allow electronic comments on those documents. For “economically significant” guidance documents (e.g., those expected to have a \$100 million impact on the economy), agencies would be required to publish a notice in the Federal Register announcing that the draft guidance document is available, invite public comments, and respond to those comments.¹⁹⁶ Although the proposed bulletin does not specifically provide a role for OIRA in the approval process, some have expressed concerns that the bulletin could allow greater opportunities for the office and industry to influence agency decisionmaking.¹⁹⁷ As was the case with the peer review bulletin, OIRA is expected to retain significant discretion to decide which documents are subject to the bulletin’s requirements.

¹⁹³For a copy of this revised peer review bulletin, see [http://www.whitehouse.gov/omb/infoereg/peer_review041404.pdf].

¹⁹⁴Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664 (Jan. 14, 2005). OMB published the final bulletin on its web site on December 15, 2004. Certain provisions took effect in June 2005, but others did not take effect until December 2005.

¹⁹⁵OMB published the proposed bulletin on its web site on November 23, 2005, available at [http://www.whitehouse.gov/omb/infoereg/good_guid/good_guidance_preamble.pdf]. On November 30, 2005, OMB published a notice and request for comments on the proposed bulletin (but not the bulletin itself) in the Federal Register. 70 Fed. Reg. 71,866 (Nov. 30, 2005).

¹⁹⁶Because guidance is, by definition, nonbinding, it is not clear how it could have a \$100 million impact on the economy, and, therefore, qualify as “economically significant.”

¹⁹⁷See, e.g., Cindy Skrzycki, *Finding a Way to Better Guidance*, Wash. Post, Dec. 20, 2005, at D1.

Risk Assessment Bulletin. The most recent manifestation of OIRA's expanding (at least potential) influence was its publication of a proposed bulletin on agency risk assessment practices.¹⁹⁸ Released for public comment and peer review by the National Academy of Sciences on January 9, 2006, the stated purpose of the bulletin is "to enhance the technical quality and objectivity of risk assessments prepared by federal agencies by establishing uniform, minimum standards." The legal authority cited for the bulletin included the Information Quality Act, the Regulatory Right-to-Know Act, and "OMB's general authorities to oversee the quality of agency analyses, information and regulatory actions."¹⁹⁹ Public comments were requested on the proposed bulletin by June 2006, with the bulletin going into effect 12 months after its publication in final form. Risk assessments are used in a variety of ways in the federal government, and are particularly important in developing regulations involving health, safety, or the environment. The OIRA bulletin described a series of general risk assessment and reporting standards (e.g., "summarize the scope of the assessment" and "be scientifically objective"), with one set of standards specifically for risk assessments used in regulatory analyses. It also laid out a set of "special standards for influential risk assessments" (i.e., those expected to have a "clear and substantial impact on important public policies or private sector decisions"). The scope of the bulletin is quite broad, covering all agencies covered by the PRA (i.e., including independent regulatory agencies) and defining risk assessment in sweeping terms.²⁰⁰ The bulletin requires agencies to certify that each covered risk assessment has complied with its requirements, but allows agency heads to defer or waive some or all of its requirements. OIRA and the White House Office of Science and Technology Policy were made responsible for overseeing the bulletin's implementation.

¹⁹⁸This proposed risk assessment bulletin is available at [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

¹⁹⁹Specifically, OIRA noted that section 515(a) of the IQA requires OMB to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility and integrity of information" disseminated by federal agencies. Also, OIRA said the Regulatory Right-to-Know Act directs OMB to "issue guidelines to agencies to standardize . . . measures of costs and benefits." One could argue that OIRA had already satisfied these requirements through the issuance of its February 2002 IQA guidelines and OMB Circular A-4.

²⁰⁰Risk assessment is defined as "a scientific and/or technical document that assembles and synthesizes scientific information to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment."

OIRA and the Future of Presidential Regulatory Review

For more than 25 years, OIRA has played a central role in the federal rulemaking process. Although some argued early in OIRA's history that the office's regulatory review role was unconstitutional, few observers continue to hold that view. No court has directly addressed the constitutionality of the OIRA regulatory review process, but in 1981 (the year that OIRA was created) the D.C. Circuit said the following:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy. He and his advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. The executive power under our Constitution, after all, is not shared — it rests exclusively with the President.²⁰¹

OIRA is located within the Executive Office of the President and is the President's direct representative in the governmentwide rulemaking process. As Executive Order 12866 states, OIRA is the "repository of expertise on regulatory issues" within the Executive Branch, and is uniquely positioned both within OMB (with its budgetary influence) and within the federal rulemaking process (reviewing and commenting on rules just before they are published in the Federal Register) to enable it to exert maximum influence. As discussed above, OIRA has been given significant responsibilities by Congress, but perhaps its most significant role — regulatory review — has been assigned by the President. Further, OIRA has assigned itself a number of additional roles in recent years, including issuing standards for agencies to follow with regard to peer review, risk assessment, and guidance documents. Lisa Heinzerling has argued that OIRA's actions have also led to alterations in agencies' interpretations of regulatory statutes.²⁰² As a consequence, she says "OIRA's increasingly aggressive role in controlling agency action is so far the biggest administrative law story of the new century."²⁰³

Variations in how OIRA operates — as a gatekeeper or a counselor — are largely a function of the wishes of the President that the office serves. For example, in a June 2001 article in *Harvard Law Review*, Elena Kagan posited that, while it is generally acknowledged that President Reagan used OIRA's review function as a tool to control the policy and political agenda in an anti-regulatory manner, President Clinton did much the same thing to accomplish pro-regulatory objectives.²⁰⁴ She said he did so by exercising directive authority and asserting personal ownership over a range of agency actions, thereby making them "Presidential" in nature. She also characterized this emergence of enhanced methods of Presidential control over the regulatory state — what she termed the "presidentialization of administration" — as "the most important development in the last two decades in administrative process." Similarly, William F. West concluded that OIRA's regulatory review process "has promoted executive interests across administrations precisely because the process has internalized incumbents'

²⁰¹Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

²⁰²Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 Ford. Urb. L. Rev. 1097 (2006).

²⁰³*Id.* at 1117.

²⁰⁴Elena Kagan, *Presidential Administration*, 18 Harv. L. Rev. 2245 (2001).

political preferences.”²⁰⁵ Therefore, instead of the “neutral competence” that some assert that bureaucracy can best provide Presidents, West characterizes OIRA’s performance as “responsive competence.”

As Sally Katzen, OIRA administrator during the Clinton Administration, told GAO, because OIRA is part of the Executive Office of the President, and the President is the office’s chief client, a change in the presidency has a profound effect on how OIRA operates.²⁰⁶ She also said each new administrator of OIRA — and ultimately each new administration — represents a reaction to the previous Administrator and administration. Just as the Clinton administration’s OIRA was a reaction to the administrations that preceded it, she said the current Bush administration’s OIRA is a reaction to the Clinton period. Similarly, in March 2002, then-OIRA Administrator Graham said “Presidents use the powers of OMB regarding agency action to advance Administration priorities and policy objectives We should remember that OMB is an office within the Executive Office of the President and its actions necessarily reflect Presidential priorities.”²⁰⁷

Other observers, however, view OIRA (like other executive branch agencies) as having more of a shared allegiance between the President and the Congress. They point out that OIRA was created by Congress, and has been given a number of statutory responsibilities through the PRA and other laws. Nevertheless, even supporters of a strong legislative perspective recognize that OIRA is part of the Executive Office of the President, and that Congress gave OIRA its responsibilities because of its strategic position within that office.²⁰⁸ With both statutory and executive order responsibilities, OIRA embodies a broader tension between Congress and the President for control of administrative agencies.

Stuart Shapiro has viewed OIRA in another way, however, describing the relationship and potential conflict between two of the office’s roles: reviewing the analytical bases for agencies’ rules and furthering the President’s agenda.²⁰⁹ Shapiro notes that the two goals are in harmony when both the results of agency cost-benefit analyses and the President’s position are the same (i.e., either both supporting the issuance of the subject regulation or opposing it). He also points out, however, that the two goals can be at odds, and notes that regulations (e.g., some related to homeland security) can prevail even if their costs are high and the benefits are ill-defined if supported by the White House. Similarly, Susan Dudley (nominated to be OIRA administrator on July 31, 2006) and Angela Antonelli noted that “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

²⁰⁵William F. West, *The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA*, *Presidential Studies Quarterly*, vol. 35 (Mar. 2005) at 76-93.

²⁰⁶U.S. General Accounting Office, *Rulemaking*, GAO-03-929, at 40.

²⁰⁷John D. Graham, *Presidential Management of the Regulatory State*, remarks prepared for delivery to the National Economists Club, Mar. 7, 2002. Remarks are available at [<http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html>].

²⁰⁸For example, David H. Rosenbloom, in *Building a Legislative-Centered Public Administration* (Tuscaloosa, AL: The University of Alabama Press, 2001) states that “where coordinated government-wide clearance is required to achieve Congress’ policy objectives, there may be few or no alternatives (to paperwork and regulatory review within OMB).”

²⁰⁹Stuart Shapiro, *Politics and Regulatory Policy Analysis*, Regulation, Summer 2006, at 40-45.

agenda will most certainly prevail over independent and objective analysis.”²¹⁰

Although major differences of opinion exist among observers of the federal rulemaking process regarding the appropriateness of OIRA’s regulatory review role, the broad reach and influence of the office’s is undebatable. Rulemaking agencies formally challenge OIRA’s returns and “suggestions” for change only rarely, and sometimes refrain from even submitting draft rules for review if they believe they will be opposed by OIRA. Regulated entities also recognize OIRA’s influence, and seem to view the office as a “court of second resort” if they are unable to influence regulatory agencies to their position directly.

Possible Legislative Issues

Congress also recognizes the importance that OIRA plays in the rulemaking process, and usually holds several hearings each year examining OIRA’s implementation of its responsibilities pursuant to various statutes and executive orders. Proposals for changes to OIRA’s authority and responsibilities have focused on such issues as: (1) providing a statutory underpinning for regulatory reviews, (2) increasing or decreasing the office’s funding and staffing, (3) including independent agencies’ rules under the office’s regulatory review function, and (4) improving the transparency of OIRA’s regulatory review processes.

Statutory Authority for Regulatory Review. As noted previously, Congress has enacted legislation expanding OIRA’s statutory responsibilities, and has considered (but not enacted) legislation that would provide a statutory basis for OIRA’s regulatory review function. For example, in the 106th Congress, section 632 of S. 746 (the “Regulatory Improvement Act of 1999”) would have required the President (via OMB and OIRA) to “establish a process for the review and coordination of Federal agency regulatory actions.” The proposed legislation also would have placed in statute many of the transparency requirements in Executive Order 12866. The legislation, however, was not enacted.

At a CRS symposium on “Presidential, Congressional, and Judicial Review of Rulemaking,” held on September 11, 2006, Bill Kovacs from the United States Chamber of Commerce suggested that Executive Order 12866 be put into statute. Other panelists, however, voiced both practical and constitutional concerns about doing so. For example, Neil Eisner, Assistant General Counsel at the Department of Transportation, said the following:

I don’t think it would be a good idea to put it in statute. I think it’s an executive order that will need changes over the years, if for nothing else than to take the vice president out of the process and put the White House chief of staff into the process because of a particular administration. It’s too difficult to amend going through statute. As someone mentioned this morning, you don’t know what else might get added to it when you’re trying to make a simple little fix like that.

Sally Katzen, former OIRA administrator during the Clinton Administration agreed, noting that both the Clinton and Bush administrations have opposed codifying the order. Separately, a member of the audience expressed concerns about the constitutionality of Congress telling the president how the president had to supervise his Cabinet and sub-Cabinet appointees. There are many, many good reasons why codifying the executive order is a bad idea, but one issue that

²¹⁰Susan E. Dudley & Angela Antonelli, *Congress and the Clinton OMB: Unwilling Partners in Regulatory Oversight?*, Regulation, Fall 1997, at 17-23.

hasn't been mentioned, I think, is the serious separation of powers problem that will come from that."

Mort Rosenberg of CRS asked, instead of simply taking the text of the order and putting into statute, whether it might not be a better idea "if you authorized the president to issue an executive order regarding the review of regulations, and put in there a bottom line, let's say, of transparency that's better than what's here now – put that in the law and give the president general authority that he has assumed for the last 26 years." David Vladeck from Georgetown University said "that may be a better stratagem from Congress' standpoint and one way around some of the obvious separation of powers problems that would come from simply trying to enact the executive order into law."

Increased Funding and Staffing. OIRA does not have a specific line item in the budget, so its funding is part of OMB's appropriation. Similarly, OIRA's staffing levels are allocated from OMB's totals. Although OIRA staffing has increased in recent years, as of May 2004, OIRA has fewer staff than it had when its regulatory review function was first established in 1981. Currently, about 30 OIRA desk officers and branch chiefs review about 3,000 agency information collection requests each year and about 700 significant rules each year. At various times in its history, certain Members of Congress have attempted to reduce funding for OIRA in order to signal Congressional displeasure with the office's actions.²¹¹ Other observers, however, believe that OIRA's funding should be increased, not reduced, arguing that a relatively small amount of additional resources for OIRA could yield substantial benefits.²¹²

At other times, proposed legislation has been introduced designating how OIRA staff should be used. For example, in the 108th Congress, a provision in H.R. 2432 as originally introduced would have required the OMB Director to "assign, at a minimum, the equivalent of at least 2 full time staffers to review the Federal information collection burden on the public imposed by the Internal Revenue Service." The Internal Revenue Service accounts for more than 80% of the estimated paperwork burden, but OIRA indicated that it devoted less than one FTE to reviewing the agency's paperwork requests (because much of the burden is mandated by statute). The Bush Administration objected to this specific direction of OIRA staff, so the sponsors of the bill agreed to delete this requirement before it was approved by the House of Representatives in May 2004.

Coverage of Independent Agencies' Rules. Although several of the statutes that OIRA helps to administer include rules issued by independent regulatory agencies (e.g., the PRA, the Regulatory Flexibility Act, the Congressional Review Act, and the Data Quality Act), the executive orders that have established regulatory review within OIRA have explicitly

²¹¹For example, as noted previously, in OMB's appropriation for 2002, Congress stipulated that nearly \$1.6 million should not be obligated until OMB submitted a report assessing the total costs and benefits of implementing Executive Order 13166. Also, in the conference report for OMB's fiscal year 2004 appropriation (under the heading "Office of Information and Regulatory Affairs"), the conferees directed that \$1 million "be withheld from obligation until resolution of existing programmatic concerns by House conferees are addressed and the House and Senate Committee on Appropriations approve of such obligations."

²¹²See, e.g., Robert W. Hahn & Robert E. Litan, *Why Congress Should Increase Funding for OMB Review of Regulations*, AEI-Brookings Joint Center for Regulatory Studies, Policy Matter 03-33 (Oct. 2003).

excluded rules issued by those agencies.²¹³ Some observers have suggested that this limitation be lifted, arguing that independent regulatory agencies issue regulations that have a significant impact on the economy (about \$230 billion per year according to OIRA), but their rules often contain little quantitative information on regulatory costs and benefits.²¹⁴ Those opposed to this expansion in OIRA's duties point out that independent regulatory agencies were established to be relatively independent of the President, and inclusion of their rules under OIRA's would be counter to this purpose. In response, proponents argue that independent regulatory agencies' rules are already reviewed for purposes such as paperwork clearance and ensuring that data quality requirements are met, so examining the substance of the rules is just an extension of those reviews.

At the CRS symposium on September 11, 2006, Sally Katzen, former OIRA administrator during the Clinton Administration, noted that both the Reagan and Clinton administrations contemplated expanding Presidential review to independent agencies:

When Boyden Gray was drafting 12291 for President Reagan, the same issue was raised. And as I said, the Department of Justice opined that the president had constitutional authority to extend to independent regulatory commissions. They chose not to do it. We reconsidered the question and chose not to do it. I think there is an aspect of an independent regulatory commission that says it should somehow be kept a little distant from the validly political actors. And this was not in that direction, and I think it's a sound one. It's not one based on the law. I think we had the authority; I think it's purely a question of desirability.

Transparency Improvements. One consistent area of concern to some observers has been the lack of transparency of the OIRA review process to the public. Notwithstanding recent improvements, they argue that it is difficult for the public to know with any degree of certainty what changes OIRA has suggested to agencies' draft rules, what contacts OIRA has made with regulated entities and other outside parties regarding those rules, or whether documents were exchanged between OIRA and the agencies. In its September 2003 report, GAO said that the documentation that agencies are required to provide showing the changes made at OIRA's suggestion or recommendation were not always available and, when done, were not always clear or consistent.²¹⁵ GAO also said that the transparency requirements incumbent on OIRA were not always clear, and recommended several improvements. For example:

- Although OIRA indicated that it can have its greatest impact on agencies' rules during *informal* reviews before review packages are formally submitted, OIRA indicated that agencies only had to disclose the changes made at OIRA's suggestion during *formal* review (some of which were as short as one day). GAO recommended that OIRA define this requirement in the executive order to include informal reviews, just as it did with regard to the requirements involving

²¹³For purposes of regulatory review, both Executive Order 12291 and Executive Order 12866 defined a covered "agency" as excluding those agencies specified in 44 U.S.C. § 3502(10) (2000).

²¹⁴*See, e.g.,* Center for Regulatory Effectiveness, *A Blueprint for OMB Review of Independent Agency Regulations* (Mar. 2002). The previously mentioned bill (S. 746) that proposed to establish in law Presidential review of rules would have included rules issued by independent regulatory agencies.

²¹⁵U.S. General Accounting Office, *Rulemaking*, GAO-03-929, at 110-16.

the office's communications with outside parties.

- As noted previously, the “consistent with change” code in OIRA’s database does not differentiate between OIRA- or agency-initiated changes, or changes that were major or minor in nature. GAO recommended that the database be changed to more clearly indicate which rules were substantively changed at OIRA’s suggestion.
- GAO also recommended refinements to the executive order’s requirements applicable to OIRA (e.g., more clearly indicating on its website the regulatory actions being discussed at meetings with outside parties and the affiliations of the participants) and the requirements applicable to the agencies (e.g., defining the types of “substantive” changes that agencies should disclose).

In commenting on GAO’s report, the administrator of OIRA said that the office planned to review its implementation of the executive order’s transparency requirements and would work to improve the clarity of its meeting log. The administrator did not, however, believe that changes made during informal OIRA reviews should be disclosed — even though he said that OIRA can have its greatest influence during informal reviews. Disclosure of these informal review changes could be required through an administrative directive issued by the OIRA administrator or, alternatively, through legislation.

Areas for Additional Research

In addition to, or possibly as a supplement to, these areas of possible legislative action, a number of issues regarding Presidential review of rulemaking bear further examination by ACUS or some other body. They include the following:

- Should Congress codify Presidential review of agency rulemaking? If so, how detailed should that codification be? For example, should it simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay? Or should the codification spell out in detail the process by which Presidents should review rules before they are published? What are the policy implications of codification?
- Should independent regulatory agencies’ rules be subject to Presidential review (as they are now under the Paperwork Reduction Act)? Or would Presidential review adversely affect the independence intended for these agencies?
- What general type of role should OMB play in the Presidential rule review process? Should OMB be a “counselor” to the agencies (as during the Clinton Administration), suggesting improvements to the agencies but generally deferring to agencies’ statutory expertise? Or should it be more of a “gatekeeper” (as during the current Bush Administration) establishing strict standards and ensuring that regulations meet certain standards before publication?
- What rules should govern OMB’s contacts with outside parties during the Presidential review process? For example, should OMB be allowed to meet with

regulated entities outside of the period when agencies are not permitted to do so? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) to provide an administrative record for any subsequent changes?

- How transparent should the Presidential rule review process be to the public? Are improvements in review transparency currently needed (either administratively or by statute)? Specifically: (1) Should OMB clearly define what types of “substantive” changes to rules need to be disclosed?; (2) Should agencies or OMB be required to disclose substantive changes made to rules during “informal” reviews (when OMB says it can have its greatest effect)?; (3) Should OMB clearly indicate in its database which rules were changed at its suggestion?
- A number of actions by OMB during the Bush Administration have had the effect of centralizing rulemaking authority in the Executive Office of the President. For example, OMB has revitalized the regulatory review function under Executive Order 12866 (emphasizing cost-benefit analysis, returning rules to the agencies); and issued governmentwide guidelines on data quality and peer review (with OMB able to determine when agencies’ rules should be peer reviewed and at what level). Have these actions taken too much authority away from the agencies in whom Congress vested rulemaking authority, thereby upsetting the balance of power between Congress and the President in this area?
- Some critics have asserted that OIRA reviews, particularly for health, safety, and environmental rules, is a “one-way ratchet” in that the effects of the reviews are almost always designed to weaken, not strengthen the rules. To what extent is that true? Of the health, safety, and environmental rules that OIRA affects each year, how many are made more protective and how many are made less protective?
- How has the OIRA “prompt letter” process worked? How many new regulations or improvements to existing rules can be traced to these letters?
- Does OIRA have the legal authority to promulgate requirements or even guidelines regarding agencies’ use of peer reviews, risk assessments, or guidance documents?
- Is Presidential review of rules cost beneficial? Is there any way to objectively measure the benefits that OIRA review provides?
- Should OIRA’s funding and staffing be increased, decreased, or stay the same? If increased, is there evidence that doing so would yield substantial returns on investment?
- Should a new President be authorized to stay the effectiveness of “midnight rules” that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed?

III. Congressional Review of Rules

The constitutional dimension of the Administrative Law Project is most prominently evident in its review of the major Congressional effort to establish an effective mechanism to oversee the agency rulemaking, the passage in 1996 of the Congressional Review Act (CRA).²¹⁶ The House and Senate sponsors of the legislation make clear the important, fundamental institutional concerns that were addressed by the Act:

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

The objective of the Act was to set in place a process that would keep Congress informed about the rulemaking activities of federal agencies and allow for expeditious Congressional review, and possible nullification, of particular rules. This was to be accomplished by requiring that all rules, and not only rules subject to the APA notice and comment requirements but guidance, policy statements, handbooks and the like, would have to be reported to Congress and be subject to legislative disapproval. An unreported rule could not be enforced. Expedited consideration procedures were provided for the Senate (but not the House). A disapproved rule, if not vetoed by the President, deprived the agency of authority to promulgate rules in the same area unless authorized to do so by Congress. Judicial review of certain actions taken under the Act were not to be subject to judicial review.

It was the apparent vision of the sponsors of the CRA that the effective utilization of the new reporting and review mechanism would draw the attention of the rulemaking agencies and that its presence would become an important factor in the rule development process. Congress was well aware at the time of enactment of the success achieved by President Reagan's executive orders centralizing review of agency rulemaking, from initial development to final promulgation, within OIRA, in the face of aggressive challenges of Congressional committees. The Clinton Administration, with a somewhat modified executive order, but with an aggressive posture of intervention into and direction of rulemaking proceedings, continued a program of central

²¹⁶ Pub. L. No. 104-121, 110 Stat. 857-874 (2000) (codified at 5 U.S.C. §§801-808).

control of administration.²¹⁷ The expectation was that Congress, through the CRA, would again become an effective player with the White House in influencing agency decisionmaking.

The ineffectiveness of the CRA review mechanism, however, soon became readily apparent to observers. Most prominently, the lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, and numerous interpretative uncertainties of key statutory provisions, served to deter use of this mechanism. By 2001, one commentator observed that if the perception of a rulemaking agency is that the possibility of Congressional review is remote, "it will discount the likelihood of Congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rules."²¹⁸

The numbers accumulated since the Act's passage in 1996 are telling. Over 43,000 rules were reported to Congress over that period, including more than 630 major rules, and only one, the Labor Department's ergonomics standard, was disapproved in March 2001. Only 37 disapproval resolutions, directed at 28 rules, have been introduced during that period, and only three, including the ergonomics rule, passed the Senate. Many analysts believe the negation of the ergonomics rule was a singular event not likely to soon be repeated. Furthermore not nearly all the rules defined by the statute as covered are reported for review. The GAO has estimated that over 2,000 covered rules have not been submitted for review. Federal appellate courts in that period have negated all or parts of 60 rules, a number, while significant in some respects, is comparatively small in relation to the number of rules issued in that period.

Compounding such a perception that Congress would not likely intervene in rulemaking, particularly after 2001, has been the emergence of what has been called by one scholar as the "New Presidentialism,"²¹⁹ that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President; and the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" (because he alone is elected by the entire nation). One of the consequences of this Presidentially-centered theory of governance, it is contended, is that it diminishes the other important actors in our collaborative constitutional enterprise. Were it maintained that the Congress is constitutionally and structurally unfit for running democratic responsiveness, public-regardness, managerial efficiency and technocratic

²¹⁷See Christopher Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945 - 2004*, 90 Iowa L. Rev. 601, 690-729 (2005) (detailing the history of Presidential control of administrative actions of departments and agencies in the Reagan, Bush I, Clinton and Bush II, administration.) (Hereinafter referred to as "Yoo"); see also, Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of Reagan Administration's Theory of Unitary Executive*, 57 Geo. Wash. L. Rev. 627 (1989) (hereinafter referred to as "Rise and Demise").

²¹⁸Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059, 1090 (2001).

²¹⁹Cynthia R. Farina, *Undoing The New Deal Through The New Presidentialism*, 22 Harv. J. of Law and Policy 227 (1998).

rationality, this scholar's suggested response is: why bother talking with Congress about what is the best way to improve the practice of regulatory government?

In a widely cited 2001 article,²²⁰ the current dean of the Harvard Law School, posits the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, unless the legislative delegation specifically states otherwise. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions of all agency officials. The author states that "a Republican Congress proved feckless in rebuffing Clinton's novel use of directive power - just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process."²²¹ She explains that "the reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power - or, what is the same thing, to deny authority to other branches of government."²²² She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.²²³

Dean Kagan's observations and theories appear to have been almost a blueprint for the Presidential actions and posture toward Congress of the current Administration.²²⁴

The CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme

²²⁰Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2246 (2001).

²²¹*Id.* at 2314.

²²²*Id.* at 2314.

²²³*Id.* at 2347.

²²⁴See Yoo, *supra* note 217, at 722-30.

Court's most recent rejection of an attempted revival of the nondelegation doctrine²²⁵ adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, uncertain judicial review, and increasing Presidential control over the rulemaking process will likely continue.

A review of the more than a decade of experience under the CRA indicates that there is more than ample evidence to conclude that it has not worked well enough to achieve the objectives envisioned by its sponsors. Of all the subjects of the Administrative Law Project, it appears the most immediately amenable to legislative remediation though perhaps, the most difficult to politically achieve.

Review of Agency Rules Under the CRA

The CRA requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. (section 801(a)(1)(A)) Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee. (section 801(a)(1)(C)) In addition, the promulgating agency must submit to the CG: (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each House. (section 801(a)(1)(B))

Section 804(3) adopts the definition of "rule" found at 5 U.S.C. § 551(4), which provides that the term rule "means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy."²²⁶ The legislative history of section 551(4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."²²⁷ The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"²²⁸ including interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus, a broad range of agency action is potentially subject to Congressional review.

The CG and OIRA Administrator have particular responsibilities with respect to a "major

²²⁵Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).

²²⁶Section 804(3) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties."

²²⁷Attorney General's Manual on the Administrative Procedure Act at 13 (1948).

²²⁸Avoyelles Sportsmen's League, Inc., v. Marsh, 715 F.2d 897 (5th Cir. 1983).

rule,” defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA. (section 804(2)) If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG’s report “shall include an assessment of the agency’s compliance with the procedural steps required by section 801(a)(1)(B).”²²⁹ (section 801(a)(2)(A)) The CG has interpreted his duty under this provision narrowly as requiring that he simply determine whether the prescribed action has been taken, i.e., whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not to examine the substantive adequacy of the actions.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to section 801(a)(1)²³⁰ or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted). (section 801(a)(3))

Thus, the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under section 808(2) an agency may determine that a rule should become effective notwithstanding section 801(a)(3) where it finds “good cause that notice and public

²²⁹See, e.g., *Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993) (memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993) (interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F.Supp 1346 (E.D. La 1988) (federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995) (affirming lower court’s ruling that SEC “no action” letter was a rule within section 551(4)).

²³⁰The General Counsel of the GAO has ruled that the 60-day period does not begin to run until *both* Houses of Congress receive the required report. See B-289880, April 5, 2002, opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel. The situation involved a Department of Health and Human Service’s (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate’s receipt, relying on the language of section 801(a)(1)(A) of the Act requiring that a copy of a covered rule must be submitted “to *each* House of Congress” in order to become effective.

procedure thereon are impracticable, unnecessary, or contrary to the public interest.”²³¹ Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement. (section 801(c)) Finally, a third route is available under section 801(a)(5) which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.”²³²

All other rules take effect “as otherwise allowed by law” after having been submitted to Congress under section 801(a)(1). (section 801(a)(4)) Under the APA, a final rule may go into effect 30 days after it is published in the Federal Register in final form. (5 U.S.C. § 553(d)) An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

All covered rules are subject to disapproval even if they have gone into effect. Congress has preserved for itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. (section 801(d)(1)) Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the House in the succeeding session and as though a report under section 801(a)(1) was submitted on that date. (section 801(d)(2)(A), (e)(2)) A held-over rule takes effect as otherwise provided. (section 801(d)(3)) The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time. (section 801(f)) If a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. (section 803) A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed,

²³¹Reviewing courts have generally applied the Administrative Procedure Act’s good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. *See, e.g.,* *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). As section 805 precludes judicial review for any “determination, finding, action or omission under this chapter,” there could be no court condemnation of a good cause determination, but the rule would still be subject to Congressional vacation and retroactive nullification.

²³²In *Leisegang v. Sect’y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (Fed. Cir. 2002), the appeals court held that Section 801(a)(3) “does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.” At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superceding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

before any reissued or new rule that is “substantially the same” as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule. (section 801(b)(2))

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.²³³ A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with section 801(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to pass it and thereby get the benefit of expedited consideration procedures, retroactive nullification of an effective rule, and the limitation on an agency from promulgating a “substantially similar” rule without subsequent Congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until its final disposition. (section 802(d)(1)) Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order. (section 802(d)(2)) At the conclusion of debate an up or down vote on the joint resolution is to be taken. (section 802(d)(3))²³⁴

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution “shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House.” (section 802(f)(1)(2))

²³³For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, see Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, CRS Report RL31160.

²³⁴There is some question whether a motion to proceed is nondebatable because of the absence of language so stating. Arguably, the nondebatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the CRA’s statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as “all debatable motions,” to ten hours. Ultimately, a resolution of this question by the Senate Parliamentarian, or the Senate itself, may be necessary. At the commencement of the debate on S.J.Res. 6, to disapprove the ergonomics rule, the presiding officer, however, declared, “The motion to proceed is not debatable. The question is on agreeing to the motion.” The motion was agreed to. 147 Cong. Rec. S1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was nondebatable despite the silence of the act on the matter. See 127 Cong. Rec. S4871 (May 12, 1981).

Section 805 precludes judicial review of any “determination, finding, action or omission under this chapter.” This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a Presidential determination that a rule should become effective immediately, an agency determination that “good cause” requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General’s assessment of an agency’s report. The legislative history of this provision indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule. This appears not to be a judicially settled matter.

Finally, the law provides a rule of construction providing that a reviewing court shall not draw any inference from a Congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute. (section 801(g))

Utilization of the Review Mechanism Since 1996

Since March 1996, the CG had submitted reports pursuant to section 801(a)(2)(A) to Congress on over 630 major rules.²³⁵ In addition, GAO had cataloged the submission in excess of 43,000 non-major rules as required by section 801 (a) (1) (A). To date, 37 joint resolutions of disapproval have been introduced relating to 28 rules. One rule, OSHA’s ergonomics standard in March 2001, has been disapproved, an action that may prove to be unique to the circumstances of its passage. Two other rules have been disapproved by the Senate. One, the Federal Communication Commission’s 2003 rule relating to broadcast media ownership was disapproved by the Senate during the 108th Congress, but was not acted upon by the House. The second, a 2005 Department of Agriculture rule relating to the establishment of minimal risk zones for introduction of bovine spongiform encephalopathy (Mad Cow Disease) was disapproved on March 3, 2005, but its counterpart, H.J.Res. 23, was never acted upon by the House. A third joint resolution, S.J. Res. 20, seeking disapproval of a rule promulgated by the Environmental Protection Agency to delist coal and oil-direct utility units from the new source category list under the Clean Air Act, was defeated in the Senate by a vote of 47-51 on September 13, 2005.²³⁶

OSHA’s ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush Administration.²³⁷ OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests and the formation of an umbrella organization, the National Coalition on Ergonomics, to oppose its adoption. In 1995, OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, Congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics proposals during the fiscal years 1995, 1996, and 1998.²³⁸ The riders did not prohibit OSHA from continuing its development work, however, which included responding to concerns that

²³⁵General Accounting Office, *Reports on Federal Agency Major Rules*, available at [<http://www.gao.gov/decisions/majrule/majrule.htm>].

²³⁶The 37 disapproval resolutions are detailed in Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Update and Assessment of the CRA After Ten Years*, CRS Report RL70116.

²³⁷The turbulent history of the development of the ergonomics standard is recounted in Edward Rappaport, *Ergonomics in the Workplace: Is It Time for an OSHA Standard?*, CRS Report 97-724.

²³⁸In a close floor vote, the rider proposed for FY1997 was deleted.

scientific knowledge of ergonomics was inadequate for rulemaking and that the cost of industry implementation of a broad standard would be extraordinarily costly. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms are not understood. In 2000, Congressional attempts to pass another appropriation rider, as well as stand alone prohibitory legislation, failed, and on November 14, 2000, OSHA issued its final standard which became effective on January 16, 2001.²³⁹ Most employer responsibilities under the new standard, however, were not to begin until October, 2001.

As soon as the rule was issued two industry groups filed suit in the Court of Appeal for the District of Columbia Circuit challenging OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation with the election of a president and effective control of both Houses of Congress in the same political party. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J.Res. 16, on March 1, 2001. A discharge petition was filed on March 5, and debate on and passage of the resolution occurred on March 6 by a vote of 56-44. That evening the House Rules Committee issued a rule for floor action the next day, and after an hour of debate H.J.Res. 35 was passed on March 7 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2002.²⁴⁰

In sum, the veto of the ergonomics standards may be seen as the product of an unusual, and possibly irreplicable, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a president seeking to undo a contentious, end-of-term rule from a previous administration.

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members, which in some instances was successful.²⁴¹ The anecdotal evidence of successful exertion of such pressure is quite limited.

Structural and Interpretive Deterrents to the Effective Use of the CRA. The sparing use of the CRA mechanism since its enactment has fostered considerable debate. Several salient issues have emerged in that period. These have included the need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives for consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; scope of the law's coverage; the judicial enforceability of its key requirements; whether a disapproval resolution may be directed at part of a rule; and the effect of a rule nullification on future agency rulemaking in the same area, which have introduced uncertainties and impediments to confident use of the process.

²³⁹65 Fed. Reg. 68,261 (Nov. 14, 2000).

²⁴⁰Pub. L. No. 107-5 (2001).

²⁴¹See CRS Report 97-724, *supra* note 237, at 13-16, describing examples of successful influence.

Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review; Proposals for Reform. The lack of a screening mechanism that will alert committees to rules that may raise important or sensitive substantive issues arguably prevents busy committees from prioritizing such issues. As indicated above, the Comptroller General's reports on major rules serve as check lists as to whether legally required agency tasks have been done and not as substantive assessments of whether they were done properly or whether the rules accord with Congressional intent. Indeed, lack of knowledge of the *existence* of such sensitive rules by jurisdictional committees or interested Members is rarely the case. What appears to be absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that may provide the basis for triggering meaningful Congressional review.

The need for an independent substantive screening body was signaled by the introduction by Representative Sue Kelly of H.R. 1704 in the 105th Congress, a bill that would have established a Congressional Office of Regulatory Analysis (CORA).²⁴² The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees both of which favorably reported differing versions of the legislation.²⁴³ Both versions would have established an independent CORA to be headed by a director appointed by the House Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the CG under the CRA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance with the procedural steps for 'major rules'" required by CRA, directs the proposed CORA to "conduct its own regulatory impact of these 'major rules.'"²⁴⁴ The bill as reported by the Government Reform Committee would have allowed the CORA director to use "any data and analyses generated by the Federal agency and any data of the Office" in analyzing the submitted rule. Both bills provided that a similar analysis of non-major rules was to be conducted when requested to do so by a House or Senate committee or by individual members of either House. First priority for the conduct of such analyses was given to all major rules. Secondary priority was assigned to committee requests. Tertiary priority was given individual member requests. Finally, under the Judiciary Committee version, the report was to be furnished within 45 days after Congress receives notification of the rule; the Governmental Reform bill would have allowed 30 days. H.R. 1704 received no floor action during the 105th Congress.

Some argue that an independent office of regulatory analysis would serve the Congressional need for objective information necessary to evaluate agency regulations. It might also provide credibility and impetus to utilize the review mechanism. Further, by providing intensive review of certain non-major rules, the possibility of OIRA "hiding" significant rules by not designating them as "major" is forestalled. Objections may be heard that creation of a new Congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive. The requirement of the Judiciary Committee's version that a CORA do its own cost-benefit analysis from scratch could be pointed to as an unknown cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

²⁴²A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. Feb. 25, 1998).

²⁴³See H.R. Rep. No. 105-441 (1998).

²⁴⁴Section 4 (a)(3)(A).

Congress agreed upon a limited test of the CORA concept, late in the 106th Congress, with the passage of the Truth in Regulating Act of 2000 (TIRA).²⁴⁵ That legislation established a three-year pilot project for GAO to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either House of Congress may request the CG to review the rule. The CG was to report on each rule within 180 calendar days. The report had to contain an “independent evaluation” by the CG of the agency’s cost-benefit analysis. We are aware of only one request ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture’s forest planning and roadless area rule. GAO advised the requesters that although Act authorized \$5.2 million per year for the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh exactly with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the Act expired in January 2004.

In the 109th Congress, Representative Sue Kelly introduced H.R. 1167, which would make permanent the authority of Congress to request GAO to perform regulatory analyses. The new TIRA, if it had been enacted as a permanent responsibility of GAO, would not appear to have required a specific appropriation to require agency performance of the vested task as was the case when it was established as a “pilot project.” It would, in effect, be an unfunded mandate on GAO. Although GAO currently does (and historically has always done) some reviews of agencies’ rules at Members’ requests under its current appropriations, both the volume and nature of the reviews are likely to be substantially different and may affect its ability to conduct other agency reviews. A similar bill, H.R. 725, would also have made TIRA permanent, but would have authorized up to \$5 million for the revenues. Although GAO may view this bill as preferable, if the authorized funds are not appropriated, GAO could be in the same “unfunded mandate” situation as it would under H.R. 1167.

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, Representative Ginny Brown-Waite introduced H.R. 3356, the Joint Administrative Procedures Committee Act of 2003, in the 108th Congress, which would amend the CRA by establishing a joint Congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA.²⁴⁶ The responsibilities are in addition to the current statutory framework providing for review of new rules that are required to be reported. A new provision permits the joint committee to recommend disapproval of new rules to jurisdictional committees. The proposed Joint Administrative Procedures Committee (JAPC) would be composed of 12 members from each House with no more than 7 from one political party, selected by the Senate Majority Leader and the Speaker of the House. The JAPC would receive all agency submissions of covered rules and provide copies to all jurisdictional committees. The JAPC has sixty days to consider the rule. The agency could be required to submit such reports

²⁴⁵Pub. L. No. 106-312, 114 Stat. 1248-50, 5 U.S.C. § 801 note (2000).

²⁴⁶See introductory remarks on the measure at 147 Cong. Rec. H2454 (daily ed. Oct. 21, 2003).

as is required by the joint committee such as a cost-benefit analysis or risk assessment. If no action is taken by JACP, the rule may go into effect. If a majority determines that rule is inconsistent with Congressional intent in the area, JACP may recommend a disapproval resolution to the House and Senate jurisdictional committees.

In its report to the jurisdictional committees, JACP is to pinpoint the objectionable provisions of the rule. The proposal would establish a new expedited consideration procedure for disapproval resolutions in the House of Representatives. On the third legislative day after a joint resolution is recommended by JACP, it is in order for any member of the House to move to proceed to consideration of the disapproval resolution. It is a privileged, non-debatable motion and once agreed to must be considered before any other business under expedited procedures. Only one hour of debate would be allowed. Finally, section 801(b)(2) of the CRA is amended to provide that an agency may promulgate a new rule without new statutory authorization if it carries out the recommendation set forth in the report submitted by the JACP to the jurisdictional committees. The bill was referred to the House Committees on Rules and Judiciary. The Judiciary Committee referred it to the CAL Subcommittee. No action was taken by either Committee. Representative Brown-Waite's proposal was reintroduced in the 109th Congress as H.R. 3148 but received no action.

Another bill, H.R. 576, introduced by Representative Ney in the 109th Congress, is similar in many respects to H.R. 3148, but quite different in certain fundamental ways. Both would create a 24-member House-Senate joint committee capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. Both also provide for an expedited consideration procedure in the House. Significant differences appear, however, with respect to the roles assigned to the joint committees. Under H.R. 3148, the current process established by the CRA for Congressional review of new agency rules is maintained. Required reports on new rulemakings are submitted to each House and such reports are sent to the jurisdictional committees of each House for action. Rules required to be reported are also sent to the joint committee. Special rules are provided for discharge from committees in the Senate and, under proposed H.R. 3148, from House committees. Expedited procedures are in effect for floor proceedings in each House. The only part to be played by the joint committee in the new rule review process under H.R. 3148 is to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions. Deference to the current roles of jurisdictional committees is also maintained under H.R. 3148 with respect to the new duties given to the joint committee to selectively review existing federal agency rules in effect before the enactment of the CRA and existing major rules of federal agencies promulgated since April 1996. The joint committee may only recommend to jurisdictional committees that they take appropriate legislative action to amend or repeal such laws.

Under H.R. 576, the joint committee, rather than the jurisdictional committees of each House, receives the report of covered rules submitted for review by federal agencies as well as cost-benefit analyses and other materials. Jurisdictional committees receive copies of these materials from the joint committee. GAO is to submit its report on major rules to the joint committee, not the jurisdictional committees concerned. Major rules take effect no earlier than 60 days after the rule is published in the Federal Register or is received by the joint committee. Joint resolutions of disapproval are reported by the joint committee to the respective Houses for action. The joint committee may also report "by bill . . . recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the joint committee or otherwise within the jurisdiction of the joint committee." It would appear, then, that the joint committee would have the predominant role in the Congressional review process,

which would inject a highly controversial issue – diminution of the role of jurisdictional committees – in a reform debate already freighted with difficult and sensitive political and legal considerations.

A third bill introduced in the 109th Congress is H.R. 931, by Representative Hayworth, would prohibit any regulation proposed by a federal agency from going into effect until a bill enacted under expedited consideration procedures applicable to the rule is signed into law. The term “regulation” is given the broad meaning of the term “rule” as defined in 5 U.S.C. § 551(4). The bill does not specifically reference the current CRA process. In fact, it would supercede it and require rulemaking agencies to seek approval of all covered “regulations.” There is no provision for Congressional processing in a timely and expeditious manner raising the specter of a legislative back of a potentially huge number of proposed regulations.

Lack of an Expedited House Procedure. The current absence of an expedited consideration procedure in the House of Representatives may well be a factor discouraging use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, perhaps only the most well situated in the body will be able to gain access within the limited period of review.²⁴⁷ Also, a perception that no action will be taken in the House might deter Senate action.

The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule. A consideration behind any serious effort to use the full CRA review mechanism likely has been the realization that any joint resolution disapproving a rule that does not have the support of the administration would be vetoed and require a two-thirds vote in each House to override. The deterrent potential of the need for a supermajority in each House to overcome a Presidential veto is significant, unless the object of the exercise is simply to provide the impetus for informal accommodations, such as occurred in the HCFA surety bond matter, or to influence Members to support remedial legislation. Nevertheless, the ready realization by agencies over time that passage of a disapproval resolution is highly unlikely could substantially reduce the efficacy of such a threat. Additionally, a possible consequence of such an assumption is that agencies will not factor in Congressional disapproval as part of the rule development process.²⁴⁸

²⁴⁷The experience with respect to the repeal of the ergonomics standard, discussed *supra* at notes 237 - 241 and accompanying text, would appear to bear this out.

²⁴⁸See Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059, 1089 (2001). Mr. Seidenfeld explains:

The paucity of motions for disapproval resolutions indicates that agencies are not apt to focus on fast-track review as a check on their rulemaking discretion at least until late in the rulemaking process. Agencies might be likely to focus on such review when they adopt rules that they know will be unpopular in Congress, but even then they need not fear the ramifications of fast-track review unless they also believe that the president opposes the rule or is willing to compromise it to win other political battles. Fast-track review may have greater significance for midnight rules that are subject to review when a different president is in office.

(continued...)

The validity of this assumption may be seen to have been borne out in the aftermath of the ergonomics standard veto. Since that action, 19 resolutions of disapproval with respect to 14 rules have been introduced, only one of which has been acted upon (by one House),²⁴⁹ an apparent return to the prior practice of using the mechanism to facilitate bargaining.

Thus, even with the successful disapproval of the ergonomics standard, the supermajority hurdle still remains. One possible solution is to establish a multi-tiered disapproval mechanism. That is, instead of all rules, major or non-major, being treated equally in that they can only be overturned by a joint resolution of disapproval, a process in which the entire burden of action is on the Congress, some rules might be designated for more selective, special review. For example, major or significant rules might be subject to a joint resolution of *approval*. Under such a scheme a major or significant rule would not become effective unless a joint resolution approving it passed both Houses within a specified period of time.²⁵⁰ To make such a scheme effective someone or some body, other than the OIRA administrator or a Congressional agency, such as the proposed CORA, might be vested with the authority to designate which rules are “major” or “significant” and thereby subject to the affirmative approval requirement. A benefit from the Congressional standpoint is that the burden for supporting and justifying such rules falls on the promulgating agencies. All other rules would be subject to disapproval resolutions. Another option would be to subject all covered rules to Congressional approval and establish an expedited procedure whereby non-controversial rules may be sped through leaving only a few for close consideration.²⁵¹

The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection. Section 808 of the review provision sets forth the mandatory text of any joint resolution of disapproval: “That Congress disapproves the rule submitted by the _____ relating _____, and such rule shall have no force or effect. (The blank spaces being appropriately filled in).” The quoted text refers to “the rule” and “such rule,” indicating a rule in its entirety. The experience of 33 joint resolutions of disapproval thus far introduced is that the first blank is filled with the name of the promulgating agency and the second with a generic title or description of the rule.²⁵² Similarly, the text of the review provision refers to “such rule,” “a rule,” or “the rule,” with no language expressly referring to a part of any rule

²⁴⁸(...continued)

Id.

²⁴⁹S.J.Res. 17, dealing with the FCC’s media ownership rule, which passed in the Senate but was not acted upon in the House.

²⁵⁰*See e.g.*, Reorganization Act Amendments of 1984, providing that both Houses of Congress had to pass a joint resolution approving a reorganization plan within 90 days of continuous session after the date of Presidential submission or else it is deemed disapproved. 5 U.S.C. § 906 (a) (1994).

²⁵¹Two bills introduced in the 106th Congress to revise the CRA utilized the joint resolution of approval approach. See S. 1348, 106th Cong. (1999) (Sen. Brownback) S. 2670, 106th Cong. (2000) (Sen. Thomas). A similar approach is reflected in H.R. 110 introduced by Rep. Hayworth (with 25 co-sponsors) in the 108th Congress. All agency rules must be reported to Congress and may become effective only on passage, by means of a fast-track procedure applicable to both Houses, of an approval law, which is not subject to judicial review.

²⁵²S.J.Res. 50 and H.J.Res. 123, “relating to surety bond requirements for home health agencies under the medicare and medicaid programs”

under review. The procedure leading to a vote on the proposed disapproval resolution allows for no amendments, and the final vote is up or down on the joint resolution as introduced.

The legislative history of the provision is similarly uniform in using language that would ordinarily indicate a reference to a submitted rule in its entirety, except in one instance. During a discussion of the section 802 procedure that would obtain when one House completes its action on a joint resolution and sends to it to the other House before the second House has yet to complete any action, the following comment is made:

Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(e). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). *If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.*²⁵³

²⁵³Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. E571, at E577 (daily ed. April 19, 1996); 142 Cong. Rec. S3683, at S3686 (daily ed. Apr. 18, 1996) (emphasis added) (hereinafter Legislative History). These identical detailed explanations by the legislative sponsors of the intent and scope of the CRA's provisions appeared in the daily editions of the Congressional Record some three weeks after SBREFA was signed into law. In the absence of committee hearings and the sparse commentary during floor debate, these explanations represent the most authoritative contemporary understanding of the provisions of the law. It is, however, post-enactment legislative history and does not carry the weight that committee report explanations and floor debates provide. As one court dealing with the interpretation of a CRA provision stated, the post-enactment legislative history "buttresses the 'limited scope' of the CRA judicial review provision." The court warned, however, that "the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome." See *United States v. Southern Indiana Gas & Electric Co.*, discussed *infra* at note 269 and accompanying text. It has recently come to our attention that the permanent edition of the Congressional Record for the 104th Congress places the Senate sponsors Joint Explanation at April 18, 1996, the same date it appeared in daily edition. See 142 Cong. Rec. 8196-8201. The House sponsors' Joint Explanation, which originally appeared in the daily edition of April 19, 1996, is now placed during the floor debate on SBREFA on March 28, 1996, the date of its passage. See 142 Cong. Rec. 6922-6930. There is no explanation for the earlier placement. As a consequence, we have determined to continue to treat the Joint Explanation as post-enactment legislative history that arguably merits close consideration by a reviewing court as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.

The last two sentences seem to raise some uncertainty. The next to last sentence would appear to contemplate the possibility of a conference to resolve differences in resolutions. The last sentence minimizes what those differences could be. Some have suggested that the explanation contemplates that parts of rules may be the subject of disapproval resolutions, arguing that the framers of the provision would have known that many rules are complex and contain a variety of provisions, only one or a few of which may be objectionable, and would not have required a whole rulemaking to be brought down simply because of one offending portion out of many. It might also be argued that in light of the section 801(b)(2) prohibition against agency issuance of a rule “in substantially the same form” after passage of a disapproval resolution unless Congress by subsequent law authorizes it, not allowing rejection of part of a rule would have a draconian result.

In fact, an up or down vote on the entire rule would appear to have been the intent of the framers of the review provision. The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for Congressional actions dealing with military base closings,²⁵⁴ international trade agreements,²⁵⁵ and Presidential reorganization plans,²⁵⁶ among others. Each dealt with complex, politically sensitive decisions which allowed only an up or down vote by the Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicate that Congress intended the process to focus on submitted rules as a whole and not to allow veto of individual parts. Perhaps a proper reading of the quoted portion of the legislative history is that it was contemplating the possibility that the blank to be filled in after “relating to” might have different generic descriptions of the rule subject to disapproval. A broader reading of these sentences would not otherwise appear warranted by either the legislative language itself or the rest of the explanatory legislative history.

If this reading is correct, it – as a practical matter – may be a factor in the limited use of the mechanism. As indicated, nullifying a rule means disabling an agency from regulating in the area covered by the rule unless Congress passes further authorization legislation, a significant consequence of any disapproval action. On the other hand, expressly authorizing nullification of portions of a rule might allow competing disapproval resolutions within each House and the certainty of a long, drawn out conference with the possibility of no agreement.

The Uncertainty of Which Rules Are Covered By the CRA. The framers of the Congressional review provision intentionally adopted the broadest possible definition of the term “rule” when they incorporated section 551(4) of the APA. As indicated previously,²⁵⁷ the legislative history of section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents – such as policy statements, guidance, manuals, circulars, memoranda, bulletins and the like – which as a legal or practical matter an agency wishes to make binding on the affected public.

²⁵⁴Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2908 (b) 104 Stat. 1808, 10 U.S.C. § 2687, note (2000).

²⁵⁵See 19 U.S.C. §§ 2191-2193 (2000).

²⁵⁶See, e.g., Reorganization Act of 1984, 5 U.S.C. §§ 909-912 (2000).

²⁵⁷See *supra* notes 216-19 and accompanying text.

The legislative history of the CRA emphasizes that by adoption of the section 551(4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”²⁵⁸ The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically,²⁵⁹ and noted that it was the intent of the legislation to subject just such documents to Congressional scrutiny:

The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, “guidelines,” and agency policy and procedure manuals. The committees admonish the agencies that the APA’s broad definition of “rule” was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.²⁶⁰

It is likely that virtually all the 43,000 non-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. This would mean that perhaps thousands of covered rules have not been submitted for review.²⁶¹ Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously.

Eight such agency actions have come to the attention of committee chairmen and Members and were referred to the Comptroller General for determinations whether they were covered rules. In five of the eight cases the CG determined the action documents to be covered rules:

²⁵⁸See Legislative History, *supra* note 253, at E 579, S 3687.

²⁵⁹This practice has been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311 (1992); cf., General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (August, 1998).

²⁶⁰See Legislative History, *supra* note 253, at E 578, S 3687.

²⁶¹An indication of the vast number of unreported covered rules came as a result of an investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See *Non-Binding Legal Effect of Agency Guidance Documents*, H.R. Rep. 106-1009 (2000). GAO testimony at the Committee’s March 30, 2006 hearing on the CRA suggested that over 200 covered rules per year are unreported.

- Letter to Honorable Lane Evans, Ranking Minority Member, House Committee on Veterans' Affairs, B-292045 (May 19, 2003) (Department of Veterans Affairs memorandum terminating the Department's Vendee Loan Program is not a rule that must be submitted to Congress because it is exempt under section 804(3)(B) and (C) as a rule relating to "agency management" or "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.").
- Letter to Honorable Ted Strickland, B-291906 (February 28, 2003) (Department of Veterans Affairs memorandum instructing all directors of health care networks to cease any marketing activities to enroll new veterans in such networks is excluded from CRA coverage by section 804(3)(C) which excludes "any agency rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.").
- Letter to Honorable Doug Ose, Chairman, House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, B-287557 (May 14, 2001) (Department of Interior's Fish and Wildlife Service's Trinity River "Record of Decision" is a rule covered by the CRA because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy and is an "agency action[] that substantially affect[s] the rights and obligations of outside parties.").
- Letter to the Hon. James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000) (Farm Credit Administration's national charter initiative held to be a rule under the CRA).
- Letter to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999) (EPA "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.).
- Letter to Senator Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by Presidential executive order and direction and the President is not an "agency" under the APA and is not subject to the provisions of the APA);
- Letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy).
- Letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to be a

covered rule because it is of general applicability and interprets and implements the statutory program.).

The GAO opinion on the American Heritage River Initiative rests its rationale that a Presidential directive to an agency that results in substantive action by that agency is not thereby covered by the CRA based on the Supreme Court's rulings in *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Spector*, 511 U.S. 462, 469 (1994). In light of *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) and *National Family Planning v. Sullivan*, 979 F.2d 227 (1992), which successfully challenged substantive changes in rules that were directed by a Presidential directive, the GAO General Counsel's conclusions may be problematic.

Also questionable is the General Counsel's analysis in its February 28, 2003 opinion concluding that a Department of Veterans Affairs (DVA) memorandum terminating a long-time veterans health outreach program was an exempt agency practice that had no substantial effect on the rights of non-agency parties. In contrast with its May 19, 2004 opinion dealing with a termination of a DVA vendee loan program, where it closely examined the statutory basis of the loan program and found that it was established on the basis of *discretionary* authority of the Secretary and provided no direct benefits to veterans, the General Counsel made no mention that the Congress had charged the Secretary of DVA "with the affirmative duty of seeking out eligible veterans and eligible dependants and providing them" with federal benefits and services.

Representative Strickland joined with the Vietnam Veterans of American in a suit seeking declaratory and injunctive relief to restore the program. In *Vietnam Veterans of America v. Principi*, 2005 WL 901133 (D.D.C. March 11, 2005), the district court found that "[u]nder 38 U.S.C. 7721, 7722, and 7227, Congress charges the Secretary of the Department of Veterans Affairs with the affirmative duty to 'provide outreach services.' This duty is not discretionary but must be done in accordance with Congress' wishes." The court concluded, however, that since Congress appropriated a lump-sum for both outreach services and health care services, and the record showed that some monies had been expended for outreach services, it indicated that Congress meant to allow the Secretary the discretion to decide "the manner in which [outreach services] are to be provided." The critique here is that the CG's failure to examine the Secretary's duty under the statute in question eliminated the possibility finding a substantial effect of the agency's action on the rights or obligations of non-agency parties, thereby forestalling the opportunity for legislative review under CRA procedures. It is interesting to note that subsequent to the CG's decision and the filing of the lawsuit, Congress enacted a limitation on the Fiscal Year 2004 VA appropriation stating It is interesting to note that subsequent to the CG's decision and the filing of the lawsuit, Congress enacted a limitation on the Fiscal Year 2004 VA appropriation stating, "[n]one of the funds made available may be used to implement any policy prohibiting the Directors of the Veterans Integrated Service Networks from conducting outreach or marketing to enroll new veterans within their respective networks," an apparent indication that Congress thought the controverted policy could be having an impact on potential beneficiaries. See Pub.L. No. 108-199, H.R. 2673, 108th Cong. § 418 (2004).

The Uncertainty of the Effect of An Agency's Failure to Report a Covered Rule to Congress. Section 801(a)(1)(A) of the CRA provides that "[b]efore a rule can take effect," the federal agency promulgating such rule shall submit to each House of Congress and the CG a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. Section 805 states that "no determination, finding, action or omission under this chapter shall be subject to judicial review." The Department of

Justice (DOJ) has broadly hinted that the language of section 805 “precluding judicial review is unusually sweeping” so that it would presumably prevent judicial scrutiny and sanction of an agency’s failure to report a covered rule.²⁶² DOJ has succeeded with its preclusion argument in two federal district court rulings. More recently the rationale of those opinions has been called into question and rejected by a third district court.

In *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*,²⁶³ three thrift associations and two of their trade associations sued the Federal Housing Finance Board challenging one of its policies regarding the home mortgage lending industry. The plaintiff’s argued, *inter alia*, that the policy was a rule required to be reported to Congress under the CRA and the failure to report it precluded its enforcement. The government asserted that section 805 was a blanket preclusion of judicial review. In response to plaintiff’s contention that section 805 only precluded review of any “determination, finding, or omission” by Congress, the court held that “the statute provides for no judicial review of any ‘any determination, finding, action or omission under this chapter,’ not ‘by Congress under this chapter.’ The court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts.”²⁶⁴ The court made no reference to the scheme of the Act or its legislative history.

The Texas district court’s “plain meaning” rationale was cited with approval by an Ohio district in *United States v. American Electric Power Service Corp.*²⁶⁵ That case was one of many involving an extensive litigation campaign by the Environmental Protection Agency (EPA), begun in the mid-1990s to establish the extent to which a power plant or factory may alter its facilities or operations without bringing about a “modification” of that emission source so as to trigger the Clean Air Act’s New Source Performance Standards and pre-construction “new source review.”²⁶⁶ Among the issues common in these cases, and raised in this case, was whether EPA’s determination to begin a campaign of litigation enforcement after many years of no enforcement was a substantive change that had to be reported to Congress under the CRA. It was among 123 affirmative defenses raised by defendants, nine coal-fired power plants in Ohio, Virginia, and West Virginia, which the Government moved to dismiss. Citing the *Texas Savings* case approvingly, the district court agreed “that the language of Section 805 is plain” and that “[d]eparture from the plain language is appropriate in the ‘rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters . . . or when the statutory language is ambiguous.’ . . . In all other cases, the plain

²⁶²See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at 9-11 (hereinafter DOJ Memorandum).

²⁶³1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), *aff’d*, 201 F.3d 551 (5th Cir. 2000).

²⁶⁴*Id.* at note 15.

²⁶⁵218 F.Supp.3d 931 (S.D. Ohio 2002).

²⁶⁶For background on the legal development of the issue, see Robert Meltz, *Air Pollution: Legal Perspective on the “Routine Maintenance” Exception to New Source Review*, CRS Report RS21424.

meaning of the statute controls.”²⁶⁷ The court did not indicate whether it had attempted to discern whether there was any evidence of Congressional intent at odds with the court’s plain meaning reading. It did, however, provide an alternative rationale: “Furthermore, this Court is not convinced that the instant enforcement action amounts to rulemaking which would be covered by 5 U.S.C. 801 *et. seq.*, in the first instance,” without elaboration.²⁶⁸

In *United States v. Southern Indiana Gas and Electric Co.*,²⁶⁹ the court faced the same issue in a motion for summary judgment by the power company defendant. Rejecting the *Texas Savings* and *American Electric Power* precedents, it found that section 805 is ambiguous and susceptible to two possible meanings: that Congress did not intend for any court review of an agency’s compliance with the CRA or that Congress only intended to preclude judicial review of its own determination, findings, actions or omissions made under the CRA *after* a rule had been submitted to it for review. Adopting the first alternative, argued for by the Government and adopted by the *Texas Savings* and *American Electric Power* courts, would, according to the court, allow agencies “to evade the strictures of the CRA by simply not reporting new rules and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which is to provide a check on administrative agencies’ power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual.”²⁷⁰ The court found that the post-enactment legislative history “buttresses the ‘limited scope’ of the CRA’s judicial review provision” but was careful to acknowledge that “the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome.” Nevertheless, the court emphasized that it “reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the act. The legislative history only serves to further reinforce the Court’s conclusion.”²⁷¹

It is certainly arguable that the *Southern Indiana* court’s view of the limited preclusiveness of section 805 is plausible and persuasive. Indeed, an even stronger case can be made from a closer analysis of the text and structure of the act taken as a whole. Moreover, although the court was correct as a general matter that post-enactment legislative history normally is given less weight, there are a number of Supreme Court rulings that recognize that under certain circumstances, arguably applicable here, contemporaneous explanations of key provisions’ intent have been found to be an “authoritative guide” to a statute’s construction. In one instance the Court relied on an explanation given eight years after the passage of the legislation.

The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and

²⁶⁷218 F.Supp.3d at 949.

²⁶⁸*Id.*

²⁶⁹2002 WL 1760752 (S.D. Ind. 2002).

²⁷⁰*Id.* at 13-14.

²⁷¹*Id.* at 15-16, n.3.

possible nullification through joint resolutions of disapproval.²⁷² The scheme provides for the delayed effectiveness of some rules deemed innately important (“major rules”) (section 801(a)(3)), and temporarily waives the submission requirement of section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or for a rule an agency “for good cause” finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest. (section 808) Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of “major rule,” yet all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect. (sections 801(b)(1), 801(f)) Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval. (section 801(b)(2))

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the CG must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or publication of the rule (section 801(a)(2)(A)); the Administrator of OIRA determines whether a rule is a “major rule” (section 804(2)); and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures. (section 802) Nevertheless, Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress adjourns a session of the Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. (section 801(d)(1))

Thus, the statutory scheme is geared toward Congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to “determination[s], finding[s], action[s], or omission[s] *under this chapter*,” a plain reference to the range of actions authorized or required as part of the review process. Congress arguably did not intend, as is more fully described below, to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the CG properly performed his reporting function. These are matters that Congress can remedy by itself. Nevertheless, without the potential of court invalidation of enforcement actions based on the failure to submit covered rules, agencies are not likely to comply with submission requirements. If section 805 is read so broadly, it would arguably render ineffective as well the section 801(b)(2) prohibition against an agency promulgating a new rule that is “substantially the same” as a disapproved rule unless it “is specifically reauthorized by a law enacted after” the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued

²⁷² See Legislative History, *supra* note 253, at E 575 and S 3683 (“This legislation establishes a government-wide Congressional review mechanism for most new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects.”).

rule is “substantially the same” as a disapproved rule is one that a court will be asked to make.²⁷³ Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in section 801(g) that “[i]f Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any interest of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”

The legislative history of the review provision confirms this view of the limited reach of the judicial review preclusion language. A key sponsor of the legislation, Representative Henry Hyde, explained during the floor debate on H.R. 3136 that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.”²⁷⁴

Shortly thereafter, the principal Senate and House sponsors of H.R. 3136 published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the Congressional review provision of the CRA and its legislative history. Senator Nickles explained:

Mr. President, I will submit for the Record a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day . . . Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator Reid and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint statement to be printed in the Record on behalf of myself, as the sponsor of the S. 219, Senator Reid, the prime co-sponsor of S. 219, and Senator Stevens, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.²⁷⁵

The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

Section 805 provides that a court may not review any congressional or administrative “determination, finding, action, or omission under this chapter”. Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are

²⁷³The disapproval of the ergonomics rule underlines a possible need for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. That rule, which was broad and encompassing in its regulatory scope, raises the question as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute. This issue is addressed in the next section.

²⁷⁴142 Cong. Rec. H3005 (daily ed. March 28, 1996).

²⁷⁵See Legislative History, *supra* note 253, at 142 Cong. Rec. S3683.

not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to “determine the Rules of its Proceedings”. U.S. Const. art. I, §5, cl. 2, which includes each house being the final arbiter of compliance with such Rules.

The limitation on a court’s review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when “Congress does not enact a joint resolution of disapproval”, or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).²⁷⁶

The Justice Department has suggested that such post-enactment legislative history should not carry any weight, particularly in view of the unambiguous nature of the preclusion language at issue.²⁷⁷ As discussed below, however, the courts appear to have taken a contrary view in analogous interpretive situations.

The Joint Explanatory Statement is a contemporaneous explanation of the Congressional review provision by the legislative sponsors of the legislation which is consonant with the text and structure of the legislation. Such statements by legislative sponsors have been described by the Supreme Court as an “authoritative guide to the statute’s construction.” *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 526-27 (1982) (citing a bill summary placed in the Congressional Record by the bill’s sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983) (relying on a 1965 explanation by “an important figure in the drafting of the 1957 [Atomic Energy Act]”); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984) (remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

Finally, it may be noted that analogous preclusion of judicial review provisions in the original Paperwork Reduction Act of 1980, Pub. L. No. 96-511 and in the 1995 revision of the Act, Pub. L. No. 104-13, have been uniformly construed by the courts to allow enforcement of its public protection provision. Thus, 44 U.S.C. § 3504 (1994), which authorized the Director of

²⁷⁶See Legislative History, *supra* note 253, at E 577 and S 3686.

²⁷⁷See DOJ Memorandum, *supra* note 262, at 10, n.14.

OMB to review and approve or disapprove information collection requirements in agency rules, and to assign control numbers to such forms, provided that “there shall be no judicial review of any kind of the Director’s decision to approve or not to act upon a collection of information requirement contained in an agency rule.” (44 U.S.C. § 3504(h)(9)) A similar provision appears in the 1995 revision of the Paperwork Reduction Act.²⁷⁸ The 1980 legislation also contained a “public protection” provision, which absolved a person from any penalty for not complying with an information collection request if the form did not display an OMB control number or failed to state that the request was not subject to the act.²⁷⁹ The public protection provision, section 3512, has been the subject of numerous court actions, some finding it applicable and providing a complete defense to noncompliance, others finding it inapplicable. But no court has ever raised a question with respect to preclusion of judicial review.²⁸⁰

A reviewing court construing the language of the Congressional review provision, the structure of the legislation, and its legislative history, including post-enactment statements, is therefore likely to hold that a court is not precluded from preventing an agency from enforcing a covered rule that was not reported to Congress in compliance with section 801(a)(1)(A).

The Uncertainty of the Breadth of the Prohibition Against An Agency’s Promulgation of a “Substantially Similar” Rule After the Original Rule Has Been Vetoed. Enactment into law of a disapproval resolution has several important consequences. First, a disapproved rule is deemed not to have had any effect at any time. Thus, even a rule that has become effective for any period of time is retroactively negated.²⁸¹ Second, a rule that does not take effect, or is not continued because of the passage of a disapproval resolution, cannot be “reissued in the same form” nor can a “new rule” that is “substantially the same” as the disapproved rule be issued unless such action is specifically authorized by a law enacted subsequent to the disapproval of the original rule.²⁸² The full text of this provision states:

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

Finally, if a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the disapproval resolution.²⁸³

²⁷⁸44 U.S.C. § 3507(d)(6) (2000).

²⁷⁹See 44 U.S.C. § 3512 (1994).

²⁸⁰*Compare* United States v. Smith, 866 F.2d 1092 (9th Cir. 1980) (failure of Forest Service to file a plan of operations with OMB control number precluded conviction for failure to file) *with* Cameron v. IRS, 593 F.Supp. 1540, *aff’d*, 773 F.2d 126 (6th Cir. 1984) (failure of IRS forms to have OMB control numbers did not violate section since it was a collection of information during the investigation of a specific individual or entity which is exempt under the provision).

²⁸¹5 U.S.C. § 801(f) (2000).

²⁸²5 U.S.C. § 801(b)(2) (2000).

²⁸³5 U.S.C. § 803 (2000).

It can be anticipated that opponents of a disapproval resolution will argue that successful passage of a resolution may disable an agency from ever promulgating rules in the “area” covered by the resolution without future legislative reauthorization as a successful disapproval resolution must necessarily bring down the entire rule. Or, at the very least, it may be contended that any future attempt by the agency to promulgate new rules with respect to the subject matter will be subject to judicial challenge by regulated persons who may claim that either the new rules are substantially the same as those disapproved or that the statute provides no meaningful standard to discern whether a new rule is substantially the same and that the agency must await Congressional guidance in the form of a statute before it can engage in further rulemaking in the area. The practical effect of these arguments, then, may be to dissuade an agency from taking any action until Congress provides clear authorization.

A review of the CRA’s statutory scheme and structure, the contemporaneous Congressional explanation of the legislative intent with respect to the provisions in question, the lessons learned from the experience of the March 2001 disapproval of the OSHA ergonomics rule, and the application of pertinent case law and statutory construction principles suggests several observations. First, it is doubtful that Congress intended that all disapproved rules would require statutory reauthorization before further agency action could take place. For example, it appears that Congress anticipated further rulemaking, without new authorization, where the statute in question established a deadline for promulgating implementing rules in a particular area. In such instances, the CRA extends the deadline for promulgation for one year from the date of disapproval. Second, a close reading of the statute, together with its contemporaneous Congressional explication, arguably provides workable standards for agencies to reform disapproved regulations that are likely to be taken into account by reviewing courts. Those standards would require a reviewing court to assess both the nature of the rulemaking authority vested in the agency that promulgated the disapproved rule and the specificity with which the Congress identified the objectionable portions of a rule during the floor debates on disapproval. An important factor in a judicial assessment may be the CRA’s recognition of the continued efficacy of statutory deadlines for promulgating specified rules by extending such deadlines for one year after disapproval. Third, the novelty of the issue, the uncertainty of the weight a court will accord the post enactment Congressional explanation, and the current judicial inclination to give deference to the “plain meaning” of legislative language, make it difficult to reliably anticipate what a court is likely to hold.

A blanket contention that enactment of a joint resolution disapproving an agency’s rules would disable that agency from promulgating future rules in the “area” of concern until Congress passes new legislation authorizing it to issue rules on that subject would not appear to have a substantial basis in the CRA. Such argumentation would apparently be based on the notion that the “plain meaning” of the CRA’s disapproval mechanism forecloses further rulemaking with respect to that subject matter unless Congress specifically reauthorizes such action in subsequent legislation. That is, as Congress can apparently only disapprove a rule as a whole, rather than pinpointing any particular portions, there is no sound basis for the agency to act without further legislative guidance where a rule deals exclusively with an integrated subject matter. The statute gives no indication as to how an agency is to discern what actions would be “substantially the same” and it would run the risk of a successful court challenge if it guessed wrong. It might be further argued that even if the agency promulgates new rules, which of course would be subject to CRA scrutiny, and Congress did not act to disapprove the new rules, that would not provide the necessary reauthorization since section 801(g) of the act provides as a rule of construction that in the event of the failure of Congress to disapprove a rule “no court . . . may infer any intent of Congress from any action or inaction of the Congress with regard to such, related statute, or joint resolution of disapproval.”

It is, of course, fundamental that statutory language is the starting point in any case of statutory construction. In recent years, the Supreme Court has shown a strong disposition to hold Congress to the letter of the language it uses in its enactments. In its ruling in *Barnhart v. Sigmon Coal Co.*²⁸⁴ the Court advised that the first step “is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”²⁸⁵ “The inquiry ceases ‘if the statutory language is unambiguous and the statutory scheme is coherent and consistent.’”²⁸⁶ In such cases, the Court has held, resort to “legislative history is irrelevant to the interpretation of an unambiguous statute.”²⁸⁷ In *Barnhart*, the Court warned, “parties should not seek to amend [a] statute by appeal to the Judicial Branch.”²⁸⁸

The plain meaning rule, however, is not an unalterable, rigid rule of construction and has been held inapplicable where it would “lead to an absurd result,”²⁸⁹ or “would bring about an end completely at variance with the purpose of the statute.”²⁹⁰ “It is ‘a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme’ Thus it is a more faithful construction of [a statute] to read it as a whole, rather than as containing two unrelated parts. It is the classic judicial task of construing related statutory provisions to make sense in combination.”²⁹¹ In the instant situation, it is arguably not likely that a court would hold that the “substantially the same” language of section 801(b)(2) is unambiguous, either on its face or in the context of the statutory scheme. The direction of the provision is not a self-enforcing mandate; it clearly requires a further determination whether rules have been reissued in “substantially the same form” or whether a new rule is “substantially the same” as the one disapproved. The ambiguity raised is who makes those determinations and on what basis.

The language of the provision, however, does not naturally or ineluctably lead to the conclusion that no further remedial rulemaking can take place unless Congress passes a new law. This reasoning is buttressed by section 803(a) which contemplates that agency rulemaking must take place after a disapproval action if the authorizing legislation of the agency mandates that rules disapproved had to have been promulgated by a date certain. That provision extends the deadline for promulgation for one year “after the date of enactment of the joint resolution,” not one year after Congress reauthorizes action in the area. The reasonable conclusion is that Congress understood that after disapproval, an agency, if it was under a mandate to produce a

²⁸⁴534 U.S. 438 (2002).

²⁸⁵*Id.* at 450.

²⁸⁶*Id.*

²⁸⁷*Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09, n.3; *accord Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Daas*, 198 F.2d 1167, 1175 (9th Cir. 1999), *cert. denied*, 531 U.S. 999 (2000).

²⁸⁸534 U.S. at 462.

²⁸⁹*Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

²⁹⁰*United Steelworkers v. Weber*, 443 U.S. 193, 201 (1978).

²⁹¹*United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (holding, *inter alia*, that it is appropriate for a court to look at the history and background against which Congress was legislating).

particular rule, had to try again. The question then is, how was it to perform this task. The answer lies in the legislative history of the Act.

The Congressional Review Act was part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996. That Title was a product of negotiation between the Senate and House and did not go through the committee process. Thus, there is no detailed expression of its legislative history, apart from floor statements by key House and Senate sponsors, before its passage by the Congress on March 28, 1996 and its signing into law by the President on March 29. Thereafter, the principal sponsors of the legislation in the Senate (Senators Nickles, Reid and Stevens) and House (Representative Hyde) submitted identical joint explanatory statements for publication in the Congressional Record “intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act’s terms.”²⁹² Although it is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.²⁹³

The Joint Explanatory Statement directly addresses a number of issues that may arise upon enactment of a disapproval resolution and attempts to provide guidance for both Congress and agencies faced with repromulgation questions. At the outset, the Statement notes that disapprovals may have differing impacts on promulgating agencies depending on the nature and scope the rulemaking authority that was utilized. For example, if an agency’s authorizing legislation did not mandate the promulgation of the disapproved rule, and the legislation gives the agency broad discretion, the authors deem it likely that it has the discretion whether or not to promulgate a new rule. On the other hand, the Statement explains that “if an agency is mandated to promulgate a particular rule and its discretion is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule.”²⁹⁴ By implication, a Congressional mandate to issue regulations that is not circumscribed would still be operative. A question arises as to how would the agency be guided in that circumstance? The Statement answers that very question by observing that it is the obligation of Congress during the debate on the disapproval resolution “to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof after the enactment of a joint resolution of disapproval.”²⁹⁵ Thereafter, “the agency must give effect to the resolution of disapproval.”²⁹⁶ The full statement on the issue is as follows:

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that “A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.” Subsection 801(b)(2) provides that such a disapproval rule “may not be reissued in substantially the same form, and a new rule that is substantially the

²⁹²See Legislative History, *supra* note 253.

²⁹³See, e.g., *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530-31 (1982); *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220, n.23 (1983); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

²⁹⁴See Legislative History, *supra* note 253, at S3686.

²⁹⁵*Id.*

²⁹⁶*Id.*

same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.” Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency’s options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency’s responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

The Congressional experience with the disapproval of the OSHA ergonomics standard provides a useful lesson. This rule became the first, and only, rule to be disapproved thus far under the CRA. The principal sponsor of the resolution, Senator Jeffords, at the outset of the debate addressed the issue whether disapproval would disable OSHA from promulgating a new rule. Senator Jeffords referred to the above-discussed Joint Statement and noted that OSHA “has enormously broad regulatory authority,” citing pertinent sections of the OSHA Act providing expansive rulemaking authority. The Senator concluded that “I am convinced that the CRA will not act as an impediment to OSHA *should* the agency decide to engage in ergonomics rulemaking.”²⁹⁷ What Senator Jeffords apparently understood was that while the agency had broad authority to promulgate rules, there was no Congressional mandate to issue an ergonomics rule in the underlying law. As a consequence, it was possible that no further rulemaking would occur, as implied by a letter to Senator Jeffords from Secretary Chao which indicated that a new rulemaking was only one of many options available to the Department should the rule be disapproved.²⁹⁸ In fact, OSHA made it clear on April 5, 2002, that no rulemaking was in the offing. On April 17, 2002, Senator Breaux and 26 co-sponsors, many of whom had voted in favor of the disapproval resolution, introduced S. 2184, which would direct the Secretary of Labor to promulgate a new ergonomics rule and specify in detail what should be included, what should not be included, and what evidence should be considered. Section 1 (b)(4) of the bill deems the direction to issue the rule “a specific authorization by Congress in accordance with Section 801 (b)(2)” of the CRA.²⁹⁹

²⁹⁷ 147 Cong. Rec. S1832-33 (daily ed. March 6, 2001) (emphasis added).

²⁹⁸ *Id.* at S1832.

²⁹⁹ *Id.*

An interesting contrast with the ergonomics situation was the consideration given by the key Senate sponsors of the Bipartisan Campaign Reform Act 2002 (BCRA),³⁰⁰ which requires that the Federal Election Commission (FEC) promulgate rules implementing the soft money limitations and prohibitions of Title I of the Act no later than 90 days after its date of enactment,³⁰¹ whether to introduce a CRA disapproval resolution with respect to the rules issued by the FEC on July 17, 2002.³⁰² The Senate sponsors believed that the new rules, which became effective on November 6, 2002, undermined the BCRA's ban on the raising and spending of soft money by federal candidates and officeholders and on national party use of soft money. As the FEC was mandated to promulgate rules to implement the BCRA by a date certain, it could have been argued that, in contrast with the general discretion OSHA has with respect to whether to issue any ergonomics standard, if Congress disapproved the FEC's soft money rule, the agency would be obligated to undertake a new rulemaking (to be completed within a year after the disapproval resolution was signed into law) that would reflect Congressional objections to the rule. At the same time, in accordance with the understanding of the Joint Statement, it would have been arguably incumbent on Congress in its debates on any such resolution to clearly identify those provisions of the rule that are objectionable as well as those that are not.

Whether this line of argument will be sufficient to withstand a challenge in the courts cannot be answered with any degree of certainty. Foreseeable obstacles may be the novelty of the issue, the amount of weight, if any, that a court will accord the post-enactment Congressional explanation of the CRA, and the current inclination of the courts to give deference to the plain meaning of statutory language and to eschew legislative history. A new rule may be challenged on grounds of lack of authority as a consequence of the disapproval resolution either because Congress failed to articulate its objections to the rule, thereby providing no standards for the agency to apply in its rulemaking, or that the new rules were "substantially the same" as the old, disapproved rules and therefore invalid under the CRA.

In the future, if Congress does not clarify its intent legislatively, when it considers a disapproval resolution it should be mindful of the guidance provided by the Joint Statement. The Joint Statement declares that it is the Congressional intent to make clear and specific identification of the options available to the agency, including identification of objectionable provisions in the proposed rule during the floor debates. In this way Congress provides an agency clear and direct guidance as to what it expects in the repromulgation process as well as a possible defense to a challenge based on the "substantially the same" language of the CRA.

Discussion: The Need for CRA Revision and the Options for Legislative Action

The identified flaws in the CRA justify at least modest legislative remediation, if for no other reason than to maintain a credible Congressional presence in the process of delegated administrative lawmaking. The role of Congress as the nation's dominant policy maker is

³⁰⁰Pub. L. No. 107-55 (2002).

³⁰¹*Id.* at § 402 (c)(2).

³⁰²Kenneth P. Doyle, *Wertheimer, Bauer Debate Move to Void Soft Money Rule Before Senate Democrats*, Bureau of National Affairs, July 19, 2002. A disapproval resolution of the FEC rules was introduced in the Senate, S.J.Res. 48, on October 8, 2002, but was never acted upon by either House.

seriously threatened by the substantial body of evidence demonstrating widespread agency evasion of notice and comment rulemaking requirements; the continued pressure for legislative enhancement of the already ominous trend toward intrusive substantive judicial review of agency rules; and the irrepressible calls for increased Presidential control of agency rulemaking. The potential pernicious consequences of these developments for Congress is illuminated by recent exhaustive scholarly examinations of rulemaking ossification,³⁰³ the latest unsuccessful attempt to resuscitate the nondelegation doctrine,³⁰⁴ and the continuing effort to legitimize the notion of the unitary executive.³⁰⁵ In particular, the ossification studies have detailed the manner in which rule promulgation has become too time consuming, burdensome, and unpredictable. The thrust of the academic critics, which assigns blame to each of the branches for the increasingly ineffective implementation of statutory mandates, has strongly suggested that courts are the chief

³⁰³See, e.g., Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. On Reg. 257 (1987); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L. J. 1385 (1992); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 Admin. L.J. AM U. 82, 82 - 84 (1996); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995) (hereinafter *Seven Ways*); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 Duke L.J. 300 (hereinafter "D.C. Circuit Polarity"); Paul R. Verkuil, *Comment: Rulemaking Ossification - A Modest Proposal*, 47 Admin. L. Rev. 453 (1995); see also Carnegie Commission on Science, Technology, and Government, *Risk and the Environment; Improving Regulatory Decommissioning* (1993); John M. Medeloff, *The Dilemma of Toxic Substance Regulation: How Overregulation Causes Underregulation of OSHA 7-16* (1998).

³⁰⁴See, e.g., Jerry L. Mashaw, Greed, Chaos, & Governace: Using Public Choice to Improve Public Laws 131-58 (1997); David Schoenbrod, *Power Without Responsibility; How Congress Abuses the People Through Delegation* (1993); see also Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 Cardozo 1 (1999); William A. Niskanen, *Legislative Implications of Reasserting Congressional Authority Over Regulations*, 20 Cardozo L. Rev. 939 (1999); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 Cardozo L. Rev. 731 (1999); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, Cardozo L. Rev. 775 (1999).

³⁰⁵See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23 (1995); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 54 (1994); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075 (1986); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 Harv. J. L. & Pub. Poly 227 (1998); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 Cardozo L. Rev. 219 (1993); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994); Daniel B. Rodrituez, *Comment: Management, Control and Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 Duke L.J. 1180(1994); Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 Geo. Wash. L. Rev. 327(1989); Morton Rosenberg, *Beyond the Limits of Executive Power; Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981). Peter L. Strauss, *Presidential Rulemaking*, 27 Chi. Kent L. Rev. 965 (1997); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984). See also T.J. Halstead *Presidential Signing Statements: Constitutional and Institutional Implication*, CRS Report RL33667.

culprits because of their excessive intrusion in agency decisionmaking through interpretations and applications of APA's arbitrary and capricious test. Reviewing courts, it is maintained, will now find an agency to have violated its duty to engage in reasoned decisionmaking if its statement of basis and purpose is found to contain any gap in data or flaw in stated reasoning with respect to any issue. The commentators cite startling statistical evidence that reviewing courts have been holding major rules invalid almost fifty percent of the time.³⁰⁶ Preliminary indications of a study commissioned by the Committee appear to suggest a far more modest successful challenge rate, but the consequence of the perceived actions of the reviewing courts has been the encouragement of agencies to utilize alternative vehicles to make and announce far-reaching regulatory decisions. Agencies can use actions such as in adjudication of individual disputes or by so-called "non-rule" rules, where purportedly non-binding statements of policy are made in guidances, operating manuals, staff instructions, or like agency public communications.³⁰⁷ The proposed solutions of these scholars, however, are essentially adjurations to the judiciary to modify or abandon current doctrinal courses. For example, scholars suggest that courts abolish the duty to engage in reasoned decisionmaking and instead conduct a review of rules to determine whether they violate clear statutory or constitutional constraints, or apply Chevron defense more consistently and strictly.³⁰⁸

It may be recognized that only part of the problem facing Congress is simply fixing identifiable structural and interpretive flaws. Part may also be attributable to a lack of political will to confront and deal with complex and sensitive policy issues that major rulemakings often present. Avoidance is the easier path when a court is available to bail you out or an agency is handy to blame. During the CRS-sponsored symposium on "Presidential, Congressional, and Judicial Control of Rulemaking", one panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived] that everything an agency does is their responsibility since they've taken it on and Reviewed it under this mechanism? . . . Do they want to have that perception?" He concluded that "I think that this may just increase the blaming opportunities for Congress."

A good part of the problem also appears to lie in the failure of the Congress to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them. Professor Cynthia Farina appears correct in identifying the legitimacy of the administrative lawmaking process as being at the heart of the deossification, nondelegation and new Presidentialism debates. Her insight is to the necessity of viewing the

³⁰⁶See Peter H. Schuck & Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L. J. 984, 1022 (1990) (finding that during 1965, 1974, 1984 and 1985, reviewing courts upheld only 43% of agency rules); Patricia M. Wald, *Judicial Review: Talking Points*, 48 Admin L. Rev. 350 (1996) (noting that 36 major rules Reviewed by the District of Columbia Circuit during on year, 17 or 47% were remanded in part for reconsideration.)

³⁰⁷See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public?* 41 Duke L.J. 1311 (1992); Robert A. Anthony, "Well You Want the Permit, Don't You?": *Agency Efforts to Make Non-Legislative Documents Bind the Public*, 44 Admin. L. Rev. 31 (1992); Michael Asimow, *California Underground Regulations*, 44 Admin. L. Rev. 43 (1992).

³⁰⁸See, e.g., Gellhorn & Verkuil, *supra* note 304; Pierce, *Seven Ways*, *supra* note 303, at 71-93. A more detailed discussion of the issues by court rulings on agency decisionmaking appears in the Report's section entitled, "Judicial Review of Rules."

legitimacy and operational effectiveness of the regulatory process as a “collaborative enterprise” involving the appropriate official actors and institutional practices is an informing guidepost for action.³⁰⁹

Legislative Options

The following list of legislative options is based on propositions and assumptions extracted from the hearings held by the CAL Subcommittee on the CRA, the CRA symposium, CRS and GAO reports, and academic commentary: (1) Delegation of lawmaking authority to agencies is an unalterable and essential fact of life of the modern administrative state; (2) Agency lawmaking is a surrogate for the Congress, and should be understood as political in nature and openly recognized and treated as such; and (3) Presidential oversight of, and input into, agency lawmaking is appropriate and necessary as long as the review process is transparent, not subject to arbitrary delay, allows for meaningful public participation to be maintained, and displacement of agency authority is avoided.

1. *Amend the CRA to provide that all covered rules must be submitted to Congress cannot become effective until Congress passes a joint resolution of approval.* This would vest optimal control (as well as accountability) over agency rulemaking in Congress. It would presumably also force the agencies (and OIRA) to take into serious consideration evident Congressional concerns before submitting rulemaking proposals. It would require expedited consideration procedures be established in both Houses as well as a special process to assure speedy approval of non-controversial proposed rules. Testimony by the current House Parliamentarian before the Committee indicated that a “deeming” process could be established under the rulemaking authority of each House which would allow summary approval of all rules for which there has been no indication of a need for full consideration by the House, *i.e.*, the filing of a notice of intent by a specific number of Members with a prescribed time period after Congressional receipt of the proposed rule.³¹⁰ Although the internal decisional processes (expedited consideration and the deeming process) could be established by House rule, the requirement of Congressional approval of all rules would require the passage of a new law. Presidential approval of such legislation, however, is likely to be highly problematic.

2. *By rule of each House establish a joint committee to act as a clearinghouse and screening mechanism for all covered rules.* Such a committee would be advisory only, reporting to jurisdictional committees for both Houses its findings with respect to reported rules and recommendations, when appropriate, for action on joint resolutions of disapproval. The House of Representatives would establish by rule an expedited consideration procedure complimentary to the current Senate procedure. The joint committee would be authorized to request reports on submitted rules from GAO assessing such matters as the cost and benefits, cost effectiveness, and legal authority of the subject rule. None of the foregoing would require the passage of legislation requiring Presidential approval.³¹¹ There was recognition among witnesses at the

³⁰⁹Farina, *supra* note 305, at 232, 235, 238.

³¹⁰For a more detailed description of such process and a discussion of its constructional basis, see Morton Rosenberg, “*Whatever Happened to Congress Reviews of Agency Rulemaking? A Brief Overview, Assessment, and Proposal for Reform.*” 51 Admin. L. Rev. 1051, 1083-1090 (1999).

³¹¹An appropriation to cover the costs of GAO’s new assessment tasks would likely be (continued...)

Committee's hearings and panelists at the CRS symposium that the establishment of a joint Congressional committee that would screen rules and recommend action to jurisdictional committees in both Houses could provide the coordination and information necessary to inform both bodies sufficiently and in a timely manner to allow them to take appropriate actions under current law. The balanced nature of such a joint committee and its lack of substantive authority appears to provide a way to allay political concerns regarding "turf" intrusions. House Parliamentarian John V. Sullivan agreed that such a joint committee was a viable construct.

3. *Amend the CRA to direct that reports to Congress and GAO of covered rules are to be submitted electronically.* The House Parliamentarian and other witnesses and symposia panelists have indicated that the paperwork burden on the Parliamentarian's office as well as the uncertainties of proper receipt by Congress and timely redirection to the appropriate committees, and other problems with paper submissions, would be relieved by electronic submissions.

4. *Amend the CRA to require the reporting of only "major rules."* This option has been suggested by witnesses and panelists as a way to limit the screening burden on committees. It is based on the assumption that only "major rules" are likely to raise significant Congressional review issues. At present, however, the CRA allows only the Administrator of OIRA to designate which rules are to be deemed "major." There may be some reluctance in Congress to allow OIRA to alone determine which rules would be subject to review. Also, even a rule that may be conceded to be "minor," in the sense of it having minimal economic impact, may well have a significance to Congressional constituencies that are worth of addressing. The difficulty is designating a determiner that is politically acceptable and constitutionally appropriate. The Supreme Court's ruling in *INS v. Chadha*,³¹² the legislative veto case, precludes authorizing legislative committees or officers from selecting particular rules and ordering agencies to report them for review. In view of the practical and legal problems, it may well be that the current requirement of blanket rule reporting, perhaps supplemented by a screening body, such as the suggested joint committee, would be more acceptable.

5. *Amend the CRA to make it clear that failing to report a covered rule renders the rule unenforceable and is subject to judicial review.* The failure to have an unquestionably enforceable reporting requirement undermines the purpose fo the CRA. Legislative clarity with respect to that intent is essential.

6. *Amend the CRA to make it clear that an up-or-down vote is on the entire reported rule.* The credible threat of Congressional review will presumably force agencies to carefully tailor their rules with more attention to Congressional expectations. Expedition in the review process, however, is vital so as not to undermine agency enforcement and the certainty needed by the regulated community. The possibility of conflicting disapproval resolutions from each House, and long, perhaps unsuccessful conference committee deliberations, may undermine the intended purpose of the CRA. The CRA should make clear this purpose. The following option, however, may ameliorate the concern over the up-or-down vote on the entire rule.

7. *Amend the CRA to provide that if a rule is disapproved, an agency is prohibited from repromulgating only those provisions of the rule that the review process and floor debates on*

³¹¹(...continued)
necessary.

³¹²462 US. 919 (1983).

disapproval clearly identify as objectionable. Such a qualification to the CRA review process is supported by legislative intent of the sponsors of the CRA. If the option of creation of a joint committee is adopted, it would be consonant with the purpose of such a screening committee to charge it with identifying the discrete problems of the rule that were objectionable. The House resolutions establishing the joint committee could require making such an identification part of its recommendation for actions. That would obviate the necessity of legislative amendment to re-establish agency authority in an area after passage of a disapproval resolution.

Areas for Additional Research

In addition to, or possibly as a supplement to, these areas of possible legislative action, a number of issues regarding Congressional review of rules bear further examination by ACUS or some other body. They include the following:

- How effective has the Congressional Review Act been in improving Congressional oversight of the rulemaking process? Does the Act need to be amended/replaced? For example:
 - Should agencies still be required to send all rules to the House, Senate, and GAO or should reporting be limited to just “major” or “significant” rules?
 - Should Congress amend the CRA to require electronic reporting of rules Congress and GAO?
 - How are GAO’s reports handled by Congress? Do they need refinement?
 - Should there be an expedited procedure for House consideration of rules reported for review?
 - Should Congress clarify that an agency’s failure to report a covered rule renders the rule unenforceable and makes it subject to judicial Review?
 - Should Congress clarify how not to run afoul of the “substantially the same” prohibition in the CRA?
 - Should the “legislative day” measure be clarified since it is so unpredictable in terms of calendar days?
 - Should Congress adopt the changes in the CRA process that were contemplated by H.R. 3148 in the 109th Congress, including the proposal to establish a joint Congressional committee to screen and recommend proposed rules for disapproval? If so, should it provide the joint committee with authority envisioned in the Truth in Regulating Act to require the GAO to provide assessments of selected rules

- Other than the Congressional Review Act, what other options does Congress have to prevent the implementation of an agency rule (e.g., appropriations riders)? How common are such approaches? Are they effective?
- Should Congress establish a “Congressional Office of Regulatory Analysis” to help it oversee the agencies’ compliance with various rulemaking requirements? If so, should it follow the format envisioned in the Truth in Regulation Act (e.g., be established within the Government Accountability Office, require assessment of all rulemaking requirements, etc.)? If so, should Congress simply reauthorize and fund TIRA?
- Should Congress affirmatively approve all major rules (e.g., those with a \$100 million annual impact on the economy) before they take effect instead of the current scheme of making all final rules, major or minor, subject to review and possible disapproval?

IV. Judicial Review of Rules

Rulemaking and Judicial Review Under the APA

Section 4 of the APA, codified at 5 U.S.C. §553, establishes the general procedures that an agency must follow when promulgating a rule.³¹³ Rulemaking under this section is referred to as “informal,” or “notice and comment” rulemaking, and requires an agency to publish notice of a proposed rulemaking in the Federal Register, provide opportunity for the submission of comments by the public, and to publish a final rule and a general statement of basis and purpose in the Federal Register “not less than 30 days before its effective date.”³¹⁴ The APA also establishes a general presumption in favor of judicial review of agency rulemaking activity by providing that the action “of each authority of the Government of the United States” is subject to review, except where “statutes preclude judicial review,” or “where agency action is committed to agency discretion by law.”³¹⁵ The APA likewise contains provisions proscribing generally the scope of judicial review of agency action, categorizing them at 5 U.S.C. § 706 as follows:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

³¹³5 U.S.C. § 553 (2000).

³¹⁴*Id.* at § 553(c), (d). Under the APA, a rule is defined as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.” *Id.* at § 551(4).

³¹⁵*Id.* at § 701.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.³¹⁶

The standards delineated at section 706 are laid out in general terms, and the APA itself does not provide any further information clarifying the manner in which these standards are to be applied. Accordingly, the proper interpretation of these provisions has been the focus of substantial judicial consideration, resulting in several Supreme Court decisions that have significantly impacted agency rulemaking efforts under the APA.³¹⁷ As a general rule, courts defer to agency policy decisions, predicated upon the notion that federal regulatory agencies have greater expertise in assessing and responding to the technical complexities that underlie regulations. Apart from basic procedural deficiencies, there are two main reasons a court will strike down a rule. First, a reviewing court will generally only invalidate agency rules that are unlawful, in that they violate constitutional provisions or lack statutory authority. Second, a court can invalidate a statutorily authorized rule that is arbitrary or capricious in nature.

The Chevron Doctrine. Regarding this first category of basic lawfulness, the court will first look to ensure that the rule meets minimum constitutional requirements. Once this hurdle is passed, the court will then look to see whether the challenged regulation is within the agency's legal authority. Generally speaking, the court simply looks to see whether the rule in question is authorized by an act of Congress. In *Chevron v. Natural Resources Defense Council*, the Supreme Court established a two-part test for judicial review of agency statutory interpretations.³¹⁸ First, a reviewing court must determine "whether Congress has directly spoken to the precise question at issue."³¹⁹ If a court finds that there has been an express Congressional statement, the inquiry is concluded, as the court "must give effect to the unambiguously expressed intent of Congress."³²⁰ In the event that Congress has not unequivocally addressed the issue, a reviewing court must respect an agency's interpretation, so long as it is permissible.³²¹ The Court further stated that:

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to that agency to elucidate a specific provision of the statute by regulation Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.³²²

The Court went on to note that "[j]udges are not experts in the [technical] field, and are

³¹⁶*Id.* at § 706.

³¹⁷Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 8 (American Bar Ass'n 4th ed. 2006).

³¹⁸467 U.S. 837 (1984).

³¹⁹*Id.* at 842.

³²⁰*Id.* at 843.

³²¹*See INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999).

³²²*Chevron*, 467 U.S. at 843-44.

not part of either political branch of the Government,” while agencies, as part of the executive branch, appropriately make “policy choices – resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”³²³ Thus, the rationale for this deference is predicated upon the notion that it is not the role of the judiciary to “assess the wisdom” of policy choices and resolve the “struggle between competing views of the public interest,” as well as an agency’s greater expertise regarding the subject matter of the regulations.³²⁴

Essentially, if the statute is silent or ambiguous, the court’s inquiry must focus on whether the agency’s action is based on a permissible construction of the statute. This is an important point, because *Chevron* does not stand for the proposition that the agency has to construe the statute in the most logical manner, or that the court has to even agree with the agency. Instead, courts must respect a reasonable interpretation, given that Congress has delegated the responsibility for administering the particular program in question to the agency.

There are two basic justifications for this approach, as opposed to a standard that would require an agency to implement regulations that are seen as optimal by the judiciary. First is again the notion that administrative agencies are more familiar with the often complex subject matter at issue, and are therefore better suited to ascertain how general principles or legislative commands should be applied in a specific regulatory context. The second argument for deference to an agency’s construction of a statute is that statutory interpretation requires agencies to make policy judgments, and that these policy judgments should be made by agencies overseen by Congress, on the basis that it is not the proper role of the judiciary to evaluate the merits of competing policy proposals. Given this, the Supreme Court determined in *Chevron* that deference to regulatory agencies is reasonable, while stressing that deference is not abdication.

As applied through the *Chevron* review dynamic, the APA has been described as creating an agency-court partnership. The maxim of judicial deference delineated in *Chevron*, however,

³²³*Chevron*, 467 U.S. at 865. In *Cablevision Sys. Dev. v. Motion Picture Ass’n*, 836 F.2d 599, 608-609 (D.C. Cir. 1988), the court noted that, “*Chevron*’s rationale for deference is based on more than agency expertise.” Elaborating, the court stated, “Like the Court in *Chevron*, we are faced with several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose. We see no reason to deny the Copyright Office’s legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable.” *Id.* at 609.

³²⁴*Chevron*, 467 U.S. at 866; *Rust v. Sullivan*, 500 U.S. 173, 187 (1991). It should be mentioned that the Supreme Court revisited *Chevron* in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), declaring that the Food & Drug Administration lacks jurisdictional authority to regulate tobacco products. In reaching this determination, the Court discussed the first prong of *Chevron*, declaring that the proper analysis is to focus not only on the statutory clause, but rather to consider the structure, function, and history of all relevant provisions, interpreting a statute “as a symmetrical and coherent regulatory scheme.” *Id.* at 1294. Upon concluding that Congress “squarely rejected proposals to give the FDA jurisdiction over tobacco,” the Court stated that it was “obliged to defer not to the agency’s expansive construction of the statute, but to Congress’ consistent judgment to deny the FDA this power.” *Id.* at 1315. This reasoning centers on an analysis of the unique regulatory scheme created for tobacco products under the first prong of the *Chevron* test, and, as such, does not appear to impact the traditional inquiry as it applies to the issue at hand.

has given rise to a significant degree of confusion as courts have attempted to balance judicial deference to agency action with traditional legal principles. This tension is perhaps most apparent when considering recent Supreme Court decisions addressing the issue of what the degree of such deference should be, and to what types of agency action should this deference adhere.

In *United States v. Mead*, for instance, the Supreme Court held that *Chevron* deference should only be accorded in instances where Congress intended to grant an agency the authority to issue rules with the force of law. The Court stated that such Congressional intent could be demonstrated by some other indication than a grant of authority to conduct notice and comment rulemaking, but did not specify what would constitute such an indication. The holding in *Mead* did specify, however, that interpretive rules do not qualify for *Chevron* deference. The practical effect of this determination was to require agencies to engage in notice and comment rulemaking in order to qualify for *Chevron* deference. Under this dynamic, agencies that do not engage in such rulemaking are still eligible for a lesser degree of deference pursuant to the holding in *Skidmore v. Swift & Co.*³²⁵ While the Court's decision in *Mead* limited the regulatory flexibility that had been enjoyed by agencies, it served concordantly to limit the practice on the part of agencies of promulgating rules with practical legal effect without following notice and comment procedures.

Justice Scalia dissented from the decision, declaring that the Court's holding would encourage agencies to engage in notice and comment rulemaking in instances where less resource-intensive procedures would suffice.³²⁶ Justice Scalia also asserted that the holding would lead to the "ossification of large portions" of statutory law, as agencies would be bound by judicial interpretations of statutes that were deemed to be outside the scope of the *Chevron* standard. According to Justice Scalia, this effect could be avoided only if agencies were able to effectively overrule judicial decisions, a development that would mark "a landmark abdication of judicial power."³²⁷

The Supreme Court revisited *Mead* in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, delivering a holding that could decrease agency incentives to engage in notice and comment rulemaking.³²⁸ Specifically, the Court held that a "court's prior judicial construction of a statute trumps an agency construction . . . only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."³²⁹ According to the Court, a contrary position would vitiate Congressional intent by "allow[ing] a court's interpretation to override an agency's."³³⁰ The Court went on to note that a differing approach would also lead to the anomalous result that

³²⁵323 U.S. 134 (1944). In *Skidmore*, the Court held that "[t]he weight of such a[n] agency judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 140.

³²⁶*Id.* at 246.

³²⁷*Id.* at 247.

³²⁸125 S.Ct. 2688 (2005).

³²⁹*Id.* at 2700.

³³⁰*Id.*

“whether an agency’s interpretation of an ambiguous statute is entitled to *Chevron* deference would turn on” whether an agency or a court had been the first to issue an interpretation.³³¹ Finally, echoing Justice Scalia’s dissent in *Mead*, the Court stated that a contrary holding would “lead to the ossification of large parts of our statutory law.”³³²

Justice Scalia dissented from the Court’s holding in *Brand X*, stating that the agency’s construction of the statute at issue was implausible, and further characterized the Court’s holding as an ineffectual approach to remedying the effects of the decision in *Mead*.³³³ Repeating his criticism that *Mead* had inappropriately limited the types of agency action that qualified for *Chevron* deference, Justice Scalia argued that the holding in *Brand X* would now make “judicial decisions subject to reversal by Executive officers.”³³⁴ Justice Scalia went on to argue that as “Article III courts do not sit to render decisions that can be reversed or ignored by Executive officers,” the Court was validating unconstitutional outcomes in a holding that would engender significant confusion and uncertainty.³³⁵

Arbitrary or Capricious Review. In analyzing agency regulations that are statutorily based, a court may nonetheless invalidate a rule that is deemed arbitrary or capricious. This standard of review, which is traditionally applied to informal rulemaking, is not clearly defined, and the judiciary’s interpretation of the meaning of this standard has changed substantially over the past thirty years. Until the 1970s, arbitrary or capricious review was extremely deferential, essentially requiring only that a regulation fall within the scope of legally delegated authority.³³⁶ This broadly deferential standard adhered until the Supreme Court handed down its decision in *Citizens to Preserve Overton Park, Inc. v. Volpe* in 1971, which established a dynamic that has led to more stringent review of rules.³³⁷

Overton Park dealt with an informal adjudication conducted by the Secretary of Transportation approving the release of federal funds for use in the construction of a highway through a park in Memphis, Tennessee.³³⁸ This approval was challenged as a violation of laws prohibiting the use of federal funds for highway construction through public parks so long as a “feasible and prudent” alternative route could be utilized. After determining that the arbitrary or capricious test controlled review of informal agency action, the Court construed the standard to require reviewing courts to analyze whether an agency decision was based on “a consideration of

³³¹*Id.*

³³²*Id.*

³³³*Id.* at 2713, 2718-19.

³³⁴*Id.* at 2719.

³³⁵*Id.* at 2720-21.

³³⁶*See, e.g., Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (“where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches . . .”).

³³⁷401 U.S. 402 (1971).

³³⁸*See* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. Rev. 1251 (1992).

the relevant factors and whether there had been a clear error in judgment³³⁹ The Court further instructed that while this inquiry into the facts must be “searching and careful, the ultimate standard of review is a narrow one,” stressing that a court “is not empowered to substitute its judgment for that of the agency.”³⁴⁰ The *Overton Park* Court remanded the case, so that, in its words, the lower court could conduct a “thorough, probing, in-depth review of the administrative record underlying the Secretary of Transportation’s decision.”³⁴¹ While the Court dictated this approach in the context of an informal adjudicative proceeding, it has been consistently applied to informal rulemaking as well.³⁴²

The language used by the Court in *Overton Park* is at once instructive yet ambiguous. The Court declares that judicial review under the arbitrary and capricious standard is to be “searching and careful,” while simultaneously espousing a deferential approach to review of informal agency action by stating that the judiciary “is not empowered” to impose its judgment on an agency. It has been asserted that courts applying the precepts of *Overton Park* “tend to ignore all but the mandate to conduct a ‘searching and careful’ inquiry,” slipping into a “a more active role than was intended for arbitrariness review.”³⁴³ In turn, this increased level of scrutiny has been cited as facilitating the development of what has come to be referred to as the “hard look” doctrine of arbitrary and capricious review. This approach has been characterized as obliging a reviewing court “to examine carefully the administrative record and the agency’s explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions.”³⁴⁴

The Supreme Court implicitly endorsed the hard look doctrine in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*³⁴⁵ The *State Farm* holding centered on a decision by the Secretary of Transportation to rescind a rule issued by a prior administration requiring new cars to be equipped with automatic seatbelts or airbags. This decision was based on the agency’s determination that the rule would be ineffective due to the ability of customers to simply detach the automatic seatbelts. The Court began its analysis of the agency’s decision by determining that arbitrary and capricious review was appropriate, and reiterated the maxim from *Overton Park* that such review is “narrow and a court is not to substitute its judgment for that of the agency.”³⁴⁶ The Court then went on to state:

Normally, an agency rule would be arbitrary and capricious if the agency has

³³⁹*Overton Park*, 401 U.S. at 416.

³⁴⁰*Id.* at 416.

³⁴¹*Id.* at 415.

³⁴²See Lubbers, *supra* note 317, at 475.

³⁴³Charles H. Koch, Jr., *Administrative Law and Practice* §10.4 at 32, (West Pub. Co., 2nd ed. 1997).

³⁴⁴Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 *Duke L.J.* 1385, 1410 (1992).

³⁴⁵463 U.S. 29 (1983).

³⁴⁶*Id.* at 43.

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.³⁴⁷

Applying this standard, the Court rejected the agency's action for two reasons. First, the Court found that the agency had failed to consider the possibility that inertia would have caused a substantial number of people to leave the seatbelts attached.³⁴⁸ Additionally, the Court found it significant that the Department of Transportation had failed to explain why it did not consider implementing a mandatory airbag or non-detachable restraint option.³⁴⁹ Given these omissions, the Court held that the agency had "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard."³⁵⁰ Finally, while noting that an "agency's view of what is in the public interest may change, either with or without a change in circumstances," the Court stressed that "an agency changing its course must supply a reasoned analysis" for such a change.³⁵¹ Holding that "the agency has failed to supply the requisite 'reasoned analysis' in this case," the Court remanded the matter to the agency for further consideration.³⁵²

As noted above, the Court in *State Farm* adopted the hard look doctrine while continuing to assert, as it had in *Overton Park*, that a reviewing court is not to substitute its judgment for that of the agency. This dichotomy between what, on the one hand, appears to be a very broad grant of discretion to a reviewing court and the much more restrictive notion that the courts are not to usurp agency judgment has been focused upon by both proponents and critics of the hard look standard. Some commentators have argued that the hard look doctrine is essential to allow for an appropriate level of judicial scrutiny of an agency's exercise of power, in that it ensures that agency decisions are not controlled by narrow private interests or an agency's own "idiosyncratic view of the public interest."³⁵³ Further, it is argued that the doctrine keeps the courts from engaging in a simplistic review to determine whether a regulation is merely within the bounds of a statutory directive by requiring the court to study the agency's decisionmaking process to make sure that the agency carefully deliberated the issues at play.³⁵⁴ There are certainly cases that have highlighted the deferential aspects of the *State Farm* decision, such as *Center for Auto Safety v. Peck*, where the D.C. Circuit Court stated that it would uphold a rule

³⁴⁷*Id.* at 43.

³⁴⁸*Id.* at 54.

³⁴⁹*Id.* at 55-56.

³⁵⁰*Id.* at 56.

³⁵¹*Id.* at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

³⁵²*Id.* at 57.

³⁵³Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *Tex. L. Rev.* 483, 491 (1997).

³⁵⁴*Id.*

containing uncertainties, analytic imperfections, or even mistakes, as long as the agency's decisions were within the range of those that a reasonable person could derive from the evidence presented.³⁵⁵

On the other end of the spectrum, critics of hard look review maintain that it allows for so much judicial discretion "that a single unsympathetic or confused reviewing court can bring about a dramatic shift in focus or even the complete destruction of an entire regulatory program."³⁵⁶ An often cited example of this potential is the Fifth Circuit's decision in *Corrosion Proof Fittings v. EPA*.³⁵⁷ In that case, the court overturned a regulation regarding asbestos exposure that had involved a wide range of scientific studies and the receipt of over 200 comments. The court rejected the rule based on the fact that the EPA had not calculated the costs and benefits of each possible intermediate level of regulation.³⁵⁸ According to one commentator, the court's decision tasked the EPA with conducting a "potentially endless analytical crusade in search of the holy grail of the least burdensome alternative that still adequately protected against unreasonable risk," and did not defer "one whit to EPA's interpretation of its statute or to its exercise of rulemaking expertise."³⁵⁹ It has been argued that the establishment of a more stringent review dynamic in *Overton Park*, coupled with the adoption of the hard look doctrine in *State Farm*, has caused the rulemaking process to become more rigid and burdensome upon agencies. In turn, this has led to the assertion that rulemaking has become "ossified," with agencies either undertaking resource and time intensive steps to ensure that a rule will withstand increased scrutiny, or circumventing the traditional notice and comment rulemaking process by issuing policy statements and interpretive rules to effectuate compliance with a regulatory agenda.³⁶⁰

In light of the above analysis, it is apparent that the evolution of judicial review of agency rulemaking since the decision in *Overton Park* has had a significant impact in the regulatory context. Competing viewpoints on the propriety and effectiveness of the hard look doctrine, however, illustrate a lack of consensus on the nature of this impact. Proponents of judicial review characterize it as a tool that improves agency regulatory efforts by making agencies aware of Congressional mandates, improving analytical rigor, and increasing agency

³⁵⁵751 F.2d 1336 (D.C. Cir. 1985).

³⁵⁶Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525, 541 (1997); see also, Lubbers, *supra* note 6, at 327.

³⁵⁷947 F.2d 1201 (5th Cir. 1991).

³⁵⁸*Id.* at 1217.

³⁵⁹McGarity, *supra* note 356, at 548. *But see* Granta Y. Nakayama, *Corrosion Proof Fittings v. EPA: No Death Penalty for Asbestos Under TSCA*, 1 Geo. Mason Indep. L. Rev. 99 (1992) ("Contrary to the criticisms of those who would rewrite toxic substance control statutes, or restrict the scope of judicial review under these statutes, *Corrosion Proof Fittings* illustrates the importance of the substantive protections accorded private parties under the current toxic substances regulatory statutes. In particular, the Fifth Circuit's decision in *Corrosion Proof Fittings* is a case study in how judicial review can prevent inefficient and wasteful regulation of toxic substances. The court's decision recognizes that toxic substances are neither completely safe nor completely unsafe. Rather, according to the court, the opportunity costs of not using the substance must be balanced against the benefits which would accrue from a ban.").

³⁶⁰Lubbers, *supra* note 317, at 485.

responsiveness to those impacted by regulation.³⁶¹ Alternatively, as touched upon above, critics of judicial review maintain that it has had a debilitating effect on the regulatory environment by imposing onerous requirements on the development of new rules, either significantly delaying the promulgation of rules or encouraging agencies to avoid traditional rulemaking whenever possible.³⁶² These conflicting perspectives could be analyzed more objectively through the development of objective empirical data that could serve to “inform decision making about whether to expand or contract opportunities for judicial review.”³⁶³ Various studies have been conducted attempting to evaluate the number of challenges to agency rulemaking efforts and the effect of judicial review thereon. It has been stated, however, that “administrative law scholars have failed generally to produce systematic empirical analysis of the effects of judicial review.”³⁶⁴

Empirical Data and Anecdotal Information

The few empirical studies that have been conducted tend to evaluate the success rate for federal agency rules that are subjected to judicial review, by concluding generally that increased judicial scrutiny has had a substantial effect on agency rulemaking. In 1990, Peter H. Schuck and E. Donald Elliot published a thorough empirical study regarding judicial review of agency rulemaking.³⁶⁵ The goal of this study was to analyze the outcome of direct appellate court review of federal agency actions, and the scope of the study and its design might be viewed as instructive as to why such empirical analyses are rare in the field of administrative law. The study’s sample sets identified a total of 2,472 cases for review, with case analyses, interviews, and data recordation performed by law students at Georgetown and Yale from early 1987 to March 1989. The collected data were then coded, error corrected and subsequently entered into a computer for preliminary analysis.³⁶⁶ Among the numerous findings contained in the study, the authors reported: (1) that “[b]etween 1965 and 1985, administrative law became more complex and technical,” and that there was a dramatic growth in judicial caseloads, with the number of administrative law cases decided on the merits increasing “from 489 cases in 1965 to more than 1567 cases in 1987;”³⁶⁷ (2) that rates of affirmance by courts in administrative law cases ranged from 55.1% in 1965, to 60.6% in 1975, and to 76.6% in 1984-85;³⁶⁸ (3) that the rate of

³⁶¹Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. Ill. L. Rev. 1111, 1125.

³⁶²See Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Agency Rulemaking*, 78 N.C. L. Rev. 1013 (2000).

³⁶³Coglianese, *supra* note 361, at 1127.

³⁶⁴*Id.* (citing Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 Yale J. On Reg. 257, 275 (1987) (“the normative expectations of administrative lawyers have seldom been subjected to empirical verification of a more than anecdotal sort.”)).

³⁶⁵See Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984.

³⁶⁶*Id.* at 993-994.

³⁶⁷*Id.* at 996-997.

³⁶⁸*Id.* at 1007-1008. As a further indication of the difficulty in crafting consistent research (continued...)

affirmance was consistently lower in the D.C. Circuit from 1965 through 1988 as compared to other federal appellate courts;³⁶⁹ and (4) that in instances where courts remanded a matter to an agency for further consideration the agencies adopted “major changes” in 40% percent of the cases, and appeared “to do so primarily because of the remand.”³⁷⁰

According to the authors, the most important finding that emerged from their “twenty-year punctuated longitudinal analysis” was their determination that “the circuit courts are affirming agency decisions at a steadily increasing rate, a rate that approximated 76% in 1984-85, and reached over 81% in 1985— just after [the court’s decision in] *Chevron*.”³⁷¹ This finding has led to the general assertion that the deferential aspects of the *Chevron* decision, as discussed above, have “increased the rate of affirmance of agency actions by about 15 percent.”³⁷²

While there have been no updates or subsequent studies conducted according to the parameters of the Schuck and Elliot study, it is interesting to note that aggregated data from the Administrative Office of the United States Courts (AO) indicate that while the judicial caseload in the administrative context has not increased dramatically since the conclusion of the study, it nonetheless remains substantial. Specifically, the AO has released raw data indicating that there have been roughly 15,000 lawsuits pertaining to agency regulatory activity from 1995 through September 30, 2004.³⁷³

While the aforementioned study reported that roughly between 70 and 80 percent of regulations are upheld when challenged in federal court, a more recent study focusing on the EPA’s record in the D.C. Circuit in particular found a significantly lower success rate for that agency. Specifically, in 2000, the Reason Public Policy Institute (RPPI) published a study analyzing the success rate of substantive challenges to Environmental Protection Agency rules in the United States Court of Appeals for the District of Columbia Circuit during the Clinton Administration.³⁷⁴ The study identified 69 such cases, determining that the EPA won only 23 (33.33 percent) of these challenges, with the court striking down all or a substantial portion of the challenged rule in 53.62 percent of the cases. While noting that anecdotal evidence from other appellate courts indicated a higher success rate for the EPA, the RPPI study opined that this disparity might stem from the fact that few of the cases considered in other courts involved

³⁶⁸(...continued)

protocols in this context, the authors noted that information obtained from the Administrative Office of the United States Courts (AO) regarding this category differed from the findings of their study, with the AO reporting a 75% affirmance rate for 1965, a 70% affirmance rate for 1975 and a 75.9% affirmance rate for 1984-85. *Id.* at 1009-1010.

³⁶⁹*Id.* at 1041-1042.

³⁷⁰*Id.* at 1059 (emphasis in original).

³⁷¹*Id.* at 1057.

³⁷²Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 72 (1995).

³⁷³See Administrative Office of the United States Courts, *Administrative Agency Appeals Terminated in the Federal District Courts of Appeals, by Circuits, Excluding Board of Immigration Appeals and Consolidated Appeals During the 12-Month Periods Ending September 30* (2005).

³⁷⁴Jonathan H. Adler, *Environmental Performance at the Bench: The EPA’s Record in Federal Court*, Reason Public Policy Institute, Policy Study No. 269 (May 2000).

“challenges to broad regulatory decisions by the EPA,” and concluded its analysis by asserting that the low rate of affirmance in the D.C. Circuit was the result of deficiencies in the EPA’s development and execution of its regulatory agenda.³⁷⁵

These two studies appear to constitute the bulk of empirical information available analyzing the impact of judicial review on agency rulemaking efforts, and the data contained therein could be cited as either supporting or undermining the general assertion that the evolution of judicial review since *Overton Park* has contributed to the “ossification” of the rulemaking process. Indeed, in their concluding remarks regarding their extensive study, Schuck and Elliot declared:

Our own methodology is far from perfect. The conclusions to be drawn can be no better than the data on which they are based, and the data relating to some of the most interesting characteristics of decided cases are impressionistic and subject to competing interpretations. Even apart from these problems, our analysis failed at certain points to accomplish what we hoped.³⁷⁶

Whatever conclusions might be drawn from the data presented above, it should be noted that there is a large body of anecdotal information that has been cited by commentators as evidence that the arbitrary or capricious standard is being applied in such a fashion as to contribute significantly to the ossification of the rulemaking process.³⁷⁷ In particular, stringent judicial review is generally seen as at least partially responsible for changing the notice and comment process from a simple affair, to a complex and time consuming matter where, according to Justice Breyer, agencies “establish procedures to consider thoroughly all alternatives in every case,” which will only cause “considerable unproductive delay.”³⁷⁸ Finally, as touched upon above, it has been argued that this increased review has led agencies to fear judicial rejection to the degree that it has generally reduced agency willingness to engage in rulemaking altogether.³⁷⁹ At the same time, however, other commentators have asserted that the adverse effects of judicial review have been overestimated. Professor Cary Coglianese, for example, maintains that “[t]he empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed.”³⁸⁰ In support of this position, Professor Coglianese cites findings showing that “the number of pages in the Code of Federal Regulations (CFR) has grown consistently over the years, even in the face of the

³⁷⁵*Id.* at Parts 3 & 5.

³⁷⁶Schuck & Elliot, *supra* note 365, at 1060-1061.

³⁷⁷*See, e.g.,* McGarity, *supra* note 344, at 1412 (noting that “stringent judicial review is largely responsible for [NHTSA’s] virtual abandonment of rulemaking in favor of case-by-case recalls,” and further noting that an increase in the time it took the FTC to promulgate a rule from roughly two years in the 1960s, to over five years by the end of the 1970s).

³⁷⁸*See* Cross, *supra* note 362, at 1022 (quoting Stephen Breyer, *Breaking the Vicious Circle - Toward Effective Risk Regulation* at 58 (1993)).

³⁷⁹Jerry L. Mashaw, *Greed, Chaos and Governance* (1997) (“The past decade’s case study literature on the performance of America’s administrative agencies details an agency-by-agency retreat from rulemaking.”).

³⁸⁰Coglianese, *supra* note 361, at 1127.

courts' hard look review in the 1970's,"³⁸¹ and that "only a fraction of agency rules are ever subject to petitions for review."³⁸²

These competing scholarly viewpoints, coupled with the practical and analytical difficulties adhering to empirical analysis in this context, make it difficult to offer any determinative conclusion regarding the degree to which heightened judicial scrutiny has impacted agency rulemaking. It should be noted, however, that the CAL Subcommittee has sponsored an extensive empirical study of judicial review of agency rulemaking as part of the Administrative Law, Process and Procedure Project for the 21st Century. The CAL Subcommittee recruited Professor Jody Freeman of the Harvard Law School to conduct a study to ascertain what happens to agency rules upon appellate judicial review, with the aim of determining the rate at which rules are invalidated in whole or in part, and the reasons for that invalidation. The study is focusing on data derived from administrative agency appeals from 1995 to 2004. The data consists of 3,075 cases drawn from an initial database of over 10,000 cases involving administrative appeals from every circuit court over that time frame maintained by the AO. Professor Freeman's study is ongoing, but she discussed the methodology of the study and presented the preliminary findings of the study at a September 11, 2006 symposium on "Presidential, Congressional, and Judicial Control of Agency Rulemaking," that was hosted by CRS as part of the Committee's project. While the study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, the limitations of this type of study might be seen as providing further evidence of the utility of a reconstituted ACUS. As Professor Freeman noted in her comments at the symposium, these types of studies do not give rise to a coherent and comprehensive empirical strategy that will foster optimal analysis of the administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

Potential Congressional Options

In the event that Congress determines that judicial review of rules has adversely affected the agency rulemaking process to a degree meriting legislative intervention, the question turns to what steps might be taken to mitigate the impact of such review. There are several potential approaches available to Congress in this regard. Justice Breyer, for instance, has advocated the creation of a specialized administrative court to review rules.³⁸³ Conversely, whereas the Congressional Review Act establishes procedures for enacting joint resolutions of disapproval to strike down newly promulgated rules,³⁸⁴ Congress could act to establish a system whereby rules become effective only after the enactment of a joint resolution of approval, or, alternatively,

³⁸¹*Id.* at 1127-1128.

³⁸²*Id.* at 1129.

³⁸³See Breyer, *supra* note 378, at 68-72.

³⁸⁴5 U.S.C. §§ 801, *et seq.* (2000); see also, Morton Rosenberg, *Congressional Review of Agency Rulemaking: An Update and Assessment After Nullification of OSHA's Ergonomics Standard*, CRS Report RL30116.

could prescribe more deferential standards for judicial review.³⁸⁵ Another potential approach might be for Congress to preclude judicial review of agency rules altogether.

Generally speaking, there is a strong presumption in favor of judicial review of administrative action, and the courts will infer a right to judicial review in the face of legislative silence.³⁸⁶ It is well established, however, that this presumption may be overcome by “specific language or specific legislative history that is a reliable indicator of congressional intent”, or a specific congressional intent to preclude judicial review that is ‘fairly discernable’ in the detail of the legislative scheme.³⁸⁷ Accordingly, Congress could alter the current statutory dynamic to effect a blanket preclusion of judicial review of all agency rulemaking activity, or, conversely, could preclude review on a case-by-case basis as it sees fit.³⁸⁸ A recent example of a discrete statutory provision precluding judicial review of agency regulatory actions may be found in the law directing the expeditious construction of the World War II memorial on the National Mall.³⁸⁹ That law contained express language declaring that decisions regarding the location and design of the memorial, as well as the granting of a special use permit, “shall not be subject to judicial review.”³⁹⁰ Addressing claims raised in a lawsuit that agencies involved in the construction had violated various statutes governing their activities, the reviewing court held: “[w]e find that the Act withdrew our subject matter jurisdiction over the statutory claims, and therefore that we lack jurisdiction to entertain them,” subsequently dismissing the suit.³⁹¹

A related, less expansive approach might focus on crafting statutes to limit standing to seek judicial review to specific classes of plaintiffs. Regarding standing generally, the relevant portion of the APA provides:

A person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny

³⁸⁵See, e.g., William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere With Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 N.W. U. L. Rev. 393, 402 (2000).

³⁸⁶See *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbot Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

³⁸⁷*Michigan Academy*, 476 U.S. at 673 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984)).

³⁸⁸It should be noted that courts interpret such preclusion provisions as not applying to constitutional claims, so as to avoid the “serious constitutional question” that would arise “if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.” *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Michigan Academy*, 476 U.S. at 681 n.12).

³⁸⁹Pub. L. No. 107-11, 107th Cong., 1st Sess. (2001).

³⁹⁰*Id.*

³⁹¹*National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1094 (D.C. Cir. 2001).

relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.³⁹²

Separate from this general administrative provision are constitutional limitations on standing. Specifically, Article III of the Constitution defines and limits the jurisdiction of the federal courts to adjudication of “cases and controversies.”³⁹³ The Supreme Court has established that to satisfy the requirements of Article III, a party bringing suit must: (1) establish an “injury in fact” (2) caused by the actions of the defendant (3) that is redressable by a favorable judicial decision.³⁹⁴ In addition to constitutional requirements, the judiciary has developed prudential rules to constrain the instances in which review may be obtained. Like their constitutional counterparts, these judicially imposed limits on the exercise of federal jurisdiction are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”³⁹⁵ The prudential components of the standing doctrine require that: (1) a plaintiff assert his own legal rights and interests rather than those of third parties, (2) a plaintiff’s complaint be encompassed by the “zone of interests” protected or regulated by the constitutional or statutory guarantee at issue, and (3) courts decline to adjudicate “‘abstract questions of wide public significance’ which amount to ‘generalized grievances’ pervasively shared and most appropriately addressed in the representative branches.”³⁹⁶

While Congress may not alter constitutional standing requirements, it may modify or abrogate prudential components by “expanding standing to the full limit allowed by the Constitution.”³⁹⁷ Conversely, in instances where a potential plaintiff might otherwise meet the aforementioned constitutional and prudential requirements, Congress may, “subject to due process dictates,” provide for administrative action while limiting “to a specified class the right to seek judicial review.”³⁹⁸ In essence, Congress is enabled to bind the issues of standing and statutory jurisdiction together,³⁹⁹ giving rise to a dynamic closely related to preclusion of judicial review generally. As stated in *National Wildlife Federation v. Burford*, “[T]he statute at issue will preclude standing if it expresses a fairly discernible congressional intent to forestall a suit at the plaintiff’s behest. Although the plaintiff may fall within a statute’s zone of interest, judicial

³⁹²5 U.S.C. § 702 (2000).

³⁹³See *Flast v. Cohen*, 392 U.S. 83, 94 (1968).

³⁹⁴See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-103 (1998).

³⁹⁵*Warth v. Seldin*, 422 U.S. 490, 498 (1974); see also *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

³⁹⁶*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982) (quoting *Seldin*, 422 U.S. at 499-500).

³⁹⁷See *Lubbers*, *supra* note 317, at 424; see also *Seldin*, 422 U.S. at 501; *Spear*, 520 U.S. at 162.

³⁹⁸*Davis v. Romney*, 490 F.2d 1360, 1364 (3d Cir. 1974).

³⁹⁹See *Koch*, *supra* note 343, §14.14 at 414.

review will not occur if the statute suggests the Congress intended to allow only a specific class of plaintiff to challenge an agency's action."⁴⁰⁰

This requirement was established in *Block v. Community Nutrition Institute*, where the Supreme Court determined that processors, but not consumers, of dairy had standing to obtain judicial review of milk market orders issued pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA).⁴⁰¹ Noting the aforementioned principles governing availability and preclusion of judicial review generally, the Court held that a relevant statute will be deemed to preclude standing for particular plaintiffs whenever Congressional intent to preclude is "fairly discernible in the statutory scheme."⁴⁰² Discussing the AMAA in particular, the Court found a fairly discernible intent to preclude consumers from challenging market orders in light of express provisions in the Act establishing a right of review for processors. The Court emphasized that preclusion would "not threaten realization of the fundamental objectives of the statute" and determined that "consumer suits might themselves frustrate achievement of the statutory purposes" by disrupting the "cooperative venture among the Secretary, producers, and [processors]" as contemplated by Congress, thereby "undermin[ing] the congressional preference for administrative remedies."⁴⁰³ Thus, in addition, or as an alternative to general preclusion of judicial review, the above analysis indicates that Congress could consider structuring statutes according to the precepts laid out in *Brock* to limit perceived negative effects of judicial review of agency rulemaking.

Areas for Additional Research

- Should Congress establish statutorily prescribed rules of "deference" that will apply upon a court's determination that a statutory delegation is ambiguous in light of the confusion engendered by the Supreme Court's decisions in *United States v. Mead* and *National Cable & Telecommunications Ass'n v. Brand X Internet Services*?
- Should Congress amend the judicial review provisions of the APA to clarify the definition of the "arbitrary and capricious" standard in order to address the effects of the Supreme Court's decisions in *Citizens to Protect Overton Park v. Volpe* and *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Insurance Co.*?
- In the event that ongoing empirical studies affirm the anecdotal assumption that appellate courts reverse over 50% of challenged agency regulations either whole

⁴⁰⁰871 F.2d 849, 852 (9th Cir. 1989).

⁴⁰¹467 U.S. 340 (1984).

⁴⁰²*Id.* at 351.

⁴⁰³*Id.* at 352. In a subsequent case, the Court explained that the maxim delineated in *Block* supplements the traditional zone of interests test. It stated, "The inquiry into reviewability does not end with the 'zone of interest' test. In [*Block*], the interests of consumers were arguably in the zone of interests meant to be protected by the Act, but the Court found that point not dispositive because at bottom the reviewability question turns on congressional intent." *Clark v. Securities Industry Ass'n*, 479 U.S. 388, 400 (1987).

or in part, should Congress amend the APA to modify standards of review or seek to limit judicial review through other means?

- Should Congress clarify whether the Information Quality Act permits judicial review?
- Should the APA be amended to make more clear when the courts can remand a rule without vacating it?
- The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. How effective/problematic has this been?
- Should Congress address the increasing use of consent decrees that modify or alter the substantive content of agency rules?
- Should Congress amend the APA to address the prudential aspects of standing doctrine in response to judicial decisions regarding private rights of action, ripeness, finality, and exhaustion of administrative remedies?

V. Regulatory Analysis and Accountability Requirements

One of the first and most basic of regulatory accountability requirements was established by the APA, which generally requires that agencies publish their proposed rules in the Federal Register, receive and consider comments on the proposed rules, and then publish a final rule stating its basis and purpose.⁴⁰⁴ Between 1946 and 1980, Congress established dozens of federal agencies and programs designed to improve the environment, make workplaces safer, and protect consumers (e.g., the EPA, OSHA, and the Consumer Product Safety Commission). Subsequently, an array of federal economic, environmental, and social regulations were put in place that affected many of the decisions made by American businesses. Strong concerns then began to be raised about whether the benefits that these regulations and regulatory agencies were attempting to achieve were worth the costs associated with compliance. Concerns were also being raised about the cumulative effects of all federal regulations on individual businesses, and the effects that federal rules were having on particular segments of the economy (e.g., small businesses), and on other levels of government.

Since 1980, there have been numerous attempts in Congress and elsewhere to modify the federal rulemaking process. Underlying many of these “regulatory reform” efforts is a perceived need to reduce the burden associated with regulatory compliance. Proponents of reform contend that federal regulations are too costly, time consuming, complex, and intrusive for businesses and other regulated parties, and that better crafted rules can be developed through, among other things, the use of sophisticated analytical tools and greater oversight by the President and Congress. On the other hand, some contend that these reform efforts focus too much on the costs associated with regulations and do not adequately recognize the benefits that the rules provide. They also argue that additional requirements will have the effect of eroding existing regulatory protections or lengthening an already lengthy rulemaking process, thereby depriving the public of needed health, safety, and environmental improvements.

This chapter discusses a range of regulatory analysis and other accountability requirements that have been established by Congress and Presidents in recent decades. Those initiatives include cost-benefit and risk analysis requirements, small entity “flexibility” analysis and requirements focusing on unfunded mandates, attempts to establish regulatory accounting and budgets, moratoriums on new regulations, reviews of existing regulations, and efforts focusing on paperwork reduction and small businesses. After reviewing these efforts and examinations of them, the chapter concludes by discussing common themes, possible Congressional initiatives, and areas for future study.

Regulatory Analysis Requirements

A common (and some would say the primary) concern voiced by proponents of regulatory reform in recent decades has been that the costs associated with regulations often outweigh the benefits that those regulations are intended to provide. Another, and somewhat related, view is that more intelligent regulatory policies could achieve the same social goals

⁴⁰⁴William West, *Administrative Rulemaking: An Old and Emerging Literature*, 65 Public Admin. Rev., Nov./Dec. 2005, at 655-668 (“If rulemaking is subject to many controls, notice and comment remains the most basic and important.”)

(e.g., cleaner environment, safer workplaces) at much less cost (or achieve more ambitious goals at the same cost).⁴⁰⁵ To improve the quality and effectiveness of federal rules and minimize burden, regulatory reform proponents have frequently advocated greater use of a range of analytic tools during the rulemaking process, including cost-benefit analysis (sometimes referred to as benefit-cost analysis), cost-effectiveness analysis, and risk assessment.

“Cost-benefit analysis,” in this context, involves the systematic identification of all costs and benefits associated with a forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society. A proposed regulatory requirement is judged to pass the “cost-benefit test” if the sum of its anticipated benefits outweighs the sum of its present and future costs in present value terms.

These prospective (also known as *ex ante*) estimates of benefits and costs that are done before rules are issued are necessarily uncertain and heavily dependent on numerous assumptions. Particularly difficult to quantify are long-term or uncertain effects of rules where subtle interactions between various factors are often not well understood or directly measurable. Cost-benefit analysis is particularly controversial when it seeks to rationalize inherent value trade-offs and to place a value on benefits not traded in the market (e.g., health or lives).⁴⁰⁶ Also, as the Supreme Court affirmed in 2001, some statutes prohibit the consideration of costs when setting certain health standards.⁴⁰⁷ These concerns notwithstanding, most economists believe that, when used carefully and with adequate data, cost-benefit analysis can be an effective tool in regulatory decisionmaking.⁴⁰⁸

“Cost-effectiveness analysis” seeks to determine how a given goal can be achieved at the least cost. In contrast to cost-benefit analysis, the concern in cost-effectiveness analysis is not with weighing the merits of the goal, but with identifying and analyzing the costs of alternatives to reach that goal (e.g., dollars per life saved). Cost-effectiveness analysis has been referred to as a “bang-for-the-buck” exercise in which the payoff is measured in health units rather than dollars. It is commonly seen as a better tool than cost-benefit analysis for uncovering cases in which large incremental costs result in minor gains. A disadvantage of this type of analysis is that misjudgments in determining the goal or the budget may go undetected.

“Risk assessment,” in this context, is the systematic evaluation of the probability of certain hazards occurring and their adverse effects, and can serve as the starting point for regulatory activity and for estimates of regulatory benefits. For example, risk assessment is often used to estimate the expected rate of illness or death in a population exposed to a hazardous chemical. The quality of the analysis depends on the adequacy of the underlying data and the validity of the methods and assumptions used. Advocates state that risk analysis may be

⁴⁰⁵See, e.g., Tammy O. Tengs & John D. Graham, The Opportunity Costs of Haphazard Social Investments in Life-Saving, in *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Oxford University Press, Robert W. Hahn, ed., 1996). For a counter argument, see Richard W. Parker, *Grading the Government*, 70 U. Chi. L. Rev. 1345 (2003).

⁴⁰⁶See, e.g., Lisa Heinzerling & Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Georgetown University 2002).

⁴⁰⁷*Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

⁴⁰⁸See Kenneth J. Arrow, et al., *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* (The Annapolis Center 1996).

used as an objective, scientific basis for planning, identifying management strategies to promote risk reduction. Conversely, critics argue that risk analysis is often not entirely objective, in part because of inadequate data regarding the health and ecological effects of most chemicals.⁴⁰⁹ Major concerns are that risk analysis may oversimplify problems, that its conclusions can be easily manipulated, and that when used in cost-benefit analyses it may undervalue benefits, especially when projected over time. Another concern is that risk analyses often focus on relatively small risks to the population as a whole, rather than larger risks to smaller groups. These concerns notwithstanding, many observers believe that risk analysis, carefully used and supported by adequate data, can be a valuable management tool in developing and directing regulatory programs.⁴¹⁰

Presidential Initiatives. Each President within the past 35 years has required some form of regulatory analysis before rules are published in the Federal Register. For example:

- In 1971, President Nixon required agencies to develop a summary of their proposals, a description of the alternatives that they considered, and the costs of those alternatives.
- In 1974, President Ford required agencies to develop an “inflation impact statement” for each major proposed rule.
- In 1978, President Carter required agencies to prepare a regulatory analysis that examined the cost-effectiveness of the alternative regulatory approaches for major rules.

Current cost-benefit analysis requirements in the rulemaking process are primarily traceable to President Reagan’s Executive Order 12291, issued in February 1981.⁴¹¹ Under that executive order, covered agencies (those other than independent regulatory agencies) were generally required to: (1) refrain from taking regulatory action “unless the potential benefits to society for the regulation outweigh the potential costs to society,” (2) select regulatory objectives to maximize net benefits to society, and (3) select the regulatory alternative that involved the least net cost to society. The order also required covered agencies to prepare a “regulatory impact analysis” for each “major” rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of \$100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a description of alternative approaches that could achieve the regulatory goal at lower cost (and why they weren’t selected), and a determination of the net benefits of the rule.

These analytical requirements remained in place until September 1993, when President

⁴⁰⁹For example, EPA concluded that the full set of basic toxicity data was available for only about 7% of approximately 3,000 high-production-volume chemicals. See Environmental Protection Agency, *Chemical Hazard Data Availability Study: What Do We Really Know About the Safety of High Production Volume Chemicals?* (Apr. 1998).

⁴¹⁰For a more in-depth discussion, see Linda-Jo Schierow, *The Role of Risk Analysis and Risk Management in Environmental Protection*, CRS Issue Brief IB94036.

⁴¹¹Exec. Order 12,291, *Federal Regulation*, 46 Fed. Reg. 13,193 (Feb. 19, 1981).

Clinton issued Executive Order 12866.⁴¹² The new executive order, which is still in effect, revoked Executive Order 12291 but established analytical requirements that are similar (although not identical) to those it replaced. For example, regulatory principles under Executive Order 12866 include adoption of regulations only upon a “reasoned determination that the benefits of the intended regulation justify its costs”⁴¹³ and tailoring regulations to impose the least burden on society needed to achieve the regulatory objective. The order also requires a cost-benefit analysis for all “economically significant” rules (essentially the same as “major” rules under Executive Order 12291) containing an assessment of the anticipated costs and benefits of the regulatory action and an assessment of the costs and benefits of alternatives to the regulatory action (with an explanation of why the planned action is preferable). Like its predecessor, Executive Order 12866 applies to cabinet departments and independent agencies, but not to independent regulatory agencies such as the Federal Communications Commission and the Securities and Exchange Commission.

In January 1996, OIRA published a document that described “best practices” for preparing the economic analyses called for by the executive order.⁴¹⁴ In essence, the best practices document said that the analysis should: (1) clearly state the need for the proposed action (e.g., market failure) and make clear why federal regulation (as opposed to other methods such as state regulation or subsidies) is the appropriate solution, (2) clearly show that the agency considered the most important alternative approaches (e.g., performance-oriented standards or market incentives), and (3) assess the incremental costs and benefits of the proposed action (taking into account such factors as the appropriate baseline and the use of discount rates when benefits and costs occur at different times). The best-practices document also stated that cost-effectiveness analysis should be used where possible to evaluate alternatives, and says that estimating the benefits and costs of risk reducing regulations requires a risk assessment that, in part, characterizes the probabilities of occurrence of outcomes of interest.

President George W. Bush retained the general analytical requirements in Executive Order 12866. In September 2003, though, OMB and the Council of Economic Advisors finalized new guidance on regulatory analysis, refining and replacing the 1996 best practices document. Among other things, the new guidance (which has been formally issued as “OMB Circular A-4, Regulatory Analysis”): (1) places more emphasis on cost-effectiveness analysis as well as cost-benefit analysis, (2) requires formal probability analysis of future rulemakings with more than a \$1 billion impact on the economy, and (3) requires more systematic evaluation of qualitative as well as quantified costs and benefits.⁴¹⁵ The new guidance took effect on January 1, 2004, for regulatory analyses in support of proposed rules, and takes effect on January

⁴¹²Exec. Order 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993). To view a copy of this order, see [<http://www.whitehouse.gov/omb/inforeg/EO12866.pdf>].

⁴¹³As previously mentioned, the standard in Executive Order 12291 was that regulatory benefits “outweigh” costs, not just that there be a “reasoned determination” that they “justify” those costs.

⁴¹⁴This “best practices” document was developed by an interagency group co-chaired by the Administrator of OIRA and a member of the Council of Economic Advisors. The document was revised and issued as guidance in 2000. To view a copy of the best practices document, see [<http://www.whitehouse.gov/omb/inforeg/riaguide.html>]. As noted later in this report, this document and the 2000 guidance was later replaced by OMB Circular A-4.

⁴¹⁵To view a copy of OMB Circular A-4, see [<http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>].

1, 2005, for analyses in support of final rules. Industry groups have been generally supportive of the new guidance, but public advocacy groups have expressed concerns that it may result in less regulation protecting public health and the environment.

In addition to the broadly applicable analytical requirements in Executive Order 12866 and related guidance, a number of other Presidential actions have required analyses of regulations for particular purposes. For example, Executive Order 13132 on “federalism” requires agencies to prepare a “federalism summary impact statement” whenever they issue a rule that has “significant federalism implications.”⁴¹⁶ The order goes on to say that the assessment is to contain “a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.” Other executive orders specifically require agencies to assess the effect of their rules on children and on energy supply, distribution, or use. Most of these orders, however, give agencies substantial discretion to determine when the analytical requirements are triggered.

Congressional Initiatives. Congress has also required federal regulatory agencies to analyze the effect of their rules before they are issued. Some of the requirements are potentially applicable to a range of regulations while others are focused on particular types of rules. Perhaps the broadest of these requirements are in title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. §§ 1532-1538).⁴¹⁷ Before promulgating a rule containing a mandate that may result in the expenditure of \$100 million or more by the private sector or state, local, and tribal governments in the aggregate, UMRA requires agencies (again, other than independent regulatory agencies) to prepare a written statement containing a “qualitative and quantitative assessment of the anticipated costs and benefits . . . as well as the effect of the Federal mandate on health, safety, and the natural environment.” These requirements are not triggered, though, if the agency issues a final rule without a previous notice of proposed rulemaking. (About half of all final rules do not have a prior proposed rule.) Also, as GAO pointed out in 1998 and 2004, UMRA’s analytical requirements do not apply to most economically significant rules, give agencies substantial discretion regarding their implementation, and do not require much more than is already required in Executive Order 12866.⁴¹⁸ As OMB reported in its most recent report on the implementation of UMRA, federal agencies classified only six rules as “public sector

⁴¹⁶Exec. Order 13,132, *Federalism*, 64 Fed. Reg. 43,255 (Aug. 10, 1999).

⁴¹⁷Title I of UMRA contains requirements applicable to Congressional consideration of bills containing mandates. For a more complete discussion of UMRA, see Keith Bea & Richard S. Beth, *Unfunded Mandates Reform Act Summarized*, CRS Report RS20058.

⁴¹⁸U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998; and *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

mandates” under the act in its first 10 years.⁴¹⁹ In 2005, GAO reported that parties familiar with the act (e.g., public interest groups, businesses, state and local governments) had a range of ideas of how the Act’s requirements could be strengthened.⁴²⁰

Other statutory analytical requirements have been enacted with regard to particular issues or constituencies, such as the environment or small entities. For example, the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. §§ 4321-4347) requires all federal agencies to include in every recommendation or report related to “major Federal actions significantly affecting the quality of the human environment” a detailed statement on the environmental impact of the proposed action. The environmental impact statement must delineate the direct, indirect, and cumulative effects of the proposed action. Agencies are also required to include in the statement: (1) any adverse environmental effects that cannot be avoided should the proposal be implemented, (2) alternatives to the proposed action, (3) the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity, and (4) any irreversible and irretrievable commitments of resources that would be involved if the proposed action should be implemented. The adequacy of an agency’s environmental impact statement is subject to judicial review.

The Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. §§ 601-612) requires federal agencies to assess the impact of their forthcoming regulations on “small entities,” which the act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. The RFA requires the analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. The RFA’s analytical requirements are not triggered, though, if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are triggered. Also, as in UMRA, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and agencies do not have to consider the cumulative impact of their rules on agencies in making analytical determinations under the act. Finally, the courts have interpreted the Act to require the analysis only with regard to direct effects on small entities, not any indirect effects.⁴²¹ GAO has examined the implementation of the RFA several times within the past ten to 15 years, and a recurring theme in GAO’s reports is the varying interpretation of the RFA’s requirements by federal agencies.⁴²² In 2001, GAO

⁴¹⁹U.S. Office of Management and Budget, “Tenth Annual Report to Congress on Agency Compliance with the Unfunded Mandates Reform Act,” part II of OMB’s 2005 Report to Congress on the Costs and Benefits of Federal Regulations, pp. 139-180, available at [http://www.whitehouse.gov/omb/inforeg/2005_cb/final_2005_cb_report.pdf].

⁴²⁰U.S. Government Accountability Office, *Unfunded Mandates: Views Vary About Reform Act’s Strengths, Weaknesses, and Options for Improvement*, GAO-05-454, Mar. 31, 2005.

⁴²¹See *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001).

⁴²²See, e.g., U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’* (continued...)

testified that the promise of the RFA may never be realized until Congress or some other entity defines what a “significant economic impact” and a “substantial number of small entities” mean in a rulemaking setting.⁴²³ Other reviews have been more charitable, but often still conclude that improvements to the RFA and its implementation are needed.⁴²⁴

In the mid-to-late 1990s, Congress considered several comprehensive regulatory reform legislative proposals that were intended to increase or improve the use of cost-benefit analysis, cost-effectiveness analysis, or risk assessment by federal agencies.⁴²⁵ The bills’ particular requirements varied substantially, but all of them would have generally required federal agencies to analyze risks as well as costs and benefits when developing major rules. Some of the bills would have also required a cost-effectiveness analysis, and some required specific studies of how the rules would effect small businesses. Most of the bills would have required that benefits justify costs or that the agency select the most cost-effective alternative. On the other hand, most of the bills (particularly those in the 105th and 106th Congress) also indicated that these analytic requirements and decision criteria would not supercede the provisions in existing law (e.g., the Clean Air Act or the Safe Drinking Water Act) regarding whether, and if so, how agencies should weigh costs and risks in developing regulations.⁴²⁶ One of the most controversial aspects of some of these bills were provisions that would have made agencies’ cost-benefit analyses and risk assessments subject to judicial review. If these analyses were found to be deficient, the rules on which they were based could have been reversed.⁴²⁷ Some expressed concerns that the courts were ill-equipped to assess the quality or importance of such analyses to the underlying rules, and also indicated that the judicial review process could prohibit the speedy adoption of health, safety, and environmental rules. None of these comprehensive regulatory reform bills was enacted.

Bills requiring some type of regulatory analysis continue to be introduced. For example, in the 109th Congress, H.R. 2840 (the “Federal Agency Protection of Privacy Act”) would, if enacted, require agencies to prepare and make available to the public a “privacy impact analysis”

⁴²²(...continued)

Interpretations of Review Requirements Vary, GAO/GGD-99-55, April 2, 1999; U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

⁴²³U.S. General Accounting Office, *Regulatory Flexibility Act: Key Terms Still Need to Be Clarified*, GAO-01-669T, April 24, 2001.

⁴²⁴See, e.g., Keith W. Holman, *The Regulatory Flexibility Act at 25: Is the Law Achieving Its Goal?*, 33 Ford. Urb. L.J. 1119 (2006).

⁴²⁵For a thorough discussion of many of these bills, see Linda-Jo Schierow, *Environmental Risk and Cost-Benefit Analysis: A Review of Proposed Legislative Mandates, 1993-1998*, CRS Report RL30031.

⁴²⁶As noted previously, some statutes forbid any consideration of costs in setting a health standard (e.g., national ambient air quality standards under the Clean Air Act). Other statutes establish other requirements (e.g., requiring agencies to regulate to the extent “feasible” or “achievable”) whose effect on the use of cost-benefit analysis in decisionmaking is less clear.

⁴²⁷In some cases (e.g., S. 746, the “Regulatory Improvement Act of 1999”), these bills permitted courts to remand or invalidate a rule if an agency had *failed to perform* a required analysis, but could not do so because of the *perceived inadequacy* of the analysis.

describing the effect of the rule on the privacy interests of individuals. The bill specifies that the analysis should describe the extent to which the rule provides notice of the collection of personally identifiable information, allows access to and permits correction of that information by those individuals, and provides security for the information. As in UMRA and the RFA, though, the analysis is not required if the agency issues a final rule without an associated proposed rule. Also, the requirement only applies to a rule that “pertains to the collection, maintenance, use, or disclosure of personally identifiable information from 10 or more individuals.”

Implementation of Analytical Requirements. In addition to the studies mentioned above regarding UMRA, the RFA, and other analytical requirements, a number of researchers have examined agencies’ economic analyses of rules under Executive Order 12866 and related guidance documents.⁴²⁸ Several of the studies indicated that the agencies’ analyses are not always consistent with the requirements in the order or the guidance. For example, in 1998 the General Accounting Office (GAO, now the Government Accountability Office) reported that some of the 20 economic analyses that it examined did not discuss alternatives to the proposed regulatory action and, in many cases, it was not clear why the agencies used certain assumptions.⁴²⁹ Also, five of the analyses did not discuss uncertainty associated with the agencies’ estimates of benefits or costs or document the agencies’ reasons for not doing so. GAO has also examined the cost-benefit analyses for particular rules, and often found them lacking in some of the same ways.⁴³⁰ Other studies have criticized agencies for not providing quantitative information on net benefits in their analyses.⁴³¹ Still other studies have examined the accuracy of agencies’ regulatory cost estimates, often concluding that costs are overestimated.⁴³² OMB reviewed the literature on *ex ante* cost and benefit estimates, and concluded that federal agencies tend to overestimate both benefits and costs.⁴³³

⁴²⁸See, e.g., Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Resources for the Future 1997); Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (AEI Press 1996).

⁴²⁹U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 26, 1998.

⁴³⁰U.S. Government Accountability Office, *Clean Air Act: Observations on EPA’s Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252, Feb. 28, 2005. GAO concluded that EPA did not, among other things, consistently analyze available options or provide estimates of the costs and benefits of each option.

⁴³¹See, e.g., Robert W. Hahn & 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).

⁴³²For a summary of this literature, see Winston Harrington, Richard D. Morgenstern, & Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 J. of Policy Analysis and Management, at 297-322 (2000); see also William K. Reilly, *The EPA’s Cost Underruns*, Wash. Post, Oct. 14, 2003, at A23 (“a review of some of the major regulatory initiatives overseen by the EPA since its creation in 1970 reveals a pattern of consistent, often substantial overestimates of their economic costs”).

⁴³³U.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* (continued...)

GAO and others have also examined agencies' use of risk assessment in regulation. In 2001, GAO described selected agencies' chemical risk assessment procedures, noting (among other things) that the statutory and legal context in which the assessments are conducted and how the agency plans to use the information play an important role in determining why certain risk assessment approaches are used.⁴³⁴ For example, some statutes require regulatory decisions to be based solely on risk, while others require standards to be based on the "best available control technology." In general, GAO concluded that the agencies followed the four-step risk assessment process recommended by the National Academy of Sciences in 1983.⁴³⁵ The report also indicated that assumptions are an unavoidable part of risk assessment because science cannot always provide definitive answers to questions raised at various stages of an assessment.

In addition to studies examining the implementation of cost-benefit and risk assessment requirements, a large body of literature has developed debating the very notion of subjecting agencies' rules to these analytical requirements. Those supporting the use of these analytical methods view cost-benefit analysis as a helpful and neutral tool in regulatory decisionmaking.⁴³⁶ They point out that some type of cost-benefit balancing takes place during the rulemaking process anyway, and that the formal analysis simply makes that balancing (with the associated data and assumptions) more explicit, systematic, and rigorous. Furthermore, they argue that putting an accurate dollar value on costs and benefits as possible makes decisions regarding whether and how to regulate easier and more rational. As one author stated, "[m]onetizing risk and environmental benefit does not devalue these outcomes, but rather gives them real economic value when the effects might otherwise be ignored."⁴³⁷

Others, however, assert that cost-benefit analysis is inherently flawed and biased against regulation.⁴³⁸ For example, they assert that because regulatory benefits are generally more difficult to measure in dollar terms than regulatory costs, cost-benefit analysis is not carried out on a level playing field. Measurement of the benefits associated with health, safety, and environmental rules often requires an assessment of risk (e.g., how many people would get sick or die in the absence of the regulatory intervention) and a monetization of the associated benefits (i.e., placing a dollar value on the lives saved or illnesses prevented). These steps frequently involve significant methodological and ethical difficulties. As noted previously, data are frequently not available to measure regulatory risks precisely, and using "willingness to pay" models to determine the values to assign to health effects are highly controversial. Critics of

⁴³³(...continued)

Regulations and Unfunded Mandates on State, Local, and Tribal Entities, at 41-52, available at [http://www.whitehouse.gov/omb/info/2005_cb/final_2005_cb_report.pdf].

⁴³⁴U.S. General Accounting Office, *Chemical Risk Assessment: Selected Federal Agencies' Procedures, Assumptions, and Policies*, GAO-01-810, Aug. 6, 2001.

⁴³⁵National Research Council, National Academy of Sciences, *Risk Assessment in the Federal Government: Managing the Process* (commonly referred to as the "Red Book") (National Academy Press 1983).

⁴³⁶See, e.g., Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

⁴³⁷W. Kip Viscusi, *Monetizing the Benefits of Risk and Environmental Regulation*, 33 *Ford. Urb. L.J.* 1003 (2006).

⁴³⁸See, e.g., Lisa Heinzerling & Frank Ackerman *supra* note 406.

cost-benefit analysis also assert that regulatory cost data are often provided by regulated entities, who have an incentive to inflate those costs in order to influence agencies not to issue the rules. Other criticisms focus on the use of “discount rates” that reduce the value of future benefits to current dollars, and the “distributional” effects that are not often considered in such analyses. Finally, these critics suggest that although executive orders and statutes often indicate that non-monetized benefits must be considered as part of the rule development process, there is a natural tendency to discount or disregard non-monetized benefits. Therefore, a rule may be viewed as not passing a cost-benefit test even though its non-monetized benefits are significant. Still other critics assert that regardless of whether cost benefit analysis is neutral in concept, it is not neutral in effect, tending to result in the promulgation of fewer and weaker rules.⁴³⁹

Other Accountability Requirements

In addition to these analytic requirements, both Congress and Presidents in recent years have established a number of other requirements designed to improve the accountability of regulatory agencies. Perhaps most prominent among these has been the establishment of Presidential review of rules issued by covered agencies (all except independent regulatory agencies), most notably through Executive Order 12291 in 1981, and then continued but altered somewhat by Executive Order 12866 in 1993. As Presidential review is discussed at length elsewhere in this Report, however, this section will not discuss its various elements. Likewise, judicial review and Congressional review of rulemaking (e.g., the Congressional Review Act), also highly important accountability mechanisms, are discussed in detail in other chapters of this committee print. Finally, because legislative and executive branch initiatives in the areas of information quality, peer review, and risk assessment are discussed in other chapters, they will also not be discussed at length here.

Regulatory Accounting. Like taxing and spending, regulation is a basic function of government. Unlike taxing and spending, though, the costs that nonfederal entities pay to comply with federal regulations are not accounted for in the federal budget process. Some researchers have estimated those off-budget costs in the hundreds of billions of dollars, and the estimates of aggregate regulatory benefits are even higher.⁴⁴⁰ Congress decided that it needed more information on regulatory costs and benefits, so for several years it included language in appropriations bills that required OMB to submit annual reports to Congress. Most recently, section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note), sometimes known as the “Regulatory Right-to-Know Act,” put in place a permanent requirement for an OMB report on regulatory costs and benefits. Specifically, it requires OMB to prepare and submit with the budget an “accounting statement and associated report” containing an estimate of the costs and benefits (including quantifiable and nonquantifiable effects) of federal rules and paperwork, to the extent feasible, that assesses the costs and

⁴³⁹David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. Col. L. Rev. 335 (2006).

⁴⁴⁰*See, e.g.,* W. Mark Crain & Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms* (Small Business Administration 2001). The study estimated the total costs of federal regulations at \$843 billion in 2000, of which \$497 billion fell on business and \$346 billion fell on consumers or governments.

benefits: (1) in the aggregate, (2) by agency and agency program, and (3) by major rule. The accounting statement is also required to contain an analysis of impacts of federal regulation on state, local, and tribal governments, small businesses, wages, and economic growth.⁴⁴¹

From 1997 through 2001, OMB provided estimates of the total costs and benefits of federal rules, but presented those estimates with strong caveats. For example, in its 1998 report OMB said there was not a professional consensus on how regulatory costs and benefits should be measured, and discussed a number of methodological problems (e.g., determining what costs and benefits would have occurred in the absence of the regulation). OMB's estimates (particularly of regulatory benefits) varied substantially from year to year,⁴⁴² and also varied from estimates provided by other researchers.

Since 2001, OMB has not presented cost or benefit estimates for all rules. Instead, the office has reported information for all regulations that it reviewed within a particular time-frame: (1) that had costs or benefits of at least \$100 million annually and (2) whose costs and benefits had been monetized by either the rulemaking agency or OMB. In its 2002 report, OMB said its decision to present data for only certain rules during a limited time-frame was driven by the inconsistent and increasingly aged nature of many of the studies used to develop aggregate estimates. OMB went on to say that "we do not believe that the estimates of the costs and benefits of regulations issued over ten years ago are reliable or very useful for informing current policy decisions." Therefore, OMB said that it decided not to provide aggregate estimates "in keeping with the spirit of OMB's new information-quality guidelines."⁴⁴³

In its September 2003 report, OMB provided estimates of the costs and benefits of 107 regulations that it reviewed during the 10-year period from October 1992 to September 2002.⁴⁴⁴ OMB's estimate of the cost of these rules ranged from \$36 billion to \$42 billion, and the estimated benefits ranged from \$146 billion to \$230 billion (all in 2001 dollars). OMB said that it recognized that this information was not a complete accounting of the costs and benefits of all federal regulations, or even for all rules issued during the 10-year period, and said that the total costs and benefits of all federal rules in place "could easily be a factor of ten or more larger than the sum of the costs and benefits reported (for the 10-year period)." Nevertheless, OMB said that estimates prepared for rules adopted prior to the 10-year period "are of questionable relevance now." OMB made a similar statement in its 2005 report on regulatory costs and

⁴⁴¹For a discussion of these requirements and other researchers' efforts to measure regulatory costs and benefits, see Curtis W. Copeland, *Federal Regulations: Efforts to Estimate Total Costs and Benefits of Rules*, CRS Report RL32339.

⁴⁴²For example, OMB's estimate of regulatory benefits was \$298 billion in 1997 and between \$260 billion and \$3.5 trillion in 1998. By 2000, OMB's upper-end benefit estimate declined to nearly \$1.8 trillion.

⁴⁴³As discussed later in this report, section 515 of the Treasury and General Government Appropriations Act, 2001, generally known as the "Data Quality Act" or the "Information Quality Act," amended the Paperwork Reduction Act and directed OMB to issue government-wide guidelines that "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." OMB issued a final version of those guidelines in February 2002.

⁴⁴⁴See http://www.whitehouse.gov/omb/inforg/2003_cost-ben_final_rpt.pdf.

benefits.

Regulatory Budgets. In addition to better informing Congress and the public about the costs and benefits of regulations, some observers have suggested using regulatory accounting information to create a “regulatory budget” to improve regulatory accountability and control.⁴⁴⁵ A regulatory budget might limit the total volume of regulatory programs, expenditures, and compliance costs, by setting a cap on the compliance costs each agency could impose on the economy. Therefore, an agency proposing to add additional compliance costs would be obligated to remove a commensurate amount of existing cost. Implementing a regulatory budget, however, can present many conceptual and empirical problems, including the scope of regulations to be covered (almost all federal programs involve some degree of regulation, the amount depending to some extent upon one’s definition of “regulation”); the accuracy of cost estimates (direct and indirect, including the impact on firms, industries, and consumers beyond compliance costs); the accuracy of benefit estimates (generally regarded as more difficult to determine than estimating costs); and redundancy or overlap with state and local regulations.⁴⁴⁶

Legislation has been introduced that could lay the groundwork for regulatory budgeting in the future. For example, in the 108th Congress, H.R. 2432, the “Paperwork and Regulatory Improvements Act of 2003,” would have required OMB to designate at least five agencies (including at least EPA and the Departments of Labor and Transportation) as pilot projects in regulatory budgeting for fiscal years 2006 and 2007. The bill provided that the budgets “shall present, for one or more of the major regulatory programs of the agency, the varying levels of costs and benefits to the public that would result from different budgeted amounts.” The bill directed OMB to issue a report by February 2009 on the pilot project and “recommend whether legislation requiring regulatory budgets should be proposed.” During testimony in July 2003 on the bill, OMB suggested reducing the scope of the pilot projects, and clarifying that the budget levels set by OMB were not legally binding. Similar legislation has been introduced in the 109th Congress (H.R. 725, the “Paperwork and Regulatory Improvements Act of 2005”) that would, if enacted, require OMB to designate at least three agencies or offices to participate in a study on regulatory budgeting for fiscal years 2006 and 2007.

Moratoria on New Regulations. Imposing a moratorium on new rulemaking is a technique that has been used to assert control over the rulemaking process, particularly for an incoming Presidential administration.⁴⁴⁷ For example, on January 29, 1981, shortly after taking office, President Reagan issued a memorandum to the heads of the Cabinet departments and the EPA Administrator directing them to take certain actions that would give the new administration time to implement a “new regulatory oversight process,” particularly for “last-minute decisions” made by the previous administration. Specifically, the memorandum said that agencies should, to the extent permitted by law: (1) postpone for 60 days the effective date of all final rules that were scheduled to take effect during that 60-day period, and (2) refrain from promulgating any new final rules. Executive Order 12291, issued a few weeks later, contained another moratorium

⁴⁴⁵In fact, the creation of a regulatory budget was contemplated in section 6(a)(6) of Executive Order 12291 in 1981.

⁴⁴⁶Samuel Hughes, *Regulatory Budgeting*, Center for the Study of American Business, Washington University, Working Paper 160, June 1996.

⁴⁴⁷The volume of rulemaking typically increases at the end of a Presidential administration. See Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-Election Quarters* (Mercatus Center Oct. 5, 2000).

on rulemaking that supplemented, but did not supplant, the January 29, 1981, memorandum. Section 7 of the executive order directed agencies to “suspend or postpone the effective dates of all major rules that they have promulgated in final form as of the date of this Order, but that have not yet become effective.” Excluded were major rules that could not be legally postponed or suspended, and those that ought to become effective “for good cause.” Agencies were also directed to refrain from promulgating any new final rules until a final regulatory impact analysis had been conducted.

In January 1992, President George H.W. Bush imposed a 90-day moratorium on new regulations in response to criticisms that regulatory burden was increasing rapidly during his administration. The President instructed agencies to identify existing regulations and programs imposing unnecessary regulatory burdens and to develop programs to reduce or eliminate those burdens. Regulations that were issued in response to emergency situations, had statutory or judicial deadlines, dealt with military or foreign affairs, or were related to agency administrative matters were exempted from the moratorium. The moratorium was later extended, and remained in force until the end of the Bush Administration.

On January 22, 1993, the Director of OMB for the incoming Clinton Administration sent a memorandum to the heads and acting heads of Cabinet departments and independent agencies requesting them to: (1) not send proposed or final rules to the Office of the Federal Register for publication until they have been approved by an agency head appointed by President Clinton and confirmed by the Senate, and (2) withdraw from the Office of the Federal Register all regulations that had not been published in the Federal Register and that could be withdrawn under existing procedures. The requirements did not apply, however, to any rules that had to be issued immediately because of a statutory or judicial deadline. The OMB Director said these actions were needed because it was “important that President Clinton’s appointees have an opportunity to review and approve new regulations.”

Most recently, on January 20, 2001, Andrew H. Card, Jr., Assistant to President George W. Bush and Chief of Staff, sent a memorandum (often referred to as the “Card memo”) to the heads and acting heads of all executive departments and agencies generally directing them to: (1) not send proposed or final rules to the Office of the Federal Register, (2) withdraw from the Office rules that had not yet been published in the Federal Register, and (3) postpone for 60 days the effective date of rules that had been published but had not yet taken effect.⁴⁴⁸ The Card memo instructed agencies to exclude any rules promulgated pursuant to statutory or judicial deadlines, and to notify the OMB Director of any rules that should be excluded because they “impact critical health and safety functions of the agency.” The memo indicated that these actions were needed to “ensure that the President’s appointees have the opportunity to review any new or pending regulations.”

In February 2002, GAO reported on the delay of effective dates of final rules subject to the Card memo.⁴⁴⁹ GAO indicated that 371 final rules were subject to the Card memo, and federal agencies delayed the effective dates of at least 90 of them. As of the one-year anniversary of the Card memo, most of the 90 rules had taken effect, but one had been withdrawn and not replaced by a new rule, three had been withdrawn and replaced by new rules,

⁴⁴⁸ U.S. White House Office, *Regulatory Review Plan*, 66 Fed. Reg. 7702 (Jan. 24, 2001).

⁴⁴⁹ U.S. General Accounting Office, *Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration’s Jan. 20, 2001, Memorandum*, GAO-02-370R, Feb. 15, 2002.

and nine others had been altered (e.g., different implementation date or reporting requirement). The agencies generally did not permit the public to comment on the delays or changes.

All of these Presidential moratoria on rulemaking have generally exempted regulations issued by independent regulatory boards and commissions, as well as regulations issued in response to emergency situations or statutory or judicial deadlines. Critics claim that moratoria disrupt the regulatory process and delay the implementation of important regulations. They have also raised concerns about changes in the effective dates of published rules without permitting public comment.⁴⁵⁰ In fact, some of the delays and changes initiated by these Presidential moratoria were later overturned by the courts.⁴⁵¹ Supporters, on the other hand, assert that moratoriums help to block undesirable regulations and enable the new administration and federal agencies to revise or eliminate less desirable regulations.

Reviews of Existing Regulations. Each year, federal agencies issue more than 4,000 final rules, which are then codified in the Code of Federal Regulations (CFR). Although most of the attention of regulatory reformers has been focused on new rules, reexamination of the large body of existing rules can reveal that they are no longer needed, or that improvements in the regulatory approach can make the program more effective or less burdensome. Reviews of existing regulations were recommended by ACUS,⁴⁵² and have been initiated by both recent Presidents and the Congress.

Presidential Initiatives. Most recent Presidents have directed agencies to reconsider their existing regulations. For example, in 1979, President Carter issued Executive Order 12044, which required agencies to review their existing rules “periodically.”⁴⁵³ One of the missions of President Reagan’s task force on regulatory relief was to identify existing regulations and recommend changes. During the previously-mentioned moratorium on new rules during the administration of President George H.W. Bush, agencies were instructed “to evaluate existing regulations and programs and to identify and accelerate action on initiatives that will eliminate any unnecessary regulatory burden or otherwise promote economic growth.”

Section 5 of Executive Order 12866, issued in September 1993, required agencies to submit to OIRA a plan for periodically reviewing their existing significant regulations to determine whether any should be modified or eliminated. According to the executive order, the purpose of the review was to make the agencies’ regulatory programs more effective, less burdensome, or better aligned with the President’s priorities and the principles specified in the order. In its report on the first year’s implementation of the executive order, OIRA said this review of existing rules was intended to be “a fundamental reengineering of entire regulatory systems,” not just “tinkering with regulatory provisions to consolidate or update provisions.”

⁴⁵⁰See, e.g., William M. Jack, *Taking Care That Presidential Oversight of the Regulatory Process is Faithfully Executed: A Review of Rule Withdrawals and Rule Suspensions Under the Bush Administration’s Card Memorandum*, 54 Admin. L. Rev. 1479 (2002).

⁴⁵¹See, e.g., *Natural Resources Defense Council v. Abraham*, 355 F.3d 179 (2d Cir. 2004).

⁴⁵²ACUS cautioned that such reviews should not be “one-size-fits-all,” but should be tailored to the agencies’ individual needs. For the specific recommendations, see Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 399-400 (American Bar Ass’n 4th ed. 2006).

⁴⁵³Exec. Order 12,044, *Improving Government Regulations*, 43 Fed. Reg. 12,661 (Mar. 24, 1978).

Because of concerns that all agencies were not “taking the steps necessary to implement regulatory reform,” President Clinton sent a memorandum to the heads of Cabinet departments and independent agencies in March 1995 directing them to, among other things, conduct a page-by-page review of all their regulations in force and eliminate or revise those that were outdated or in need of reform. In June 1995, the President announced that this effort had resulted in commitments to eliminate 16,000 pages from the CFR. GAO later reported, however, that four agencies’ page elimination totals did not take into account the pages that they had added to the CFR while the eliminations were taking place.⁴⁵⁴ GAO also said that about half of the actions were likely to result in little or no reduction of regulatory burden.

The most recent OIRA-directed reviews of existing rules have involved the general public in the review process. In May 2001, OIRA asked the public to nominate rules that it believed should be modified or rescinded.⁴⁵⁵ In response, OIRA received 71 nominations from 33 commentators, and decided that 23 of the rules nominated merited “high priority review.” In March 2002, OIRA again solicited public comments on regulations in need of reform, and in response received more than 300 suggestions from about 1,700 commentators, some of which suggested making rules more stringent or developing new rules. This time, OIRA forwarded the suggestions to the relevant federal agencies for review and prioritization. In February 2004, OIRA requested public nomination of promising regulatory reforms relevant to the manufacturing sector. Specifically, OIRA requested that commenters suggest reforms to regulations, guidance documents, or paperwork requirements that would “improve manufacturing regulation by reducing unnecessary costs, increasing effectiveness, enhancing competitiveness, reducing uncertainty and increasing flexibility.”

Congressional Initiatives. Congress has also directed agencies to review the effects of their existing regulations. Some of these Congressionally-initiated review requirements focus on rules issued under specific statutes. For example, section 812 of the 1990 amendments to the Clean Air Act required EPA to provide information about the economic costs and benefits and the health, welfare, and environmental impacts of the Clean Air Act.⁴⁵⁶ The 1990 amendments also directed an interagency group to report every four years, beginning in 1996, on the costs, benefits, and effectiveness of the acid rain program.

Other Congressionally-directed regulatory reviews are more crosscutting, although still focused on particular types of rules. Section 610 of the Regulatory Flexibility Act (RFA) requires each federal agency to develop a plan for the review of its existing rules that have or will have a “significant economic impact on a substantial number of small entities.” The purpose of this “look-back” review is to determine whether the rules should be continued without change or should be amended or rescinded to minimize their impact on small entities. GAO reported in 1999, however, that few of these reviews were being conducted, and that

⁴⁵⁴U.S. General Accounting Office, *Regulatory Reform: Agencies’ Efforts to Eliminate and Revise Rules Yield Mixed Results*, GAO/GGD-98-3, Oct. 2, 1997.

⁴⁵⁵OIRA said it requested the nominations in response to a requirement in section 628(a)(3) of the fiscal year 2000 Treasury and General Government Appropriations Act that required OMB to submit “recommendations for reform” with its report on the costs and benefits of federal regulations.

⁴⁵⁶For a discussion of reviews of EPA rules, see U.S. General Accounting Office, *Environmental Protection: Assessing the Impacts of EPA’s Regulations Through Retrospective Studies*, GAO/RCED-99-250, Sept. 14, 1999.

regulatory agencies differed in how they interpreted this requirement.⁴⁵⁷ For example, it was not clear whether agencies are supposed to review rules that currently *have* an impact on small entities, or those that *had* that impact at the time the rules were issued. Another reason why so few section 610 reviews have been conducted is the discretion agencies have under the RFA in deciding whether their rules have a “significant” economic impact on a “substantial” number of small entities. If an agency certifies that a rule did not (or currently does not) have that impact, it does not have to conduct a section 610 review.⁴⁵⁸

Several of the comprehensive regulatory reform bills that Congress considered (but did not enact) during the mid-to-late 1990s would have required agencies to review virtually all of their existing rules, not just those issued under certain statutes or that affected small entities. For example, the “Regulatory Sunset and Review Act of 1995” (H.R. 994) would have required agencies to review each existing significant rule (and other rules upon request by affected parties or Congressional committees) within four to seven years after the bill’s enactment and then to either issue a report continuing the rule or take action to modify, consolidate, or terminate it. Later, the “Regulatory Improvement Act of 1997” (S. 981) would have required agencies to review existing rules identified by an advisory committee representing a balanced cross section of public and private interests. The agencies would have then had to decide whether to retain, amend, or repeal the rules it reviewed.

Paperwork Reduction Initiatives. Other regulatory reform initiatives have focused specifically on controlling the paperwork that often accompanies regulations. Many information collections, recordkeeping requirements, and third-party disclosures are contained in, or are authorized by, regulations as monitoring or enforcement tools. In fact, these paperwork requirements are the essence of many agencies’ regulatory provisions.⁴⁵⁹ A large amount of federal paperwork is necessary, and is how many agencies carry out their missions. For example, IRS needs to collect information from taxpayers and their employers to know the correct amount of taxes owed. EPA uses information requirements to ensure compliance with its regulations, to evaluate the effectiveness of its programs, and for other purposes. Nevertheless, federal agencies are expected to minimize the paperwork burden that they impose.

Paperwork Reduction Act. The most notable of the various reform initiatives to control federal paperwork is the Paperwork Reduction Act (PRA) (44 U.S.C. §§ 3501-3520), which was originally enacted in 1980 but was subsequently amended in 1986 and again in 1995. The original PRA replaced the ineffective Federal Reports Act of 1942, and established OIRA within OMB to provide central agency leadership and oversight of government-wide efforts to reduce unnecessary paperwork and improve the management of information resources.

⁴⁵⁷U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

⁴⁵⁸For a discussion of this issue, see Michael R. See, *Willful Blindness: Federal Agencies’ Failure to Comply with the Regulatory Flexibility Act’s Periodic Review Requirement — and Current Proposals to Invigorate the Act*, 33 Ford. Urb. L.J. 1199 (2006).

⁴⁵⁹For example, EPA’s Toxics Release Inventory (TRI) program is essentially a database created through collections of information imposed on businesses in order to inform the public about chemical hazards in their communities. TRI reports require businesses in certain industries to report the quantity of any of more than 600 chemicals entering each environmental medium on site, transfers of the chemical in wastes to off-site locations, on-site treatment methods and efficiency, and source reduction and recycling activities.

Currently, the Act requires OIRA to maintain a government-wide strategic information resources management plan. Such a plan could help ensure that federal paperwork is the minimum necessary and is well integrated into agencies' missions and objectives.⁴⁶⁰ GAO reported in February 2002, though, that OMB had not fully developed and implemented an information resources management plan that articulated a comprehensive federal vision for all aspects of government information.⁴⁶¹

The PRA also requires agencies to receive OIRA approval (signified by an OMB control number) for each information collection request before it is implemented. Under the PRA's "public protection" provision, no one can be penalized for failing to comply with a collection of information subject to the Act if it has not been approved by OIRA within the previous three years. Each year, however, OIRA reports that agencies impose hundreds of paperwork requirements without OIRA approval (although the number of such PRA violations have declined in recent years).⁴⁶² OIRA can disapprove any collection of information (and generally stop any associated regulation) if it believes the collection is inconsistent with the requirements of the PRA.⁴⁶³

The 1995 amendments to the PRA required OIRA to set a goal of at least a 10% reduction in the government-wide burden-hour estimate for each of fiscal years 1996 and 1997, a 5% goal for each of the next four fiscal years, and annual agency goals that reduce burden to the "maximum practicable opportunity." Therefore, if these goals had been met, the amount of federal paperwork would have fallen by 35%—from about 7 billion burden hours at the end of fiscal year 1995 to about 4.6 billion hours at the end of fiscal year 2001. This anticipated reduction did not occur, though. In fact, by the end of fiscal year 2002, the government-wide paperwork estimate stood at more than 8.2 billion hours—a 17% increase since the PRA amendments took effect at the end of fiscal year 1995. The agencies often contend that they cannot reduce their paperwork requirements without changes in their authorizing statutes, many of which require the collection of certain types of information.

Other Paperwork Initiatives. In addition to the PRA, Congress has enacted other statutes in an attempt to reduce or at least control federal paperwork burden. For example, in June 2002, Congress enacted, and the President signed, the Small Business Paperwork Relief Act of 2002 (Pub. L. No. 107-198). The Act amended the PRA to, among other things, require each agency to establish a single point of contact to act as a liaison for small business concerns with regard to information collection and paperwork issues.⁴⁶⁴ It also directed agencies to make a

⁴⁶⁰Harold Relyea, *Paperwork Reduction Act Reauthorization and Government Information Management Issues*, CRS Report RL30590; Ronald C. Moe, *General Management Laws: A Selective Compendium—107th Congress*, CRS Report RL30795.

⁴⁶¹U.S. General Accounting Office, *Information Resources Management: Comprehensive Strategic Plan Needed to Address Mounting Challenges*, GAO-02-292, Feb. 22, 2002.

⁴⁶²For a summary of this trend, see U.S. General Accounting Office, *Paperwork Reduction Act: Record Increase in Agencies' Burden Estimates*, GAO-03-691T, April 11, 2003.

⁴⁶³Independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information. Also, OIRA disapproval does not overrule a specific statutory requirement that certain information be collected.

⁴⁶⁴OMB posted compliance assistance resources and points of contact on its Web site at (continued...)

special effort to reduce information collection burdens for small businesses with fewer than 25 employees, and established a task force to study the feasibility of streamlining information collection requirements on small businesses. The task force delivered its first report in June 2003,⁴⁶⁵ and its final report is due in June 2004.

Statutory reforms have been introduced in each Congress in an attempt to address paperwork requirements in particular areas. For example, in the 108th Congress, H.R. 464, the “IDEA Paperwork Reduction Act of 2003,” was intended to “provide relief to teachers, administrators, and related service providers from excessive paperwork burden” required under the Individuals with Disabilities Act. Other bills have focused on such issues as the suspension of fines under certain circumstances for first-time paperwork violations for small businesses.

Initiatives Focusing on Small Entities. A number of regulatory reforms implemented in recent decades have attempted to get agencies to recognize the effect that their rules can have on small businesses and other small entities. Advocates of these initiatives note the important role that small entities play in the economy (e.g., about 50% of the gross domestic product) and point to research indicating that small entities are disproportionately affected by federal regulations.⁴⁶⁶ Others indicate, however, that special regulatory treatment of small entities is “both unjustified and socially destructive.”⁴⁶⁷

Although there have been some Presidential initiatives in this area,⁴⁶⁸ most of the significant rulemaking requirements affecting small entities have been imposed by Congress. As noted previously, the RFA requires agencies to examine the effects of their rules on small entities and, if the agency concluded the rule had a “significant economic effect on a substantial number of small entities,” to conduct a regulatory flexibility analysis. The Act gives regulatory agencies substantial discretion to decide when these analytical requirements are triggered. Other previously mentioned reforms focusing on small entities include the “look back” requirement in section 610 of the RFA and the requirements in the Small Business Paperwork Relief Act (e.g., a single point of contact for small businesses regarding paperwork).

A number of statutory reforms directed at small entities’ concerns were included in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Perhaps most notably, SBREFA amended the RFA and permitted judicial review of agencies’ compliance with initial and final regulatory flexibility analysis requirements, their use of the “no significant impact” exclusion, and compliance with the “look back” requirement in section 610. (The

⁴⁶⁴(...continued)

[<http://www.whitehouse.gov/omb/inforeg/infocoll.html#sbpra>].

⁴⁶⁵To view a copy of this report, see [<http://www.whitehouse.gov/omb/inforeg/sbpr2003.pdf>].

⁴⁶⁶U.S. Small Business Administration, Office of the Chief Counsel for Advocacy, *The Changing Burden of Regulation, Paperwork, and Tax Compliance on Small Business: A Report to Congress* (U.S. Government Printing Office 1995).

⁴⁶⁷Richard J. Pierce, Jr., *Small Is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 Admin. L. Rev. 537 (1998).

⁴⁶⁸For example, Exec. Order 13,272, *Proper Consideration of Small Entities in Agency Rulemaking*, 67 Fed. Reg. 53,461 (Aug. 16, 2002), among other things, required agencies to issue written procedures and policies to ensure that the potential impacts of draft rules on small entities are properly considered during rulemaking.

original RFA prohibited judicial review.) As discussed below, other SBREFA provisions included requirements that agencies develop compliance guides for small entities, provide small entities with penalty relief, permit more equal access to justice, and ensure that small entities' interests are represented on boards and panels involved in the rulemaking process.

Compliance Guides and Other Guidance. Section 212 of SBREFA requires agencies to publish one or more compliance guides for each rule or group of related rules for which the agency is required to prepare a final regulatory flexibility analysis under the RFA. Because this provision in SBREFA was built on the RFA, all of the discretion inherent in the RFA regarding whether to do an analysis also applies to whether compliance guides must be developed. For example, if the agency concludes that the final rule would not, in its opinion, have a "significant" impact on a "substantial" number of small entities, the agency is not required to prepare a compliance guide. When they are prepared, section 212 requires the guides to be published, to be designated as "small entity compliance guides," and to explain the actions a small entity is required to take to comply with the associated final rule. In other areas, though, section 212 gives agencies broad discretion. For example, the statute says agencies "may" prepare separate guides covering groups or classes of similarly affected small entities, and "may" cooperate with associations of small entities to develop and distribute the guides. Agencies are given "sole discretion" in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. Therefore, under section 212, an agency could develop a compliance guide years after a final rule is published with no input from small entities. In 2001, GAO reviewed agencies' implementation of section 212 and concluded that the requirement did not appear to have had much of an impact on agencies' rulemaking actions.⁴⁶⁹

Section 213 of SBREFA requires federal agencies regulating the activities of small entities to establish a program for responding to inquiries concerning compliance with applicable statutes and regulations. The section also says that in any civil or administrative action against a small entity, such guidance "may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties or damages sought against such small entity."

Penalty Relief. By the mid-1990s, concerns were being expressed about the impact that civil penalties can have on small businesses and other small entities, particularly for infractions that may be relatively minor in nature. In April 1995, President Clinton issued a memorandum directing the heads of 27 departments and agencies to modify the penalties for small businesses "to the extent permitted by law."⁴⁷⁰ For example, the memorandum said agencies "shall exercise their enforcement discretion to waive the imposition of all or a portion of a penalty when the violation is corrected within a time period appropriate to the violation in question." The memorandum also directed each agency to submit a plan to the Director of OMB describing the actions the agency would take, and said the plans should identify how notification of the agencies' policies would be given to frontline workers and small businesses.

Similar requirements were included in SBREFA, which was enacted less than a year later in March 1996. Section 223 of SBREFA, entitled "Rights of Small Entities in Enforcement

⁴⁶⁹U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

⁴⁷⁰U.S. President (Clinton), *Regulatory Reform-Waiver of Penalties and Reduction of Reports*, Memorandum of April 21, 1995, Code of Federal Regulations, vol. 3 (1996), pp. 474-475.

Actions,” requires agencies to provide small entities with some form of relief from civil monetary penalties. Specifically, the statute requires federal agencies regulating the activities of small entities to establish a policy or program by the end of March 1997 for the reduction and, under appropriate circumstances, the waiver of civil penalties on small entities. It also required agencies to submit a one-time report to four Congressional committees by the end of March 1998 on the scope of their programs or policies and the implementation of their penalty reduction efforts. Section 223 also gave federal agencies substantial discretion in how these requirements were to be carried out. In 2001 GAO examined the implementation of section 223 and determined that the agencies were using that discretion extensively.⁴⁷¹ For example, some of the agencies’ policies covered only certain civil penalty enforcement actions, and some of the policies gave small entities no more penalty relief than large entities. The agencies also varied in how key terms were defined and in their conditions and exclusions. GAO made several recommendations to strengthen penalty relief and improve Congressional oversight.

Ombudsman and Fairness Boards. Section 222 of SBREFA amended the Small Business Act (15 U.S.C. §§ 631 *et seq.*) to require the SBA Administrator to designate a “Small Business and Agriculture Regulatory Enforcement Ombudsman,” who was directed to work with each agency to ensure that small business concerns have an opportunity to comment on agencies’ enforcement actions. The ombudsman was directed to annually evaluate and report on each agency’s enforcement activities, including a rating of the “responsiveness to small business” of each agency’s regional and program offices. Section 222 also required the Administrator to establish a “Small Business Regulatory Fairness Board” in each SBA regional office to report to and advise the ombudsman on “excessive enforcement actions of agencies against small business concerns.

Equal Access to Justice Act Amendments. The Equal Access to Justice Act (28 U.S.C. § 2412 and 5 U.S.C. § 504) was originally enacted in 1980 to allow certain parties to recover attorney’s fees from the government in civil actions and administrative adjudication. Subtitle C (sections 231 and 232) of SBREFA amended this Act in three ways: (1) raising the hourly cap on attorneys fees to \$125 per hour, (2) generally permitting eligible parties to claim fees and other expenses related to defending against demands “substantially in excess of the judgment finally obtained” (not just if they prevailed in the case) and, (3) in these “excessive demand” cases, expanding the definition of an eligible party to include small entities as defined in the RFA.⁴⁷²

Advocacy Review Panels. Section 244 of SBREFA put in place special requirements for proposed rules issued by EPA and OSHA. EPA and OSHA are required to convene “advocacy review panels” before publishing a regulatory flexibility analysis for a proposed rule. Specifically, the agency issuing the regulation (OSHA or EPA) must notify the SBA Chief Counsel for Advocacy and provide information on the draft rule’s potential impacts on small entities and the type of small entities that might be affected. The Chief Counsel then must identify representatives of affected small entities within 15 days of the notification. The review panel must consist of full-time federal employees from the rulemaking agency, OMB, and SBA’s Chief Counsel for Advocacy. During the panel process, the panel must collect the

⁴⁷¹U.S. General Accounting Office, *Regulatory Reform: Implementation of Selected Agencies’ Civil Penalty Relief Policies for Small Entities*, GAO-01-280, Feb. 20, 2001.

⁴⁷²See SBA Office of Advocacy, *The Equal Access to Justice Act and Small Business — Analysis and Critique*, Aug. 10, 2001.

advice and recommendations of representatives of affected small entities about the potential impact of the draft rule. The panel must report on the comments received and on the panel's recommendations no later than 60 days after the panel is convened, and the panel's report must be made public as part of the rulemaking record. An agency may or may not adopt the panel's recommendations. GAO examined the initial implementation of these requirements and reported that the participants generally agreed that the panels were worthwhile, but suggested several changes to make them work better.⁴⁷³

Concluding Observations

Most of the regulatory reform efforts enacted in the past 25 years have been introduced with great fanfare and even greater expectations. And in a few cases, the reforms appear to have achieved at least some of those expectations (e.g., the above-mentioned requirement that EPA and OSHA convene small entity advocacy review panels before developing proposed rules). It appears, however, that most of the regulatory reform initiatives implemented in the past 25 years or so have been less effective than their authors had initially hoped. Some have been less charitably described as failures.

Agency Discretion. One reason why some previous regulatory reform efforts have not been more effective appears related to the amount of discretion that agencies have been given in their implementation. In some cases, that discretion is directly provided to the agencies through statutory language (e.g., agencies "may" take certain actions, or are required to conduct an analysis "when feasible"). In other cases, the discretion is provided when the reform requirements are not clear, or when definitions of key terms are not provided. It is important to recognize that some measure of agency discretion in implementing the reforms is inevitable and necessary. But if that discretion results in ineffective analytical or accountability requirements, improvements in effectiveness may require some reductions in discretion.

One of the best known examples of a reform effort that gives agencies a great deal of discretion is the RFA, which allows agencies to define key terms such as "significant economic impact on a substantial number of small entities," thereby avoiding the act's requirements. For example, in 1999, the EPA issued a proposed rule that would have lowered the threshold for reporting the use of lead under the Toxic Release Inventory (TRI) program from 25,000 pounds to 10 pounds.⁴⁷⁴ As a result, any business with ten or more employees that used more than ten pounds of lead per year in its manufacturing process would have to fill out a TRI report. By EPA's own estimates, the TRI report took more than 100 hours to fill out the first time, and lowering the reporting threshold would have swept in more than 5,000 small businesses, costing each of them about \$7,500 the first year and more than \$5,000 each subsequent year. Nevertheless, EPA certified that this rule would not have a "significant economic impact on a substantial number of small entities," so it did not trigger the requirements of the RFA. GAO concluded in its 2000 report that EPA's policies — while setting a "high threshold" — were

⁴⁷³U.S. General Accounting Office, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-98-36, Mar. 18, 1996.

⁴⁷⁴Environmental Protection Agency, *Lead and Lead Compounds*, 64 Fed. Reg. 42,222 (Aug. 3, 1999).

within the discretion that the RFA allows.⁴⁷⁵ GAO also determined that since 1996, EPA had certified 96% of its rules as not having a significant impact on small entities. During this same period, the office of pesticides and the office of solid waste within EPA had certified 100% of their rules.

The compliance guide requirement in section 212 of SBREFA also gives agencies substantial discretion. For example, the statute says agencies “may” prepare separate guides covering groups or classes of similarly affected small entities, and “may” cooperate with associations of small entities to develop and distribute the guides. Agencies are given “sole discretion” in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. As a result, it would be possible for an agency to develop a *hard to understand* compliance guide *years after* a final rule is published with *no input* from small entities, and still be considered in compliance with the act. Likewise, under section 223 of SBREFA, an agency could have a small entity penalty relief policy that covered only some of its enforcement actions, and even where covered, give small entities no more penalty relief than large entities.

The Unfunded Mandates Reform Act (UMRA) also gives agencies a great deal of discretion in its implementation. For example, section 202 of UMRA requires agencies to prepare “written statements” containing, among other things, estimates of future compliance costs and any disproportionate budgetary effects “if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material.” The statute gives agencies the same discretion regarding estimates of the effects of their rules on the national economy. Therefore, an agency can omit these estimates if, in its sole discretion, it considers them inaccurate, unfeasible, irrelevant, or immaterial. Likewise, section 203 requires agencies to develop plans to involve small governments in the development of regulatory proposals that have a “significant or unique” effect on those entities. Therefore, an agency that concludes that a rule’s effect on small governments will not be “significant” or “unique” can avoid this requirement. None of the agencies that GAO reviewed in its 1998 report on UMRA had developed small government plans pursuant to section 203.⁴⁷⁶

Agency discretion is present in most federal rulemaking requirements — even the most longstanding and revered of those requirements. For example, the APA, which established the basic “notice and comment” rulemaking process, allows agencies to issue final rules without a NPRM if the agencies can demonstrate “good cause” — i.e., that allowing the public to comment is “impracticable, unnecessary, or not in the public interest.” And use of the good cause exception makes sense in certain circumstances, such as when new flight restrictions were needed quickly in the wake of the September 11, 2001, terrorist attacks. There is also some evidence, however, to suggest that agencies may be overusing this “good cause” exception. For example, in 1998, GAO reported that about half of the more than 4,600 final rules issued in 1997

⁴⁷⁵ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

⁴⁷⁶ U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998. Some agencies had such programs, but said they were not developed because of UMRA. No subsequent reviews of agency compliance with this provision have been conducted.

had no NPRMs.⁴⁷⁷ Although many of these rules involved administrative or technical issues that were not likely to generate comments, the agencies indicated that some of the rules without a notice would have a \$100 million impact on the economy. In some cases, it was unclear why the agency could not have issued a proposed rule. For example, one agency indicated that its rule would be in the public interest, and that constituted “good cause” not to allow the public to comment on it. In other cases the agencies said issuing proposed rules was impracticable because of statutory or other deadlines that had already passed by the time the rule was issued.

Presidents have also given agencies substantial discretion in the implementation of some of the requirements they have placed on rulemaking agencies. For example, in 1987, President Reagan issued Executive Order 12612 on “Federalism,” which established a set of fundamental principles and criteria for executive departments and agencies to use when formulating and implementing policies that have federalism implications.⁴⁷⁸ The executive order also required federal agencies to prepare a “federalism assessment” whenever the responsible agency official determines that a proposed policy had sufficient federalism implications to warrant the preparation of the assessment. The assessment was required to contain certain elements (e.g., identifying the extent to which the policy would impose additional costs or burdens on the states), and was to accompany any rule submitted to OMB for review under Executive Order 12866. The GAO, however, examined the implementation of Executive Order 12612 and, in 1999, concluded that it had little effect on agency rulemaking.⁴⁷⁹ Agencies prepared few federalism assessments because they concluded that their rules would not have sufficient “federalism implications” to merit an analysis, *even when they also said that the rules preempted state or local law*. In 1999, President Clinton issued Executive Order 13132 on “Federalism,” which revoked Executive Order 12612. Like its predecessor, though, the new executive order provides agencies with substantial flexibility to determine which of their actions have “federalism implications” and, therefore, when they should prepare a “federalism summary impact statement.”

Linking New Requirements to Old Requirements. Another reason why some regulatory reform measures have not worked as well as some expected is that the reforms have been related to or built on other reforms with some of the above-mentioned problems. As noted previously, the “look back” requirement in section 610 of the RFA and the compliance guide requirement in section 212 of SBREFA are triggered only when the rulemaking agency determines that a rule has a “significant economic impact on a substantial number of small entities.” Therefore, if the agency concludes that a rule would not, in its opinion, have a “significant” impact on a “substantial” number of small entities, the agency is not required to reexamine its rule or to prepare a compliance guide.

Even regulatory reforms that are regarded as effective can be adversely affected by their linkage to other rulemaking requirements. For example, the EPA and OSHA small business advocacy review panels that are required by SBREFA are only required when the agency determines that a rule might have a “significant economic impact on a substantial number of small entities.” Therefore, if EPA and OSHA conclude that their forthcoming proposal would

⁴⁷⁷U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

⁴⁷⁸Exec. Order 12,612, *Federalism*, 52 Fed. Reg. 41,685 (Oct. 30, 1987).

⁴⁷⁹U.S. General Accounting Office, *Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking*, GAO/T-GGD-99-131, June 3, 1999.

not, if implemented, have such an impact on small entities, they can avoid the panel requirement.

Narrow Scope of Requirements. Other regulatory reforms would arguably be more effective if their scope were broader. For example, when Congress enacted the UMRA, it was considered one of the most important efforts to constrain the imposition of new requirements on state and local governments and businesses without new resources to implement those requirements. And, there is some evidence to indicate that the requirements that Congress placed on itself in title I of the Act have had that effect, at least with regard to state and local governments.⁴⁸⁰ Nevertheless, there is little direct evidence that the requirements placed on the agencies in title II of UMRA have had much, if any, effect on the rulemaking process. One reason involves the limited number of rules that the act covers.

- First, the statute says that UMRA does not cover any rules issued by independent regulatory agencies such as the Federal Communications Commission, the Securities and Exchange Commission, or the Consumer Product Safety Commission.
- Second, the statute says that UMRA also does not apply to any rules issued without a previous notice of proposed rulemaking. As discussed indicated earlier, about half of all final rules are issued without an NPRM, so UMRA does not apply to any of those rules.
- Third, UMRA says that agencies need not prepare a written statement containing (among other things) an estimate of benefits and costs if the rule in question imposes an enforceable duty only as part of a voluntary program or as a condition of federal financial assistance. A number of the programs that agencies consider “voluntary” (e.g., the No Child Left Behind Act) are not viewed that way by the states or other regulated entities.
- Finally, the Act says that agencies need not prepare an UMRA written statement if the rule will not require “expenditures” of at least \$100 million. As some rules do not technically require “expenditures” (e.g., the rule may prevent the money from ever getting into the pockets of affected parties), UMRA does not cover them.

Not surprisingly, when GAO examined the implementation of UMRA in 1998 and 2004, it concluded that the Act had little effect on agency rulemaking.

Although not discussed at length in this chapter, some observers have also criticized the limited scope of the Presidential review requirements in Executive Order 12866.⁴⁸¹ Like its

⁴⁸⁰Congressional Budget Office, *A Review of CBO’s Activities Under the Unfunded Mandates Reform Act*, testimony before the House Committee on Government Reform, March 8, 2005, available at [<http://www.cbo.gov/showdoc.cfm?index=6141&sequence=0>]. CBO said that although Congress has rarely used UMRA’s explicit enforcement mechanisms, “it has changed several pieces of legislation before enactment to either eliminate mandates or lower costs.”

⁴⁸¹The Center for Regulatory Effectiveness, *A Blueprint for OMB Review of Independent* (continued...)

predecessor (Executive Order 12291) and UMRA, the executive order covers only executive departments and independent agencies; it does not cover rules issued by independent regulatory agencies in such areas as telecommunications, energy, and trade with an estimated effect on the economy of more than \$200 billion – roughly the same as the health, safety, and environmental rules that OIRA *does* review. Advocates of extending the executive order to independent regulatory agencies' rules point out that OIRA already reviews their information collection requests under the PRA, and argue that reviewing the substance of their rules would be a logical extension of that effort. Opponents note, however, that these agencies were established to be independent of the President, and argue that including them under the scope of the executive order would violate that independence.

Countervailing Forces. Another reason why some accountability requirements appear to have been unsuccessful involves countervailing forces or conflicting goals that work against the achievement of the requirements' objectives. For example, the 1995 amendments to the PRA required OMB to set burden reduction goals for the next six years that would have, if they had been met, reduced the amount of federal paperwork from about seven billion burden hours at the end of fiscal year 1995 to about 4.6 billion hours by the end of fiscal year 2001. By the end of fiscal year 2002, however, the government-wide paperwork burden estimate stood at more than 8.2 billion hours. A number of factors contributed to agencies inability to achieve the goals set in the PRA, including increases in the population of respondents and failures in the paperwork clearance process.⁴⁸² One major factor, however, appears to be that, at the same time agencies were being told to reduce paperwork, Congressional and Presidential initiatives were either directly or indirectly requiring the agencies to collect *more* paperwork. Perhaps the best illustration of this is the Internal Revenue Service (IRS), which is responsible for about 80% of the federal paperwork requirements. In recent years, IRS officials have stated that the agency's paperwork requirements have increased largely because of new statutes providing new tax breaks for individuals and businesses (e.g., the American Jobs Creation Act of 2004 and the Working Families Tax Relief Act of 2004) and creating new levels of complexity.⁴⁸³ In order to determine whether taxpayers are deserving of such benefits, IRS requires additional information from them — thereby increasing the agency's estimated paperwork burden. Therefore, OIRA has concluded that IRS' burden reduction actions to represent the "maximum practicable opportunity" available to the agency, and are consistent with the burden reduction goals under the PRA.

Although the Congressional Review Act (CRA) was initially viewed as a way for Congress to reassert itself in the rulemaking process, checking agencies' work to ensure consistency with the intent of underlying statutes, its implementation has been well short of that goal. By March 2006, 10 years after the CRA was enacted, agencies had submitted more than 42,000 rules to Congress, including 610 "major" rules, most with a \$100 million impact on the economy. Although many of even the major rules were not controversial, dozens if not hundreds

⁴⁸¹(...continued)
Agency Regulations, (Mar. 2002). Available at [<http://www.thecre.com/pdf/blueprint.pdf>].

⁴⁸²U.S. Government Accountability Office, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-424. GAO determined that certain agencies were not carrying out all of their review responsibilities under the PRA.

⁴⁸³*See, e.g.*, Mark W. Everson, Commissioner of Internal Revenue, testimony before the House Committee on Government Reform's Subcommittee on Regulatory Affairs, May 25, 2005, available at [http://reform.house.gov/UploadedFiles/IRS_testimony_PW2005.TaxPolicy--AMS.doc].

of the rules submitted to Congress were publicly opposed by a number of lawmakers, and 37 resolutions of disapproval had been introduced since 1996. Nevertheless, only one rule has been reversed under CRA procedures — the Department of Labor’s ergonomics rule in early 2001. Many reasons have been offered for the CRA’s lack of use (e.g., the lack of expedited legislative procedures in the House, or the lack of a neutral organization to provide Congress with information about rules).⁴⁸⁴ The primary reason, however, appears to be the balance of power between the Congress and the President. Under the CRA, if the President vetoes a joint resolution of disapproval regarding a rule *that has been approved by officials in his Administration*, it requires a two-thirds vote in both chambers for Congress to disapprove the rule over the President’s objection. As a result, it is very difficult for Congress to use the CRA to disapprove a rule that the President would like to see go into effect. In fact, the only time that the CRA has been used to disapprove a rule — the ergonomics rule — was when the presidency changed hands, and the incoming President wanted to see the previous Administration’s rule disapproved.

Areas for Possible Congressional Action

The above discussion suggests several possible types of Congressional action to improve the operation of these analytical and accountability requirements — e.g., reducing agency discretion in certain areas; removing the link between certain requirements and other, ineffective requirements; and broadening the scope of certain requirements.

Regulatory Flexibility Act. GAO and others have said that the key to improving the performance of the RFA is for Congress to define, or require some other entity to define, the term “significant economic impact on a substantial number of small entities.” Doing so could also improve the implementation of other analytical and accountability requirements built on the RFA (e.g., the small entity compliance guide requirements that are triggered only when an agency concludes that a rule has that level of impact).

Other suggested legislative improvements to the RFA include: (1) codification of Executive Order 13272, which requires agencies to establish written policies on how they measure their impacts on small entities and to notify SBA about draft rules expected to trigger the Act’s requirements; (2) requiring federal agencies to analyze foreseeable indirect impacts and cumulative impacts; and (3) strengthening the “look back” requirements in section 610 of the Act.⁴⁸⁵

Cost-Benefit Analysis Requirements. With regard to cost-benefit analysis, some have argued that Congress should reconsider current prohibitions regarding the consideration of cost in certain statutes (e.g., the Clean Air Act).⁴⁸⁶ Doing so, they argue, would allow agencies like EPA to use analytic tools that could improve decisionmaking.

Other Congressional Reforms. Some have suggested that the regulatory and analytical requirements that have been put in place during the past 60 years, but particularly in

⁴⁸⁴See, e.g., Mort Rosenberg, *Congressional Review of Agency Rulemaking: An Assessment after Nullification of OSHA’s Ergonomics Standard*, CRS Report RL30116.

⁴⁸⁵Holman, *supra* note 424, at 1135-1136.

⁴⁸⁶Sunstein, *supra* note 436, at 131-136.

the last 25 years, should be rationalized, and put into a single statute. Doing so, they argue, would make the rulemaking requirements more consistent, more integrated, and easier for rulemaking agencies to follow.

Issues for Further Research

In addition to issues for Congressional consideration, the above discussion suggests numerous areas for further research by ACUS or other researchers. Possible research questions include the following:

- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?
- Executive Order 12866 requires agencies to assess the costs and benefits of all significant rules, and requires a full cost-benefit analysis of all “economically significant” rules. Does OMB apply these requirements and use cost-benefit information in a balanced way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain types of rules or rules from certain agencies (e.g., Homeland Security rules) essentially exempt from these requirements?
- Does OMB use cost-benefit analysis to prompt rulemaking or to increase regulatory requirements, or only to stop or limit rulemaking?
- How effective have been the analytical requirements designed to protect small businesses and other small entities (e.g., the RFA and SBREFA)? Do they give federal agencies too much discretion in their application? Should SBA or some other entity be required to define key terms (e.g., “significant economic impact on a substantial number of small entities”)?
- How effective have been the regulatory requirements designed to protect federalism (e.g., in Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., “significant federalism implications”)?
- Should agencies be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden? (Currently, agencies are only required to do so for rules that had/have a “significant economic impact on a substantial number of small entities.”) Or, should Congress take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress)? Relatedly, should agencies’ final rules include a “sunset” provision that requires them to be reexamined and republished?
- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?
- To what extent have the analytical and accountability requirements contributed to what is called the “ossification” of the rulemaking process?

- How accurate are agencies' pre-promulgation cost and benefit estimates?
- How much does it cost for agencies to conduct cost-benefit analyses, risk assessments, regulatory flexibility analyses, federalism assessments, etc.?

VI. Science and the Regulatory Process

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted an all-day conference for the CAL Subcommittee entitled “The Role of Science in Rulemaking.” As Neil Kerwin, interim president of American University and director of the Center for the Study of Rulemaking, said in his opening remarks, “[R]ulemaking is the transformation of information into legal obligations and rights. That information takes many forms, but the type of information that contributes most profoundly to a vast swath of rulemaking can be broadly categorized as scientific.” The role of science in rulemaking has become highly controversial in recent years, with observers from both the left and the right suggesting that “sound science” has been given insufficient weight in the development of regulatory standards. Those on the right assert that closer adherence to science would lessen the burden of unnecessary regulation, thereby lowering regulatory costs. Observers from left indicate that science is often trumped by political considerations, and as a result regulatory standards that science suggests are needed do not get developed. As part of that debate, questions have been raised about the quality of data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can/should play in deciding what to regulate and at what levels.

The conference’s first panel, “The Office of Management and Budget’s (OMB’s) Recent Initiatives on Regulatory Science,” focused on: the Information Quality Act and related OMB guidelines, OMB’s peer review bulletin, and the office’s 2006 draft bulletin on risk assessment. Moderated by Curtis Copeland of CRS, the panel members were: Don Arbuckle, Acting Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA); Al Teich, Director of Science and Policy Programs of the American Association for the Advancement of Science; Bill Kovacs, Vice President for Environment, Technology and Regulatory Affairs of the United States Chamber of Commerce; and Rena Steinzor, Professor at the University of Maryland School of Law and Co-founder of the Center for Progressive Regulation.

The second conference panel, “Science and the Judicial Review of Rulemaking,” was moderated by Jeffrey Lubbers of the Washington College of Law at American University. It featured: Tom McGarity, Professor at the University of Texas School of Law; Sid Shapiro, Professor at the Wake Forest University School of Law; Peter Strauss, Professor at the Columbia University School of Law; and E. Donald Elliott, Partner at Willkie Farr & Gallagher, LLP.

The third panel, “Science Advisory Panels and Rulemaking,” was moderated by Morton Rosenberg of CRS. It was comprised of Wendy Wagner, Professor at the University of Texas School of Law; Jamie Conrad, Assistant General Counsel at the American Chemistry Council; Richard Parker, Professor at the University of Connecticut School of Law; and Fred Anderson, Partner at McKenna Long & Aldridge.

The fourth panel, “Government Agencies’ Science Capabilities,” was moderated by Laura Langbein of American University, the panel featured Richard Belzer of Regulatory Checkbook; John Morall, Branch Chief at OIRA; Robert O’Connor, Director of Decision, Risk and Management Sciences Program of the National Science Foundation; and Liza Hinzerling, Professor at Georgetown University Law School.

The discussions that occurred in these panels are summarized below, along with related information. As the OMB initiatives were a consistent theme in each of the panel discussions,

the first section below provides detailed information on the IQA and OMB's guidelines, OMB's peer review bulletin, and the proposed risk assessment bulletin.

OMB's Recent Initiatives on Regulatory Science

OMB's Office of Information and Regulatory Affairs (OIRA) was created by the Paperwork Reduction Act of 1980. Although OIRA is a relatively small office (currently, 55 full-time equivalents), it can have a significant— if not determinative— effect on a broad array of federal regulations that agencies issue to enact statutes and establish specific requirements. Under Executive Order 12866, OIRA reviews hundreds of significant proposed and final rules from all federal agencies (other than independent regulatory agencies) before they are published in the Federal Register. As a result of OIRA's review, many draft rules are changed before publication, withdrawn before a review is completed, or returned to the agencies because, in OIRA's opinion, certain aspects of the rule need to be reconsidered.

In recent years, OIRA has taken a number of actions — some unilaterally, some at the urging of Congress — that are expected to have a major effect on rulemaking and, in particular, regulatory science. The first such action (in 2001 and 2002) was the issuance of guidance to federal agencies on information quality, which was required by the Information Quality Act (also known as the Data Quality Act). The second action was related to the first, i.e., the development and issuance in 2003 and 2004 of a bulletin on “peer review” of the information that is used to develop regulations and other types of influential information that federal agencies disseminate to the public. Finally, in January 2006, OMB published a draft bulletin on risk assessment for public comment and for review by the National Academy of Sciences. Each of these actions is introduced below, followed by a summary of the panel discussion at the science and rulemaking conference.

Information Quality Act Guidelines

In December 2000, Congress passed and the President signed the Treasury and General Government Appropriations Act, 2001 (Pub. L. No. 106-554). Section 515 of that more than 700-page bill has subsequently been referred to as the “Data Quality Act” or the “Information Quality Act” (IQA) (codified at 44 U.S.C. §§ 3504(d)(1) and 3516). Although little noticed at the time, the IQA has subsequently been the subject of intense debate and controversy. The act required the Office of Management and Budget (OMB) to issue guidance to federal agencies designed to ensure the “quality, objectivity, utility, and integrity” of information disseminated to the public. It also required agencies to issue their own information quality guidelines, and to establish administrative mechanisms that allow affected persons to seek correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance.

The IQA amended the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. Chapter 35), which already required OMB to develop and oversee the implementation of policies, principles, standards, and guidelines to apply to federal agency dissemination of public information. The PRA also required agencies to manage their information resources “to improve the integrity, quality, and utility of information to all users within and outside the agency.”⁴⁸⁷ Also already in place were a variety of nonstatutory requirements related to information dissemination (e.g.,

⁴⁸⁷44 U.S.C. § 3506(b)(1)(C) (2000).

OMB Circular A-130 on “Management of Federal Information Resources”). Therefore, the IQA can be seen as an extension of these previous statutory and nonstatutory requirements.

Representative Jo Ann Emerson is generally regarded as the primary sponsor of the IQA.⁴⁸⁸ The act, in its entirety, reads as follows:

(a) IN GENERAL. — The Director of the Office of Management and Budget shall, by not later than September 30, 2001, and with public and Federal agency involvement issue guidelines under sections 3504(d)(1) and 3516 of title 44, United States Code, that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies in fulfillment of the purposes and provisions of chapter 35 of title 44, United States Code, commonly referred to as the Paperwork Reduction Act.

(b) CONTENT OF GUIDELINES. — The guidelines under subsection (a) shall (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and (2) require that each Federal agency to which the guidelines apply (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency by not later than 1 year after the date of issuance of the guidelines under subsection (a); (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and (C) report periodically to the Director (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and (ii) how such complaints were handled.

As noted previously, these provisions were inserted as section 515 of the more than 700-page Treasury and General Government Appropriations Act, 2001. There were no hearings or debates specifically on these provisions and no committee reports were filed. OMB had previously been urged by individual Members or committees to develop similar guidance on several previous occasions, but OMB had rejected those requests.⁴⁸⁹

Supporters of the IQA, many of whom represent businesses and other regulated parties, considered it an extremely important tool to oversee the work of rulemaking agencies. In fact,

⁴⁸⁸Some press reports attribute the IQA to Jim Tozzi, a former OMB official, who is currently head of the Center for Regulatory Effectiveness. The Center describes itself on its website as receiving “financial support, services in kind, and work product from trade associations and private firms,” and says its primary goals are to ensure that (1) the public has access to information used to develop federal regulations and (2) information that federal agencies disseminate to the public is of the highest quality. See <http://www.thecre.org>.

⁴⁸⁹See, e.g., the H.R. Rep. No. 105-592, at 49 (1998). For an example of OMB rejection of those requests, see the letter from John T. Spotilla, then-Administrator of OIRA, to the Honorable Jo Ann Emerson, Apr. 18, 2000, available at http://thecre.com/quality/20041012_letter.htm.

the United States Chamber of Commerce⁴⁹⁰ said the Act was “the most significant change to the federal rulemaking process since the Administrative Procedure Act was enacted more than 50 years ago,” and said it would have “a revolutionary impact on the regulatory process.” These supporters contended that the IQA and the resultant OMB and agency guidelines would improve the quality of agency science and regulation and force agencies to regulate based on the best science available. Some of these proponents also maintained that the act would help agencies defend their regulations against lawsuits and would reduce the number of lawsuits filed.

Critics of the IQA and the guidelines, including many environmental and public interest groups such as OMB Watch⁴⁹¹ and Public Citizen,⁴⁹² said the law was a tool by which regulated parties can slow and possibly stop new health, safety, and environmental standards, and that could lead to the revision or elimination of existing standards. They contended that the Act could have a chilling effect on agency distribution and use of scientific information. These critics foresaw a flood of data quality challenges, correction requests, and court suits on a wide range of scientific issues, which could tie up agency resources and significantly delay health, safety, and environmental regulations. Critics have also noted that since “quality” is a subjective term and some regulations are based on “best available data,” regulations could be arbitrarily rejected under the IQA, or may never be developed at all because of concerns about running afoul of the act.⁴⁹³

OMB Guidelines. In light of the Act’s scant legislative history and the Act’s lack of detail, OMB’s guidance interpreting key provisions in the Act has a major effect on its implementation. OMB published proposed governmentwide IQA guidelines in the Federal Register on June 28, 2001 (66 Federal Register 34489), and published final guidelines (with a request for further comments on certain points) on September 28, 2001 (66 Federal Register 49718). OMB later republished the guidelines (after making changes pursuant to public comments) on February 22, 2002 (67 Federal Register 8452).⁴⁹⁴ OMB noted that the guidelines apply to all federal agencies that are subject to the PPA, i.e., Cabinet departments, independent regulatory agencies (e.g., the FCC), and other independent agencies (e.g., the EPA). Agencies not subject to the PRA (and therefore not covered by the IQA or OMB’s guidelines) are the GAO, the Federal Election Commission, and government-owned contractor-operated facilities (e.g., laboratories engaged in national defense research and production activities).

The OMB guidelines describe OMB and agency responsibilities under the Act, including agency reporting requirements. For example, the guidelines note that the IQA essentially

⁴⁹⁰The Chamber of Commerce describes itself on its website as the world’s largest not-for-profit business federation. See <http://www.uschamber.org>.

⁴⁹¹OMB Watch describes itself on its website as a “nonprofit research and advocacy organization dedicated to promoting government accountability and citizen participation in public policy decisions.” See <http://www.ombwatch.org>.

⁴⁹²Public Citizen describes itself on its website as a “national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch, and the courts.” See <http://www.citizen.org>.

⁴⁹³For a discussion of this issue, see Rick Weiss, “Data Quality” Law is Nemesis of Regulation, Wash. Post, Aug. 16, 2004, at A1.

⁴⁹⁴For a copy of the OMB guidelines, see <http://www.whitehouse.gov/omb/fedreg/reproducible2.pdf>.

requires covered agencies to do three things: (1) issue their own guidelines by October 1, 2002, (2) establish administrative mechanisms allowing affected persons to seek correction of information that they believe does not comply with these guidelines, and (3) report periodically to OMB on the number and nature of the complaints that the agencies received. The guidelines also require the agencies to designate the Chief Information Officer or some other official to be responsible for agency compliance, and required them to develop agency-specific guidelines and administrative correction mechanisms. OMB said the agencies must permit the public to comment on their guidelines and correction mechanisms, and then must submit them to OMB for review before publishing them in final form. OMB also said the report on the number and nature of complaints received should be done on a fiscal year basis, with the first such report due to OMB on January 1, 2004.

The OMB guidelines also define a number of key terms that are undefined in the IQA, and those definitions have had a significant effect on how the act is implemented. OMB said “quality” encompasses elements of utility, objectivity, and integrity. The definitions of some of these and other terms are relatively straightforward and noncontroversial, but others have proven to be much more controversial because they establish the scope and applicability of the guidelines.

Information. OMB established the broad scope of the Act by defining “information” in the guidelines as “any communication or representation of knowledge such as facts or data, in any medium or form.” OMB went on to say that the definition includes information that the agency disseminates through its website, but does not include hyperlinks to information that other organizations disseminate.

Dissemination. The IQA only applies to information that is “disseminated” by federal agencies, so the definition of that word also has a major effect on the Act’s scope of coverage. The OMB guidelines define “dissemination” as “agency initiated or sponsored distribution of information to the public.” The guidelines make it clear that an agency can initiate the distribution of information either directly or indirectly (e.g., information prepared by an outside party and disseminated by an agency “in a manner that reasonably suggests that the agency agrees with the information”). OMB said an agency has “sponsored” an information dissemination if it directs a third party to distribute information or if an agency has the authority to review and approve it before it is distributed.

Objectivity. The OMB guidelines state that “objectivity” is a function of both presentation (i.e., whether the information is presented in an accurate, clear, complete, and unbiased manner) and substance (i.e., whether the information is accurate, reliable, and unbiased). OMB indicated that agencies can presume that data are sufficiently “objective” if they have been subject to an independent peer review process (e.g., as used by scientific journals), but a member of the public can rebut this presumption “based on a persuasive showing by the petitioner in a particular instance.”

Influential Information. Additional IQA obligations apply to scientific, financial, or statistical information that is “influential,” which the guidelines define as information that “the agency can reasonably determine” will have or does have a “clear and substantial impact on important public policies or important private sector decisions” when disseminated to the public. OMB authorized the covered agencies to define “influential” in ways appropriate for them, but indicated that the data and analytic results related to influential information should meet certain “reproducibility” and “transparency” standards. Specifically, OMB said that agency guidelines should “generally require sufficient transparency about data and methods that an independent

reanalysis could be undertaken by a qualified member of the public” and would generate similar results. Critics, however, have questioned how agencies are to know in advance of dissemination when information will be “influential,” or what constitutes an “important public policy.”

Risk Information. When agencies disseminate information related to the analysis of risks to human health, safety, and the environment, the OMB guidelines require agencies to “adopt or adapt” the “quality principles” that Congress established in the Safe Drinking Water Act Amendments of 1996 (42 U.S.C. § 300g-1(b)(3)(A) and (B)). When basing actions under this Act on science, the amendments require EPA to use “the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices” and to use “data collected by accepted methods or best available methods.” When presenting risk information to the public concerning safe drinking water, the amendments also require EPA (where “practicable”) to identify a “central estimate of risk” for specific populations, upper-bound and lower-bound estimates of risk, and “each significant uncertainty identified in the process of the assessment.” OMB said that through these amendments, “Congress adopted a basic quality standard for the dissemination of public information about risks of adverse health effects.” Critics, however, have questioned whether it is appropriate for OMB’s guidelines to export risk analysis principles established for the Safe Drinking Water Act to agency actions under other environmental, health, and safety statutes.

Correction Mechanisms. OMB’s data quality guidelines also generally describe the “administrative mechanisms” that agencies are required to establish to allow “affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines.” Specifically, the guidelines state that the mechanisms should be “flexible, appropriate to the nature and timeliness of the disseminated information, and incorporated into agency information resources management and administrative practices.” They go on to say that the agencies must make decisions within “appropriate time periods,” and must “notify the affected persons of any corrections made.” Agencies also must establish an “administrative appeal process” to review the agencies’ initial decisions, and must specify “appropriate time limits” for the resolution of requests for reconsideration. The preamble to the guidelines indicates that, to ensure objectivity, the office that originally disseminates the information should not have responsibility for both the initial response and resolution of a disagreement.

OMB’s Reports on IQA Implementation. The IQA required agencies to report periodically to OMB on the information quality complaints they received, but the Act did not require that OMB report to Congress on its implementation. Subsequently, though, a reporting requirement was established. The conference report on H.R. 2673, the Consolidated Appropriations Act of 2004, indicated that the conferees were “concerned that agencies are not complying fully with the requirements of the [IQA],” and directed OMB to submit a report to the House and Senate Committees on Appropriations by June 1, 2004, on whether agencies had been “properly responsive” to public requests for correction of information pursuant to the IQA.⁴⁹⁵ The conference report also said that OMB should suggest changes to the act or to OMB’s guidelines to “improve the accuracy and transparency of agency science.”

On April 30, 2004, OMB provided a report to Congress on the implementation of the IQA

⁴⁹⁵“Implementation of the Federal Data Quality Act,” 149 Cong. Rec. H12699 (daily ed. Nov. 25, 2003).

during fiscal year 2003. In December 2005, as part of its annual report on the costs and benefits of federal regulations, OMB updated its 2004 report on IQA implementation.⁴⁹⁶ The report provided information on correction requests received in 2003 and 2004, repeated many of the observations included in the earlier report about IQA implementation, and offered several “helpful tips for stakeholders interested in writing an effective correction request.”

OMB noted that agencies’ interpretation of what qualifies as an IQA correction request “has not been consistent,” with some counting requests that were similar to those previously received and that did not appear to be generated by the Act, and others not counting those requests. Therefore, OMB cautioned readers “against drawing any conclusions about trends or year-to-year comparisons.”⁴⁹⁷ In its report, OMB decided to include some correction requests “despite the fact that some arguably are not generated by the Act.” OMB revised the number of correction requests received in fiscal year 2003 from 35 to 48, and said it considered only 37 requests to be generated by the IQA during fiscal year 2004. Therefore, OMB included a total of 85 correction requests for both years.

OMB reported that ten of these 85 requests led to the correction or partial correction of information (many of which, OMB said, were without significant policy implications), 13 were resolved through other processes (e.g., treated as comments on proposed rules), 17 were pending at the end of FY2004, and 45 had been denied. Of the 45 denied requests (which OMB characterized as “more substantive in nature”), 28 had been appealed, and 13 had been denied again by the end of the fiscal year.

As so few substantive correction requests had been received by the agencies (85 in two years, compared to more than three million Freedom of Information Act requests during fiscal year 2003), OMB said it was still not prepared to make suggestions for legislative changes to the IQA. OMB, however, pointed out that it had issued a memorandum to the President’s Management Council requesting that agencies post all IQA correspondence on their websites by December 1, 2004, and noted that many agencies had done so.

OMB noted that the number of substantive IQA requests received had been fewer than some had anticipated, that the correction request process had been used by virtually all sectors of society, and that, “to our knowledge, the [Act] has not affected the pace or length of rulemakings.”⁴⁹⁸ OMB also again noted that it had learned that “what constitutes a ‘dissemination’ is not straightforward,” and also said that most non-frivolous requests were denied because “a reasonable scientist could interpret the available information the way the agency had,” meaning “it is possible for neither the agency nor the requestor to be incorrect.”⁴⁹⁹

Finally, OMB included a section in its 2005 report on the IQA that listed “tips that will bolster the quality of correction requests and make them easier for agencies to address in a

⁴⁹⁶Office 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*, Dec. 2005, at 55-77.

⁴⁹⁷*Id.* at 58.

⁴⁹⁸*Id.* at 65.

⁴⁹⁹*Id.* at 63.

rigorous and timely fashion.”⁵⁰⁰ For example, OMB said the public should: (1) submit correction requests as part of the traditional comment process when the information is under public review (e.g., when rules are out for public comment); (2) provide agencies with peer-reviewed references to scientific sources that support their viewpoint; (3) be as specific as possible and suggest specific changes that need to be made; and (4) request withdrawal of a dissemination only as a last resort.

The IQA and Judicial Review. Some observers see judicial review as the crucial test of the Act’s future effectiveness. If judicial review is permitted, agencies may find themselves subject to potentially endless legal challenges to their regulations and other types of information disseminations, which could make them less likely to issue similar regulations in the future. On the other hand, the absence of judicial review may encourage agencies to pay less attention to the IQA and make them more subject to administrative directives provided by OMB. Law journal articles do not convey any consensus in the legal community as to whether an agency’s response to a data quality challenge is subject to judicial review, or whether a court in reviewing a regulation might be influenced by a data quality challenge to the underlying data. Recent decisions by two district courts and a circuit court, however, suggest that judicial review is not available under the Act.

In the first IQA-related case to be addressed by a court, on June 21, 2004, a district court ruled that the Act does not permit judicial review regarding an agency’s compliance with its provisions.⁵⁰¹ In that case involving the Missouri River, the court first noted that the IQA does not specifically provide for a private cause of action. The court then noted that judicial review was generally available under the APA, but not if the agency is acting within the discretion provided by Congress. That discretion is generally considered to have been provided if the statute at issue is written in such broad terms that “there is no law to apply.”⁵⁰² In this case, the court said that such terms as “quality,” “objectivity,” “utility,” and “integrity” are not defined in the IQA, and the history of the legislation does not provide any indication as to the scope of these terms. Therefore, absent any “‘meaningful standard’ against which to evaluate the agency’s discretion, the Court finds that Congress did not intend the IQA to provide a private cause of action.”

On June 25, 2004 — four days after the above court decision — the Department of Justice (DOJ) filed a brief recommending the dismissal of a lawsuit filed under the IQA by the Chamber of Commerce and the Salt Institute against the National Heart, Lung, and Blood Institute (NHLBI) within the National Institutes of Health. The lawsuit challenged the NHLBI’s statements concerning sodium consumption and health effects. The DOJ brief said that the plaintiffs lacked standing to challenge the agency’s underlying study on sodium consumption, and also said that there was no statutory basis for the court to review the agency’s action because the IQA does not permit judicial review. Specifically, DOJ said the following:

Plainly, nothing in the text of the statute indicates that Congress intended for the *federal courts* [emphasis in the original] to serve as ongoing monitors of the ‘quality’ of information maintained and disseminated by federal agencies.

⁵⁰⁰*Id.* at 70.

⁵⁰¹*In re* Operation of the Missouri River Sys. Litig., No. 03-MD-1555 at 49 (D. Minn. June 21, 2004) (order granting motions for summary judgment).

⁵⁰²*Heckler v. Chaney*, 470 U.S. 821 (1985).

Rather, the language and structure of the IQA reflects Congress's intent that any challenge to the quality of information disseminated by a federal agency should take place in administrative proceedings before federal agencies. Simply put, Congress nowhere provided a new judicial avenue for private parties to enforce the terms of the IQA.

DOJ also noted that the above-mentioned Missouri River court case was "the first and only court to address this issue recently determined that the IQA does not provide for private cause of action." The Chamber of Commerce and Salt Institute filed a brief on July 16, 2004, challenging DOJ's arguments.

On November 15, 2004, the United States District Court for the Eastern District of Virginia ruled in this case that the Salt Institute and the Chamber of Commerce lacked standing to sue (e.g., they had suffered no "injury in fact"), and that judicial review of the agency's decisionmaking was not available. Specifically, the court ruled that there is no private right of action under the IQA, saying that the "language in the IQA reflects Congress's intent that any challenges to the quality of information disseminated by federal agencies should take place in administrative proceedings before federal agencies and not the courts."⁵⁰³ The court also said that judicial review under the APA was not available because the agency's actions did not constitute a "final agency action" (i.e., one in which "rights or obligations have been determined, or from which legal consequences will flow"),⁵⁰⁴ and because the agency decisions were within the discretion provided to the agency by law.⁵⁰⁵ The court explained:

Neither the IQA nor the OMB guidelines provide judicially manageable standards that would allow meaningful judicial review to determine whether an agency properly exercised its discretion in deciding a request to correct a prior communication. In fact, the guidelines provide that "agencies, in making their determination of whether or not to correct information, may reject claims made in bad faith or without justification, and are required to undertake only the degree of correction that they conclude is appropriate for the nature and timeliness of the information involved." 67 Fed. Reg. at 8458. Courts have determined that regulations containing similar language granted sufficient discretion to agencies to preclude judicial review under the APA.⁵⁰⁶

On March 6, 2006, the Fourth Circuit dismissed the appeal by the Salt Institute and the Chamber of Commerce, agreeing with the district court that the appellants lacked standing because they did not suffer an injury from the published data.⁵⁰⁷ The Fourth Circuit concluded that the IQA "creates no legal rights in any third parties," including any right to "information or to correctness." Therefore, the court argued, "appellants cannot establish injury in fact and, therefore, lack Article III standing to pursue their case in the federal courts."

⁵⁰³Salt Institute v. Thompson, 345 F.Supp.2d 589 (E.D. Va. 2004).

⁵⁰⁴See *Bennet v. Spear*, 520 U.S. 154, 178 (1997).

⁵⁰⁵The APA expressly prohibits judicial review when the agency action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (2000).

⁵⁰⁶Salt Institute v. Thompson, 345 F.Supp.2d at 602-603.

⁵⁰⁷Salt Institute v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006).

Panel Discussion. In his opening remarks during the panel discussion on OMB's science-related initiatives, Bill Kovacs from the United States Chamber of Commerce said that, because of these recent court decisions, the IQA is "little more than a nice academic exercise," and that his organization plans to go back to Congress "to get judicial review provisions put into the law." He also indicated that Executive Order 12866 could be amended to give OMB "more of a policing authority," but he quickly pointed out that any such amendment to the executive order could be "abolished by the next administration." In summary, he said the following:

And so I guess what we're really down to is we've got to decide as a nation whether . . . science should be part of the rulemaking process . . . Or we just have to say, look, the whole process was a farce, and we really don't need whatever OIRA is doing other than data collection. And we need to move on, but we need to make a decision. It's a huge public policy decision.

In contrast, Rena Steinzor of the University of Maryland School of Law said that the IQA represented the "corpularization of science; that is, looking at each piece of scientific evidence very critically, deconstructing every study, questioning each individual piece as opposed to viewing all the scientific evidence together and making a scientific judgment on what the weight of the evidence tells us." In answering a question from the audience regarding whether there was agreement regarding what "weight of the evidence" means, Al Teich from AAAS said it was hard to define, but then said "is what they say about pornography. You know it when you see it." He then went on to say, though, that it is "an accumulation of studies over a period of time that's accepted by a large majority of the relevant scientific community."

Don Arbuckle of OIRA, noting the criticisms levied at the IQA by the other panel members, said that OMB believes that the Act is "working quite well," and that it has been mischaracterized by a variety of actors. He noted that the Act "asked OMB to issue guidance and the agencies to issue guidance," and therefore characterized the guidance as "more of an internal government quality control exercise than a regulation or a law that is challengeable through the judicial branch. We think that's the way it was set up on purpose." He would not, however, indicate whether OIRA would oppose efforts to add judicial review to the statute. He also said that the guidance places a "hefty data burden of proof on the petitioner," and was not intended to "give people an easy avenue to criticize government work."

OMB's Peer Review Bulletin

On September 15, 2003, OMB, in coordination with the Office of Science and Technology Policy (OSTP), published a proposed bulletin in the Federal Register on "Peer Review and Information Quality." The bulletin, if made final, would have established a process by which all "significant regulatory information" and "especially significant regulatory information" would be peer reviewed.⁵⁰⁸ OMB described the term "peer review" in this context as "a scientifically rigorous review and critique of a study's methods, results, and findings by others in the field with requisite training and expertise." The proposed bulletin placed additional peer review

⁵⁰⁸Office of Management and Budget, Executive Office of the President, "Proposed Bulletin on Peer Review and Information Quality," 68 Fed. Reg. 54,023 (Sept. 15, 2003). This proposed bulletin had been released to the public via OMB's website on Aug. 29, 2003. See http://www.whitehouse.gov/omb/inforeg/peer_review_and_info_quality.pdf.

requirements on “especially significant regulatory information,” and said agencies were required to notify OMB in advance of any studies that might require peer review. The scope of the proposed bulletin was very broad, covering virtually all agencies and defining “regulatory information” as “any scientific or technical study that . . . might be used by local, state, regional, federal and/or international regulatory bodies.” OMB indicated it was issuing the bulletin because agencies’ peer review practices were inconsistent, and government-wide standards for peer review would make regulatory science more competent and credible.

The proposed bulletin aroused substantial controversy, with some observers expressing concern that it could create a centralized peer review system within OMB that would be vulnerable to political manipulation or control by regulated entities. OMB received nearly 200 comments on the proposal, including comments from Members of Congress, trade associations, public interest groups, and recognized experts in the field of peer review and scientific research. As a result of those comments, OMB (again in consultation with OSTP) published what it described as a “substantially revised” peer review bulletin in the Federal Register on April 28, 2004.⁵⁰⁹ In some ways, the revised bulletin was broader than its predecessor. For example, instead of focusing on “significant” and “especially significant regulatory information,” the revised bulletin centered on “influential scientific information” (which includes, but is not limited to, regulatory information) and “highly influential scientific assessments.” In other ways, though, the revised bulletin was less inclusive and directive. For example, it gave agencies more discretion to determine when information required a peer review, and when the more detailed review requirements for “highly influential” information were applicable. Also, unlike the proposed bulletin, the revised bulletin did not exclude individuals from being peer reviewers if they had received research grants from the agency disseminating the information being peer reviewed.

In structure, the revised peer review bulletin was similar to the proposed bulletin in that it still essentially required agencies to take three actions (to the extent permitted by law): (1) have a peer review conducted on all “influential scientific information” that the agency intends to disseminate, (2) have all “highly influential scientific assessments” peer reviewed according to more specific and demanding standards, and (3) indicate what “influential” and “highly influential” information the agency plans to peer review in the future. The revised bulletin defined the term “influential scientific information” as information the agency “reasonably can determine that the dissemination of which will have or does have a clear and substantial impact on important public policies or private sector decisions.” The bulletin said that agencies were also not required to conduct a peer review of influential information that had already had an “adequate” peer review, and gave agencies substantial discretion in determining whether a prior review was “adequate” (specifically stating that the earlier review “need not comply with all of the requirements of this bulletin”). The bulletin also gave agencies discretion in determining the appropriate peer review mechanism for any information not previously reviewed.

The revised bulletin contained a number of additional peer review requirements for

⁵⁰⁹Office of Management and Budget, Executive Office of the President, “Revised Information Quality Bulletin on Peer Review,” 69 Fed. Reg. 23,230 (Apr. 28, 2004). This revised bulletin had been released to the public via OMB’s website on April 15, 2004. To view a copy, see http://www.whitehouse.gov/omb/inforeg/peer_review041404.pdf. In this report, the first draft of the bulletin is referred to as the “proposed bulletin” and the second draft as the “revised bulletin.” Unless otherwise specified, each respective reference includes the introductory supplemental information as well as the body of the bulletin per se.

“scientific assessments” that are “highly influential.” These requirements were much more specific than those placed on “influential” scientific information, and appeared to give OMB and the agencies significant authority to determine when the requirements are applicable. The revised bulletin described in some detail how peer reviewers of highly influential scientific assessments should be selected, but still gave agencies substantial discretion in making the final decision. For example, the bulletin said that reviewers must be selected primarily on the basis of “necessary” expertise, experience, and skills, and must be diverse enough to “fairly” represent different perspectives. In a significant departure from the proposed bulletin, the revised bulletin also said that research grants awarded to a scientist through a competitive, peer-reviewed process did not disqualify that scientist from serving on a peer review panel. The revised bulletin said that agencies could decide on their own whether to make the information at issue available for public comment, but said agencies should “consider” having a public comment period and public meetings before the reviewers “when there is sufficient public interest.”

Finally, the proposed bulletin required agencies to notify OMB at least once each year of any existing or upcoming studies that might trigger the peer review requirements within the next year, and of the agencies’ plans for conducting those peer reviews. In contrast, the revised bulletin required each covered agency to post an “agenda” on its website every six months delineating any information disseminations subject to peer review. The revised bulletin was also much more specific about these notices than the proposed bulletin, requiring each entry on the agenda to contain a detailed description of the “peer review plan.”

OMB again requested comments on the revised peer review bulletin, and said that 57 individuals and organizations ultimately commented.⁵¹⁰ Most of the substantive comments were supportive of at least some of the changes that OMB made to the bulletin. For example, the presidents of the National Academy of Sciences and its two affiliated institutions, the National Academy of Engineering and the Institute of Medicine, generally praised the revision, arguing that it would “improve the quality of the government’s scientific assessments and . . . decision-making,” and “better accommodate the diverse circumstances of . . . federal agencies.”⁵¹¹ The American Association for the Advancement of Science (AAAS) said that the “revised version is much improved,” but still raised questions and made suggestions (e.g., that agencies be required

⁵¹⁰For OMB’s response to the comments provided on the revised peer review bulletin, see http://www.whitehouse.gov/omb/inforeg/peer2004/peer_response.pdf. For a link to each of the comments, see http://www.whitehouse.gov/omb/inforeg/peer2004/list_peer2004.html.

⁵¹¹National Academy of Sciences, *Academies’ Presidents Comment on OMB Peer Review Guidelines*, Press Release (Apr. 15, 2004), at <http://www4.nationalacademies.org/news.nsf/isbn/s04152004?OpenDocument>.

to make public the criteria for determining when outside entities would be commissioned to select peer reviewers or manage the peer review process, and how these entities would be selected and overseen by the agencies).⁵¹²

Some commenters, however, believed the changes had weakened the bulletin to such an extent that they withdrew their initial support. In particular, the United States Chamber of Commerce said that it could not support the issuance of a final bulletin until those problems are addressed.⁵¹³ The Chamber said it had “deep concerns” about (among other things) the “excessive” discretion given to agencies in the implementation of the bulletin, and the absence of “provisions allowing affected parties to contest any agency determination of applicability, peer review type, panel selection, charge, or other peer review program element as it applies to a specific case.” The Chamber said that the changes OMB made in issuing the revised bulletin “are so severe and debilitating as to eliminate the public benefit of having a common, government-wide minimum standard for peer review.”

Still others believed the changes had not gone far enough. For example, 12 Members of Congress said that the revisions did not address previously expressed concerns that the proposal was “unjustified, overly broad, burdensome, and did not appropriately guard against appointment of reviewers with conflicts of interest,” or that it provided OMB with “excessive authority over the production and dissemination of government information.”⁵¹⁴ The Members said that the need for the bulletin remained unjustified, that the exemptions in the revised bulletin resulted in an unbalanced approach, and that it creates “considerable new burdens on agencies.” They also said that “safeguards to ensure the integrity of the process for selection of reviewers have not been included in the Bulletin.”

On December 15, 2004, OMB published a final version of the peer review bulletin on its website.⁵¹⁵ The final bulletin was published in the Federal Register on January 14, 2005.⁵¹⁶ OMB said this version reflects “minor revisions” made in response to the public comments on the revised bulletin. For example, the final bulletin requires agencies to disclose the names of peer reviewers to the public and adds an annual reporting requirement to allow OMB to track how agencies are using the bulletin. Nevertheless, agencies are still afforded substantial discretion to determine when and what type of peer review is required. OMB also retains substantial discretion in certain areas.

Background of Peer Review. Some type of peer review has been used for centuries

⁵¹²For a copy of the AAAS comments, see <http://www.aaas.org/spp/cstc/docs/5-28-04OMBpeerltr.pdf>.

⁵¹³For a copy of the Chamber’s comments, see <http://www.uschamber.com/NR/rdonlyres/eznlbdbxz7wylilw7now26n2cqigrnx57hqpvqkxf7xgvfy2foiy5w5bd37suvonhln7jv7myxop/COMMENTSProposedRevisedBulletinonPeerReviewandInfo.pdf>.

⁵¹⁴For a copy of these Members’ comments, see <http://www.whitehouse.gov/omb/inforeg/peer2004/25.pdf>.

⁵¹⁵Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, Dec. 15, 2004, at http://www.whitehouse.gov/omb/inforeg/peer2004/peer_bulletin.pdf.

⁵¹⁶Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, 70 Fed. Reg. 2664 (Jan. 14, 2005).

within the scientific community to judge the quality of science. Peer review can take many different forms, and is used for a variety of purposes. For example, it is used commonly by federal agencies to evaluate research proposals, and plays a major role in funding decisions. In these cases it is often part of a broader category of evaluation known as merit review. Peer review is also the usual method by which the editors of scientific publications evaluate proposed research reports. It even plays an important role in many research institutions, including many government agencies, in decisions about retention and promotion for individual scientists and in reviewing research programs. A February 1999 report from the Committee on Science, Engineering, and Public Policy concluded that expert review (the most common form of which is peer review) is the most effective means of evaluating federally funded research programs.⁵¹⁷

Peer review is also used for scientific and technical products relating to policies, including regulations, to determine whether the underlying scientific findings are well supported. For example, such peer review was established as Environmental Protection Agency (EPA) policy in 1993.⁵¹⁸ In 1996, a panel of leading economists concluded that peer review should be used for economic analyses supporting regulations with a potentially large impact on the economy (e.g., those whose annual economic costs exceed \$1 billion).⁵¹⁹ The panel also indicated that reviewers should be selected based on their demonstrated expertise and reputations.

In its peer review bulletins, OMB recognized the variety of ways that peer review is used. OMB said that independent peer review is especially important in the regulatory arena because federal agencies often develop or fund the science that underlies their regulations, and then oversee the peer review of those scientific studies, thereby creating the appearance of a conflict of interest.

Legislative Peer Review Proposals. A number of statutes and legislative proposals have advocated the use of peer review in a regulatory context for particular issues. For example, the Safe Drinking Water Act (42 U.S.C. § 300g-1(b)(3)(A)) requires EPA, when taking action under the Act based on science, to use the “best available, peer reviewed science and supporting studies.” In the 108th Congress, the Water Resources Development Act of 2003 (H.R. 2557) would have generally required project studies to be subject to peer review by an independent panel of experts if the project has an estimated total cost of more than \$50 million. Similarly, the Sound Science for Endangered Species Act Planning Act of 2003 (H.R. 1662, 108th Congress) would have directed the Secretary of the Interior, in making decisions about species protection, to give greater weight to certain kinds of data that had been peer reviewed by qualified individuals as defined in the bill.

There have also been legislative efforts to require peer review more broadly. For example, in the 106th Congress, the Senate considered but did not enact bipartisan legislation (S. 746) that would have required virtually all agencies to provide for an independent peer review of any

⁵¹⁷The Committee on Science, Engineering, and Public Policy, *Evaluating Federal Research Programs: Research and the Government Performance and Results Act* (Nat’l Academies Press Feb. 1999). The Committee is a joint committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine.

⁵¹⁸U.S. General Accounting Office, *Federal Research: Peer Review Practices at Federal Science Agencies Vary*, GAO/RCED-99-99, Mar. 1999.

⁵¹⁹Kenneth J. Arrow, *et al.*, *Benefit-Cost Analysis in Environmental, Health, and Safety Regulation: A Statement of Principles* (AEI Press 1996).

required risk assessments and cost-benefit analyses of major rules that the agencies or the OMB Director reasonably anticipated were likely to have a \$500 million effect on the economy. The bill would have required that peer reviews be conducted through panels that were “broadly representative” and involved participants with relevant expertise who were “independent of the agency.” Nevertheless, if an agency certified that adequate peer review had already been conducted, and the OMB Director agreed, no further peer review would have been required. In its comments on this legislation, the GAO generally supported the use of peer review in this context, noting that “the rigorous, independent review of economic analyses should help enhance the quality, credibility, and acceptability of agencies’ decisionmaking.”⁵²⁰ The GAO, however, cautioned that (given the number of reviews contemplated) agencies would need to plan carefully for the reviews, and that the panels would need to reflect all points of view.

Presidential Support for Peer Review. Recent Presidential administrations have also supported peer review as a preferred means of assessing scientific research, both prospectively and retrospectively. For example, beginning with the fiscal year 1996 budget cycle, OMB and OSTP have jointly provided annual direction to agencies, encouraging them to emphasize the funding of peer-reviewed research over nonpeer-reviewed research for most scientific activities. In 1997, the then OIRA Administrator testified that the Clinton Administration supported peer review, but also said the Administration recognized that it is not cost-free in terms of agencies’ resources or time.⁵²¹

On September 20, 2001, the new OIRA Administrator for the George W. Bush Administration issued a memorandum for the President’s Management Council recommending (among other things) that agencies subject regulatory impact analyses and supporting technical documents for “economically significant” and “major” rules (e.g., those with a \$100 million annual effect on the economy) to independent, external peer review.⁵²² The OIRA Administrator also recommended certain criteria for peer review (e.g., disclosure by peer reviewers of prior technical or policy positions on the issues at hand and their sources of personal and institutional funding), and said OIRA would give agency analyses that had undergone such a review “a measure of deference” during its reviews of their regulatory proposals under Executive Order 12866.⁵²³

Cautionary Notes. Although the concept of peer review has generally received wide support, some observers have also raised cautionary notes or mentioned certain limitations to the approach in particular situations. For example, OMB indicated in 1997 that peer review costs can be significant for agencies in terms of both time and agency resources.⁵²⁴ To pay for peer review procedures, agencies may have to divert resources from other areas (e.g., regulatory

⁵²⁰U.S. General Accounting Office, *Regulatory Reform: Comments on S. 746—The Regulatory Improvement Act of 1999*, GAO/T-GGD/RCED-99-163, Apr. 1999, at 6.

⁵²¹*The Regulatory Improvement Act of 1997: Hearing on S. 981 Before the S. Comm. on Governmental Affairs*, 105th Cong. (1997) (statement of Sally Katzen, OIRA Administrator).

⁵²²See http://www.whitehouse.gov/omb/inforeg/oira_review-process.html.

⁵²³Executive Order 12866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (Oct. 4, 1993). For a description of OMB’s reviews under this executive order, see Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, CRS Report RL32397.

⁵²⁴Statement of Sally Katzen, *supra* note 521.

enforcement or standards development). Scientists from academic institutions who perform peer reviews on a voluntary basis may also incur opportunity costs with respect to other activities such as teaching and research.

Other concerns have focused on how peer reviews have been implemented. For example, GAO noted that peer review methods varied within and among federal agencies,⁵²⁵ and that agencies' economic analyses of major rules were often not peer reviewed.⁵²⁶ A number of observers have expressed concerns about the impact of peer review requirements on the pace of regulatory activity, with additional requirements exacerbating what is already often regarded as an "ossified" rulemaking process.⁵²⁷ In fact, some critics have suggested that regulatory relief and delay is the primary purpose of peer review proposals in this context.

Still other concerns about peer review have centered on issues of bias and balance. Experts agree that effective peer review panels must be (and must be perceived to be) free from any significant conflict of interest and properly balanced, allowing for a wide range of views and appropriate expertise. In June 2001, however, GAO reported that the policies and procedures developed by EPA's Science Advisory Board to ensure balance and independence of the Board's peer reviewers had limitations that reduced their effectiveness.⁵²⁸ For example, GAO said that the staff office did not routinely ensure that panel members' financial disclosures were complete or that they contained enough information to determine whether a conflict of interest existed. Also, panel members reportedly did not have to disclose information regarding previous positions on the matter being reviewed until the panel's first meeting, thereby making it difficult to determine the independence and balance of the panel members until after they had been selected. GAO also reported that the panel's policies and procedures did not adequately inform the public about the points of view represented on the panels. GAO made several recommendations in this report that were designed to better ensure that the Science Advisory Board's peer review panels are independent and balanced.

As noted previously, GAO reported that federal agencies' peer review practices are not consistent,⁵²⁹ and OMB cited that inconsistency as one of the reasons why the peer review bulletin was needed. Nevertheless, GAO did not recommend greater uniformity in agencies' peer review practices. Also, several studies of peer review in the federal government have

⁵²⁵GAO/RCED-99-99. For example, GAO reported that some agencies conducted peer reviews of research proposals primarily by mail, while others generally relied on panels or committees. All agencies used a combination of external and internal reviewers for these reviews, but one (Federal Aviation Administration) relied primarily on agency employees who were not employed in the project but had the required expertise.

⁵²⁶U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 1998. Only 1 of the 20 economic analyses that GAO reviewed had been independently peer reviewed.

⁵²⁷See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995); Paul R. Verkuil, *Rulemaking Ossification – A Modest Proposal*, 47 Admin. L. Rev. 453 (1995).

⁵²⁸U.S. General Accounting Office, *EPA's Science Advisory Board Panels: Improved Policies and Procedures Needed to Ensure Independence and Balance*, GAO-01-536, June 2001.

⁵²⁹GAO/RCED-99-99.

suggested that rigidly uniform peer review procedures may not be desirable. For example, a 1996 National Science and Technology Council report indicated that peer review implementation should be flexible and “appropriate to the nature of scientific processes.”⁵³⁰ Similarly, in its 1999 report on peer review, GAO reported that OSTP believed agencies’ peer review practices should be “flexible and tailored to agency missions and type of research, and that specific uniform practices should not be dictated for every agency or all federally funded research.”⁵³¹ GAO also said that agencies viewed a variety of peer review methods as “both appropriate and essential, reflecting the varying nature of the research and its purposes, the differences in research timelier, the broad spectrum of [research and development] performers, and the varying funding mechanisms, such as grants, contracts, and cooperative agreements.”

Panel Discussion. Al Teich of AAAS said during the panel discussion on OMB’s science-related initiatives that many scientists looked at the OMB’s initial bulletin on peer review and said “well, this looks like a means of attacking regulation by attacking the science behind it,” and questioned whether the central premise behind the bulletin, i.e., that the most important science behind regulations was not being adequately reviewed. He also said that the science community’s negative reactions to OMB’s initial bulletin on peer review “focused on a number of things.”

First of all, they focused on the constraints on the selection of peer reviewers. They gave little discretion to the agencies. Peer reviewers were excluded if they had expressed an opinion on a subject. Academics were excluded if they were funded by an agency, but employees of regulated industries weren’t. There was a provision that called for, kind of, equal and opposite biases — if a peer reviewer had an unavoidable bias to find another one who had a counteracting bias without any discussion of the relative qualifications of the two reviewers. And finally, there was a question of attributions, which violated the general . . . procedure of giving anonymity to peer reviewers in science.

He went on to say, however, that OIRA “listened to the science community” and the second version was “much improved.” Don Arbuckle also indicated that the public commenting process for the peer review bulletin — particularly receiving a second round of comments — “proved to be extremely beneficial,” and said doing so helped ensure that the government accurately reflected consensus views regarding this highly controversial and politically sensitive issue.

OMB’s Proposed Risk Assessment Bulletin

On January 9, 2006, OIRA released a proposed bulletin on risk assessment for comment by

⁵³⁰ Subcommittee on Research, Committee on Fundamental Science, National Science and Technology Council, *Assessing Fundamental Science* (Nat’l Science Foundation July 1996). The National Science and Technology Council was established by executive order in November 1993 to coordinate federal research and development, and to establish clear national goals for science and technology investments. To view a copy of this report, see <http://www.nsf.gov/sbe/srs/ostp/assess/start.htm>.

⁵³¹ GAO/RCED-99-99, at 5.

the public and for peer review by the National Academy of Sciences (NAS).⁵³² The proposed bulletin would, if made final, establish general risk assessment and reporting standards, and establish special standards for “influential” risk assessments. The proposed bulletin would apply to all agencies covered by the Paperwork Reduction Act (i.e., cabinet departments, independent agencies, and independent regulatory agencies). The legal authorities cited for the bulletin include the Information Quality Act (IQA),⁵³³ the Regulatory Right-to-Know Act,⁵³⁴ which directs OMB to “issue guidelines to agencies to standardize . . . measures of costs and benefits” of federal rules; and Executive Order 12866,⁵³⁵ which says OIRA is the “repository of expertise concerning regulatory issues,” and requires agencies to base their decisions on the “best reasonably obtainable scientific, economic, or other information.” OMB said the risk assessment bulletin builds on its IQA guidelines⁵³⁶ and its peer review bulletin,⁵³⁷ and is intended to be a companion document to its guidance on regulatory impact analyses (OMB Circular A-4).⁵³⁸

Although characterized as “guidance” in the document’s summary, the narrative text mentions the “requirements” of the bulletin, and the language in the bulletin prior to the standards lists the standards with which “[each agency shall] comply. However, OMB also says that the bulletin applies to all agency risk assessments “to the extent appropriate.” Agency heads are authorized to waive or defer some or all of the requirements in the bulletin “where warranted by a compelling rationale.” Also, under the heading of “Judicial Review,” OMB said that the bulletin is “intended to improve the internal management of the Executive Branch,” and “does not create any right or benefit, substantive or procedural, enforceable at law or equity, against the United States, its agencies or other entities, its officers or employees, or any other person.” Public comments on the bulletin were requested by June 15, 2006.

Risk assessment is defined in the bulletin as a document that “assembles and synthesizes scientific information to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment.” In a regulatory context, risk assessment helps agencies identify issues of potential concern (e.g., whether exposure to a given risk agent causes effects such as cancer, reproductive and genetic abnormalities, or ecosystem damage); select

⁵³²Office of Management and Budget, “Proposed Risk Assessment Bulletin,” Jan. 9, 2006, *at* http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf.

⁵³³The IQA, sometimes referred to as the Data Quality Act, was enacted in December 2000 as section 515 of the Treasury and General Government Appropriations Act, 2001, Pub. L. No. 106-554 (2001).

⁵³⁴Section 624 of the Treasury and General Government Appropriations Act, 2001, (31 U.S.C. § 1105 note).

⁵³⁵Exec. Order 12,866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

⁵³⁶A copy of OMB’s IQA guidelines is available at http://www.whitehouse.gov/omb/inforeg/iqg_oct2002.pdf. For more information, see Curtis W. Copeland, *The Information Quality Act: OMB’s Guidance and Initial Implementation*, CRS Report RL32532.

⁵³⁷A copy of OMB’s peer review bulletin is available at <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-03.pdf>. For more information, see Curtis W. Copeland, *Peer Review: OMB’s Proposed, Revised, and Final Bulletins*, CRS Report RL32680.

⁵³⁸To view a copy of OMB Circular A-4, see <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>.

regulatory options; and estimate a forthcoming regulation's benefits. OMB said it "has a strong interest in the technical quality of agency risk assessments because these assessments play an important role in the development of public policies at the national, international, state and local levels." OMB also said that "there is general agreement that the risk assessment process can be improved, and said the purpose of the bulletin is "to enhance the technical quality and objectivity of risk assessments prepared by federal agencies by establishing uniform, minimum standards."

Background on Risk Assessment. Risk assessments, particularly quantitative assessments, date to the first half of the 20th Century, but their use was accelerated by the enactment of numerous health, safety, and environmental statutes in the early 1970s. In 1983, NAS identified four steps in the risk assessment process: (1) *hazard identification* (determining whether a substance or situation could cause adverse effects), (2) *dose-response assessment* (determining the relationship between the magnitude of the exposure to a hazard and the probability and severity of adverse effects), (3) *exposure assessment* (identifying the extent to which exposure actually occurs), and (4) *risk characterization* (combining the above information into a conclusion about the nature and magnitude of the risk).⁵³⁹ NAS pointed out that this four-step assessment process is separate and distinct from the decision on where to set a regulatory standard (which is termed "risk management").

In 1990, Congress mandated that a commission be formed to "make a full investigation of the policy implications and appropriate uses of risk assessment and risk management in regulatory programs under various Federal laws to prevent cancer and other chronic human health effects." In its 1997 final report, the commission said that the assessments should be guided by an understanding of the issues of importance to risk management decisions and to the public's understanding of what is needed to protect public health and the environment. The commission also noted, however, that risk-related controversy often "arises from what we don't know and from what risk assessments can't tell us."⁵⁴⁰

Data, Assumptions, and Context. Key elements in any risk assessment are the data used in determining the level of risk associated with any given substance or situation. In many cases, though, the data needed to assess risk are lacking. For example, in 1998, the EPA reported that of 3,000 high-production-volume chemicals, a full set of toxicity data was available for only about 200 (7%) of the chemicals, and there was no publicly available data for about 43% of the chemicals.⁵⁴¹ Similar data gaps exist regarding the extent to which people are exposed to chemicals. For example, in 2000, the GAO reviewed federal and state efforts to collect human exposure data on more than 1,400 naturally occurring and manmade chemicals considered by the Department of Health and Human Services (HAS), EPA, and other entities to pose a threat to human health. GAO reported that HAS and EPA surveys measured exposure of the general population for only 6% of those chemicals.⁵⁴²

⁵³⁹National Research Council of the National Academy of Sciences, *Risk Assessment in the Federal Government: Managing the Process* (Nat'l Academy Press 1983).

⁵⁴⁰Presidential/Congressional Commission on Risk Assessment and Risk Management, *Framework for Environmental Health Risk Management*, Final Report, Vol. 1, 1997, at 23.

⁵⁴¹U.S. Environmental Protection Agency, *Chemical Hazard Data Availability Study: What Do We Really Know About the Safety of High Production Volume Chemicals*, Apr. 1998.

⁵⁴²U.S. General Accounting Office, *Toxic Chemicals: Long-Term Coordinated Strategy Needed* (continued...)

Because of the lack of data, agencies often must make assumptions as part of the risk assessment process. Some critics believe those assumptions are unjustifiably “precautionary” (i.e., designed to ensure that risks are not underestimated) in the face of new scientific data and methods, thereby producing estimates that overstate actual risks, and that those effects are compounded when multiple precautionary assumptions are used. Others, though, believe that agencies are often not precautionary enough, particularly when estimating the synergism of exposures to multiple chemicals, or to account for risks to particularly vulnerable groups (e.g., children, the elderly, or the infirm).⁵⁴³ As part of the process of determining whether a hazard exists, agencies may conduct a “screening”-level risk assessment using conservative, “worst-case” scenarios. Only if this screening assessment reveals evidence of harm will the agency proceed to a more comprehensive estimate of risk.

The legal context in which risk assessments are conducted plays an important role in determining what type of assessment is performed and why certain approaches are used. For example, different agencies (and often different offices within a single agency) have different risk-related statutory mandates. Some statutes require regulatory decisions to be based solely or primarily on risk. For example, section 109 of the Clean Air Act requires the EPA to set national ambient air quality standards that allow for an “ample margin of safety” to protect public health. Other statutes require technology-based standards (e.g., “best available technology”), and still others require balancing the benefits of risk reduction against the costs incurred in setting risk management goals. Some statutes also place the primary responsibility for conducting risk assessments and compiling risk data for a particular chemical or source of exposure with industry, states, or localities, not federal agencies. For instance, industry petitioners have the primary responsibility to provide the data needed to support registration and tolerances from EPA for their pesticides. Still other statutes specifically define what will be a hazard, tell the agency to take certain methodological steps, or specify an exposure scenario. In many cases, however, the statutes simply provide a general framework within which agencies make specific assumptions and methodological choices.

What OMB’s Proposed Bulletin Would Require. OMB’s proposed risk assessment bulletin would establish general risk assessment and reporting standards, as well as special standards for “influential” risk assessments. The bulletin makes OIRA, in consultation with the Office of Science and Technology Policy, responsible for overseeing agency implementation of its requirements.

General Standards. With regard to the general standards, the bulletin establishes six risk assessments quality standards. The assessments must:

- clearly state the informational needs driving the assessment as well as the objectives of the assessment;
- clearly summarize the scope of the assessment (including identification of the agent, technology, or activity at issue; the hazard of concern; the affected

⁵⁴²(...continued)

to Measure Exposures in Humans, GAO/HE’S-00-80, May 2, 2000.

⁵⁴³For a discussion of some of these assumptions, see U.S. General Accounting Office, *Chemical Risk Assessment: Selected Federal Agencies’ Procedures, Assumptions, and Policies*, GAO-01-810, Aug. 6, 2001.

entities; and the event-consequence or dose-response relationships for the relevant exposure ranges);

- provide a qualitative and, where possible, a quantitative characterization of risk (including a range of plausible estimates for quantitative measures);
- ensure objectivity by “neither minimizing nor exaggerating the nature and magnitude of risk;⁵⁴⁴ using the best available data; being based on the weight of the available scientific evidence; and having a high degree of transparency regarding the data, assumptions, and methods;
- explain the basis of each critical assumption and those assumptions that affect the assessment’s key findings, including an evaluation (quantitative if possible) of the effects of plausible alternative assumptions; and
- contain an executive summary that discloses the assessment’s objectives and scope, key findings, and key scientific limitations and uncertainties.

When a risk assessment is produced in relation to regulatory analysis for a rule with annual economic effects of \$1 billion or more, the bulletin establishes a seventh requirement, i.e., that there be a “formal quantitative analysis of the relevant uncertainties about benefits and costs.” The bulletin highlights several “important aspects of risk assessments useful for regulatory analysis,” including: (1) identification of baseline risk; (2) comparison of baseline risk to alternative mitigation measures, noting any “countervailing risks” caused by those alternatives; (3) information on the timing of exposure and the onset of adverse effects, and the time between control measures and the cessation of those effects; and (4) when risk is measured quantitatively, the development of a range of plausible risk estimates, including a central estimate (e.g., a weighted average based on relative plausibility).

Special Standards for Influential Risk Assessments. The proposed bulletin defines an “influential risk assessment” as one that “the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” OMB said that such assessments include those that determine the level of risk regarding health, safety, or the environment (e.g., risk assessments that support EPA’s National Ambient Air Quality Standards, Food and Drug Administration (FDA) tolerance levels, or economically significant rulemakings — e.g., those with a \$100 million impact on the economy). In addition to the general standards delineated above, the proposed bulletin requires all influential risk assessments to:

- be capable of being “substantially reproduced,” which is defined in the narrative portion of the bulletin (referencing the IQA guidelines) as meaning that “independent reanalysis of the original or supporting data using the same methods would generate similar analytical results”,⁵⁴⁵

⁵⁴⁴OMB said this standard would not apply to “screening-level” risk assessments designed to determine whether any hazard exists.

⁵⁴⁵The narrative text goes on to say that “public access to original data is necessary to satisfy this standard.”

- compare the results of the assessment to other results published on the same topic from “qualified scientific organizations” (which is undefined in the bulletin);
- highlight central estimates as well as high-end and low-end estimates of risk when such estimates are uncertain;
- characterize uncertainty with respect to the major findings of the assessment (e.g., by conducting a sensitivity analysis and providing a quantitative distribution of the uncertainty);
- portray results based on different effects observed and/or different studies to convey how the choice of effect and/or study influences the assessment;
- characterize (to the extent feasible) variability through a quantitative distribution, reflecting different affected population(s), time scales, geography, or other parameters relevant to the needs and objectives of the assessment;
- where human health effects are a concern, determinations of which effects are adverse shall be specifically identified and justified based on the best available scientific information generally accepted in the relevant clinical and toxicological communities;
- provide discussion (to the extent possible) of the “nature, difficulty, feasibility, cost and time associated with undertaking research to a report’s scientific limitations and uncertainties;” and
- consider all significant comments received on a draft risk assessment report, and issue a “response to comment” document summarizing the significant comments received and the agency’s responses.

NAS Review of the Bulletin. On March 22, 2006, a committee of the Board on Environmental Issues and Toxicology within the National Academies’ Division of Earth and Life Sciences began what is expected to be an 11-month peer review of OMB’s proposed bulletin. According to the committee’s website,⁵⁴⁶ it will:

determine whether the application of the proposed guidance will meet OMB’s stated objective to “enhance the technical quality and objectivity of risk assessments prepared by federal agencies.” In performing its task, the committee will comment, in general terms, on how the guidance will affect the practice of risk assessment in the federal government. The committee will identify critical elements that might be missing from the guidance. The committee will also determine whether OMB appropriately incorporated recommendations from previous reports of the NRC and other organizations into the proposed risk assessment guidance. In addition, the committee will assess whether there are scientific or technical circumstances that might limit applicability of the guidance.

On May 22, 2006, the committee held a public meeting on OMB’s proposed risk assessment

⁵⁴⁶The website is at <http://www8.nationalacademies.org/cp/projectview.aspx?key=34282>.

bulletin. According to press accounts, the nine federal agency officials who testified at the meeting voiced a variety of opinions about the bulletin.⁵⁴⁷ For example, the Director of FDA's Center for Drug Evaluation and Research reportedly said that if the bulletin was made final in its current form, doctors and the public might not receive timely warnings about potential health risks posed by drugs and medical devices (e.g., warnings related to the use of the anti-inflammatory drug Vioxx). To illustrate, the FDA director said that of 109 safety alerts that FDA issued in 2005, 92 of them would have been considered risk assessments under the bulletin, and therefore would have been delayed by the required analyses. He and two other agency officials (from the National Institute of Environmental Health Sciences and the National Institute for Occupational Safety and Health's Risk Evaluation Branch) reportedly said that the bulletin's definition of risk assessment is so broad that many types of federal analyses could be inappropriately covered by its requirements.

On the other hand, EPA's science advisor was quoted as saying that the agency was in "pretty good shape" in terms of meeting the requirements in the proposed bulletin, but nevertheless suggested that the guidance be revised to explain how much flexibility agencies have regarding its requirements (e.g., how agencies can get waivers from the bulletin's requirements). He and an official from the National Aeronautics and Space Administration also said that some aspects of the bulletin would conflict with their own, agency-specific guidance documents on risk assessment, and it was not clear how those conflicts should be resolved. A representative from the Department of Defense reportedly supported the proposed guidelines, noting that any increased cost would be justified by improvements in the resulting risk assessments.

Public Comments on the Proposed Bulletin. On June 22, 2006, OMB posted the comments it had received regarding the proposed bulletin on its website.⁵⁴⁸ Those comments varied significantly, with some suggesting ways to make the document stronger and more inclusive, while others suggested that OMB abandon the bulletin altogether.

For example, in its comments on the bulletin, the United States Chamber of Commerce said it "welcomes and applauds this undertaking by OMB to improve the risk assessments performed by federal government agencies and especially in requiring a reliable characterization of the uncertainties that impact the quality and useful information content of the assessments."⁵⁴⁹ Although it offered several suggestions for improvement, the Chamber generally concurred with the text of the bulletin and encouraged its implementation. Perhaps most notably, the Chamber viewed the lack of judicial review as a "significant weakness" that "begs the question of what happens if agencies simply choose to ignore the directions given in the Bulletin."

Other individuals and organizations, while also supporting the issuance of the bulletin, urged OMB to go further. For example, the National Association of Manufacturers said exceptions to the bulletin should be "very limited" (e.g., declared public emergencies), and said

⁵⁴⁷Pat Phibbs, *Definition of Risk Assessment Deemed Too Broad by Several Health Agency Officials*, BNA Daily Report for Executives, May 23, 2006, at A15.

⁵⁴⁸See http://www.whitehouse.gov/omb/inforeg/comments_rab/list_rab2006.html.

⁵⁴⁹See http://www.uschamber.com/issues/comments/060518_ombriskassessment.htm.

the “reproducibility” standard for influential assessments should be applied to all assessments.⁵⁵⁰ The National Federation of Small Businesses questioned the exemption for individual permitting decisions (e.g., EPA determinations regarding pesticide applications).⁵⁵¹ Two Members of Congress proposed deleting the phrase “to the extent appropriate” from the bulletin’s scope because it suggested that compliance with its requirements was at the discretion of the agencies.⁵⁵²

On the other hand, the Center for Progressive Reform (CPR) urged OMB to “withdraw the Proposed Bulletin and abandon efforts to revise it.”⁵⁵³ CPR said any effort to produce government wide, “one-size-fits-all” risk assessment requirements would only cause confusion and delay in the development of public and worker protections. The organization also questioned why OMB should be issuing risk assessment guidance at all, since it is composed primarily of economists and budget analysts, not scientists. In particular, CPR said certain terms in the bulletin are confusing (e.g., “central” or “expected” risk), requires information that may not exist or would be costly to obtain, and may lead to the further “ossification” of the rulemaking process. Similarly, the Natural Resources Defense Council (NRDC) expressed “grave misgivings” regarding the proposed bulletin, and urged OMB to withdraw it.⁵⁵⁴ In particular, NRDC said issuance of the document as a “bulletin” rather than as guidance and its use of directive terms (e.g., “shall”) suggest that the document is mandatory, and said the exclusion of risk assessments prepared by private industry for licensing and registration requirements “protects industry assessments from scrutiny.”

Other commenters raised additional issues. The American Bar Association (ABA) said the proposed bulletin is generally consistent with a 1999 ABA recommendation on risk assessment, but noted several areas for possible improvement (e.g., clarifying the amount of flexibility agencies have to deviate from the bulletin’s requirements).⁵⁵⁵ The ABA also suggested that OMB clearly describe the problems that warrant the creation of a new risk assessment bulletin, and also describe why OMB (and not the regulatory agencies) is best suited to resolve those problems. Dr. Gilbert Omenn, who chaired the Presidential/Congressional Commission on Risk Assessment and Risk Management in the 1990s, said the proposed bulletin has “worthy intentions,” but also said it was “too broad” and recommended a number of improvements (e.g., deletion of the “influential” risk assessment category and its additional requirements). He also recommended greater transparency in the OMB and agency review processes, and the correction of certain “omissions” (e.g., an exclusion for research agencies).

Panel Discussion. During The Role of Science in Rulemaking Symposium, Don Arbuckle of OIRA said the National Academy of Sciences (NAS) had been asked to look at the draft risk assessment bulletin “to try and make sure that we are following the practices that the NAS itself has recommended for many years.” He said one of the goals of the bulletin is to make it “specific enough to present best practices for the government but flexible enough for agencies that deal in very different types of endeavors to be able to use.”

⁵⁵⁰See http://www.whitehouse.gov/omb/inforeg/comments_rab/nam.pdf.

⁵⁵¹See http://www.whitehouse.gov/omb/inforeg/comments_rab/nfib.pdf.

⁵⁵²See http://www.whitehouse.gov/omb/inforeg/comments_rab/cec.pdf.

⁵⁵³See http://www.whitehouse.gov/omb/inforeg/comments_rab/cpr.pdf.

⁵⁵⁴See http://www.whitehouse.gov/omb/inforeg/comments_rab/nrdc.pdf.

⁵⁵⁵See http://www.whitehouse.gov/omb/inforeg/comments_rab/aba.pdf.

Rena Steinzor of the University of Maryland School of Law said that, from her perspective, there are two key problems with OMB's draft risk assessment bulletin: (1) a "one size fits all" approach that requires a central, weighted-average measure of risk (which she said "makes very little sense from a scientific perspective); and (2) the bulletin's "conflation of assessment and management" because it requires agencies to "develop an assessment of all the risk reduction measures that might be available and . . . what the implications are of those risk reduction measures." She also said that there is concern by some Members of Congress regarding how the NAS planned to carry out its peer review of the draft bulletin, and pointed out that the risk assessment requirements in the bulletin were not required regarding policy decisions where industry would want a prompt risk assessment (e.g. pesticides registration, FDA drug approvals, and nuclear power plant licensing).

In response to this last point, Don Arbuckle explained that the inapplicability of the risk assessment bulletin to those decisions was because "OMB generally tries to stay away from particular adjudications, from licensing, from cases where there is not, as the APA expresses it, 'cases of general applicability and future effect.'" He also said that the bulletin did not cover risk assessments in the insurance industry, financial institutions, and other types of fields because OMB felt that these endeavors were so different that it would be "not possible or not particularly useful to try to incorporate all of these together." Finally, he said it was not OMB's intent that the guidelines be a "one size fits all" approach, and "we would expect the NAS to tell us so if that was the case."

Science Advisory Boards

The Role of Science in Rulemaking Symposium panel discussion on scientific advisory boards reflected the current sharp divide of opinion how such independent expert panels are selected and operated and the weight their advice and recommendations should be accorded. There was little common agreement on such fundamental issues as to how and by whom members of such advisory bodies should be selected; how to deal with issues of neutrality and conflicts of interests; at what stage of the agency decision process should scientific and technical issues identified and selected for review be addressed; how much transparency should there be in the deliberation process of the expert panel members; how much public participation should there be in the panel member selection process and during the deliberations of the panel members; should the primary concern of the agency convenors of expert panels be populating with the best scientific and technological expertise available or should achievement of balance require including stakeholder and/or interest group representation; should such expert panels be cost-effective; what weight should be accorded the findings and recommendations of such panels; and should final reports be independently reviewed and refereed?

Discussions with the panelists and a review of the pertinent literature revealed that there has been no definitive census of currently existing scientific and advisory bodies that address the fundamental structural and operational questions just outlined. Federal advisory committees have been called the "fifth arm of the government" because of the significant role they play in advising federal agencies, the President, and the Congress on important national issues. Within the area of science and technology, it is estimated that thousands of such advisory boards and committees have been established over time to advise such entities as the Department of Health and Human Services and the EPA on topics ranging from safe levels of lead to the use of humans in research studies. Despite their prevalence and importance, little is known about the characteristics of these science committees, how they are established, how members are selected how they operate, or the impact or use of the results of their deliberations. Congress required an

annual report from the President describing all advisory committees, but that report was discontinued in 1998. The General Services Administration (GSA) does, however, still maintain a database listing all federal advisory committees (at <http://www.fido.gov/facdatabase>) with more than 200 of the committees identified as “science and technology” related. A better understanding of how science advisory committees operate and what role they play in the public policymaking process can help Congress and federal agencies as they establish and use them in the future.

To fill this crucial gap in knowledge and understanding, CRS recommended a year-long study to be done by the Maxwell School of Citizenship and Public Affairs of Syracuse University led by Professor Stuart Bretschneider, the Associate Dean and Chair of the Department of Public Administration. In a preliminary report to CRS on December 5, 2006, Professor Bretschneider reported that the first phase of the study had been completed. By plumbing the GSA database, the team created a spreadsheet that identifies all scientific and technological advisory committees existing in 2005, the agencies they serve, the authority under which they were created, their stated purpose, the classification of membership, how committee membership is balanced, the number of open and closed meetings held by each and the reasons given for closing meetings, and what each committee cost the government. The research team also determined what information the GSA database does not contain with respect to the particular issues of concern to Congress, and has developed suggestions for surveys to be conducted with federal agencies next year to elicit further information about these expert bodies to permit an informed Congressional evaluation of any legislative actions that may be necessary. The final report is expected to be completed by June 2007.

Analysis

Information Quality Act

Although the IQA is described by some as the most significant change to the federal rulemaking process in the past 60 years, both the relatively few substantive correction requests submitted in the Act’s first two years of implementation and its treatment by the district and circuit courts would suggest otherwise. That said, it is probably too early to conclude that its effect on rulemaking and regulatory science will always be as benign as it has been to date.

The Fourth Circuit’s determination regarding whether agencies’ actions are subject to judicial review under the IQA is likely to have a major effect on the Act’s implementation. If judicial review is unavailable under the Act, some observers believe that agencies will be more likely to deny information correction requests. Some have suggested that Congress amend the IQA and specifically provide for judicial review. Others have suggested focusing on new test cases, believing that the *Salt Institute* case did not represent the best case to test whether the IQA was subject to judicial review (e.g., because the appellants’ request was that information be made public, not that it be corrected). Another approach some have suggested is for OMB to take a more active role in reviewing agencies’ decisions under the act, perhaps as part of their regulatory review responsibilities under Executive Order 12866. It is likely that one or more of these steps will be taken to address perceived deficiencies in the act.

Even in the absence of judicial review, though, the IQA can still have a significant impact on federal agencies and their information dissemination activities. OMB’s reports on the implementation of the Act during fiscal years 2003 and 2004 provided numerous examples of

agencies changing their information dissemination practices in response to administrative requests for correction from affected parties. For example, in June 2004, the National Institute on Aging within the National Institutes of Health agreed to revise its website and printed publications, eliminating statements indicating that smokeless tobacco products are no less safe than cigarettes. The change was a direct result of an IQA correction request filed by the National Legal and Policy Center.⁵⁵⁶ IQA correction requests have also been filed by groups and in policy areas that few observers anticipated.⁵⁵⁷

The observations of other interested parties suggest additional possible areas of clarification or refinement in either the IQA or in any subsequent reporting requirements. For example, OMB Watch indicated that OMB's report to Congress should have examined the effect that the IQA was having on the pace of the regulatory process and on agency resources. OMB said it was not aware of any data indicating that the IQA was slowing down rulemaking, but also said agencies were finding that it took longer than expected to respond to correction requests and to implement the appeals process. To improve oversight regarding these issues, either Congress or OMB could initiate the collection of more systematic and reliable data regarding the I.A.'s effect on rulemaking or agencies' resources.

OMB's 2005 report notes that agencies are inconsistent in how they treat such submissions, with some characterizing them as IQA correction requests and others deciding not to do so. To clarify these and other issues, either Congress or OMB could better define the scope of the act or the issues to be included in any future report. Clarification could also be provided regarding whether correction requests that the agencies determine to involve issues outside the scope of the IQA (e.g., a challenge to the minutes of a federal advisory committee meeting) should be included in a report that is supposed to list correction requests under the Act.

Peer Review Bulletin

OMB's peer review bulletin is likely to have a significant effect on federal rulemaking and other forms of information dissemination and public policy. That effect is likely to be both direct (through agencies' and OMB's enforcement of the bulletin's requirements) and indirect (through references to the bulletin by others). For example, section 402 of the "Specialty Crops Competitiveness Act of 2004" (Pub. L. No. 108-465 (2004)) indicated that a required peer review of the procedures and standards governing the consideration of certain import and export requests "shall be consistent with the guidance by the Office of Management and Budget pertaining to peer review and information quality."

Some of the initial issues and concerns raised by commenters on the proposed peer review bulletin were clarified or otherwise addressed in the revised and final versions of the bulletin. Perhaps most notably, the bulletin now makes it clear that scientists are not prohibited from serving as peer reviewers if they receive research grants from the agency based on investigator-

⁵⁵⁶*Government Watchdog Group Successfully Challenges Federal Health Policy on Data Quality Act Grounds*, PR Newswire, July 14, 2004.

⁵⁵⁷For example, in October 2004, Americans for Safe Access (a Berkeley, California advocacy group) filed an IQA correction request with the Department of Health and Human Services asserting that the Department's statements that marijuana has no medical use in treatment in the United States "misstates the scientific evidence and ignores numerous reports and studies demonstrating the medical utility of marijuana and its constituent compounds."

initiated, competitive, peer reviewed proposals. The bulletin also provides exemptions from the peer review requirements for time-sensitive medical, public health, and safety information, and other compelling circumstances. A number of other issues remain unclear, however. These include: (1) the amount of discretion that agencies will actually have in carrying out the bulletin's requirements, (2) the degree to which the bulletin will accomplish the stated goal of making federal peer review practices more consistent, and (3) the effects of the bulletin on agencies and the federal rulemaking process.

Agency Discretion. The final peer review bulletin appears to give federal agencies substantial discretion in determining whether peer review is required for specific products and, if so, what type of peer review mechanism is appropriate and who should serve as peer reviewers. For example, the bulletin says agencies need not have peer review conducted on influential scientific information that had already been subject to "adequate" peer review. To determine whether a prior review was "adequate," agencies are directed to consider (among other things) whether the science is "novel" or "complex," and whether it is "important" to decisionmaking. Notably, though, the final bulletin no longer indicates that an "adequate" peer review "need not comply with" all of the requirements of the bulletin. Also, the final bulletin says that information should be considered "influential scientific information" if the agency "reasonably can determine" that it will have or does have a "clear and substantial" impact on "important" public policies or private sector decisions. The bulletin says that peer reviewers should be selected to provide the necessary expertise, experience, and skills, and the group of reviewers should be "sufficiently" broad and diverse to "fairly" represent the "relevant" scientific perspectives and knowledge.

On the other hand, the final bulletin also gives OMB substantial discretion in certain areas. For example, the bulletin indicates that OMB can require agencies to use the more exacting procedures for "highly influential scientific assessments" if OMB determines the information is a "scientific assessment" that "could" have a substantial impact on public policies or private sector decisions with a "potential impact" of more than \$500 million in any year, or is "novel, controversial, or precedent setting," or has "significant" interagency interest. Also, OMB can unilaterally approve agencies' use of alternative peer review procedures. The amount of discretion that agencies will actually have in carrying out their peer review programs (or, conversely, the amount of control that OMB will retain) will be apparent only through the bulletin's implementation. The amount of agency discretion (or OMB control) could vary substantially from one administration to another.

Consistency. OMB indicated that stronger peer review policies were needed because of the importance of the issue and, citing a 1999 GAO report, because of the "variability in both the definition and implementation of peer review across agencies." OMB went on to say that, prior to the development of the bulletin, "there were no government-wide standards concerning when peer review is required and, if required, what type of peer review processes are appropriate." Therefore, OMB said that the bulletin "establishes minimum standards for when peer review is required for scientific information, and the types of peer review that should be considered by agencies in different circumstances."

The final bulletin, however, may not provide the desired consistency in peer review definition or implementation. As indicated above, the bulletin leaves many key terms undefined or subject to interpretation, and gives the agencies substantial discretion regarding when certain actions should be taken (e.g., when previous peer reviews are "adequate") and which reviewers should be selected (i.e., those with the "necessary" expertise, experience, and skills). To the

extent that agencies are allowed to exercise discretion in these areas, consistency may be forfeited. On the other hand, strict enforcement of uniform procedures established by OMB carries with it a different set of concerns about aggregation of power within the Executive Office of the President, and may be resisted by federal agencies. Also, as noted previously, although GAO reported that agencies' peer review practices were inconsistent, it did not recommend greater consistency, and some view variation in those practices as appropriate and desirable.

Effects on Agencies and Rulemaking. A number of commenters expressed concerns regarding the effect that adding new peer review requirements would have on what is already viewed by some observers as a lengthy, "ossified" federal rulemaking process. Somewhat related concerns have been voiced regarding the cost of the requirements to federal agencies, with Senators Lieberman and Duhon suggesting that the requirements "do not pass OMB's own [cost-benefit] test of good rulemaking." In response, OMB provided estimates in the preamble to the revised bulletin indicating that it did not believe the costs would be prohibitive to the agencies. As noted previously, though, in 1997, OMB indicated that peer review costs could be significant in terms of both time and agency resources.⁵⁵⁸ Little empirical data are currently available regarding the cost of peer reviews, how they affect the federal rulemaking process, or their effect on the quality of the information being reviewed. It is even less clear how the peer review requirements suggested by OMB will affect those factors, and there appears to be no mechanism in place for collecting such data. There are some indications, however, that the requirements could delay regulatory action.⁵⁵⁹

The A.E.I.-Brookings Joint Center for Regulatory Studies recommended that OMB or some other entity build into the peer review program an evaluation to determine its effect on the quality of regulatory analyses. Any such evaluation could, at least conceptually, include an examination of the cost of the new peer review requirements to federal agencies and its effect on the pace of rulemaking. To determine the effect of the peer review bulletin on these or other factors, baseline information regarding the current state of the art would need to be gathered before the bulletin's implementation.

Even if the data indicate that peer review adds time to the early stages of the rulemaking process, that time may be worth the investment if doing so reduces the likelihood of subsequent judicial challenges to the rules. Peer review may also provide agencies with a preview of likely objections to a rule during the notice and comment phase, thereby allowing them to minimize any weaknesses and respond quickly to adverse comments. All of these factors would have to be considered in any evaluation of the effect of peer review on the regulatory process.

Risk Assessment Bulletin

Some believe that, because OMB's risk assessment bulletin is not subject to judicial review, it will not have a significant effect on rulemaking. Like the peer review bulletin, however, the manner in which OMB implements the bulletin will also determine its effectiveness. For example, it is unclear the extent to which agencies will be allowed to waive or defer the

⁵⁵⁸Statement of Sally Katzen, *supra* note 521.

⁵⁵⁹Ben Gellman, *White House Peer Review Requirements Could Delay Standards*, 10 Greenwire 9 (Dec. 17, 2004). The article quoted a program manager in the Department of Energy as saying that efficiency standards for residential furnaces and boilers, commercial air conditioners and other equipment were being delayed for two years because of OMB's peer review bulletin.

bulletin's requirements when they believe it is "warranted by a compelling rationale." Similarly, it is unclear whether OMB will allow agencies to decide when a risk assessment is "influential" (thereby triggering additional standards in the bulletin) and whether OMB will treat the bulletin's provisions as "guidance" or as "requirements." If OMB views the bulletin as requirements that are enforceable as part of its review of agency rules under Executive Order 12866, the bulletin could have a major effect on the development of health, safety, and environmental rules.

Issues for Congress or Further Study

As the above discussion suggests, a number of issues remain for possible Congressional consideration, or for further study by a re-funded ACUS or some other body. In some cases, Congress could weigh in and resolve the issue. For example, in light of recent court decisions, if Congress wants agencies' decisions under the IQA to be judicially reviewed, it could resolve any lingering questions by amending the statutes and permitting judicial review. Likewise, if Congress objects to using risk standards for one statute and applying them to other statutes, it could make its objections clear through statutory language, or through oversight of OMB's risk assessment bulletin.

Among the questions that merit further study are the following:

- How should scientific advisory panels be constructed to ensure that they are unbiased?
- Under what circumstances should agencies' regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?
- Do agencies have too much discretion to deny correction requests under the IQA? What effect has the act had on the length of time it takes agencies to issue rules? Do the Shelby Amendment and the IQA, in tandem, potentially restrict the release of research findings that would have significant social impact?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?
- Are governmentwide standards for peer review and risk assessment needed? Does OMB have the authority to issue such standards? What effect have these requirements had on the length of time it takes agencies to issue rules?
- Are agencies complying with the peer review and risk assessment bulletins? For example, are agencies posting agendas listing their upcoming peer reviews? Are agencies peer reviewing all "influential" information? Are some agencies complying better than others? Should Congress refer to these bulletins in legislation as models for particular peer reviews or risk assessments?
- What has been the effect of the Supreme Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (regarding the acceptance and understanding of scientific evidence to be used in the legal system) on regulatory policymaking?

- What constitutes the “weight of the evidence” in making risk-based regulatory decisions? Should Congress define the term, or should it be left up to the agencies within a specific regulatory context?

VII. Agency Adjudication

The Choice Between Rulemaking or Adjudication

Another matter of significant importance and interest to the Project has been the issue of agency adjudication. In addition to rulemaking, it is a fundamental maxim of administrative law that agencies may control regulated activities and entities through adjudicatory processes. Regarding the basic issue of an agency's discretion to choose between rulemaking and adjudication, the Supreme Court established in *SEC v. Cheery Corporation (Cheery II)* that an agency has the authority to make law through adjudication.⁵⁶⁰ In *Cheery II* the Court addressed the SEC's refusal to approve the reorganization of a utility company on the basis that the reorganization would violate standards of fairness derived from the SEC's interpretation of the governing statute, as company insiders had received from their purchases. Neither the act at issue nor SEC regulations, however, proscribed such conduct. Nonetheless, the SEC issued a ruling that established a policy against insider trading. Through this action, the SEC formulated a rule and applied in the adjudication before it.

While observing that "[t]he function of filling in the interstices of the Act should be performed, as much as possible, through the quasi-legislative promulgation of rules to be applied in the future," the Court held that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."⁵⁶¹ In a prior decision in *Securities and Exchange Commission v. Cheery ("Cheery I")*, the Court had ruled that "before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct proscribed by an agency of government authorized to prescribe such standards." The holding in *Cheery II* established that this language did not require an agency, in instances where the standard is unclear, to develop a general rule prior to proceeding through individual adjudications. The Court emphasized in *Cheery II* that "[t]he absence of a general rule or regulation governing management trading during reorganization did not affect the Commission's duties in relation to the particular proposal before it."

Justice Jackson dissented from the holding in *Cheery II*, arguing that the SEC should have been required to give notice of the agency's position before its application, namely by requiring the agency to first promulgate a "rule" of general applicability. In particular, Justice Jackson voiced concern with the notion that an agency should be allowed to establish binding standards via adjudication under any circumstances, noting that "[e]ven if the Commission had, as the Court says, utilized this case to announce a new legal standard of conduct, there would be hurdles to be cleared. . . ." In essence, Justice Jackson's dissent forwards the position that agency adjudication is inherently unfair to the extent that the legal rights of an affected party can be impacted concordant with a decision explicitly prohibiting the conduct at issue for the first time.

Despite Justice Jackson's concerns, the Supreme Court has repeatedly upheld the general maxims of *Cheery II*, establishing that agencies have broad authority in choosing whether to develop agency law through rulemaking or adjudication. As the setting of policy through

⁵⁶⁰332 U.S. 194 (1947).

⁵⁶¹*Id.* at 202-03.

rulemaking became increasingly entrenched within agencies, however, the focus of argument shifted to the assertion that the formulation of general rules of policy through adjudication effectively and improperly circumvented the notice and comment provisions of the APA. The Supreme Court rejected this argument in *NLRB v. Bell Aerospace Co.*, stating that:

[T]he Board is not precluded from announcing new principles in an adjudicative proceeding...the choice between rulemaking and adjudication lies in the first instance within the Board's discretion. Although there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or violation of the Act, nothing in the present case would justify such a conclusion.⁵⁶²

This dichotomy effectively allows agency adjudicators to exert policy-making authority through a quasi-judicial proceeding, as opposed to the quasi-legislative nature of the procedures that govern notice and comment rulemaking. This dynamic has given rise to the question of whether it is appropriate for agencies to establish binding policy through adjudication when such action could be effected through notice and comment rulemaking. ACUS, as a reconstituted entity, would be in a unique position to analyze the impact of agency determinations to regulate through adjudication and rulemaking, with the aim of formulating a recommendation as to whether the APA should be amended to explicitly address issues adhering to agency adjudication.

In addition to issues regarding the equity of proceeding with adjudication or rulemaking in a given instance from a public policy perspective, there are also significant practical factors that may inform agency determinations in this context. A majority of commentators on the issue have posited that rulemaking carries significant benefits over adjudication. In particular, it has been asserted that rulemaking is superior to the degree that it allows agencies to manage the scope and logistical aspects of a proceeding, giving the agency greater control over its agenda and enabling it to formulate a regulatory strategy that is not subject to the procedural and substantive limitations of the adjudicatory process.⁵⁶³ Relatedly, rulemaking is seen as more efficient in that it enables agencies to promulgate rules with broad, prospectively binding legal effect, whereas orders and decisions reached via adjudication are merely of precedential value in subsequent proceedings.⁵⁶⁴

Conversely, adjudication may be viewed as superior in light of other practical considerations. Specifically, the increased complexity of the notice and comment rulemaking process may be avoided through the use of adjudication. This factor may be especially significant in contexts that are particularly suited to adjudication, as may be the case with discrete or highly specialized regulatory regimes, given that agencies may be able to give effect to the underlying aims of a statute more efficiently through adjudication than through compliance with the myriad clearance and review requirements imposed on notice and comment

⁵⁶²416 U.S. 267, 294 (1974).

⁵⁶³See Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 Admin. L. Rev. 149, 163 (1986).

⁵⁶⁴*Id.* at 163-64.

rulemaking.⁵⁶⁵ Likewise, modifications may be made more easily through adjudication. While a specific rule may lose its utility over time, the typically generalized and broad nature of the authorities delegated to an agency by Congress will usually ensure the vitality of the overall statutory regime. Accordingly, given that modifications of repeals of rules through notice and comment rulemaking may be a cumbersome and contested issue, policy change through adjudication may be more efficient and flexible.⁵⁶⁶ Relatedly, standard setting through adjudication may allow agencies to address significant regulatory issues more precisely, thereby avoiding the risk that a generally applicable rule will be either over or under-inclusive.⁵⁶⁷

As the factors identified above indicate, there is a significant interplay between rulemaking and adjudication under the APA, and an agency's choice of which of these regulatory vehicles to employ centers on a myriad of equitable and practical considerations that can be of enormous significance to both the agency and those entities affected by agency regulatory efforts. Accordingly, there is a substantial likelihood that a sustained analysis of the multitude of factors that adhere in this context by a reconstituted ACUS would have a salutary effect on the fairness and efficiency of agency regulation.

Evidentiary Standards in Informal Adjudication

The Supreme Court has established a presumption of informality for rulemaking proceedings, but has not specifically addressed the issue in the context of agency adjudication.⁵⁶⁸ The APA establishes formal and explicit procedural requirements only for those adjudications that are "required by statute to be determined on the record after opportunity for an agency hearing."⁵⁶⁹ This provision effectively establishes that the APA's adjudication procedures are mandatory only in those instances when an agency is directed by the terms of a separate statute to conduct an evidentiary hearing in the adjudication of cases.

The federal courts have devised three separate approaches to assess whether an agency that is engaged in adjudication is required to use the formal procedures delineated in the APA. In *Seacoast Anti-Pollution League v. Castle*, the First Circuit held that the APA's formal adjudication provisions were applicable in any instance when a federal adjudicator is required by statute to hold a "hearing."⁵⁷⁰ The court in *Seacoast* explained that the statute at issue need not specifically require a hearing to be held "on the record" or "in compliance with" the formal adjudication provisions of the APA. Instead, under the *Seacoast* standard, the simple imposition of a statutory hearing requirement is sufficient to trigger these formal provisions.⁵⁷¹ Conversely, in *City of West Chicago v. Nuclear Regulatory Commission*, the Seventh Circuit held that unless clearly indicated by Congress, an agency is free to employ informal adjudication at its

⁵⁶⁵See E. Donald Elliot, *Re-Inventing Rulemaking*, 41 Duke L.J. 1490 (1992).

⁵⁶⁶See Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking* 143 (American Bar Ass'n, 4th ed. 2006).

⁵⁶⁷*Id.* at 144.

⁵⁶⁸Peter L. Strauss *et al.*, *Gellhorn & Byse's Administrative Law* 333 (10th ed. 2003).

⁵⁶⁹5 U.S.C. § 554(a) (2000).

⁵⁷⁰572 F.2d 872 (1st Cir. 1978).

⁵⁷¹*Id.* at 874-78.

discretion.⁵⁷² Under this approach, the simple inclusion of a requirement for a hearing in a statute will not mandate the use of the formal adjudication provisions of the APA; rather, the text of the statute or the legislative history accompanying the enactment must make it clear that Congress intended for the agency to use such formal procedures.⁵⁷³ Finally, the District of Columbia Circuit has held that the issue of whether a statute requires compliance with the APA's formal adjudication provisions must be resolved pursuant to the *Chevron* standard. Specifically, in *Chemical Waste Management, Inc. v. EPA*, the court, upon determining that it was unable to ascertain sufficiently whether a statute requiring the EPA to hold "public hearings" indicated a clear Congressional intent that formal procedures were to be followed, declared that it would defer to the EPA's position that the statute allowed "informal hearing procedures."⁵⁷⁴ Thus, under the *Chemical Waste* standard, an agency is free to devise its own procedures in adjudicating cases absent a clear statutory indication that the APA's formal provisions apply.⁵⁷⁵

This split in authority, coupled with the related result and effect that the vast majority of agency adjudications are not subject to the formal procedural protections of the APA, has been the source of significant academic consideration. The American Bar Association (ABA) has been particularly active in addressing this issue. In 2000, the ABA House of Delegates issued Resolution 113, recommending both that Congress should explicitly address whether formal or informal adjudication was required when enacting new law, and that, in instances where new legislation does not explicitly address the issue, a presumption should rest in favor of the application of the APA's formal adjudication requirements.⁵⁷⁶ While the first aspect of this resolution would provide legal clarity at a low cost to the legislative resources of Congress, the utility of the latter recommendation is less clear. Although it has been argued that such an approach would give effect to the original intent of the APA, it has also been asserted that the blanket imposition of formal procedural requirements would be excessively doctrinal and formalistic to the detriment of agency efficiency and flexibility.⁵⁷⁷

The ABA's Section on Administrative Law and Practice has engaged in further study of this issue, culminating in the submission of a revived proposal to the ABA House of Delegates that was approved on February 14, 2005.⁵⁷⁸ While retaining the aforementioned recommendations, the 2005 proposal specifically addressed informal adjudication, advocating that certain formal procedural protections should be extended to informal proceedings, such as the provision of an impartial decisionmaker, a requirement for the issuance of a written or oral decision of findings, and a prohibition on *ex parte* contacts.⁵⁷⁹

⁵⁷²701 F.2d 632 (7th Cir. 1983).

⁵⁷³*Id.* at 641.

⁵⁷⁴873 F.2d 1477, 1480-82 (D.C. Cir. 1989).

⁵⁷⁵*Id.* at 1482.

⁵⁷⁶See Gary J. Edles, *An APA Default Presumption For Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 Admin. L. Rev. 787, 788 (2003).

⁵⁷⁷*Id.*

⁵⁷⁸See Daily Journal, ABA House of Delegates, 2005 Midyear Meeting (Feb. 14, 2005).

⁵⁷⁹See Michael Asimov, *The Spreading Umbrella: Extending the APA's Adjudication Provisions to All Evidentiary Hearings Required by Statute*, 56 Admin. L. Rev. 1003 (2004).

Areas for Additional Research

- Is there a need to reassess the role of ALJs and how they are selected and evaluated? Should regulatory ALJs be treated differently from benefits ALJs?
- Should the notion of a centralized ALJ corps be revisited?
- Is there a need to examine and review the role of non-ALJ hearing officers?
- Should the split-enforcement model of agency adjudication (e.g., OSHA-OSHRC) be used more often?
- Should the APA contain a provision regarding informal adjudication?
- Should the APA's adjudication provisions be extended to all evidentiary hearings required by statute?

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A P P E N D I X : H E A R I N G S

ADMINISTRATIVE LAW, PROCESS AND PROCEDURE
PROJECT FOR THE 21ST CENTURY

HEARING

BEFORE THE

SUBCOMMITTEE ON

COMMERCIAL AND ADMINISTRATIVE LAW

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

NOVEMBER 14, 2006

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ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY

TUESDAY, NOVEMBER 14, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 3:27 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. I would like to apologize to the witnesses for the late start. The votes, and people chatting in the halls, make the gauntlet from the Capitol here virtually impassable. So I apologize to you, and I appreciate your patience and look forward to your testimony.

Today's hearing is a fitting way to bring to a close the 109th Congress. The Committee on the Judiciary, as one of its very first items of business for this Congress, authorized the Subcommittee on Commercial and Administrative Law to undertake a comprehensive study of administrative law, process and procedure on January 26, 2005, as part of the Committee's oversight plan for the 109th Congress.

This hearing represents the culmination of that 2-year study known as the Administrative Law, Process and Procedure Project for the 21st Century. Over the course of this project, the Subcommittee conducted six hearings, participated in three symposia, and sponsored several empirical studies.

Topics examined as part of this project included the adjudicatory process of agencies; the role of public participation in rulemaking; the process by which agency rulemaking is reviewed by the Congress, the President, and the Judiciary; and the role of science in the regulatory process.

From its very inception, this project has been a thoroughly bipartisan and nonpartisan undertaking. To that end, I want to thank the Subcommittee Ranking Member, Mr. Watt for his active and unwavering support throughout this undertaking, and point out that I look forward to working with him in whichever chairmanship he assumes in the next Congress.

It is also important to remember that this project was inspired and initiated by the House Judiciary Chairman, Jim Sensenbrenner. The project is a testament to the Chairman's deep and long-standing commitment to improving the law and procedure in general, and, in particular, to improving the administrative and

rulemaking process. Accordingly, we thank the Chairman for his insight and leadership in allowing the Subcommittee to spearhead this endeavor.

It is also appropriate at this time to extend our sincere thanks to the Congressional Research Service and its director, Dan Mulhollan, for devoting so many critical resources—physical, financial, and human—to this project.

The three witnesses who appear today on behalf of CRS, namely, Mort Rosenberg, Curtis Copeland and T.J. Halstead, deserve much of the credit for playing such a major role in guiding the project and ensuring its success.

It is my sincere hope that the findings and recommendations of the project's report, which will be issued later this month, will not just sit on the proverbial shelf to gather dust. Rather, it should become a valuable legacy for the next Congress.

Let me cite just one example. One of the most important legacies of the project is that it underscored the absolute and urgent need to have a permanent, neutral, nonpartisan think tank that can dispassionately examine administrative law and process and that can make credible recommendations for reform. Clearly, I am referring to the need to reactivate the Administrative Conference of the United States. Although reauthorized in the 108th Congress with overwhelming bipartisan support, the Conference remains to be funded.

The extremely nominal investment to fund ACUS would redound in billions of savings in taxpayer dollars. Accordingly, I encourage our Subcommittee Members on both sides of the aisle to continue to pursue this very worthy cause in the waning days of this Congress, and, if that fails, in the next Congress.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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Mr. CANNON. I now turn to my colleague Mr. Watt, the distinguished Ranking Member—soon to be more distinguished—of the Subcommittee, and ask him if he has any opening remarks.

Mr. WATT. Thank you, Mr. Chairman. I assure you that being a Chair or a Ranking Member is not, by definition, more distinguishing or less distinguishing.

Mr. CANNON. I agree with the gentleman. I hope that I don't lose much stature in the process. It would be hard for you to gain more stature because you're a person of great accomplishments and distinction already.

Mr. WATT. It does feel good.

Mr. CANNON. Now let's not rub it in, okay?

Mr. WATT. I will just, if it is all right, Mr. Chairman, ask unanimous consent to revise and extend my remarks and submit a statement for the record, and will make a very brief comment about this hearing because I think it is important for us to do the follow-up. And hopefully whoever is in charge of this Subcommittee and Committee next term of Congress will not allow this to go unnoticed, and the package of recommendations will be implemented.

We are in thorough need of reform in Government agencies and the administrative procedures since we haven't had a major reform in over a decade, when we had the National Performance Review and the second Clinton/Gore term began to focus on some of these issues, so I think this is important. The Chair has put it at the top of his agenda, and I hope some Chair will put it at the top of their agenda in the next term of Congress if nothing is done this year.

That having been said, Mr. Chairman, I would ordinarily yield back, but if this is to be the last meeting of our Subcommittee in this term of Congress, I think I would be remiss not to express my gratitude to you and my high admiration for the manner in which you have conducted this Subcommittee and consulted with me as the Ranking Member. It's the kind of consultation that I think is important, and that the American people are saying they desire to have Republicans and Democrats have. And from my part, you can be assured wherever I am, as a Chair, it will be my intention to exercise the same kind of consultation as we go forward, either on this Subcommittee or on whatever Subcommittee I'm on, on Judiciary or Financial Services, which I may also be eligible for a Subcommittee on.

So you've set a good model for us and set a high standard for bipartisanship and consultation and respect and friendship, and I just publicly want to express my thanks to you for that.

And with that, I'll yield back the balance of my time.

Mr. CANNON. I want to thank the gentleman for those kind remarks. I can't imagine any kinder thing being said about me, except possibly that I'm a good father, but you don't know my family, so that's beyond your purview. But thank you very much for those kind comments.

And I would just point out that America has evolved, it's grown in the last 10 or 12 or 15 years, and I think the next Congress is going to be an opportunity to focus on what America needs and not in a partisan fashion. There are many, many issues that are truly nonpartisan that are important, and I look forward to working with the gentleman on many of those issues.

Without objection, the gentleman's entire statement will be placed in the record. Hearing no objection, so ordered.

[The information referred to was not available.]

Mr. CANNON. I ask unanimous consent to include a letter from the American Bar Association in the prehearing record. Hearing no objection, so ordered.

[The information referred to can be found in the Appendix.]

Mr. CANNON. Without objection, all Members may place their opening statements in the record at this point. Hearing no objection, so ordered.

Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing no objection, so ordered.

I ask unanimous consent that the Members have 5 legislative days to submit written statements from the conclusion of today's hearing record. Hearing no objection, so ordered.

I am now pleased to introduce today's witnesses for today's hearing.

Our first witness is Mort Rosenberg, a specialist in American public law in the American Law Division at the CRS. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years he's been associated with CRS. Prior to his service at that office, he was chief counsel at the House Select Committee on Professional Sports, among other public service positions he's held. In addition to these endeavors, Mort has written extensively on the subject of administrative law. He obtained his undergraduate degree from New York University and his law degree from Harvard Law School, and he has been a remarkable help us to through this process, and I want to thank you for that, Mr. Rosenberg.

Our second witness is Dr. Curtis Copeland, a specialist in American Government at CRS. Dr. Copeland's expertise, appropriately relevant to today's hearing, is Federal rulemaking and regulatory policy. In addition to this area of expertise, Dr. Copeland also heads the Government and Finance Divisions, Executive and Judiciary Section at CRS, which covers issues ranging from Federal financial management to the appointment of Supreme Court Justices. Prior to joining CRS, he held a variety of positions at the Government Accountability Office over a 23-year period. Dr. Copeland received his Ph.D. From the University of North Texas.

Our final witness is T.J. Halstead, a legislative attorney in the American Law Division of CRS, and in this capacity is one of CRS's primary analysts on administrative law and separation of powers issues. Before joining CRS in 1998, Mr. Halstead received both his undergraduate and law degrees from the University of Kansas.

We understand and appreciate that as CRS staff, your testimony will be confined to technical, professional and nonadvocative aspects of the hearing subject matter pursuant to congressional guidelines on objectivity and nonpartisanship.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing.

In light of the fact that your written statements will be included in the hearing record, I request that you limit your oral remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system that starts with a green light. After 4 minutes it turns to a yellow light, and then at 5 minutes it turns to a red light. It is my habit to tap the gavel or a pencil at 5 minutes. We would appreciate it if you would finish up your thoughts within that time frame. We don't want to cut people off, and certainly not in the middle of your thinking, so it's not a hard red light or a hard termination.

After you've presented your remarks, the Subcommittee Members, in the order they arrive, will be permitted to ask questions of the witnesses subject to the 5-minute limit. I suspect that won't be a real long event.

Let me just say we welcome Mr. Chabot, who has joined us here on this end.

I would ask the witnesses to rise and raise your hand to take the oath.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that all the witnesses answered in the affirmative.

Mr. Rosenberg, would you now proceed with your testimony.

TESTIMONY OF MORTON ROSENBERG, ESQ., SPECIALIST IN AMERICAN PUBLIC LAW, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. ROSENBERG. Thank you, Mr. Chairman. Thank you, Mr. Watt. I just want to reiterate that I am honored not only to appear before you again, but also for giving me the opportunity to do the kind of work we've been doing for the last 2 years. It's been an education for me, and it's been a fruitful endeavor to put together, you know, symposia, be at these hearings, and to generally support the work of this Committee in identifying emerging issues.

Today, my CRS colleagues Curtis Copeland and T.J. Halstead and I will try to brief you on the status of the Process and Procedure Project and what might be done in the future. My testimony will focus on the potential significance of the reactivation of ACUS, and one of the seven elements of the project, the Congressional Review Act. Curtis and T.J. Will discuss the other six elements of the study.

With respect to ACUS, I've always thought that in this part of the project there was, you know—of course it's important for it to

be the reactivation that occurred in 2000—the reauthorization that occurred in 2004 was important, and that the funding and ultimate reactivation of ACUS was not important at that moment. But at some particular point—and our experience with our studies underlines the fact that there is a need for an organization like ACUS, which provided nonpartisan, nonbiased, comprehensive, practical and cost-effective assessments and guidance on a wide range of agency processes, procedures and practices, a history that has been well documented before this Committee.

What struck me as important was one of the study projects that we commissioned, the one which Professor West conducted with regard to participation in the—public participation in the prenotice and comment period. His excellent study was, you know, hindered a great deal by the fact that, as his testimony before this Committee revealed, that his entree to the Committee, to the agencies that he was attempting to get information and to do his assessments was met with recalcitrance and suspicion. Generally, the best information that he got was through informal interviews that were in, you know, deep, you know, background from knowledgeable officials of these agencies.

That was not true during the heyday of the Administrative Conference. Its reputation of credibility, of nonpartisanship, and expertise opened doors when an ACUS-sponsored researcher came to the door because there was a certain amount of self-interest involved. The reputation of ACUS as an entity that would provide expert guidance redounded, and the kinds of studies and suggestions for the agencies to—you know, to change their practices or to undertake new ways of decisionmaking redounded to their benefit so that there was a self-interest involved in having an ACUS study that could help that agency. So that reactivation, you know, that could be looked to as an extraordinarily important aspect to it.

I also enjoyed very much the empirical—the symposia that we conducted, as well as the—one of the more symposia—at least, and most interesting was the science and rulemaking symposium, from which, after questioning some of the members of the panel on advisory bodies, we discovered that nobody knew how many science advisory bodies were out there. Nobody knew what the selection process was—these were among experts in this field—and as a result of that revelation in itself—and the panels at that science symposia were quite excellent—we commissioned a study to develop a taxonomy of science advisory committees in the Federal Government, a study that will be completed sometime next June, and we'll present it to this Committee, which will tell us, you know, how many there are, how they're selected, how they're vetted, how they deal with conflicts of interest and various important information about these advisory committees that will allow Congress to decide whether any kinds of legislative actions needs more regulating.

The symposium we held on September 11 on Presidential, Congressional and Judicial Control of Rulemaking was also one that I would recommend to scholars, Congresspeople, everybody to read the transcript. One of the themes and one of the things that came across very well was the constitutional dimension of the study, or parts of the study, that you are engaged in. And I will talk about that, you know, in a few moments.

I chaired the panel on the Congressional Review Act, and of course I've spoken about the Congressional Review Act with you at one of your hearings. The panel was interesting, revealing, and I'd like to say a few words about the Congressional Review Act and where we could go from here.

Congress' stated objective of setting in place an effective mechanism to keep it informed about the rulemaking activities of Federal agencies which would allow for expeditious congressional review and possible nullification of particular rules may not have been met. That was the clear result of the testimony there and the discussion. Statistically, to date, over 43,000 rules have been reported to Congress, including over 630 major rules, and only one, the Department of Labor's ergonomics standard, was disapproved in 2001. Many analysts believe that the negation of the ergonomics rule was a singular event, not likely to be repeated.

Witnesses at your hearing pointed to structural defects in the mechanism, most commonly the lack of a screening mechanism to identify rules that warranted review by jurisdictional Committees, and then expedited consideration process in the House—the lack of an expedited consideration process in the House that complemented the Senate's procedures, as well as numerous interpretive difficulties of key statutory provisions that seemed to deter use of the mechanism.

One witness at the hearing, Todd Gaziano of the Heritage Foundation, while agreeing with the structural critique, suggested that the law's presence and the threat of a filing of a joint resolution of disapproval had had a degree of influence that could not be ignored. He agreed, however, that the framers of the legislation anticipated that the mechanism would provide an incentive for legislators to insist on institutional accountability as a response to criticisms of Congress that it had been delegating vast amounts of law-making authority to executive agencies without maintaining countervailing checks on the exercise of that authority.

There was also recognition among the witnesses that the establishment of a joint Committee that would screen rules, recommend action to jurisdictional Committees in both Houses could provide the coordination and information that were necessary to inform the bodies sufficiently and in a timely manner and nature of such to take appropriate legislative actions.

The balanced nature of such a joint Committee and its lack of substantive authority appeared to provide a way to allay political concerns over turf intrusions. The House Parliamentarian, John B. Sullivan, agreed that such a joint Committee was a viable construct.

A further question raised at the March hearing, and again at the panel discussion of the Congressional Review Act in the September 11th symposium, was whether it was necessary to have all the rules reported and reviewed. It was suggested that only major rules need be reported, which would save legislative time, and also money; and that the many rules, the thousands that have come before Congress, simply aren't of a stature that needs to be addressed by a jurisdictional Committee.

There was no consensus, however, among the panelists as to who or how a major rule would be defined. There was an agreement

among the panelists that the nonsubstantive advisory joint Committee would be a politically viable screening mechanism, but not the same unanimity with respect to an expedited House consideration procedure. Former House Parliamentarian, Charles Johnson, explained that it was likely that the lack of a parallel House expedited procedure in the CRA was purposeful. He explained that the House leadership believes that the House is a majoritarian institution, and that expedited procedures undermines majority rule.

One panelist, Professor Jack Beermann, expressed a view that making it easier for Congress to overturn an agency rule may come at a very high political cost. He asks the question, “does Congress really want to be in the position where it is perceived that everything an agency does is their responsibility, since they’ve taken it on and reviewed it under this mechanism? Do they want to have that perception?” He concluded, “I think that this may just increase the blaming opportunities for Congress.”

Professor Beermann also stated the belief that—similar to that expressed by Todd Gaziano, that the current CRA has the effect of forcing the executive to negotiate, which is a satisfactory result, in his view. I don’t think there is a lot of empirical evidence to support those comments, but it is a view that’s prevalent out there.

Proponents of the CRA concept, however, argue that it reflects a congressional recognition of the need to enhance its own political accountability, and thereby strengthening the perception of legitimacy and competence of the administrative rulemaking process.

It is also said to rest on an understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court’s most recent rejection in 2001 in the *Whitman* case of an impending revival of the so-called nondelegation doctrine is impetus for Congress to consider several facets and ambiguities of the current mechanism.

Absent congressional review, it is argued, current instances of avoidance in notice and comment, rulemaking, lack of full reporting of covered rules to be submitted under the CRA, and increasing Presidential control over the rulemaking process will likely continue. Professor Paul Verkuil, who was on the CRA panel, was a particularly strong voice for this view at the symposium.

Let me conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated, but balanced powers. The tension and conflicts of this scheme were well brought forth and voiced in CRS’s symposium on Presidential, Congressional and Judicial Control of Rulemaking.

There can be little doubt as to Congress’ authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking, and to prescribe the manner in which congressional review will be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences. I thank you, and I’ll welcome questions.

Mr. CANNON. Thank you, Mr. Rosenberg.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG



STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

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

CONCERNING

THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

PRESENTED ON

NOVEMBER 14, 2006

Mr. Chairman and Members of the Subcommittee

I am honored to appear before you again to present another progress report on CRS's efforts with respect to the unique and important study project initiated by the leadership of the House Judiciary Committee and your Subcommittee. You were concerned that in the last decade, a period coincident with the absence of the Administrative Conference of the United States, many new issues of administrative law, process, and procedure had emerged that had not been properly addressed or perhaps even identified. Today my CRS colleagues, Curtis Copeland and T.J. Halstead, and I will brief you on the status of the study project and what might be done in the future. My testimony will focus on the potential significance of the reactivation of ACUS and on one of the seven elements of the project, the Congressional Review Act. Curtis and T.J. will briefly discuss the other six elements of the study. Let me start with some background.

The Administrative Law, Process, and Procedure Project (Project) has been a bipartisan undertaking of the House Judiciary Committee, overseen and conducted by its Subcommittee on Commercial and Administrative Law. It has had two principal goals: to reauthorize and to substantiate the need to reactivate the Administrative Conference of the United States (ACUS), and, simultaneously, to set in motion a study process that would identify the important issues of administrative law, process, and procedure that have emerged in the eleven year hiatus since its demise that would serve as a basis for either immediate legislative consideration and action by the Committee or as the initial agenda for further studies by a reactivated ACUS.

Initial success was achieved by the Committee with respect to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004, Pub. L. 108-401, on October 4, 2004, reauthorizing ACUS. But, as of this date, funding legislation has not been passed.

Action to accomplish the second goal was initiated by the Committee's adoption of an oversight plan for the 109th Congress which made a study of emergent administrative law an process issues a priority oversight agenda item for the Subcommittee on Commercial and Administrative Law. The oversight plan identified seven general areas for study: (1) public participation in the rulemaking process; (2) congressional review of agency rulemaking; (3) presidential review of agency rulemaking; (4) judicial review of agency 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. The Subcommittee, in turn, tasked the Congressional Research Service (CRS) with coordinating the research effort.

ACUS

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

rationale that appears to have been successful in supporting the passage of the ACUS reauthorization measure.

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

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

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related to issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

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

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

³ *Hearing on the Reauthorization of the Administrative Conference of the United States*, 108th Cong., 2d Sess. (May 20, 2004).

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

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

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

I would note that ACUS' established credibility and non-partisan reputation opened doors at federal agencies and allowed access to ACUS-sponsored research to internal operational information that normally would not have been available otherwise. Professor William West testified before this Subcommittee of the reluctance of most agencies to provide him with information vital to his study on public participation at the development stage of a rulemaking proceeding. His requests for information were often met with reluctance and suspicion and his most valuable contacts with knowledgeable officials were on deep background. This was not the usual ACUS experience where agency cooperation was generally the rule. ACUS researchers were often welcomed because the results of their studies redounded to the benefit of the agency.

Reactivation of ACUS to make it operational would come at an opportune time. Let me provide some examples that respond to the Committee's interests. As I have indicated to you in past testimony and written memoranda, the Department of Homeland Security's (DHS) response to Hurricane Katrina and its continuing efforts to stabilize and adjust its organizational units to achieve optimum efficiency and responsiveness in planning for and successfully dealing with terrorist or natural disaster incidents have been and are continuing to receive considerable congressional attention and criticism. Both these issues, and the role ACUS might play in resolving them, appear closely related.

The Katrina catastrophe, for example, raised a number of questions as to the organization, authority and decisionmaking capability of DHS' Federal Emergency Management Agency (FEMA). Previously an independent, cabinet-level agency reporting directly to the President, FEMA was made a subordinate agency in the creation of DHS and saw some of its authority withdrawn and placed elsewhere and its funding reduced. Suggestions were made that these and other administrative operating deficiencies contributed to ineffective planning and responses that included communications break-downs among Federal, State and local officials, available resources not being used, and official actions taken too late or not taken at all, among others.⁵ It was also suggested that FEMA revert to its previous independent status outside of DHS. In October 2006 Congress acted by "reassembling" FEMA as a "distinct" entity within DHS. A reactivated and operational ACUS could be tasked with reviewing, assessing and making recommendations with respect to FEMA's new role, how it should play that role, and the authorities it needs to fulfill that role, as well as assessing the need for more comprehensive authority for such emergency situations.

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

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

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

Many of our recommendations call for the government to increase its presence in our lives— for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.

At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also to assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market.

Finally, in addition to the impact of 9/11, the decade long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies have suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than having the effect of enhancing public participation. The issue would appear ripe for ACUS-like guidance. Among other public participation issues that may need study include the peer review process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued problem of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented

for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? Is there an effective way to review, assess and modify or rescind "old" rules? Is the time ripe for codification of the process of presidential review of rulemaking that is now guided by executive order. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Anecdotal statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. As will be discussed below, CRS has commissioned a study to determine the accuracy of such claims. Whatever the result of the study, important questions may be raised: Is it appropriate for Congress to consider statutorily modifying the "reasonable decisionmaking standard" now prevailing, or to limit judicial preview of rulemaking by, for example, having all "major" rules come to Congress and be subject to joint resolutions of approval? These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

Hearings

Since 2004, the Subcommittee has held a series of hearings in anticipation of and as part of the Project. Following its May 20, 2004 oversight hearing on the proposed reauthorization of ACUS, at which Justices Scalia and Breyer testified, the Subcommittee conducted a second hearing on ACUS that examined further reasons why there is a need to reactivate ACUS. On November 1, 2005, the Subcommittee held a hearing on the status of the Project. In 2006, the Subcommittee held three hearings. The first, in March, 2006, focused on the Congressional Review Act in light of the Act's tenth anniversary. The second dealt with how the Regulatory Flexibility Act (RFA) has been implemented since its enactment in 1980 and whether proposed legislation, such as H.R. 682, the Regulatory Flexibility Improvement Act, would adequately address certain perceived weaknesses in the RFA. Finally, on July 14, 2006, the Subcommittee held a hearing on the 60th Anniversary of the passage of the Administrative Procedure Act (APA), addressing the question of whether the APA is still effective in the 21st century.

Symposia

In addition to conducting hearings, the Subcommittee to date has sponsored three symposia as part of the project. The first symposium, held on December 5, 2005, "E-Rulemaking in the 21st Century," dealt with Federal E-Government initiatives. This program, chaired by Professor Cary Coglianese, examined the Executive Branch's efforts to implement e-rulemaking across the federal government. A particular focus of this program was the ongoing development of a government-wide Federal Docket Management System (FDMS). Presentations at the symposium were given by government managers involved in the development of the FDMS as well as by academic researchers studying e-rulemaking. Representatives from various agencies, including the Office of Management and Budget (OMB), the U.S. Environmental Protection Agency, and the GAO, discussed the current progress of e-rulemaking. In addition, academics reported on current and prospective research endeavors dealing with certain aspects of e-rulemaking. The program offered a structured dialogue that addressed the challenges and opportunities for implementing e-rulemaking, the outcomes achieved by e-rulemaking to date, and strategies that could be used in the future to improve the rulemaking process through application of information technology.

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted a day-long conference for the Subcommittee entitled "The Role of Science in the

Rulemaking.” The four panels – “The Office of Management and Budget’s Recent Initiatives on Regulatory Science,” “Science and Judicial Review of Rulemaking,” “Science Advisory Panels and Rulemaking,” and “Government Agencies’ Science Capabilities” – reflected the current debate over whether “sound science” has been given sufficient weight in the development of regulatory standards. As part of that debate, questions have been raised about the quality of the data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can or should play in deciding what to regulate and at what levels.

On September 11, 2006, the Congressional Research Service, on behalf of the Subcommittee, sponsored a day-long seminar entitled “Presidential, Congressional, and Judicial Control of Agency Rulemaking,” consisting of four panels of academics, government officials and private sector public interest groups that addressed “Conflicting Claims of Congressional and Executive Branch Legal Authority Over Rulemaking,” “Judicial Review of Rulemaking,” “Congressional Review of Rulemaking,” and “Presidential Review of Rulemaking: Reagan to Bush II.”

Empirical Studies

Three empirical studies were initiated by CRS. The first, conducted by Professor William West of the Bush School of Government and Public Service at Texas A&M University, studied how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on regulatory agendas; how the rulemaking process is managed at inter and intra-agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West presented his findings and conclusions at your March 30, 2006 hearing.

A second study commissioned by CRS sought to fill the void created by the absence of an authoritative, systematic empirical analysis of the effects of judicial review of agency rulemaking by federal appellate courts. Professor Jody Freeman of the Harvard Law School agreed to conduct the study which will analyze the pertinent rulings of all federal circuit courts of appeal from 1995 to 2004 to determine the rate at which rules are invalidated in whole or in part, and the reasons for those invalidations. Professor Freeman’s study is still on-going.

A third study arose out of a discussion during the panel on the role of science advisory bodies in agencies at the Science and Rulemaking symposium when it became apparent that there was no authoritative compilation of how many science advisory committees currently exist in the agencies, how they were selected, how issues of neutrality and conflicts of interest were handled, how issues are selected for review, and the impact of advisory body recommendations on agency decisionmaking. CRS commissioned such a study to be conducted by Professor Stuart Brettschneider of the Maxwell School of Public Administration of the Syracuse University. The study is expected to be completed by June, 2007.

The Congressional Review Act (CRA)

As I detailed in my testimony before this Subcommittee in its March 30, 2006, hearing on the tenth anniversary of the passage of the CRA, Congress’s objective of setting in place an effective mechanism to keep it informed about the rulemaking activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules, apparently has not been met. Statistically, to date, over 43,000 rules have

been reported to Congress, including over 630 major rules, and only one, the Department of Labor's ergonomics standard, was disapproved in March, 2001. Many analysts believe that the negation of the ergonomics rule was a singular event, not likely soon to be repeated. Witness at the hearing pointed to structural defects in the mechanism, most prominently the lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, as well as numerous interpretive uncertainties of key statutory provisions, that served to deter use of the mechanism.

One witness, Todd Gaziano of the Heritage Foundation, while agreeing with the structural critique, suggested that the law's presence, and the threat of the filing of a joint resolution of disapproval, has had a degree of influence that should not be ignored. He argued, however, that the framers of the legislation anticipated that the mechanism would provide an incentive for legislators to insist on institutional accountability as a response to criticisms that Congress had been delegating vast amounts of lawmaking authority to executive agencies without maintaining countervailing checks on the exercise of that authority. There was agreement among the witnesses that the establishment of a joint congressional committee that would screen rules and recommend action to jurisdictional committees in both Houses would provide the coordination and information necessary to inform the bodies sufficiently and in a timely manner to take appropriate legislative actions. The balanced nature of such a joint committee and its lack of substantial authority appeared to provide a way to allay political concerns regarding "turf" intrusions. The House Parliamentarian, John v. Sullivan agreed that such a joint committee was a viable construct.

A further question raised at the March hearing, and again at the panel discussion on the CRA at the September 11, 2006, symposium, was whether it was necessary to have all rules reported and reviewed. It was suggested that only "major" rules need be reported, which would save legislative time and money. There was no consensus among the panelists as to who and or how, "major rule" would be defined. There was agreement among the panelists that a non-substantive advisory joint committee would be a valuable screening mechanism, but not the same unanimity with respect to an expedited House consideration procedure. Former House Parliamentarian Charles Johnson explained that it was likely that the lack of a parallel House expedited procedure in the CRA was purposeful. He explained that the House leadership believes that the House is a majoritarian institution and that expedited procedures undermines majority.

One panelist, Professor Jack Beermann, expressed the view that making it easier for Congress to overturn an agency rule may come at a high political cost. He asked "Does Congress want to be in the position where [it is perceived that] everything an agency does is their responsibility since they've taken it on and reviewed it under this mechanism?... Do they want to have that perception? He concluded that "I think that this may just increase the blaming opportunities for Congress." Professor Beermann also stated the belief, similar to that expressed by Todd Gaziano, that the current CRA has the effect forcing the executive to negotiate, which is a satisfactory result.

Proponents of the CRA concept argue that it reflects a congressional recognition of the need to enhance its own political accountability and thereby strengthen the perception of legitimacy and competence of the administrative rulemaking process. It is also said to rest on understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future. The Supreme Court's most recent rejection in 2001 in the *Whitman* case of an impending revival of the non-delegation doctrine adds impetus for Congress to consider several facets and ambiguities of the current

mechanism. Absent effective congressional review, it is argued, current instances of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, and increasing presidential control over the rulemaking process will likely continue.

Let me conclude by observing that much of the Administrative Law Project has an important constitutional dimension, raising the crucial question of where ultimate control of agency decisionmaking authority lies in our constitutional scheme of separated but balanced powers. The tensions and conflicts in this scheme were well brought forth in CRS' symposium on presidential, congressional and judicial control of agency rulemaking. There can be little doubt as to Congress' authority to make the determinative decisions with respect to the wisdom of any particular agency rulemaking and to prescribe the manner in which the review shall be conducted. Whether or not to do so is a political decision, a hard one with many practical consequences.

Mr. CANNON. The Chair would like to recognize Mr. Coble, the gentleman from North Carolina, who has joined us, and also the gentleman from Massachusetts Mr. Delahunt.

In deference to your experience, we went beyond the 5-minute rule. When we made that decision, we had only a couple of us here, but if I could remind the other two questions—we will probably have time for questioning, but I would like to have the panel to have the opportunity to question, so I will probably tap at 5 minutes.

Thank you, Mr. Rosenberg.

And Dr. Copeland, you are now recognized.

TESTIMONY OF CURTIS COPELAND, PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. COPELAND. Thank you very much.

Mr. Chairman, Members of the Subcommittee, thank you for inviting me here today to discuss the Administrative Law Project. My testimony will focus on three elements of that project, the Presidential review of rulemaking, the utility of regulatory analysis requirements and the role of science in the regulatory process.

During the past 25 years, the epicenter of Presidential review has been a small office within OMB, the Office of Information and Regulatory Affairs, or OIRA. OIRA's role in reviewing agency rules has changed with the changes in the Presidency. The current Bush administration has reasserted OIRA's gatekeeper role that was prominent during the Reagan administration.

Although OIRA's reviews have become somewhat more transparent in recent years, it is still far from a transparent process. For example, OIRA has said that it has its greatest impact before rules are formally submitted to it for review, but has instructed agencies not to disclose those changes to the public.

OIRA also remains highly controversial. Some public interests groups assert that OIRA review has been a one-way ratchet that only weakens and delays rules, while business groups contend that OIRA has not been assertive enough in reining in agencies.

A number of very interesting studies have recently examined the impact that OIRA has on rulemaking, but many issues remain that either Congress or ACUS may want to address. Those issues include whether Congress should codify Presidential review, whether independent regulatory agencies' rules should be subject to review, and what rules should govern OIRA's contacts with outside parties during the review process.

OIRA also has been a key player in implementing regulatory analysis requirements established by Congress and the President. Many of those requirements were developed in the 1980's and '90's in an effort to ensure that the benefits of regulation were worth the compliance cost. For example, before publishing any proposed or final rule, the Regulatory Flexibility Act of 1980 requires agencies to prepare an analysis describing the rule's effects on small businesses and what efforts the agency took to avoid those effects.

The Unfunded Mandates Reform Act of 1995 has similar requirements to protect the interests of State and local governments. Executive Order 12866 requires covered agencies to prepare a cost/

benefit analysis for any rule having a \$100 million impact on the economy. However, numerous studies indicate that these requirements have often been less effective than their advocates have hoped. For example, agencies can avoid a reg flex analysis if they certify that the rule in question does not have a “significant economic impact” on a “substantial number of small entities.” And agencies have certified rules, even when they cost businesses thousands of dollars each year in compliance costs.

In other cases, new requirements have been linked to old ones that have been viewed as ineffective. For example, the requirements that agencies develop compliance guides to help businesses and others comply with the regulations and that agencies reexamine their rules every 10 years are not triggered if the agency certifies those rules don’t have a significant impact on small entities.

After more than 25 years of experience with these analytic requirements, we know surprisingly little about their effectiveness or how they can be improved. Issues that Congress or ACUS could explore include the extent to which the requirements contribute to what is called the “ossification” of the rulemaking process; the accuracy of agency’s prerule estimates of cost and benefits; and whether the myriad of requirements should be made consistent and codified in one place.

The role of science in rulemaking has become highly controversial in recent years, with observers from both the left and the right suggesting that “sound science” has been given insufficient weight in the development of regulatory standards. The May 2006 symposium that Mort mentioned on this topic featured panelists discussing such issues as the role of science advisory panels, science and judicial review, and Government agencies’ capabilities. A panel that I moderated focused on OIRA’s recent science-related initiatives, including recent bulletins on peer review and risk assessment.

While OIRA’s peer review bulletin was initially very controversial, with some science groups and others asserting that it could make peer review vulnerable to political manipulation or controlled by regulated entities. As a result of those concerns, OIRA later published a substantially revised version of the bulletin that gave agencies more discretion, while reserving some for itself.

OIRA’s January 2006 proposed bulletin on risk assessment is currently undergoing peer review by the National Academy of Sciences. In May 2006, nine Federal agencies testified at a public meeting on that bulletin. Some agencies said that the scope of this risk assessment bulletin is so broad that doctors and the public may not receive timely warnings about potential health risks posed by medical devices and drugs like Vioxx. Other agencies were more supportive of the risk bulletin, but still proposed certain changes.

Possible areas for further research in this area include whether the Information Quality Act should be amended to provide for judicial review, how advisory panels can be constructed to ensure that they’re unbiased, and whether governmentwide standards for peer review and risk assessment are needed and working as intended. Objective and rigorous examinations of all of these administrative law issues by Congress or ACUS could prove to be a wise investment in the long term.

Mr. Chairman, that concludes my prepared statement. I'd be happy to answer any questions.

Mr. CANNON. Thank you, Dr. Copeland.

[The prepared statement of Mr. Copeland follows:]

PREPARED STATEMENT OF CURTIS W. COPELAND



Statement of Curtis W. Copeland
Specialist in American National Government
Congressional Research Service

Before

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

November 14, 2006

on

“The Administrative Law, Process, and Procedure Project”

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss this Subcommittee's bipartisan “Administrative Law, Process, and Procedure Project” and our work during the past two years related to that project. As my colleague Mort Rosenberg mentioned, an underlying theme in many of the comments and recommendations received related to those projects has been that the newly reauthorized Administrative Conference of the United States (ACUS) should be funded and tasked with addressing many of these kinds of topics. The projects also yielded numerous issues that Congress may want to address. My testimony today will focus on three elements of the administrative law project — presidential review of agency rulemaking, the utility of regulatory analysis and accountability requirements, and the role of science in the regulatory process — and will highlight some of the issues identified for ACUS or for Congress.

Presidential Review of Agency Rulemaking

At the September 11, 2006, symposium on “Presidential, Congressional, and Judicial Control of Rulemaking” that CRS sponsored for this Subcommittee, there was a great deal of discussion about whether Congress or the courts or the President actually controls agency rulemaking behavior.¹ At the conclusion of the day, the consensus seemed to be that, on a

¹ The transcripts of this symposium are available online at the website for the Center for the Study (continued...)

day-to-day basis, the President has far more control than either of the other branches. During the past 25 years, the epicenter of presidential control has been the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget. Although created by the Paperwork Reduction Act of 1980 and periodically tasked by Congress with other statutory responsibilities, OIRA is located within the Executive Office of the President and reviews hundreds of agency regulations each year before they are published to ensure that the President's policies are implemented. In a sense, therefore, OIRA embodies the tension between presidential and congressional control.

I moderated a panel at the September 11 symposium on "Presidential Review of Rulemaking: Reagan to Bush II." One of the participants on that panel was Sally Katzen, currently a professor of law at George Mason University who was administrator of OIRA from 1993 to 1998 during the Clinton Administration. As Professor Katzen pointed out, all presidents since President Nixon have called for some form of centralized review in order to, as she put it, "get their hands around agency rulemaking." The genesis of the current form of centralized presidential review is traceable to President Reagan's Executive Order 12291 in 1981, which tasked the newly-created OIRA with reviewing all agency rules except those from independent regulatory commissions — several thousand per year.² In 1985, President Reagan extended OIRA's influence over rulemaking even further by issuing Executive Order 12498, which required covered agencies to submit a "regulatory program" to OMB each year listing all of their significant regulatory actions underway or planned.³ As a result, any rule submitted to OIRA for review that had not been previously identified could be returned to the agency for "reconsideration."

The expansion of OIRA's authority in the rulemaking process via these executive orders was highly controversial. Some voiced concerns that OIRA's role violated the constitutional separation of powers and could affect public participation and the timeliness of agencies' rules.⁴ Some believed that OIRA's new authority displaced the discretionary authority of agency decision makers in violation of congressional delegations of rulemaking authority, and that the President exceeded his authority in issuing the executive orders. Others indicated that OIRA did not have the technical expertise needed to instruct agencies about the content of their rules. Still other concerns focused what was viewed as a lack of transparency of the review process. Professor Katzen said that during the Reagan era and, to a certain extent, during the Bush I era, OIRA was "a big black hole" where regulations went in and the public didn't know what happened. She also said OIRA was generally known as a group of "lean, mean junkyard dogs" who required agencies to make the changes that it wanted, and emphasized reducing regulatory costs over all other goals.

¹ (...continued)

of Rulemaking at American University [<http://www.american.edu/rulemaking/news/index.htm>].

² Executive Order 12291, "Federal Regulation," 46 *Federal Register* 13193, Feb. 19, 1981.

³ Executive Order 12498, "Regulatory Planning Process," 50 *Federal Register* 1036, Jan. 8, 1985.

⁴ U.S. Congress, House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, *Role of OMB in Regulation*, 97th Cong., 1st sess., June 18, 1981 (Washington: GPO, 1981). See also Morton Rosenberg, "Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12291," *Michigan Law Review*, vol. 80 (Dec. 1981), pp. 193-247.

When President Clinton took office and Sally Katzen became head of OIRA in 1993, she said they wrote Executive Order 12866 to make several basic changes in the presidential review process.⁵ For example, under this executive order, OIRA only reviews “significant” rules from the covered agencies, reducing the number of rules reviewed from several thousand to about 600 per year. The new executive order also improved the transparency of OIRA’s reviews by, for example, requiring agencies to disclose the changes made as a result of OIRA’s review. Other changes included reaffirming the “primacy” of the agencies in the rulemaking process (since, she argued, they possess the subject matter expertise and experience) and recognizing that non-quantifiable costs and benefits are essential to consider. In essence, Professor Katzen said, OIRA adopted a more cooperative and friendly approach to the agencies than had been the case during the Reagan and first Bush Administrations.

When the current President Bush took office in 2001, and particularly after John Graham became OIRA administrator in July of that year, OIRA’s role in presidential review changed again — even though the pertinent executive order stayed the same. OIRA’s role as “gatekeeper” or watchdog returned, and with it came an increased emphasis on economic analysis and an increase in letters from OIRA returning rules to the agencies for their “reconsideration.” OIRA also ventured into several new areas, publishing bulletins in the last three years on peer review practices, agencies’ use of guidance documents, and risk assessment procedures. OIRA became somewhat more transparent during John Graham’s nearly five-year tenure, disclosing meetings with outside parties about rules whenever they occurred and publishing on the Office’s website the status of all rules under review. However, OIRA still contends that the changes that it recommends to agencies before the formal review process begins (when OIRA says it has its greatest impact) should not be disclosed to the public. Also, although OIRA reveals its meetings with outside parties, the lists provided sometimes make it difficult to know what rule is being discussed or who the outside parties actually represent.

In the last several years, several scholars have attempted to assess the actual impact that OIRA has on rules.⁶ While some of these studies are interesting and quite good, to really understand OIRA’s effects, researchers must go rule-by-rule and examine the evidence provided in rulemaking dockets. One such study that the General Accounting Office (GAO, now Government Accountability Office) completed three years ago revealed that OIRA frequently suggested only minor changes to rules, but had a much more significant impact on certain types of rules — most notably rules submitted to OIRA from the Environmental Protection Agency’s (EPA) air and water programs and the Federal Aviation Administration.⁷ For example, at OIRA’s recommendation, EPA removed manganese from a list of hazardous wastes, deleted certain types of engines from coverage of a rule setting emissions standards, and delayed the compliance dates for two other types of emissions.

⁵ 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>].

⁶ See, for example, Steven Croley, “White House Review of Agency Rulemaking: An Empirical Investigation,” *University of Chicago Law Review*, vol. 70 (Summer 2003), pp. 821-885; Scott Farrow, *Improving Regulatory Performance: Does Executive Office Oversight Matter?* (Pittsburgh: Carnegie Mellon University, July 26, 2000).

⁷ U.S. General Accounting Office, *Rulemaking: OMB’s Role in Reviews of Agencies’ Draft Rules and the Transparency of Those Reviews*, GAO-03-929, Sept. 2003.

GAO also reported that, in several of these cases, OIRA recommended what business interest groups had suggested during their previous meetings with OIRA.

Although the nature of OIRA's review has clearly changed substantially during the past 25 years, there is little if any continued questioning of the legality of centralized presidential review. Many rulemaking agencies recognize that OIRA review can add value because it brings a different perspective to the rulemaking process and can, by its very presence, prevent bad ideas from becoming rules. However, many public interest groups do question whether centralized review is a good idea, arguing that OIRA review has usually been a "one-way ratchet" that weakens, not strengthens, rules; that it is still highly secretive and delays the issuance of rules; and that OIRA reviewers have caused agencies to issue rules that are inconsistent with their statutory mandates. Business groups, on the other hand, have argued that OIRA has not been assertive enough, and that agencies still control the rulemaking process to an unwarranted degree.

Unresolved Issues. Several issues regarding presidential review remain unresolved. For example:

- Should Congress codify presidential review of agency rulemaking? If so, how detailed should that codification be? For example, it might simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay. Or should a codification spell out in detail the process by which Presidents should review rules before they are published? What are the policy implications of codification?
- Should independent regulatory agencies' rules be subject to presidential review? Or would presidential review adversely affect the independence intended for these agencies?
- What rules should govern OMB's contacts with outside parties during the presidential review process? For example, should OMB be allowed to meet with regulated entities outside of the period when agencies are not permitted to do so? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) in order to provide an administrative record for any subsequent changes?
- Are improvements in review transparency currently needed (either administratively or by statute)? For example, should agencies or OIRA be required to disclose substantive changes made to rules during "informal" reviews (when OMB says it can have its greatest effect)?
- Does OIRA have the legal authority to promulgate requirements or even guidelines regarding agencies' use of peer reviews, risk assessments, or guidance documents?
- Is presidential review of rules cost effective? Is there any way to objectively measure the benefits that OIRA review provides?

- Should OIRA's funding and staffing be increased, decreased, or stay the same? If increased, is there evidence that doing so would yield substantial returns on investment?

Regulatory Analysis and Accountability Requirements

Regulatory analysis and accountability requirements vary considerably with regard to their sources, their content, and their effectiveness. Some of these requirements are traceable to the presidential reviews that I just discussed, while others have their roots in statute. The "grandfather" of these requirements, and the foundation for most of them, is the Administrative Procedure Act (APA) of 1946 (5 U.S.C. 551 *et seq.*) which generally requires that agencies publish their proposed rules in the *Federal Register*, receive and consider comments on the proposed rules, and then publish a final rule stating its basis and purpose. Because my colleague T.J. Halstead is covering the APA and public participation issues in his testimony, I will only note that the word "generally" in my previous sentence is important here. A 1998 GAO study indicated that about half of all final rules were published without an opportunity for prior public comment, with agencies often invoking the "good cause" exception that allows them to avoid publishing a proposed rule for comment if the agency concludes it is "impracticable, unnecessary, or not in the public interest."⁸ While many of these final rules were on relatively minor issues, some were "significant" rules under Executive Order 12866, and some had at least a \$100 million impact on the economy.

Between 1946 and 1980, Congress established dozens of federal agencies and programs designed to improve the environment, make workplaces safer, and protect consumers. Subsequently, an array of federal economic, environmental, and social regulations were put in place that affected many of the decisions made by American businesses. Strong concerns then began to be raised about whether the benefits that these regulations and regulatory agencies were attempting to achieve were worth the costs associated with compliance. Concerns were also being raised about the cumulative effects of all federal regulations on individual businesses, and the effects that federal rules were having on particular segments of the economy (e.g., small businesses), and on other levels of government.

Congressional Initiatives. Since 1980, Congress has reacted to these concerns by establishing analytical and/or accountability requirements as part of the rulemaking process. These requirements have a variety of purposes, including the protection of certain interests from unnecessary regulatory burden, increased control over rulemaking agencies, and ensuring that the rules issued focus on issues of real public concern in as efficient and effective manner possible. Statutory initiatives imposing these requirements include the (1) the Regulatory Flexibility Act (RFA) of 1980 (5 U.S.C. 601-612), (2) the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. 3501-3520), (3) the Unfunded Mandates Reform Act (UMRA) of 1995 (2 U.S.C. 1532-1538), and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Although these regulatory requirements clearly have had an effect on agency actions, many of them do not appear to have been as effective as their advocates had hoped.

⁸ U.S. General Accounting Office, *Federal Rulemaking: Agencies Often Issued Final Actions Without Proposed Rules*, GAO/GGD-98-126, Aug. 31, 1998.

For example, the Regulatory Flexibility Act requires federal agencies to assess the impact of their forthcoming regulations on “small entities” (e.g., small businesses and small governments), and requires that analysis to describe, among other things, (1) the reasons why the regulatory action is being considered; (2) the small entities to which the proposed rule will apply and, where feasible, an estimate of their number; (3) the projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (4) any significant alternatives to the rule that would accomplish the statutory objectives while minimizing the impact on small entities. However, the RFA’s analytical requirements are not triggered if the head of the issuing agency certifies that the proposed rule would not have a “significant economic impact on a substantial number of small entities.” The RFA does not define “significant economic impact” or “substantial number of small entities,” thereby giving federal agencies substantial discretion regarding when the act’s analytical requirements are triggered. A 2000 GAO study determined that EPA certified virtually all of its rules as not needing an RFA analysis, even rules that impose thousands of dollars of compliance cost on thousands of small entities.⁹ Also, the RFA’s analytical requirements do not apply to final rules for which the agency does not publish a proposed rule, and agencies do not have to consider the cumulative impact of their rules in making analytical determinations under the act. Finally, the courts have said that the act does not require the analysis with regard to indirect effects on small entities.¹⁰ GAO has examined the implementation of the RFA several times within the past 10 to 15 years, and a recurring theme in GAO’s reports is the varying interpretation of the RFA’s requirements by federal agencies.¹¹

Other statutory requirements also appear to have fallen short of proponents’ expectations. For example, section 202 of the Unfunded Mandates Reform Act requires agencies to prepare “written statements” containing, among other things, estimates of future compliance costs and any disproportionate budgetary effects “if and to the extent that the agency in its sole discretion determines that accurate estimates are reasonably feasible and that such effect is relevant and material.” The statute gives agencies the same discretion regarding estimates of the effects of their rules on the national economy. Therefore, an agency can avoid these estimates if, in its sole discretion, it considers them inaccurate, unfeasible, irrelevant, or immaterial. Likewise, section 203 of UMRA requires agencies to develop plans to involve small governments in the development of regulatory proposals that have a “significant or unique” effect on those entities. Therefore, an agency that concludes that a rule’s effect on small governments will not be “significant” or “unique” can avoid this requirement. When GAO examined the implementation of UMRA in 1998, it concluded that the act had little effect on agency rulemaking, due largely to statutory exemptions.¹² The act did not cover most of the rules that GAO examined with a \$100 million impact on the economy, and when a rule was covered, UMRA did not require the agency to do much more

⁹ U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

¹⁰ See *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

¹¹ See, for example, U.S. General Accounting Office, *Regulatory Flexibility Act: Agencies’ Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999; U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193, Sept. 20, 2000.

¹² U.S. General Accounting Office, *Unfunded Mandates: Reform Act Has Had Little Effect on Agencies’ Rulemaking Actions*, GAO/GGD-98-30, Feb. 4, 1998.

than it was already required to do under other statutes and executive orders. GAO reached a similar conclusion in its 2004 examination of UMRA's implementation.¹³ While critics deride this situation as regulatory reform ineffectiveness, others contend that Congress had good reason to entrust this amount of discretion to the agencies.

Some reforms have been related to or built on other reforms with some of the above-mentioned issues. For example, the "look back" requirements in section 610 of the RFA (mandating that agencies review certain rules within 10 years of their issuance) are triggered when the rulemaking agency determines that a rule has a "significant economic impact on a substantial number of small entities."¹⁴ As mentioned previously, some agencies certify almost all of their rules as not having that level of impact, so they can avoid section 610's requirements (as well as the analytic requirements in the RFA). For this and other reasons (e.g., a lack of clarity regarding key terms), studies of agencies' implementation of section 610 have consistently indicated that few of the required look-back reviews appear to be conducted.¹⁴

Section 212 of SBREFA requires agencies to publish one or more compliance guides for each rule or group of related rules for which the agency is required to prepare a final regulatory flexibility analysis under the RFA. Therefore, if the agency concludes that the final rule would not have a "significant" impact on a "substantial" number of small entities, the agency is not required to prepare a compliance guide. Agencies are given "sole discretion" in the use of plain language in the guides, and the statute does not indicate when the guides must be developed or how they must be published. Therefore, under section 212, an agency might develop a compliance guide years after a final rule is published with no input from small entities. In 2001, GAO reviewed agencies' implementation of section 212 and concluded that the requirement did not appear to have had much of an impact on agencies' rulemaking actions.¹⁵

Presidential Initiatives. In addition to these and other congressionally-established requirements, each President within the past 35 years has required some form of regulatory analysis before rules are published in the *Federal Register*. In addition to establishing OIRA review of rules, President Reagan's Executive Order 12291 generally required covered agencies to prepare a "regulatory impact analysis" for each "major" rule, which was defined as any regulation likely to result in (among other things) an annual effect on the economy of \$100 million. Those analyses were required to contain a description of the potential benefits and costs of the rule, a description of alternative approaches that could achieve the regulatory goal at lower cost (and why they weren't selected), and a determination of the net benefits of the rule.

These analytical requirements remained in place until September 1993, when President Clinton issued Executive Order 12866. This executive order, which is still in effect,

¹³ U.S. General Accounting Office, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637, May 12, 2004.

¹⁴ CRS Report RL32801, *Reexamining Rules: Section 610 of the Regulatory Flexibility Act*, by Curtis W. Copeland; General Accounting Office, *Regulatory Flexibility Act: Agencies Interpretations of Review Requirements Vary*, GAO/GGD-99-55, April 2, 1999.

¹⁵ U.S. General Accounting Office, *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172, Dec. 28, 2001.

established analytical requirements that are similar (although not identical) to those it replaced. For example, the order requires a cost-benefit analysis for all “economically significant” rules (essentially the same as “major” rules under Executive Order 12291) containing an assessment of the anticipated costs and benefits of the regulatory action and an assessment of the costs and benefits of alternatives to the regulatory action (with an explanation of why the planned action is preferable).

Researchers have examined agencies’ economic analyses of rules under Executive Order 12866 and related guidance documents, and several of those studies indicated that the agencies’ analyses are not always consistent with the requirements in the order or the guidance.¹⁶ For example, in 1998 GAO reported that some of the 20 economic analyses that it examined did not discuss alternatives to the proposed regulatory action and, in many cases, it was not clear why the agencies used certain assumptions.¹⁷ Five of the analyses did not discuss uncertainty associated with the agencies’ estimates of benefits or costs or document the agencies’ reasons for not doing so. GAO has also examined the cost-benefit analyses for particular rules, and often found them lacking in some of the same ways.¹⁸ Other studies have criticized agencies for not providing quantitative information on net benefits in their analyses.¹⁹ Still other studies have examined the accuracy of agencies’ regulatory cost estimates, often concluding that costs are overestimated.²⁰ OMB reviewed the literature on *ex ante* cost and benefit estimates, and concluded that federal agencies tend to overestimate both benefits and costs.²¹

In addition to studies examining the implementation of cost-benefit and other rulemaking requirements, a large body of literature has developed debating the very notion of subjecting agencies’ rules to these analytical requirements. Those supporting the use of these analytical methods view cost-benefit analysis as a helpful and neutral tool in regulatory

¹⁶ See, for example, Richard D. Morgenstern, ed., *Economic Analyses at EPA: Assessing Regulatory Impact* (Washington: Resources for the Future, 1997); and Robert W. Hahn, ed., *Risks, Costs, and Lives Saved: Getting Better Results from Regulation* (Washington: AEI Press, 1996).

¹⁷ U.S. General Accounting Office, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO/RCED-98-142, May 26, 1998.

¹⁸ U.S. Government Accountability Office, *Clean Air Act: Observations on EPA’s Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252, Feb. 28, 2005. GAO concluded that EPA did not, among other things, consistently analyze available options or provide estimates of the costs and benefits of each option.

¹⁹ See, for example, 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).

²⁰ For a summary of this literature, 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. See also (former EPA Administrator) William K. Reilly, “The EPA’s Cost Underruns,” *Washington Post*, Oct. 14, 2003, p. A-23, which said “a review of some of the major regulatory initiatives overseen by the EPA since its creation in 1970 reveals a pattern of consistent, often substantial overestimates of their economic costs.”

²¹ 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/infoereg/2005_cb/final_2005_cb_report.pdf].

decisionmaking.²² They contend that some type of cost-benefit balancing takes place during the rulemaking process anyway, and that the formal analysis simply makes that balancing (with the associated data and assumptions) more explicit, systematic, and rigorous. Furthermore, they argue that putting as accurate a dollar value on costs and benefits as possible makes decisions regarding whether and how to regulate easier and more rational. As one author stated, “[m]onetizing risk and environmental benefit does not devalue these outcomes, but rather gives them real economic value when the effects might otherwise be ignored.”²³

Others, however, assert that cost-benefit analysis is inherently flawed and biased against regulation.²⁴ For example, they assert that because regulatory benefits are generally more difficult to measure in dollar terms than regulatory costs, cost-benefit analysis is not carried out on a level playing field. Measurement of the benefits associated with health, safety, and environmental rules often requires an assessment of risk (e.g., how many people would get sick or die in the absence of the regulatory intervention) and a monetization of the associated benefits (i.e., placing a dollar value on the lives saved or illnesses prevented). These steps frequently involve significant methodological and ethical difficulties. Data are frequently not available to measure regulatory risks precisely, and using “willingness to pay” models to determine the values to assign to health effects is highly controversial. Critics of cost-benefit analysis also contend that regulatory cost data are often provided by regulated entities, who have an incentive to inflate those costs in order to influence agencies not to issue the rules. Other criticisms focus on the use of “discount rates” that reduce the value of future benefits to current dollars, and the “distributional” effects that are not often considered in such analyses. Finally, these critics suggest that although executive orders and statutes often indicate that non-monetized benefits must be considered as part of the rule development process, there is a natural tendency to discount or disregard non-monetized benefits. Still other critics assert that regardless of whether cost benefit analysis is neutral in concept, it is not neutral in effect, tending to result in the promulgation of fewer and weaker rules.²⁵

Areas for Possible Further Research. In addition to the analytical requirements discussed above, a variety of other efforts have been made by Congress or Presidents to constrain agency rulemaking, including moratoriums on new rulemaking at the start of new presidential administrations, efforts to establish regulatory “accounting” mechanisms (which could pave the way to the establishment of a “regulatory budget”), the establishment of “advocacy review panels” at the start of certain EPA and OSHA rules, and attempts to limit the impact of rules on federalism and on individual privacy. After more than 25 years of experience with these various requirements, we know surprisingly little about their effectiveness or, where effectiveness is suspect, how they can be improved. Issues that Congress, ACUS, or both might explore in this area include the following:

²² See, for example, Cass R. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago: American Bar Association, 2002).

²³ W. Kip Viscusi, “Monetizing the Benefits of Risk and Environmental Regulation,” *Fordham Urban Law Journal*, vol. 33 (May 2006), p. 1003.

²⁴ See, for example, Lisa Heinzerling and Frank Ackerman, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection* (Washington: Georgetown University, 2002).

²⁵ David M. Driesen, “Is Cost-Benefit Analysis Neutral?,” *University of Colorado Law Review*, vol. 77 (Spring 2006), pp. 335-404.

- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize? If not, can steps be taken to ensure that regulatory costs and benefits are fairly and accurately measured?
- Does OMB apply the cost-benefit analysis requirements in Executive Order 12866 and use cost-benefit information in a consistent way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain types of rules or rules from certain agencies (e.g., Homeland Security rules) essentially exempt from these requirements?
- How accurate are agencies' pre-promulgation estimates of regulatory costs and benefits? How much do cost-benefit studies cost? Do cost-benefit requirements pass a cost-benefit test?
- Should Congress or the Administration define key terms in the Regulatory Flexibility Act (e.g., "significant economic impact on a substantial number of small entities")?
- Should agency rules be reexamined periodically to ensure that they are still needed or impose the least burden? If so, who should have that reexamination responsibility?
- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?
- Have the analytical and accountability requirements contributed to what is called the "ossification" of the rulemaking process?

Role of Science in Rulemaking

On May 9, 2006, the Center for the Study of Rulemaking at American University hosted an all-day conference for this Subcommittee entitled "The Role of Science in Rulemaking." As Neil Kerwin, interim president of American University and director of the Center for the Study of Rulemaking, said in his opening remarks, "rulemaking is the transformation of information into legal obligations and rights. That information takes many forms, but the type of information that contributes most profoundly to a vast swath of rulemaking can be broadly categorized as scientific."

The role of science in rulemaking has become highly controversial in recent years, with observers from both the left and the right of the political spectrum suggesting that "sound science" has been given insufficient weight in the development of regulatory standards. Some assert that closer adherence to science would lessen the burden of unnecessary regulation, thereby lowering regulatory costs. Others argue that science is often trumped by political considerations, and as a result regulatory standards that science suggests are needed do not get developed. As part of that debate, questions have been raised about the quality of data that are used in developing proposed and final rules, the use of peer review panels as part of the process to ensure quality, and the role that risk assessment can/should play in deciding what to regulate and at what levels.

Information Quality Act. The May 2006 symposium featured panels discussing such topics as the role of science advisory panels in the rulemaking process, science and the judicial review of rulemaking, and government agencies' science capabilities. The issues discussed by those panels were too numerous and varied to detail here, but included how advisory panels can be structured to ensure neutral competence and how the courts should treat agencies' science determinations. Another panel focused on OIRA's recent science-related initiatives, and those initiatives were a consistent theme in each of the panel discussions.

The starting point of those OIRA initiatives was an act of Congress — a two-paragraph provision added to the 700-page Treasury and General Government Appropriations Act for Fiscal Year 2001 (P.L. 106-554) that is more commonly known as the "Data Quality Act" or the "Information Quality Act" (IQA) (codified at 44 U.S.C. 3504(d)(1) and 3516). Although little noticed at the time, the IQA has subsequently been the subject of intense debate and controversy. The act required OMB to issue guidance to federal agencies designed to ensure the "quality, objectivity, utility, and integrity" of information disseminated to the public. It also required agencies to issue their own information quality guidelines, and to establish administrative mechanisms that allow affected persons to seek correction of information maintained and disseminated by the agencies that does not comply with the OMB guidance.

Supporters of the IQA contended that it and the resultant OMB and agency guidelines would improve the quality of agency science and regulation and force agencies to regulate based on the best science available. Critics, on the other hand, said that the law was a tool by which regulated parties can slow and possibly stop new health, safety, and environmental standards, and that could lead to the revision or elimination of existing standards. They also contended that the act could have a chilling effect on agency distribution and use of scientific information.

In retrospect, it appears that both of these positions were overstated. OMB has reported that the expected flood of IQA correction requests did not occur (only 85 in the first two years of implementation), and that the correction request process had been used by virtually all sectors of society (albeit primarily by business groups). OMB said "to our knowledge, the act has not affected the pace or length of rulemakings," but neither it nor the agencies presented any data on this issue. Finally, OMB noted that most non-frivolous requests were denied because "a reasonable scientist could interpret the available information the way the agency had."²⁶

Recent court decisions indicate that agency denials of information correction requests are not judicially reviewable. For example, on June 21, 2004, a U.S. district court ruled that such terms as "quality," "objectivity," "utility," and "integrity" are not defined in the IQA, and the history of the legislation does not provide any indication as to the scope of these terms. Therefore, absent any "meaningful standard" against which to evaluate the agency's discretion, the Court finds that Congress did not intend the IQA to provide a private cause

²⁶ Office of Management and Budget, *Draft Report to Congress on the Costs and Benefits of Federal Regulations*, p. 50, available at [http://www.whitehouse.gov/omb/infocoreg/2005_cb/draft_2005_cb_report.pdf].

of action.”²⁷ On November 15, 2004, the U.S. District Court for the Eastern District of Virginia (Alexandria Division) ruled that the Salt Institute and the Chamber of Commerce lacked standing to sue (e.g., they had suffered no “injury in fact”), and that judicial review of the agency’s decisionmaking was not available. On March 6, 2006, the U.S. Court of Appeals for the Fourth Circuit dismissed the appeal by the Salt Institute and the Chamber of Commerce, agreeing with the district court that the appellants lacked standing because they did not suffer an injury from the published data.²⁸ The Fourth Circuit concluded that the IQA “creates no legal rights in any third parties,” including any right to “information or to correctness.” Therefore, the court argued, “appellants cannot establish injury in fact and, therefore, lack Article III standing to pursue their case in the federal courts.”

At the May 2006 panel discussion on OMB’s science-related initiatives, Bill Kovacs from the U.S. Chamber of Commerce said that, because of these recent court decisions, the IQA is “little more than a nice academic exercise,” and that his organization planned to go back to Congress “to get judicial review provisions put into the law.” In contrast, Rena Steinzor of the University of Maryland School of Law said that the IQA represented the “corpuseularization of science; that is, looking at each piece of scientific evidence very critically, deconstructing every study, questioning each individual piece as opposed to viewing all the scientific evidence together and making a scientific judgment on what the weight of the evidence tells us.” Don Arbuckle, then acting administrator of OIRA, said that OMB believes that the act was “working quite well,” and characterized the IQA and related guidelines as “more of an internal government quality control exercise than a regulation or a law that is challengeable through the judicial branch.” He also said that the guidance places a “hefty data burden of proof on the petitioner,” and was not intended to “give people an easy avenue to criticize government work.”

Peer Review. Another science-related OIRA initiative has been the development of governmentwide standards for peer review of scientific information used in developing agency regulations. OIRA indicated that the bulletin was needed because agencies’ peer review practices were inconsistent, and government-wide standards would make regulatory science more competent and credible. The initial proposed bulletin, published in September 2003, aroused substantial controversy, with some observers expressing concern that it could create a centralized peer review system within OMB that would be vulnerable to political manipulation or control by regulated entities.²⁹ OMB received nearly 200 comments on the proposal, including comments from Members of Congress, trade associations, public interest groups, and recognized experts in the field of peer review and scientific research. At our May 2006 symposium, Al Teich of the American Association for the Advancement of Science said that many scientists concluded that the initial bulletin appeared to be “a means of attacking regulation by attacking the science behind it.”

As a result of these comments, OMB later published a “substantially revised” version of the bulletin that gave agencies more discretion to determine when information required a peer review, and when the more detailed review requirements for “highly influential”

²⁷ *In re: Operation of the Missouri River Sys. Litig.*, No. 03-MD-1555 at 49 (D. Minn. June 21, 2004) (order granting motions for summary judgment).

²⁸ *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.

²⁹ Office of Management and Budget, Executive Office of the President, “Proposed Bulletin on Peer Review and Information Quality,” 68 *Federal Register* 54023 (Sept. 15, 2003).

information were applicable. Also, unlike the proposed bulletin, the revised bulletin did not exclude individuals from being peer reviewers if they had received research grants from the agency disseminating the information being peer reviewed. The bulletin essentially requires agencies to (1) have a peer review conducted on all “influential scientific information” that the agency intends to disseminate, (2) have all “highly influential scientific assessments” peer reviewed according to more specific and demanding standards, and (3) indicate what “influential” and “highly influential” information the agency plans to peer review in the future. Although these revisions were generally embraced by the scientific community and others, business groups believed the changes had weakened the bulletin to such an extent that they withdrew their initial support. Still others believed the changes had not gone far enough, asserting that the bulletin was unnecessary and did not appropriately guard against appointment of reviewers with conflicts of interest.

On December 15, 2004, OMB published a final version of the peer review bulletin on its web site.³⁰ OMB said this version reflected “minor revisions” made in response to the public comments on the revised bulletin. For example, the final bulletin requires agencies to disclose the names of peer reviewers to the public and adds an annual reporting requirement to allow OMB to track how agencies are using the bulletin. Agencies are still afforded substantial discretion to determine when and what type of peer review is required. The amount of discretion that agencies actually have in carrying out their peer review programs (or, conversely, the amount of control that OMB retains) will be apparent only through the bulletin’s implementation, and therefore could vary substantially from one administration to another. Certain provisions of the peer review bulletin took effect in June 2005, with other provisions taking effect six months later.

To date, I am unaware of any empirical studies of how this peer review bulletin has been implemented. Nevertheless, the bulletin is likely to have a significant effect on federal rulemaking and other forms of information dissemination and public policy, both directly and indirectly through references to the bulletin by others. For example, section 402 of the “Specialty Crops Competitiveness Act of 2004” (Pub. Law 108-465, signed by the President on Dec. 21, 2004) indicated that a required peer review of the procedures and standards governing the consideration of certain import and export requests “shall be consistent with the guidance by the Office of Management and Budget pertaining to peer review and information quality.”

Risk Assessment. On January 9, 2006, OIRA released a proposed bulletin on risk assessment for comment by the public and for peer review by the National Academy of Sciences (NAS).³¹ The proposed bulletin would, if made final, establish general risk assessment and reporting standards, and establish special standards for “influential” risk assessments by all agencies. Risk assessment is defined in the bulletin as a document that “assembles and synthesizes scientific information to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment.” In a regulatory context, risk assessment helps agencies identify issues of potential concern (e.g.,

³⁰ Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, Dec. 15, 2004, available at [http://www.whitehouse.gov/omb/inforeg/pccr2004/peer_bulletin.pdf].

³¹ Office of Management and Budget, “Proposed Risk Assessment Bulletin,” Jan. 9, 2006, available at [http://www.whitehouse.gov/omb/inforeg/proposed_risk_assessment_bulletin_010906.pdf].

whether exposure to a given risk agent causes effects such as cancer, reproductive and genetic abnormalities, or ecosystem damage); select regulatory options; and estimate a forthcoming regulation's benefits. OMB said that "there is general agreement that the risk assessment process can be improved, and said the purpose of the bulletin is "to enhance the technical quality and objectivity of risk assessments prepared by federal agencies by establishing uniform, minimum standards."

Although characterized as "guidance" in the document's summary, the narrative text mentions the "requirements" of the bulletin, and the language in the bulletin prior to the standards lists the standards with which "[e]ach agency shall" comply. However, OMB also says that the bulletin applies to all agency risk assessments "to the extent appropriate." Agency heads are authorized to waive or defer some or all of the requirements in the bulletin "where warranted by a compelling rationale." Public comments on the bulletin were requested by June 15, 2006, and on June 22, 2006, OMB posted the comments it had received on its web site.³² Those comments varied significantly, with some suggesting ways to make the document stronger and more inclusive, while others suggested that OMB abandon the bulletin altogether.

On March 22, 2006, a committee of the Board on Environmental Issues and Toxicology within the National Academies' Division of Earth and Life Sciences began what is expected to be an 11-month peer review of OMB's proposed bulletin. On May 22, 2006, the committee held a public meeting on OMB's proposed risk assessment bulletin. According to press accounts, the nine federal agency officials who testified at the meeting voiced a variety of opinions about the bulletin.³³ For example, the Director of FDA's Center for Drug Evaluation and Research reportedly said that if the bulletin was made final in its current form, doctors and the public might not receive timely warnings about potential health risks posed by drugs and medical devices (e.g., warnings related to the use of the anti-inflammatory drug Vioxx). He and two other agency officials (from the National Institute of Environmental Health Sciences and the National Institute for Occupational Safety and Health's Risk Evaluation Branch) reportedly said that the bulletin's definition of risk assessment is so broad that many types of federal analyses could be inappropriately covered by its requirements. On the other hand, EPA's science advisor was quoted as saying that the agency was in "pretty good shape" in terms of meeting the requirements in the proposed bulletin, but nevertheless suggested that the guidance be revised to explain how much flexibility agencies have regarding its requirements (e.g., how agencies can get waivers from the bulletin's requirements).

Like the peer review bulletin, the manner in which OMB implements the risk assessment bulletin will determine its effectiveness. For example, it is unclear the extent to which agencies will be allowed to waive or defer the bulletin's requirements when they believe it is "warranted by a compelling rationale." Similarly, it is unclear whether OMB will allow agencies to decide when a risk assessment is "influential" (thereby triggering additional standards in the bulletin) and whether OMB will treat the bulletin's provisions as "guidance" or as "requirements."

³² See [http://www.whitehouse.gov/omb/inforeg/comments_rab/list_rab2006.html].

³³ Pat Phibbs, "Definition of Risk Assessment Deemed Too Broad by Several Health Agency Officials," *BNA Daily Report for Executives*, May 23, 2006, p. A-15.

Possible Issues for Congressional or ACUS Consideration. As the above discussion suggests, a number of issues remain for possible congressional consideration, or for further study by a re-funded ACUS or some other body. In some cases, Congress could weigh in and resolve the issue. For example, in light of recent court decisions, if Congress wanted agencies' decisions under the Information Quality Act to be judicially reviewed, it could resolve any lingering questions by amending the statutes and permitting judicial review. Likewise, if Congress objected to using risk standards for one statute and applying them to other statutes, it could act through legislation or through oversight of OMB's risk assessment bulletin.

Among the questions that may merit further study are the following:

- How can scientific advisory panels be constructed to ensure that they are unbiased?
- Under what circumstances should agencies' regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?
- What were Congress's intentions in passing the IQA? Has it served those purposes?
- Do agencies have too much discretion to deny correction requests under the IQA? What effect has the act had on the length of time it takes agencies to issue rules? What if anything should be done to ensure that the act is consistently implemented?
- Should OMB take a more active role in reviewing agencies' decisions under the IQA? Should Congress or OMB initiate the collection of data regarding the IQA's effect on rulemaking or agencies' resources?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?
- Are governmentwide standards for peer review and risk assessment needed? Does OMB have the authority to issue such standards? What effect have these requirements had on the length of time it takes agencies to issue rules?
- Are agencies complying with the peer review and risk assessment bulletins? For example, are agencies posting agendas listing their upcoming peer reviews? Are agencies peer reviewing all "influential" information? Are some agencies complying better than others? Should Congress refer to these bulletins in legislation as models for particular peer reviews or risk assessments?
- What constitutes the "weight of the evidence" in making risk-based regulatory decisions? Should Congress define the term, or should it be left up to the agencies within a specific regulatory context?

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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.

Mr. CANNON. Mr. Halstead.

TESTIMONY OF T.J. HALSTEAD, ESQ., LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, DC

Mr. HALSTEAD. Mr. Chairman, Members of the Subcommittee, I am pleased to be here today to discuss the Subcommittee's Administrative Law Process and Procedure Project.

I've been particularly involved in the consideration of four issues that have arisen in the various symposia, hearings and studies conducted under the project's banner, namely, public participation in the rulemaking process, agency adjudication, judicial review of agency rulemaking, and the utility of a reconstituted ACUS in light of the regulatory clearance and review functions of the Office of Management and Budget. I have addressed those issues in detail in my prepared statement, and I would like to focus today on efforts that have been made to study court participation and judicial review over the course of the project. I think they illustrate both the time and effort that has gone into the project, as well as factors that could be viewed as supporting the continuing need for an entity such as ACUS.

The staff of your Subcommittee has spent a great deal of time focusing on public participation issues ranging from the impact of non-rule rules on public participation, to whether e-rulemaking initiatives have, in fact, facilitated an increase in public participation.

Professor Cary Coglianese convened a congressional symposium for the Committee on the e-rulemaking issue last December, and I think that type of collaborative effort has been essential to furthering our understanding of these issues. One interesting aspect of that symposium was the general consensus that e-rulemaking initiatives have not, in fact, generated the significant increase in participation that was largely expected in light of the strides that have been made in electronic technology and accessibility. The participants of that symposium recommended further studies on the issue, and, in particular, recommended expanding and institutionalizing opportunities for collaboration, which is a role that ACUS has served in the past and could arguably fulfill again.

Another significant study that Mort mentioned in his testimony has been conducted by Professor William West at Texas A&M, focusing on how agencies develop proposed rules, with a particular emphasis on public participation and transparency in the prenotice and comment phase of rule formulation. The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high-level agency personnel with extensive experience in the rulemaking process. One of the hopes of that study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice during this phase of rulemaking, but, as Mort mentioned, a low response rate to the survey prevented that from happening.

The interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to the outside participation of individuals in the development of rules, but I think the low response rate to that survey, again,

could be taken to support the position that there is an important role for ACUS. Professor West himself has related his view that the survey was hobbled by a general reluctance on the part of agencies to share information, with apparently two agencies explicitly ordering their staff not to respond to the survey.

Given the factors that Mort mentioned earlier regarding ACUS's nonpartisan nature and organizational independence, it's quite possible that a reconstituted ACUS would be able to secure a greater response for these types of studies, which in turn would further Congress' knowledge of such issues.

Another key study in the project is being conducted by Professor Jody Freeman at Harvard Law School, focusing on empirical analysis of judicial review of agency rulemaking. The goal of the study is to find out what happens to agency rules during review in the circuit courts, essentially to determine how often rules are invalidated in whole or in part, and the reasons why they are invalidated. Professor Freeman's study is ongoing, but she discussed the methodology of the study and presented her preliminary findings at our September 11, 2006, symposium on Presidential, Congressional and Judicial Control of Agency Rulemaking.

The study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, but the limitations on this type of study might be seen as providing further evidence of the futility of a reconstituted ACUS. Professor Freeman herself noted in her comments at that symposium that stand-alone studies of this type do not give rise to a coherent and comprehensive empirical strategy that fosters optimal analysis of administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

I hope my testimony has given you an idea of the scope of work that's been done in these areas, as well as the potential for a reconstituted ACUS to further improve our knowledge and understanding of administrative law and process, and I look forward to answering any questions that you might have. Thank you.

Mr. CANNON. Thank you, Mr. Halstead.

[The prepared statement of Mr. Halstead follows:]

PREPARED STATEMENT OF T.J. HALSTEAD



Statement of T.J. Halstead
Legislative Attorney, American Law Division
Congressional Research Service

Before

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

November 14, 2006

on

“The Administrative Law, Process, and Procedure Project”

Mr. Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee’s ongoing and bipartisan “Administrative Law, Process and Procedure Project.”

My testimony today will address three issues that have been studied over the course of the project: public participation in the rulemaking process, agency adjudication, and judicial review of agency rulemaking, with a focus on how the various symposia and academic studies sponsored by the Committee have contributed to our understanding of the significant and complex issues that adhere in these contexts, as well as to illustrate the potential ability of a reconstituted Administrative Conference of the United States to further aid our appreciation of such issues. My testimony will additionally discuss the issue of whether a reconstituted ACUS would be duplicative of activities that are currently performed by the Office of Management and Budget.

Public Participation

Effective public participation in agency rulemaking is a fundamental principle of the Administrative Procedure Act, and the staff of your Committee has been particularly active in considering factors impacting such participation. Working with your staff, we have identified a wide range of issues that have arisen in this context, ranging from the effect of “non-rulemaking approaches,” such as the issuance of interpretive rules and policy

statements on public participation, to the effect of e-rulemaking initiatives.

On December 5, 2005, Professor Cary Coglianese of the University of Pennsylvania Law School convened a symposium on "E-Rulemaking in the 21st Century" that was sponsored by the Committee. This symposium brought together legislative and executive branch personnel, academic researchers, and non-governmental representatives for an in-depth discussion on e-rulemaking and the manner in which advances in information technology may impact the future of administrative rulemaking. In testimony presented before the Committee on July 26, 2006, Professor Coglianese commented on the status of empirical research on e-rulemaking, noting that empirical data that has been obtained to date does not appear to support the initial expectation that advances in this context would facilitate a significant increase in public participation. Nonetheless, technological improvements may ultimately provide substantial benefits in this regard. Professor Coglianese also noted that ancillary benefits of e-rulemaking, such as increased transparency, enhanced ability for executive or congressional oversight, administrative cost reduction, and greater ease of compliance provide additional justifications for continued efforts to improve agency utilization of electronic technology in rulemaking.

Another key issue in the public participation context has been whether efforts to include the public in the rulemaking process prior to the publication of a proposed rule should be expanded. Professor William West of the Bush School of Government and Public Services at Texas A&M University undertook an effort to study a specific aspect of this issue at the behest of the Committee, with the support of the Congressional Research Service.

Professor West formulated and conducted a project to analyze how agencies develop proposed rules, with a particular emphasis on how rulemaking initiatives are placed on agency regulatory agendas; how the rulemaking process is managed at inter and intra agency levels; and how public participation and transparency factor in the pre-notice and comment phase of rule formulation. Professor West has stated that the issue of public participation at this stage of agency rule formulation "may be especially relevant to the Congress as it considers possible amendments to the APA." The study relied in large part on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules and on interviews with high level agency personnel with extensive experience in the rulemaking process. One of the hopes for the study was that the questionnaire would generate data that would enable a systematic comparison of variations in agency practice regarding the scope, transparency, and inclusiveness of outside participation during this phase of rulemaking. However, a low response rate to the electronic questionnaire prevented such a comparison. Nonetheless, the interview and survey data did enable Professor West and his team to make some very interesting and important observations relating to outside participation in proposal development: that agency officials noted that the submission of information by public interest groups, industry representatives, other affected interests, and other agencies was "frequently indispensable to intelligent decision making"; that the character of such participation is variable, based on a number of factors; and, finally, that such participation does not generally occur as the result of an inclusive agency approach, instead occurring by virtue of agency invitation or participant initiative.

While the West study has contributed significantly to congressional and academic understanding of the complex issues surrounding public participation in the pre-notice and comment rulemaking context, the low response rate to the survey could be viewed as

supporting the position that a reconstituted ACUS could serve an important role in facilitating research of this type. Professor West has related his view that the survey was hobbled by a general reluctance of agencies to share information, as illustrated by the fact that two agencies went so far as to explicitly order their staff not to respond to the survey. It is arguable that a similar study, if conducted by a reconstituted ACUS, would have greater success in generating the information necessary to enable the systematic comparisons envisioned by the West study by virtue of its non-partisan nature and organizational independence.

Agency Adjudication

Another matter of significant importance and interest to the project has been the issue of agency adjudication. In addition to rulemaking, it is a fundamental maxim of administrative law that agencies may control regulated activities and entities through adjudicatory processes. Regarding the basic issue of an agency's discretion to choose between rulemaking and adjudication, the Supreme Court established in *SEC v. Chenery Corporation* that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." This dichotomy effectively allows agency adjudicators to exert policy-making authority through a quasi-judicial proceeding, as opposed to the quasi-legislative nature of the procedures that govern notice and comment rulemaking. This dynamic has given rise to the question of whether it is appropriate for agencies to establish binding policy through adjudication when such action could be effected through notice and comment rulemaking. ACUS, as a reconstituted entity, would be in a unique position to analyze the impact of agency determinations to regulate through adjudication and rulemaking, with the aim of formulating a recommendation as to whether the Administrative Procedure Act should be amended to explicitly address issues adhering to agency adjudication.

The mechanics of agency adjudication are also an issue that might be ripe for review by a reconstituted ACUS. To this end, CRS has identified a series of issues in this context that have been of interest to administrative law scholars and practitioners, ranging from the question of whether there is a need to reevaluate the Administrative Law Judge program, with a focus on the selection of ALJ's and the issue of whether ALJ's dealing with regulatory matters should be treated differently than those handling benefits cases. Additionally, a comprehensive study of the issue of whether the APA's adjudicatory provisions should be extended to all evidentiary hearings required by statute, as has been suggested by the American Bar Association, would appear to be particularly suitable for examination by ACUS.

Judicial Review

Judicial review of agency rulemaking has emerged as an issue of great significance and interest in the years since the demise of ACUS, and the study of this issue has factored prominently in efforts undertaken in aid of the Administrative Law, Process, and Procedure Project.

Under the Administrative Procedure Act, courts are authorized to invalidate rules that are deemed to be arbitrary or capricious. This standard of review, is not clearly defined, and the judiciary's interpretation of the meaning of this phrase has changed substantially over the past thirty years. Until the 1970's, arbitrary or capricious review

was extremely deferential, essentially requiring only that a regulation fall within the scope of legally delegated authority. However, the Supreme Court's 1971 decision in *Citizens to Protect Overton Park, Inc. v. Volpe* established a dynamic that has led to more stringent review of rules.

Overton Park addressed a challenge to the Secretary of Transportation's decision to approve the release of federal funds for the construction of a highway through a park, on the basis that the decision violated a prohibition on the use of federal highway funds for highway construction through public parks so long as another feasible and prudent route could be used. Applying the arbitrary or capricious standard to the Secretary's decision, the Court held that it was required to analyze whether the decision was based on "a consideration of the relevant factors and whether there had been a clear error in judgment...." The Court stated that while this inquiry must be "searching and careful," the standard of review was ultimately narrow. The Court then proceeded to remand the case so that the lower court could conduct a "thorough, probing, in-depth review of the administrative record underlying the Secretary's decision."

The language used by the Court in *Overton Park* is at once instructive yet ambiguous. The Court declares that judicial review under the arbitrary and capricious standard is to be "searching and careful," while simultaneously espousing a deferential approach to review of informal agency action by stating that the judiciary "is not empowered" to impose its judgment on an agency. It has been asserted that courts applying the precepts of *Overton Park* "tend to ignore all but the mandate to conduct a 'searching and careful' inquiry," slipping into a "a more active role than was intended for arbitrariness review." In turn, this increased level of scrutiny has been cited as facilitating the development of what has come to be referred to as the "hard look" doctrine of arbitrary and capricious review. This approach has been characterized as obliging a reviewing court "to examine carefully the administrative record and the agency's explanation, to determine whether the agency applied the correct analytical methodology, applied the right criteria, considered the relevant factors, chose from among the available range of regulatory options, relied upon appropriate policies, and pointed to adequate support in the record for material empirical conclusions."

The Supreme Court implicitly endorsed the hard look doctrine in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, while continuing to assert, as it had in *Overton Park*, that a reviewing court is not to substitute its judgment for that of the agency. This dichotomy between what, on the one hand, appears to be a very broad grant of discretion to a reviewing court and the much more restrictive notion that the courts are not to usurp agency judgment has been focused upon by both proponents and critics of the hard look standard. Some commentators have argued that the hard look doctrine is essential to allow for an appropriate level of judicial scrutiny of an agency's exercise of power, in that it ensures that agency decisions are not controlled by narrow private interests or an agency's own "idiosyncratic view of the public interest." Conversely, critics of hard look review maintain that it allows for so much judicial discretion "that a single unsympathetic or confused reviewing court can bring about a dramatic shift in focus or even the complete destruction of an entire regulatory program." It has been argued that the establishment of a more stringent review dynamic in *Overton Park*, coupled with the adoption of the hard look doctrine in *State Farm*, has caused the rulemaking process to become more rigid and burdensome upon agencies. In turn, this has led to the assertion that rulemaking has become "ossified," with agencies either undertaking resource and time intensive steps to ensure that a rule will withstand increased scrutiny, or circumventing the

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traditional notice and comment rulemaking process by issuing policy statements and interpretive rules to effectuate compliance with a regulatory agenda.

Various studies have been conducted attempting to evaluate the number of challenges to agency rulemaking efforts and the effect of judicial review thereon. However, it has been stated that “administrative law scholars have failed generally to produce systematic empirical analysis of the effects of judicial review.”

In hopes of ameliorating this situation, the Committee recruited Professor Jody Freeman of the Harvard Law School to conduct a study aimed at providing just such an empirical analysis. With the aid of Curtis Copeland, one of my fellow CRS coordinators of this Project, Professor Freeman was able to obtain access to data on administrative agency appeals from the Administrative Office of the Courts (AOC) from 1995 to 2004. The data consists of 3,075 cases drawn from an initial database of over 10,000 cases involving administrative appeals from every circuit court over that time frame. The goal of the study is to ascertain what happens to agency rules upon appellate judicial review, with the aim of determining the rate at which rules are invalidated in whole or in part, and the reasons for that invalidation. Professor Freeman’s study is ongoing, but she discussed the methodology of the study and presented the preliminary findings of the study at a September 11, 2006 symposium on “Presidential, Congressional, and Judicial Control of Agency Rulemaking,” that was hosted by CRS as part of the Committee’s project. While the study is ultimately expected to yield significant and useful empirical data on the success of challenges to agency rules in the appellate courts, the limitations of this type of study might be seen as providing further evidence of the utility of a reconstituted ACUS. As Professor Freeman noted in her comments at the September 11, 2006 symposium, these types of studies do not give rise to a coherent and comprehensive empirical strategy that will foster optimal analysis of the administrative process for the long term. Rather, it could be argued that only an entity such as a reconstituted ACUS will have the ability to assemble a group of experts with the aim of formulating a cohesive methodology that will be supported by ongoing and systematic analysis.

The Differing Roles of ACUS and OIRA

Regarding the reauthorization and refunding of ACUS, I have worked closely with the staff of your Committee over the past two years in analyzing assertions that a reconstituted ACUS would be duplicative of functions that are already performed by Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). Before addressing the merits of this argument, I think it is useful to provide an overview of the statutory structures and missions of these two entities.

Legislation creating a permanent Administrative Conference of the United States was enacted in 1964,¹ with funds first appropriated in 1968.² In 1995, the activities of ACUS ceased when funding for its activities was terminated. ACUS was reauthorized in the 108th Congress,³ but has yet to receive an appropriation. The statutory provisions governing ACUS were never repealed by Congress, and the reauthorization in the 108th Congress only slightly

¹ See 5 U.S.C. §§ 591-96.

² P.L. 90-392 (1968).

³ P.L. 108-401, 108th Cong. 2d Sess. (2004).

revised its original provisions, by authorizing appropriations and by making four additions to the "purposes" section of the Act.⁴

Pursuant to its statutory authorization, ACUS is tasked with (1) providing "suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest"; (2) promoting "more effective public participation and efficiency in the rulemaking process"; (3) reducing "unnecessary litigation in the regulatory process"; (4) improving "the use of science in the regulatory process," and (5) improving "the effectiveness of laws applicable to the regulatory process."⁵

The reauthorization leaves intact ACUS' original membership dynamic, which is structured, in effect, as a public/private partnership, in order to maximize "the joint participation of agency and outside experts in administrative procedure."⁶ In the event of appropriation its membership will thus consist of a minimum of 75 and a maximum of 101 members, composed of a Chairman, council, and assembly. The Chairman would be appointed by the President, the council would be composed of the chair and ten other members, and the assembly, if comprised in accordance with prior practice, would consist of approximately 100 members, "consisting of representatives of federal agencies, boards, and commissions and private citizens, including lawyers, law professors, and others knowledgeable about administrative law and practice."⁷

During the course of its original existence, ACUS was widely viewed as an effective, independent and nonpartisan entity. For instance, Sally Katzen, a former Administrator of OIRA during the Clinton administration, stated in 1994 that ACUS "has a long-standing tradition of private-sector membership that crosses party and philosophical lines."⁸ Likewise, C. Boyden Gray, a former White House Counsel in the George H.W. Bush administration, testified before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: "Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist."⁹

⁴ *Id.*

⁵ 5 U.S.C. §591(1)-(5).

⁶ Jeffrey Lubbers, "If it Didn't Exist, it Would Have to be Invented" - *Reviving the Administrative Conference*, 30 Ariz. St. L.J. 147, 148 (1998).

⁷ Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition, American Bar Association, p. xvii (1998).

⁸ Toni M. Finc, *A Legislative Analysis of the Administrative Conference of the United States*, 30 Ariz. St. L.J. 19, 55 (1998).

⁹ C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

As further evidence of the respect of, and support for, ACUS, it is interesting to note that Supreme Court Justices Scalia and Breyer testified before the Subcommittee in support of the reauthorization of ACUS. Justice Scalia stated that ACUS was “a proved and effective means of opening up the process of government to needed improvement,” and Justice Breyer characterized ACUS as “a unique organization, carrying out work that is important and beneficial to the average American, at a low cost.”¹⁰ Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.¹¹

The Office of Management and Budget traces its origin to the establishment of the original Bureau of the Budget within the Department of the Treasury by the Budget and Accounting Act of 1921.¹² The Bureau was transferred to the newly created Executive Office of the President by Reorganization Plan No. 1 of 1939,¹³ and was subsequently designated as the Office of Management and Budget by Reorganization Plan No. 2 of 1970.¹⁴ While OMB’s primary function centers on budget formulation and execution, it has many other major functions, including regulatory analysis and review. The Paperwork Reduction Act of 1980, later recodified as the Paperwork Reduction Act of 1995, established the Office of Information and Regulatory Affairs within OMB. In addition to its statutory responsibilities, OIRA exerts significant influence on the scope and substance of agency regulations through a presidentially mandated review and planning process. Shortly after the creation of OIRA in 1980, President Reagan issued Executive Order 12291, which imposed cost-benefit analysis requirements on rule formulation and established a centralized review procedure for all agency regulations. Responsibility for this program was delegated to OIRA.

In practical effect, E.O. 12291 gave OIRA a substantial degree of control over agency rulemaking, enabling OMB to exert considerable influence over agency efforts in this context from the earliest stages of the process. The impact of E.O. 12291 on agency regulatory activity was immediate and substantial, with OIRA reviewing over 2000 regulations per year and returning multiple rules to agencies for reconsideration. As a result of this rigorous review process, agencies became sensitized to the regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.¹⁵ The issuance and implementation of the order generated controversy and criticism, with opponents asserting that the review process was distinctly anti-regulatory and constituted an unconstitutional transfer of authority to OIRA from the executive agencies. This review scheme was retained to similar effect and controversy in the George H.W. Bush Administration.

¹⁰ Jeffrey Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 Dec. Fed. Law. 26 (2004).

¹¹ Fine, n. 8, *supra*, at 46. See also, Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101, 117 (1998).

¹² 42 Stat. 20 (1921).

¹³ 53 Stat. 1423 (1939).

¹⁴ 84 Stat. 2085 (1970).

¹⁵ See T.J. Halstead, *Presidential Review of Agency Rulemaking*, Congressional Research Service, Rep. No. RL32855 at 3 (2005).

President Clinton supplanted the Reagan era review scheme with Executive Order 12866, entitled "Regulatory Planning and Review."¹⁶ The Clinton order implemented a more selective and transparent review process, while generally retaining the centralized review dynamic established by E.O. 12291. Coupled with the comparatively pro-regulatory stance of OMB during the Clinton era, this review scheme resulted in a decrease in the rates of OIRA review of rules, from an average of 2080 regulations per year in fiscal years 1982-93 to an average of 498 in fiscal year 1996.¹⁷ It is important to note that this decrease in the numbers of rules reviewed does not indicate a concession on the part of the Clinton Administration that there were limits on presidential control of the scope of OIRA review or on the agency rulemaking process specifically.¹⁸ Rather, it would appear that the Clinton Administration employed the OIRA review process and general assertions of administrative control over agencies in order to implement its regulatory agenda.¹⁹

The George W. Bush Administration has retained E.O. 12866, utilizing it to implement a review regime that subjects rules to more stringent review than was the case during the Clinton Administration. It has been asserted that the current Administration has returned to the review dynamic that prevailed under E.O. 12291, with OIRA describing itself as the "gatekeeper for new rulemakings."²⁰ Under the current Administration, OIRA has increased the use of "return" letters to require agencies to reconsider rules, which, in turn, has led agencies to seek OIRA input "into earlier phases of regulatory development in order to prevent returns later in the rulemaking process."²¹ This dynamic arguably buttresses executive control over agency rulemaking efforts by exerting influence over rulemaking activity at the earliest stages of rule formulation.²² Additionally, OIRA has instituted the practice of issuing "prompt letters" to appropriate agencies to encourage rulemaking on issues it feels are ripe for regulation.²³ OIRA has acknowledged that prompt letters "do not have the mandatory implication of a Presidential directive," characterizing them instead as a device that "simply constitutes an OIRA request that an agency elevate a matter in priority."²⁴ As with the use of return letters, the use of prompt letters has arguably enabled OIRA to exert a substantial degree of influence on an agency's regulatory agenda.²⁵

While ACUS and OIRA could be viewed as operating within the same sphere to the extent that they are both concerned with regulatory matters, it would appear that there are substantial, concrete differences between their respective structures and missions that in turn give rise to a fundamental difference between the nature and manner of their respective assessments of agency performance in the administrative process.

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 10.

²¹ *Id.* at 10.

²² *Id.* at 10.

²³ *Id.* at 10.

²⁴ *Id.* at 11.

²⁵ *Id.* at 11.

Most importantly, ACUS is an independent entity, whereas OIRA is responsible for effectuating a given administration's regulatory agenda. As touched upon above, ACUS was widely regarded as an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process. As stated by one commentator, "[t]his level of bipartisanship contributed greatly to the ability of the Administrative Conference to reach consensus on issues for their merits rather than because of any particular ideology or party agenda; this in turn contributed to the credibility of the Conference's work and the willingness of academics and private attorneys to volunteer their time to the Administrative Conference."²⁶ Conversely, OIRA does not possess the indicia of independence or objectivity that characterized ACUS, nor does it claim such a character. As an arm of OMB, situated within the Executive Office of the President, OIRA is quintessentially executive in nature, with a predominant mission to advance the policy goals of the President. As such, while OIRA might be characterized as serving a coordinating function in the administrative context, it naturally follows that this function is exercised under the influence of the President.²⁷ Indeed, the activities of OIRA during the Reagan, Clinton, and George W. Bush Administrations, as touched upon above, would appear to establish that this coordinating function has been employed to further the regulatory agenda of those administrations.

The distinction between ACUS as an independent entity and OIRA as an executive agency may also be seen as having practical effects that give further credence to the ability of ACUS to serve in the consideration of agency specific issues. For instance, Loren A. Smith, currently serving as a Senior Judge on the United States Court of Federal Claims and a former Chairman of ACUS, has stated:

[T]he very fact of ACUS' smallness and its lack of investigative powers and budget sanctions, made agencies willing to come to ACUS and listen to ACUS. OMB or the General Accounting Office were threatening. The General Services Administration and the Office of Personnel Management were often perceived as the enemy. ACUS on the other hand, was seen as the kind counselor, one who gave useful, and generally palatable remedies. It thus had the confidence of most of the Executive branch and the Congress. And a place like this is not to be valued lightly.²⁸

Apart from concerns regarding independence and objectivity, it has been suggested that while the staff of OIRA possess a significant degree of expertise with regard to administrative issues, there are nonetheless fundamental structural issues that would inhibit OIRA's efficacy in this context, such as the "multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system."²⁹ Justice Breyer echoed this sentiment

²⁶ Fine, n. 8, *supra*, at 55.

²⁷ See, e.g., Lubbers n. 6, *supra*, at 152.

²⁸ Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 Ariz. St. L.J. 175, 181 (1998).

²⁹ See Edles, n. 11, *supra*, at 135 (quoting Thomas O. Sargentich, *The Supreme Court's Administrative Law Jurisprudence*, 7 Admin. L.J. Am. U. 273, 280 (1993)). Professor Edles has further suggested that "[p]rocedure and process changes would rarely, if ever, rise to the level

(continued...)

in his testimony discussing the mission of ACUS, stating "I have not found other institutions readily available to perform this task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons....The Office of Management and Budget does not normally concern itself with general procedural proposals."²⁹

Also, the broad scope of ACUS' mission, coupled with its independence and expertise is seen by many as making it the appropriate entity to analyze the efficacy of the functions of OMB itself. In his testimony before the Subcommittee, C. Boyden Gray identified OMB activities as being ripe for study by ACUS, suggesting "empirical research on the innovation of the OMB 'prompt' letter, matters relating to data quality and peer review issues," as particularly suitable topics for inquiry.³¹

These issues of independence and objectivity, the widely recognized expertise and bipartisan nature of ACUS, and the broad scope of the work it conducted in all facets of the administrative process could thus be taken to belie the notion that the activities of a reconstituted ACUS would be duplicative of the functions of OMB or its Office of Information and Regulatory Affairs.

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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.

²⁹ (...continued)
sufficient to attract OIRA's attention." See Edles, n. 11, *supra*, at 135-36 n. 212.

³⁰ Stephen G. Breyer, Associate Justice, Supreme Court of the United States, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess., pp. 2-3 (May 20, 2004). See also, n. 9, *supra*.

³¹ See n. 9, *supra*.

Mr. CANNON. And again, thank you all for being here today.

Mr. ROSENBERG, if I could just follow up on some of your comments. You talked at some length about the Congressional Review Act and about how it would work here in Congress. And you fell a little short of talking about what we actually talked about, I think, in this hearing, and that was if Congress were to review every rule. In other words, if you set aside the major rules as impractical to actually determine, then what the effect of that would be that noncontroversial rules would be viewed as minor, and if anybody had a problem with a rule, they could raise that problem in the course of a congressional oversight process.

That would mean that Congress would have to staff up somewhat. The Majority or the Minority would shift a little bit in how they would happen, but you would have an internal process whereby notice and comment could be had, and that way what was major would be determined not by the agency's action or by some other standard which would be difficult to implement, but rather by the reaction of the population. So that in the case of a small business and the effect of a regulation on a small business, small businesses could come forward and say, hey, this regulation would be more difficult, and you could do it in a more easier fashion.

I don't know if you recall that part of the conversation, but it seems to me actually that the panel is agreeing that if you give up the idea of making a distinction between major and minor regulations, that you pretty soon end up in a point where you just say maybe Congress should review all, and then those that are substantial would become the point of focus. Do you recall that? And what is your thinking on that today?

Mr. ROSENBERG. What I was talking about today was a relation of testimony at the March hearing. It has been my view that there is a way to deal with all rules; that if, let's say, a joint Committee was set up as a screening mechanism, or a quorum-type vehicle was set up as a screening mechanism, which then presented recommendations, an internal procedure could be set up to screen out those rules that might be deemed minor rather than major, and that a deeming process that we talked about at the last hearing, which was approved by current Parliamentarian Sullivan and former Parliamentarian Charlie Johnson, that these could be the mechanism for—

Mr. CANNON. Would you mind suspending for a moment here while we have people leave? Thank you.

Please proceed.

Mr. ROSENBERG. The difficulty with limiting congressional review to major rules is just what you're saying: You're going to be losing rules that have an impact. Right now a major rule is defined by the Office of Management and Budget, and I don't know that you want to continue to have the Office of Management and Budget deciding what is a major rule, and therefore, these are the only rules that will come before Congress. You could do it verbally, with a sense of a \$100 million impact, or a catch-all kind of a thing where it has a major significance, impact on—I did a nice thing here.

One of the constitutional problems is Congress itself can't decide what to bring up, what would be a charter problem, demanding that an agency bring up a particular rule. So you may have a prob-

lem of all or nothing, and to have the kind of effective congressional oversight, it would seem to me that all rules, as they are now, should come before Congress. And you would set up a procedure whereby there would be a screening process that, let's say, after 30 days, if a particular rule is not acted upon or a joint resolution of approval is not followed against that particular rule, it then goes to a calendar Wednesday when all the rules are being passed at that particular point or approved.

Mr. CANNON. But the charter problem doesn't exist if all rules come through, but directing a rule—Congress is not good at directing, so you don't ultimately have a charter problem, do you?

Mr. ROSENBERG. Not when it's there, not with all the rules covered. Then there can be a selection process and a deeming of approval at that particular point. You could get rid of 99.98 percent of the rules every year, and you would be able to catch the 60 or so major rules that come forward, if they're necessary. Most of the major rules are not that controversial either. So that you would have a process whereby the meaningful threat is out there that Congress is looking, and that these rules will have to come up, you know, in a way that, you know, conforms with what they were supposed to be.

Mr. CANNON. Mr. Watt, would you allow me to do one more question?

Mr. WATT. Sure.

Mr. CANNON. Dr. Copeland, when you talked about the blaming process—I think you mentioned that, that was mentioned by one of the witnesses here—that is, does Congress want to be blamed for rules that it approves based upon agency action? It seems to me that that's actually our job.

But secondly, having a process whereby you have a political review means that if you don't have significant objection to a rule, that the blame really goes to the people who have the interest who didn't assert the interest at the time. So do you think that the blaming—concern about blaming is something that Members of Congress would want to avoid, or is it something that we can deal with if we did some kind of a review of all regulations and perhaps a vote on all regulations?

Mr. COPELAND. I don't recall getting into the blaming issue, but I can respond to your question a bit.

The issue of whether congressional accountability for agency rules—it really gets back to the question of that the agency rules are based on congressional action. But the problem is more alluded to if Congress got in the business of approving all rules. There is about 4,000 final rules issued every year, and that would take up a significant amount of Congress' time. So some process of weeding these things out is necessary in order to avoid that overwhelming task.

The question then becomes how do you pick. And if you let OMB and the agencies pick which ones are subject to congressional review and would come up here. But technically any rule, under the Congressional Review Act—and Mort, correct me if I'm wrong—any rule can be challenged right now; there can be a resolution of disapproval on any rule, and it doesn't have to be one that an agency does a major rule report on or that GAO does a major rule report

on. So Congress can pick which ones, and certainly the interest groups in Washington are adept at pointing things out to Congress which ones they have a problem with.

Mr. ROSENBERG. The difficulty is it goes through a normal process of legislation, and you know how difficult that is. That's why expedited procedures assist in focusing and taking action in a timely and effective way. I'm the one that brought up the blaming—

Mr. CANNON. Oh, I'm sorry. You were quoting someone else, but—

Mr. ROSENBERG. I was quoting one of the participants on my panel who was making a political point, you know, that you're never going to get this because it puts too much responsibility. It may be that Congress gets blamed for doing things, and most often for not doing things; and here you're adding a whole category of rules that they could have taken care of, and somebody will hammer then. So therefore, let's have a procedure that's less threatening to us, or to you guys.

Mr. CANNON. I would hope that you could do some sort of expedited procedure and pass all bills, and the American people actually want that, and they're beginning to see that. And the blame thing is an initiating thing that we look at as individuals. Institutionally I think that Congress ought to have a greater role in the vast amount of law that gets created under the direction of the law we pass, but at the behest of the Administration.

Mr. ROSENBERG. One of the ostensible reasons for the passage of the Congressional Review Act was to place responsibility and accountability on Congress in order to wipe out the criticism that they nearly delegated vast amounts of power out and never, you know—

Mr. CANNON. That lever hasn't worked as well—it might have worked a little bit, but we don't have the data, and it hasn't worked clearly as well as we had hoped. But you know that I'm a fan of the idea of passing all.

Thank you, all. And I would like to recognize Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

And let me also join you in thanking the witnesses who have devoted so much time to this project, and I think advanced it to a point where hopefully it can be picked up and moved forward.

Mr. Rosenberg, I just had one clarifying question because I wasn't sure I understood what you were saying about ACUS being reauthorized in the 108th Congress, but wasn't so critical that it be funded. What was that point?

Mr. ROSENBERG. Well, my meaning was simply that the process that we're going through, the study process, the projects, the symposia, were setting the groundwork. And we could set the groundwork over a 2-year period, which we have done, but at some point there would have to be an ACUS or something like ACUS. There has to be something like ACUS to provide the kind of objective, nonpartisan consideration and study of sophisticated—

Mr. WATT. Right. I just wanted to make sure that the record was clear that all three of the witnesses, I assume, would strongly advocate funding of ACUS, not just reauthorizing it; or is there any disagreement about that?

Mr. ROSENBERG. We don't advocate, but we would be pleased—

Mr. WATT. I mean, supportive and pleased, yes.

Mr. ROSENBERG. Let's just do it one by one so we'll have it in the record, and there won't be any equivocation about it.

Mr. ROSENBERG. I am supportive of a reactivated ACUS.

Mr. COPELAND. Certainly it makes sense for these issues to be explored further. I think the potential is there for significant savings as a result of this because the people will quibble about what the total dollar value is of all regulations, but it's clearly in the hundreds of millions of dollars. Just last year OMB approved 82, I believe it was, economically significant rules, each of which is \$100 million; 1 percent of that total is \$82 million.

Mr. HALSTEAD. It's very difficult to quantify how much money ACUS saved over its existence. There are anecdotal examples—

Mr. WATT. Let me be clear. I'm trying to get a straight answer into the record that you support or don't support appropriating money to fund ACUS.

Mr. HALSTEAD. I think over the course of the project we've identified several factors that could be looked at as very much supporting the notion that a reconstituted, refunded ACUS would have a beneficial effect for modern administrative government.

Mr. WATT. Having established that from all three of the witnesses, let me also be clear. If you have some concept of what the appropriate appropriation level would be to adequately fund ACUS. And I guess I would say that against—obviously not having ACUS or something similar to it has had substantial economic impacts on various parts of our economy, businesses, so forth and so on. I'm trying to kind of put in context for the next Congress or future Congresses or Members of this Committee or the Judiciary Committee what it would cost as opposed to what it would save, I guess. And so what kind of appropriation level would we be talking about to adequately fund ACUS? Got a clue?

Mr. HALSTEAD. Well, we—

Mr. WATT. Mr. Halstead.

Mr. HALSTEAD. Using the prior reauthorization, it authorized, if my memory serves correctly, a funding level for fiscal years 2005 through 2007 of roughly \$3 million a year. I think it's 3.2 million for the 2007 authorization. And based on the work that the Subcommittee did for that initial reauthorization, the expectation is that that would be somewhere in the neighborhood of what you would need for ACUS to get up and running in an effective fashion.

When you look at the academic literature study in ACUS, it has always been regarded as a very cost-effective organization in relation to the return it provides. So somewhere around that \$3 million figure is maybe—

Mr. WATT. Three million?

Mr. HALSTEAD. Three million, yes.

Mr. WATT. Okay. And that's the figure that you're projecting that would be to get it up and running. What is the annual figure, ballpark, that you would think it would be appropriate to sustain it once it is up and running on an annual basis?

Mr. HALSTEAD. I would think it would be somewhere in that neighborhood. Throughout the course of its existence, it was at somewhat roughly that proportional level.

Mr. WATT. Okay. I just wanted all that to be in the record because, I mean, you know, we're constantly doing cost/benefit analyses. It seems to me that this is one of those occasions that, while we're not being scientific about it, that it's important for us to make it very clear to future Committees and Congresses that we view ACUS as being a very cost-effective agency. And \$3 million, if you're saving substantial cost in paperwork and administrative burden and getting substantial benefits out of what ACUS does, is a minuscule amount of money when juxtaposed against the benefit that we get out of it.

That's the point I'm trying to drive home, and I don't want this hearing to end without having that unequivocally in the record. If anybody wants to argue with it, I want that from the witnesses, but—nobody seems to be arguing with it, so I'm going to do like the Chairman does when he administers the oath: Let the record show that everybody is nodding in affirmative agreement with the statements that I just made.

And with that, I'm happy, and I'll yield back, Mr. Chairman.

Mr. CANNON. Thank you.

Let me just add my view that ACUS is a remarkably cost-effective tool for governing ourselves, and that while I suspect that neither of us will be back on this Committee or directing this Committee next cycle, we will both be advocates for ACUS and for change. I am certainly concerned about who does Chair this Committee, and I'm hoping that we get someone—we've talked to several people who might end up doing that—who would recognize the importance of what we would be doing with this study and how we can translate that into law.

I'd like to ask unanimous consent to introduce into the record this memorandum from the Congressional Research Service from Mr. Rosenberg and Mr. Halstead, which its subject is the comparison of the duties and objectives of the Office of Management and Budget and the Administrative Conference of the United States with respect to the assessments of executive agency performance in the administrative process. I think that that is a valuable addition, especially in conjunction with the questions Mr. Watt asked.

[The information referred can be found in the Appendix.]

Mr. CANNON. I want to, again, thank the witnesses for being here, and the hearing will now be adjourned.

[Whereupon, at 4:23 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

LETTER FROM THE AMERICAN BAR ASSOCIATION SUBMITTED BY THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW



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The Honorable Chris Cannon
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The Honorable Melvin L. Watt
Ranking Member
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Re: Hearing on "The Administrative Law, Process and Procedure Project for the 21st Century"

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Dear Chairman Cannon and Ranking Member Watt:

Kerry M. Lawrence
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On behalf of the American Bar Association ("ABA") and its more than 410,000 members, I write to advise your Subcommittee of the great interest that the ABA, particularly its Section of Administrative Law and Regulatory Practice (the "Section") and its Judicial Division's National Conference of the Administrative Law Judiciary ("NCALJ"), has in the subject of today's scheduled hearing on "The Administrative Law, Process and Procedure Project for the 21st Century". The Project is a very important and worthwhile endeavor and it is our hope that we can work with you and your Subcommittee on the various key administrative law and rulemaking reforms contemplated by the Project. In addition, if the Subcommittee holds additional hearings on the Project or any other administrative law reform issues in the future, the ABA and the Section would welcome the opportunity to testify. As the Chair of the Section, I have been authorized to express the ABA's views on this important subject and request that this letter be included in the official record of today's hearing.

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The ABA, including the Section of Administrative Law and Regulatory Practice and NCALJ, has a longstanding interest in reforming and improving the overall administrative law and rulemaking process, including the seminal statute in this area, the Administrative Procedure Act (APA). Towards that end, the ABA has adopted policy on a host of issues regarding the APA over the years, including reforms in rulemaking, public information, and judicial review. In 2001, the Section completed a comprehensive review of the APA culminating in a restatement of administrative law.¹ The most recent ABA policy pertaining to the APA is a resolution proposing

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¹ American Bar Association Section of Administrative Law and Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 17 (2001).

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amendments to some sections of the APA relating to adjudication. We request that your Subcommittee give due consideration to this proposed amendment as you continue work on your Project. Below we have highlighted some issues of pressing concern to the ABA with regard to administrative law and rulemaking. These include: amendment of the adjudication provisions of the APA, reauthorization and appropriation of funds for the Administrative Conference of the United States, and creation of the "Administrative Law Judge Conference of the United States."

1. Proposed Changes in APA Adjudication

The rulemaking, public information, and judicial review provisions of the APA apply to all federal agencies (with specific exceptions). However, this is *not* the case with the adjudication sections of the APA (primarily sections 554, 556 and 557). These sections presently apply only to a small subset of the subject matter of federal agency adjudications: Social Security Act disability, old-age and survivors benefits claims, Medicare claims, labor law cases, and certain hearings conducted by about 20 other independent regulatory agencies and other Executive Branch agencies. We call these Type A hearings.

These APA provisions guarantee basic, fundamental fairness. They provide for the right to: present evidence and confront the opponent's evidence; require an impartial decision-maker; prohibit ex parte contacts; require separation of adjudicatory from advocacy functions within the agency; and require a statement of findings and reasons. Unfortunately, however, the APA adjudication provisions do not apply under present law to a vast number of adjudications in which an evidentiary hearing is required by federal statutes. Some of the excluded hearings are cases involving immigration and asylum, veterans' benefits, government contract disputes, civil money penalties, security clearances, IRS collection disputes, and about 80 other hearing schemes. We call these Type B hearings. There is no logical reason for the distinction between Type A and Type B hearings. Yet the number of statutes calling for Type B hearings is steadily increasing while the number of statutes calling for Type A hearings remains relatively constant. The APA should apply to all adjudicatory hearings required by statute that are conducted by federal agencies.

In 2005, the ABA adopted a resolution urging Congress to apply the adjudication provisions of the APA to Type B adjudication for the first time. This ABA policy, attached as Appendix A, includes draft legislative language as well as a detailed explanatory report. The ABA strongly urges the Subcommittee to support the APA reforms outlined in this resolution.

Although the ABA's proposal would subject Type B hearings to the adjudication provisions of the APA, one important part of the existing APA would *not* be applied to Type B hearings under our proposal. Specifically, these hearings would not be conducted by administrative law judges ("ALJs"). In an ideal world, ALJs would preside in all hearings required by federal statutes, but this does not appear to be feasible at this time. Nonetheless, these proposed reforms would offer vastly more protection to persons litigating against federal agencies than is provided by existing law.

In addition to expanding the APA adjudication provisions to Type B hearings, the ABA's policy proposal calls for a number of other significant changes in these provisions. In particular, it (1) mandates the adoption of a code of ethics for all administrative presiding officers, whether they serve in Type A or Type B hearings; (2) provides protection for full-time Type B presiding officers

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against dismissal without good cause; (3) expands the opportunity to seek a declaratory order; and (4) clarifies various definitions in the existing Act that have caused confusion – in particular, the definition of a “rule.”

The drafters of the APA wanted to achieve uniformity of procedure in federal administrative law. They achieved that goal with respect to rulemaking, judicial review, and freedom of information, but they did not achieve it with respect to adjudication. Since 1946, a vast number of Type B hearing schemes have emerged that fall outside the APA’s protective umbrella. The ABA’s recommended reforms would bring Type B hearings under the APA umbrella, which in turn would assure fair administrative procedures to generations of future litigants who find themselves in disputes with federal agencies.

2. Administrative Conference of the United States

In the Federal Regulatory Improvement Act of 2004, P. L. 108–401, Congress reauthorized the ~~Administrative Conference of the United States (“ACUS”) for fiscal years 2005, 2006, and 2007.~~ This reauthorization comports with long-standing ABA policy supporting ACUS and its reauthorization. Specifically, the ABA adopted policy in February 1989 that calls for reauthorization of ACUS with funding sufficient to permit the agency to continue its role as the government’s coordinator of administrative procedural reform. A copy of this ABA policy statement is attached as Appendix B. In our view, a revitalized ACUS could play a crucial role in the future development of the federal APA as well as the other areas of reform contemplated by your Project. Indeed, ACUS would be an ideal forum for exploring just the sort of comprehensive reevaluation of the APA and other reforms that the Subcommittee has been addressing in its Project. It could provide a vital, inclusive and prestigious adjunct to the Subcommittee’s work.

ACUS was originally established in 1964 as a permanent body to serve as the federal government’s in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy, and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The ABA and its Section of Administrative Law and Regulatory Practice strongly supported the reauthorization of ACUS in 2004 and we applaud your strong leadership in both sponsoring and facilitating the passage of the legislation that made this possible. Since ACUS was reauthorized in 2004, the ABA has been honored to work with you and your staff in an effort to secure adequate funding for the reconstituted agency from Congress. As part of that effort, the ABA sent a letter to the Senate Appropriations Committee on July 18, 2006, urging them to provide funding for ACUS for fiscal year 2007 at the fully authorized level of \$3.2 million. A copy of that letter is attached as Appendix C.

As the ABA explained in its correspondence to the Senate Appropriations Committee, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. Unfortunately, neither the Senate nor the House Appropriations Committees have approved the

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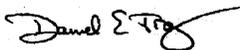
funding that ACUS needs to reconstitute its staff, secure office space and supplies, and resume its critical work. Therefore, the ABA urges you and the Subcommittee to continue your efforts to secure funding for ACUS for fiscal year 2007. In addition, whether or not ACUS receives this critical funding this year, we urge you to support legislation in the new 110th Congress that would reauthorize ACUS for fiscal year 2008 and beyond so that it can continue its vital mission.

3. **Administrative Law Judge Conference of the United States**

The ABA also encourages Congress to establish the proposed Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management ("OPM") with respect to Administrative Law Judges ("ALJs"), including their testing, selection, and appointment. The ABA's proposal—adopted by the ABA House of Delegates in August 2005 and attached as Appendix D—would maximize administrative efficiency by consolidating services, promoting professionalism, promoting public confidence in administrative decision-making, ensuring high ethical standards for administrative law judges, and providing necessary Congressional oversight. Therefore, the ABA strongly urges the Subcommittee to support this proposal by approving legislation that would formally establish the ALJ Conference of the United States.

Thank you for considering the views of the ABA, the Section of Administrative Law and Regulatory Practice, and NCALJ on these critical issues. We stand ready to assist you and the Subcommittee in a reexamination of the APA and with regard to the many other important reforms contemplated by the Project. We will be contacting your staff shortly to consider next steps. In the meantime, if you would like to discuss the ABA's views in greater detail, please feel free to contact me at 301/736-8000 or the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



Daniel E. Troy, Chair
ABA Section of Administrative Law and Regulatory Practice

cc: Members of the Subcommittee on Commercial and Administrative Law
The Honorable Teta L. Castwood, NCALJ
The Honorable Jodi B. Levine, ABA Judicial Division

Appendix A

**RECOMMENDATION 114
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION**

February 14, 2005*

RESOLVED, That the American Bar Association urges Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation consistent with the attached draft bill entitled "Federal Administrative Adjudication in the 21st Century," dated February 2005, recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

FEDERAL ADMINISTRATIVE ADJUDICATION
IN THE 21ST CENTURY ACT

A BILL

To amend title 5, United States Code, to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Administrative Adjudication in the 21st Century Act".

SEC. 2. DEFINITIONS.

- (a) Section 551 of title 5, United States Code, is amended—
- (1) by striking "and" at the end of paragraph (13);
 - (2) by striking the period at the end of paragraph (14) and inserting "and"; and
 - (3) by adding the following at the end:

"(15) 'Type A adjudication' means adjudication required by statute to be—

 - "(A) determined on the record after opportunity for an agency hearing; or
 - "(B) conducted in accordance with sections 556 and 557 of this title;

"(16) 'Type B adjudication' means an agency evidentiary proceeding required by statute, other than a Type A adjudication;

"(17) 'agency evidentiary proceeding' means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and

"(18) 'presiding officer' means the initial decisionmaker in a Type B adjudication."
- (b) Section 551(4) of title 5, United States Code, is amended to read as follows:
- "(4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;"

SEC. 3. TYPE A AND B ADJUDICATIONS.

Section 554 of title 5, United States Code, is amended—

(1) in subsection (a),

(A) by striking "adjudication required by statute to be determined on the record after opportunity for an agency hearing" in the matter preceding paragraph (1) and inserting "Type A adjudication and Type B adjudication";

(B) by inserting "or in a Type A or Type B adjudication" at the end of paragraph (1); and

(C) by striking paragraph (2) and redesignating paragraphs (3), (4), (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;

(2) in subsection (b), by inserting "in a Type A or Type B adjudication" after "an agency hearing" in the matter preceding paragraph (1);

(3) in subsection (c),

(A) by inserting "in a Type A or Type B adjudication," at the beginning of the subsection; and

(B) by striking "on notice and in accordance with sections 556 and 557 of this title" and inserting "in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e)";

(4) in subsection (d),

(A) by designating the first sentence as paragraph (2) and by striking "he" in that sentence and inserting "he or she";

(B) by designating the second sentence as paragraph (3) and redesignating the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B), respectively;

(C) by designating the third and fourth sentences as paragraph (4) and, in the first sentence as so redesignated, by striking all after "agency in a" and inserting "Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision except as witness or counsel in public proceedings"; and

(D) by inserting the following at the beginning of the subsection:

"(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of this title," and

(5) by striking subsection (e) and inserting the following:

"(e)(1) A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

"(2) A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

"(3) The functions of a presiding officer or an officer who reviews the decision of a presiding officer shall be conducted in an impartial manner.

"(4)(A) A presiding officer shall make the recommended or initial decision in the adjudication unless he or she becomes unavailable to the agency.

"(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult with any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

"(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

"(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

"(E) The requirements of this paragraph do not apply—

- "(i) in determining applications for initial licenses;
- "(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- "(iii) to the agency or a member or members of the body comprising the agency.

"(5) The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

"(6) The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

"(7) An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

"(8) Unless otherwise specified, after the date of enactment of this subsection, the establishment of an opportunity for hearing in an adjudication subject to the requirements of this section shall be deemed to provide for a Type A adjudication."

"(9) Nothing in this section shall affect the requirements relating to agency or judicial review that are presently provided by statute.

SEC. 4. SUNSHINE ACT EXCEPTION.

Section 552b(c)(10) of title 5, United States Code, is amended by striking "formal agency adjudication pursuant to the procedures in section 554 of this title" and inserting "an agency evidentiary proceeding under section 554 of this title."

SEC. 5. DECLARATORY ORDERS.

Section 555 of title 5, United States Code, is amended by adding the following at the end:

"(f) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

SEC. 6. ISSUES RELATING TO EVIDENCE.

Section 556(d) of title 5, United States Code, is amended—
 (1) by inserting "and may be entirely based on evidence that would be inadmissible in a civil trial" at the end of the third sentence; and
 (2) by adding the following after the second sentence: "Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

SEC. 7. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE OF PRESIDING OFFICERS.

(a) Title 5, United States Code, is amended by inserting after section 559 the following:
 "§ 559a. Ethics and independence of Presiding Officers and Administrative Law Judges

"(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

"(b) The regulations shall be prescribed in accordance with section 553(b) and (c) of this title.

"§ 559b. Removal and discipline of presiding officers

"(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

"(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to the discipline or removal of a presiding officer."

(b) The analysis for chapter 5 of title 5, United States Code, is amended by inserting the following after the item relating to section 559:
 "560a. Ethics and independence of Presiding Officers and Administrative Law Judges.
 "560b. Removal and discipline of presiding officers."

SEC. 9. SUPERSEDING CONTRARY STATUTORY PROVISIONS.

The provisions of this act supersede existing contrary statutory provisions.

REPORT**Introduction**

The Administrative Procedure Act of 1946 (APA)¹ controls the procedures of almost all federal government administrative agencies and it has achieved nearly constitutional status. The APA is of immense importance to the governmental process and to uncounted millions of people who are impacted by federal agencies. The APA regulates *all* federal agency rulemaking and *all* judicial review of agency action (with narrowly drawn exceptions in each case). Under the Freedom of Information Act,² an amendment to the APA passed in 1966, *all* federal government information is covered (again with specific exceptions). The Negotiated Rulemaking Act and the Administrative Dispute Resolution Act³ comprehensively regulate agency alternate dispute resolution.

As discussed in greater detail below, only a portion of agency adjudication is subject to the adjudication provisions of the APA. We call these "Type A adjudications." Type A adjudications are the cases in which administrative law judges (ALJs) ordinarily preside—primarily benefits cases involving Social Security, Medicare,⁴ and Black Lung. In addition, Type A adjudication covers a wide array of regulatory adjudication, such as that conducted by the FTC, NLRB, SEC, and FERC. Type A adjudication also covers a variety of other programs involving civil penalties, labor, transportation, and communication. The APA provides significant protections to litigants in Type A adjudication. These include detailed provisions relating to the merit selection, independence, compensation, freedom from performance evaluation, and tenure of ALJs.

Numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA's adjudication provisions. We refer to these as "Type B adjudications." Presiding officers (POs) rather than ALJs conduct these hearings. We believe it would be in the public interest to extend certain APA provisions that prescribe fundamental norms of fair adjudicatory procedure to Type B adjudication. Although all presiding officers should, of course, be selected based on merit, competence and experience, we do not propose that the APA's specific provisions relating to the selection, compensation and tenure of ALJs be extended to POs in Type B adjudication since it is not practical to do so.

This resolution attempts to modernize the adjudication provisions of the APA by accomplishing the following goals:

1. Extend certain APA procedural protections to Type B adjudication (Part I of this Report).

¹ 5 U.S.C. §551 et. seq. The APA is cited herein without the prefix "5 U.S.C."

² APA §552.

³ 5 U.S.C. §§561 et. seq; 571 et. seq.

⁴ The new prescription drug provision will undoubtedly increase the number of Medicare cases heard by ALJs. See Eleanor D. Kinney, *Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?* 29 Admin. & Reg. Law News 6 (Spring 2004) (transfer of ALJs deciding Medicare cases from Social Security to HHS).

2. Require adoption of ethical standards for ALJs and POs and protect full-time POs against removal or discipline without cause. (Part II).
3. Clarify the definitions of rule and adjudication under the APA (Part III).
4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication (Part IV).
5. Clarify the APA provisions relating to evidence (Part V).
6. Clarify the ability of all adjudicating agencies to issue declaratory orders.
7. Clarify the right to obtain transcripts at agency's cost of duplication (Part VI).
8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions (Part VII).

I. Extending APA procedural protections to Type B adjudication

II.
The existing APA adjudication provisions cover only Type A adjudication. *The proposal discussed in this section of the report would not change Type A adjudication or alter the various provisions in the APA that safeguard ALJ independence.*³ We propose to extend certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.⁴

A. Type A adjudication under the APA

The term "Type A adjudication" covers all those hearing schemes to which the existing APA adjudicatory provisions apply.⁵ These proceedings, often referred to as "formal adjudication," are ordinarily conducted by ALJs.⁶ They include hearings relating to Social Security, Medicare, and Black Lung benefits as well as to hearings provided by an array of regulatory agencies. There are approximately 1,350 federal ALJs.

In general, Type A adjudications are presently identified by statutes (outside the APA) that either i) explicitly require that sections 556-557 of APA apply or ii) call for adjudication "required by statute to be determined on the record after opportunity for an agency hearing."⁷ As discussed in Part IV, the phrase "on the record" has acquired talismanic properties and most cases hold that those very words (or other clear evidence of Congressional intent) must be used

³ The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.

⁴ These recommendations relate only to "adjudication" which, as discussed in part III below, means action of a particular rather than general applicability. Thus, proceedings for rulemaking for an entire industry, like those in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), would be treated as rulemaking, not adjudication, and would not be treated as Type B adjudication.

⁵ APA §554, 556-58. See proposed §551(15) defining "Type A adjudication."
⁶ Type A adjudication includes some relatively rare situations in which ALJs do not preside. First, a statute may provide that APA §§556-57 apply except that ALJs do not preside. APA §554(b). See Michael Atimow, editor, *A Guide to Federal Agency Adjudication* §1003 (ABA Section of Administrative Law and Regulatory Practice, 2003) (hereinafter referred to as *Guidebook*). Second, the APA allows the agency head or head to preside instead of ALJs, although this rarely if ever occurs. Third, in initial licensing or reinstating cases, the APA allows the agency to designate staff members other than ALJs as presiding officers. §556(b). Type A adjudication covers hearings and procedures described in this footnote even though in fact ALJs do not preside.

⁷ APA §554(a) (emphasis added). See *Guidebook* §1.01. Under the proposed default provision discussed in part IV below, adjudicatory hearings called for in future statutes will be Type A adjudication (even if the statute does not use the magic words "on the record") unless Congress provides the contrary.

before Type A adjudication provisions come into play. Other than the changes described in Parts II to VII of this Report, which are not fundamental in nature, we propose no changes in Type A adjudication since we view the system of Type A adjudication as working well.

B. Type B adjudication and informal adjudication

The recommendation proposes extension of certain fundamental procedural protections set forth in the existing APA to "Type B adjudications," meaning evidentiary proceedings required by statute other than Type A adjudication.¹⁰ Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.¹¹

Although people sometimes refer to Type B adjudication as "informal adjudication," this usage is not proper. Many Type B hearings are as "formal" or even more "formal" than Type A hearings.¹² The term "informal adjudication" is properly used to describe the vast array of adjudications conducted by federal agencies with respect to which no statute requires a hearing.¹³ There are literally millions of informal adjudications, ranging from economically important orders (such as refusal to grant a bank charter) to low-stakes decisions (such as allocation of campsites by federal forest rangers). Our proposals do not affect informal adjudication as defined in this paragraph.

C. Rationale

The provisions in Title V of the U. S. Code relating to rulemaking, judicial review, alternative dispute resolution, and government information apply across the board, but the APA's provisions for adjudication apply only to a portion of federal agency evidentiary proceedings.¹⁴ This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to provide basic fair-hearing norms in most agency adjudication.¹⁵

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) of Type B adjudication.¹⁶ Frye identified 2,692

¹⁰ See proposed APA §§551(16) and (17).

¹¹ In practice, numerous titles are used to describe POs, but we used the generic term PO to include all such positions. See proposed APA §551(18).

¹² Most Type A hearings are Social Security cases which are conducted in a non-adversarial, relatively informal fashion.

¹³ The term "informal adjudication" is sometimes used to describe Type B proceedings that are conducted informally but we believe that the term "informal adjudication" should be reserved for the vast array of adjudicatory proceedings as to which no statute requires an evidentiary hearing.

¹⁴ APA §§555 and 559 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudication or the protections we propose should be applicable to Type B adjudication. See Guidebook §§.04, 9.06.

¹⁵ Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Failing?* 10 Admin. L. J. 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. (2004); Attorney General's Manual on the APA § (1947).

¹⁶ John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 Admin. L. Rev. 261, 264 (1992). Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Vechell et al., *The Federal Administrative Judiciary*, Vol. 2 (1992) ACUS Rec. & Rep. 775, 788-90, 843-73. In

POs. Of the 83 case-types, 15 accounted for 98% of the total. The largest Type B category is deportation cases. There are a substantial number of law enforcement cases, including civil penalties administered by numerous agencies,¹⁸ as well as passport denials or security clearance disputes. Type B adjudication includes many benefit cases such as veterans' benefits and Medicare Part B cases decided by employees of insurance carriers. A substantial number of cases deal with economic matters (farm credit, public contract disputes, bid protests, or debarment of contractors) and federal employment relationships (such as those administered by the Merit Systems Protection Board).

In 2002, Raymond Limon updated Frye's study.¹⁹ Limon found 3,370 Type B POs, about a 25% increase from 1989 figures. In contrast, there are 1,351 ALJs in 29 different agencies (a 15% increase).²⁰ Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).²¹

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.²² Frye found that full-time POs decide about 90% of the Type B cases (but part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).²³ Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.²⁴

Based on the criteria set forth in Part IV, it would be desirable to convert many of the existing systems of Type B adjudication to Type A adjudication. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. Thus, our proposal recognizes that

cooperation to the 343,000 Type B adjudications, the ACUS study estimated that there were about 300,000 Type A adjudications per year in the late 1980's.

¹⁸ Under the Clean Water Act, EPA can impose a "class 1 civil penalty" (\$10,000 per violation up to \$25,000 maximum) or a "class 2 civil penalty" (\$10,000 per violation with a maximum of \$125,000). A class 2 penalty must follow "notice and opportunity for a hearing on the record in accordance with section 554 of Title 5." A class 1 penalty also requires notice and a hearing but "such hearing shall not be subject to section 554 and 556 of Title 5 but shall provide a reasonable opportunity to be heard and present evidence." 33 U.S.C.A. §1319(d)(7). These Class 2 penalties call for Type A adjudication but Class 1 penalties call for Type B adjudication. For a thorough treatment of civil penalties and Type B adjudication, see William F. Funk, *Close Enough for Government Work—Using Informal Procedures for Imposing Civil Penalties*, 24 Seton Hall L. R. 1 (1993).

¹⁹ Office of Administrative Law Judges, *The Federal Administrative Judiciary Then and Now—A Decade of Change 1992-2002* (Dec. 23, 2002).

²⁰ Limon stated that in 1992 there were 1167 ALJs; in 2002, there were 1351 ALJs. Limon 3, n.4. During much of the period between the Frye and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

²¹ Numerous recent statutes call for Type B adjudication. For example, a recently enacted statute provides for "collection due process" (CDP) hearings by the IRS. IRC §§6320, 6330. The IRS now conducts about 30,000 CDP hearings annually and the number is rising steadily. CDP hearings appear to be Type B adjudication although numerous issues about the nature of CDP hearings and judicial review thereof are at present unresolved. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Florida L. Rev. 1, 117-28 (2004); Leslie Book, *The Collection Due Process Rights: A Hurray or Sigh in the Right Direction*, 41 Houston L. Rev. (2004).

²² Some part-time POs are not agency staff members; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

²³ Frye found that there were 601 full-time POs and 2130 part-time POs. However, full-time POs decided about 90% of the Type B cases. Frye 349-50.

²⁴ Frye 349. Limon found that of 3370 POs, only 1370 were lawyers. However, of the 601 full-time POs, 438 were lawyers.

second-best is better than nothing at all. It is intended to insure fundamental, baseline procedural protection in the large universe of Type B adjudication.²⁴ In practice, so far as we can determine, such protections are normally provided in existing Type B adjudication schemes. Nevertheless the public deserves to be guaranteed that such protections will always be provided through generally applicable and accessible APA provisions, instead of the existing maze of due process requirements and situation-specific statutes and procedural regulations.

D. Meaning of "evidentiary proceeding"

Our proposal recognizes and distinguishes three types of federal adjudication. Type A adjudication refers to the set of evidentiary hearings usually conducted by ALJs and is unaffected by our proposal.²⁵ Type B adjudication refers to evidentiary hearings required by statute that are conducted by POs. Our proposal would impose a set of procedural requirements on Type B adjudication. Informal adjudication entails decisions by federal agencies with respect to which no statute calls for a hearing. Our proposal does not affect informal adjudication (except to make clear that it is possible to issue a declaratory order through informal adjudication—see Part VI).

As discussed in Part IV, there is considerable case law that distinguishes Type A from Type B adjudication. Unfortunately, this case law is in conflict. Our proposal does not attempt to resolve this conflict but assumes that the line between Type A and Type B would continue to be drawn under existing law. (Part IV of our proposal would clarify the Type A/Type B distinction for statutes adopted in the future). We discuss here the problem of distinguishing Type B adjudication from informal adjudication.

Type B adjudication, as defined in proposed §551(16), means "an agency evidentiary proceeding required by statute, other than Type A adjudication."²⁶ Under proposed §551(17), the term "agency evidentiary proceeding" means "a proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing." As provided in new §551(18), a "presiding officer" conducts Type B adjudication. Thus a Type B proceeding will

²⁴ New provisions in California's APA that were enacted in 1995 call for a scheme similar to this proposal. The California statute preserved a system of Type A adjudication that relies on central panel ALJs. It then provides for an "administrative adjudication bill of rights" for Type B adjudication. See generally Michael Janow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 *Tulsa L.J.* 287 (1996).

²⁵ See note 16 which observes that a few classes of Type A adjudication are not heard by ALJs. The definition excludes from Type B adjudication the types of cases already exempted from Type A adjudication by §554(a) with some modifications: (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication; (2) proceedings in which decisions rest solely on inspections, tests, or elections; (3) the conduct of military or foreign affairs functions; (4) cases in which an agency is acting as an agent for a court; or (5) the certification of worker representatives.

We strike out an existing exemption: "(2) the selection or tenure of an employee other than an ALJ." Hearings required by statute that concern the tenure of government employees would normally be classified as Type B adjudication. If any statute provides for evidentiary hearings relating to selection of employees, these would generally be Type B hearings also. Hearings relating to the tenure of ALJs would continue to be Type A adjudication. We propose that disputes concerning the tenure of Type B POs should also be Type A adjudication. We propose to strike out the existing exemption because hearings relating to selection and tenure of federal employees should be included in the APA's provisions for Type A or B adjudication. See Part II.

always be identified by the presence of a federal statute (other than the APA) that calls for an evidentiary proceeding.

Federal statutes frequently call for evidentiary "hearings" that are not Type A adjudication. The definition of Type B adjudication captures these proceedings.²⁷ Some statutes use terms other than "hearing" to describe such proceedings but the intention of the statute is to call for an "evidentiary proceeding."²⁸ The term "evidentiary proceeding" covers hearings required by statute even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans' Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).²⁹

The term "evidentiary proceeding" does not include statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) where such procedures do not limit the decisionmaker to consideration only of the evidence in the record.³⁰ Nor does it include so-called "hearings" in which the public is invited to appear and make statements (such as often occurs with respect to various forms of land use decisions),³¹ informal inquiries, or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another de novo administrative review or de novo judicial review to finally resolve the matter).³²

²⁷ For example, in railroad unemployment insurance cases, an employee "shall be granted an opportunity for a hearing before a referee." 35 USC §355. A federal government employee claiming workers compensation "is entitled to a hearing on his claim before a representative of the Secretary." 5 USC §8124(b)(1). In Agriculture Department disputes, there is a "right to appeal an adverse decision for an evidentiary hearing of a hearing officer." 7 USC §6996(a). Persons who are subject to IRS collection activities have "a right to a hearing." IRC §6330(a)(1).
²⁸ In immigration cases, the statute states that an Immigration Judge (IJ) "shall conduct proceedings for deciding the inadmissibility or deportability of an alien." In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien "shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government." The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions. 8 USC §1229a(j)(3)(1), (b)(1), (4)(B); 8 CFR §240.1(c). The Contract Disputes Act provides that a board of contract appeals shall "provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing." A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 USC §607(c), (10). We understand that the existing system of public contract dispute resolution already meets all requirements of Type B adjudication.

²⁹ 38 USC §8710(a), 7107(b). BVA hearings are informal and non-adversarial. See 38 CFR §20.700(c).
³⁰ See 16 USC §1450(d)(A) concerning licensing decisions for activities within the coastal zone. The Secretary consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appropriate-file procedures for the conduct of the Secretary's inquiry, the statute indicates no requirement for an evidentiary proceeding as the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

³¹ See, e.g., *Bostroy v. United States*, 690 F.2d 1170, 1174-83 (5th Cir. 1982) ("opportunity for public hearing" does not trigger APA formal adjudication).
³² Present section 554(a)(1) contains an exception for "a matter subject to a subsequent trial of the law and the facts de novo in a court." We propose to add the words "or in a type A or Type B adjudication." We intend thereby to make clear that the requirements for Type B adjudication will not apply where a "hearing" required by statute can be followed by another de novo trial of the law and facts, whether it takes place in an Article III court or before some administrative tribunal or Article I court. In short, a litigant gets only one Type B or Type A administrative proceeding, not two. (For this purpose, we do not consider the remote likelihood that the agency heads or other

It would be possible to extend Type B adjudication to evidentiary proceedings called for by the Due Process clause of the 5th Amendment. We do not propose this because it would be difficult to decide which due process cases call for evidentiary proceedings and which ones call for some sort of interaction that is less formal than an evidentiary proceeding.³³ Due process cases use an ad hoc balancing test to decide what procedures are applicable³⁴ and thus resist the sort of rigidity that the proposed statutory test would entail.

It would also be possible to extend the Type B adjudication concept to evidentiary proceedings called for by agency procedural regulations rather than by statute.³⁵ We do not propose this, however, because it would create perverse incentives. It might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are not required to do so. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing procedural protections that they are not required to provide.³⁶

E. APA provisions applicable to Type B adjudication

Under proposed APA §554(e), certain provisions of the existing APA will apply to Type B adjudication:

- Timely notice and right to submit settlement offers;³⁷
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;³⁸

reviewing authority can call for a de novo hearing after the decision of an ALJ or a PO as constituting a subsequent de novo trial).

³³ See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (procedures required before public employee is discharged); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

³⁴ *Mishrow v. Elkridge*, 404 U.S. 319 (1976).

³⁵ The VA regulations (but not a statute) provide for a hearing in connection with benefits disputes (so-called "regional office hearings"), 38 CFR §3.103(c). Such hearings are not Type B adjudication for two reasons: 1) they are provided for in regulations rather than by statute, and 2) they are followed by a subsequent de novo administrative hearing provided by the Board of Veterans' Appeals. Similarly, the Equal Employment Opportunities Commission provides hearings for federal employees who allege prohibited discrimination but such hearings are authorized by regulation rather than by statute. See 42 U.S.C. §2000e-16(b); 29 CFR §1614.109(c) (2003).

³⁶ Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations calling for evidentiary proceedings. It seems likely that many would choose to do so (or have already done so).

³⁷ Proposed APA §554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to Type B proceedings. See Guidebook ¶4.02.

³⁸ Proposed APA §554(e)(2) adapts language from APA §556(d): "A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts." See Guidebook ¶5.07, 5.08. As in Type A adjudication, a PO would have discretion as to whether evidence should be presented orally or in writing. Similarly, a PO would have discretion whether to allow cross-examination. A PO may decide that cross-examination is not needed for a "full and true disclosure of the facts" where the issue to be resolved is not a disputed factual question that turns on credibility. As in Type A adjudication, a PO may decide that evidence that has been received in written form need not be subject to cross-examination.

Under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask "follow-up questions" of the witnesses. 38 CFR §20.700(c) ("Parties to the

- Decisionmaker impartiality;³⁹
- Decisionmaker independence and separation of functions;⁴⁰
- Prohibition on ex parte contacts with decisionmakers;⁴¹
- The exclusive record and official notice provisions;⁴² and
- the requirement of a written or oral decision containing findings and reasons. In the event that the PO's decision is reviewed at a higher agency level, the PO's decision must be disclosed to the parties who have an opportunity to comment on it prior to the highest-level decision.⁴³

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.⁴⁴ The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage. We also believe that the exception from the Government in the Sunshine Act that applies to the "initiation, conduct, or disposition" of Type A adjudication should be extended to include Type B adjudication.⁴⁵

hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted"). Because of the non-adversarial format of DVA hearings (meaning that the VA is not represented), there may be little occasion for cross-examination. The provision for follow-up questions should be sufficient to meet the requirements of proposed §554(d)(1). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Reg. §301.6330-1(d)(1) A-D6 ("the taxpayer or the taxpayer's representative do not have the right to subpoena and examine witnesses at a CDP hearing"). The issues in a CDP hearing would not ordinarily involve credibility conflicts so cross-examination should not be necessary.

³⁹ Proposed APA §554(e)(3) adopts language drawn from §556(f): "The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner." See *Guidebook* ¶7.02.

⁴⁰ Proposed §554(e)(4)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing §554(d). Proposed §554(e)(4)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing §554(d)(1). Proposed §554(e)(4)(C) prohibits command influence. It parallels existing §554(d)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigations or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, we propose that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same adjudication that the PO is deciding. We seek to avoid extra costs or disruption of existing structures, and we do not wish to compel agencies to reorganize themselves. Finally, §554(e)(4)(D) parallels the existing provision for separation of functions; it prohibits agency prosecutors or investigators in a case from participating or advising in the decision of that case. See *Guidebook* ¶7.06.

⁴¹ Proposed APA §554(e)(5) incorporates the provisions of existing APA §557(i). See *Guidebook* ¶7.04.

⁴² Proposed APA §554(e)(6) also incorporates APA §556(c): "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is notified, on timely request, of an opportunity to show the contrary." See *Guidebook* ¶7.08.

⁴³ Proposed APA §554(e)(7) requires a PO's decision to include "a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. The decision may be delivered orally or in writing to the discretion of the PO. This provision modifies language in existing APA §557(i). See *Guidebook* ¶6.02. We understood that some POs deliver oral decisions. We did not wish to compel a change in this practice by requiring written decisions. We also understood that in some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. Our proposal would change this practice.

⁴⁴ Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

⁴⁵ 5 USC §552a(c)(10).

Numerous provisions of the existing APA will not apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALJs.⁴⁶
- Provisions relating to evidence and burden of proof.⁴⁷
- Various provisions relating to review of initial decisions.⁴⁸
- The right to an award of attorney's fees under the Equal Access to Justice Act.⁴⁹

Judge Frye's report confirms that Type B adjudication is already conducted in accordance with the requirements of proposed section 554(c) in almost all cases. Therefore, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. Our intention is to assure that litigants will receive fundamental procedural protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. Ethical standards and protection against reprisal

Proposed §559a requires the Office of Government Ethics to adopt ethical standards for all federal ALJs and POs. This proposal implements Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA's Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.

The objective of Resolution 101B, and of proposed §559a, is to assure that both ALJs and POs be held accountable to appropriate ethical standards. These rules should be based on the ABA Model Code of Judicial Conduct as a starting point, taking account of the unique characteristics of particular positions of ALJs and POs. The rules should also consider the codes of ethics adopted by groups such as NCALJ and the 1989 Code of Conduct for Administrative Law Judges, and might include particular standards adapted to the unique characteristics of various positions held by ALJs and POs, for part-time and full-time POs, or for lawyers and non-lawyers.⁵⁰

⁴⁶ 5 U.S.C. §§3105, 7521, 5372, 3344, 1305. See *Guidebook* Chapter 10.

⁴⁷ §556(d). See *Guidebook* §§.03 to 5.05. In our view, it is not necessary to incorporate the APAs provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudications. In particular, we did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Guidebook* §5.033.

⁴⁸ APA §557(b), (c). See *Guidebook* §6.03. Again, we did not believe it necessary to incorporate these detailed provisions to achieve fair procedures in Type B adjudication.

⁴⁹ See *Guidebook*, chapter 11. We would not be opposed to extending EAJA to Type B adjudication but do not recommend it at this time in the interests of minimizing the budgetary impact of our proposal.

⁵⁰ The ABA's Model Code of Judicial Conduct stresses that "anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions...is a judge within the meaning of this Code."

Also in keeping with Resolution 101B, proposed section 559b provides that full-time POs shall be removed or disciplined only for good cause and only after a hearing to be provided by MSPB under the standards of Type A adjudication, subject to judicial review.²³ Section 559b is also based on ALBA Resolution 101B.²⁴ POs should be protected from negative consequences for engaging in ethical and independent decisionmaking. Good cause should include violation of the ethical rules referred to in the preceding paragraph. POs should also be entitled to judicial review of such decisions.

III. Clarifying the definition of rule

At present, the APA's definition of "rule" is defective.²⁵ Rulemaking is the process for formulating a "rule." A "rule" is a "statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy...and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Adjudication is the process for formulating an "order" and an "order" means a "final disposition . . . in a matter other than rule making but including licensing."²⁶

The statute should be amended so that agency action of *general applicability* is a rule and agency application of *particular applicability* is adjudication.²⁷ Under the existing definitions, for example, an FTC cease and desist order would be a rule (since it is agency action of particular applicability and future effect), but everyone treats cease and desist orders as "orders" rather than as "rules" and agrees that they should be subject to adjudicatory procedure.²⁸ This

²³ As provided in Recommendation IV, newly enacted hearing schemes should be Type A rather than Type B adjudication unless Congress specifically provides to the contrary. Consistent with the spirit of Recommendation IV, we recommend here that adjudications arising out of the discipline or discharge of POs should be Type A adjudication, meaning that such cases would be heard by the MSPB's ALJs rather than its POs. Of course, the same exceptions presently applicable to hearings to remove ALJs (relating to national security or to reductions in force) would also apply to removal of POs. 3 USC §7521(b)(A) and (B), referring to §7532 and §3502. A full-time PO would be treated as such even if the official had limited incidental duties in addition to judicial responsibilities in evidentiary hearings.

²⁴ The 2001 resolution made clear that, for this purpose, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

²⁵ See *Guidebook* §1.04; Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. J. Rev. (2004).

²⁶ APA §§551(4) to (7).

²⁷ The recommendation also deletes the words "and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The effect of the latter change is that rulemaking of general applicability would be rulemaking but rulemaking of particular applicability would be adjudication. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that setting of industry-wide railway rate should be treated as informal rulemaking under the APA).

²⁸ As under existing law, a rule that in practice would apply to only a single person is still a rule (rather than an adjudication) as long as it is stated in general terms and it is theoretically possible that it could apply to additional persons. An agency's grant of exemption from a rule to a particular person would be an adjudication.

proposal is already ABA policy. It was part of a set of recommendations approved in 1970 by the HOD.

A further clarifying amendment removes the words "and future effect" from the definition of "rule." This revision would make clear that the APA applies to retroactive rules. Under Supreme Court case law,²⁷ an agency may not adopt a retroactive rule that has the force of law unless Congress explicitly authorizes the agency to do so. When agencies do adopt retroactive rules with the force of law, they should be adopted with appropriate notice and comment procedures.²⁸ In addition, interpretive rules often have retroactive effect; the APA's definition of "rule" should also cover retroactive interpretive rules.

IV. Type A Adjudication: Guidelines for Congress and a Default Provision When Statute is Unclear

In June, 2000, the ABA House of Delegates adopted Resolution 113, a recommendation sponsored by the Judicial Division, that set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication. A second part of the resolution created a default provision that would sweep newly adopted adjudicatory schemes into Type A unless Congress provided otherwise. This 2000 resolution is germane to the present set of recommendations. If Congress takes up the issues of Type A and B adjudication, it would naturally consider this recommendation at the same time.²⁹

A. Criteria for deciding whether new program should employ Type A adjudication

When Congress sets up a new program involving adjudications with opportunity for hearing, it should consider and explicitly determine whether the new program will be Type A adjudication.

Congress should consider the following factors (each of which points toward Type A rather than Type B adjudication):

- a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.
- b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

²⁷ *Brewer v. Georgetown University Hospital*, 488 U.S. 204 (1988). We do not propose to change the rule of the *Georgetown* case but only to provide that the APA's definition of rule applies when an agency is authorized to adopt a retroactive rule or when it adopts a retroactive interpretive rule.

²⁸ See ABA House of Delegates Resolution (Feb. 1997) stating that "retroactive rules are and should be subject to the notice and comment requirements of Section 553 of the Administrative Procedure Act."

²⁹ Because of the various changes in statutory nomenclature embodied in this recommendation and report (such as adoption of the terms Type A and B adjudication), we propose non-substantive changes in the 2000 recommendation.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.⁴⁰

B. Default provision

Congress should amend the APA to provide prospectively that absent a statutory requirement to the contrary, in any future legislation that creates opportunity for an adjudicatory evidentiary hearing, such hearing shall be Type A adjudication.⁴¹

C. Rationale

Under the existing APA, Type A adjudication exists only when "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing..."⁴² Where a statute calls for an evidentiary hearing but does not use the magic words "on the record," it has been difficult to decide whether the resulting adjudication is Type A or Type B. The case law is conflicting.⁴³ ABA Resolution 113, already adopted by the HOD, calls for Congress to carefully consider this issue when it adopts future legislation that creates opportunity for an adjudicatory evidentiary hearing. The Resolution provides a useful list of factors that Congress should consider when it makes that decision. The resolution also calls for a prospective-only default rule. Under that rule, future legislation that creates opportunity for an adjudicatory evidentiary hearing will require Type A adjudication unless Congress provides the contrary.

This default rule will nudge federal administrative law in the direction of greater use of ALJs and Type A adjudication. This will result in enhancement in the impartiality and skill of adjudicatory decisionmakers and an accompanying improvement in the fairness and quality of decisions. Generally, agencies are well aware of legislation that affects them and the burden should be on the agencies to inform Congress at the time it considers a new adjudicatory scheme if the agency believes that Type A is inappropriate.⁴⁴

⁴⁰ These factors are substantially the same as those in ACUS Recommendation 92-7, 57 Fed. Reg. 61760 (Dec. 29, 1992).

⁴¹ Resolution 113 states that such hearings "shall be subject to 5 USC §§554, 556, and 557." The present Recommendation used the term Type A adjudication which embodies the sections of the APA referred to in Resolution 113. No change in meaning is intended.

⁴² APA §554(a).

⁴³ See *Guidesbook* §3.01; Gary Edles, "An APA-Default Presumption for Administrative Hearings: Some Thoughts on 'Onsifying' the Adjudication Process," 55 Admin. L. Rev. 787, 796-804 (2003); Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 Admin. L. Rev. 317 (1985); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. (2004). Three distinct lines of cases have emerged. Some cases conclude that Type A adjudication is intended despite absence of the words "on the record." *Shadman v. SBC*, 450 U.S. 91, 96 n.13 (1981); *Seacoast Anti-Pollution League v. Coale*, 572 F.2d 672, 675-78 (1st Cir. 1978); *Lane v. USDA*, 120 F.3d 106 (9th Cir. 1997). Other cases require the use of the words "on the record" or some other clear statement of Congressional intention. *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983); *RR Comm'n of Texas v. United States*, 765 F.2d 221, 227-29 (D.C. Cir. 1985). And still others accord *Chevron* deference to the agency's determination that the statute does not call for Type A adjudication. *Chemical Waste Mgmt. Inc. v. EPA*, 875 F.2d 1477, 1480-83 (D.C. Cir. 1989).

⁴⁴ According to the Report accompanying Resolution 113, the default rule would apply to "any new adjudication that Congress creates with an opportunity for a hearing." See Edles, 812-14.

V. Issues relating to evidence

A. Residuum rule

The "residuum rule" (followed in some states) requires that a decision must be supported by at least some non-hearsay evidence. This rule creates many problems, such as requiring the judge to make constant hair-splitting rulings about hearsay and its many exceptions, and requiring the parties to object at some appropriate time that the residuum rule applies in order to preserve the issue on appeal. It is generally believed that *Richardson v. Perales*⁴⁵ rejected the residuum rule at the federal level but this should be made clear in the statute.

The proposed amendment to APA section 556(d) accomplishes this result by adding the italicized language: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, and may be entirely based on evidence that would be inadmissible in a civil trial."

B. Evidence—FRE 403

In general, the Federal Rules of Evidence are not applicable to administrative agencies. The existing APA provides that an agency "as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."⁴⁶ An ACUS study indicated that this provision was inadequate because it did not give ALJs adequate case management tools. The consultant's survey of ALJs indicated that they believed they lacked power to exclude evidence that was patently unreliable or whose probative value was so low that it would not justify the amount of hearing time it would require.

The ACUS study declared: "This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state. Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications."⁴⁷

As a result, ACUS recommended that agencies adopt evidentiary rules allowing decisionmakers to exclude evidence under Federal Rule of Evidence 403.⁴⁸ That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁴⁹ We agree and recommend that section 556(d) of the APA be amended to specifically permit ALJs to exclude evidence based on the FRE 403 standard (as modified slightly to take account of the differences between administrative and judicial proceedings).

⁴⁵ 402 U.S. 389 (1971).

⁴⁶ APA §556(d).

⁴⁷ Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 23 (1987).

⁴⁸ ACUS Recommendation 86-2, 51 Fed. Reg. 25642 (July 16, 1986).

⁴⁹ The citation in this quotation is for the words "or misleading the jury" and "danger of unfair prejudice," which seem inapplicable to the administrative process.

VI. Declaratory orders

Existing §554(e) empowers an agency to issue a declaratory order to terminate a controversy or remove uncertainty. The placement of this subsection in the existing statute implies that only an agency authorized to conduct Type A adjudication can issue a declaratory order. We believe that any agency, whether conducting Type A, Type B, or informal adjudication, should be authorized to issue a declaratory order. Therefore, we propose moving this provision to §555, which applies to agency proceedings generally.⁷⁹

VII. Transcripts

The APA should provide that transcripts of agency proceedings (if they exist) should be available to private parties at cost of duplication. This is probably already required by §11 of the Federal Advisory Committee Act which provides: "Except where prohibited by contractual agreements entered into prior to the effective date of this act, agencies shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings (as defined in §551(12))." It would be useful to incorporate this provision in the APA itself where it would not be overlooked. As a result, we recommend that section 556(e) be amended by adding the italicized language and deleting the stricken out language:

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and on payment of lawfully prescribed fees, shall be made available to the parties. Agencies shall make such transcripts available to the parties at the actual cost of duplication. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

Legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.

Respectfully submitted,
 Randolph J. May
 Chair, Section of Administrative Law and
 Regulatory Practice

February 2005

⁷⁹ See Jeffrey S. Lubbers & Blake D. Morant, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. (2004).

APPENDIX
(Ramseyer Rule)

I. Extending APA procedural protections to Type B adjudication

A. Definitions

Add to APA § 551 (definitions), 5 U.S.C. §551:⁷¹

- (15) "Type A" adjudication means adjudication required by statute to be—
 (A) determined on the record after opportunity for an agency hearing; or
 (B) conducted in accordance with sections 556 and 557 of this title;
 (16) "Type B adjudication" means an agency evidentiary proceeding required by statute, other than a Type A adjudication;⁷²
 (17) "agency evidentiary proceeding" means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and
 (18) "presiding officer" means the initial decisionmaker in a Type B adjudication.

B. Type B adjudication

Amend existing APA §554 so that it reads as follows:

Sec. 554. - Adjudications

(a) *General principles.* This section applies, according to the provisions thereof, in every case of Type A adjudication and Type B adjudication adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication;⁷³
 (2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;⁷⁴
 (3) proceedings in which decisions rest solely on inspections, tests, or elections;

⁷¹ Subsequent references to the APA will exclude the prefatory 5 U.S.C.

⁷² The problem of distinguishing Type A, Type B, and informal adjudication is discussed in Parts I.A. and I.B. of the Report that follows these recommendations.

⁷³ In some agencies, the agency heads or a superior reviewing authority can, in theory, require a new de novo hearing of a case already heard by an ALJ or a FO to be conducted before the agency heads. We understand that this virtually never occurs in practice. The unlikely possibility of a de novo rehearing at the agency head level should not be taken into account in applying this subsection. Thus the rules relating to Type A and Type B adjudication apply to the hearing provided by an ALJ or a FO despite the remote possibility that the case could be heard anew at a higher level. For further discussion, see note 22 of the Report.

⁷⁴ This exception in the existing act becomes inappropriate in light of the adoption of the provisions relating to Type B adjudication. For further discussion, see note 26 of the Report.

- (3) the conduct of military or foreign affairs functions;
- (4) cases in which an agency is acting as an agent for a court; or
- (5) the certification of worker representatives.

(b) *Notice.* Persons entitled to notice of an agency hearing in a Type A or Type B adjudication shall be timely informed of —

- (1) the time, place, and nature of the hearing;
- (2) the legal authority and jurisdiction under which the hearing is to be held; and
- (3) the matters of fact and law asserted. ... [balance of subsection remains the same]

(c) *Settlement proposals.* In a Type A or Type B adjudication, the agency shall give all interested parties opportunity for —

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision ~~on notice and in accordance with sections 556 and 557 of this title.~~ in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e).

(d) *Procedures for Type A adjudication.*

- (1) A Type A adjudication shall be conducted pursuant to sections 556 and 557 of this title.
- (2) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he or she becomes unavailable to the agency.
- (3) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
 - (A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
 - (B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
- (4) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision, decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply —
 - (A) in determining applications for initial licenses;
 - (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
 - (C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.⁷⁵

(e) *Procedures for Type B adjudication.*

- (1) *General rule.* A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.
- (2) *Presentation of evidence.* A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
- (3) *Impartiality of presiding officers and reviewing officers.* The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.
- (4) *Agency decisional process*
 - (A) A presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.
 - (B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.
 - (C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.
 - (D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.
 - (E) The requirements of this paragraph do not apply—
 - (i) in determining applications for initial licenses;
 - (ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
 - (iii) to the agency or a member or members of the body comprising the agency.
 - (5) *Ex parte communications.* The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.
 - (6) *Decision.* The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the

⁷⁵ The provision for declaratory orders is moved from §554 to §555. See VI. below.

record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

(7) Additional protections. An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

C. Sunshine Act exception.

Section 552b(c)(10) in the Government in the Sunshine Act provides an exception to the Sunshine Act requirements for the "initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." This section should be amended to make clear that the exception applies also to Type B adjudication.

II. Ethical standards and protection against reprisal

A. Ethical standards

Add new section 559a:

559a. Ethics and independence of presiding officers and administrative law judges

(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

(b) The regulations shall be prescribed in accordance with sections 533(b) and (c) of this title.

B. Removal and discipline of presiding officers

Add a new section 559b:

559b. Removal and discipline of presiding officers

(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to discipline or removal of a presiding officer.

III. Clarification of the definition of rule

APA section 551(4) should be amended to read as follows:

(4) "rule" means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;

~~Rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.~~

IV. Type A adjudication: guidelines for Congress and a default provision when statute is unclear

A. Criteria for deciding whether new programs should be Type A adjudication.

When Congress creates a new program involving adjudication with opportunity for an evidentiary hearing, it should consider and explicitly determine whether the new program will be Type A or Type B adjudication.

Congress should consider the following factors (the presence of which would weigh in favor of the use of Type A rather than Type B adjudication):

- a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.
- b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.
- c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Please note that this provision relating to criteria for choosing between Type A and Type B adjudication is not included in the Bill language above since it is not intended to be a statutory provision.

B. Default provision.

Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary, in any future legislation that creates an opportunity for hearing in an adjudication, such hearing shall be Type A adjudication.

V. Issues relating to evidence

Section 556(d) should be amended by adding the italicized language:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and may be entirely based on evidence that would be inadmissible in a civil trial. [The remainder of §556(d) remains the same]

VI. Declaratory orders

Section 555 should be amended by adding thereto the following subsection:

(f) Declaratory orders. The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

VII. Transcripts

Section 556(e) should be amended by adding the italicized language and striking the crossed-out language:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title, *and, on payment of lawfully prescribed costs, shall be made available to the parties. Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

The provisions of this act supersede existing contrary statutory provisions.

Appendix B

RECOMMENDATION 126A
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

February 1989

BE IT RESOLVED, that the American Bar Association supports the
reauthorization of the Administrative Conference of the United States (ACUS) and the
provision of funds sufficient to permit ACUS to continue its role as the government's in-
house advisor and coordinator of administrative procedural reform.

Appendix C



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July 18, 2006

The Honorable Thad Cochran
Chairman
Committee on Appropriations
United States Senate
Washington, D.C. 20510

The Honorable Robert C. Byrd
Ranking Member
Committee on Appropriations
United States Senate
Washington, D.C. 20510

Re: Funding the Newly Reauthorized Administrative Conference of the
United States for Fiscal Year 2007

Dear Chairman Cochran and Ranking Member Byrd:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of \$3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at <http://www.abanet.org/policy/ACUSreauthorization.html>.

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Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and restructuring the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service ("CRS") prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at <http://www.abanet.org/polsadv/ACUSreauthorization.html>. As outlined by CRS, ACUS has many virtues, including the following:

• A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. The CRS Memorandum concludes that "ACUS's reactivation would fill the exact urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts," including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission's recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

• ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, "... the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions." ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional action over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that "all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation."

• Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the

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Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS' recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS' encouragement of administrative dispute resolution had saved millions of dollars that would otherwise have been spent for litigation costs." CRS also noted that in 1994, the FDIC estimated that "its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million." The CRS Memorandum provides numerous additional examples of ACUS' prior successes as well.

• ACUS' role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS' fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange "best practices" ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration's regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide \$3.2 million in funding for ACUS for fiscal year 2007 during your Committee's mark up of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,

Robert D. Evans

Robert D. Evans

July 18, 2006
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cc: The Honorable Christopher S. Bond
The Honorable Patty Murray
All other members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Jerry Lewis
The Honorable David R. Obey
The Honorable Joseph Kaellenberg
The Honorable John W. Olver
The Honorable Chris Cannon

Appendix D

RECOMMENDATION 106A
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

August 9, 2005*

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.² However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.³ Their powers emanate

¹The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

²The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies.
 "The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b.
 5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM.
 An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203c. Id. § 930.203a; see also 5 U.S.C. § 5372 (2009) (providing for pay for administrative law judges, also subject to OPM approval).

³See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

from the Administrative Procedure Act.⁴ Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.⁵ After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation⁶ and that ALJs are functionally equivalent to other Federal trial judges:

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM's administration of the program. The APA contemplated that the Civil Service Commission (now OPM)⁷ would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointments), 3344 (loans), and 45373 (pay) OPM "may: investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees." Although the OPM Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.⁸

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)⁹, in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

⁴ See, A Guide to Federal Agency Adjudication, Michael Asimov, ed., 164 (*American Bar Association Administrative Law Section*, 2002). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judge, *id.* The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in *Marshall v. Service*, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

⁵ Aniel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 *Judicature* 216, 218 (1987).

⁶ *Batz v. Economos*, 438 U.S. 478 (1978).

⁷ *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 311 (1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

⁸ Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board ("MSPB").

⁹ See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb. 23, 1998).

¹⁰ Now the National Conference of the Administrative Judiciary.

OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the Federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.¹¹ However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Adler*¹² was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one exception,¹³ agencies could not hire judges from the ALJ Register during this period. In *Bash v. Office of Personnel Management*, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice.¹⁴ On

¹¹ 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

¹² *Meeker v. Merit Systems Protection Board*, 319 F.3d 1368 (Fed. Cir. 2003).

¹³ In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Hearing Before the Subcommittee on Social Security of the Committee on Ways and Means House of Representatives*, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

¹⁴ Smecting America Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by Federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate venereal professions from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance

February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (FRL),¹⁷ resulting in irreparable harm to an ALJ on the FRL and a preliminary injunction against its continued improper administration of the FRL.¹⁸

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.¹⁹

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions *in se* to promote administrative uniformity.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for

OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the *Agall* litigation.

¹⁷ Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALJ register of eligibles maintained by OPM.

¹⁸ *Rothberg v. United States*, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist. LEXIS 19432 (D. Mass., 1998).

¹⁹ In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon SP/ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (*In re Chacoff*, 1 MSPBR 612, 651 (1978)) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.¹⁸

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.¹⁹ ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.²⁰

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.²¹

Respectfully Submitted,

Lorraine Arkfeld, Chair, Judicial Division
August, 2005

¹⁸ Policy 101B, 2001, *ABA Policy/Procedures Handbook*, 193 (2004).

¹⁹ Standards for the Education of the Administrative Judiciary, Policy 99 A101, *ABA Policy/Procedures Handbook*, 268 (2004).

²⁰ Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

²¹ See ABA Policy, August, 1997, *ABA Policy/Procedures Handbook: Policy on Legislative and National Issues*, 233 (2004).

MEMORANDUM FROM MORTON ROSENBERG, SPECIALIST IN AMERICAN PUBLIC LAW AND T.J. HALSTEAD, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE, TO THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW



Memorandum

August 3, 2005

TO: House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary
Attention: Susan Jensen

FROM: Morton Rosenberg
Specialist in American Public Law
American Law Division

T.J. Halstead
Legislative Attorney
American Law Division

SUBJECT: Comparison of the Duties and Objectives of the Office of Management and Budget and the Administrative Conference of the United States With Respect to the Assessments of Executive Agency Performance in the Administrative Process

Pursuant to your request, this memorandum provides a brief overview of the duties and objectives of the Administrative Conference of the United States and the Office of Management and Budget, with a focus on whether the activities of a reconstituted Administrative Conference would be duplicative of functions already performed by OMB.

Structure and Functions of ACUS

Legislation creating a permanent Administrative Conference of the United States (ACUS), was enacted in 1964,¹ with funds first appropriated in 1968.² In 1995, the activities of ACUS ceased when funding for its activities was terminated. ACUS was reauthorized in the 108th Congress,³ but has yet to receive an appropriation. The statutory provisions governing ACUS were never repealed by Congress, and the reauthorization in the 108th

¹ See 5 U.S.C. §§ 591-96.

² P.L. 90-392 (1968).

³ P.L. 108-401, 108th Cong. 2d Sess. (2004).

Congress only slightly revised its original provisions, by authorizing appropriations and by making four additions to the “purposes” section of the Act.⁴

Pursuant to its statutory authorization, ACUS is tasked with (1) providing “suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other federal responsibilities may be carried out expeditiously in the public interest”; (2) promoting “more effective public participation and efficiency in the rulemaking process”; (3) reducing “unnecessary litigation in the regulatory process”; (4) improving “the use of science in the regulatory process;” and (5) improving “the effectiveness of laws applicable to the regulatory process.”⁵

The reauthorization leaves intact ACUS’ original membership dynamic, which is structured, in effect, as a public/private partnership, in order to maximize “the joint participation of agency and outside experts in administrative procedure.”⁶ In the event of appropriation its membership will thus consist of a minimum of 75 and a maximum of 101 members, composed of a Chairman, council, and assembly. The Chairman would be appointed by the President, the council would be composed of the chair and ten other members, and the assembly, if comprised in accordance with prior practice, would consist of approximately 100 members, “consisting of representatives of federal agencies, boards, and commissions and private citizens, including lawyers, law professors, and others knowledgeable about administrative law and practice.”⁷

During the course of its original existence, ACUS was widely viewed as an effective, independent and nonpartisan entity. For instance, Sally Katzen, a former Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) during the Clinton administration, stated in 1994 that ACUS “has a long-standing tradition of private-sector membership that crosses party and philosophical lines.”⁸ Likewise, C. Boyden Gray, a former White House Counsel in the George H.W. Bush administration, testified before the House Judiciary Committee’s Subcommittee on Commercial and Administrative Law in support of the reauthorization of ACUS, stating: “Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.”⁹

⁴ *Id.*

⁵ 5 U.S.C. §591(1)-(5).

⁶ Jeffrey Lubbers, “*If it Didn’t Exist, it Would Have to be Invented*” - *Reviving the Administrative Conference*, 30 *Ariz. St. L.J.* 147, 148 (1998).

⁷ Jeffrey Lubbers, *A Guide to Federal Agency Rulemaking*, Third Edition, American Bar Association, p. xvii (1998).

⁸ Toni M. Fine, *A Legislative Analysis of the Administrative Conference of the United States*, 30 *Ariz. St. L.J.* 19, 55 (1998).

⁹ C. Boyden Gray, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess. (June 24, 2004).

As further evidence of the widespread respect of, and support for, ACUS, it is interesting to note that Supreme Court Justices Scalia and Breyer testified before the Subcommittee in support of the reauthorization of ACUS. Justice Scalia stated that ACUS was "a proved and effective means of opening up the process of government to needed improvement," and Justice Breyer characterized ACUS as "a unique organization, carrying out work that is important and beneficial to the average American, at a low cost."¹⁰ Examples of the accomplishments for which ACUS has been credited range from the simple and practical, such as the publication of time saving resource material, to analyses of complex issues of administrative process and the spurring of legislative reform in those areas.¹¹

Structure and Functions of OMB

The Office of Management and Budget traces its origin to the establishment of the original Bureau of the Budget within the Department of the Treasury by the Budget and Accounting Act of 1921.¹² The Bureau was transferred to the newly created Executive Office of the President by Reorganization Plan No. 1 of 1939,¹³ and was subsequently designated as the Office of Management and Budget by Reorganization Plan No. 2, of 1970.¹⁴ While OMB's primary function centers on budget formulation and execution, it has many other major functions, including regulatory analysis and review. The Paperwork Reduction Act of 1980, later recodified as the Paperwork Reduction Act of 1995, established the Office of Information and Regulatory Affairs (OIRA) within OMB. In addition to its statutory responsibilities, OIRA exerts significant influence on the scope and substance of agency regulations through a presidentially mandated review and planning process. Shortly after the creation of OIRA in 1980, President Reagan issued Executive Order 12291, which imposed cost-benefit analysis requirements on rule formulation and established a centralized review procedure for all agency regulations. Responsibility for this program was delegated to OIRA.

In practical effect, E.O. 12291 gave OIRA a substantial degree of control over agency rulemaking, enabling OMB to exert considerable influence over agency efforts in this context from the earliest stages of the process. The impact of E.O. 12291 on agency regulatory activity was immediate and substantial, with OIRA reviewing over 2000 regulations per year and returning multiple rules to agencies for reconsideration. As a result of this rigorous review process, agencies became sensitized to the regulatory agenda of the Reagan Administration, largely resulting in the enactment of regulations that reflected the goals of the Administration.¹⁵ The issuance and implementation of the order generated controversy and criticism, with opponents asserting that the review process was distinctly anti-regulatory and constituted an unconstitutional transfer of authority to OIRA from the executive

¹⁰ Jeffrey Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 Dec. Fed. Law. 26 (2004).

¹¹ Fine, n. 8, *supra*, at 46. See also, Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101, 117 (1998).

¹² 42 Stat. 20 (1921).

¹³ 53 Stat. 1423 (1939).

¹⁴ 84 Stat. 2085 (1970).

¹⁵ See T.J. Halstead, *Presidential Review of Agency Rulemaking*, Congressional Research Service, Rep. No. RL32855 at 3 (2005).

agencies. This review scheme was retained to similar effect and controversy in the George H.W. Bush Administration.

President Clinton supplanted the Reagan era review scheme with Executive Order 12866, entitled "Regulatory Planning and Review."¹⁶ The Clinton order implemented a more selective and transparent review process, while generally retaining the centralized review dynamic established by E.O. 12291. Coupled with the comparatively pro-regulatory stance of OMB during the Clinton era, this review scheme resulted in a decrease in the rates of OIRA review of rules, from an average of 2080 regulations per year in fiscal years 1982-93 to an average of 498 in fiscal year 1996.¹⁷ It is important to note that this decrease in the numbers of rules reviewed does not indicate a concession on the part of the Clinton Administration that there were limits on presidential control of the scope of OIRA review or on the agency rulemaking process specifically.¹⁸ Rather, it would appear that the Clinton Administration employed the OIRA review process and general assertions of administrative control over agencies in order to implement its regulatory agenda.¹⁹

The George W. Bush Administration has retained E.O. 12866, utilizing it to implement a review regime that subjects rules to more stringent review than was the case during the Clinton Administration. It has been asserted that the current Administration has returned to the review dynamic that prevailed under E.O. 12291, with OIRA describing itself as the "gatekeeper for new rulemakings."²⁰ Under the current Administration, OIRA has increased the use of "return" letters to require agencies to reconsider rules, which, in turn, has led agencies to seek OIRA input "into earlier phases of regulatory development in order to prevent returns later in the rulemaking process."²¹ This dynamic arguably buttresses executive control over agency rulemaking efforts by exerting influence over rulemaking activity at the earliest stages of rule formulation.²² Additionally, OIRA has instituted the practice of issuing "prompt letters" to appropriate agencies to encourage rulemaking on issues it feels are ripe for regulation.²³ OIRA has acknowledged that prompt letters "do not have the mandatory implication of a Presidential directive," characterizing them instead as a device that "simply constitutes an OIRA request that an agency elevate a matter in priority."²⁴ As with the use of return letters, the use of prompt letters has arguably enabled OIRA to exert a substantial degree of influence on an agency's regulatory agenda.²⁵

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 10.

²¹ *Id.* at 10.

²² *Id.* at 10.

²³ *Id.* at 10.

²⁴ *Id.* at 11.

²⁵ *Id.* at 11.

Analysis

While ACUS and OIRA could be viewed as operating within the same sphere to the extent that they are both concerned with regulatory matters, it would appear that there are substantial, concrete differences between their respective structures and missions that in turn give rise to a fundamental difference between the nature and manner of their respective assessments of agency performance in the administrative process.

Most importantly, ACUS is an independent entity, whereas OIRA is responsible for effectuating a given administration's regulatory agenda. As touched upon above, ACUS was widely regarded as an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process. As stated by one commentator, "[t]his level of bipartisanship contributed greatly to the ability of the Administrative Conference to reach consensus on issues for their merits rather than because of any particular ideology or party agenda; this in turn contributed to the credibility of the Conference's work and the willingness of academics and private attorneys to volunteer their time to the Administrative Conference."²⁶ Conversely, OIRA has none of the indicia of independence or objectivity that characterized ACUS, nor does it claim such a character. As an arm of OMB, situated within the Executive Office of the President, OIRA is quintessentially executive in nature, with a predominant mission to advance the policy goals of the President. As such, while OIRA might be characterized as serving a coordinating function in the administrative context, it naturally follows that this function is exercised under the influence of the President.²⁷ Indeed, the activities of OIRA during the Reagan, Clinton, and George W. Bush Administrations, as touched upon above, would appear to establish that this coordinating function has been employed to further the regulatory agenda of those administrations.

The distinction between ACUS as an independent entity and OIRA as an executive agency may also be seen as having practical effects that give further credence to the ability of ACUS to serve uniquely in the consideration of agency specific issues. For instance, Loren A. Smith, currently serving as a Senior Judge on the United States Court of Federal Claims and a former Chairman of ACUS, has stated:

[T]he very fact of ACUS' smallness and its lack of investigative powers and budget sanctions, made agencies willing to come to ACUS and listen to ACUS. OMB or the General Accounting Office were threatening. The General Services Administration and the Office of Personnel Management were often perceived as the enemy. ACUS on the other hand, was seen as the kind counselor, one who gave useful, and generally palatable remedies. It thus had the confidence of most of the Executive branch and the Congress. And a place like this is not to be valued lightly.²⁸

Apart from concerns regarding independence and objectivity, it has been suggested that while the staff of OIRA possess a significant degree of expertise with regard to

²⁶ Fine, n. 8, *supra*, at 55.

²⁷ See, e.g., Lubbers n. 6, *supra*, at 152.

²⁸ Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 *Ariz. St. L.J.* 175, 181 (1998).

administrative issues, there are nonetheless fundamental structural issues that would inhibit OIRA's efficacy in this context, such as the "multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system."²⁹ Justice Breyer echoed this sentiment in his testimony discussing the mission of ACUS, stating "I have not found other institutions readily available to perform this task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons...The Office of Management and Budget does not normally concern itself with general procedural proposals."³⁰

Also, the broad scope of ACUS' mission, coupled with its independence and expertise could be seen as making it the appropriate entity to analyze the efficacy of the functions of OMB itself. In his testimony before the Subcommittee, C. Boyden Gray identified OMB activities as being ripe for study by ACUS, suggesting "empirical research on the innovation of the OMB 'prompt' letter, matters relating to data quality and peer review issues," as particularly suitable topics for inquiry.³¹

These issues of independence and objectivity, the widely recognized expertise and bipartisan nature of ACUS, and the broad scope of the work it conducted in all facets of the administrative process could thus be taken to belie the notion that the activities of a reconstituted ACUS would be duplicative of the functions of OMB or its Office of Information and Regulatory Affairs.

²⁹ See Edles, n. 11, *supra*, at 135 (quoting Thomas O. Sargentich, *The Supreme Court's Administrative Law Jurisprudence*, 7 Admin. L.J. Am. U. 273, 280 (1993)). Professor Edles has further suggested that "[p]rocedure and process changes would rarely, if ever, rise to the level sufficient to attract OIRA's attention." See Edles, n. 11, *supra*, at 135-36 n. 212.

³⁰ Stephen G. Breyer, Associate Justice, Supreme Court of the United States, Testimony Before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Commercial and Administrative Law, Hearing on the Reauthorization of the Administrative Conference of the United States, 108th Cong., 2d Sess., pp. 2-3 (May 20, 2004). See also, n. 9, *supra*.

³¹ See n. 9, *supra*.

THE 60TH ANNIVERSARY OF THE ADMINISTRATIVE PROCEDURE ACT: WHERE DO WE GO FROM HERE?

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

—
JULY 25, 2006
—

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THE 60TH ANNIVERSARY OF THE ADMINISTRATIVE PROCEDURE ACT: WHERE DO WE GO FROM HERE?

TUESDAY, JULY 25, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:30 a.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. The Committee on the Judiciary's Subcommittee on Commercial and Administrative Law will come to order.

The current Federal regulatory process faces many significant challenges. Just last week, the Subcommittee on Commercial and Administrative Law conducted a hearing on legislation aimed at addressing various loopholes and recurrent inefficiencies involving the Regulatory Flexibility Act of 1980. As this hearing revealed, these shortcomings in the regulatory process translate into real costs that are borne by every American.

Other problematic issues that have arisen over the years in the area of administrative law and procedure include the absence of transparency at certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposed basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the Administrative Procedure Act was enacted more than 60 years ago, a fundamental question that arises is whether the act is still effective in the 21st century.

To help us answer that question, House Judiciary Committee Chairman Sensenbrenner, with the active support of Ranking Member Conyers, last year asked our Subcommittee to spearhead the Administrative Law Process and Procedure Project.

With the objective of conducting a nonpartisan, academically credible analysis, the project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research to be considered by the hopefully soon-to-be reactivated Administrative Conference of the United States.

As many of you know, ACUS was an independent agency that served as a think-tank and made numerous recommendations that

improved efficiency, adequacy, and fairness of the procedure used by agencies to carry out administrative programs. We are particularly pleased that Professor Breger, who previously served 6 years as the chairman of ACUS, is here to share his views on the state of the APA, especially in light of his experience with ACUS.

Today's hearing is one of a series of programs and hearings that our Subcommittee has conducted as part of this project. In addition to the Regulatory Flexibility Act, the Subcommittee conducted a hearing on the Congressional Review Act, as well as a hearing on the project itself.

The Subcommittee has also cosponsored two symposia as part of the project. The first symposium, held last December, focused on Federal e-Government initiatives. This program, chaired by Professor Coglianesi, examined the executive branch's efforts to implement e-rulemaking across the Federal Government. Professor Coglianesi will provide a summary of that symposium for us today, as well as an update on subsequent developments, especially with respect to the Government-wide Federal docket management system.

The Subcommittee's second symposium examined the role of science in the rulemaking process. Issues considered at that program included OMB's recent initiative dealing with regulatory science and the role of science advisory panels.

A further symposium is planned for September 11, 2006, which will examine such issues as the respective roles that the executive and legislative branches play in the rulemaking process. As part of the project, several studies are also being conducted. One of these studies, which another of our witnesses, Professor Bill West, will discuss today, examines how agencies develop proposed rules.

While the APA generally requires agencies to involve the public in the rulemaking process by publishing notices of proposed rulemaking to which the public can submit comments, critical decisions regarding proposed rules are often made in the months and perhaps even years before rules are published. Surprisingly, little is known about how agencies actually develop these rules. Professor West's study will shed some light on this heretofore unexamined area of the rulemaking process.

At this time, I would like to extend, on behalf of the Subcommittee, our thanks to the Congressional Research Service for funding this very much needed research and for its role, as particularly exemplified by Mort Rosenberg and Curtis Copeland, in coordinating this and other research endeavors for the project. As Professor Magill will later explain, the need for empirical research is not being met. This gap only emphasizes the need to reactivate ACUS.

I now turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee, and ask him if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

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Mr. WATT. Thank you, Mr. Chairman.

I thank the Chairman for convening this hearing and for the very important and strong and committed leadership role that he has played in taking the charge of our Chairman, Mr. Sensenbrenner, and the Ranking Member, seriously and studying this area.

Today, as he has indicated, we will hear from noted scholars on various aspects of the Administrative Procedure Act. APA is as important now as it was when it was first enacted in 1946. From Administration to Administration, whether Democratic or Republican, the role of the administrative agencies in our political system cannot be underestimated.

Although recently new entities have emerged to compete for the title of fourth branch of Government, such as the media, lobbyists and corporate interests, of course, there is no doubt that our administrative agencies continue to exercise power officially reserved for the first three branches, or power not defined by the Constitution at all.

The Administrative Procedure Act is a necessary tool to ensure that the power conferred upon the agencies is not abused and that it is exercised efficiently and fairly. Our rapidly changing technological landscape requires that we look to see whether the APA requires modernization to ensure that fairness and efficiency remain viable.

So I look forward to hearing from the witnesses about the various developments in the area of administrative rulemaking and the regulatory process, with an eye toward improving and strengthening the process.

My staff person has just reminded me that if the APA is 60 years old, it is a baby-boomer. So we need to be researching our own roles. Maybe we have two baby-boomers here, trying to figure out what to do about another baby-boomer. So everybody is studying age and growing old. It is time that we do it on the APA.

Thank you. I yield back.

Mr. CANNON. I thank the gentleman.

Without objection, the gentleman's statement will be placed in the record. Hearing no objection, so ordered.

Without objection, all Members may place their statements on the record at this point. Hearing no objection, so ordered.

Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing no objection, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. Hearing no objection, so ordered.

Some of the witnesses have asked for additional time to submit more formal statements. We appreciate your willingness to be here, and in a couple of cases on relatively short notice, and so I ask unanimous consent that the witnesses be allowed 5 days within which to submit more formal statements. Hearing no objection, so ordered.

At this point, I would like to submit on unanimous consent a statement from the Federal Administrative Law Judges Conference for inclusion in the record. Hearing no objection, so ordered.

[The material referred to follows:]

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Below we have highlighted some issues of pressing concern to the ABA. These include: amendment of the adjudication provisions of the APA, reauthorization and appropriation of funds for the Administrative Conference of the United States, and creation of the "Administrative Law Judge Conference of the United States."

I. Proposed Changes in APA Adjudication

The rulemaking, public information, and judicial review provisions of the APA apply to all federal agencies (with specific exceptions). However, this is *not* the case with the adjudication sections of the APA (primarily sections 554, 556 and 557). These sections presently apply only to a small subset of the subject matter of federal agency adjudications: Social Security Act disability, old-age and survivors benefits claims, Medicare claims, labor law cases, and certain hearings conducted by about 20 other independent regulatory agencies and other Executive Branch agencies. We call these Type A hearings.

These APA provisions guarantee basic, fundamental fairness. They provide for the right to present evidence and confront the opponent's evidence; require an impartial decision-maker; prohibit ex parte contacts; require separation of adjudicatory from advocacy functions within the agency; and require a statement of findings and reasons. Unfortunately, however, the APA adjudication provisions do not apply under present law to a vast number of adjudications in which an evidentiary hearing is required by federal statutes. Some of the excluded hearings are cases involving immigration and asylum, veterans' benefits, government contract disputes, civil money penalties, security clearances, IRS collection disputes, and about 80 other hearing schemes. We call these Type B hearings. There is no logical reason for the distinction between Type A and Type B hearings. Yet the number of statutes calling for Type B hearings is steadily increasing while the number of statutes calling for Type A hearings remains relatively constant. The APA should apply to all adjudicatory hearings required by statute that are conducted by federal agencies.

In 2005, the ABA adopted a resolution urging Congress to apply the adjudication provisions of the APA to Type B adjudication for the first time. This ABA policy, attached as Appendix A, includes draft legislative language as well as a detailed explanatory report. The ABA strongly urges the Subcommittee to support the APA reforms outlined in this resolution.

Although the ABA's proposal would subject Type B hearings to the adjudication provisions of the APA, one important part of the existing APA would *not* be applied to Type B hearings under our proposal. Specifically, these hearings would not be conducted by administrative law judges ("ALJs"). In an ideal world, ALJs would preside in all hearings required by federal statutes, but this does not appear to be feasible at this time. Nonetheless, these proposed reforms would offer vastly more protection to persons litigating against federal agencies than is provided by existing law.

In addition to expanding the APA adjudication provisions to Type B hearings, the ABA's policy proposal calls for a number of other significant changes in these provisions. In particular, it: (1) mandates the adoption of a code of ethics for all administrative presiding officers, whether they serve in Type A or Type B hearings; (2) provides protection for full-time Type B presiding officers against dismissal without good cause; (3) expands the opportunity to seek a declaratory order; and

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(4) clarifies various definitions in the existing Act that have caused confusion – in particular, the definition of a “rule.”

The drafters of the APA wanted to achieve uniformity of procedure in federal administrative law. They achieved that goal with respect to rulemaking, judicial review, and freedom of information, but they did not achieve it with respect to adjudication. Since 1946, a vast number of Type B hearing schemes have emerged that fall outside the APA’s protective umbrella. The ABA’s recommended reforms would bring Type B hearings under the APA umbrella, which in turn would assure fair administrative procedures to generations of future litigants who find themselves in disputes with federal agencies.

2. Administrative Conference of the United States

In the Federal Regulatory Improvement Act of 2004, P. L. 108–401, Congress reauthorized the Administrative Conference of the United States (“ACUS”) for fiscal years 2005, 2006, and 2007. This reauthorization comports with long-standing ABA policy supporting ACUS and its reauthorization. Specifically, the ABA adopted policy in February 1989 that calls for reauthorization of ACUS with funding sufficient to permit the agency to continue its role as the government’s coordinator of administrative procedural reform. A copy of this ABA policy statement is attached as Appendix B. In our view, a revitalized ACUS could play a crucial role in the future development of the federal APA. Indeed, ACUS would be an ideal forum for exploring just the sort of comprehensive reevaluation of the APA that the Subcommittee has initiated. It could provide a vital, inclusive and prestigious adjunct to the Subcommittee’s work.

ACUS was originally established in 1964 as a permanent body to serve as the federal government’s in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. Through the years, ACUS was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The ABA and its Section on Administrative Law and Regulatory Practice strongly supported the reauthorization of ACUS in 2004 and we applaud your strong leadership in both sponsoring and facilitating the passage of the legislation that made this possible. Since ACUS was reauthorized in 2004, the ABA has been honored to work with you and your staff in an effort to secure adequate funding for the reconstituted agency from Congress. As part of that effort, the ABA sent a letter to the Senate Appropriations Committee on July 18, 2006, urging them to provide funding for ACUS for fiscal year 2007 at the fully authorized level of \$3.2 million. A copy of that letter is attached as Appendix C.

As the ABA explained in its correspondence to the Senate Appropriations Committee, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. Unfortunately, neither the Senate nor the House Appropriations Committees have approved the funding that ACUS needs to reconstitute its staff, secure office space and supplies, and resume its critical work. Therefore, the ABA urges you and the Subcommittee to continue your efforts to

July 25, 2006
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secure funding for ACUS for fiscal year 2007. In addition, whether or not ACUS receives this critical funding this year, we urge you to support legislation in the new 110th Congress that would reauthorize ACUS for fiscal year 2008 and beyond so that it can continue its vital mission.

3. Administrative Law Judge Conference of the United States

The ABA also encourages Congress to establish the proposed Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management ("OPM") with respect to Administrative Law Judges ("ALJs"), including their testing, selection, and appointment. The ABA's proposal, adopted by the ABA House of Delegates in August 2005 and attached as Appendix D, would maximize administrative efficiency by consolidating services, promoting professionalism, promoting public confidence in administrative decision-making, ensuring high ethical standards for administrative law judges, and providing necessary Congressional oversight. Therefore, the ABA strongly urges the Subcommittee to support this proposal by approving legislation that would formally establish the ALJ Conference of the United States.

Thank you for considering the views of the ABA, the Section of Administrative Law and Regulatory Practice, and NCALI on these critical issues. We stand ready to assist you and the Subcommittee in a reexamination of the APA at its 60th anniversary. We will be contacting your staff shortly to consider next steps. In the meantime, if you would like to discuss the ABA's views in greater detail, please feel free to contact me at 317/274-4091 or the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



Eleanor D. Kinney, Chair
ABA Section of Administrative Law and Regulatory Practice

cc: Members of the Subcommittee on Commercial and Administrative Law
The Honorable Jodi B. Levine, ABA Judicial Division

Appendix A

RECOMMENDATION 114
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

February 14, 2005*

RESOLVED, That the American Bar Association urges Congress to amend and modernize the adjudication provisions of the Administrative Procedure Act and to expand certain fundamental fair hearings provisions of that Act by enacting legislation consistent with the attached draft bill entitled "Federal Administrative Adjudication in the 21st Century," dated February 2005, recognizing the administrative law judge adjudication as the preferred type of adjudication for evidentiary proceedings conducted under the Administrative Procedure Act.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

**FEDERAL ADMINISTRATIVE ADJUDICATION
IN THE 21ST CENTURY ACT**

A BILL

To amend title 5, United States Code, to modernize the adjudication provisions of the Administrative Procedure Act and to extend certain fundamental fair hearing provisions to additional hearings required by statute.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Administrative Adjudication in the 21st Century Act".

SEC. 2. DEFINITIONS.

(a) Section 551 of title 5, United States Code, is amended--

- (1) by striking "and" at the end of paragraph (13);
- (2) by striking the period at the end of paragraph (14) and inserting "; and"; and
- (3) by adding the following at the end:

"(15) 'Type A adjudication' means adjudication required by statute to be--

"(A) determined on the record after opportunity for an agency hearing; or

"(B) conducted in accordance with sections 556 and 557 of this title;

"(16) 'Type B adjudication' means an agency evidentiary proceeding required by statute, other than a Type A adjudication;

"(17) 'agency evidentiary proceeding' means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and

"(18) 'presiding officer' means the initial decisionmaker in a Type B adjudication."

(b) Section 551(4) of title 5, United States Code, is amended to read as follows:

"(4) 'rule' means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;"

SEC. 3. TYPE A AND B ADJUDICATIONS.

Section 554 of title 5, United States Code, is amended--

- (1) in subsection (a),
 (A) by striking "adjudication required by statute to be determined on the record after opportunity for an agency hearing" in the matter preceding paragraph (1) and inserting "Type A adjudication and Type B adjudication";
 (B) by inserting "or in a Type A or Type B adjudication" at the end of paragraph (1); and
 (C) by striking paragraph (2) and redesignating paragraphs (3), (4), (5), and (6) as paragraphs (2), (3), (4), and (5), respectively;
 (2) in subsection (b), by inserting "in a Type A or Type B adjudication" after "an agency hearing" in the matter preceding paragraph (1);
 (3) in subsection (c),
 (A) by inserting "In a Type A or Type B adjudication," at the beginning of the subsection; and
 (B) by striking "on notice and in accordance with sections 556 and 557 of this title" and inserting "in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e)";
 (4) in subsection (d),
 (A) by designating the first sentence as paragraph (2) and by striking "he" in that sentence and inserting "he or she";
 (B) by designating the second sentence as paragraph (3) and redesignating the existing paragraphs (1) and (2) in that sentence as subparagraphs (A) and (B), respectively;
 (C) by designating the third and fourth sentences as paragraph (4) and, in the first sentence as so redesignated, by striking all after "agency in a" and inserting "Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision except as witness or counsel in public proceedings"; and
 (D) by inserting the following at the beginning of the subsection:
 "(1) A Type A adjudication shall be conducted in accordance with sections 556 and 557 of this title."; and
 (5) by striking subsection (e) and inserting the following:
 "(e)(1) A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.
 "(2) A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
 "(3) The functions of a presiding officer or an officer who reviews the decision of a presiding officer shall be conducted in an impartial manner.
 "(4)(A) A presiding officer shall make the recommended or initial decision in the adjudication unless he or she becomes unavailable to the agency.
 "(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult with any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

"(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

"(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

"(E) The requirements of this paragraph do not apply—

"(i) in determining applications for initial licenses;
 "(ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
 "(iii) to the agency or a member or members of the body comprising the agency.

"(5) The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

"(6) The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

"(7) An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

"(I) Unless otherwise specified, after the date of enactment of this subsection, the establishment of an opportunity for hearing in an adjudication subject to the requirements of this section shall be deemed to provide for a Type A adjudication."

(E) Nothing in this section shall affect the requirements relating to agency or judicial review that are presently provided by statute.

SEC. 4. SUNSHINE ACT EXCEPTION.

Section 552b(c)(10) of title 5, United States Code, is amended by striking "formal agency adjudication pursuant to the procedures in section 554 of this title" and inserting "an agency evidentiary proceeding under section 554 of this title."

SEC. 5. DECLARATORY ORDERS.

Section 555 of title 5, United States Code, is amended by adding the following at the end:

"(f) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

SEC. 6. ISSUES RELATING TO EVIDENCE.

Section 556(d) of title 5, United States Code, is amended--
 (1) by inserting "and may be entirely based on evidence that would be inadmissible in a civil trial" at the end of the third sentence; and
 (2) by adding the following after the second sentence: "Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

SEC. 7. ALJ AND PO ETHICAL STANDARDS; REMOVAL AND DISCIPLINE OF PRESIDING OFFICERS.

(a) Title 5, United States Code, is amended by inserting after section 559 the following:

"§ 559a. Ethics and independence of Presiding Officers and Administrative Law Judges

"(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

"(b) The regulations shall be prescribed in accordance with section 553(b) and (c) of this title.

"§ 559b. Removal and discipline of presiding officers

"(a) A presiding officer, as defined in section 551 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

"(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to the discipline or removal of a presiding officer."

(b) The analysis for chapter 5 of title 5, United States Code, is amended by inserting the following after the item relating to section 559:
 "560a. Ethics and independence of Presiding Officers and Administrative Law Judges.
 "560b. Removal and discipline of presiding officers."

SEC. 9. SUPERSEDING CONTRARY STATUTORY PROVISIONS.

The provisions of this act supersede existing contrary statutory provisions.

REPORT**Introduction**

The Administrative Procedure Act of 1946 (APA)¹ controls the procedures of almost all federal government administrative agencies and it has achieved nearly constitutional status. The APA is of immense importance to the governmental process and to uncounted millions of people who are impacted by federal agencies. The APA regulates *all* federal agency rulemaking and *all* judicial review of agency action (with narrowly drawn exceptions in each case). Under the Freedom of Information Act,² an amendment to the APA passed in 1966, *all* federal government information is covered (again with specific exceptions). The Negotiated Rulemaking Act and the Administrative Dispute Resolution Act³ comprehensively regulate agency alternate dispute resolution.

As discussed in greater detail below, only a portion of agency adjudication is subject to the adjudication provisions of the APA. We call these "Type A adjudications." Type A adjudications are the cases in which administrative law judges (ALJs) ordinarily preside—primarily benefits cases involving Social Security, Medicare,⁴ and Black Lung. In addition, Type A adjudication covers a wide array of regulatory adjudication, such as that conducted by the FTC, NLRB, SEC, and FERC. Type A adjudication also covers a variety of other programs involving civil penalties, labor, transportation, and communication. The APA provides significant protections to litigants in Type A adjudication. These include detailed provisions relating to the merit selection, independence, compensation, freedom from performance evaluation, and tenure of ALJs.

Numerous statutes that call for evidentiary hearings as part of regulatory or benefit programs are not governed by the APA's adjudication provisions. We refer to these as "Type B adjudications." Presiding officers (POs) rather than ALJs conduct these hearings. We believe it would be in the public interest to extend certain APA provisions that prescribe fundamental norms of fair adjudicatory procedure to Type B adjudication. Although all presiding officers should, of course, be selected based on merit, competence and experience, we do not propose that the APA's specific provisions relating to the selection, compensation and tenure of ALJs be extended to POs in Type B adjudication since it is not practical to do so.

This resolution attempts to modernize the adjudication provisions of the APA by accomplishing the following goals.

1. Extend certain APA procedural protections to Type B adjudication (Part I of this Report).

¹ 5 U.S.C. §§51 et. seq. The APA is cited herein without the prefatory 5 U.S.C.

² APA §552.

³ 5 U.S.C. §§561 et. seq.; 571 et. seq.

⁴ The new prescription drug provision will undoubtedly increase the number of Medicare cases heard by ALJs. See Eleanor D. Kinney, *Changes in the Adjudication of Medicare Beneficiary Appeals in the New Medicare Prescription Drug Legislation: Reform or Retreat?* 29 Admin. & Regal. Law News 6 (Spring 2004) (transfer of ALJs deciding Medicare cases from Social Security to HHS).

2. Require adoption of ethical standards for ALJs and POs and protect full-time POs against removal or discipline without cause. (Part II).
3. Clarify the definitions of rule and adjudication under the APA (Part III).
4. Clarify the circumstances in which newly adopted adjudication schemes will be Type A as opposed to Type B adjudication (Part IV).
5. Clarify the APA provisions relating to evidence (Part V).
6. Clarify the ability of all adjudicating agencies to issue declaratory orders.
7. Clarify the right to obtain transcripts at agency's cost of duplication (Part VI).
8. Clarify that legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions (Part VII).

I. Extending APA procedural protections to Type B adjudication

II.

The existing APA adjudication provisions cover only Type A adjudication. *The proposal discussed in this section of the report would not change Type A adjudication or alter the various provisions in the APA that safeguard ALJ independence.*⁵ We propose to *extend* certain procedural protections that are presently applicable to Type A adjudication to Type B adjudication.⁶

A. Type A adjudication under the APA

The term "Type A adjudication" covers all those hearing schemes to which the existing APA adjudicatory provisions apply.⁷ These proceedings, often referred to as "formal adjudication," are ordinarily conducted by ALJs.⁸ They include hearings relating to Social Security, Medicare, and Black Lung benefits as well as to hearings provided by an array of regulatory agencies. There are approximately 1,350 federal ALJs.

In general, Type A adjudications are presently identified by statutes (outside the APA) that either i) explicitly require that sections 556-557 of APA apply or ii) call for adjudication "required by statute to be determined *on the record* after opportunity for an agency hearing."⁹ As discussed in Part IV, the phrase "on the record" has acquired talismanic properties and most cases hold that those very words (or other clear evidence of Congressional intent) must be used

⁵ The proposals discussed in Parts II to VII apply to Type A adjudication but do not involve fundamental changes.
⁶ These recommendations relate only to "adjudication" which, as discussed in part III below, means action of *particular* rather than *general* applicability. Thus, proceedings for ratemaking for an entire industry, like those in *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), would be treated as rulemaking, not adjudication, and would not be treated as Type B adjudication.

⁷ APA §§554, 556-58. See proposed §551(15) defining "Type A adjudication."
⁸ Type A adjudication includes some relatively rare situations in which ALJs do not preside. First, a statute may provide that APA §§556-57 apply except that ALJs do not preside. APA §556(b). See Michael Asimow, editor, *A Guide to Federal Agency Adjudication* §10.03 (AJIA Section of Administrative Law and Regulatory Practice, 2003) (hereinafter referred to as *Guidebook*). Second, the APA allows the agency head or bonds to preside instead of ALJs, although this rarely if ever occurs. Third, in initial licensing or ratemaking cases, the APA allows the agency to designate staff members other than ALJs as presiding officers. §556(b). Type A adjudication covers hearings and proceedings described in this footnote even though in fact ALJs do not preside.
⁹ APA §554(a) (emphasis added). See *Guidebook* §3.01. Under the proposed default provision discussed in part IV below, adjudicatory hearings called for in future statutes will be Type A adjudication (even if the statute does not use the magic words "on the record") unless Congress provides the contrary.

before Type A adjudication provisions come into play. Other than the changes described in Parts II to VII of this Report, which are not fundamental in nature, we propose *no changes* in Type A adjudication since we view the system of Type A adjudication as working well.

B. Type B adjudication and informal adjudication

The recommendation proposes extension of certain fundamental procedural protections set forth in the existing APA to "Type B adjudication," meaning evidentiary proceedings required by statute other than Type A adjudication.¹⁰ Type B adjudication covers a wide range of evidentiary proceedings that are conducted by presiding officers (POs) who are not ALJs.¹¹

Although people sometimes refer to Type B adjudication as "informal adjudication," this usage is not proper. Many Type B hearings are as "formal" or even more "formal" than Type A hearings.¹² The term "informal adjudication" is properly used to describe the vast array of adjudications conducted by federal agencies with respect to which no statute requires a hearing.¹³ There are literally millions of informal adjudications, ranging from economically important orders (such as refusal to grant a bank charter) to low-stakes decisions (such as allocation of campsites by federal forest rangers). Our proposals do not affect informal adjudication as defined in this paragraph.

C. Rationale

The provisions in Title V of the U. S. Code relating to rulemaking, judicial review, alternative dispute resolution, and government information apply across the board, but the APA's provisions for adjudication apply only to a portion of federal agency evidentiary proceedings.¹⁴ This unfortunate balkanization of hearing procedures defeats the purpose of the drafters of the APA who wished to achieve greater uniformity and to provide basic fair-hearing norms in most agency adjudication.¹⁵

A 1992 study by ALJ John H. Frye III (based on 1989 data) identified about 83 case-types (involving about 343,000 cases annually) of Type B adjudication.¹⁶ Frye identified 2,692

¹⁰ See proposed APA §§551(16) and (17).

¹¹ In practice, numerous titles are used to describe POs, but we used the generic term PO to include all such presiders. See proposed APA §551(18).

¹² Most Type A hearings are Social Security cases which are conducted in a non-adversarial, relatively informal fashion.

¹³ The term "informal adjudication" is sometimes used to describe Type B proceedings that are conducted informally but we believe that the term "informal adjudication" should be reserved for the vast array of adjudicatory proceedings as to which no statute requires an evidentiary hearing.

¹⁴ APA §§555 and 558 apply to all adjudications but provide protections that fall far short of those provided in Type A adjudication or the protections we propose should be applicable to Type B adjudication. See *Guidebook* ¶¶9.04, 9.06.

¹⁵ Jeffrey S. Lubbers, *APA Adjudication: Is the Quest for Uniformity Faltering?* 10 *Admin. L. J.* 65 (1996); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 *Admin. L. Rev.* (2004); *Agency General's Manual on the APA* 9 (1947).

¹⁶ John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 *Admin. L. Rev.* 261, 264 (1992). Frye eliminated 46 case types that showed a caseload of less than one case per year. See also Paul Verkuil et al., *The Federal Administrative Judiciary*, Vol. 2 [1992] ACUS Rec. & Rep. 779, 788-90, 843-73. In

POs. Of the 83 case-types, 15 accounted for 98% of the total. The largest Type B category is deportation cases. There are a substantial number of law enforcement cases, including civil penalties administered by numerous agencies,¹⁷ as well as passport denials or security clearance disputes. Type B adjudication includes many benefit cases such as veterans' benefits and Medicare Part B cases decided by employees of insurance carriers. A substantial number of cases deal with economic matters (farm credit, public contract disputes, bid protests, or debarment of contractors) and federal employment relationships (such as those administered by the Merit Systems Protection Board).

In 2002, Raymond Limon updated Frye's study.¹⁸ Limon found 3,370 Type B POs, about a 25% increase from 1989 figures. In contrast, there are 1,351 ALJs in 29 different agencies (a 15% increase).¹⁹ Frye reported 393,800 Type B proceedings each year; Limon reported 556,000 (a 41% increase).²⁰

POs may be full-time decisionmakers or may be agency staff members who engage in part-time judging along with other tasks.²¹ Frye found that full-time POs decide about 90% of the Type B cases (but part-time POs decided cases in 34 of the 83 case-types, mostly the less active ones).²² Most of the full-time POs are lawyers but most of the part-time POs are not lawyers.²³

Based on the criteria set forth in Part IV, it would be desirable to convert many of the existing systems of Type B adjudication to Type A adjudication. However, it is unlikely that Congress will be persuaded to do so in the foreseeable future. Thus, our proposal recognizes that

comparison to the 343,000 Type B adjudications, the ACUS study estimated that there were about 300,000 Type A adjudications per year in the late 1980's.

¹⁷ Under the Clean Water Act, EPA can impose a "class 1 civil penalty" (\$10,000 per violation up to \$25,000 maximum) or a "class 2 civil penalty" (\$10,000 per violation with a maximum of \$125,000). A class 2 penalty must follow "notice and opportunity for a hearing on the record in accordance with section 554 of Title 5." A class 1 penalty also requires notice and a hearing but "such hearing shall not be subject to sections 554 and 556 of Title 5 but shall provide a reasonable opportunity to be heard and present evidence." 33 U.S.C.A. §1319(g)(2). Thus Class 2 penalties call for Type A adjudication but Class 1 penalties call for Type B adjudication. For a thorough treatment of civil penalties and Type B adjudication, see William F. Funk, *Class Enough for Government Work?—Using Informal Procedures for Imposing Civil Penalties*, 24 Seton Hall L. R. 1 (1993).

¹⁸ Office of Administrative Law Judges, *The Federal Administrative Judiciary Then and Now—A Decade of Change 1993-2002* (Dec. 23, 2002).

¹⁹ Limon stated that in 1992 there were 1167 ALJs; in 2002, there were 1351 ALJs. Limon 3, n.4. During much of the period between the Frye and Limon reports, the hiring of ALJs was frozen. But for the freeze, the number of ALJs would undoubtedly have expanded more rapidly.

²⁰ Numerous recent statutes call for Type B adjudication. For example, a recently enacted statute provides for "collection due process" (CDP) hearings by the IRS. IRC §46520, 6330. The IRS now conducts about 30,000 CDP hearings annually and the number is rising steadily. CDP hearings appear to be Type B adjudications although numerous issues about the nature of CDP hearings and judicial review thereof are at present unresolved. See Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 94 Florida L. Rev. 1, 117-29 (2004); Leslie Book, *The Collection Due Process Rights: A Mistay or Step in the Right Direction*, 41 Houston L. Rev. (2004).

²¹ Some part-time POs are not agency staff members; they may be retired judges or academics who are called upon by the agency from time to time as their particular expertise is needed.

²² Frye found that there were 601 full-time POs and 2170 part-time POs. However, full-time POs decided about 90% of the Type B cases. Frye 349-50.

²³ Frye 349. Limon found that of 3370 POs, only 1370 were lawyers. However, of the 601 full-time POs, 438 were lawyers.

second-best is better than nothing at all. It is intended to insure fundamental, baseline procedural protection in the large universe of Type B adjudication.²⁴ In practice, so far as we can determine, such protections are normally provided in existing Type B adjudication schemes. Nevertheless the public deserves to be guaranteed that such protections will always be provided through generally applicable and accessible APA provisions, instead of the existing maze of due process requirements and situation-specific statutes and procedural regulations.

D. Meaning of “evidentiary proceeding”

Our proposal recognizes and distinguishes three types of federal adjudication. Type A adjudication refers to the set of evidentiary hearings usually conducted by ALJs and is unaffected by our proposal.²⁵ Type B adjudication refers to evidentiary hearings required by statute that are conducted by POs. Our proposal would impose a set of procedural requirements on Type B adjudication. Informal adjudication entails decisions by federal agencies with respect to which no statute calls for a hearing. Our proposal does not affect informal adjudication (except to make clear that it is possible to issue a declaratory order through informal adjudication—see Part VI).

As discussed in Part IV, there is considerable case law that distinguishes Type A from Type B adjudication. Unfortunately, this case law is in conflict. Our proposal does not attempt to resolve this conflict but assumes that the line between Type A and Type B would continue to be drawn under existing law. (Part IV of our proposal would clarify the Type A/Type B distinction for statutes adopted in the future). We discuss here the problem of distinguishing Type B adjudication from informal adjudication.

Type B adjudication, as defined in proposed §551(16), means “an agency evidentiary proceeding required by statute, other than Type A adjudication.”²⁶ Under proposed §551(17), the term “agency evidentiary proceeding” means “a proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing.” As provided in new §551(18), a “presiding officer” conducts Type B adjudication. Thus a Type B proceeding will

²⁴ New provisions in California’s APA that were enacted in 1995 call for a scheme similar to this proposal. The California statute preserved a system of Type A adjudication that relies on central panel ALJs. It then provides for an “administrative adjudication bill of rights” for Type B adjudication. See generally Michael Assinow, *The Influence of the Federal Administrative Procedure Act on California’s New Administrative Procedure Act*, 32 *Tulsa L.J.* 297 (1996).

²⁵ See note 16 which observes that a few classes of Type A adjudication are not heard by ALJs.

²⁶ The definition excludes from Type B adjudication the types of cases already excepted from Type A adjudication by §554(4) with some modifications: (1) a matter subject to a subsequent trial of the law and the facts, its review in a court or in a Type A or Type B adjudication; (2) proceedings in which decisions rest solely on inspections, tests, or elections; (3) cases in which an agency is acting as an agent for a court; or (4) the certification of worker representatives.

We strike out an existing exemption: “(2) the selection or tenure of an employee other than an ALJ.” Hearings required by statute that concern the tenure of government employees would normally be classified as Type B adjudication. If any statute provides for evidentiary hearings relating to selection of employees, these would generally be Type B hearings also. Hearings relating to the tenure of ALJs would continue to be Type A adjudication. We propose that disputes concerning the tenure of Type B POs should also be Type A adjudication. We propose to strike out the existing exemption because hearings relating to selection and tenure of federal employees should be included in the APA’s provisions for Type A or B adjudication. See Part II.

always be identified by the presence of a federal statute (other than the APA) that calls for an evidentiary proceeding.

Federal statutes frequently call for evidentiary “hearings” that are not Type A adjudication. The definition of Type B adjudication captures these proceedings.²⁷ Some statutes use terms other than “hearing” to describe such proceedings but the intention of the statute is to call for an “evidentiary proceeding.”²⁸ The term “evidentiary proceeding” covers hearings required by statute even if all of the evidence is submitted in writing rather than orally, so long as the decisionmaker is limited to considering only record evidence. The term includes non-adversarial, inquisitorial hearings in which the Government is not represented, such as the hearings conducted by the Board of Veterans’ Appeals (just as Type A adjudication includes non-adversarial Social Security hearings).²⁹

The term “evidentiary proceeding” does *not* include statutory provisions calling for notice and comment-type procedures (even if applicable to adjudication) where such procedures do not limit the decisionmaker to consideration only of the evidence in the record.³⁰ Nor does it include so-called “hearings” in which the public is invited to appear and make statements (such as often occurs with respect to various forms of land use decisions),³¹ informal inquiries, or investigatory or settlement-oriented hearings (meaning hearings that can be followed by another *de novo* administrative review or *de novo* judicial review to finally resolve the matter).³²

²⁷ For example, in railroad unemployment insurance cases, an employee “shall be granted an opportunity for a hearing before a referee.” 35 USC §355. A federal government employee claiming workers compensation “is entitled to a hearing on his claim before a representative of the Secretary.” 5 USC §8124(b)(1). In Agriculture Department disputes, there is a “right to appeal an adverse decision for an evidentiary hearing of a hearing officer.” 7 USC §6996(a). Persons who are subject to IRS collection activities have “a right to a hearing.” IRC §6330(a)(1).
²⁸ In immigration cases, the statute states that an Immigration Judge (IJ) “shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” In context, it is clear that the IJ is to conduct an evidentiary proceeding. For example, an alien “shall have reasonable opportunity to present evidence and cross examine witnesses presented by the government.” The IJ is authorized to administer oaths, receive evidence, and issue subpoenas; the IJ must rule on evidentiary objections and provide findings and reasons for decisions. 8 USC §1229a(1)(a)(1), (b)(1), (4)(B); 8 CFR §240.1(c). The Contract Disputes Act provides that a board of contract appeals shall “provide to the fullest extent practicable informal, expeditious, and inexpensive resolution of disputes and shall issue decisions in writing.” A member may administer oaths, authorize depositions, and subpoena witnesses for taking of testimony. Again, the context makes clear that an evidentiary hearing is intended. 41 USC §607(e), 610. We understand that the existing system of public contract dispute resolution already meets all requirements of Type B adjudication.

²⁹ 38 USC §3710(a), 7107(b). BVA hearings are informal and non-adversarial. See 38 CFR §20.700(c).
³⁰ See 16 USC §1456(c)(2)(A) concerning licensing decisions for activities within the coastal zone. The Secretary of Commerce can override a state’s objection to the issuance of a federal license or permit after finding the activity consistent with goals and objectives of the Coastal Zone Management Act or necessary in the interests of national security. The Secretary must first provide an opportunity for the state and permit applicant to submit detailed comments. Though the regulations implementing this provision establish detailed appellate-like procedures for the conduct of the Secretary’s inquiry, the statute indicates no requirement for an evidentiary proceeding as the Secretary is not limited to considering only the data contained in the written comments submitted by the parties.

³¹ See, e.g., *Butney v. United States*, 699 F.2d 1170, 1174-83 (5th Cir. 1982) (“opportunity for public hearing” does not trigger APA formal adjudication).
³² Present section 554(a)(1) contains an exception for “a matter subject to a subsequent trial of the law and the facts *de novo* in a court.” We propose to add the words “or in a type A or Type B adjudication.” We intend thereby to make clear that the requirements for Type B adjudication will not apply where a “hearing” required by statute can be followed by another *de novo* trial of the law and facts, whether it takes place in an Article III court or before some administrative tribunal or Article I court. In short, a litigant gets only one Type B or Type A administrative proceeding, not two. (For this purpose, we do not consider the remote likelihood that the agency heads or other

It would be possible to extend Type B adjudication to evidentiary proceedings called for by the Due Process clause of the 5th Amendment. We do not propose this because it would be difficult to decide which due process cases call for evidentiary proceedings and which ones call for some sort of interaction that is less formal than an evidentiary proceeding.³³ Due process cases use an ad hoc balancing test to decide what procedures are applicable³⁴ and thus resist the sort of rigidity that the proposed statutory test would entail.

It would also be possible to extend the Type B adjudication concept to evidentiary proceedings called for by *agency procedural regulations* rather than by statutes.³⁵ We do not propose this, however, because it would create perverse incentives. It might discourage agencies from voluntarily adopting hearing procedures through their regulations when they are not required to do so. Also, it might encourage agencies to dispense with hearing procedures now called for by regulations. Agencies should not be discouraged from providing procedural protections that they are not required to provide.³⁶

E. APA provisions applicable to Type B adjudication

Under proposed APA §554(c), certain provisions of the existing APA will apply to Type B adjudication:

- Timely notice and right to submit settlement offers;³⁷
- The right to present a case by oral or documentary evidence and to conduct cross examination when required for a full and true disclosure of the facts;³⁸

reviewing authority can call for a de novo hearing after the decision of an ALJ or a PO as constituting a subsequent de novo trial).

³³ See, e.g., *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985) (procedures required before public employee is discharged); *Goss v. Lopez*, 419 U.S. 565 (1975) (procedures required before suspending child from school for ten days or less).

³⁴ *Mathews v. Elridge*, 424 U.S. 319 (1976).

³⁵ The VA regulations (but not a statute) provide for a hearing in connection with benefits disputes (so-called "regional office hearings"). 38 CFR §3.103(c). Such hearings are not Type B adjudication for two reasons: i) they are provided for in regulations rather than by statute, and ii) they are followed by a subsequent de novo administrative hearing provided by the Board of Veterans' Appeals. Similarly, the Equal Employment Opportunities Commission provides hearings for federal employees who allege prohibited discrimination but such hearings are authorized by regulation rather than by statute. See 42 U.S.C. §2000e-16(b); 29 CFR §1614.109(a) (2013).

³⁶ Of course, agencies might choose to incorporate the principles applicable to Type B adjudication in their procedural regulations calling for evidentiary proceedings. It seems likely that many would choose to do so (or have already done so).

³⁷ Proposed APA §554 (b) and (c) apply the existing APA provisions for notice and submission of settlement proposals to Type B proceedings. See *Guidebook* §4.02.

³⁸ Proposed APA §554(e)(2) adapts language from APA §556(d): "A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts." See *Guidebook* §5.07, 5.08. As in Type A adjudication, a PO would have discretion as to whether evidence should be presented orally or in writing. Similarly, a PO would have discretion whether to allow cross-examination. A PO may decide that cross-examination is not needed for a "full and true disclosure of the facts" where the issue to be resolved is not a disputed factual question that turns on credibility. As in Type A adjudication, a PO may decide that evidence that has been received in written form need not be subject to cross-examination.

Under VA regulations, no cross-examination is allowed in BVA hearings. However, the parties (presumably including the PO) may ask "follow-up questions" of the witnesses. 38 CFR §20.700(c) ("Parties to the

- Decisionmaker impartiality;³⁹
- Decisionmaker independence and separation of functions;⁴⁰
- Prohibition on ex parte contacts with decisionmakers;⁴¹
- The exclusive record and official notice provisions;⁴² and
- the requirement of a written or oral decision containing findings and reasons. In the event that the PO's decision is reviewed at a higher agency level, the PO's decision must be disclosed to the parties who have an opportunity to comment on it prior to the higher-level decision.⁴³

It is intended that the provisions for notice and hearing, decisionmaker independence, and written or oral decisions, would apply only to the initial proceeding.⁴⁴ The requirements of impartiality, separation of functions, ex parte contact, and exclusive record would apply both to the initial decision stage and to the agency review stage. We also believe that the exception from the Government in the Sunshine Act that applies to the "initiation, conduct, or disposition" of Type A adjudication should be extended to include Type B adjudication.⁴⁵

hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted"). Because of the non-adversarial format of EYA hearings (meaning that the VA is not represented), there may be little occasion for cross-examination. The provision for follow-up questions should be sufficient to meet the requirements of proposed §554(e)(1). Similarly, IRS collection due process (CDP) hearings do not include cross-examination. Reg. §301.6330-1(d)(3) A-D6 ("the taxpayer or the taxpayer's representative do not have the right to subpoena and examine witnesses at a CDP hearing"). The issues in a CDP hearing would not ordinarily involve credibility conflicts so cross-examination should not be necessary.

³⁹ Proposed APA §554(e)(3) adapts language drawn from §556(b): "The functions of a presiding officer or an officer who reverses the decisions of a presiding officer shall be conducted in an impartial manner." See *Guidebook* ¶7.02.

⁴⁰ Proposed §554(c)(4)(A) provides that a PO shall make the recommended or initial decision unless he or she becomes unavailable. This parallels existing §554(d). Proposed §554(e)(4)(B) provides that a PO shall not consult any person or party ex parte on a fact in issue. This parallels existing §554(e)(1). Proposed §554(e)(4)(C) prohibits command influence. It parallels existing §554(c)(2). The proposed command influence provision applies only to full-time POs. It would be impracticable to prohibit command influence in the case of part-time POs who engage in investigation or prosecution functions in other cases and are supervised by staff members who engage in such functions. Instead, we propose that a part-time PO not be supervised by a person serving as prosecutor or investigator in the same adjudication that the PO is deciding. We seek to avoid extra costs or disruption of existing structures, and we do not wish to compel agencies to reorganize themselves. Finally, §554(e)(4)(D) parallels the existing provision for separation of functions; it prohibits agency prosecutors or investigators in a case from participating or advising in the decision of that case. See *Guidebook* ¶7.06.

⁴¹ Proposed APA §554(e)(5) incorporates the provisions of existing APA §557(d). See *Guidebook* ¶7.04.

⁴² Proposed APA §554(e)(5) also incorporates APA §556(e): "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision. . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." See *Guidebook* ¶7.08.

⁴³ Proposed APA §554(e)(6) requires a PO's decision to include

"a statement of findings, conclusions, and reasons, on material issues of fact, law, or discretion presented on the record. The decision may be delivered orally or in writing in the discretion of the PO." This provision modifies language in existing APA §557(c). See *Guidebook* ¶6.02. We understand that some POs deliver oral decisions. We did not wish to compel a change in this practice by requiring written decisions. We also understand that in some Type B proceedings, POs write recommended decisions that are not disclosed to the parties until after the agency review phase is completed. Our proposal would change this practice.

⁴⁴ Normally the initial proceeding would be conducted by a PO but these requirements should also apply if the initial proceeding is conducted by the agency heads or other officials.

⁴⁵ 5 USC §552(e)(10).

Numerous provisions of the existing APA will *not* apply to Type B adjudication unless required by statute (or by agency rule). These include:

- The various provisions relating to the hiring, compensation, rotation, evaluation and discharge applicable to ALLJs.⁴⁶
- Provisions relating to evidence and burden of proof.⁴⁷
- Various provisions relating to review of initial decisions.⁴⁸
- The right to an award of attorney's fees under the Equal Access to Justice Act.⁴⁹

Judge Frye's report confirms that Type B adjudication is already conducted in accordance with the requirements of proposed section 554(e) in almost all cases. Therefore, the adoption of these baseline procedural protections should not significantly change the way that federal agencies conduct Type B adjudication. These provisions will not increase the costs of conducting Type B adjudication or cause delays or confusion or require costly agency reorganizations. Our intention is to assure that litigants will receive fundamental procedural protections in Type B adjudication without requiring restructuring of existing hearing schemes.

II. Ethical standards and protection against reprisal

Proposed §559a requires the Office of Government Ethics to adopt ethical standards for all federal ALJs and POs. This proposal implements Resolution 101B, adopted August 6, 2001, in which the ABA recommended that members of the administrative judiciary be held accountable under appropriate ethical standards adapted from the ABA's Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.

The objective of Resolution 101B, and of proposed §559a, is to assure that both ALJs and POs be held accountable to appropriate ethical standards. These rules should be based on the ABA Model Code of Judicial Conduct as a starting point, taking account of the unique characteristics of particular positions of ALJs and POs. The rules should also consider the codes of ethics adopted by groups such as NCALJ and the 1989 Code of Conduct for Administrative Law Judges, and might include particular standards adapted to the unique characteristics of various positions held by ALJs and POs, for part-time and full-time POs, or for lawyers and non-lawyers.⁵⁰

⁴⁶ 4 U.S.C. §§3105, 7521, 5372, 3344, 1305. See *Guidebook* Chapter 10.

⁴⁷ §556(d). See *Guidebook* §5.03 to 5.05. In our view, it is not necessary to incorporate the APA's provisions relating to evidence and burden of proof in order to insure fair procedure in Type B adjudication. In particular, we did not wish to impose the *Greenwich Collieries* decision on agencies conducting Type B adjudication unless they choose to adopt it. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994); *Guidebook* §5.033.

⁴⁸ APA §557(b), (c). See *Guidebook* §6.03. Again, we did not believe it necessary to incorporate these detailed provisions to achieve fair procedures in Type B adjudication.

⁴⁹ See *Guidebook*, chapter 11. We would not be opposed to extending EAJA to Type B adjudication but do not recommend it at this time in the interests of minimizing the budgetary impact of our proposal.

⁵⁰ The ABA's Model Code of Judicial Conduct stresses that "anyone, whether or not a lawyer, who is an officer of a judicial system and performs judicial functions...is a judge within the meaning of this Code."

Also in keeping with Resolution 101B, proposed section 559b provides that full-time POs shall be removed or disciplined only for good cause and only after a hearing to be provided by MSPB under the standards of Type A adjudication, subject to judicial review.⁵³ Section 559b is also based on ABA Resolution 101B.⁵⁴ POs should be protected from negative consequences for engaging in ethical and independent decisionmaking. Good cause should include violation of the ethical rules referred to in the preceding paragraph. POs should also be entitled to judicial review of such decisions.

III. Clarifying the definition of rule

At present, the APA's definition of "rule" is defective.⁵⁵ Rulemaking is the process for formulating a "rule." A "rule" is a "statement of *general or particular applicability and future effect* designed to implement, interpret or prescribe law or policy, . . . and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Adjudication is the process for formulating an "order" and an "order" means a "final disposition . . . in a matter *other than rule making* but including licensing."⁵⁶

The statute should be amended so that agency action of *general applicability* is a rule and agency application of *particular applicability* is adjudication.⁵⁷ Under the existing definitions, for example, an FTC cease and desist order would be a rule (since it is agency action of particular applicability and future effect), but everyone treats cease and desist orders as "orders" rather than as "rules" and agrees that they should be subject to adjudicatory procedure.⁵⁸ This

⁵³ As provided in Recommendation IV, newly enacted hearing schemes should be Type A rather than Type B adjudication unless Congress specifically provides to the contrary. Consistent with the spirit of Recommendation IV, we recommend here that adjudication arising out of the discipline or discharge of POs should be Type A adjudication, meaning that such cases would be heard by the MSPB's ALJs rather than the POs. Of course, the same exceptions presently applicable to hearings to remove ALJs (relating to national security or to reductions in force) would also apply to removal of POs. 5 USC §7521(b)(4) and (5), referring to §7522 and §7502. A full-time PO would be treated as such even if the official had limited incidental duties in addition to judicial responsibilities in evidentiary hearings.

⁵⁴ The 2001 resolution made clear that, for this purpose, the administrative judiciary includes all individuals whose exclusive role in the administrative process is to preside and make decisions in a judicial capacity in evidentiary proceedings, but does not include agency heads, members of agency appellate boards, or other officials who perform the adjudicative functions of an agency head.

⁵⁵ See *Guidebook* §1.04; Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule,"* 56 Admin. L. Rev. 4 (2004).

⁵⁶ APA §§551(4) to (7).

⁵⁷ The recommendation also deletes the words "and includes the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing." The effect of the latter change is that ratemaking of general applicability would be rulemaking but ratemaking of particular applicability would be adjudication. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that setting of industry-wide railway rate should be treated as informal rulemaking under the APA).

⁵⁸ As under existing law, a rule that in practice would apply to only a single person is still a rule (rather than an adjudication) as long as it is stated in general terms and it is theoretically possible that it could apply to additional persons. An agency's grant of exemption from a rule to a particular person would be an adjudication.

proposal is already ABA policy. It was part of a set of recommendations approved in 1970 by the HOD.

A further clarifying amendment removes the words "and future effect" from the definition of "rule." This revision would make clear that the APA applies to retroactive rules. Under Supreme Court case law,⁵⁷ an agency may not adopt a retroactive rule that has the force of law unless Congress explicitly authorizes the agency to do so. When agencies do adopt retroactive rules with the force of law, they should be adopted with appropriate notice and comment procedures.⁵⁸ In addition, interpretive rules often have retroactive effect; the APA's definition of "rule" should also cover retroactive interpretive rules.

IV. Type A Adjudication: Guidelines for Congress and a Default Provision When Statute is Unclear

In June, 2000, the ABA House of Delegates adopted Resolution 113, a recommendation sponsored by the Judicial Division, that set forth criteria Congress should consider in deciding whether a new adjudicatory scheme should employ Type A adjudication. A second part of the resolution created a default provision that would sweep newly adopted adjudicatory schemes into Type A unless Congress provided otherwise. This 2000 resolution is germane to the present set of recommendations. If Congress takes up the issues of Type A and B adjudication, it would naturally consider this recommendation at the same time.⁵⁹

A. Criteria for deciding whether new program should employ Type A adjudication

When Congress sets up a new program involving adjudications with opportunity for hearing, it should consider and explicitly determine whether the new program will be Type A adjudication.

Congress should consider the following factors (each of which points toward Type A rather than Type B adjudication):

a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.

b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.

⁵⁷ *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). We do not propose to change the rule of the *Georgetown* case but only to provide that the APA's definition of rule applies when an agency is authorized to adopt a retroactive rule or when it adopts a retroactive interpretive rule.

⁵⁸ See ABA House of Delegates Resolution (Feb. 1992) stating that "retroactive rules are and should be subject to the notice and comment requirements of Section 553 of the Administrative Procedure Act."

⁵⁹ Because of the various changes in statutory nomenclature embodied in this recommendation and report (such as substitution of the terms Type A and B adjudication), we propose non-substantive changes in the 2000 recommendation.

c. Whether the adjudication would be one in which adjudicators ought to be lawyers.⁶⁰

B. Default provision

Congress should amend the APA to provide prospectively that absent a statutory requirement to the contrary, in any future legislation that creates opportunity for an adjudicatory evidentiary hearing, such hearing shall be Type A adjudication.⁶¹

C. Rationale

Under the existing APA, Type A adjudication exists only when "adjudication [is] required by statute to be determined on the record after opportunity for an agency hearing..."⁶² Where a statute calls for an evidentiary hearing but does not use the magic words "on the record," it has been difficult to decide whether the resulting adjudication is Type A or Type B. The case law is conflicting.⁶³ ABA Resolution 113, already adopted by the HOD, calls for Congress to carefully consider this issue when it adopts future legislation that creates opportunity for an adjudicatory evidentiary hearing. The Resolution provides a useful list of factors that Congress should consider when it makes that decision. The resolution also calls for a prospective-only default rule. Under that rule, future legislation that creates opportunity for an adjudicatory evidentiary hearing will require Type A adjudication unless Congress provides the contrary.

This default rule will nudge federal administrative law in the direction of greater use of ALJs and Type A adjudication. This will result in enhancement in the impartiality and skill of adjudicatory decisionmakers and an accompanying improvement in the fairness and quality of decisions. Generally, agencies are well aware of legislation that affects them and the burden should be on the agencies to inform Congress at the time it considers a new adjudicatory scheme if the agency believes that Type A is inappropriate.⁶⁴

⁶⁰ These factors are substantially the same as those in ACUS Recommendation 92-7, 57 Fed. Reg. 61760 (Dec. 29, 1992).

⁶¹ Resolution 113 states that such hearings "shall be subject to 5 USC §§554, 556, and 557." The present Recommendation used the term "Type A adjudication" which embodies the sections of the APA referred to in Resolution 113. No change in meaning is intended.

⁶² APA §554(a).

⁶³ See *Guidebook* §3.01, Gary Edles, "An APA Default Presumption for Administrative Hearings: Some Thoughts on 'Onstaying' the Adjudication Process," 55 Admin. L. Rev. 787, 796-804 (2003); Cooley R. Howarth, *Federal Licensing and the APA: When Must Formal Adjudicative Procedures Be Used?* 37 Admin. L. Rev. 317 (1985); Cooley R. Howarth, *Restoring the Applicability of the APA's Adjudicatory Procedures*, 56 Admin. L. Rev. (2004). These distinct lines of cases have emerged. Some cases conclude that Type A adjudication is intended despite absence of the words "on the record." *Steadman v. SEC*, 450 U.S. 91, 96 n.13 (1981); *Seacrest Anti-Pollution League v. Costle*, 572 F.2d 872, 875-78 (1st Cir. 1978); *Lane v. USDA*, 120 F.3d 106 (8th Cir. 1997). Other cases require the use of the words "on the record" or some other clear statement of Congressional intention. *City of West Chicago v. NRC*, 701 F.2d 632, 644-45 (7th Cir. 1983); *RR Comm'n of Texas v. United States*, 765 F.2d 221, 227-29 (D.C. Cir. 1985). And still others accord *Chevron* deference to the agency's determination that the statute does not call for Type A adjudication. *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989).

⁶⁴ According to the Report accompanying Resolution 113, the default rule would apply to "any new adjudication that Congress creates with an opportunity for a hearing." See Edles, 812-14.

V. Issues relating to evidence

A. Residuum rule

The "residuum rule" (followed in some states) requires that a decision must be supported by at least some non-hearsay evidence. This rule creates many problems, such as requiring the judge to make constant hair-splitting rulings about hearsay and its many exceptions, and requiring the parties to object at some appropriate time that the residuum rule applies in order to preserve the issue on appeal. It is generally believed that *Richardson v. Perales*⁶⁵ rejected the residuum rule at the federal level but this should be made clear in the statute.

The proposed amendment to APA section 556(d) accomplishes this result by adding the italicized language: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party, *and may be entirely based on evidence that would be inadmissible in a civil trial.*"

B. Evidence—FRE 403

In general, the Federal Rules of Evidence are not applicable to administrative agencies. The existing APA provides that an agency "as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence."⁶⁶ An ACUS study indicated that this provision was inadequate because it did not give ALJs adequate case management tools. The consultant's survey of ALJs indicated that they believed they lacked power to exclude evidence that was patently unreliable or whose probative value was so low that it would not justify the amount of hearing time it would require.

The ACUS study declared: "This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state. Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications."⁶⁷

As a result, ACUS recommended that agencies adopt evidentiary rules allowing decisionmakers to exclude evidence under Federal Rule of Evidence 403.⁶⁸ That rule provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues . . . or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."⁶⁹ We agree and recommend that section 556(d) of the APA be amended to specifically permit ALJs to exclude evidence based on the FRE 403 standard (as modified slightly to take account of the differences between administrative and judicial proceedings).

⁶⁵ 402 U.S. 389 (1971).

⁶⁶ APA § 556(d).

⁶⁷ Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 Admin. L. Rev. 1, 23 (1987).

⁶⁸ ACUS Recommendation 86-2, 51 Fed. Reg. 25642 (July 16, 1986).

⁶⁹ The citation in this quotation is for the words "or misleading the jury" and "danger of unfair prejudice," which seem inapplicable to the administrative process.

VI. Declaratory orders

Existing §554(e) empowers an agency to issue a declaratory order to terminate a controversy or remove uncertainty. The placement of this subsection in the existing statute implies that only an agency authorized to conduct Type A adjudication can issue a declaratory order. We believe that any agency, whether conducting Type A, Type B, or informal adjudication, should be authorized to issue a declaratory order. Therefore, we propose moving this provision to §555, which applies to agency proceedings generally.⁷⁹

VII. Transcripts

The APA should provide that transcripts of agency proceedings (if they exist) should be available to private parties at cost of duplication. This is probably already required by §11 of the Federal Advisory Committee Act which provides: "Except where prohibited by contractual agreements entered into prior to the effective date of this act, agencies shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings (as defined in §551(12))." It would be useful to incorporate this provision in the APA itself where it would not be overlooked. As a result, we recommend that section 556(e) be amended by adding the italicized language and deleting the stricken out language:

"The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title ~~and on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

Legislation adopted pursuant to these recommendations will supersede existing contrary statutory provisions.

Respectfully submitted,
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Chair, Section of Administrative Law and
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February 2005

⁷⁹ See Jeffrey S. Lobbers & Blake D. Moran, *A Reexamination of Federal Agency Use of Declaratory Orders*, 56 Admin. L. Rev. (2004).

APPENDIX
(Ramseyer Rule)

1. Extending APA procedural protections to Type B adjudication

A. Definitions

Add to APA § 551 (definitions), 5 U.S.C. §551:⁷¹

- (15) "Type A" adjudication means adjudication required by statute to be—
 (A) determined on the record after opportunity for an agency hearing; or
 (B) conducted in accordance with sections 556 and 557 of this title;
 (16) "Type B adjudication" means an agency evidentiary proceeding required by statute, other than a Type A adjudication;⁷²
 (17) "agency evidentiary proceeding" means an agency proceeding that affords an opportunity for a decision based on evidence submitted by the parties orally or in writing; and
 (18) "presiding officer" means the initial decisionmaker in a Type B adjudication.

B. Type B adjudication

Amend existing APA §554 so that it reads as follows:

Sec. 554. - Adjudications

(a) *General principles.* This section applies, according to the provisions thereof, in every case of Type A adjudication and Type B adjudication adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

- (1) a matter subject to a subsequent trial of the law and the facts de novo in a court or in a Type A or Type B adjudication;⁷³
 (2) the selection or tenure of an employee, except an administrative law judge appointed under section 3105 of this title;⁷⁴
 (2) proceedings in which decisions rest solely on inspections, tests, or elections;

⁷¹ Subsequent references to the APA will exclude the prefatory 5 U.S.C.

⁷² The problem of distinguishing Type A, Type B, and informal adjudication is discussed in Parts I.A. and I.B. of the Report that follows these recommendations.

⁷³ In some agencies, the agency heads or a superior reviewing authority can, in theory, require a new de novo hearing of a case already heard by an ALJ or a PO to be conducted before the agency heads. We understand that this virtually never occurs in practice. The unlikely possibility of a de novo rehearing at the agency head level should not be taken into account in applying this subsection. Thus the rules relating to Type A and Type B adjudication apply to the hearing provided by an ALJ or a PO despite the remote possibility that the case could be heard anew at a higher level. For further discussion, see note 32 of the Report.

⁷⁴ This exception in the existing act becomes inappropriate in light of the adoption of the provisions relating to Type B adjudication. For further discussion, see note 26 of the Report.

- (3) the conduct of military or foreign affairs functions;
 - (4) cases in which an agency is acting as an agent for a court; or
 - (5) the certification of worker representatives.
- (b) *Notice.* Persons entitled to notice of an agency hearing in a *Type A* or *Type B* adjudication shall be timely informed of —
- (1) the time, place, and nature of the hearing;
 - (2) the legal authority and jurisdiction under which the hearing is to be held; and
 - (3) the matters of fact and law asserted. ... [balance of subsection remains the same]
- (c) *Settlement proposals.* In a *Type A* or *Type B* adjudication, the agency shall give all interested parties opportunity for —
- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
 - (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision ~~on notice and in accordance with sections 556 and 557 of this title, in accordance with the procedures for Type A adjudication specified in subsection (d) or Type B adjudication specified in subsection (e).~~
- (d) *Procedures for Type A adjudication.*
- (1) *A Type A adjudication shall be conducted pursuant to sections 556 and 557 of this title.*
 - (2) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he or she becomes unavailable to the agency.
 - (3) Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not —
 - (A) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
 - (B) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
 - (4) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. *Type A adjudication may not, in that or a factually related adjudication, participate or advise in the initial or recommended decision or any review of such decision, decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.* This subsection does not apply —
 - (A) in determining applications for initial licenses;
 - (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
 - (C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.⁷⁵

(e) *Procedures for Type B adjudication.*

(1) *General rule.* A Type B adjudication shall be conducted in accordance with the procedures specified in this subsection.

(2) *Presentation of evidence.* A party may present its case or defense by oral or documentary evidence and conduct such cross-examination as may be required for a full and true disclosure of the facts. An agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(3) *Impartiality of presiding officers and reviewing officers.* The functions of a presiding officer or an officer who reviews the decisions of a presiding officer shall be conducted in an impartial manner.

(4) *Agency decisional process*

(A) A presiding officer shall make the recommended or initial decision unless he or she becomes unavailable to the agency.

(B) Except to the extent required for the disposition of ex parte matters as authorized by law, the presiding officer shall not consult any person or party on a fact in issue, unless on notice and with an opportunity for all parties to participate.

(C) A full-time presiding officer shall not be responsible to or subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions. A part-time presiding officer in an adjudication shall not be subject to the supervision or direction of an agency employee engaged in the performance of investigative or prosecuting functions in the same adjudication.

(D) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in an adjudication may not, in that or a factually related adjudication, participate or advise in an initial or recommended decision or any review of such decision, except as witness or counsel in public proceedings.

(E) The requirements of this paragraph do not apply—

- (i) in determining applications for initial licenses;
- (ii) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (iii) to the agency or a member or members of the body comprising the agency.

(5) *Ex parte communications.* The requirements of sections 556(e) and 557(d) shall apply to the proceeding and, in particular, the requirements that apply to an administrative law judge under section 557(d) shall apply to the presiding officer in the proceeding.

(6) *Decision.* The decision of a presiding officer shall include a statement of findings, conclusions, and reasons, on material issues of fact, law, and discretion presented on the

⁷⁵ The provision for declaratory orders is moved from §554 to §555. See VI. below.

record. The decision may be delivered orally or in writing in the discretion of the presiding officer. In the event the decision is reviewed at a higher agency level, the parties shall have an opportunity to submit comments on the decision before the review process is completed.

(2) Additional protections. An agency engaged in Type B adjudications may adopt rules that provide greater procedural protections than are provided in this section.

C. Sunshine Act exception.

Section 552b(c)(10) in the Government in the Sunshine Act provides an exception to the Sunshine Act requirements for the "initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing." This section should be amended to make clear that the exception applies also to Type B adjudication.

II. Ethical standards and protection against reprisal

A. Ethical standards

Add new section 559a:

559a. Ethics and independence of presiding officers and administrative law judges

(a) The Office of Government Ethics shall prescribe regulations providing for appropriate ethical standards for administrative law judges and presiding officers who conduct adjudications under section 554 of this title.

(b) The regulations shall be prescribed in accordance with sections 553(b) and (c) of this title.

B. Removal and discipline of presiding officers

Add a new section 559b:

559b. Removal and discipline of presiding officers

(a) A presiding officer, as defined in section 531 of this title and who is full-time, may be disciplined or removed from his or her position as presiding officer only for good cause and only after a hearing before the Merit Systems Protection Board, subject to judicial review. The hearing shall be a Type A adjudication.

(b) The exceptions applicable to administrative law judges, relating to national security or reductions in force, shall be applicable to discipline or removal of a presiding officer.

III. Clarification of the definition of rule

APA section 551(4) should be amended to read as follows:

(4) "rule" means the whole or a part of an agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency.

~~“rule means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”~~

IV. Type A adjudication: guidelines for Congress and a default provision when statute is unclear

A. Criteria for deciding whether new programs should be Type A adjudication.

When Congress creates a new program involving adjudication with opportunity for an evidentiary hearing, it should consider and explicitly determine whether the new program will be Type A or Type B adjudication.

Congress should consider the following factors (the presence of which would weigh in favor of the use of Type A rather than Type B adjudication):

- a. Whether the adjudication is likely to involve a substantial impact on personal liberties or freedom, whether the orders carry with them a finding of criminal-like culpability or would have substantial economic effect, or whether the orders involve determinations of discrimination under civil rights or analogous laws.
- b. Whether the adjudication would be similar to, or the functional equivalent of, a current type of Type A adjudication.
- c. Whether the adjudication would be one in which adjudicators ought to be lawyers.

Please note that this provision relating to criteria for choosing between Type A and Type B adjudication is not included in the Bill language above since it is not intended to be a statutory provision.

B. Default provision.

Congress should amend the APA to provide prospectively that, absent a statutory requirement to the contrary, in any future legislation that creates an opportunity for hearing in an adjudication, such hearing shall be Type A adjudication.

V. Issues relating to evidence

Section 556(d) should be amended by adding the italicized language:

Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. *Evidence may be excluded, although relevant, if its probative value is substantially outweighed by the danger of confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.* A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party *and may be entirely based on evidence that would be inadmissible in a civil trial.* [The remainder of §556(d) remains the same]

VI. Declaratory orders

Section 555 should be amended by adding thereto the following subsection:

(f) Declaratory orders. The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

VII. Transcripts

Section 556(e) should be amended by adding the italicized language and striking the crossed-out language:

The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title. ~~and, on payment of lawfully prescribed costs, shall be made available to the parties.~~ *Agencies shall make such transcripts available to the parties at the actual cost of duplication.* When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

VIII. Superseding contrary statutory provisions

The provisions of this act supersede existing contrary statutory provisions.

Appendix B

RECOMMENDATION 126A
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

February 1989

BE IT RESOLVED, that the American Bar Association supports the reauthorization of the Administrative Conference of the United States (ACUS) and the provision of funds sufficient to permit ACUS to continue its role as the government's in-house advisor and coordinator of administrative procedural reform.



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July 18, 2006

The Honorable Thad Cochran
 Chairman
 Committee on Appropriations
 United States Senate
 Washington, D.C. 20510

The Honorable Robert C. Byrd
 Ranking Member
 Committee on Appropriations
 United States Senate
 Washington, D.C. 20510

Re: Funding the Newly Reauthorized Administrative Conference of the
 United States for Fiscal Year 2007

Dear Chairman Cochran and Ranking Member Byrd:

On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of \$3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at <http://www.abanet.org/poladv/ACUSreauthorization.html>.

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Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service ("CRS") prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at <http://www.abanet.org/oladiv/ACUS/Reauthorization.html>. As outlined by CRS, ACUS has many virtues, including the following:

- A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. The CRS Memorandum concludes that "[ACUS's] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts," including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission's recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.
- ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, "...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions." ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that "all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation."
- Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the

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Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS' recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS's encouragement of administrative dispute resolution had saved 'millions of dollars' that would otherwise have been spent for litigation costs." CRS also noted that in 1994, the FDIC estimated that "its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million." The CRS Memorandum provides numerous additional examples of ACUS' prior successes as well.

• ACUS' role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS' fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange "best practices" ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration's regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that necessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide \$3.2 million in funding for ACUS for fiscal year 2007 during your Committee's mark up of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,



Robert D. Evans

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cc: The Honorable Christopher S. Bond
The Honorable Patty Murray
All other members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Jerry Lewis
The Honorable David R. Obey
The Honorable Joseph Knollenberg
The Honorable John W. Olver
The Honorable Chris Cannon

Appendix D

RECOMMENDATION 106A
ADOPTED BY THE
HOUSE OF DELEGATES
OF THE
AMERICAN BAR ASSOCIATION

August 9, 2005*

RESOLVED, that the American Bar Association encourages Congress to establish the Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

*Note: The "Recommendation," but not the attached "Report," constitutes official ABA policy.

REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.¹

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.² However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.³ Their powers emanate

¹The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

²The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

"The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. *Id.* § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

³See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

from the Administrative Procedure Act.⁴ Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.⁵ After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation⁶ and that ALJs are functionally equivalent to other Federal trial judges:⁷

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM's administration of the program. The APA contemplated that the Civil Service Commission (now OPM)⁸ would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM "may... investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees." Although the OPM Program Handbook, p. 4, affirms these responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.⁹

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)¹⁰, in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

⁴ See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (*American Bar Association Administrative Law Section*, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. Id. The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in *Marshall v. Jerrico*, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

⁵ Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 *Judicature* 216, 218 (1987).

⁶ *Rutz v. Egan*, 438 U.S. 478 (1978).

⁷ *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 511 (1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

⁸ Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board ("MSPB").

⁹ See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb. 23, 1998).

¹⁰ Now the National Conference of the Administrative Judiciary.

OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.¹¹ However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While *Adell*¹² was pending, OPM suspended the examination process for administrative law judges (ALJs). Therefore, the ALJ register became dated. With one exception,¹³ agencies could not hire judges from the ALJ Register during this period. In *Bush v. Office of Personnel Management*, 313 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to be given part of the ALJ examination, the Federal Circuit determined that the suspension of testing was a reviewable employment practice.¹⁴ On

¹¹ 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

¹² *Mecker v. Merit Systems Protection Board*, 319 F.3d 1368 (Fed. Cir. 2003).

¹³ In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See *Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives*, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

¹⁴ Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance

February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL),¹⁷ resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.¹⁸

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.¹⁷

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions ~~for~~ to promote administrative uniformity.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for

OPM's Office of Administrative Law Judges. Although OPM feebly adhered to these requests, it failed to administer the system during the period when it was involved in the *Asadi* litigation.

¹⁷ Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any ALJ vacancy ahead of others on the ALJ register of eligibles maintained by OPM.

¹⁸ *Rutberg v. United States*, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist. LEXIS 19832 (D. Mass., 1998).

¹⁷ In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (*In re Choccolito*, 1 MSPBR 612, 651 (1978)) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.¹⁸

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.¹⁹ ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.²⁰

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.²¹

Respectfully Submitted,

Louraine Arkfeld, Chair, Judicial Division
August, 2005

¹⁸ Policy 101B, 2001, *ABA Policy/Procedures Handbook*, 193 (2004).

¹⁹ Standards for the Education of the Administrative Judiciary, Policy 99 A101, *ABA Policy/Procedures Handbook*, 268 (2004).

²⁰ Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

²¹ See ABA Policy, August, 1997, *ABA Policy/Procedures Handbook: Policy on Legislative and National Issues*, 233 (2004).

Mr. CANNON. I am now pleased to introduce the witnesses for today's hearing.

Our first witness is Dr. Bill West of the Bush School of Government and Public Service at Texas A&M University. A 1971 graduate of the United States Military Academy, Dr. West earned his Ph.D in political science at Rice University. Currently, he teaches public policy administration at the Bush School. He also serves as the school's director of the Master in Public Service and Administration program. Dr. West has authored two books and published numerous articles.

Our next witness is Marshall Breger, who is a professor of law at the Columbus School of Law at the Catholic University of America and was my chief of staff Matt Iandoli's professor while he studied at Catholic.

Professor Breger has had a diverse career. From 1993 to 1995, he was a senior fellow at The Heritage Foundation. During the prior Bush administration, he served as solicitor of labor, the chief lawyer for the Labor Department. In 1992, he served concurrently by presidential designation as the acting assistant secretary for labor management standards.

As I alluded to earlier, Professor Breger was the chairman of ACUS from 1985 to 1991. For 2 years during that period, he served as an alternate delegate of the United States to the United Nations Human Rights Commission in Geneva.

A prolific writer and editor, Professor Breger is vice president of the Jurispolicy Center, a Jewish conservative think-tank. Professor Breger obtained his undergraduate and master's degrees from the University of Pennsylvania. He received his law degree magna cum laude from the University of Pennsylvania, where he was an editor of the law review and a member of the Order of the Coif.

Our third witness is Professor Elizabeth Magill of the University of Virginia Law School, where she teaches, not surprisingly, courses on administrative law, as well as on food and drug law and constitutional structure.

Upon obtaining her undergraduate degree from Yale College, Professor Magill served as a senior legislative assistant for North Dakota Senator Kent Conrad. Thereafter, she obtained a law degree from the University of Virginia School of Law. After graduating from law school, Professor Magill clerked for the Honorable J. Harvey Wilkinson of the Fourth Circuit Court of Appeals, and then for Justice Ruth Bader Ginsburg. Like her fellow panelists, Professor Magill has also published extensively.

Our final witness is Professor Cary Coglianese. As I noted in my opening remarks, Professor Coglianese was the moderator of the Subcommittee's symposium on e-rulemaking, which was held in this very room last December.

Welcome back.

Professor Coglianese is the Edward B. Shils professor of law and professor of political science at the University of Pennsylvania Law School. Prior to joining the University of Pennsylvania, Professor Coglianese spent 12 years on the faculty of the John F. Kennedy School of Government at Harvard. While there, he served as the faculty chair in the school's Regulatory Policy Program and director of its Politics Research Group.

Professor Coglianese received his undergraduate degree from Albertson College. He then went on to the University of Michigan, where he received his law degree and master's degree in public policy, as well as a doctorate in political science.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing.

In light of the fact that your written statements will be included in the record, you may not want to limit your comments to 5 minutes. We will have time for questions, and you can certainly volunteer things during the Q&A. I don't think we are going to have a great deal of competition from other Members of the Committee here.

You do have a lighting system in front of you. After 4 minutes, it turns from green to yellow. It is my habit to tap just with a pencil or something to draw your attention to the fact that we are getting to that point. It is not a big deal today, given the fact that we are not overwhelmed with folks that want to ask questions.

After you have presented your remarks, we will go in order, if others arrive, of arrival, to ask questions. Pursuant to the direction of the Chairman of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to take the oath.

[Witnesses sworn.]

The record should reflect that the witnesses all answered in the affirmative.

You may be seated.

Professor West, would you please proceed with your testimony?

TESTIMONY OF PROFESSOR WILLIAM WEST, THE BUSH SCHOOL OF GOVERNMENT AND PUBLIC SERVICE, TEXAS A&M UNIVERSITY, COLLEGE STATION, TX

Mr. WEST. I am Bill West from The Bush School of Government and Public Service at Texas A&M University. Thank you for inviting me to testify in commemoration of the 60th anniversary of the APA.

My testimony today will focus primarily on parts of a recent exploratory study of how agencies develop proposed rules. The study was conducted by a team of seven Bush School students that I supervised and that was supported by the Congressional Research Service. Curtis Copeland and Mort Rosenberg of CRS provided invaluable support and guidance for the project.

I might also note that Caitlyn Miller, who is the student leader of the project, is here today.

Mr. CANNON. Could I interrupt and ask who Ms. Miller is? Could we have her raise her hand?

Welcome. Nice to have you here today.

Pardon me for the interruption.

Mr. WEST. That is fine.

The 60th anniversary of the APA is a good occasion to consider its effects and its limitations. An especially important, if neglected topic, is that part of the rulemaking process that takes place before the APA's requirements come to bear. Notice and comment is intended to ensure that rulemaking is transparent and accessible to all relevant stakeholders. Yet although these procedures are un-

doubtedly salutary, it is also true that they come to bear at a relatively late stage in the decision-making process.

The part of the rulemaking process that precedes the publication of notice frequently lasts for several years and almost always results in a specific and thoroughly justified policy proposal. It is where the most critical decisions often occur. If public notice and comment is intended to promote inclusive and transparent participation in decision-making therefore, how inclusive and transparent is participation in proposal development?

As a starting point, one thing that our study finds is that pre-notice participation is common and that it takes place through a variety of mechanisms. Although participants vary a great deal from one agency to the next, and indeed from one rule to the next, they can include representatives of industry and other affected interests, public interest groups and other agencies. OMB and other entities within the executive office of the president are also sometimes involved.

Unlike notice and comment under the APA, however, participation in the development of proposed rules usually does not occur by general invitation. Rather, it is informal and occurs at the specific invitation of the agency or at the initiative of the participant. The primary exception to this is when agencies solicit comments from all interested parties through an advance notice of proposed rulemaking. Although agencies' use of advanced notice varies, it is never routine or even frequent. It is probably employed significantly less than 5 percent of the time across the Federal bureaucracy.

Participation during the pre-notice phase of rulemaking thus is not subject to the same institutional guarantees of inclusiveness that the APA provides during the comment phase. Whether this is a problem, much less a problem that Congress should address, suggests a number of more specific questions.

For example, how effective are agencies in gathering input from all relevant stakeholders during proposal development? If they are not effective, do the APA's notice and comment requirement serve as a check on earlier imbalances in participation? Would the benefits of institutional reforms that might increase inclusiveness in proposal development outweigh their costs in terms of administrative efficiency?

Our examination of pre-notice rulemaking also addresses the question of transparency. Although the APA is silent on the subject, there has been an expectation since the 1970's that agencies base their rules on a record. Although they generally docket communications outside the executive branch that occur after the publication of notice, however, there is wide variation across agencies in pre-notice docketing practices. Some indicate that they record all communications with non-executive actors throughout this phase. Others indicate that they do not require any pre-notice docketing.

In between these two extremes there is variation in the types of communications placed on the public record and in the stage of the proposal development process at which docketing begins. As with inclusiveness, the policy issues surrounding transparency are complex.

If on-the-record communications promote openness in decision-making, for example, they may also impede the collection of needed information. As in the legislative process, moreover, on-the-record communications may be inimical to the bargaining and compromise required for the accommodation of affected interests.

Some officials we interviewed for our study also indicated that off-the-record communications with other agencies and OMB were important for coordination among administrative programs. Indeed, any effort by Congress to require docketing within the executive branch would necessarily have to consider the court's sympathy for a unified executive in recent decades.

I should hasten to emphasize that our study was designed to identify key issues, rather than to resolve them. In these and many other respects, gaining a better understanding of the administrative process is an essential foundation for sound institutional policy.

Again, I am grateful for the opportunity that you and CRS have given to us to explore one broad dimension of rulemaking, and I applaud other recent initiatives to shed more light on topics such as e-rulemaking and the role of advisory committees in administrative decision-making.

As an extension of these last observations, let me close by stressing the need to devote more resources to policy and legal analysis in the administrative process. For years, the Administrative Conference of the United States produced objective studies by first-rate scholars that were of considerable practical, as well as academic value.

I am happy that ACUS has been reauthorized, and I would like to join those who have argued that it should be re-funded as well. This would produce substantial benefit for relatively little cost.

Thank you.

[The prepared statement of Mr. West follows:]

PREPARED STATEMENT OF PROFESSOR WILLIAM WEST

I am Bill West from the Bush School of Government and Public Service at Texas A&M University. Thank you for inviting me to testify in commemoration of the 60th anniversary of the Administrative Procedure Act. I am honored to be here.

My testimony today will focus primarily on the results of a recent study of how agencies develop proposed rules. The study was conducted by a team of seven Bush School students that I supervised and that was supported by the Congressional Research Service. Curtis Copeland and Mort Rosenberg of CRS provided invaluable support and guidance for the project. I am also grateful to Daniel Mulhollan, Angela Evans, and Kent Ronhovde for their initiatives in establishing a relationship between CRS and the Bush School. Our study of rulemaking is one of several worthwhile projects that CRS has sponsored at the Bush School and other schools of public affairs.

The Administrative Procedure Act is a venerable statute that has served the nation well. As many have remarked, however, American administrative law was a comparatively new field at the time the APA was enacted and the so-called bureaucratic state was still in its relative infancy. New procedural constraints on agency discretion have been added as the bureaucracy has grown and as new issues of legitimacy and accountability have arisen. Mechanisms for direct oversight of administrative policy making have been added as well. The most important development in this latter regard has been the institutionalization of regulatory review in the Executive Office of the President that has occurred over the past three decades.¹ The

¹ James Blumstein, "Presidential Administration and Administrative Law: Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues," *Duke Law Journal* 51 (2001).

various controls that shape the administrative process have been added largely in a piecemeal fashion and perhaps without sufficient consideration of how they all fit together.

In any case, the 60th anniversary of the APA is an appropriate occasion to consider its effects and its possible limitations. With regard to rulemaking, one might examine the effects of public comment on agency decisions or the impact of judicial review (or the threat thereof) as the meaning of the "arbitrary-or-capricious" standard has evolved. Or one might examine the relationship between the APA's objectives, on the one hand, and centralized executive oversight of rulemaking on the other. Scholars have, in fact, given a good deal of attention to these and other important topics relating to formal, institutional constraints on agencies' exercise of legislative discretion.

At the same time, scholars have practically ignored the informal processes that precede the APA's notice-and-comment requirements and most other controls on rulemaking. This, despite the fact that the most important policy decisions in rulemaking are arguably made as proposals are being developed. I have noted elsewhere that the notices of proposed rulemaking that appear in the Federal Register are usually very specific. Further, they often take years to develop and reflect a substantial investment of agency resources. Important proposals are sometimes accompanied by book-length documents that lay out their legal and empirical premises. Suffice to say that agency officials usually feel that they are on firm ground before they invite public comment, and that the most critical issues in terms of defining problems and eliminating alternative solutions to those problems have at least tentatively been resolved.²

This is not to deny the importance of notice and comment. Several recent studies have found that agencies do sometimes alter proposed rules in ways that are consistent with the comments they receive.³ As a matter of perspective, however, it is difficult for agencies to change proposed rules in fundamental ways. An obvious disincentive is sunk organizational costs. Intertwined with this is the fact that the demands of due process may compel agencies to invite additional comments in response to substantial changes, thus lengthening an already protracted process.⁴ An irony of rulemaking procedures is that the effort to ensure the viability of public comment by requiring agencies to base their decisions on a record (as the courts have generally done since the 1970s and has Congress done in some enabling legislation) creates an incentive for agencies to develop proposals that will not need to be changed.

With these observations as a point of departure, the project that we conducted for CRS examines how agencies develop proposed rules. It relies primarily on agency documents, on an electronic questionnaire sent to agency staff involved in the development of a large sample of individual rules, and on telephone interviews with high-level agency careerists with extensive experience in the rulemaking process. As an exploratory study, it addressed three general sets of issues as a way of identifying questions for further research: how are rulemaking initiatives placed on agencies' agendas; how is the rulemaking process managed within and across agencies; and what is the character of outside participation in the development of proposed rules. The last of these questions may be especially relevant to the Congress as it considers possible amendments to the APA.

The goals of the APA offer a frame of reference for evaluating participation in proposal development. The Act sought to provide some uniformity across agencies (at least regulatory agencies) as they carried out their quasi-judicial and quasi-legislative responsibilities. By the same token, it sought to ensure a degree of due process that was appropriate for each of these functions. In the case of rulemaking, the "informal" or "notice-and-comment" procedures set forth in section 553 were designed to promote a certain level of rationality as well as transparency and inclusiveness in administrative policy making. The requirements that agencies publish a notice

²William F. West, "Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making," *Public Administration Review* 64: 66-80 (February 2004).

³*Ibid.* Also see Steven J. Balla, "Administrative Procedures and Political Control of the Bureaucracy," *American Political Science Review* 92: 663-673 (1998). Marissa Martino Golden, "Interest Groups in the Rulemaking Process: Who Participates? Who Gets Heard?" *Journal of Public Administration Research and Theory* 8: 245-70 (1998). Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 2d. ed. (Washington, D.C.: Congressional Quarterly Press, 2003). Susan Webb Yackee, "Sweet-Talking the Fourth Branch: Assessing the Influence of Interest Group Comments on Federal Agency Rulemaking," *Journal of Public Administration Research and Theory* 26: 103-24 (2006).

⁴West, *supra* note 1. These observations were also confirmed in some of the interviews conducted for the study described in this testimony.

in the Federal Register and solicit comments from any and all interested parties were designed to promote these latter, democratic values.⁵

As many have noted, developments in administrative law over the past three-and-a-half decades have been intended to reinforce these goals. The most important has been the requirement that agencies based their rules primarily on a record. This has resulted in part from provisions in some enabling statutes that supersede the APA and in part from judicial (re)interpretation of the APA's "arbitrary or capricious" standard of review. Although the courts have backed off from the precedents of the 1970s in some respects, the "hard-look" doctrine of review is hardly dead—especially if one compares current practices with those that existed during the first two-and-a-half decades after the APA's passage. Whether instituted by Congress or the courts, the extension of more rigorous due process to rulemaking has been motivated in part by the desire to ensure that bureaucracy consider all legitimate comments in arriving at policy decisions.⁶ This goal became popular as the result of the allegation that agencies were "captured" by special interests.⁷

If many of the most important decisions are made before notice appears in the Federal Register, however, what of the participation that occurs as agencies are developing proposals? How inclusive and transparent is that process? As with most of the other issues we examined in our study, there are no simple answers here. This is largely because agency practices are so diverse with regard to most of the key dimensions of proposal development. Although we had hoped that the data from our electronic survey would allow us to make systematic comparisons of such variation across agencies and policy areas, a low response rate prevented this. Still, our interviews and survey data allow for some important observations that suggest further study and that may ultimately be relevant for institutional reform. Indeed, the observation that such variation exists may be significant in and of itself given the relative standardization of practices within the comment phase of rulemaking.

One thing that we found is that outside participation in proposal development is common. Although it does not always occur, it does occur frequently. Not surprisingly, in fact, a number of the officials we interviewed noted that gathering information from people outside of the agency was frequently indispensable to intelligent decision making. Although participants vary a great deal from agency to agency and from one rule to the next, they can include representatives of industry and other affected interests, public interest groups, and other agencies. The latter might become involved in order to resolve jurisdictional issues or coordinate across programs or to represent the interests of their constituents.

OMB's Office of Information and Regulatory Affairs can also be an important participant in proposal development. Although its level of involvement varies a good deal from one agency to the next, some officials characterized OIRA as the "800-pound gorilla." Its informal role in policy formulation is undergirded by the formal powers it enjoys at a later stage to return for reconsideration proposed rules that are not properly justified or that are inconsistent with the president's agenda. In contrast, there was a near consensus among those we interviewed that, although specific statutory requirements were a very important source of rulemaking initiatives in some agencies, the extent and impact of congressional involvement in the development of proposed rules tended to be quite limited.

Beyond the observation that it occurs and that it can involve various actors, we found that the character of participation varies considerably. The timing of input is one important dimension of variation. Some officials indicated that their agencies communicate with extra-governmental actors throughout proposal development while others indicated that their policy is to terminate communications at an intermediate stage of the process. Among the latter, the most common termination point is after the agency has collected general views about the nature of the problem being addressed and possible solutions to that problem and before it begins to articulate and support a specific policy proposal. The mechanisms of participation also vary a great deal. They range from informal conversations at trade conferences or over the telephone to e-mails and letters to hearings to advisory committees, among various other possibilities. Some agencies even use focus groups on occasion.

A generalization that one can offer about participation in proposal development, however, is that—unlike notice-and-comment under the APA—it *does not usually occur by general invitation*. Rather, it occurs either at the specific invitation of the

⁵*The Administrative Procedure Act: A Legislative History* (Washington, D.C.: U.S. Government Printing Office, 1946) Senate Doc. 248, 79th Cong., 2d. Sess.

⁶Colin S. Diver, "Policymaking Paradigms in Administrative Law," *Harvard Law Review* 95: 393–434 (1981).

⁷Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88: 1667–1814 (1975).

agency or at the initiative of the participant. The primary exception to this generalization is when agencies solicit comment from all interested parties through an advanced notice of proposed rulemaking. Yet although the use of ANPRMs varies from one agency to the next, they are never used on a routine or even a frequent basis. Although we did not gather precise data, it appears as if they are employed significantly less than five percent of the time across all rulemaking.

Our interviewees offered several explanations for their reluctance to use advance notices more often. One was that ANPRMs were an additional source of delay in a process that was already slowed by numerous procedural hurdles. This disincentive was sometimes reinforced by pressures from Congress and elsewhere to issue rules in a timely fashion. Another explanation was that advanced notices did not produce any useful information beyond what the agency could obtain by contacting stakeholders individually. Not surprisingly, virtually all of the officials we interviewed indicated that they made assiduous efforts to gather all relevant perspectives, and many expressed confidence that they usually knew who were affected by their rules. In addition, several officials noted that, because it did not occur in response to a specific proposal, comment pursuant to advance notices was too unfocused to be of much value. Two of the senior people we interviewed noted that their agencies' use of ANPRMs had declined in recent years as the result of these factors.

In brief, then, although critical policy decisions are at least tentatively made during proposal development, participation during that phase of rulemaking is not subject to the same institutional guarantees of inclusiveness that the APA provides during the comment phase of rulemaking. Whether or not this is a problem, much less a problem that Congress should seek to address is a complex issue that involves a variety of considerations. One obvious question is whether agencies are effective in gathering input from all relevant stakeholders during proposal development (or whether participation and influence tends to be confined to the "usual suspects"). To the extent participation during proposal development is not inclusive, another important set of questions have to do with whether the APA's notice and comment requirements redress participatory imbalances during proposal development. Are agencies willing to make substantial changes in proposed rules? Given the resources required for effective comment, moreover, the formal opportunity to offer feedback on proposed rules may have little practical effect in enfranchising those who have not had access to agency decision makers during proposal development. Finally, even if Congress could promote inclusiveness through institutional constraints on proposal development, the potential benefits of such a reform must also be weighed against its costs in terms of administrative efficiency and effectiveness. The officials we interviewed were unanimous in their opinion that requiring advanced notices for all or certain classes of rulemaking would impose undue delay on decision making.

Our study also addressed the related issue of transparency in proposal development. Again, although the APA is silent on the subject, there has been an expectation since the 1970s that agencies base their rules on a record. Given this, almost all of the officials we interviewed indicated that they made available to the public all communications with actors outside of the Executive Branch (including legislators and legislative staff) that occurred after a notice appeared in the Federal Register. In contrast, there was wide variation in pre-notice docketing practices. A high-level official in the general counsel's office of one department indicated that his agency's policy was that practically all communications with non-executive actors must be recorded. In contrast, another official indicated that his agency did not feel a need to docket any pre-notice communications. In between these two extremes, some interviewees said that their agencies did not docket early communications designed to collect general information about problems but became more conscious of the need to docket communications at the later stages of proposal development. Others indicated that they tended only to docket communications that were material to their proposed rules.

Such wide variation in docketing practices may be attributable in part to the current ambiguity of judicial precedent in this area over the past thirty years. It is also undoubtedly attributable to agency culture and tradition, as well to the preferences key officials. One senior careerist with a good deal of influence over administrative procedures within his department indicated that he favored strict docketing requirements on policy as opposed to legal grounds. Given that most pre-notice participation occurred at the specific invitation of agency officials, he felt that recording such communications was desirable as a way of avoiding perceptions of bias in the process.

As with inclusiveness, the prescriptive issues surrounding transparency are complex and invite further research. If off-the-record communications obviously detract from the openness (and thus perhaps the legitimacy) of proposal development, they

may also be desirable in terms of administrative efficiency and effectiveness. Although the officials we interviewed were not as consistent in their opposition to docketing requirements as they were to advanced notices, a number of them indicated that *ex parte* conversations facilitated the kind of information gathering required for rulemaking. As in the legislative process, moreover, on-the-record communications may be inimical to the bargaining and compromise required for the accommodation of competing interests. Although agency officials involved in rulemaking typically describe it as a “technical” process of ascertaining legislative intent and making sound factual determinations, there is little doubt that it is also frequently a political process that requires “partisan mutual adjustment” among competing interests. (It usually requires only a little prodding in interviews to bring this out.)

Some officials also indicated that off-the-record communications with other agencies and OMB were important for coordination and management among administrative programs. Indeed, any effort by Congress to require the docketing of communications within the Executive Branch would necessarily have to consider the legal implications of such a policy. This observation is underscored by the Supreme Court’s sympathy in recent decades for a “unified executive” as a means of rationalizing policy implementation across the federal bureaucracy.⁸ Yet while managerial prerogatives within the executive are certainly an important consideration, it is also true that other agencies, OMB, and the White House sometimes act as conduits for private interests in their efforts to influence rulemaking. This is well-documented in the case of OIRA, for example.⁹ To some extent, therefore, docketing requirements for non-governmental actors but not for members of the Executive Branch might have the potential to produce a misleading appearance of transparency.

All of this is to say that the development of proposed rules deserves much more attention than it has received. It is the proverbial black box; the part of the iceberg that lies under the water. Again, our study was an exploratory effort designed to identify some of the key parameters of variation in the process and to identify important questions rather than to answer them. That was true of our consideration of agenda setting and the management of proposal development as well.

In the case of agenda setting, for example, we found that whereas some agencies’ rulemaking consisted primarily or exclusively of discretionary initiatives that derived from various sources (agency staff research, feedback from enforcement officials, suggestions from affected groups, etc.) other agencies’ agendas were dominated by non-discretionary (legislatively required) rules. Still other agencies combined the two in various proportions. A systematic, cross-agency study of where ideas for rules come from and of why some ideas become rules and others do not can add a good deal to our understanding of how government works. An examination of agenda setting might also have prescriptive value. In the case of one agency, for example, although non-discretionary rules comprised a minority of its total workload, the fact that they took precedence nonetheless made it difficult to plan and execute a coherent agenda for all rulemaking. The official with whom we spoke felt that more effective communication with Congress could help alleviate this problem.

The management of proposal development is also a fertile area for further investigation. For example, we found that some agencies have highly detailed, formalized procedures whereas others have no written policies to guide the process. The degree to which key decisions in the formulation of proposed rules is centralized at the departmental level also varies a good deal. To observe that such variation exists naturally suggests the questions of why it exists and what difference it makes in terms of agency performance.

There are many other important dimensions of proposal development that have received little if any attention. For example, what are the forms and roles of advisory committees and to what extent do these bodies provide effective representation for stakeholders? Another important set of questions concerns whether and how rulemaking is coordinated across agencies. The list could go on.

This is not to say that studying proposal development is easy. Evaluative and prescriptive analysis is complicated at the conceptual level by the fact that we expect different qualities in the rulemaking process. Given its legislative nature, we naturally want it to reflect the democratic values of openness and balanced responsiveness. Given its administrative nature, we also want it to be carried out in as timely and efficient a manner as possible. A third criterion, which might be labeled “substantive rationality,” is the expectation that rulemaking decisions be objective and

⁸ Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001).

⁹ For a recent discussion see William F. West, “The Institutionalization of Regulatory Review: Organizational Stability and Responsive Competence at OIRA,” *Presidential Studies Quarterly* 35 (March 2005).

based on rigorous empirical evidence. All of these criteria are legitimate bases for assessing proposal development (and rulemaking more generally). As might be evident from the preceding discussion, however, they all potentially conflict with one another in critical ways.

Data collection presents another, more practical challenge to the study of proposal development. Because of its extreme diversity, studies that focus on one or a few cases are of limited value in developing generalizations. Conversely, gathering process-related data for a large sample of rules can be a daunting task. As we found, for example, efforts to accomplish this goal through surveys of agency personnel face several obstacles, not the least of which is the inherent reluctance of bureaucracy to share information. Indeed, two agencies ordered their staff not to comply with our survey despite (or perhaps because of) a cover letter indicating that it was being conducted under the auspices of CRS and the Judiciary Committee. Even the senior officials we interviewed, all of whom were extremely helpful, were sometimes unable to share internal documents describing the rulemaking process.

Still, the research needs to be done. Gaining a better understanding of the administrative process is an essential foundation for sound institutional policy. Again, I am grateful for the opportunity that you and CRS have given us to explore one broad dimension of rulemaking and I also applaud other recent initiatives to shed more light on topics such as e-rulemaking and the use of advisory committees.

As an editorial observation, let me close by stressing the need to devote more resources to policy and legal analysis in these and other areas of the administrative process. For years, the Administrative Conference of the United States produced studies by first-rate scholars that were of considerable practical as well as academic value. Because it was clearly non-partisan and free of organizational ties that might otherwise bias its analysis, ACUS enjoyed the kind of access to agencies that is necessary for studying many of the most important issues in the administrative process. I am happy that ACUS has been re-authorized, and I would like to join the more distinguished individuals who have argued that it should be funded as well. This would produce substantial benefit for relatively little cost.

Thank you.

Mr. CANNON. Thank you. We will use that last statement when it comes to get it re-funded.

Professor Breger, you are recognized for 5 minutes.

TESTIMONY OF PROFESSOR MARSHALL BREGER, THE CATHOLIC UNIVERSITY OF AMERICA-COLUMBUS SCHOOL OF LAW, WASHINGTON, DC

Mr. BREGER. Thank you. My name is Marshall Breger. I teach at the Columbus School of Law at The Catholic University of America. I am pleased to join you today in this discussion of the future of the Administrative Procedure Act.

If I may just follow along with Congressman Watt's comments, the Administrative Procedure Act may be 60, but I think like many baby-boomers, it is not ready for retirement, rather for reviving, re-tuning, and hopefully a new lease on life.

Having said that, the APA has served us well for the last 60 years, but we have to remember we are today in a different time and a different place. In 1946, over 90 percent, and I could get you the exact numbers, but over 90 percent of the activities of administrative agencies were adjudications. Now, it has flipped. It is mostly rulemaking.

In 1946, we came out of the New Deal with great enthusiasm, belief in the power of the regulatory process to address political, economic, and social problems. Today, we are more realistic, if not more skeptical. Indeed, we have a kind of default position for market solutions and the regulatory process has to prove itself in every instance. But being skeptical about regulation does not mean that you should be uninterested in the regulatory process. In fact, it means you need to think more hardly, more seriously, and have

more empirical research about regulation, what works, what doesn't work, and what works better. So I am very pleased that this Committee is beginning to address that issue.

I am going to speak about a number of issues in rulemaking, which I believe is the gravamen of this hearing, that I think are important to consider in thinking about revisions of the APA. First, informal rulemaking. You know that the notice and comment rule-making process has been called by Kenneth Davis the greatest invention of Government in the 20th century. No doubt, it swept the board and changed the nature of the administrative process.

However, we have seen in the last 60 years growing accretion of requirements for what is supposed to be informal, from the judiciary, growing accretions of requirements from Congress in mandates, and from the White House OIRA process, making informal more formal.

We have had the growth of non-statutory informal rulemaking techniques, interim rulemaking, direct final rulemaking, advance notice of proposed rulemaking. And we have had the increasing tendency for agencies to bypass the "informal" notice-and-comment process using interpretive rules and other forms of guidance to avoid what they call the "ossification" of the rulemaking process.

Now, we certainly don't want ossification. What we have to think of now, is the time to begin to institutionalize and codify some of these non-statutory techniques and to consider how to pattern interpretive and guidance documents to make sure that they provide the proper transparency and public participation that the Administrative Procedure Act stands for.

Secondly, we have seen and we will see a growth in cooperative regulation, EPA, OSHA, VPP program, EPA Brownfields program, where there is an individuated interaction between the regulated entity and the regulator. It is trying to find flexible individual solutions. This is good. This is terrific, but it leaves us a challenge. How to have flexibility and at the same time neutrality, fairness and the rule of law? The rulemaking process has to think about that.

Similarly, we have to think about public-private partnerships. We have had and we will have an increased growth in public-private partnerships, Government-sponsored enterprises, Government corporations, contracting out of what we generally think of as public functions, charter schools, private prisons. Does administrative law end when we start to move out of the traditional or classic public bureaucracy? That is a challenge for administrative law and for the APA.

Judicial review. When the APA was passed, it instituted the notion of substantial evidence on the record as a criteria for judicial review. Justice Frankfurter said, Congress has set a mood for the judges to follow in reviewing administrative agency actions. Sixty years is a great deal of judicial experience. It may be appropriate for Congress to revisit that mood and recalibrate its notions of the proper relationship between judicial review of the courts and the agencies.

And similarly, the whole problem of deference to agency interpretations of statutes and regulations, the Chevron case, and now the

Mead and cases following, call out for some guidance from Congress on what the proper canons of construction should be.

Finally, I think we need to be looking at State and local innovations. There is a tendency when the APA was passed, to Federal administrative law. That is what we study. That is what we focus on. There has been a really cauldron of creativity in the States, California, Arizona, Florida to name a few. We need studies to look at what they have been doing and to see how they are relevant to the Federal administrative process.

Now, to complete this agenda, what we need is an institution like the Administrative Conference to undertake the kinds of studies that marry not just academic expertise, but practical experience. That was a peculiar genius of the conference.

So I applaud this Committee for reauthorizing the conference, and I hope that it will be appropriated in this year and future years to continue this work and begin to solve these problems.

I thank the Committee, and I would be happy to answer any questions.

[The prepared statement of Mr. Breger follows:]

PREPARED STATEMENT OF MARSHALL J. BREGER

STATEMENT OF

MARSHALL J. BREGER
PROFESSOR, CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF
LAW

BEFORE THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

**“60TH ANNIVERSARY OF THE ADMINISTRATIVE PROCEDURE ACT:
WHERE DO WE GO FROM HERE?”**

WASHINGTON, D.C.

JULY 25, 2006

My name is Marshall Breger. I am a Professor of Law at the Columbus School of Law, Catholic University of America. From 1985-91 I was Chairman of the Administrative Conference of the United States (ACUS) and from 1991-93 I was Solicitor of Labor for the Department of Labor. I have taught administrative law and government regulation at various law schools including, the Catholic University, the University of Buffalo, the University of Texas, as well as the Jagellonian University, Krakow, Poland and the Hebrew University of Jerusalem.

I am pleased to participate in this hearing on the “60th Anniversary of the Administrative Procedure Act: Where Do We Go From Here?”

I

The Administrative Procedure Act passed in 1946 is often called the “bible” of administrative law. It is certainly the “default” position in administrative adjudication and rulemaking for agencies which lack other statutory instruments and is often “read into”

enabling statutes by the courts.

The Act, when passed, was an heroic effort to marry New Deal perspectives on regulation with traditional common law concepts of accountability and due process. As Justice Jackson pointed out, “[t]he Act... represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest. It contains many compromises and generalities and, no doubt, some ambiguities.”¹ Nonetheless, it was a compromise, one that worked exceedingly well in setting out the parameters for the developing “administrative state” in the last half of the 20th century. It was able to do so, in part, because of judicial interpretations which breathed life into relatively “sparse” statutory language concerning such subjects as “notice and comment” or informal rulemaking; informal adjudication; and concepts like a “formal hearing on a record.”

The APA provided us with innumerable important innovations in administrative law including “informal” or “notice and comment” rulemaking; statutory codification of the various common law levels of the scope of judicial review of agency adjudication (including the requirement of “substantial evidence on the record”) and rulemaking, as well as the ALJ system. Later amendments triggered the transparency revolution exemplified by the Freedom of Information Act and promoted innovative adjudication and rulemaking techniques for federal agencies such as alternative dispute resolution (“ADR”) and “reg-neg” or negotiated rulemaking.

Beginning in the 1990’s, our perspective on the role of government and government regulation changed from the traditional New Deal paradigm. Indeed, Americans have shown a “deep uneasiness,” as James Freedman has put it, “about the

¹ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 40 (1950).

coercive and dehumanizing influence of bureaucratic organizations.² One reason is a belief that bureaucracies “too often appear concerned primarily with formalistic adherence to their own wishes, rather than with seeking such a personalized response to the peculiarities of his specific circumstance.”³ This concern that the letter of the law often undercuts its “spirit” is well described in Philip Howard’s best seller, The Death of Common Sense.⁴

Others have urged that laissez-faire or market-based solutions are presumptively superior to regulatory regimes that have often placed substantial burdens on the American “administrative state.” Even more, we now recognize that the cumbersome “command and control” regulations of the New Deal era, ought to be replaced, wherever possible, by “performance based” standards. Indeed, some have argued that we are now at a kind of “constitutional moment,” to borrow from Bruce Ackerman,⁵ where the default position in American politics is market-based solutions and where the proponents of regulation have, as it were, the burden both of production and of proof.

But this innate skepticism towards government regulation only increases the need for thoughtful analysis about administrative law and administrative procedure. I can understand skepticism toward regulation or views that the default position should be a market solution. Nonetheless, however nostalgic we may be for the government “lite” of the early Republic, we cannot, following King Canute, simply wave away the regulatory impetus that is intrinsic to a technological and globalized age. While we may dislike and

² James O. Freedman, *Crises and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1068 (1975).

³ *Id.* at 1066.

⁴ PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (Random House 1994).

⁵ BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 49-50, 107-08 nn 4-5 (Harvard Univ. Press 1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 311 (Harvard Univ. Press 1998).

distrust regulation we cannot dislike it so much that we do not care that what regulation there must be is both fair and efficient. If we are going to regulate, we want to do so in the most advantageous manner. That is why I applaud this Committee for thinking seriously and systematically about the last 60 years of experience of rulemaking under the APA and how it can be improved.

As we look back over the 60 years of the APA, it is hardly surprising that the administrative law “roadmap” has become somewhat dated, since the terrain and climate have changed as well.⁶ As I understand this hearing to be focused on issues related to rulemaking, I note below a number of areas where further research and rethinking regarding administrative rulemaking may be useful.

- **Cooperative regulation and its effect on rulemaking**

We live in an age of reconceptualization of administrative law in which scholars are proposing new paradigms such as “reflexive” regulation, “cooperative implementation,” and “interactive compliance.”⁷ Commentators have begun to ascertain a new approach to government intervention based on informal approaches to regulatory management. These initiatives, variously termed “democratic experimentation,” cooperative regulation, “the Renew Deal”⁸ are all premised on the view that “Americans still want government to tackle...[large problems]; they just don’t want government to tackle these problems via the characteristic institutional form of the New Deal- Great

⁶ For earlier perspectives, see Marshall J. Breger, *Administrative Law After Forty Years*, 33 FED. B. NEWS & J. 297 (Sept. 1986); Marshall J. Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337 (1986).

⁷ JAY A. SIGLER & JOSEPH E. MURPHY, *INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATOR COMPULSION* (Quorum Books 1988). “Interactive compliance rests upon the encouragement (and development) of reliable self-regulatory systems for corporate activity.” *Id.* at x.

⁸ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 352-56 (2004).

Society constitutional order, namely, bureaucracy.⁹

The desire for flexibility has resulted in federal programs such as OSHA's Voluntary Protection Program (VPP), and its Cooperative Compliance Program (CCP), the EPA's Project XL, and its Environmental Leadership Program (ELP). It has also meant the promotion of performance standards and market based regulations such as deposit/refund systems, tradable pollution permits and pollution taxes, as well as the proposed elimination of numerous traditional command and control regulations. On occasion this has led to efforts to provide institutional carrots to give incentives for supererogatory performance as with the Wage and Hour "trendsetter" program.

These approaches are all premised on the use of individuated flexibility within the application of general norms. Some of these approaches (such as proposals for self-audits in OSHA and EPA) are a form of "self-regulation" within general regulatory guidelines. Others require the use of economic incentives and the use of information based requirements.¹⁰ All these "cooperative" appraisals raise issues of principles of neutrality and fairness. There is a need to develop systematic administrative procedures to merge traditional rulemaking concepts with these new structures across the board.

- **Public-private partnerships**

The 21st century will see an increased use of non-traditional government activity. This includes public-private partnerships, the out-sourcing of public functions through, as example, privately-run services and charter schools, and government corporations or Government Sponsored Enterprises (GSE's) like the present day Fannie Mae. When government "contracts out" public functions, are all elements of administrative procedure

⁹ Michael Dorf, *After Bureaucracy*, 71 U.C.L.A. L. REV. 1245, 1271 (2004).

¹⁰ As in EPA's toxic release inventory (TRI) program.

no longer relevant? How should the provisions of the Administrative Procedure Act relate to privatization and public-private partnership? This is a key problem that administrative law must face in the coming decades.

- **Developments in Informal Rulemaking**

The APA informal rulemaking process have been called “one of the greatest inventions of modern government.”¹¹ In recent years, however, we have seen increased efforts by federal agencies to bypass the statutory notice and comment requirements of informal rulemaking due perhaps to efforts by federal agencies to avoid the so-called “ossification” of the administrative process. This has occurred through a variety of “bypass” mechanisms. Agencies have used (or misused) statutory exceptions to “notice and comment” rulemaking including the “good cause” exception, interpretive rulemaking and use of so-called guidance documents in the expectation that they will have the functional effect of substantive rules. OMB has recently offered up a proposed “good guidance practices” memo to advise agencies regulating the promulgation of informal documents that *de facto* have the force of law.¹² And courts have variously attempted to sort this all out. As we know much of the prevailing “notice and comment” rulemaking processes are the result of judicial gloss on the APA’s statutory requirements. It is appropriate for Congress to consider the extant (and in some cases conflicting) judicial interpretations in this area in light of this rich judicial experience. It is appropriate as well for Congress to consider some basic legislative fixes of existing rulemaking procedures including: better definitions of the term “rule” and “order,” institutionalizing the practices of interim-final

¹¹ 1 DAVIS ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (Supp. 1970).

¹² Office of Management and Budget, Proposed Bulletin for Good Guidance Practices, *available at* http://www.whitehouse.gov/omb/inforep/good_guid/good_guidance_preamble.pdf (last visited July 22, 2006).

and direct-final rulemaking; the institutionalization of “hybrid rulemaking;” and providing a statutory basis for “Advanced Notice of Proposed Rulemaking” (APRN).

- **Effective Use of Science in Rulemaking**

One of the most contested issues in rulemaking is the question of how to ensure the appropriate factual predicate for rulemaking where complex scientific and technological issues are involved. This is, of course, a cognate problem to that which courts face in dealing with “junk science.” The OMB Bulletin on this subject “establishes that important scientific information shall be peer reviewed by qualified specialists before it is disseminated by the federal government” so as to “enhance the quality and credibility of the government’s scientific information.”¹³ The matter is highly charged, however, with claims that regulated interests have captured the process of scientific evaluation.

The Information Quality Act (also referred to as the Data Quality Act) was designed to promote transparency regarding the scientific basis of data used by agencies in formulating regulatory policy. Under the IQA affected parties can challenge data disseminated by a federal agency by filing a request for correction (RFC).

Now anything that promotes peer review and scientific debate should be applauded. And it is early days in our judgments regarding these OMB bulletins. I do believe, however, that systematic review of the effectiveness of those OMB guidelines is appropriate to ensure that both peer review and the IQA will succeed in their purpose and, at the same time, not paralyze the administrative process.

- **E-rulemaking**

¹³ Office of Management and Budget, *Final Information Quality Bulletin for Peer Review*, available at <http://www.whitehouse.gov/omb/information/2005/m05-03.pdf> (last visited July 24, 2006).

E-Government is an umbrella term which includes: e-publication, “by far the most important and widespread government use” involving “dissemination or ‘publication’ of information;”¹⁴ e-filing or “online filing of official documents;”¹⁵ and e-procurement.¹⁶ The E-Government Act, which codifies these innovations, “fill(s) a gap in the APA, which does not by express terms require the agency to make the comments its (sic) receives during the comment process available to the public.”¹⁷ Nevertheless it offers significant opportunities to incentivize public participation in the administrative process.

I know that this Congress has had some problems with the management of the E-Government initiative and that Congressional appropriators have recently applied spending restrictions, to the e-government “project.”¹⁸ Nonetheless, I believe that e-government and e-rulemaking in particular, offers extraordinary opportunities to increase both participation and transparency in the administrative process, thus increasing the democratic quotient of administrative law. E- rulemaking has the potential to enhance legislative transparency by spawning “deliberative forums... (and) panels of citizens, like traditional juries, that would advise about rulemaking.”¹⁹ As but one example, which I reuse for heuristic purposes only, David Fontana has urged a two-tier rulemaking system. Besides traditional “notice and comment” rulemaking, the system would offer “enhanced participation involving administrative jury deliberations (juries featuring stakeholders and members of the general public).” He proposed that “the more public participation in the promulgation of an agency rule, the more deference that rule should receive when it is

¹⁴ John C. Reitz, *Section VI: Computers and Law: E-Government*, 54 AM. J. COMP. L. 733, 734-35 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 744.

¹⁸ See Jason Miller, *Law Maker Tighten Reins on Project as Agencies Struggle to Explain Their Value*, GOV'T COMPUTER NEWS, July 24, 2006.

¹⁹ Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 360-61 (2004).

challenged in court.”²⁰ This proposal may well be too complex for ‘practical implementation, yet it does focus us on the lodestar which should guide thinking about e-rulemaking- how to use it to maximize public participation, or what John Reitz terms “e-democracy.” In its deliberations, Congress must be chary that these efforts do not simply “increase the incentive for agencies and the public to ‘work around’ technological mechanisms and shift away from transparent toward less democratic, but more manageable models of back-room consultation.”²¹

- **Judicial Review of Agency Regulations**

As this committee knows, there is evidence that appellate courts are reversing more than 50% (some say 80%) of challenged agency rules. Whatever the exact number, this high incidence of reversal suggests either that agencies are not doing their job or that courts are substituting their own policy preferences for agencies or both. I know that this committee has commissioned the Congressional Research Service (CRS) to undertake empirical work on the first of these possibilities. And that empirical information, must, of course, inform this Committee’s deliberations.

Nonetheless, I believe it is useful for the Committee to consider whether it is worth rethinking the scope of judicial review of rulemaking as put forth in Section 706 of the Administrative Procedure Act as well as the rules of “deference” for “ambiguous” statutory delegations in light of *United States v. Meade*²² and cases following. It is more than reasonable to expect Congress to set general guidelines for the scope and standards of judicial review and to “privilege” the most appropriate canons of statutory

²⁰ David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 *FORDHAM L. REV.* 81 (2005).

²¹ Beth Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433, 443 (2004).

²² *United States v. Meade Corp.*, 533 U.S. 218 (2001).

construction. At the end of the day the proper allocation of deference between the judiciary and federal agencies both as to agency findings of fact and agency interpretations of statutory instruments is an appropriate matter for Congress. In earlier proposed regulatory reform bills, Congress has on occasion suggested new approaches here and it remains worthy of exploration.

- **Revisiting Existing Regulations**

As Solicitor of Labor during the administration of President George H. W. Bush, I am sensitive to the need to revisit existing regulations. In an in-house review in the early 1990's of our regulations on the books I remember being astonished by the existence of rules related to gas lights more appropriate to the horse and buggy era.

I believe strongly in revisiting existing regulations for their present utility. I believe this requirement should exist beyond the present requirement of reexamination of rules that have or have had "a significant economic impact on a substantial number of small entities." I do not know if the proposed Sunset Commission will encompass such a revisiting of discrete rules or rather the review of programs and agencies. In any event, Congress should consider requiring agencies to review their existing rules every ten years according to a set of agreed on criteria.

I know that in HR 3356 the 108th Congress had contemplated a mechanism for revisiting existing regulations, so to speak, through establishment of a Joint Administrative Procedures Committee at the "back end" of rulemaking so as to provide a "fast track" method of revisiting regulations in force. I would suggest exploration of a different approach.

Placing the responsibility on the administrative agency itself is a preferable

procedure. It will allow for full use of the agencies experience and technical experience. Congress always retains the right to change an agency enabling Act so as to render a regulation nugatory or to prevent appropriation of funds for its enforcement.

- **Study of state administrative law initiatives**

We have seen in recent years a rebirth of interest in state and federal administrative law. Florida, Arizona, and California, to name a few, have rulemaking procedures from which the federal government can learn. A model state Administrative Procedure Act has been promulgated. States have long served as the "laboratories of democracy." Systematic efforts should be made to study these local innovations and their relevance to the federal government. And of course, however problematic its implementation, the Congressional Review Act (CRA) continues to provide Congress an opportunity to visit major rules, at the "front end" before they actually came into force.

II

These are but a few of the emergent issues in administrative law related to rulemaking that require intensive study and analysis. But academic analysis alone will not suffice. The improvement of the administrative process can best occur in a context where academic analysis is tested in the crucible of experience – the experience of government agencies, of the regulated community and of public interest groups. The peculiar genius of the Administrative Conference of the United States (ACUS) was to provide such a crucible – one which married both analysis and expertise, "a partnership of the public and private sectors, but with a distinctively governmental flavor."²³

The heart of the unique enterprise that was ACUS was the plenary Assembly.

²³ See Gary J. Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 111 (1998). See generally Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813 (1992).

Meeting at least twice a year and consisting of up to 101 members, the Assembly included representatives of the each government department of agency-often the chief legal officer-private sector members from the practicing bar, scholars in the field of administrative law or government or others specially informed by knowledge and expertise with respect to federal administrative procedure” The membership was remarkable diverse for an advisory committee although the agency bylaws stated that “[e]ach member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private.”²⁴

It is because of the wealth of independent expertise represented in ACUS that the Senate Government Affairs Committee assigned specific responsibilities to ACUS to assist in implementing the Congressional Accountability Act of 1995. As the Senate Committee stated:

Because ACUS is comprised of experts and practitioners representing a wide range of perspectives and interests, and has a record of developing unbiased solutions to regulatory problems, the Committee believes that this agency is well suited to producing the studies and recommendations needed to fulfill the intent...[of the bill].²⁵

The Administrative Conference is uniquely suited to promote fairness and efficiency in our “administrative state.” ACUS studies and the forge of the “Assembly” process can provide invaluable assistance to Congress and the agencies in providing seasoned and practical approaches that draw on 60 years of administrative experience to propose

²⁴ Bylaw 302.2(a)(1), *reprinted in* 1994-95 Annual Report of the Administrative Conference of the United States 119 (Sept. 1995). In order to further encourage diversity, the Conference in 1984 restricted membership to four consecutive terms. And in order not to lose the wealth of expertise of veteran members an emeritus category was created that of Senior Fellows. While Senior Fellows did not vote in the Assembly plenary session they participated fully in the Activities of the Conference.

²⁵ Regulatory Reform Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (1995).

amendments to the Administrative Procedure Act. The ACUS study and review process can serve to defuse highly charged issues with partisan overtones, allowing, at least in part, the parameters of debate to be set by objective expert research, both analytical and empirical. As you consider how to move forward in this 60th anniversary of the APA I urge Congress to fully fund ACUS and allow it to serve all of branches of government in study and in understanding the “administrative state.” Rest assured, it will assist this Committee in its work.

I am pleased to answer any questions you may have.

Mr. CANNON. Thank you, Professor.

I couldn't help thinking while you were speaking that between the Ranking Member and me, we at least, maybe more than average between us, spent more than half of the life of APA as lawyers. That is a startling concept when you think about the evolution, especially recent evolution. In your litany of these issues, I was getting more and more nervous. How do we deal with this?

The answer, of course, is ACUS. We need to reauthorize it. We need to fund it. We need to get people who are smart together because even with all the scope of this Committee and its resources, we can't deal with the problems that are transforming before us as quickly as the litany that you presented. So thank you for that. We will have some questions.

Professor Magill, you are recognized for 5 minutes.

TESTIMONY OF PROFESSOR M. ELIZABETH MAGILL, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Ms. MAGILL. Thank you, Mr. Chairman. My name is Elizabeth Magill. I am a law professor at the University of Virginia. I teach and write in the fields of administrative law and constitutional law.

I am so pleased to be asked to testify before the Subcommittee because, like a lot in the administrative law community, we have all admired the work of the Subcommittee, the leadership in seeking the reauthorization of ACUS and its passage in 2004.

We have admired the efforts of the Subcommittee with the assistance of CRS's American Law Division to start to identify a research agenda to address important questions of administrative process and funding projects like Professor West's and the project Professor Freeman testified about last fall and the fall of 2004. We are so excited about what is happening, and it is such a pleasure as a result of that to be asked to testify.

This hearing recalls the adoption of the APA and asks the question, where do we go from here? I am going to do my best in the last minute of my remarks to answer that question, but I have to say at the outset that I don't know exactly where we go from here because in my opinion we don't fully comprehend where we are right now.

That is, despite the scope and the significance of the administrative state, there is not enough, as all the witnesses to date have said, and I bet the subsequent witness will say and this Subcommittee knows so well, there is not enough systematic and careful work that asks about the way the administrative state works, actually what it does, and whether it does it well.

Nor is there enough systematic work about the various mechanisms we have and rely on to curb the exercise of agency discretion, congressional oversight, executive oversight, judicial review. There are lots of examples that highlight the lack of empirically grounded research and writing on the administrative state.

One of my favorites that I uncovered is that there is an often repeated statistic, repeated many times, that 90 percent of agency action is informal, that is it falls below the APA requirements. It is not formal enough to invoke the APA requirements. I traced the origin of the statistic and the author of the statistic said, this is a guess. So I think the first step to studying the course for the future

is the investment of resources in careful study of the most pressing issues that arise across a range of agencies.

And if I might add a little bit to the pitch for why ACUS, it is wonderful that it is here, why it needs to be appropriated, I think administrative process is a little different than a lot of other questions we might want to address. And that is because administrative agencies do a wide variety of things in a wide variety of ways. So there is an enormous complexity.

At the same time, I think most people who study them think there are enough similar tasks that they do, for instance, relying on science to make decisions, a similarity in their processes, that you can generalize across agencies. But that is a pretty tough task to produce useful answers to questions that both take account of the complexity that is across the administrative state, but also try to find generalizable lessons.

So I think that is an added sort of argument for why we need funding of a think tank like ACUS.

I think I was asked to testify because for the past several years I have been trying to find out exactly where we are now, which is what I said was I think the first step to figuring out where we go in the future. With a colleague at the University of Michigan, Steve Croley, we have been working together to try to provide a comprehensive empirical picture of Federal agency decision-making.

Our data, our project will present pretty detailed data on the frequency and type of decisions that Federal agencies make, both across agencies and across time. Our goal is to explain with attention to the legal parameters of agency decision-making tools, as in-depth a data as is available on the frequency, including the changing frequency over time, of agency reliance on these tools. By "these tools," I mean rulemaking, adjudication, litigation on behalf of agencies, and guidance.

Our data is presented in the aggregate, how many rules do we have across the Federal Government and how that has changed over time, if it has changed over time, and it is also agency by agency. So our project is, as I have described, quite descriptive, but we also try to address various questions that are raised by the descriptive patterns we uncovered.

We undertook this project because as students of the administrative state and teachers of administrative law, we were incredibly frustrated by the lack of comprehensive information about what agencies do, and whether it has changed over time, and if so, how. So our primary goal has been to supply what we think is missing, some certain basic comprehensive facts about agency behavior.

We have relied on a lot of sources in the work we have been doing. In identifying the sources, we I think have had an ACUS-like attitude, which is our preference was for data collected across a large number of agencies, collected by neutral entities at regular intervals. So we wanted to avoid collecting data agency by agency because that risks inconsistency in the way a single entity characterizes what it does.

Our sources are largely Government sources. They are OPM, the GAO, the Regulatory Information Service Center, OIRA at OMB, the GSA, the Executive Office of U.S. Attorneys, and the Administrative Office of the Courts. So the work of the project really has

been collecting and presenting in meaningful and useful form data that is already out there.

We are still very much in the process of writing and analyzing what we found. In January of 2006, we presented some preliminary findings, and let me give you a flavor of them. The core of the work is a chapter devoted to each of the major policymaking tools available to agencies, as I said, rulemaking, adjudication, Government litigation, and guidance. I will talk about rulemaking, adjudication and Government litigation very quickly, because I have 50 seconds left.

So knowing how many rules are promulgated each year is actually a pretty complicated enterprise. A rule is a legal term of art. There are different definitions of rules, and even within definitions, there are different types of rules. There are two sources that provide pretty good aggregate data and those are the ones we rely on.

Agencies together issue over about 4,000 final rules per year, an amount that reflects a gradual decline from the early 1980's when they issued over 6,000 rules a year, and 66 percent of all final rules come from agencies whose heads report to cabinet secretaries, and 10 percent come from the independent agencies. That is a decline from about 20 percent 2 decades ago, and the last 25 percent come from agencies like EPA that don't report to cabinet secretaries, but to the president.

Not all rules, though, have substantive effect. Some are ministerial. There are somewhere between, 1,000 and 1,200 rules each year that had a substantive effect. Among the substantive rules, about 500 to 700 are far-reaching enough that they trigger White House review. That number was closer to 500 in the 1990's and it is now, since 2000, closer to 700 each year. Of those 500 to 700, 45 to 75, depending on the year, are huge rules, for lack of a better term. They have an estimated annual impact on the economy of more than \$100 million.

I am going to skip to Government litigation because I think what we see there is—

Mr. CANNON. Ms. Magill, from my perspective, I am quite interested and you don't need to worry about the time.

Ms. MAGILL. Okay. All right. Sorry. These are red stop signs.

Let me talk a moment, half of a minute, about adjudication. Tracking adjudication, as many people at this table know, in the Federal Government is actually quite difficult. There are two different kinds of adjudicators, there are actually more than that, but administrative law judges, obviously, and what have been denominated presiding officers.

They are not administrative law judges, but they preside over evidentiary hearings. There is no current Government-wide collection of data on the number of adjudications performed each year. The vast majority of administrative law judges in the Federal Government adjudicate cases in the Social Security Administration. The Social Security Administration ALJs have since 1991 always constituted more than 72 percent of all Federal ALJs. After the Social Security Administration, the next highest employers of ALJs are Labor, the NLRB, and the Energy Department.

In the aggregate from 1991 to 2004, the number of ALJs in the Federal Government increased by 13 percent, and that increase, of

course, occurred during a period when total Government employment declined by about 15 percent. But the 13 percent increase was not consistent across agencies.

Basically, Social Security Administration ALJs increased, while other ALJs decreased. So Social Security ALJs increased 31 percent, while non-Social Security Administration ALJs declined 37 percent. Roughly speaking, you could say that the number of adjudicators in the Federal Government who are implementing regulatory programs, say, at the NLRB or in the Energy Department, declined, while the number of adjudicators adjudicating benefits in the Social Security Administration increased.

There are many adjudicators in the Federal Government, however, who are not ALJs. We know this from two surveys, the first one conducted under the auspices of ACUS, and the first one was in 1989. It showed that there were several thousand presiding officers in 1989. The author found 2,600 presiding officers. That number increased to 3,300 in a follow-up survey in 2002.

The largest users of presiding officers were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration and the IRS. That was from 2002.

Last, Government litigation. I think it is less written about, although there are actually quite great data sources that tell you what is happening with Government litigation. That is one window onto the administrative state, observe the litigation that is brought on behalf of agencies, and also the defense of litigation when the United States defends an agency from a suit brought against it. Affirmative litigation is called U.S. plaintiff litigation in the reports, and U.S. defendant litigation is the defense of litigation.

A look at these data are actually revealing on a lot of different fronts. The most dramatic descriptive trend, my coauthor and I found, was a quite significant decline in U.S. plaintiff litigation starting from 1990 to the present. The Administrative Office of the U.S. Courts reports that U.S. plaintiff litigation declined by two-thirds in a 14-year period between 1990 and 2004, going from 30,000 U.S. plaintiff cases to 10,000 in 2004.

Another source we used was from the Justice Department which tracks the cases brought by United States Attorneys in U.S. Attorneys' offices throughout the country, which is the lion's share of litigation handled by the Justice Department. From 1991 to 2003, overall civil cases handled by the U.S. Attorneys declined by 11 percent, but the U.S. plaintiff cases declined by 60 percent, while U.S. defendant cases increased 11 percent. Affirmative litigation on behalf of every agency that the Justice Department represents declined, except for the Interior Department.

Kind of a whirlwind tour of statistics that we are going to present with more detail in our book. The goal, as I said, is to provide an accurate and systematic picture of the activities of the administrative state. Like the other witnesses, I hope this sort of grounded work will be a basis for moving forward, identifying the right questions to ask and potentially identifying solutions.

The data obviously raise a lot of different questions. Why in the last 5 years are there more significant rules being forwarded to the White House's OIRA for review? What accounts for the rise in presiding officers? Why is the number of regulatory ALJs declining?

And what is happening to the work that they did? Why has U.S. plaintiff litigation declined so dramatically?

So I think the real question that this Subcommittee is interested in is where do we go from here. My plea is we don't quite know where we are, and we need to invest more resources in figuring out where we are and identifying the important questions, and answering them in a systematic way, not by anecdote, not by haphazardly gathered data, but by very careful collection of information that establishes the facts on the ground and allows us to move forward.

Thank you very much.

[The prepared statement of Ms. Magill follows:]

PREPARED STATEMENT OF ELIZABETH MAGILL¹

My name is Elizabeth Magill and I am a law professor at the University of Virginia School of Law. Thank you for asking me here today.

My teaching and research are in the fields of constitutional law and administrative law. I have taught administrative law and related courses—food and drug law, advanced administrative law—since 1998. My academic writing in administrative law is about judicial review of administrative action and about the varied procedural choices agencies make when they implement their statutory mandates—whether, for instance, they adopt a legislative rule or adjudicate a case or bring an enforcement action in the courts. I have served as a reporter for the APA Restatement Project of the Administrative Law and Regulatory Practice Section of the American Bar Association.

I am especially pleased to be asked to testify before this Subcommittee. Like many administrative law professors, I have admired this Subcommittee's work on administrative process. The academics I know all cheered this Subcommittee's leadership in seeking the reauthorization of the Administrative Conference of the United States and we hailed its passage in 2004. We have also admired the efforts of this Subcommittee to, with the assistance of the Congressional Research Service's American Law Division, identify a research agenda to address important questions of administrative process and to fund several research projects.

I. WHERE DO WE GO FROM HERE?

This hearing, which recalls the adoption of the Administrative Procedure Act sixty years ago, has been convened to ask what the future holds. I will do my best to answer that question in a moment, but I must note at the outset that it is not exactly clear where we go from here. That is because we do not fully comprehend where we are this moment. Despite the scope and significance of the administrative state, there is not enough systematic work that identifies what agencies are doing and asks whether they are doing it well; nor is there enough systematic work that asks about the effects of the mechanisms used to curb agency discretion—Congressional oversight, Executive and judicial review. There are many examples that highlight this lack of empirically-grounded research and writing on the administrative state. As Professor Jody Freeman pointed out in her testimony before this Subcommittee in 2005, an often-repeated statistic was that 80% of EPA rules were challenged in court; the only problem was that this had no basis in fact as one study demonstrated. Another often repeated statistic is that 90% of agency action is "informal"—that is, it does not follow procedures specified in the APA—but, after tracing the origin of this statistic, I found that the author of the statistic represented it as a "guess."

In my view, the first most important step to setting a course for the future is the investment of resources in careful study of the most pressing issues that arise across a range of agencies. This Subcommittee's leadership has started us down that road, and I will speak in a moment about work that advances that objective. But I do not have any doubt that more remains to be done.

Careful and systematic study is not an easy task and that is one reason why there is not enough of it. The administrative state is incredibly complex. Agencies have distinctive statutory mandates—some distribute benefits, some regulate the market, some protect the nation. They also follow different processes and have distinctive designs—Commission, Administrator, Cabinet level or not Cabinet level. They ad-

¹A revised version of this statement is published in the Appendix of this hearing.

dress a dizzying variety of tasks in varied ways. That complexity makes systematic and generalizable research very difficult to conduct.

At the same time, it is clear that administrative agencies are not so distinctive that one cannot generalize about their behavior and draw conclusions about what may trouble us about the soundness or wisdom of their activities. Of course, most agencies are subject the basic template provided for in the Administrative Procedure Act. More than that, though, many agencies share similar substantive tasks—they must rely on scientific judgments to do their business or they manage large benefit programs or they are in the business of licensing firms before they enter the market. Looking across agencies to determine and assess how they perform these tasks is obviously a worthwhile endeavor. Agencies are also subject to similar controls. They are the object of close oversight by Congress, the Executive, and/or the federal courts. Thus, despite the enormous complexity of the administrative state, there are common issues and problems that affect a large set of agencies such that cross-agency study will repay enormous dividends and will guide administrative reforms.

To figure out where we go from here, then, we must invest the resources to study the general issues that affect a substantial number of agencies and, if warranted, identify problems and formulate solutions. I would emphasize that those resources must be put in the hands of people who will approach their study in a systematic way. In my view, such studies must rely on the time-tested methods of social scientific inquiry, rather than the haphazard gathering of data or, worse, anecdote. It is only careful study that can establish the facts of the matter and thus provide a sound basis for identifying problems that need to be rectified.

There are several promising signs that such study is starting to occur. In part, these developments are due to the efforts and vision of the Members and staff of this Subcommittee and the CRS. Re-authorization of ACUS has generated enormous enthusiasm in the administrative law community. The studies that this Subcommittee's efforts have spawned—Professor West's work on public participation in rule-making that we are hearing about today and Professor Freeman's study of judicial review of administrative action—are important efforts that will advance our understanding and clarify what, if anything, is needed in the way of law reform. More than that, in my corner of the world, an increasing number of my peers are convinced of the need for empirical study of the administrative state and an increasing number of people in law teaching have the necessary training to engage in rigorous empirical work.

II. ESTABLISHING AN ACCURATE PICTURE OF THE ADMINISTRATIVE STATE'S ACTIVITY

For the past several years, I have been working with a colleague to complete what I just testified was the most important step to take before we could identify what comes next—that is, we have been working on a project to find out exactly where we are now. My colleague is Professor Steven Croley at the University of Michigan Law School and we have been working together to provide a comprehensive empirical picture of federal agency decision-making. We have received several grants to support our work, including from the Milton and Miriam Handler Foundation and the Olin Foundation. Our goal, in the most general terms, is to describe what agencies do and how that has changed over time.

Our project will present detailed data on the frequency and type of decisions that federal agencies make, both across agencies and across time. Our book explains the legal parameters of agencies' primary decision making tools—including legislative rulemaking, adjudication, litigation, and agency guidance—and provides as in depth data as is available about the frequency, including change in frequency over time, of agency reliance on those tools. Our data is presented in the aggregate (how many rules across the federal government and how has that changed over time) as well as agency by agency. We also identify patterns in that data. Our project is heavily descriptive, but we also provide narrative explanation of why, when, and how federal agencies make decisions, and we address various normative questions implicated by our empirical findings as well.

Professor Croley and I undertook this project because, as students of the administrative state, we were frustrated by the lack of comprehensive information about agency decision-making. Most administrative law scholarship focuses primarily on judicial review of agency decision making. While obviously important, judicial reaction to agency work product is only one window onto the activities of the administrative state. Meanwhile, political scientists and economists who write about agency behavior are not generally attentive to the legal differences among the agencies' policymaking tools. As teachers of administrative law, we found no work that examined empirically the range and frequency of procedures agencies employ. More than that, no work provides a ready general source of data about the form and frequency of

administrative agencies' legal work-product. Our motivation for undertaking this project has been primarily to supply what is missing—certain basic, comprehensive facts—about agency behavior and agency decision-making.

Our effort has several goals. Most basically, we aim to shed descriptive light on fundamental but understudied questions about federal agency decision-making. For example: Exactly how often do agencies engage in rulemaking and adjudication processes under APA? Which agencies do so the most, and which the least? Have agencies engaged in more or less rulemaking, and adjudication, over time (and adjusting for variables like population, GNP, and legislative activity)? In addition, how many of which different types of rules—“regulatory rules,” “redistributive rules,” “governmental housekeeping rules,” etc.—have agencies issued over recent years? How many staff have agencies committed to the adjudication processes over time? How many times do agencies sue to enforce their statutory mandates and how, if at all, has that changed over time? How often are agencies sued and required to defend their exercises of authority and how, and if so, has that changed over time?

A related goal of our project is to provide others with an empirical base from which others can draw their own conclusions about administrative government. We hope to inspire others to enlist the data we supply to advance their own research on agency behavior. Abstract discussions of administrative government should be grounded as much as possible in concrete facts about what agencies really do, and the facts we present will inform others' work.

Last but not least, we engage in analyses ourselves, practicing what we preach. That is, in addition to presenting the facts about the type and volume of agency activities, we consider how those facts might connect to perennial normative debates about, for example, executive versus legislative control of agencies, agency accountability and independence, and the appropriate size and role of the federal government, among others. We also explore our descriptive findings by running several statistical tests to evaluate hypotheses related to normative discussions of agency activity. For example, we investigate whether certain agency decision-making procedures increase or decrease with Republican or Democratic administrations, or in times of divided or undivided government, among other things.

We have collected data from a very wide variety of sources. In identifying sources, we had a strong preference for data collected across a large number of agencies, and collected by neutral entities at regular intervals. We wished to avoid collecting data agency by agency because of the risks of inconsistency this raises. Our sources are largely available from various government sources. The data come from, for example, Office of Personnel Management, GAO, the Regulatory Information Service Center, Office of Information and Regulatory Affairs at OMB, the General Services Administration, Executive Office of the United States Attorneys, and the Administrative Office of the U.S. Courts. Much of it is available in a raw form that must be analyzed and aggregated to be meaningful and appropriate for generalization. Most of the labor of our project consists of the legwork of finding, compiling, and aggregating data across many different sources, and then organizing and presenting that data in meaningful ways.

We are still in the process of producing our book. But in January of 2006, at the annual meeting of the American Association of Law Schools, we presented some of our preliminary findings. I will recount for you some of what we reported there.

The core of the book are chapters devoted to each of the major policy making tools available to agencies—rulemaking, adjudication, government litigation, and guidance. Let me provide a few highlights of our findings about rulemaking, adjudication, and government litigation:

***Rules:** Knowing how many rules are promulgated each year depends on the type of rule as well as the classification system of the entity that collects the information. “Rule” is a legal term of art and there are different definitions of rule and different types of rules. But, two sources, RISC and GAO, provide the most useful aggregate data on the number of rules issued each year. Relying on these data sources, we have come to the following preliminary conclusions.

First, agencies together issue just over 4,000 final rules per year, an amount reflecting a gradual decline since the early 1980s, when they issued just over 6,000 rules a year. Second, about 66% of all final rules come from agencies whose heads report to cabinet secretaries, while only about 10% percent come from the independent agencies, down from about 20% percent two decades ago. The remaining 25% come from executive-branch agencies, like the EPA, whose heads do not report to cabinet secretaries but to the President.

Considering proposed rather than final rules, the same general pattern emerges. Agencies now publish about 2,700 proposed rules a year, down from over 3,500 in the early and mid-1980s. Here, however, independent agencies publish a bigger share, 15–20% of proposed rules, with non-cabinet executive agencies publishing

just barely more than that, and the remaining 60% then coming from cabinet agencies.

Not all rules, however, have a substantive effect. Somewhere between 1,000 and 1,200 rules issued each year have a substantive effect. Among substantive rules, between about 500 and 700 rules each year are far-reaching enough to trigger White House review. The number was closer to 500 in the late 1990s, and approximates 700 each year since 2000. Of those, about 45 to 75 per year constitute huge rules with an estimated annual impact on the economy of more than \$100 million.

***Adjudication:** Tracking adjudication in the federal government is difficult because there are different types of adjudicators—Administrative Law Judges (ALJs) and Presiding Officers (POs)—who preside over evidentiary hearings and there is no current governmentwide collection of data on the number of adjudications conducted each year. For one putting together an accurate empirical picture of administrative adjudication, the primary sources are OPM personnel data, two publications by the ACUS in the late 1970s, and two surveys of non-ALJ adjudications conducted in 1989 and 2002.

The vast majority of ALJs in the federal government adjudicate cases in the Social Security Administration. SSA ALJs have, since 1991, always constituted more than 72% of the total ALJs in the federal government. After SSA, the next highest employers of ALJs are Labor, NLRB, and the Energy Department.

In general, from 1991 through 2004, the total number of ALJs increased by 13%, from 1191 to 1341. This increase occurred during a period when total government employment declined by 15%.

The 13% increase in the number of ALJs was not consistent across agencies. Social Security Administration ALJs increased by 31% while the number of non-SSA ALJs declined 37% between 1991 and 2004. In other words, the number of adjudicators who are implementing regulatory programs declined while those adjudicating benefits have increased.

Many who adjudicate cases in the federal government are not ALJs. We know from two surveys that there are several thousand POs conducting evidentiary hearings. In a 1989 survey, the author found 2,692 POs and this number increased to 3,370 according to a follow-up survey conducted in 2002. As of the 2002 survey, the largest number POs were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration, and the IRS and the largest number of cases decided by POs were in EOIR, the IRS, and the Appeals Council of the SSA.

***Government Litigation:** One window onto the administrative state is to observe litigation on behalf of agencies in the courts. This includes affirmative litigation—called "US as plaintiff" litigation—brought by the federal government as litigation whether the government is defending against a challenge to its activities—called "US as defendant." The Administrative Office of the Courts and the Executive Office of U.S. Attorneys each track this litigation.

A look at those data are revealing on a variety of fronts, but the most dramatic descriptive trend is the dramatic decline in "US as plaintiff" litigation. The Administrative Office of the Courts reports that US plaintiff litigation declined by two thirds in a 14 year period. In 1990, there were 30,000 US plaintiff cases and this declined to 10,000 in 2004. During the same period, US as defendant litigation increased dramatically, from just under 25,000 cases to nearly 40,000 cases.

The Executive Office of the US Attorneys reports similar data, although their data track agency litigation more closely because US Attorneys represent client agencies throughout the government. From 1991 through 2003, overall civil cases handled by US Attorneys declined by 11%. But US plaintiff cases declined by 60% while US defendant cases increased by 11%. Affirmative litigation on behalf of every agency that DOJ represents declined, except the Interior Department.

This whirlwind tour of statistics provides just a slice of the data we will present in our book. As you can see, our goal is to provide an accurate and systematic picture of the activities of the administrative state. It is our hope that this sort of grounding will be a basis for moving forward by identifying the right questions to ask. And the data raise many questions: Why, in the last five years, are there more "significant" rules being forwarded to OIRA for review? What accounts for the rise in POs? Why is the number of regulatory ALJs declining? Why has US Plaintiff litigation declined so dramatically?

III. WHERE DO WE GO FROM HERE?

So I return to the question I started with, namely, where do we go from here? As I said at the outset, I do not know where we go next because of the dearth of

sound and careful work about where we are now. I am absolutely confident that further study is necessary to identify problems and formulate solutions. And the reauthorized ACUS gives us a real opportunity to move forward. Once funding is secured, many will clamor to fund various research projects. They may disagree on the priority, but few will disagree about the central need for more and more rigorous work about what is occurring at agencies. And there are many worthy research projects. In the fall of 2005, you heard testimony from Professor Jeffrey Lubbers, Mr. Mort Rosenberg, and Professor Jody Freeman, all suggesting possible avenues for research of a reconstituted ACUS. I have read their testimony and believe they made extremely valuable suggestions. I will add a few of my own to the list. My suggestions are not detailed proposals for study, but what I view to be the most important general areas for research.

External Agency controls: To my mind, a central question about agency activity is whether and how the various oversight mechanisms that are in place for agencies work. Agencies are subject to control and oversight by Congress, by the Executive, and they are subject to judicial review by courts. To my mind, asking about the function and efficacy of these control mechanisms is probably the most important question we can be asking. Thankfully, there is work that has been and is being done on these areas. Professor Croley has carefully studied the White House Review of agency rules and Professor Freeman is now engaged in her own comprehensive study of judicial review of agencies. These two studies are notable for their systematic—as opposed to ad hoc—approach and they have and will teach us a lot. But we need to do more because these external controls on agencies are so important and it is a complex enterprise to assess their efficacy. In my view, we are just at the beginning of building an accepted base of knowledge and moving toward conclusions about the wisdom and efficacy of these control mechanisms.

Internal Agency Controls: Another promising area for research is to get inside the agency and study how agencies make their important decisions. My own research has made me very interested in why it is agencies choose to implement their mandates in such different ways, some relying heavily on adjudication, others relying heavily on rules. But there are many other questions, for instance: When and why do agencies adopt enforcement guidelines? How do they organize internal appeals from front-line decision makers? How do they set their regulatory priorities? These questions about the internal decision making process of agencies are central to understanding why they behave the way they do and, as a result, are worthy of sustained attention.

Effectiveness of Rules. Many have noted that we have no way to determine the effectiveness of rules after they are in place. Among other things, we presently have no mechanism to determine whether the projections contained in the cost-benefit analysis when the rule is adopted turn out to be accurate in the long-run. Answering this question may not answer questions about the overall efficacy of regulations, but it would be a useful question to ask and, more importantly, it is just the sort of analytic task that a think tank arm of government could design and conduct. A research program aimed at identifying the promising ways to go about assessing the costs and benefits after implementation and comparing them to earlier projections would be a worthy enterprise.

Thank you for inviting me here today. I am gratified by the interest this Subcommittee has shown in the efficacy and fairness of administrative process.

Mr. CANNON. Thank you. I look forward to your report.

Professor Coglianese, you are recognized for 5 minutes or whatever time you would like to take.

TESTIMONY OF PROFESSOR CARY COGLIANESE, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Mr. COGLIANESE. Thank you very much.

Chairman Cannon, and fellow Members of the Subcommittee, I appreciate the invitation to testify here today. I recently joined the University of Pennsylvania Law School faculty, after spending 12 years at the John F. Kennedy School of Government, where I remain a senior research fellow and continue to do work on administrative law, with a particular emphasis on empirical inquiry of the regulatory process.

I would like to take my time today to talk about the role of information technology in the rulemaking process, and what kind of implications that has for thinking about the Administrative Procedure Act in the next 60 years. I would like to make three main points.

First, information technology is here to stay. It is an important fixture in the administrative process. Second, empirical research on the effects of information technology is important for decision-makers to have available in deciding how to deploy information technology in a smart way. And third, information technology projects present key management challenges, some of which will demand congressional involvement in oversight.

Let me take each of these in turn. First, information technology has become a major issue in how we think about the rulemaking process today, and it will only continue to be a major issue in the future.

Now, that is, I think, something that is quite different than at least the first 50 years of the Administrative Procedure Act. During that time, information technology moved roughly from carbon copy to photocopy, but the way in which information was managed by regulatory agencies remained largely paper-based. People who wanted to find out about the rulemaking process had to come to Washington, physically enter a docket room to gather information. If they wanted to participate in the regulatory process, there might be an occasional public hearing held somewhere in the country that they might attend, but generally speaking they would participate by picking up the phone or, more commonly, sending in a letter.

That has changed. It is now possible with information technology for people in Washington State, as well as Washington, D.C., to access information about any rule that Government agencies are developing. It is now possible for people all around the country to engage in an interactive iterative way with themselves or with Government officials over regulations, through the Internet.

This is a process that has been encouraged, that is the process of employing information technology in the rulemaking process, encouraged by both the Clinton administration and the Bush administration. The Bush administration most recently has created an e-rulemaking initiative which has produced an online portal called *Regulations.gov* at which place any member of the public can go and find out about any proposed rule that is open for comment and comment on it.

The e-rulemaking initiative is now also developing a Federal docket management system which will be a single location on the Internet where eventually a member of the public could go and find all the supporting documents for any rule across the Federal Government. These issues are, as I say, here to stay.

The second point is that we need to understand what difference this information technology is actually making, what kind of effects it is having on the rulemaking process. Now, one of the predictions that is most widespread both among Government officials, as well as among academics, is that the Internet will create what some people have even called a revolution in public participation, allowing citizens to play a role in rulemaking that they have never been able to play before and involving them on a frequent basis in the regulatory process.

This actually is an issue that researchers have examined quite extensively already. A growing body of research is developing on these questions. What is most surprising, perhaps given these predictions, is that the available research is showing that public participation has not increased in almost all rules due to the advent of the Internet.

I say that should be surprising given the predictions, but I think with hindsight it probably shouldn't be too surprising. Rulemaking, whether it is e-rulemaking or not, is still a fairly technical, and if not even arcane, area of public policymaking. So we probably shouldn't be surprised that many members of the public are not participating on a frequent basis.

Indeed, just as the Internet has lowered the cost to participate in the rulemaking process, it has also lowered the cost for members of the public to chat online with their friends or follow sports results or celebrity gossip or do other things that they would probably much rather do with their time.

Now, the fact that public participation has not expanded with the advent of e-mail and *Regulations.gov* does not mean that e-rulemaking shouldn't be pursued. There are other important purposes for using information technology in the regulatory process, from transparency, from public expectations about access to Government, from enhanced oversight by the legislature or the executive branch, various administrative efficiencies, and I also think a great deal of benefit for academic researchers.

But for all of those purposes, empirical research will be important to figure out which kind of technologies are actually serving those goals, how well are they serving those goals, and how can information technology be better deployed to serve those goals.

My third and final point is that in any information technology project, technology is only half the battle. Organizational and institutional factors matter a lot for the success of any information technology project. When we had our symposium here in December of 2005, a number of people expressed concerns and complaints about the current Federal Docket Management System, its searching capability, and the kinds of information that it holds.

Those are concerns that the people managing the project are aware of. But they might be among the first to acknowledge that the institutional structures right now for pursuing information technology projects relate to rulemaking, the FDMS project in particular, are really somewhat makeshift. It is the Environmental Protection Agency that is actually managing a Government-wide IT initiative related to rulemaking.

However much you may admire the work that the folks at EPA are doing, it is not clear that an individual regulatory agency should have the authority to be managing this project. We might look in the future at the model of the Office of Federal Register or the National Archives and Records Administration as a possible institutional way of organizing information technology projects in the future.

Of course, as with efforts for empirical research and other important efforts of Government, IT projects also need adequate funding vehicles as well. So there is a continued role for Congress in pur-

suing and overseeing information technology projects as they related to rulemaking.

I thank the Committee for the opportunity to talk with you about these issues and for your interest in these issues.

[The prepared statement of Mr. Coglianesi follows:]

PREPARED STATEMENT OF CARY COGLIANESE

Statement of Cary Coglianese
Edward B. Shils Professor of Law and Professor of Political Science
Director, Penn Program on Regulation
University of Pennsylvania Law School

Before

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

July 25, 2006

On

“The 60th Anniversary of the Administrative Procedure Act:
Where Do We Go From Here?”

**Statement of Cary Coglianese
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On

**“The 60th Anniversary of the Administrative Procedure Act:
Where Do We Go From Here?”**

Mr. Chairman and Members of the Subcommittee, my name is Cary Coglianese and I appreciate the invitation to testify here today about the how the future of administrative rulemaking may be affected by advances in information technology.

I am the Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania and a Senior Research Fellow at the John F. Kennedy School of Government at Harvard University. My research and teaching focus on regulation, administrative law, and environmental law, with a particular emphasis on the empirical evaluation of alternative regulatory strategies and procedures. I am a Vice Chair of the E-Rulemaking Committee of the American Bar Association's section on

Administrative Law and Regulatory Practice, and have published a number of research papers on e-rulemaking, or the application of advanced information technology to the rulemaking process.¹

Beginning in 2002, with support from the National Science Foundation's Digital Government Program, I convened a series of workshops designed to develop a research agenda on e-rulemaking.² This effort has played a role over the last several years in launching a new, interdisciplinary community of academic researchers working on e-rulemaking, connecting researchers with government officials responsible for information technology and rulemaking, and helping generate a growing body of academic research.³

In 2005, I worked with the staff of this Subcommittee as well as with the Congressional Research Service to convene a symposium on e-rulemaking held here on December 5, 2005. This symposium, sponsored by the Subcommittee, brought together legislative and executive branch staff and appointees with academic researchers, representatives from non-governmental organizations, and other interested members of the public for an extended dialogue on e-rulemaking and its implications for the future of administrative law.

¹ Cary Coglianese, Weak Democracy, Strong Information: The Role for Information Technology in the Rulemaking Process, in Viktor Mayer-Schoenberger & David Lazer, eds., *From Electronic Government to Information Government: Governing in the 21st Century* (MIT Press, forthcoming 2007); Cary Coglianese, Citizen Participation in Rulemaking: Past, Present, and Future, *Duke Law Journal* (forthcoming 2006) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912660); Cary Coglianese, E-Rulemaking, in Ari-Veikko Anttiroiko and Matti Malkia, eds., *Encyclopedia of Digital Government* (Idea, 2006); Cary Coglianese, Stuart Shapiro, & Steven J. Balla, Unifying Rulemaking Information: Recommendations on the New Federal Docket Management System, *Administrative Law Review* 57: 621-645 (2005); Cary Coglianese, The Internet and Citizen Participation in Rulemaking, *IS: Journal of Law and Policy for the Information Society* 1: 33-57 (2005); Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, *Administrative Law Review* 56: 353-402 (2004); Cary Coglianese, Information Technology and Regulatory Policy, *Social Science Computer Review* 22: 85-91 (2004).

² The workshops were supported under NSF award number 0226053 (8/15-2002 - 7/31/2004). The final report from the workshops can be found on-line at http://www.ksg.harvard.edu/cbg/rpp/enrulemaking/papers_reports/E_Rulemaking_Report2004.pdf.

³ Much research produced on e-rulemaking in the last four years, as well as various related government reports and documents, can be found on-line at www.enrulemaking.org.

My testimony today draws on some of the presentations and deliberations that took place at the December 2005 symposium, but also on my other research related to e-rulemaking. My comments fall into three categories. First, I briefly review the progress made to date by the federal government in implementing e-rulemaking. Second, I report some of the principal findings from available empirical research on the impact of e-rulemaking on public participation in the rulemaking process. Finally, I highlight some issues that remain for consideration both by researchers as well as by legislative and executive decision makers.

1. Progress on E-Rulemaking

In the early to mid-1990s, as the Internet began to find its way into business transactions as well as everyday life, the movement to apply information technology to the rulemaking process began to take shape. During this time, the Clinton Administration's National Performance Review recommended that agencies begin to explore uses of new technologies in the regulatory process.⁴ The Administrative Conference of the United States (ACUS) issued a comprehensive report on the use of on-

⁴ Office of the Vice President, Accompanying Report of the National Performance Review, *Creating a Government That Works Better & Costs Less: Improving Regulatory Systems* 39 (1995), available at <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (recommending that agencies "[i]ncrease [their] use of information technology," as this would, among other things, "give the public easier and more meaningful access to rulemaking and policy guidance documents"); Office of the Vice President, Accompanying Report of the National Performance Review, *Creating a Government That Works Better & Costs Less: Reengineering Through Information Technology* 25, 28 (1995), available at <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (recommending the use of information technology "to reduce the complexities that citizens face" and improve "[c]itizen access to government information and services").

line dockets by administrative agencies.⁵ Congress adopted amendments to the Freedom of Information Act and the Paperwork Reduction Act designed, respectively, to increase the on-line availability of information held by administrative agencies and to expand agency use of information technology.⁶ And the Office of the Federal Register began to make the *Federal Register* and the *Code of Federal Regulations (CFR)* available on-line.⁷

Administrative agencies themselves began to make rulemaking documents available on their web sites. In addition, a few agencies began to scan comments and process them electronically, while other agencies began to allow the public to submit comments via email. In 1998, the Department of Transportation (DOT) became the first regulatory agency to establish a department-wide, on-line regulatory docket.⁸ This docket – which can be found at dms.dot.gov – provides full access to all supporting documents and public comments related to the Department's rulemakings and gives member of the public an easy, electronic vehicle for submitting comments on proposed rules. Within a few years, the Environmental Protection Agency (EPA) and several other agencies also began implementing their own on-line docket systems.⁹

⁵ Henry H. Perritt, Jr., *Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication*, Report to the Administrative Conference of the United States (1995), available at http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm (discussing technical and legal issues related to improving public access to the regulatory process through e-rulemaking).

⁶ 1995 Paperwork Reduction Act Amendments, Pub. L. 104-14, 109 Stat. 186 (1995) (codified at 44 U.S.C. §§ 3501-21 (2000)); Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 (2000)).

⁷ On-line availability of the *Federal Register* began in 1994, while the *CFR* became available in 1996. See <http://www.gpoaccess.gov/nara/index.html>.

⁸ U.S. Department of Transportation, Department of Transportation's Docket Management System, available at <http://www.Dtggov.Org/Archive/Library/Dgo2001/DGOMAC/MEDIA/MEERS.PDF>

⁹ See Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, *Administrative Law Review* 56: 353-402 (2004); Barbara H. Brandon & Robert D. Carlitz, *On-line Rulemaking and Other Tools for Strengthening Our Civic Infrastructure*, *Administrative Law Review* 54: 1421 (2003).

In 2002, Congress passed the E-Government Act,¹⁰ which directs agencies to accept comments that are submitted electronically and to establish full electronic dockets for their rulemakings. The Act also authorized a new Office of Electronic Government within OMB, required that this office produce guidelines for all agency web sites, and generally encouraged agencies to explore new applications of information technology.

Beginning around this same time, the George W. Bush Administration launched an eRulemaking Initiative as part of a larger e-government program.¹¹ The eRulemaking Initiative is managed by EPA in cooperation with other agencies and with oversight by OMB. It consists of three parts.

The first part, completed in January 2003, involved the creation of a search-and-comment portal located at www.regulations.gov. The *Regulations.Gov* portal houses an on-line, searchable index of the Office of Federal Register's listings of notices of proposed rules. Users can search all proposed rules that are open for public comment and use the portal to submit comments on any proposed rule issued by any federal agency. The system automatically disseminates comments submitted through *Regulations.Gov* to the appropriate administrative agencies.

The second stage of the Bush Administration's e-rulemaking project, first launched in September 2005, involves the implementation of a multi-agency docket management system. The aim is to use the new Federal Docket Management System (FDMS) to store, and allow public access to, all documents related to every new regulation across the entire federal government. Currently, about ten federal departments

¹⁰ E-Government Act of 2002, Pub. L. No. 107-347, 166 Stat. 2899 (2002).

¹¹ OMB, The President's Management Agenda, Fiscal Year 2002, available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>

or agencies, or portions thereof, have migrated their dockets to FDMS, and plans are to have additional agencies join the system in the coming years.¹²

A third stage of the eRulemaking Initiative, still in planning, is intended to develop a standard suite of desktop tools relevant to the work of rulemaking. These tools would assist agency staff in data collection, analysis, decision making, and rule-writing.

In addition to these efforts by the Bush Administration, administrative agencies continue to explore new applications of information technology to the rulemaking process. For example, several agencies have experimented with on-line dialogues, which allow members of the public to interact with each other and with government officials in Internet discussion forums.

II. Empirical Research on E-Rulemaking

These various e-rulemaking efforts have been justified on many grounds, including improved governmental transparency as well as administrative efficiency.¹³ Another common justification for using information technology in rulemaking has been to increase public participation in what has otherwise been a relatively obscure governmental process. Both governmental officials and administrative law scholars have predicted that information technology will expand the role of citizens in rulemaking.¹⁴ One of the earliest administrative law articles on e-rulemaking claimed that the Internet

¹² Oscar Morales and John Moses, eRulemaking's Federal Docket Management System (May 24, 2006), available at <http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf>.

¹³ For a list of various goals that e-rulemaking could serve, see Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process, *Administrative Law Review* 56: 353-402 (2004).

¹⁴ See, e.g., *supra* note 4; Press Release, Executive Office of the President, Office of Mgmt. & Budget, OMB Accelerates Effort to Open Fed. Regulatory Process to Citizens and Small Businesses (May 6, 2002), available at <http://www.whitehouse.gov/omb/pubpress/2002-27.pdf> (explaining the Bush administration's effort to make the "regulatory process more open to the public" through on-line rulemaking).

will “change[] everything,” helping to ensure that “[c]itizens can . . . play a more central role in the development of new agency policies and rules.”¹⁵ Another legal scholar has argued that e-rulemaking holds the potential to “enlarge significantly a genuine public sphere in which individual citizens participate directly to help . . . make government decisions.”¹⁶

Such predictions might appear bolstered by recent rulemakings that have generated large numbers of citizen comments. Over the past few years, for example, a Federal Communications Commission (FCC) rulemaking on media ownership,¹⁷ an EPA rulemaking on mercury pollution,¹⁸ and a U.S. Forest Service rulemaking on road construction in wilderness areas¹⁹ have each elicited hundreds of thousands of comments, many of which were submitted electronically.

The existence of such rules with large numbers of comments raises the question of whether e-mail and other applications of technology like *Regulations.gov* have facilitated an increase in citizen commentary on administrative rules. So far, the early

¹⁵ Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, *Administrative Law Review* 50: 277, 277, 303 (1998)

¹⁶ Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, *US: Journal of Law and Policy for the Information Society* 1: 147, 148 (2005); see also Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, *Administrative Law Review* 56: 353, 373 (2004) (reporting on an e-rulemaking workshop at which “[i]n]any participants were convinced that [i]nformation technology] would lead to a dramatic increase in the number of comments submitted on agency rules”); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, *Minnesota Law Review* 89: 342, 440 (2004) (“The new portals for notice and comment help make the public comment process more interactive and deliberative. This . . . increases public participation and democratic legitimacy.” (footnote omitted)).

¹⁷ JoAnne Holman, *Strength in Numbers? Public Participation in the Media Ownership Proceeding at the Federal Communication Commission 3* (Aug. 31, 2005) (unpublished manuscript), available at <http://web.sj.umich.edu/tprc/papers/2005/426/TPRC%206049.pdf>.

¹⁸ David Schlosberg et al., “To Submit a Form or Not to Submit a Form. That Is the (Real) Question”: *Deliberation and Mass Participation in U.S. Regulatory Rulemaking* (May 5, 2005), available at http://erulemaking.ucsur.pitt.edu/doc/papers/SDEST_stanford_precon.pdf.

¹⁹ Stuart W. Shulman et al., *Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences*, *Social Science Computer Review* 21: 1, 2–3 (2003).

empirical research on e-rulemaking has examined this precise question more extensively than any other.

To date, the available information on *Regulations.gov* suggests that it has not resulted in any substantial impact on public participation in rulemaking. The Government Accountability Office (GAO) reported in September 2003 that only about a few hundred comments came in via *Regulations.gov* during its first five months in operation.²⁰ According to the GAO's study, *Regulations.gov* brought in only about eight of the 300,000 overall comments submitted to the EPA and twenty-one of the 18,000 comments submitted to DOT during the same time period.²¹ By October 2004, *Regulations.gov* had reportedly brought in 9,800 comments to various federal regulatory agencies,²² which is clearly a more substantial response but still only amounts to an average of two comments per the 4,900 rules the federal government proposed during this same period. Furthermore, we simply cannot know how many of the comments submitted via *Regulations.gov* would have been submitted to agencies anyway through other channels. More study of the impact of *Regulations.gov* is certainly not unwarranted.

Even if *Regulations.gov* has not increased the level of citizen comments on agency rules, there remains the question of whether *e-mail* has contributed to any such increase. One media report has mentioned that comments on DOT rulemakings "soared

²⁰ U.S. General Accounting Office, *Electronic Rulemaking: Efforts to Facilitate Public Participation Can be Improved* 23 (Sept. 17, 2003), available at <http://www.gao.gov/new.items/d03901.pdf>.

²¹ *Id.*

²² Rick Otis, *Federal eRulemaking Initiative*, Presentation at the Meeting of the American Bar Association Section of Administrative Law & Regulatory Practice 13 (Oct. 21, 2004), available at http://www.ksg.harvard.edu/cbg/ppp/erulemaking/papers_reports/Otis_eRule_ABA_v3_final_10_21_04.pdf.

when electronic submission became routine.²³ Comparing comments filed in 1998, the first full year of the DOT's on-line docket, with comments filed two years later in 2000, it has been claimed that there has been nearly a twenty-fold increase in the average number of comments per rule.²⁴

However, any comparison of the average comments filed in two individual years can be misleading. Since rulemakings have not been randomly selected for email comment submissions, it is possible that DOT's rules in 2000 were simply more controversial or otherwise more likely to generate comments than were its rules in 1998. It is also possible that the differences in the average number of comments stemmed from an exceptionally large number of comments in just one or two rules in 2000, even while most rules in both years still had about the same number of comments.

Recent studies have tested the impact of the availability of email and have found that, even after the introduction of email, most proposed rules still continue to generate relatively few comments, even though occasionally a rule will generate a high volume of comments. In a recent study of comments filed in seventeen randomly selected DOT rulemakings, 83 percent of the total comments came from just a single proceeding, a rule concerning the mandatory retirement age for commercial airline pilots.²⁵ According to the study, "most DOT rulemaking dockets established after [the introduction of DOT's on-line system in] 1998 continued to receive only a few submissions during the notice-and-comment period."²⁶ Similarly, according to a recent study of Federal

²³ Cindy Skrzycki, U.S. Opens On-line Portal to Rulemaking: Web Site Invites Wider Participation in the Regulatory Process, *Washington Post*, Jan. 23, 2003, at E1.

²⁴ *Id.*

²⁵ Ioana Munteanu & J. Woody Stanley, Participation in E-Rulemaking: Evidence from an Agency Electronic Docket (Nov. 1, 2004).

²⁶ *Id.*

Communications Commission (FCC) proceedings, “in 99% of dockets, the e-filing [option] does not seem to cause an increase in individual or interest group participation.”²⁷

A particularly careful study by political scientists Steven Balla and Benjamin Daniels was presented at the December 2005 Symposium on E-Rulemaking in the 21st Century.²⁸ Balla and Daniels examined over four hundred and fifty DOT rules, roughly half issued between 1995 and 1997 (before the introduction of the DOT’s on-line system) and the other half issued afterwards (between 2001 and 2003).²⁹ By systematically comparing comments before and after the agency’s on-line docket system, Balla and Daniels’ study was designed to avoid the problems of small samples or comparisons of just two individual years. They found, surprisingly, that commenting followed basically the same patterns across both time periods. The median rulemaking in 2001–03 generated nearly the same number of comments as the median rulemaking did in 1995–97 (thirteen versus twelve).³⁰ The *average* number of comments was different (628 in 2001–03 versus 162 in 1995–97), but only because of two (rare) outlier rules in the 2001–03 period that were especially controversial.³¹ By and large, most rules continued to generate relatively modest levels of comments even after email and on-line docketing.

Similar results can be found in other studies. According to study of nine of the most comment-prone DOT rulemakings in late 1999 and early 2000, for example, very

²⁷ John M. De Figueiredo, E-Rulemaking: Bringing Data to Theory, *Duke Law Journal*, vol. 56 (2006).

²⁸ Steven J. Balla & Benjamin Daniels, Information Technology and Public Commenting on Agency Regulations (Mar. 14, 2006) (updated version of paper presented at the December 2005 Symposium on E-Rulemaking in the 21st Century).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

few individuals filed comments in the vast majority of the rulemakings.³² At least at present, neither email nor *Regulations.gov* appear to have resulted in any dramatic increase in public participation in the rulemaking process. Most rules continue to generate modest numbers of comments -- and still fewer comments from ordinary citizens. As in the past, the occasional rulemaking does attract a large number of citizen comments, but these rules remain rare. Moreover, most of the comments submitted in these rare rules are quite unsophisticated and unhelpful to the agencies, if not even duplicative. For example, in another study presented at the December 2005 Symposium, researchers examined about 500,000 comments submitted in connection with an especially controversial EPA rule, finding that less than 1 percent of these comments had anything original to say.³³

Of course, with the hindsight made possible by this growing body of empirical research, it probably should not be surprising that information technology has not caused any substantial upswing in citizen participation in agency rulemaking, at least in most rulemakings. The subject matter of most agency rules continues to be rather technical, if not arcane. Information technology may lower the cost of finding documents about proposed rules or of communicating with government officials, but it has not reduced the non-technological barriers -- such as lack of knowledge or motivation -- that stand in the way of more widespread citizen participation in rulemaking. Filing a comment in a rulemaking requires knowing about agency rulemaking in general, as well as knowing

³² Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* (Resources for the Future, Discussion Paper No. 03-22, 2003), available at <http://www.rff.org/Documents/RFF-DP-03-22.pdf>

³³ David Schlosberg et al., "To Submit a Form or Not to Submit a Form. That Is the (Real) Question": *Deliberation and Mass Participation in U.S. Regulatory Rulemaking* (May 5, 2005), available at http://enlemaking.ucsur.pitt.edu/doc/papers/SDEST_stanford_precon.pdf.

about the specific issues involved in a given agency rulemaking. Even with the Internet, it remains relatively costly for citizens to learn about a rulemaking proceeding and submit a substantive comment.³⁴ Moreover, these costs are what economists call opportunity costs. Even if the Internet decreases the absolute cost of submitting a comment to a government agency, it also decreases the absolute costs of other opportunities more attractive to most citizens, such as chatting with friends, keeping track of sports results, following the stock market, staying on top of celebrity gossip, or playing computer games.

The empirical findings to date suggest that non-technological barriers to public participation in rulemaking remain substantial. Perhaps the most that can be expected from e-rulemaking in terms of public participation, therefore, will be more modest, incremental changes. One incremental change could be an increase in participation by groups or individuals who are already highly motivated or reasonably sophisticated, such as by members of professional groups affected by proposed rules (e.g., pilots or flight attendants with respect to Federal Aviation Administration proceedings). A second incremental change could be an increase in the number of comments submitted on especially controversial rulemakings. Instead of seeing the exceptionally controversial rule receive hundreds or thousands of comments, as in the past, such rare rules may now start to receive tens of thousands or hundreds of thousands of comments. These effects may be notable in specific cases, but in general the level of public participation in rulemaking appears so far to have remained largely unchanged by the introduction of information technology.

³⁴ Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, *IS: Journal of Law and Policy for the Information Society* 1: 33-57 (2005).

III. Remaining Issues and Challenges

The empirical results obtained to date are significant as they draw into serious question a popular belief that e-rulemaking will usher in a revolution in citizen participation. By relying on the best available information, policy makers and designers of administrative procedures can make more realistic judgments about how to use information technology in the regulatory process -- or whether to change rulemaking procedures given the new technologies that are now available. Of course, even though the effects of e-rulemaking on levels of public participation do not fit the conventional wisdom, this does not mean that information technology has no value or should not be applied in new ways to the rulemaking process. As noted earlier, e-rulemaking may be justified for other reasons, such as improved transparency, enhanced ability for congressional or executive branch oversight, reductions in administrative costs, greater ease of compliance, or improvements in researchers' ability to study (and thereby generate ideas about improvements in) regulatory policy. All of these other possible rationales for e-rulemaking certainly merit their own consideration, as well as their own empirical study.

There is still a good possibility that for some of the challenges associated with government rulemaking, technological improvements may provide demonstrable benefits. Some technological improvements may simply enhance existing e-rulemaking systems. For example, a number of concerns about deficiencies of the FDMS were raised by participants in the December, 2005 symposium sponsored by the Subcommittee, such

as concerns about the ease and accuracy of FDMS' search capability or the completeness and consistency of the data fields the system uses. Other improvements may be needed in order to achieve new or broader objectives. For instance, as several observers have noted, it is now possible to create information systems that would enable users to move seamlessly between related legislation and legislative history, implementing regulations, supporting regulatory documents and public comments, guidance documents, and even court filings and decisions.³⁵ Right now, separate information systems have been developed for information produced in separate institutional settings, whether in Congress, agencies, or the courts. Yet for those who must comply with regulations, if no others, it would be markedly easier to understand and navigate through their regulatory thicket with clear computer linkages built into different types of regulatory information.

Making technological improvements – whether to existing systems or in order to advance still broader objectives – undoubtedly will require some institutional change. Some of these institutional changes will be budgetary, for resources will be needed not only to make the technological developments and modifications but also for empirical research needed to determine which technologies to deploy or to evaluate their efficacy in practice. Other institutional changes will be legal and jurisdictional ones. At present, the government-wide FDMS has been developed and managed by the EPA, working in consultation with other regulatory agencies. However much one may admire the work EPA has done, it is still far from clear that any individual regulatory agency is the proper

³⁵ Jeffrey Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, Regulatory Policy Working Paper RPP-2002-04, Cambridge MA: Center for Business and Government, John F. Kennedy School of Government, Harvard University (2002) (also published in *Administrative & Regulatory Law News* 27: 6 (Summer 2002)); Richard D. Otis & Stuart C. Miles-McLean, *Federal Government Inter-Branch Integrated Regulatory Information* (May 24, 2006), available at <http://enulmaking.ucsur.pitt.edu/doc/Crossroads.pdf>.

venue for the management of such a cross-agency initiative. After all, the current eRulemaking Initiative has faced certain financial and legal constraints owing in part to its somewhat makeshift institutional structure.³⁶ If the government does seriously intend to centralize all its regulatory dockets, consideration should be given to whether to vest management of such a central system in an independent records agency, much like the *Federal Register* is produced within the National Archives and Records Administration.

Successful e-rulemaking will ultimately require integrating both technological and institutional considerations, seeking the optimal fit of both organizational structures and technological capabilities to achieve relevant goals. Since information technology is intended to achieve improvements to both the substance and process of rulemaking, future empirical research will also be needed to determine the extent to which information technology advances the goals of those who implement it. Continued collaborative efforts between government and the research community should enable decision makers to make better judgments about any further modifications to and improvements in the rulemaking process.

³⁶ Cindy Skrzycki, *Document Portal Sticks on Funding*, *Washington Post*, January 10, 2006; Page D01.

Mr. CANNON. Thank you, Professor.

I intend to do more than one round of questioning, if that is agreeable to Mr. Watt. So I am going to limit myself to 5 minutes, and we will go back and forth, if that is interesting to you.

I was intrigued, Professor Coglianese, by your comments about empirical studies. Can I ask a couple of questions of you all, four or five?

How many of you have been online to look at Wikipedia or any other wiki? Do any of you do that? It is a fascinating experience.

How many of you have used Google as your search engine? Okay. How many of you have e-mailed, or how many of you have looked at gmail? Okay, you are obviously the guru here.

Are any of you members of an online community?

Let me tell you my experience. I don't spend a lot of time on the Net because my time is jerked around. But yesterday, I am too fat and I want to lose weight, and to do that I decided to Google "calorie counter."

So I ended up with a whole bunch of choices, and I went to a site called "sparklepeople" or something like that. It looked like it had a calorie counter, so I went to the site and couldn't find the counter without joining. And I thought, what the heck, I joined the community, so I signed up.

They asked for my e-mail. I was reluctant to give my real e-mail, and so I decided to see what Gmail is like. I don't mean to bore you here, but if you are talking about being empirical, you can't do empirical analysis retrospectively. You have to look at the tools that are available, and that is where I am sort of headed here. So Gmail is not e-mail.

Let me just say, you also look at Gmail. I am not recommending that because that would not be a congressional thing to do, but it was fascinating, and I decided to sign up for the Gmail account. And I used that as the e-mail address, and I hope I am protected because you use your cell phone number, by the way, when you do Gmail. It is not e-mail. It is a different thing and very interesting.

And then I became part of the community. It turns out the calorie counter was more awkward to use there than otherwise, but I did flip through the site to see how it worked, and it is a real community about people trying to use weight.

In that environment, in the environment we are in, which is an environment of dramatic change, just with the difference between e-mail, where you communicate back and forth, and Gmail, where I think what they say on the Web site is archive and don't delete.

So, for instance, I had a very interesting conversation on texting from my telephone to my son's telephone in quite a poignant point of our lives, and what I have on my telephone is my statement in the outbox and his statement in the inbox, and you can't put them together, at least not with the technology that I have.

So I have saved that, because it is sort of interesting. In fact, it is very interesting. I think 10 years from now he is going to be fascinated when we go back over that conversation. You can't do that given the technology that is the latest technology you can get that I have had, but you can do it with Gmail.

And so, when you talk about people being engaged, I am sort of lecturing here, but the reason I am, I really appreciated the input.

This has been a remarkable hearing. When you look at the decisions we have to make, and you all are focused on those and dealing with those, it has got to be done in the context not of what Government is or what has been happening or what agencies have been doing or what agencies haven't been doing, or what people are involved.

Given the nature of the community, you are not going to get people, individuals normally involved with a system that has questions about what records are available, when you have Google that makes everything available.

And so it seems to me part of what we need to do here is look at where we can go with people and their involvement. And you don't expect a guy who is not a geophysicist to be commenting on a rule that relates to something technical like geophysics. But you can get him involved if you have a community and a discussion and a conclusion and a choice.

And many times, we don't vote on the rules. We do the things that make rational sense, but you can get feedback from people in the context of maybe we should think about this. If you have gone through and read and evaluated and considered the implications of what you are doing, how do you think Government ought to react?

In that context, I think that we have to look back at our most famous and first democrat, Thomas Jefferson, who believed that that governs best which is closest to the people that are affected by it. How much Government are we going to be able to shift away from the Federal level and toward the local level? And by the way, you can multiply complexity because there are a lot more people at the local level than there are in Washington, D.C.

So I am going to ask some questions in my next round. My time is almost up. I hope you will help as we go forward with this project, and you guys have been involved and we appreciate it. We absolutely need, the thing that has come through with great clarity is we need ACUS.

ACUS is not what it was in the 1960's. ACUS is the place where we can draw with resources everybody together and think about these issues. They are not Republican issues. They are not Democrat issues. They are issues of our time. They are issues that are largely created by technology and if we don't answer them thoughtfully and with a thoughtful process, we are going to get the wrong kinds of answers.

So with that, I will yield back and recognize the gentleman, the Ranking Member, for 5 minutes.

Mr. WATT. Mr. Chairman, I am impressed.

Mr. CANNON. That I didn't ask a question? [Laughter.]

Mr. WATT. No, with your knowledge of the technology. While you were exploring the technology, I was out running. [Laughter.] It will help you lose weight a lot faster.

Mr. CANNON. He doesn't need the calorie counter. I am almost ready to take that up. [Laughter.]

Mr. WATT. Just a suggestion to you, in case you are looking for a suggestion about how to lose weight. Don't count the calories, just burn them. [Laughter.]

Anyway, having said that, Professor Breger, your last round of statements, or your last subject that you dealt with, was some of

the creativity at the State level. I was hurriedly trying to read through your testimony. You gave it a sentence or two in your oral statement and you gave it a sentence or two in your written statement, too.

So can you tell us a little bit more about what some of the States are doing in terms of creativity that we ought to be at least thinking about?

Mr. BREGER. Thank you, Congressman.

Arizona has, institutionalized by the State legislature, a kind of State OIRA process, which has some innovative features for centralized review of rulemaking, including the centralized review also suggesting to the agencies when they should be re-looking at existing rules or not.

Florida has its own State APA which has dealt with interpretive regulations in innovative ways, also problems of waiver of regulation by agencies. California's Administrative Procedure Act has a different approach toward judicial review with different levels of deference.

And of course, the model State Administrative Procedure Act, which is a kind of model for the States, has a number of different approaches and solutions from the APA that are worth considering, including interpretative regulations among others. Those are just a few of the kind of creative activity that is going on in the States.

I would be happy to enlarge on that in written testimony.

Mr. WATT. I think that would be helpful to us, lest we have to go and Google what the States are doing. While my Chairman will be capable of doing that, I assure you I will not. [Laughter.]

I won't either e-mail it or Gmail it.

Let me try to tie together what Professor Magill and Professor Coglianesse said. Is it possible that the decline in hearings and U.S. litigation may be being precipitated by those limited number of people who are engaging in e-technology? It seems to me that one possibility is that e-technology is certainly enabling people who are interested in an issue to be a lot more involved in discussing that issue quickly and interactively.

It used to be that you could only comment through the written, paper, slow-mail process. You got no response to that until the rule was actually made. Is this notion that I have that this increased interactive capability may be helping to sort through some of the disagreements that are taking place or were taking place that were not resolved, and maybe leading to a reduction in administrative procedures and/or litigation?

Ms. MAGILL. Sure. It is an interesting idea. I guess the theory would be that increased participation and potential collaboration resolves conflicts, and therefore agencies have less need to bring enforcement actions or pursue violators of rules or statutory violations. That is an interesting idea.

It is not something we had yet thought of, but we haven't yet zeroed in on this descriptive finding. At the moment, we are very big-picture, what has happened with rulemaking, what has happened with adjudication, what has happened with litigation. This descriptive trend surprised us. We presented it in January of 2006. There were several people from the Justice Department who were also surprised.

So we don't know the answer, and the best I can say is I think there are lots of possibilities. This is one possibility we can think about. We are some months away from thinking about it in a sort of rigorous way. What could possibly explain the reductions, and then try to test whether those factors do show up as causally related to the reduction, or at least correlated with the reduction.

So it is an interesting idea, and I am sad to say I can't yet tell you with confidence whether I think the data supports it.

Mr. COGLIANESE. We don't have any definitive research on that specific question, but it is highly plausible. In fact, one would expect that if members of the public can access Government information about rulemaking more easily, then their comments should be better informed and more helpful to the agency, right, which should enable the agency to make a better rule.

And if it is easier for interested members of the public, as you say, those who have a connection with the rule and an understanding of the general area, if it is easier for them to participate, then Government may hear more from them. And that may enable them to anticipate problems, anticipate conflicts, and create a better rule.

Right now, we don't have any research that examines the extent to which information technology creates better rules, but we would hope it does. And we would hope that with increased investments and innovation in information technology, we could come up with tools that would make rules even better; that would not only avoid litigation, but deliver more benefits to society.

Mr. WATT. Mr. Chairman, I know I am over my time, but since I am on a roll and I haven't gotten Professor West yet, can I ask one more question? Well, actually one more question after that, too, but it is not as important.

Mr. CANNON. Would the gentleman mind? I would like to follow up on the last question. Are you going to change the subject?

Mr. WATT. No. I think I am going to extend it to the pre-comment period with Mr. West. That is what he devoted most of his time talking about, and his student may want to join in the conversation with us.

I was just fascinated by how you can do this pre-comment period, get more interactive, especially through technology you could do it. But I don't know how you would do it without having a bunch of Government officials just sitting there e-mailing back and forth in every agency.

How would you structure this increased pre-comment notion that you think is desirable, that it seemed to me that you all thought it might be desirable, and maybe actually helpful in maybe decreasing even more the litigation, if you could get more people talking earlier in the process. But how do you structure something like that without just being so burdensome that it just takes up so much time that you can't manage it?

Mr. WEST. That is a great question. I don't have a ready answer for it.

You know, we wanted to see how much communication there was in the pre-notice phase of rulemaking, and with whom it took place and raise some issues. Should the pre-notice process be structured? That begs a number of other questions. In part, it depends on how

effective the comment phase of rulemaking is in redressing imbalances that occur during it.

Mr. WATT. It has to be structured to some extent, don't you think, because otherwise you don't know who to communicate with. Maybe that is a good dissertation undertaking for your student. She is smiling, hey, maybe I can structure something pre-comment period.

Mr. WEST. Well, that is a great question.

An obvious alternative would be to require agencies to use advance notices for all rules or for certain kinds of rules, maybe rules that reach a certain threshold of significance. Actually, our study was based in large part on interviews with seasoned public servants, many of whom had been working in the area of rulemaking for decades. They were uniformly against that, a requirement for advance notice is across the board. They thought that that would just impede efficiency too much.

Mr. WATT. And be burdensome.

Mr. WEST. It would be burdensome. It would delay the process.

Mr. WATT. It would take a lot of time.

Mr. WEST. Sure it would, yes. It is already a protracted process and they felt that it would lengthen rulemaking by years, in some cases.

Mr. WATT. I didn't change the subject, I don't think.

Mr. BREGER. Mr. Chairman, if I can just add, when I was Solicitor of Labor, when we did Advance Notices of Proposed Rulemaking, these were for major rules. We thought through in advance questions to ask with great particularity to see what the different interest groups in the regulated community thought about going in different directions. We found that was very helpful.

We also developed some roundtables trying to bring together different interest groups. I won't call them focus groups.

Mr. WATT. That is the same thing as a chat room?

Mr. BREGER. But in person. That was pre-high-tech. Again, that was very useful in bringing to our attention problems in our thinking and therefore make the rule better.

And finally, and of course with Professor Coglianesi here, I have to mention negotiated rulemaking, which is another mechanism, where he is an expert, but another mechanism which we used at the Labor Department to bring out in kind of less than formal ways problems with a proposed rule to try to refine it and improve it in the rule development process.

Thank you.

Mr. CANNON. Neg reg, of course, was one of the great successes of ACUS.

Mr. BREGER. Yes.

Mr. CANNON. May I ask, how many students do we have who are associated with your project here? Do you want to raise your hand, those who are associated with Dr. West's project?

Mr. WEST. Just one.

Mr. CANNON. One. Do you have any other students associated with Dr. Magill's project?

Okay, we are not going to put anybody on the spot here. Thanks.

Let me follow up on this line of reasoning, whether we call it a chat room or in-person kind of thing. Let me give you another experience that I had, also related to my weight.

I have decided, since this discussion, I am going to find a keyboard that has more resistance so I am using more calories when I do that, but I noticed my weight was different in Utah than in Washington. I had the same brand of scale. I got it from Costco. It was very consistently different.

So I Googled the difference in altitude and weight. I got a very simple answer, but that was as part of a discussion board, and somebody responded to that simple answer with a more complex answer, and then somebody who had a Ph.D in something came on and said no and then gave a very big answer, a very complicated answer. The net effect is I think it is just a consistent difference in my scales.

But the reason I tell that story is because if you look at the world like having to do a pre-rulemaking and a notice of rulemaking or a negotiated rulemaking, you are dealing with what a few people in an agency are seeing, as opposed to what the world is seeing. And so maybe if you have a context for discussions, this rule is not working because I have a farm in Minnesota and it is a different situation from the people that you have regulated in other parts of the country.

If you have that kind of an environment, all of a sudden you get the right kind of input from the right kind of people, and then maybe some agronomist somewhere can point out, you think your farm is different, but in these regards it is the same. And the guy says, oh, yes, you are right. And so you have compliance by a guy who might otherwise not comply on the low end, and therefore less litigation, but on the other end you have people, associations of people that then focus on their interest and their differences and the way they communicate.

So if you look at the Internet as a way to do what we used to do better, it is not the same thing as saying, what do we have, what tools do we have available that allows us to do better what we ought to be doing, rather than what we have done. And so, let me just hope that that will ferment in your perfervid imaginations.

Ms. Magill, may I ask you a question? You said that the 90 percent agency actions informal statistic, when did he come up with that guess? Do you know?

Ms. MAGILL. It was a speech given in the middle of the 1970's, published in the Administrative Law Journal.

Mr. CANNON. We have been using that figure, that guess, for 30 years.

Ms. MAGILL. Professor Freeman had an example in the fall of 2005 in her testimony that I think people relied upon. This was the 80 percent figure, 80 percent of EPA rules are challenged in court. A study demonstrated that that was not true. I am not sure my 90 percent figure has been the basis for policymaking, but it is repeated a lot.

Mr. CANNON. It is repeated a lot, yes.

Ms. MAGILL. It is repeated a lot. It is a difficult enterprise to carefully answer the question, how much agency action is informal, even in one agency. So maybe a guess is the best we can do. I don't

think so. But to answer that question definitely would be hard, but again, we can do better than a guess, I think.

Mr. CANNON. And probably the difference is going to be relevant and significant as we go forward.

Ms. MAGILL. Yes.

Mr. CANNON. Dr. West, in your prepared statement, you said two agencies ordered their staff not to comply with your survey, despite a cover letter indicating that it was being conducted under the auspices of CRS and the Judiciary Committee.

What were the two agencies that refused to cooperate with you?

Mr. WEST. Caitlyn, correct me if I am wrong, but I think it was the Internal Revenue Service and the Department of Transportation.

Mr. CANNON. Ms. Miller, would you like to join us at the table? We won't even put you under oath. We would love to have you here.

Do either of you have a guess as to why those two agencies were uncooperative?

This goes on your resume. You have yet to testify. You have to say something at some point. [Laughter.]

Mr. WEST. The person from the IRS told us that. We assured everyone that the survey would be confidential and that it would not even identify specific regulations, but they were nonetheless afraid that that would establish a precedent that would lead to lawsuits or other efforts to open up, to get access to communications that occurred during the pre-notice phase of rulemaking. That was my recollection for IRS.

I can't remember the rationale that was given to us by the Department of Transportation.

Ms. MILLER. We did do the survey electronically, and we got some e-mails. We sent out the cover letter to all of our respondents, and then we sent out a preliminary e-mail with the link to the survey. We got some responses back that there were policies from the counsel's office in the departments that they were not to participate in any academic surveys. Their impression was that they were too busy.

Mr. CANNON. I suspect that means we have to haul them in here before this Committee, right?

Mr. WEST. I will add, though, that especially with the Department of Transportation, the other part of our study consisted of interviews with experienced Government officials, people from general counsel's offices and so forth. There were several people from Transportation that were extremely helpful in that part of the project.

Mr. CANNON. You know, there is an interesting overlay between what Congress can do and what our staff can do, and what an academic institution can do. I suspect that ACUS sort of helps bridge that gap by working together with staff.

Do you think, Professor West, that if ACUS had been involved that that would have affected these agencies' reaction?

Mr. WEST. Well, it might have, and this is something that Curtis Copeland and I discussed. ACUS is obviously a nonpartisan agency without any apparent institutional bias. So people in the agencies might be more forthcoming to cooperate in research by ACUS than

in research occurring under the auspices of, say, a congressional Committee.

Mr. CANNON. But would you indulge me for one more question? Dr. Breger, you headed ACUS for a period of time. In your experience, did ACUS ever work with Committee staff to get information that was otherwise difficult to get?

Mr. BREGER. We worked with Committee staff in the sense that Committee staff often suggested projects to us. We generally had a good working relationship with the agencies. The reason is that every agency by statute was a member of ACUS. Usually, their chief legal officer, or their general counsel, was the member or the deputy general counsel in charge of regulations. So they, in a sense, bought into the process.

As a result, we had a much easier time. I won't say "easy." We had a relatively easy time in gaining their cooperation, certainly on the front end of the study. One of my jobs after the plenary assembly approved a recommendation was to knock on everyone's door and say, why don't you accept it? That was not always so easy.

Mr. CANNON. You know, you gave a litany of the problems we have. Everybody has suggested that there is a vast amount that we don't know that is knowable, and ACUS can help us know that on the one hand. On the other hand, we have great opportunities to transform what we do, and having agencies buy in through ACUS makes the case very, very strongly, I think, for ACUS.

I yield back. Do you have more questions, Mel?

Mr. WATT. I just wanted to follow up with Professor Coglianese. Can you provide a little information about how EPA got to managing e-rulemaking, the whole process? And would ACUS be an alternative to that? Or what would be the logical alternatives to one particular agency taking the lead on something like that?

Mr. COGLIANESE. Certainly. The president established an e-Government agenda which had 24 different projects. E-rulemaking was one of those projects. For each project, the Administration designated a lead agency to administer these initiatives.

My understanding is that OMB hired a consulting firm to examine the hardware that was used by agencies that had online docket systems in place already, and that the consultant report identified the EPA as having the best hardware, which was not surprising since EPA was one of the most recent agencies, at that time, to adopt such a system. So it had the latest technology.

EPA has since worked with a great deal of cooperation by all the other agencies, 100 agencies or so, that are connected in this e-rulemaking initiative. Many of the agencies that issue a lot of rules are more active in working collaboratively with EPA, but the project is administered by EPA. That has led to some challenges when it comes to funding.

Initially, OMB was channeling funds on a pro-rata basis according to how many rules an agency issues, all coming from different agencies to fund this initiative. The congressional Appropriations Committee didn't quite agree with that as an approach to funding e-Government efforts and has since called into question that practice, and now it is much more difficult to fund this project adequately because of this makeshift institutional structure.

The other thing that has happened is that EPA really has no final say, in a sense, because it is not administering a statutory mandate that has vested management authority in it. So an alternative model for undertaking an e-rulemaking project like this that covers the entire Federal Government would probably not be ACUS, but something like the Office of Federal Register, which similarly is charged with an information management function that cuts across the entire Federal Government. There are standards for what goes into the Federal Register, what format it is in, and the like, and those standards apply to all agencies.

So something like that might be the more appropriate model to look at creating an institution that could manage information technology projects that cut across the Government, and hopefully extend indefinitely into the future and allow for innovation as technology improves over time.

Can I add one other comment, by the way, to your earlier point about chat rooms and involving the public in notice-and-comment rulemaking?

Mr. WATT. I have actually never been in a chat room.

Mr. COGLIANESE. I just wanted to note, it wasn't in my testimony, but it is in a forthcoming article I have written that will appear in the Duke Law Journal. There have been several agencies that have tried chat-room, online discussions, interactive forums, as ways of generating information.

There was one study by Woody Stanley, a DOT employee, where he looked at a project that the Federal Motor Carriers Administration had undertaken. He went to the Web site, and you could either join the chat room or you could file a comment.

Interestingly enough, the people who filed the comments and chose that avenue tended to be the usual suspects. But people who entered the chat room and discussed issues tended to be truck drivers who wouldn't ordinarily have filed comments. And through that interactive dialogue, Stanley reports, there were different kinds of issues that were presented to the agency than emerged in the comments.

The comments focused on a lot of technical issues, costs and the like. The truck drivers were raising issues of practicality, of safety and the like, that were not emphasized as much through the formal comments. So there is some work being done by agencies to explore these interactive opportunities, and some research being done on what it all means.

Mr. WATT. Your second dissertation is on structuring this e-rulemaking technology. We are giving her a lot of information today.

Thank you, sir. I appreciate it. I yield back.

Mr. CANNON. I have one very quick question, and then a couple of things for the record.

Professor Coglianese, have you worked at all with the IEEE to help develop standards in this regard? They are a massive resource, and you ought to connect with them.

In fact, let me suggest a name, Lee Hollaar, L-E-E, last name H-O-L-L-A-A-R, has worked on the Hill on the Senate side. He has a degree in computer science and also law, and he works closely with the IEEE. He is on several of their Committees, and we can get you his phone number. He would be a great guy to talk to

about this because he is smart and he has the background and he can connect with the folks who ought to be doing this at IEEE, and they ought to be part of our overall project.

And just for the record, it is Ms. Miller, right? And what is your first name?

Ms. MILLER. Caitlyn.

Mr. CANNON. C-A-I-T-L-I-N?

Ms. MILLER. Y-N.

Mr. CANNON. Y-N. Okay. Great. M-I-L-L-E-R.

Ms. MILLER. Correct.

Mr. CANNON. Just so you know, this is the permanent record forever, and you are here with us. We thank you for being here.

I ask unanimous consent that we keep the record open for 10 business days, working days, for follow-up written questions. Without objection, so ordered.

Let me just thank you all. We appreciate your expertise. It is a very difficult issue which is timely and very important, and we appreciate your involvement here today, but also in the broader project. We look forward to seeing you again soon.

Thank you.

We are adjourned.

[Whereupon, at 12:59 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

REVISED PREPARED STATEMENT OF PROFESSOR M. ELIZABETH MAGILL, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

My name is Elizabeth Magill and I am a law professor at the University of Virginia School of Law. Thank you for asking me here today.

My teaching and research are in the fields of constitutional law and administrative law. I have taught administrative law and related courses—food and drug law, advanced administrative law—since 1998. My academic writing in administrative law is about judicial review of administrative action and about the varied procedural choices agencies make when they implement their statutory mandates—whether, for instance, they adopt a legislative rule or adjudicate a case or bring an enforcement action in the courts. I have served as a reporter for the APA Restatement Project of the Administrative Law and Regulatory Practice Section of the American Bar Association.

I am especially pleased to be asked to testify before this Subcommittee. Like many administrative law professors, I have admired this Subcommittee's work on administrative process. The academics I know all cheered this Subcommittee's leadership in seeking the reauthorization of the Administrative Conference of the United States and we hailed its passage in 2004. We have also admired the efforts of this Subcommittee to, with the assistance of the Congressional Research Service's American Law Division, identify a research agenda to address important questions of administrative process and to fund several research projects.

I. WHERE DO WE GO FROM HERE?

This hearing, which recalls the adoption of the Administrative Procedure Act sixty years ago, has been convened to ask what the future holds. I will do my best to answer that question in a moment, but I must note at the outset that it is not exactly clear where we go from here. That is because we do not fully comprehend where we are this moment. Despite the scope and significance of the administrative state, there is not enough systematic work that identifies what agencies are doing and asks whether they are doing it well; nor is there enough systematic work that asks about the effects of the mechanisms used to curb agency discretion—Congressional oversight, Executive and judicial review. There are many examples that highlight this lack of empirically-grounded research and writing on the administrative state. As Professor Jody Freeman pointed out in her testimony before this Subcommittee in 2005, an often-repeated statistic was that 80% of EPA rules were challenged in court; the only problem was that this had no basis in fact as one study demonstrated. Another often repeated statistic is that 90% of agency action is “informal”—that is, it does not follow procedures specified in the APA—but, after tracing the origin of this statistic, I found that the author of the statistic represented it as a “guess.”

The first most important step to setting a course for the future is the investment of resources in careful study of the most pressing issues that arise across a range of agencies. This Subcommittee's leadership has started us down that road, and I will speak in a moment about work that advances that objective. But I do not have any doubt that more remains to be done.

Careful and systematic study is not an easy task and that is one reason why there is not enough of it. The administrative state is incredibly complex. Agencies have distinctive statutory mandates—some distribute benefits, some regulate the market, some protect the nation. They also follow different processes and have distinctive designs—Commission, Administrator, Cabinet level or not Cabinet level. They ad-

dress a dizzying variety of tasks in varied ways. That complexity makes systematic and generalizable research very difficult to conduct.

At the same time, it is clear that administrative agencies are not so distinctive that one cannot generalize about their behavior and draw conclusions about what may trouble us about the soundness or wisdom of their activities. Of course, most agencies are subject the basic template provided for in the Administrative Procedure Act. More than that, though, many agencies share similar substantive tasks—they must rely on scientific judgments to do their business or they manage large benefit programs or they are in the business of licensing firms before they enter the market. Looking across agencies to determine and assess how they perform these tasks is obviously a worthwhile endeavor. Agencies are also subject to similar controls. They are the object of close oversight by Congress, the Executive, and/or the federal courts. Thus, despite the enormous complexity of the administrative state, there are common issues and problems that affect a large set of agencies such that cross-agency study will repay enormous dividends and will guide administrative reforms.

To figure out where we go from here, then, we must invest the resources to study the general issues that affect a substantial number of agencies and, if warranted, identify problems and formulate solutions. I would emphasize that those resources must be put in the hands of people who will approach their study in a systematic way. In my view, such studies must rely on the time-tested methods of social scientific inquiry, rather than the haphazard gathering of data or, worse, anecdote. It is only careful study that can establish the facts of the matter and thus provide a sound basis for identifying problems that need to be rectified.

There are several promising signs that such study is starting to occur. In part, these developments are due to the efforts and vision of the Members and staff of this Subcommittee and the CRS. Re-authorization of ACUS has generated enormous enthusiasm in the administrative law community. The studies that this Subcommittee's efforts have spawned—Professor West's work on public participation in rule-making that we are hearing about today and Professor Freeman's study of judicial review of administrative action—are important efforts that will advance our understanding and clarify what, if anything, is needed in the way of law reform. More than that, in my corner of the world, an increasing number of my peers are convinced of the need for empirical study of the administrative state and an increasing number of people in law teaching have the necessary training to engage in rigorous empirical work.

II. ESTABLISHING AN ACCURATE PICTURE OF THE ADMINISTRATIVE STATE'S ACTIVITY

For the past several years, I have been working with a colleague to complete what I just testified was the most important step to take before we could identify what comes next—that is, we have been working on a project to find out exactly where we are now. My colleague is Professor Steven Croley at the University of Michigan Law School and we have been working together to provide a comprehensive empirical picture of federal agency decision-making. We have received several grants to support our work, including from the Milton and Miriam Handler Foundation and the Olin Foundation. Our goal, in the most general terms, is to describe what agencies do and how that has changed over time.

Our project will present detailed data on the frequency and type of decisions that federal agencies make, both across agencies and across time. Our book explains the legal parameters of agencies' primary decision making tools—including legislative rulemaking, adjudication, litigation, and agency guidance—and provides as in depth data as is available about the frequency, including change in frequency over time, of agency reliance on those tools. Our data is presented in the aggregate (how many rules across the federal government and how has that changed over time) as well as agency by agency. We also identify patterns in that data. Our project is heavily descriptive, but we also provide narrative explanation of why, when, and how federal agencies make decisions, and we plan to address various normative questions implicated by our empirical findings as well.

Professor Croley and I undertook this project because, as students of the administrative state, we were frustrated by the lack of comprehensive information about agency decision-making. Most administrative law scholarship focuses primarily on judicial review of agency decision making. While obviously important, judicial reaction to agency work product is only one window onto the activities of the administrative state. Meanwhile, political scientists and economists who write about agency behavior are not generally attentive to the legal differences among the agencies' policymaking tools. As teachers of administrative law, we found no work that examined empirically the range and frequency of procedures agencies employ. More than that, no work provides a ready general source of data about the form and frequency of

administrative agencies' legal work-product. Our motivation for undertaking this project has been primarily to supply what is missing—certain basic, comprehensive facts—about agency behavior and agency decision-making.

Our effort has several goals. Most basically, we aim to shed descriptive light on fundamental but understudied questions about federal agency decision-making. For example: Exactly how often do agencies engage in rulemaking and adjudication processes under APA? Which agencies do so the most, and which the least? Have agencies engaged in more or less rulemaking, and adjudication, over time (and adjusting for variables like population, GNP, and legislative activity)? In addition, how many of which different types of rules—“regulatory rules,” “redistributive rules,” “governmental housekeeping rules,” etc.—have agencies issued over recent years? How many staff have agencies committed to the adjudication processes over time? How many times do agencies sue to enforce their statutory mandates and how, if at all, has that changed over time? How often are agencies sued and required to defend their exercises of authority and how, and if so, has that changed over time?

A related goal of our project is to provide others with an empirical base from which others can draw their own conclusions about administrative government. We hope to inspire others to enlist the data we supply to advance their own research on agency behavior. Abstract discussions of administrative government should be grounded as much as possible in concrete facts about what agencies really do, and the facts we present will inform others' work.

Last but not least, we engage in analyses ourselves, practicing what we preach. That is, in addition to presenting the facts about the type and volume of agency activities, we consider how those facts might connect to perennial normative debates about, for example, executive versus legislative control of agencies, agency accountability and independence, and the appropriate size and role of the federal government, among others. We also explore our descriptive findings by running several statistical tests to evaluate hypotheses related to normative discussions of agency activity. For example, we investigate whether certain agency decision-making procedures increase or decrease with Republican or Democratic administrations, or in times of divided or undivided government, among other things.

We have collected data from a very wide variety of sources. In identifying sources, we had a strong preference for data collected across a large number of agencies, and collected by neutral entities at regular intervals. We wished to avoid collecting data agency by agency because of the risks of inconsistency this raises. Our sources are largely available from various government sources. The data come from, for example, Office of Personnel Management, GAO, the Regulatory Information Service Center, Office of Information and Regulatory Affairs at OMB, the General Services Administration, Executive Office of the United States Attorneys, and the Administrative Office of the U.S. Courts. Much of it is available in a raw form that must be analyzed and aggregated to be meaningful and appropriate for generalization. Most of the labor of our project consists of the legwork of finding, compiling, and aggregating data across many different sources, and then organizing and presenting that data in meaningful ways.

We are still in the process of producing our book. But in January of 2006, at the annual meeting of the American Association of Law Schools, we presented some of our preliminary findings. I will recount for you some of what we reported there.

The core of the book are chapters devoted to each of the major policy making tools available to agencies—rulemaking, adjudication, government litigation, and guidance. Let me provide a few highlights of our findings about rulemaking, adjudication, and government litigation:

***Rules:** Knowing how many rules are promulgated each year depends on the type of rule as well as the classification system of the entity that collects the information. “Rule” is a legal term of art and there are different definitions of rule and different types of rules. But, two sources, RISC and GAO, provide the most useful aggregate data on the number of rules issued each year. Relying on these data sources, we have come to the following preliminary conclusions.

First, agencies together issue just over 4,000 final rules per year, an amount reflecting a gradual decline since the early 1980s, when they issued just over 6,000 rules a year. Second, about 66% of all final rules come from agencies whose heads report to cabinet secretaries, while only about 10% percent come from the independent agencies, down from about 20% percent two decades ago. The remaining 25% come from executive-branch agencies, like the EPA, whose heads do not report to cabinet secretaries but to the President.

Considering proposed rather than final rules, the same general pattern emerges. Agencies now publish about 2,700 proposed rules a year, down from over 3,500 in the early and mid-1980s. Here, however, independent agencies publish a bigger share, 15–20% of proposed rules, with non-cabinet executive agencies publishing

just barely more than that, and the remaining 60% then coming from cabinet agencies.

Not all rules, however, have a substantive effect. Somewhere between 1,000 and 1,200 rules issued each year have a substantive effect. Among substantive rules, between about 500 and 700 rules each year are far-reaching enough to trigger White House review. The number was closer to 500 in the late 1990s, and approximates 700 each year since 2000. Of those, about 45 to 75 per year constitute huge rules with an estimated annual impact on the economy of more the \$100 million.

***Adjudication:** Tracking adjudication in the federal government is difficult because there are different types of adjudicators—Administrative Law Judges (ALJs) and Presiding Officers (POs)—who preside over evidentiary hearings and there is no current governmentwide collection of data on the number of adjudications conducted each year. For one putting together an accurate empirical picture of administrative adjudication, the primary sources are OPM personnel data, two publications by the ACUS in the late 1970s, and two surveys of non-ALJ adjudications conducted in 1989 and 2002.

The vast majority of ALJs in the federal government adjudicate cases in the Social Security Administration. SSA ALJs have, since 1991, always constituted more than 72% of the total ALJs in the federal government. After SSA, the next highest employers of ALJs are Labor, NLRB, and the Energy Department.

In the aggregate, from 1991 through 2004, the total number of ALJs increased by 13%, from 1191 to 1341. This increase occurred during a period when total government employment declined by 15%.

But the 13% increase in the number of ALJs was not consistent across agencies. Social Security Administration ALJs increased by 31% while the number of non-SSA ALJs declined 37% between 1991 and 2004. In other words, the number of adjudicators who are implementing regulatory programs declined while those adjudicating benefits have increased.

Many who adjudicate cases in the federal government are not ALJs. We know from two surveys that there are several thousand POs conducting evidentiary hearings. In a 1989 survey, the author found 2,692 POs and this number increased to 3,370 according to a follow-up survey conducted in 2002. As of the 2002 survey, the largest number POs were in the Justice Department's Executive Office for Immigration Review, the Veterans Administration, and the IRS and the largest number of cases decided by POs were in EOIR, the IRS, and the Appeals Council of the SSA.

***Government Litigation:** One window onto the administrative state is to observe litigation on behalf of agencies in the courts. This includes affirmative litigation—called "US as plaintiff" litigation—brought by the federal government as well as litigation where the government is defending against a challenge to its activities—called "US as defendant." The Administrative Office of the Courts and the Executive Office of U.S. Attorneys each track this litigation.

A look at those data are revealing on a variety of fronts, but the most dramatic descriptive trend is the dramatic decline in "US as plaintiff" litigation. The Administrative Office of the Courts reports that US plaintiff litigation declined by two thirds in a 14 year period. In 1990, there were 30,000 US plaintiff cases and this declined to 10,000 in 2004. During the same period, US as defendant litigation increased dramatically, from just under 25,000 cases to nearly 40,000 cases.

The Executive Office of the US Attorneys reports similar data, although their data track agency litigation more precisely because the reports categorize litigation based on the client agency that US Attorneys are representing. From 1991 through 2003, overall civil cases handled by US Attorneys declined by 11%. But US plaintiff cases declined by 60% while US defendant cases increased by 11%. Affirmative litigation on behalf of every agency that DOJ represents declined, except the Interior Department.

This whirlwind tour of statistics provides just a slice of the data we will present in our book. As you can see, our goal is to provide an accurate and systematic picture of the activities of the administrative state. It is our hope that this sort of grounding will be a basis for moving forward by identifying the right questions to ask. And the data raise many questions: Why, in the last five years, are there more "significant" rules being forwarded to OIRA for review? What accounts for the rise in POs? Why is the number of regulatory ALJs declining? Why has US Plaintiff litigation declined so dramatically?

III. WHERE DO WE GO FROM HERE?

So I return to the question I started with, namely, where do we go from here? As I said at the outset, I do not know where we go next because of the dearth of sound and careful work about where we are now. I am absolutely confident that further study is necessary to identify problems and formulate solutions. And the reauthorized ACUS provides an opportunity to move forward. Once funding is secured, many will clamor to fund various research projects. They may disagree on the priority, but few will disagree about the central need for more and more rigorous work about what is occurring at agencies. And there are many worthy research projects. In the fall of 2005, you heard testimony from Professor Jeffrey Lubbers, Mr. Mort Rosenberg, and Professor Jody Freeman, all suggesting possible avenues for research of a reconstituted ACUS. I have read their testimony and believe they made extremely valuable suggestions. I will add a few of my own to the list. My suggestions are not detailed proposals for study, but what I view to be the most important general areas for research.

External Agency controls: To my mind, a central question about agency activity is whether and how the various oversight mechanisms that are in place for agencies work. Agencies are subject to control and oversight by Congress, by the Executive, and they are subject to judicial review by courts. Asking about the function and efficacy of these control mechanisms is probably the most important question we can be asking. Thankfully, there is work that has been and is being done on these areas. Professor Croley has carefully studied the White House Review of agency rules and Professor Freeman is now engaged in her own comprehensive study of judicial review of agencies. These two studies are notable for their systematic—as opposed to ad hoc—approach and they have and will teach us a lot. But we need to do more because these external controls on agencies are so important and it is a complex enterprise to assess their efficacy. In my view, we are just at the beginning of building an accepted base of knowledge and moving toward conclusions about the wisdom and efficacy of these control mechanisms.

Internal Agency Controls: Another promising area for research is to get inside the agency and study how agencies make their important decisions. My own research has made me very interested in why it is agencies choose to implement their mandates in such different ways, some relying heavily on adjudication, others relying heavily on rules. But there are many other questions, for instance: When and why do agencies adopt enforcement guidelines? How do they organize internal appeals from front-line decision makers? How do they set their regulatory priorities? These questions about the internal decision making process of agencies are central to understanding why they behave the way they do and, as a result, are worthy of sustained attention.

Effectiveness of Rules. Many have noted that we have no way to determine the effectiveness of rules after they are in place. Among other things, we presently have no mechanism to determine whether the projections contained in the cost-benefit analysis when the rule is adopted turn out to be accurate in the long-run. Answering this question may not answer questions about the overall efficacy of regulations, but it would be a useful question to ask and, more importantly, it is just the sort of analytic task that a think tank arm of government could design and conduct. A research program aimed at identifying the promising ways to go about assessing the costs and benefits after implementation and comparing them to earlier projections would be a worthy enterprise.

Thank you for inviting me here today. I am gratified by the interest this Subcommittee has shown in the efficacy and fairness of administrative process.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR WILLIAM WEST, THE
BUSH SCHOOL OF GOVERNMENT AND PUBLIC SERVICE, TEXAS A&M UNIVERSITY,
COLLEGE STATION, TX

Again, thank you for the opportunity to testify before your subcommittee. The questions you have posed about my statement are good ones. I have provided some brief answers below but would be happy to follow up at greater length on any of them.

1. *Why is it important to study how agencies develop proposed rules?*

The notice-and-comment requirements of the Administrative Procedure Act seek to ensure that participation in rulemaking is inclusive and transparent. Arguably, however, the most important policy decisions are usually made before these procedures go into effect. Proposed rules tend to be very detailed and represent a good deal of time and effort in their preparation. Although changes are sometimes made during the comment phase, they are difficult to make because of sunk organizational costs and because of the demands of due process. Changes in proposed rules tend to be made at the margins when they occur. Given this, it is important to examine the character of participation during proposal development. How prevalent is it? Is it broadly representative of all stakeholders? Is it open or transparent?

2. *In your written statement, you state that "scholars practically ignored the informal processes that precede the APA's notice-and-comment requirements and most other controls on rulemaking." Why is that?*

I suspect that part of the explanation is simply that this part of the process involves communications and organizational dynamics that are difficult to study. The data are not readily accessible (as we found out in our study), and the processes tend to be so idiosyncratic that they defy efforts at generalization. (That is, one or a few in-depth case studies of particular rules might not tell you that much about the process across the board.) Until recently, moreover, the study of rulemaking has been confined primarily to law scholars, who have naturally been more interested in formal procedures than informal processes.

3. *In conducting the study, you obviously had to solicit information from the agencies themselves. How were you able to ensure that the responses you received were forthright and verifiable? For example, what is the likelihood that the agency would admit, if you will, that it routinely consults with only one source in developing proposed rules?*

Great question! We bent over backwards to assure people that the interviews were confidential but there is still an incentive to look good. Frankly, I would not expect many bureaucrats to admit (even to themselves) that they are biased and fail to consult with all relevant stakeholders. Without addressing this question in a more definitive way, however, a highly relevant finding is that most communications with outside interests occur either at the invitation of the agency or at the initiative of the participant (who somehow finds out about the proposal). At least in a procedural sense, therefore, participation falls short of the inclusiveness that notice-and-comment seeks to ensure.

4. *To what do you attribute the low response rate of agencies to your study's survey?*

There may be several explanation:

- Paranoia. Notwithstanding our assurances that we would not identify specific individuals or rules, some people were no doubt put off by the possibility that they might get into trouble. A number of those contacted indicated that they had to ask their superiors if they could participate, and at least two agencies ordered their people not to complete the surveys.
- Time. People are busy and the survey required 20-30 minutes to complete.
- The wrong people. We sent the questionnaires to agency staff listed as in the Federal Register as "contact officers" for specific rules. As it turned out, these were not always people who were familiar with the rule in question. As it also turned out, they did not always pass the questionnaire along to individuals who were knowledgeable (as they were asked to do).
- A blunt instrument. As an effort to collect information on many different types of rules, our survey naturally had to pose questions in very general terms. Not all of the questions were relevant to all off the rules, and I think this put some people off (even though we did our best to deflect this). I'm sure some thought that we were hopelessly naive regarding the nature of rulemaking.

5. What are the benefits and detriments to soliciting input from interested parties prior to the formal promulgation of a proposed rule?

Benefits: Evenhandedness. Everyone—or at least everyone with access to the notice— would have an opportunity to be heard. This, in turn, might lead to agency decisions that are informed by a broader, more complete range of input. Even if it did not improve the substantive quality of decision making, moreover, giving everyone a shot might add to the legitimacy of the process.

Detriments: It would make an already-protracted process even more drawn-out. According to most agency officials, moreover, advance notices would not provide much additional useful information. The argument they make here is that the agency knows who the relevant stakeholders are and it seeks to ensure balanced communications with them as a matter of course. Also, several interviewees indicated that public comment pursuant to open-ended notices (such as those that would be provided in an ANPRM) tends to be too unfocused to be of much value for decision makers.

6. If the participation in proposal development is not usually by general invitation, how can an agency know that it has the benefit of a representative cross-section of those who may be affected by the proposal?

It can't for sure—at least at the time. Agency officials almost uniformly think they have a good feel for who all the stakeholders are but relying solely on this obviously runs the risk of confining participation to the "usual suspects." Of course, a cynic might add (with some empirical support) that participation pursuant to notice-and-comment tends to be confined to organized interests. So you don't know that you are tapping all relevant stakeholders here either.

7. *With the availability off the internet, why can't an agency engage in proposal solicitations by general invitation?*

I assume that this refers to identifying initiatives for proposed rules rather than to the development of proposals. There is no reason why an agency can't do this. As you know, the APA allows anyone to petition an agency to initiate a rulemaking proceeding. To me, at least, the more interesting question is how an agency decides which initiatives it will pursue out of many ideas for proposed rules that are brought to its attention.

8. *Given the wide variation of practices and policies that you observed among the agencies regarding the subject matter of your study, do you think OMB's Office of Information and Regulatory Affairs should play a greater role in providing guidance?*

This is a tough question that really has two parts. The first has to do with whether more uniformity in proposal development is desirable. Of course, the counter argument is that every agency operates in a unique environment and that indeed every rule is unique. Obviously, however, the intent of the APA was to standardize certain aspects of the administrative process across agencies and individual proceedings. Given that intent, coupled with the observation that many of the important determinations in rulemaking occur before the APA's constraints go into effect, you could certainly make the case for some general guidelines concerning the character of pre-notice participation. These might affect such things as what kinds of participation are permissible at what stages of the process and what kinds of participation must be docketed.

To the extent that some types of standardization might be appropriate, however, the second part of the question has to do with who should set the policies. Why OIRA? If Congress deems this to be an important issue, then why shouldn't it develop the institutional policy? After all, rulemaking is the exercise of delegated legislative authority. And procedures that set forth *how* agencies make decisions ultimately have an important bearing on *what* they do. We are essentially talking about a possible extension of the APA here, and I don't think this responsibility should be abdicated to the executive branch. (But I am somewhat of a legislative partisan.)

9. *You state in your statement that two agencies ordered their staff not to comply with your survey despite a cover letter indicating that it was being conducted under the auspices of the Congressional Research Service and the Judiciary Committee. What were the two agencies that refused to cooperate with you? Why do you think that these agencies were uncooperative? Do you think these agencies would have been more cooperative if the study was being conducted by a reactivated Administrative Conference of the United States?*

The two agencies were the IRS and the Department of Transportation. The IRS indicated to me that it was afraid of the precedent this might set. Notwithstanding the fact that we were not naming particular rules, it felt that this might open-up FOIA requests to obtain information about the development of specific regulations. I think DOT simply felt that complying with the survey

would be too time-consuming for their staff. (I should add that several high-level officials in DOT were extremely forthcoming in interviews about the rulemaking process in general.) I don't know, but I suspect that ACUS might have better access given its status as an entity without insitutional or partisan biases.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR MARSHALL BREGER, THE CATHOLIC UNIVERSITY OF AMERICA—COLUMBUS SCHOOL OF LAW, WASHINGTON, DC

**Questions for Professor Marshall Breger
The Catholic University of America – Columbus School of Law**

- 1. It has been more than ten years since the Administrative Conference of the United States (ACUS or the Conference) was terminated. What, if any, problems have arisen in administrative law and practice that could have been addressed by the Conference if it was in existence over this period?**

As the “Administrative State” has evolved, major problems have arisen in administrative law and practice in the years since ACUS was terminated. I list below a number that could (indeed, I am certain would) have been addressed by ACUS if it had still been in existence.

- The problem of “interpretative rules” and issues of “fair warning” to the regulated community of the expectations of regulators.
- The challenge of e-regulation and e-democracy.
- Administrative law and regulatory policy issues of privatization and the “contracting out” of public functions.
- The intersection of administrative law and management issues in federal agencies.
- Administrative law issues of the “National Security State” including issues related to the homeland security.
- Empirical studies on the actual effect of OMB requirements including “prompt letters,” data quality and peer review issues.
- ADR and negotiated rulemaking.
- Fair and efficient implementation of FOIA.

- 2. If ACUS were reconstituted, what, if anything, would you recommend be changed about the Conference?**

One change worth working on is a legislative fix to resolve the so-called Emoluments Clause problem laid out in Gary Edles, *Service on Federal Advisory Committees: A Case Study of OLC’s Little-Known Emoluments Clause Jurisprudence*, 58 *Admin L. Rev.* 1 (2006). Put simply, at one point the Office of Legal Counsel took the position that “[f]ederal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause” a position which made private sector participation by law firm partners problematic. Although OLC has reversed its position as to most advisory committee members. *See*, Application of the Emoluments Clause to a Member of the President’s Council on Bioethics, 2005 OLC LEXIS 2 (Op. Off. Legal Counsel, Mar. 9, 2005), it has expressly declined to do so for ACUS members even though ACUS members serve entirely as non-government advisors in much the same way as individuals on other agency advisory committees.

I further believe that Congress should encourage, if not mandate, ACUS to undertake top to bottom single agency reviews of agency practices and procedures

as it did with the Internal Revenue Service during the 1970s. While a revived ACUS may wish to commence such a review only on an agency's request, Congress could certainly mandate such reviews to assist the agency to improve its administrative practices and procedures.

3. How important is it to preserve the bipartisan, nonpolitical nature of ACUS?

It would be vital to preserve the bipartisan, unpolitical nature of ACUS. Failing that, to be blunt, the "game would not be worth the candle."

4. Should ACUS be reconstituted as part of another agency, such as the Justice Department or the General Services Administration? Should it be privatized?

Constituting ACUS as part of a federal agency will in an essential way undercut the unique "added value" it brought to reflection and innovation in the administrative process – the marriage of public and private, of regulation and regulated. Operating under the auspices of any executive or congressional branch agency – be it Justice or otherwise, any future ACUS would lack the independence from whichever "party line" is regnant at the time. Similar issues would exist with a privatized ACUS.

I might add that federal judges, who were active participants in ACUS' activities, would likely not participate if ACUS were part of an executive branch agency or department.

5. What should be the priorities for a reauthorized ACUS?

The practices for a reconstituted ACUS should include at least the following:

1. A thorough 60 year review of the APA and the options for further improvement in light of the historical experience.
2. Increased empirical work on administrative law.
3. Promotion and implementation of agency ADR and negotiated rulemaking (the latter of which has remained underdeveloped in recent years).
4. Opportunities in cooperative federalism.
5. The administrative law issues related to privatization and contracting out of public functions.
6. Issues related to the better managing of private sector management tools and government agencies, where appropriate.
7. Research into government compensation programs for victims of mass tort situations and development of reform suggestions and options.

6. What, if anything, should be done to ensure that the Conference's membership is representative?

From my experience as a former Chair, the structure of ACUS as applied had little problem with “diversity.” In the middle of the Reagan administration we had members from unions, the public interest sector as well as academics highly critical of the administration in power. All these persons had an overriding commitment to making the administrative process work and as long as issues were framed in that manner significant substantive advances were possible.

7. Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?

The problem of how to incentivize agencies to adopt ACUS regulations is a complex one. Below are a number of statutory proposals.

- ACUS could be required to send its recommendations to the relevant House and Senate appropriations and authorizations committees who could follow up as appropriate.
- Congress could explicitly mandate a yearly report from ACUS on agency implementation.

8. Should ACUS be given any administrative responsibilities (e.g., providing guidance on the implementation of ADR, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?

ACUS is at its best in dealing with cross-agency issues in that it is not controlled by any particular parochial bias. Thus it would be appropriate, indeed sensible, to give ACUS statutory responsibility to provide guidance and develop “best practices” as well as administrative responsibility in the implementation of such government wide administrative law programs as the Government in the Sunshine Act, the ADR Act, Negotiated Rulemaking Act, etc. Congress has done this in the past. It should consider doing so in the future.

I would also urge that ACUS be charged with collecting and collating basic statistics regarding the administrative process.

Congress should also give ACUS administrative responsibilities for ADR and “regulated rulemaking” functions throughout the federal agencies.

9. Given the fact that the recommendations of the Administrative Conference of the United States (ACUS or Conference) were only advisory in nature, how were the agencies encouraged to adopt them?

Agencies were encouraged to adopt ACUS recommendations in three ways. First, an agency representative (often the general counsel) invariably participated in Assembly discussion on a recommendation (and often in the earlier committee discussions). Thus, they had a chance to “buy in” to the recommendation early on. Second, as Chairman one of my most important tasks was to meet with agency heads, and general counsel and “jawbone” them to favorably respond to

the recommendation. Third, good-government groups and specialized lawyers associations often followed up with an agency on behalf of an ACUS recommendation.

10. What were some of the Conference's most significant accomplishments?

One could not focus on the accomplishments of ACUS without starting with its work on alternative dispute resolution and negotiated rulemaking. The Administrative Dispute Resolution Act, Public Law 101-552, and the Negotiated Rulemaking Act, Public Law 101-648, would not have been passed without the studies and recommendations of ACUS. ACUS spearheaded agency implementation of these statutes.

Other significant accomplishments include Recommendations 68-7 and 70-1 to remove implements to judicial review of agency action. The first Recommendation proposed a modification to the judicial review requirements to eliminate the \$10,000 jurisdictional threshold where the injury resulted from adverse action by a federal department or agency. The second urged abolition of the doctrine of sovereign immunity that deprived the federal courts of jurisdiction to entertain citizen suits in the absence of an express abrogation of the doctrine by Congress. The third Recommendation 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. These recommendations were implemented by Congress in Public Law 94-574.

Another statutory accomplishment was Public Law 102-345, the Federal Aviation Administrative civil penalty legislation that adopted ACUS recommendations in this area. And one should not ignore Recommendation 80-5 on "Eliminating or Simplifying of the 'Race to the Courthouse'" in Judicial Review of Agency Action which lead directly to Public Law 100-236.

Of course, most of ACUS recommendations are implemented by the agencies themselves as, for example, the numerous recommendations implemented by the IRS after the ACUS "top-down" review of IRS procedures during the 1970s.

11. How was the Conference able to attract such high caliber members, staff, and fellows?

The Conference had a unique ability to attract the brightest faculty members, staff and fellows. There were a number of reasons for this. First, the entire academic community interested in administrative law viewed it as the premier vehicle for progress in administrative law. The same was true of the legal community where senior partners who were practitioners fully participated. At the same time most government entities assigned their general counsel or deputy general counsel concerned with administrative law issues to represent it at the Conference.

Because of the importance of administrative procedure to the judicial process, we had the privilege of extraordinary liaisons from the Judicial Conference of the United States.

I can personally attest to the extraordinary quality of the staff which I believe was due to the unique opportunity presented civil servants to both deeply think about practical problems in government regulation and to propose solutions.

12. What were the principal reasons why ACUS was defunded?

My general impression is that the defunding of ACUS reflected a (I am sorry to say) "short-sighted" decision to close down at least one federal agency to fulfill the generally salubrious promise of the "Contract with America" to reduce federal bureaucracy. Possessing only a "good government" constituency, ACUS had few robust interest groups to sustain it. In addition, it appears that various administrative law judges (ALJs) unhappy with Conference recommendations applicable to their concerns, urged the defunding of the Conference. This is a complex historical question, however, and the best and most unbiased study of the history can be found in Toni Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 *Ariz. St. L.J.* 19 (1998).

13. Is there any way to estimate the savings in taxpayer dollars that resulted from the Conference's recommendations?

Just to put the matter in perspective, in its last year of operation, ACUS received an appropriation of \$1.8 million. The value of the pro bono contributions of the private sector members would far exceed this sum. While cost-saving assessments are necessarily speculative we may note that in 1994 the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million. In 1996, the Labor Department, using mediation techniques suggested by the Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS' encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. Since ACUS began the push for agency ADR in the early 1980's both the Department of Justice and the ABA have "gotten on board."

Similar financial savings have come from the use of settlement judges (ACUS Rec. 88-5). ACUS provided this innovative concept throughout the government. In just one agency, the National Labor Relations Board (NLRB) former Chairman William Gould noted that, in the first two years employing the new technique, the Board increased its settlement rate by about 25%. Chairman Gould estimated that each litigated case costs the government about \$35,000 and private parties spent at least as much. You can check the number of settled cases and do the math.

Other ACUS innovations including its early-on exploration of “user fees” and “self-audits” laid the groundwork for extremely significant government savings if these ideas are developed further.

While I have not researched this I have no doubt that each of the large executive branch agencies have administrative procedure reform divisions each of which most likely cost more yearly than did all of ACUS. To the extent to which ACUS is given responsibilities for “across the board” administrative law issues individual agency expenditures for this purpose may be to some small extent redundant as there would be less need to “reinvent the wheel.”

Finally, we must not neglect the value of fairness and efficiency in the administrative process, “dignitary values” not easily susceptible to monetization but central to the “rule of law.”

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR M. ELIZABETH MAGILL,
UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Professor Elizabeth Magill
Answers to Questions

1. A major theme of your testimony is the lack of empirically-grounded research and writing on the subject of administrative procedure and process. Why is there such a paucity of academic interest in this subject?

I am not certain why there is such a paucity of empirically grounded work. Empirical work takes a long lead time and usually requires funding in order to purchase or analyze large data sources. Academics who are housed in law schools have not traditionally been able to conduct such research, either because the lead time is too long or the funding is not available. I would suspect that one reason for the lack of such work is due to the demise of the Administrative Conference of the United States, which, when in operation, sponsored in-depth studies of administrative agency activity.

2. Would a reactivated Administrative Conference of the United States (ACUS) serve as a clearinghouse for such research and writing?

Yes, it would. I would hope that it would rely on time-tested social science methods in both identifying research problems and conducting the research, in which case it would be an invaluable resource.

3. Some have suggested that a private sector version of ACUS would be just as efficient as an independent, federally subsidized ACUS. What are your thoughts about this proposition?

I do not have views about a private ACUS.

4. In your prepared statement, you describe a research project that you and Professor Croley are preparing. How are you able to encourage and/or ensure agencies' cooperation with your research?

We have encountered no difficulty with agencies. We have found, however, that some agencies do not compile the data we would like and some data is not systematically collected across the government. For instance, no entity systematically collects data on the number and type of adjudications conducted by all agencies in the government.

5. What accounts for the general decline in the number of rules promulgated each year?

It would require a sophisticated study to determine the answer to that question and we have not done that. It could be any number of factors, including a reduction in the number of statutory provisions that need to be implemented by rules to changes in the overall priorities of agencies. We do not know.

6. What criteria did you use to determine whether a rule has a substantive effect?

The criteria we followed were the same criteria followed by the various entities from which we collected the data. We did not have an independent definition.

7. With respect to adjudication within the federal agencies, you state that there are two types of adjudicators - administrative law judges (ALJs) and presiding officers. Please explain the differences between the two.

Administrative Law Judges (ALJs) often preside over adjudications conducted by agencies, if the adjudication is "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554. The statutory provisions governing ALJs can be found in 5 U.S.C. §§ 1305, 3105 et. seq. Presiding officers preside over hearings in federal programs but do not have the same statutory protections available to ALJs. These hearing officers are identified and described in John H. Frye III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 Admin.L.Rev. 261 (1992).

8. What explanation, if any, do you have as to why the number of ALJs has increased by 13% from 1991 to 2004, a period when total federal government employment decreased by 15%?

I do not have an explanation, but it is important to note that the increase in ALJs has not been evenly distributed across government programs that rely on ALJs. Social Security Administration ALJs increased during the period (by about 30%), while non-SSA ALJs declined (by 37%) during this period. Thus, ALJs who preside over benefit programs—who make up the lion's share of the federal government's ALJs--have increased while other types of ALJs have declined in the same period.

9. What explanation, if any, do you have as to why the number of cases in which the United States is a plaintiff has declined so dramatically in a 14-year period?

We do not have an explanation. Again, it will take a sophisticated study to determine the answer to that question. We intend to undertake it, but we have not yet done so. There are many possible reasons, including changes in the statutory framework that the government is enforcing to changes in priorities of government litigators over the years.

RESPONSE TO POST-HEARING QUESTIONS FROM PROFESSOR CARY COGLIANESE,
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, PHILADELPHIA, PA

Responses to Questions Submitted by the House Judiciary Committee's
Subcommittee on Commercial and Administrative Law

Cary Coglianese
University of Pennsylvania Law School

August 2006

Question 1: At the December e-rulemaking symposium, you noted that with the advent of the information age, regulatory agencies are pressed to become more transparent and thereby engage the public. Has this really happened yet?

Response to Question 1: Yes, although the extent to which agencies have taken such actions varies. The E-Government Act of 2002 requires federal regulatory agencies to post on-line announcements for new rulemakings and to accept on-line submissions of comments, to the extent feasible. In keeping with this legislation, regulatory agencies have in recent years taken a number of steps to make information electronically available to the public and to make it easier for members of the public to communicate on-line with agency staff. Among these steps have included the establishment of rulemaking websites, on-line dockets with supporting information, electronic discussion groups, and web-based links for submitting comments.

The Bush Administration has launched a government-wide e-rulemaking effort, through its Regulations.Gov portal, making it possible for citizens to comment electronically on proposed rules issued by any regulatory agency. The Administration is also currently implementing an electronic Federal Docket Management System (FDMS), which allows users to retrieve background information on proposed rules. At present, only a fraction of all federal agencies have their docket information available through this system, but the Administration plans eventually to migrate regulatory dockets for all federal agencies into FDMS.

The extent to which agencies provide on-line visibility of regulatory information and use the Internet to engage with the public does vary. Only a few agencies have so far used electronic discussion boards or chat rooms, and even those agencies have done so only with respect to a handful of issues. Consequently, although some considerable efforts to apply information technology are currently underway, there remains a still greater potential for uniformity and ubiquity in these efforts across the entire federal government.

Question 2: What are the principal benefits and detriments of the Federal Docket Management System?

Response to Question 2: If fully and effectively implemented, the Federal Docket Management System (FDMS) will make available on-line all supporting materials for federal rulemakings – at any of a hundred or more federal agencies and subagencies. For

many federal entities, this will be the first time that their docket information is available to the public on-line. For anyone interested in or affected by proposed rules, this will mark an advance in the accessibility of regulatory information and the functional transparency of governmental decisionmaking. This advance will be most notable for those agencies that do not already have an on-line docket system, but even for those that do already have systems the benefits that will accrue from having a uniform, government-wide system will be similar to those that accrue from having a uniform, government-wide system of public notice about rulemakings through the *Federal Register*.

The benefits of FDMS will be most meaningful if the system is designed and implemented properly. At this time, outside observers have expressed concerns about how FDMS has been developing. These concerns, some of which were aired at the December e-rulemaking symposium, include: the incompleteness of certain fields of information in the system; the lack of full text searching within dockets; the need for a listserv function that allows users to receive email alerts when new items are posted to a docket; insufficient consistency in meta-tagging documents; and the issue of how electronic records will be archived. Certain older agency websites, such as the one created at the U.S. Department of Transportation (DOT), are much more user-friendly than the current FDMS. Consequently, there is a concern that even though the FDMS will bring many agencies a full two steps forward into the information age, it could result in some agencies like DOT taking a step backward.

There are larger questions about the institutional structure surrounding the development of the FDMS. As I noted in my testimony, FDMS is currently being managed by the U.S. Environmental Protection Agency (EPA) and funded through apportionments from EPA and various other regulatory agencies. EPA has received accolades for its implementation of e-rulemaking, but the institutional structure for this project has been makeshift and cumbersome, and it has undoubtedly made it harder for the government to address concerns that have been raised about the design of FDMS. In order to sustain a government-wide docket system over the long term and ensure that it is properly upgraded as information technology progresses, a more stable funding base and institutional structure should be explored. The Congress should consider delegating development and management of e-rulemaking to a dedicated and adequately funded entity, along lines perhaps similar to the way that the *Federal Register* and *Code of Federal Regulations* are managed.

Question 3: How do you respond to the concern that the Internet/e-government rulemaking promotes “junk” comments as part of the notice and comment process?

Response to Question 3: The phrase “‘junk’ comments” presumably refers to brief, unsophisticated comments submitted by ordinary citizens that convey no information to an agency other than the submitters’ preferences. As I understand it, the concern is that e-rulemaking may result in a dramatic increase in such comments and that processing these additional comments will be time-consuming and costly for agencies, without any corresponding benefits in terms of additional information to aid with decision making.

At least when so understood, this concern appears to be overstated as an empirical matter. Agencies are simply not drowning in comments, even after they have allowed members of the public to submit comments by email. For most rules, the volume of comments appears to have remained basically at the same level as before email.

On occasion, particularly salient and controversial rules will generate, as they have always generated, large numbers of comments, most of them meeting the above definition of “junk.” With the Internet, the number of “junk” comments may well be higher for these most exceptional rules, increasing comments from the thousands to the tens or hundreds of thousands in some instances. Even these cases, though, do not appear to be generating any untenable processing burden on agencies. First, such highly salient and controversial rules are not common. Second, since “junk” comments are by definition brief and nonsubstantive, the time it takes to “weed” them out probably will never be overly excessive for an agency. Finally, some researchers are even beginning to develop software that will identify patterns in comments and at some point soon agencies may be able automatically to identify and categorize mass mail form letters.

Question 4: Some have criticized the Federal Docket Management System as imposing a one-size-fits-all standard that fails to take into account the individual needs and resources of various agencies websites. What are your views about this criticism?

Response to Question 4: There are both virtues and vices to uniformity in any domain of rules, procedures, and institutions. The challenge is to achieve an optimal level of uniformity, where the virtues can be maximized and the vices minimized (even if never eliminated). In the case of storage and retrieval of regulatory information, the federal government has favored uniformity for a very long time, thus we have had since 1936 a single *Federal Register* and it has been publishing proposed rules since 1947. We have had a “one-size-fits-all” publication called the *Code of Federal Regulations* since 1938. The rationale for creating these uniform regulatory publications also applies in the electronic age to docket information about regulatory decisions: uniformity makes it easier for citizens, affected businesses and nonprofit organizations, and Members of Congress to keep track of agency rulemaking.

As the FDMS advances this rationale for uniformity, it should be designed so as to avoid problems that can sometimes arise with standardization, even though they need not occur. One such problem comes when government standardizes on the least common denominator. Uniformity need not be based on docket systems of lower quality, but instead should maintain, if not even advance, the state-of-the-art in hardware and software. Developers of a uniform system should take the best features of existing agencies’ systems and make sure that the new system provides at least the same (if not better) level of usability and information access. So far, the current FDMS has yet to meet this criterion, at least in its interface and searching capabilities. Users do not find that it is as easy to navigate or effective at searching as the docket management system at EPA that it replaced. It is also not close to being as useable and effective as the older docket system developed by and still in use at the U.S. Department of Transportation.

A related problem can arise if uniformity is achieved by truncating information previously made available to the public by some agencies. Concerns have been raised that fields of information previously available to the public electronically will be lost as agencies move their own agency systems over to FDMS. Yet with effective design and adequate funding, FDMS can and should be developed in such a way as to ensure full retention of public information about rulemaking. A uniform system can be created that allows some flexibility, just as the *Federal Register* allows agencies to print whatever content they like in their preambles and rule sections, even while ensuring that common fields of information are tracked and published in a uniform manner.

Question 5: You state that “information technology has not caused any substantial upswing in citizen participation in agency rulemaking.” What explains this result?

Response to Question 5: I review the empirical evidence behind this result in my article, “Citizen Participation in the Rulemaking: Past, Present, and Future,” 55 *Duke Law Journal* 943-968 (2006). In that article, I also discuss in detail what explains these seemingly surprising results. The main reason is quite straightforward: most rulemakings involve issues that are of either low salience or high complexity (or both). Citizens who are not highly motivated to participate generally in politics and policymaking do not become more so, especially on even more obscure issues, simply because they can submit comments to regulatory agencies via the Internet. Furthermore, even though the Internet make it easier to learn about new rules and send in comments, information technology also makes it much easier for people to do other things that they would prefer to do, whether chatting with friends, keeping up with celebrity gossip or sports results, or playing video games. A substantial upswing in citizen participation requires not just new technology, but a substantial upswing in citizens’ motivation to get involved in the regulatory process rather than spending their time in other, more appealing ways.

Question 6: How can an agency cope with hundreds of thousands of comments received via email in response to a proposed and final rule?

Response to Question 6: Agencies do not need to cope with hundreds of thousands of comments very often. Only a small number of rules have ever generated this volume of commentary. In these rare cases, the burden is no doubt substantial but agencies have still managed. Fortunately, most of the comments usually submitted in these rules are terse form letters, whose pattern can be easily observed. In the future, advances in natural language processing and other developments in information technology are likely to make it easier for agencies to detect duplicate comments, as well as to identify issues and sort comments. The general direction appears to be one in which information technology will make things easier for agencies, even if in the occasional rulemaking it may also mean that even larger quantities of form letters are received.

REGULATORY FLEXIBILITY IMPROVEMENTS ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

H.R. 682

JULY 20, 2006

Serial No. 109-134

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**REGULATORY FLEXIBILITY
IMPROVEMENTS ACT**

THURSDAY, JULY 20, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 12:19 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. Now, the Subcommittee will please come to order. Thank you, all. We apologize for being long on that vote. And my understanding is Mr. Watt is on his way and will join us momentarily, but we do have Mr. Coble, though, so we will get started.

Mostly, we will avoid boring Mr. Watt by not having to listen to my opening statement, which, actually, I think is sort of interesting.

I want to begin with some fairly astounding facts. First, according to OMB, no one has ever tabulated the sheer number of Federal regulations that have been adopted since the passage of the Administrative Procedure Act of 1946.

Second, and perhaps even more astounding, is the fact that OMB states that most of these existing Federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been. We do know their costs have been high.

Last year, the Office of Advocacy for the Small Business Administration issued a report estimating that the annual cost to comply with Federal regulations in the United States in 2004 exceeded \$1.1 trillion. It reported if every household received a bill for an equal share, each household would have owed \$10,172, an amount that exceeds what the average American household spent on health care in 2004, which was slightly under \$9,000.

I think these facts underscore several critical needs. Most importantly, we need to get the Administrative Conference of the United States up and running. As many of you know, I drafted bipartisan legislation that was signed into law in the last Congress that reauthorized ACUS. For 25 years, the Conference played an invaluable role as the Federal Government's in-house adviser on and coordinator of administrative procedural reforms.

I am in fact paraphrasing from a letter that the American Bar Association sent earlier this week to the Senate Appropriations Committee seeking funding for ACUS. With unanimous consent, I

would like to submit this letter for inclusion to the record, and hearing no objections, so ordered.

Second, these facts underscore the urgent need for continuing and aggressive congressional oversight over the regulatory process. To that end, the Subcommittee on Commercial and Administrative Law, at the request of the House Judiciary Committee Chairman Jim Sensenbrenner, with support of Ranking Member John Conyers, is conducting a comprehensive review of administrative law, process and procedure.

This project, which is being guided by the Congressional Research Service, will culminate with the issuance of a final report and the publication of the results of various studies focusing on succinct issues presented by the rule-making process. Third, these problems underscore the need for legislative redress. H.R. 682, I believe, is a very good start.

Essentially, this legislation addresses several significant shortcomings of the Regulatory Flexibility Act. Enacted in 1980, the act requires Federal agencies to assess the impact of proposed regulations on small entities, which the act defines as either a small business, small organization or small governmental jurisdiction.

One of the principal purposes of the act was to reduce unnecessary and disproportionately burdensome demands that Federal regulatory and reporting requirements placed on small entities. For example, the act requires agencies to prepare a regulatory flexibility analysis at the time certain proposed and final rules are promulgated. Among other things, the analysis must describe the reasons why action by the agency is necessary and identify any significant alternatives to the rule.

This analysis is not required, however, if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Since its enactment in 1980, however, certain recurring deficiencies with the act have been identified. The GAO on numerous occasions has cited the act's uneven implementation and lack of clarity. I expect Mr. Mihm, who appears today on behalf of the GAO, will be able to elaborate on these concerns.

In response to these problems, Representative Don Manzullo, who Chairs the House Committee on Small Business, introduced H.R. 682, the Regulatory Flexibility Improvement Act. On unanimous consent, I ask that the record include a statement from the bill's author, Representative Manzullo.

Hearing none, so ordered.

[The prepared statement of Mr. Manzullo is published in the Appendix.]

Mr. CANNON. H.R. 682 consists of a comprehensive set of reforms intended to encourage Federal agencies to analyze and uncover less costly alternative regulatory approaches and to ensure that all effects, including foreseeable indirect effects, of proposed and final rules are considered by agencies during the rulemaking process.

The legislation currently has 18 cosponsors, including me, and is supported by the United States Chamber of Commerce and the National Federation of Independent Business. It is against this exceedingly interesting backdrop that we are holding this legislative hearing today.

When Mr. Watt arrives, we will turn to him for any comments that he would like to make. Without objection, his entire statement and any other Members who wish to submit a statement will be placed in the record.

Hearing no objection, so ordered.

Without objection, all Members may place—we just did that. Without objection, the Chair will be authorized to declare recesses at any point of the hearing.

Hearing no objection, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record.

Hearing no objection, so ordered.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will please come to order.

I want to begin this hearing by noting some fairly astounding facts. First, according to OMB, no one has ever tabulated the sheer number of federal regulations that have been adopted since passage of the Administrative Procedure Act in 1946. Second, and perhaps even more astounding, is the fact that OMB states that "most of these existing federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been."

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I think these facts underscore several critical needs. Most importantly, we need to get the Administrative Conference of the United States up and running. As many of you know, I drafted bipartisan legislation that was signed into law in the last Congress that reauthorized ACUS. For 25 years, the Conference played an invaluable role as the federal government's in-house advisor on—and coordinator of—administrative procedural reform. I'm in fact paraphrasing from a letter that the American Bar Association sent earlier this week to the Senate Appropriations Committee seeking funding for ACUS. With unanimous consent, I would like to submit this letter for inclusion in the record. Hearing no objection, so ordered.

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Third, these problems underscore the need for legislative redress. H.R. 682, I believe, is a very good start. Essentially, this legislation addresses several significant shortcomings of the Regulatory Flexibility Act. Enacted in 1980, the Act requires federal agencies to assess the impact of proposed regulations on "small entities," which the Act defines as either a small business, small organization, or small governmental jurisdiction. One of the principal purposes of the Act was to reduce unnecessary and disproportionately burdensome demands that federal regulatory and reporting requirements place on small entities.

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H.R. 682 consists of a comprehensive set of reforms intended to encourage federal agencies to analyze and uncover less costly alternative regulatory approaches and to ensure that all effects—including foreseeable indirect effects—of proposed and final rules are considered by agencies during the rulemaking process.

The legislation currently has 18 cosponsors, including myself, and is supported by the United States Chamber of Commerce and the National Federation of Independent Businesses.

It is against this exceedingly interesting backdrop that we are holding this legislative hearing today.

I am now pleased to introduce the witnesses for today's hearing. Our first witness is Tom Sullivan, who is the Chief Counsel for Advocacy at the Small Business Administration. The Office for Advocacy was created in 1976 to serve as the watchdog for small businesses as they interact with the Federal Government.

Last year, the office helped save America's small businesses more than \$6.6 billion they would have otherwise had to spend in order to comply with Federal regulations, a truly commendable accomplishment.

Prior to assuming his current responsibilities at the Office of Advocacy, Mr. Sullivan was the Executive Director of the National Federation of Independent Business's Legal Foundation, which provides guidance on legal issues to small businesses and promotes a pro-small business agenda in the Nation's courts. We are now a big Nation of small businesses, overwhelmingly.

Mr. Sullivan received his undergraduate degree in English from Boston College and his law degree from Suffolk University in Boston.

Our next witness is Chris Mihm, who is the Managing Director of GAO's strategic issues team, which focuses on Government-wide issues with the goal of promoting a more results-oriented and accountable Federal Government. The strategic issues team has examined such matters as Federal agency transformations, budgetary aspects of the Nation's long-term fiscal outlook, and civil service reform.

As many of you know, Mr. Mihm testified last year before our Subcommittee regarding the administrative law, process and procedure project that I previously described, and, welcome back, Mr. Mihm.

Mr. Mihm is a fellow of the National Academy of Public Administration and he received his undergraduate degree from Georgetown University.

Our next witness is J. Robert Shull, who serves as the director of regulatory policy at OMB Watch. OMB Watch is a nonprofit research and advocacy organization that seeks to promote Government accountability, citizen participation in public policy decisions and the use of fiscal and regulatory policy to serve the public interest.

Before joining OMB Watch in 2004, Mr. Shull was a training specialist and child advocate. In that capacity, he worked at Children's Rights, a nonprofit advocacy organization based in New York that represents the interests of abused and neglected children. Mr.

Shull obtained his undergraduate degree from the University of Virginia and his law degree from Stanford Law School.

David Frulla is our final witness. Mr. Frulla is a partner with the law firm of Kelley, Drye, Collier, Shannon, where he is a member of the firm's litigation, environmental law and Government relations and public policy practice groups. Prior to joining Kelley Drye, Mr. Frulla was a founding partner and principal of Brand and Frulla PC, which specialized in civil, criminal and administrative advocacy before Federal and State courts and administrative agencies.

Mr. Frulla also serves as Chair of the Criminal Process Committee of the American Bar Association's Administrative Law and Regulatory Practice Section. Mr. Frulla received his undergraduate degree *summa cum laude* from Dartmouth College and his law degree from University of Virginia Law School.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the record, I request that you limit your oral remarks to 5 minutes. Accordingly, feel free to summarize and highlight the salient points of your testimony.

You will note that we have a lighting system that starts with the green. After 4 minutes, it turns to yellow and then at 5 minutes turns red. It is my habit to tap the gavel at 5 minutes. We would appreciate if you would finish up your thoughts about that time. We don't want to cut anybody off, and I find that it works much better—we are actually not overflowing with Members who have questions to ask today—so it is not as serious as sometimes it is.

So, if we could do that, we will have a significant amount of time, I think, to discuss your issues during questioning. After you present your remarks, the Subcommittee Members, in the order that they arrived, will be permitted to ask questions of the witnesses, subject to the 5-minute rule, which I will, depending upon how many people come, enforce more or less strictly.

Pursuant to the directive of the Chairman of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to take the oath.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

The record should reflect that all of the witnesses answered in the affirmative.

You may be seated.

Mr. Watt, would you like to make an opening statement?

Mr. WATT. No, just welcome the witnesses. Thank you for being here.

Mr. CANNON. Mr. Sullivan, would you proceed with your testimony?

**TESTIMONY OF THE HONORABLE THOMAS M. SULLIVAN,
CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL
BUSINESS ADMINISTRATION, WASHINGTON, DC**

Mr. SULLIVAN. Thank you, Mr. Chairman, Ranking Member Mr. Watt. I will try to be brief and actually try to go under the 5 min-

utes. Thank you for already including my written statement in the record.

The first part of my statement really goes through the history of the Regulatory Flexibility Act, and it is, I think, an important starting point. Why do we have an act that requires agencies to especially consider their impact on small business?

Well, I think that it is no surprise that we are a Nation, a big Nation, of small businesses, and those businesses are well known for being the job creators, the innovators and the community leaders. And there was a realization in 1980 that not only is small business the economic engine of the United States, but they bear a disproportionate impact when it comes to Federal rules and regulations. So shouldn't there be a law that tries to level that playing field for small businesses?

And that law is, in fact, the Regulatory Flexibility Act. It was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act. In 1996, Congress realized that the requirement, or the encouragement, for agencies to do a small business impact analysis maybe just isn't enough incentive for agencies to do that. And so in 1996, Congress actually amended the RFA to include judicial review, so that if agencies do not conduct small business impact analysis and consider less burdensome alternatives, then they can be taken to court and a court will tell them to do so.

The most recent update to the Regulatory Flexibility Act actually came in 2002, when President Bush signed an executive order—and, again, that was an affirmation of small businesses' importance to this country, and an affirmation or realization that small businesses continue to bear a disproportionate regulatory impact, and even more work needs to be done to level the playing field.

This executive order really encourages agencies even more to do the type of small business impact analysis and work with my office than ever before, and it is working. The Regulatory Flexibility Act is working, and I certainly don't want anyone to proceed in this hearing to think that we are fixing an absolutely broken law. That is just not the case.

My testimony bears out that we are saving billions of dollars by filtering out parts of rules and regulations that don't make sense for small business, and by filtering them out, you are leveling the playing field without compromising regulatory protections, while still protecting the environment, protecting workplace safety, protecting our Nation's borders.

While the Reg Flex Act is working, it is not working perfectly, and now is the time where you look at the law, much like this Committee looks at the Administrative Procedure Act and has amended it close to 60 times over the past several years. It is time to look at the Regulatory Flexibility Act and ask, "How can it work better?" And H.R. 682 plugs many, if not all, of the loopholes that are contained in the Regulatory Flexibility Act.

My office believes that the biggest loophole that needs to be closed is indirect impact. Agencies right now are required to examine how their rules will impact those who are directly regulated. But that doesn't extend to the logically foreseeable secondary impacts, tertiary impacts, and I believe it is the Government's responsibility to inform the public before finalizing rules and regulations

how will this rule work? How will it impact consumers? How will it impact the tourist industry? How will this rule impact homeowners and community leaders?

Those are the types of secondary and tertiary impacts that are sometimes ignored because the Reg Flex Act doesn't require it. H.R. 682 plugs that loophole.

There are other loopholes that exist in the Regulatory Flexibility Act. My statement goes in some detail into how H.R. 682 cures that and I am happy to answer any questions about the particulars of 682 or the Committee's curiosity on how my office works to enforce the Regulatory Flexibility Act.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF THE HONORABLE THOMAS M. SULLIVAN



Advocacy: the voice of small business in government

Testimony of

*The Honorable Thomas M. Sullivan
Chief Counsel for Advocacy
U.S. Small Business Administration*

*U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Commercial and Administrative Law*

Date: July 20, 2006
Time: 11:30 A.M.
Location: Room 2141
Rayburn House Office Building
Washington, D.C.
Topic: Regulatory Flexibility Improvements Act – H.R. 682

Created by Congress in 1976, the Office of Advocacy of the U.S. Small Business Administration (SBA) is an independent voice for small business within the federal government. The Chief Counsel for Advocacy, who is appointed by the President and confirmed by the U.S. Senate, directs the office. The Chief Counsel advances the views, concerns, and interests of small business before Congress, the White House, federal agencies, federal courts, and state policy makers. Issues are identified through economic research, policy analyses, and small business outreach. The Chief Counsel's efforts are supported by offices in Washington, D.C., and by Regional Advocates. For more information about the Office of Advocacy, visit <http://www.sba.gov/advo>, or call (202) 205-6533.

Chairman Cannon, Ranking Member Watt, Members of the Committee, good morning and thank you for the opportunity to appear before you today to address H.R. 682, the Regulatory Flexibility Improvements Act. My name is Thomas M. Sullivan and I am Chief Counsel for the Office of Advocacy at the U.S. Small Business Administration (SBA). As Chief Counsel for Advocacy, I am charged with monitoring federal agencies' compliance with the Regulatory Flexibility Act (RFA). Because the Office of Advocacy is an independent office within SBA, the views that I express do not necessarily reflect the views of the Administration or the U.S. Small Business Administration. This statement was not circulated to the Office of Management and Budget (OMB) for comment.

Background of the RFA and the Small Business Regulatory Enforcement Fairness Act

In 1980, Congress enacted the RFA after determining that uniform federal regulations produced a disproportionate adverse economic hardship on small entities. In order to minimize the burden of regulations on small entities, the RFA mandates that federal agencies consider the potential economic impact of federal regulations on small entities. The RFA also requires agencies to examine regulatory alternatives that achieve the agencies' public policy goals while minimizing small entity impacts.

Agency compliance with the RFA, however, was not judicially reviewable. Since agencies could not be held legally accountable for their noncompliance with the statute, many agencies ignored the RFA and did not conduct full regulatory flexibility analyses in conjunction with their rulemakings. In response to this widespread agency indifference, Congress amended the RFA in 1996 by enacting the Small Business Regulatory Enforcement Fairness Act (SBREFA), which reshaped the requirements of the RFA and provided for judicial review of agencies' final decisions under the RFA.

The RFA requires agencies to prepare and publish an initial regulatory flexibility analysis (IRFA), when proposing a regulation, and a final regulatory flexibility analysis (FRFA) when issuing a final rule for each rule that may have a significant economic impact on a substantial number of small entities. The purpose of the analysis is to ensure that the agency has considered the economic impact of the regulation on small entities and that the agency has considered regulatory alternatives that would minimize the rule's economic impact on affected small entities. The RFA allows the head of an agency to certify a rule in lieu of preparing a regulatory flexibility analysis if the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. Pursuant to the RFA, the agency must provide a factual basis for the certification.

Executive Order 13272

Even with the additional requirements under SBREFA and the threat of judicial review, some agencies were not complying with the requirements of the RFA. On March 19, 2002, President George W. Bush announced his Small Business Agenda, which included

the goal of "tearing down the regulatory barriers to job creation for small businesses and giving small business owners a voice in the complex and confusing federal regulatory process." To accomplish this goal, the President sought to strengthen the Office of Advocacy by enhancing its relationship with the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) and creating an executive order that would direct agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. On August 13, 2002, the President signed Executive Order (E.O.) 13272, titled "Proper Consideration of Small Entities in Agency Rulemaking."¹

E.O. 13272 enhances Advocacy's RFA mandate by directing Federal agencies to implement written procedures and policies for measuring the economic impact of their regulatory proposals on small entities. It also requires agencies to notify Advocacy of draft rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments provided by Advocacy, including publishing a response to Advocacy's comments in the *Federal Register*. The Office of Advocacy must provide periodic notification, as well as training to all federal agencies on how to comply with the RFA.

The *Report on the Regulatory Flexibility Act, FY 2005* includes information about agency compliance with E.O. 13272. With the exception of the Department of State, all Cabinet-level departments have developed written plans in compliance with E.O. 13272. The performance of the independent agencies, however, has not been as successful. Of the 75 independent regulatory agencies, only 16 responded to the requirements of the E.O. Of those 16, only eight have provided written procedures, six claimed that they do not regulate small entities, and two claimed to be exempt from the E.O.

In terms of training, Advocacy has held 55 training sessions at 45 different agencies. Agency attorneys, economists, policymakers, and other employees involved in the regulatory writing process have attended the hands-on sessions to learn how to comply with the RFA in a regulatory setting. Advocacy's current efforts are focused on rolling out an interactive electronic training module so that agencies can engage in periodic training and train new employees. Like the classroom setting, the online training program explains the steps rule writers should follow to make RFA decisions accurately.

Advocacy's training is having a noticeable impact on the way agencies develop rules. Agencies that have been through training tend to notify Advocacy earlier in the process, submit draft documents, and seek Advocacy's assistance in finding small entity data. For example, when Congress enacted the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Act), it authorized the Food and Drug Administration (FDA) to promulgate rules in an expedited timeframe to protect the nation's food supply. In response to the Act, FDA published four final rules, each preceded by a notice of proposed rulemaking, prior notice of imported food shipments,

¹ E.O. 13272 can be found on the Office of Advocacy's website at <http://www.sba.gov/advofam/oeo13272.pdf>.

registration of food facilities, establishment and maintenance of records, and administrative detention. The Act required FDA to publish the first three rules within 18 months or by December 12, 2003. FDA contacted Advocacy about the rules' impact on small businesses well before the proposed rules were published in the *Federal Register*. This allowed Advocacy to work closely with the FDA to reduce the economic effects of the rules on small businesses. As a result of the involvement of Advocacy and interested small businesses, FDA made several adjustments to the rules including the creation of the new automated commercial environment (ACE) database and a far less onerous notice requirement (twenty-four hours notice was reduced to two hours if the food is arriving by road, four hours if the food is arriving by rail, and eight hours if the food is arriving by sea); extending the registration update requirement from 30 days to 60 days; allowing those importers subject to the rule to check a food category titled "most or all" rather than requiring them to individually list food product categories that had been previously identified in the registration form; and exempting the food packaging industry, which consists primarily of small businesses, from the FDA registration and prior notice requirements. The FDA also gave small businesses more time to comply with the requirements.

Impact of the RFA, SBREFA and E.O. 13272

The SBREFA amendments to the RFA have been successful. In general, agencies are paying closer attention to their RFA obligations. As a result, they are implementing less costly regulations. Some agencies submit their draft regulations to Advocacy early in the process to obtain feedback on their RFA compliance and small business impact. Early intervention by Advocacy and improved agency compliance with the RFA have led to less burdensome regulations. For example, in FY 2001, involvement by the Office of Advocacy in agency rulemakings helped save small businesses an estimated \$4.4 billion in new regulatory compliance costs.² Similarly, in FY 2002, the Office of Advocacy's efforts to improve agency compliance with the RFA on behalf of small entities secured more than \$21 billion in first-year cost savings, with an additional \$10 billion in annually recurring cost savings.³ In FY 2003, Advocacy achieved more than \$6.3 billion in regulatory cost savings and more than \$5.7 billion in recurring annual savings on behalf of small entities. Moreover, in 2004, Advocacy helped save small entities more than \$17 billion.⁴ Most recently, in FY 2005, Advocacy's intervention resulted in \$6.6 billion in small business cost savings for a total of \$71 billion in cost savings during the course of this Administration.

Although the RFA is achieving cost savings for small entities, the RFA is needed now more than ever. In 2005, Mark Crain prepared a study on *The Impact of Regulatory Costs*

² The annual reports on the RFA can be found on the Office of Advocacy's website at <http://www.sba.gov/advocacy/ra>.

³ It should be noted that revisions made by the Environmental Protection Agency (EPA) to its Cross Media Electronic Reporting and Record-keeping rule produced an estimated savings of \$18 billion. Without that rule the cost savings for FY 2002 resulted in more than \$3 billion.

⁴ It should be noted that the withdrawal of the Department of Housing and Urban Development's rule on the Real Estate Settlement Procedures Act (RESPA) produced an estimated savings of \$10.3 billion. Without that rule, the cost savings for FY 2004 would have been approximately \$6 billion.

on Small Firms. It indicated that the overall cost of federal regulation totals \$1.1 trillion; the cost per employee for firms with fewer than 20 employees is \$7,647, 45 percent higher than their larger counterparts with 500 or more employees.⁵ Legislative action is the necessary to continue to lower regulatory costs and level the playing field for small entities.

H.R. 682 and other Suggestions for Modifying the Regulatory Process to Reduce Burdens on Small Entities

The 109th Congress has the opportunity to amend the RFA and SBREFA to improve the regulatory climate for small entities. Even though the last few years have yielded a number of successes, there are certain loopholes in the RFA that were not addressed through SBREFA. The Office of Advocacy has pursued a legislative agenda during the 109th Congress with the intention of plugging some of the major holes in the RFA and improving the overall regulatory environment for small entities. H.R. 682 is a truly comprehensive bill to address problem areas in the RFA. The Office of Advocacy supports the goals of H.R. 682 and other measures that will increase the overall effectiveness of the RFA and SBREFA. While there are many important aspects of HR 682, Advocacy believes that the following issues are the most crucial:

Foreseeable Indirect Economic Impacts

The biggest loophole in the RFA is that it does not require agencies to analyze indirect impacts. Pursuant to sections 603, 604 and 605(b) of the RFA, agencies are required to consider the economic impact of a regulatory action on small entities. Although the RFA does not define economic impact, the committee report for the RFA suggests that agencies should consider direct and indirect impacts of the proposed regulation. The courts, however, have interpreted the RFA otherwise.

The primary case on the consideration of direct versus indirect impacts for RFA purposes in promulgating regulations is Mid-Tex Electric Co-op Inc. v. Federal Energy Regulatory Commission, 249 U.S. App. D.C. 64, 773 F.2d 327 (1985) (hereinafter Mid-Tex). Mid-Tex addressed a Federal Energy Regulatory Commission (FERC) rule which stated that electric utility companies could include amounts equal to 50 percent of their investments in construction work in progress (CWIP) in their rates. In promulgating the rule, FERC certified that the rule would not have a significant economic impact on a substantial number of small entities. The basis of the certification was that virtually all of the utilities did not fall within the meaning of the term "small entities" as defined by the RFA. Plaintiffs argued that FERC's certification was insufficient because it should have considered the impact on wholesale customers of the utilities as well as the regulated utilities. The court dismissed the plaintiffs' argument. The court concluded that the

⁵ The Crain report is located at http://www.sba.gov/advo/research/rs2076e_264.pdf.

agency did not have to consider the economic impact of the rule on small entities that did not have to directly comply with the requirements of the rule.⁶

Post-SBREFEA, the U.S. Court of Appeals for the District of Columbia applied the holding of the *Mid-Tex* case to *American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027, 336 U.S.App.D.C.16 (D.C.Cir., May 14, 1999) (hereinafter *ATA*). In the *ATA* case, Environmental Protection Agency (EPA) established primary national ambient air quality standards (NAAQS) for ozone and particulate matter. At the time of the rulemaking, EPA certified the rule pursuant to section 605(b). The basis of the certification was that small entities were not subject to the rule because the NAAQS regulated small entities indirectly through state implementation plans (SIPs). Although the court remanded the rule to the agency, the court found that EPA had complied with the requirements of the RFA. Specifically, the court found that since the states, not EPA, had the direct authority to impose the burden on small entities, EPA's regulation did not directly impact small entities.⁷ The court also found that since the states would have broad discretion in obtaining compliance with the NAAQS, small entities were only indirectly affected by the standards.⁸

In *Mid-Tex*, compliance with FERC's regulation by the utilities was expected to have a ripple effect on customers of the small utilities. There were several unknown factors in the decision-making process that were beyond FERC's control such as whether utility companies had investments, the number of investments, costs of the investments, the decision of what would be recouped, to whom the utilities would pass the investment costs, etc. Unfortunately, the idea of the RFA not applying to indirect economic impacts is now being used by agencies even in cases where the impact is reasonably foreseeable, which undermines the spirit of the RFA.

One of the most compelling examples of the importance of considering indirect impacts on small entities can be found in 2002 Immigration and Naturalization Service's (INS) rule on B-2 tourist visas. This rulemaking illustrates the importance of having reasonably foreseeable indirect impacts analyzed under the RFA in the rulemaking process. On April 12, 2002, the Immigration and Naturalization Service (INS) published a proposed rule on *Limiting the Period of Admission for B Nonimmigrant Aliens*. The proposal eliminated the minimum six-month admission period of B-2 visitors for pleasure and placed the onus of explaining the amount of time for the length of stay on the foreign visitor. If the length of stay could not be determined, the INS agent would issue a visa for only thirty (30) days. Although it was foreseeable that small businesses in the travel industry could lose approximately \$2 billion as a result of the proposal, INS certified that the proposal would not have a significant economic impact on a substantial number of small entities. The basis for the certification was that the proposal applied only to nonimmigrant aliens visiting the United States as visitors for business or pleasure. Because the courts have interpreted the RFA as only requiring agencies to consider the economic impact of the proposal on the entities that the proposal will directly impact, the certification was not

⁶ *Id.* at 342.

⁷ *Id.*

⁸ *Id.*

technically erroneous. Advocacy asserted that from the standpoint of good public policy, the agency had a duty to perform a regulatory flexibility analysis and to consider less burdensome alternatives for achieving their goal when the potential impact of a regulation was foreseeable and economically devastating to a particular industry.⁹ Advocacy reiterated this position at a hearing before House Committee on Small Business in June 2002.¹⁰ Representatives from the travel industry also testified at that hearing about the potential economic impacts that their businesses would have experienced as a result of INS's actions. The rule was eventually withdrawn.

In addition, if the federal regulation is something that must be implemented by the states¹¹, as in the *ATA* case, the federal agencies are not required to perform the detailed analysis of economic impacts and alternatives required by the RFA. The duty of regulating is passed on to the states without any corresponding analysis or requirements for states to consider less burdensome alternatives for small business. Moreover, states with RFA-type laws on the books must perform the economic analysis, even though the states have fewer resources to conduct small business impact analysis than the federal government. This amounts to an unfunded mandate. Amending the RFA to require federal agencies to consider indirect impacts will help state officials craft less burdensome regulatory alternatives.

Because of the potentially devastating effect that not considering indirect impacts may have on small entities, Advocacy strongly supports section 3(b) of H.R. 682, which defines economic impact to include foreseeable indirect economic impacts. Requiring agencies to perform a regulatory flexibility analysis would provide the public with

⁹ The Office of Advocacy's comment letter is located at http://www.fda.gov/ohrt/press/2002/02081632_10513.html.

¹⁰ The Office of Advocacy's testimony before the U.S. House of Representatives, Committee on Small Business is located at http://www.fda.gov/ohrt/press/2002/02081632_10513.html.

¹¹ The *ATA* case is also an example of why the need for flexibility is not limited to federal regulations. At least 92 percent of businesses in every state are small businesses. These businesses bear a disproportionate share of regulatory costs and burdens. Recognizing that state and local governments can be a source of burdensome regulations on small business, Advocacy drafted model regulatory flexibility legislation for the states based on the federal RFA. Many states have some form of regulatory flexibility laws on the books. However, many of the laws do not contain the five critical elements addressed in Advocacy's model legislation. Advocacy's state model legislation recommends that successful state-level regulatory flexibility laws should address the following: 1) a small business definition that is consistent with state practices and permitting authorities; 2) a requirement that state agencies perform an economic impact analysis on the effect of a rule on small businesses before they regulate; 3) a requirement that state agencies consider alternatives that are less burdensome for small businesses while still meeting the agency's regulatory goals; 4) a provision that requires state governments to review existing regulations periodically; and 5) judicial review to give the law "teeth." Since 2002, 19 states have implemented regulatory flexibility via Executive Order or legislation based on Advocacy's model legislation. These states are Alaska, Arkansas, Colorado, Connecticut, Georgia, Indiana, Kansas, Kentucky, Massachusetts, Missouri, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin.

information about the potential economic impact of an agency's proposed action and, hopefully, encourage agencies to consider less burdensome alternatives.

Section 610 Review of Existing Regulations

Small businesses often complain about the difficulties in dealing with the layers of regulations that agencies issue over time. Although a single proposed rule may not impose much of a regulatory burden, that rule, when added to numerous existing rules, imposes a crippling cumulative burden. Section 610 of the RFA requires agencies to periodically review their existing rules that may have a significant economic impact on a substantial number of small entities. The purpose of the review is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the stated objectives of applicable statutes. Unfortunately, agency compliance with section 610 has historically been poor at best.

Small entities are limited in what they can do with burdensome regulations on the books. Although there are legal avenues that can be pursued to have burdensome rules reviewed, legal recourse is costly and time consuming. The automatic review of regulations afforded through section 610 not only results in the removal of burdensome regulations, it also saves small entities and federal agencies the hassle of having to resort to the legal system to obtain relief. However, limiting the review to only those regulations that the agency deemed to have a significant economic impact at the time of promulgation is problematic. As noted above, the Crain study on *The Impact of Regulatory Costs on Small Firms* indicates that the overall cost of federal regulation totals \$1.1 trillion; the cost per employee for firms with fewer than 20 employees is \$7,647, 45 percent higher than their larger counterparts with 500 or more employees.¹² Since new regulations are promulgated each year, the cumulative impact of regulations on small entities can be staggering, even if individually the regulations may not have a significant economic impact.

Section 7 of H.R. 682 only refers to the periodic review of rules that the agency determines to have a significant economic impact on a substantial number of small entities. Advocacy recommends that the RFA be amended to review all rules periodically. This change would encourage agencies to revise their rules to ensure that regulations reflect current conditions and needs.

Section 7 also amends the RFA to require an agency to submit an annual report on the result of its plan to Congress and Office of Information and Regulatory Affairs. Advocacy recommends that H.R. 682 be amended to include the Chief Counsel for Advocacy as a recipient of the agencies' reports at the same time they are submitted to Congress.

¹² The Crain report is located at <http://www.sba.gov/odb.ojs/research/207tot.264.pdf>.

Codification of E.O. 13272

E.O. 13272 has increased agency knowledge of and compliance with the RFA. One of the most important elements of E.O. 13272 is Section 3. Section 3 requires agencies to notify the Office of Advocacy of draft rules that will have a significant economic impact on a substantial number of small entities. It also requires agencies to give appropriate consideration to Advocacy's comments and address the comments in final rules. Small entities would benefit by amending the RFA to codify the requirements of E.O. 13272, ensuring that independent agencies are covered and creating long-term certainty for small entities.

Advocacy recognizes that section 4(b)(3) of H.R. 682 requires agencies to respond to Advocacy's comments if an agency prepares a FRFA. However, it does not provide for Advocacy's comments to be addressed if the agency certifies the rule at the final stage of the rulemaking. This is particularly important since in FY 2005, 12 percent of Advocacy comments were on improper certifications and 17 percent of Advocacy comments were on inadequate or missing IRFAs. Under H.R. 682, anywhere from 12 percent to 29 percent of Advocacy's comments could go unaddressed, if agencies decide to certify final rules in lieu of preparing a FRFA. Advocacy suggests that H.R. 682 be amended to require agencies to provide written responses to all comments submitted by Advocacy, regardless of whether the agency prepares a FRFA or a certification for the final rule. Amending the RFA in this way sets into law a key component of E.O. 13272 and would provide further assurance that small entities have a legitimate voice in the rulemaking process.

Panel Process

In addition to having concerns over requiring SBREFA panels for all agencies, Advocacy is concerned about the changes that H.R. 682 makes to the current panel process. The panel process described in section 6 of H.R. 682 provides Advocacy with responsibility for drafting the panel report. The current process produces a consensus report negotiated between Advocacy, OMB, and EPA or Occupational Safety and Health Administration (OSHA). Because it is a consensus document, agencies typically follow the recommendations.

Establishment and Approval of Small Business Size Standards by Chief Counsel for Advocacy

Currently, section 601(3) of the RFA provides that the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consulting with the Office of Advocacy of the Small Business Administration and after an opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes the definition in the *Federal Register*. The law assumes that the SBA size standard is appropriate unless the agency pursues a different one.

Section 9 of H.R. 682 amends the Small Business Act to allow the Chief Counsel for Advocacy to specify small business size definitions or standards for the purposes of any Act other than the Small Business Act or the Small Business Investment Act of 1958. The SBA's Office of Size Standards has the necessary expertise and resources to make appropriate decisions regarding industry size determinations. I do not believe that the proposed section 9 of H.R. 682 will benefit small entities. It may be more beneficial to amend the RFA and SBA regulations to require agencies to consult with Advocacy if the agency is interested in changing the size standard for RFA purposes rather than requiring the approval of the Administrator. This would not impact SBA's authority to establish size standards for SBA loan and other programs. This change to H.R. 682 may eliminate some of the confusion that currently exists over which office determines size standards for RFA purposes only.

Compliance Guides

Section 212 of SBREFA, which is a stand-alone section and not part of the RFA, requires agencies to provide plain English compliance guides to clearly explain each final rule that has a significant economic impact on a substantial number of small entities. The intent of section 212 of SBREFA was to ensure that small businesses had a way to understand complex and technical federal regulations. Unfortunately, this is not being done and small businesses continue to be frustrated with rules that are published without adequate compliance information. SBREFA should be amended to require agencies to publish plain language small business compliance guides whenever a final rule requires a FRFA. In addition, agencies should be required to report annually on their efforts to comply with this section. H.R. 682 does not include this needed change.

Conclusion

The Office of Advocacy believes that the RFA and SBREFA can be improved legislatively and commends this Committee for examining legislation that will help small business. Thank you for allowing me to present these views. I would be happy to answer any questions.

Mr. CANNON. Thank you, Mr. Sullivan.
Mr. Mihm?

**TESTIMONY OF J. CHRISTOPHER MIHM, MANAGING DIRECTOR
FOR STRATEGIC ISSUES, UNITED STATES GOVERNMENT AC-
COUNTABILITY OFFICE, WASHINGTON, DC**

Mr. MIHM. Thank you, Mr. Chairman, Mr. Watt. It is, again, a great honor to appear before you again today and to contribute to your review of the Regulatory Flexibility Act and your continuing broad examination of administrative law processes and procedures.

My written statement provides an overview of the basic purpose and requirements of the RFA, the main impediments to the act's implementation and the elements of RFA that Congress might consider amending to improve the effectiveness of the act. In the interest of brevity, this afternoon I will just hit the highlights of those issues.

As Mr. Sullivan mentioned in his opening statement, RFA was enacted in response to concerns about the effect Federal regulations can have on small entities. Among other things, RFA prompts regulatory agencies to analyze the potential effects of the rules on those entities, consider alternatives to reduce the burden of those rules and ensure that small entities have an opportunity to participate in the rule-making process.

As you mentioned in your opening statement, Mr. Chairman, in response to congressional requests, we have reviewed RFA's implementation on many occasions over many years, going back to the early 1990's. My bottom line today is that our prior reports have illustrated both the promise and the problems associated with RFA, with the recurring theme being the varying interpretations of RFA's requirements by Federal agencies. Although some progress has undoubtedly been made to address issues we identified, the full promise of the Regulatory Flexibility Act may never be realized until Congress either clarifies terms and definitions in the act or provides an agency with the clear authority and the responsibility to do so.

It is also important to keep in mind the domino effect that an agency's initial determination of whether the Regulatory Flexibility Act is applicable to rule-making has on other statutory requirements. These other requirements can include, for example, preparing compliance guides for small entities and periodically reviewing existing regulations.

More specifically, unclear terms and definitions can affect the applicability and effectiveness of regulatory reform requirements. We have frequently cited the need to clarify key terms in RFA, particularly—and this is the 800-pound gorilla, as it were—"the significant economic impact on a substantial number of small entities." RFA's requirements do not apply, as Mr. Sullivan mentioned, if an agency head certifies that a rule will not have that significant economic impact on a substantial number of small entities.

However, RFA neither defines this key phrase, nor places responsibility on any party to determine it consistently across the Government. It is therefore not surprising that compliance with RFA has varied from one agency to another and that agencies have had different interpretations of the act's requirements.

We have examined 12 years of annual reports from the Office of Advocacy, basically Tom's shop, and that these reports showed that compliance with RFA varied across agencies, within agencies and over time, a conclusion obviously shared by the Office of Advocacy in its own reports.

We noted that some agencies have been repeatedly characterized as satisfying the requirements, but other agencies have been viewed as less compliant over time.

One of the reasons for the agencies' lack of compliance with the Regulatory Flexibility Act requirements is that the act did not expressly authorize the SBA to interpret key provisions and did not require SBA to develop criteria for agencies to follow in reviewing their rules.

It is important to note at this point that the Office of Advocacy's 2003 RFA compliance guide, while reiterating that the RFA does not define certain terms, nevertheless provides some suggestions for agencies on the subject.

While the guidance and the associated training for agencies appear to have been very helpful, the key will be the degree to which agencies effectively and consistently apply that guidance and that training. In that regard, none of us know whether or not yet the extent or if the guidance and training has really made a substantive improvement in agencies' efforts to clarify some of the longstanding confusion about RFA requirements. We believe additional scrutiny and congressional monitoring of the RFA compliance may help to answer that question.

Well, let me just conclude there and say once again that I appreciate the opportunity to testify on these important issues and obviously would be pleased to take any questions you or Mr. Watt might have.

[The prepared statement of Mr. Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

GAO

United States Government Accountability Office

Testimony

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

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**REGULATORY
FLEXIBILITY ACT**

**Congress Should Revisit
and Clarify Elements of the
Act to Improve Its
Effectiveness**

Statement of J. Christopher Mihm
Managing Director, Strategic Issues





Why GAO Did This Study

Federal regulation is one of the basic tools of government used to implement public policy. In 1980, the Regulatory Flexibility Act (RFA) was enacted in response to concerns about the effect that regulations can have on small entities, including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Congress amended RFA in 1996, and the President issued Executive Order 13272 in 2002, to strengthen requirements for agencies to consider the impact of their proposed rules on small entities. However, concerns about the regulatory burden on small entities persist, prompting legislative proposals such as H.R. 682, the Regulatory Flexibility Improvements Act, which would amend RFA.

At the request of Congress, GAO has prepared many reports and testimonies reviewing the implementation of RFA and related policies. On the basis of that body of work, this testimony (1) provides an overview of the basic purpose and requirements of RFA, (2) highlights the main impediments to the Act's implementation that GAO's reports identified, and (3) suggests elements of RFA that Congress might consider amending to improve the effectiveness of the Act. GAO's prior reports and testimonies contain recommendations to improve the implementation of RFA and related regulatory process requirements.

www.gao.gov/cgi-bin/gettr?GAO-06-998T.
To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-4806 or mihm@gao.gov.

July 20, 2006

REGULATORY FLEXIBILITY ACT

Congress Should Revisit and Clarify Elements of the Act to Improve Its Effectiveness

What GAO Found

RFA established a principle that agencies should endeavor to fit their regulatory requirements to the scale of small entities. Among other things, RFA requires regulatory agencies to assess the impact of proposed rules on small entities, consider regulatory alternatives that will accomplish the agencies' objectives while minimizing the impacts on small entities, and ensure that small entities have an opportunity to participate in the rulemaking process. Further, RFA requires agencies to review existing rules within 10 years of promulgation that have or will have a significant impact on small entities to determine whether they should be continued without change or amended or rescinded to minimize their impact on small entities. RFA also requires the Chief Counsel for Advocacy of the Small Business Administration (Office of Advocacy) to monitor agencies' compliance. In response to Executive Order 13272, the Office of Advocacy published guidance in 2003 on how to comply with RFA.

In response to congressional requests, GAO reviewed agencies' implementation of RFA and related requirements on many occasions, with topics ranging from specific statutory provisions to the overall implementation of RFA. Generally, GAO found that the Act's results and effectiveness have been mixed; its reports illustrated both the promise and the problems associated with RFA. On one hand, RFA and related requirements clearly affected how federal agencies regulate and produced benefits, such as raising expectations regarding the analytical support for proposed rules. However, GAO also found that compliance with RFA varied across agencies, within agencies, and over time. A recurring finding was that uncertainties about RFA's requirements and key terms, and varying interpretations by federal agencies, limited the Act's application and effectiveness.

GAO's past work suggests that Congress might wish to review the procedures, definitions, exemptions, and other provisions of RFA to determine whether changes are needed to better achieve the purposes Congress intended. In particular, GAO's reports indicate that the full promise of RFA may never be realized until Congress revisits and clarifies elements of the Act, especially its key terms, or provides an agency or office with the clear authority and responsibility to do so. Attention should also be paid to the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations. GAO also believes that Congress should reexamine not just RFA but how all of the various regulatory reform initiatives fit together and influence agencies' regulatory actions. Recent developments, such as the Office of Advocacy's RFA guidance, may help address some of these long-standing issues and merit continued monitoring by Congress.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to contribute to your review of H.R. 682, the Regulatory Flexibility Improvements Act, and your continuing general agenda to review administrative law, process, and procedure issues. In my statement today, I will summarize findings from our past body of work on the Regulatory Flexibility Act (RFA), which H.R. 682 would amend, and related policies. Specifically, I will provide an overview of the basic purpose and requirements of RFA, highlight the main impediments to the Act's implementation that our work identified, and suggest elements of RFA that Congress might consider amending to improve the effectiveness of the Act.

In brief, RFA was enacted in response to concerns about the effect that federal regulations can have on small entities. Among other things, RFA prompts regulatory agencies to analyze the potential effects of their rules on small entities, consider alternatives to reduce the burden of those rules, and ensure that small entities have an opportunity to participate in the rulemaking process. In response to congressional requests, we have reviewed RFA's implementation on many occasions over the years. Our reports illustrated both the promise and the problems associated with the Act, with a recurring theme being the varying interpretations of RFA's requirements by federal agencies. Although some progress has been made to address issues we identified, the full promise of RFA may never be realized until Congress clarifies key terms and definitions in the Act, such as "a substantial number of small entities," or provides an agency or office with the clear authority and responsibility to do so. It is also important to keep in mind the domino effect that an agency's initial determination of whether RFA is applicable to a rulemaking has on other statutory requirements, such as preparing compliance guides for small entities and periodically reviewing existing regulations.

% U.S.C. §§ 601-612.

RFA and Related Requirements Are Intended to Promote Attention to Regulations' Effects on Small Entities

Federal regulation is one of the basic tools of government. Agencies issue thousands of rules and regulations each year to implement statutes enacted by Congress. The public policy goals and benefits of regulations include, among other things, ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of tax is collected. The costs of these regulations are estimated to be in the hundreds of billions of dollars, and the benefits estimates are much higher.³ Given the size and impact of federal regulation, Congresses and Presidents have taken a number of actions to refine and reform the regulatory process within the past 25 years.⁴

In September 1980, RFA was enacted in response to concerns about the effect that federal regulations can have on "small entities," defined by the Act as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. As we have previously noted, small businesses are a significant part of the nation's economy, and small governments make up the vast majority of local governments in the United States.⁵ However, there have been concerns that these small entities may be disproportionately affected by federal agencies' regulatory requirements. RFA established the principle that agencies should endeavor, consistent with the objectives of applicable statutes, to fit regulatory and informational requirements to the scale of these small entities.

RFA requires regulatory agencies—including the independent regulatory agencies—to assess the potential impact of their rules on small entities. Under RFA, an agency must prepare an initial regulatory flexibility analysis at the time a proposed rule is issued unless the head of the agency determines that the proposed rule would not have a "significant economic

³The Office of Management and Budget reported that the estimated quantified and monetized annual benefits of the major federal regulations it reviewed from October 1995 through September 2005 range from \$94 billion to \$449 billion, while estimated annual costs range from \$57 billion to \$44 billion. See Office of Management and Budget, *Budget 2006 Report to Congress on the Costs and Benefits of Federal Regulations* (Washington, D.C.: April 2006).

⁴See GAO, *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, GAO-05-533 (Washington, D.C.: July 27, 2005) for summary descriptions of major regulatory reform initiatives implemented since 1980.

⁵GAO, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/GGD-88-55 (Washington, D.C.: Mar. 18, 1988).

impact upon a substantial number of small entities.¹⁸ Further, agencies must consider alternatives to their proposed rules that will accomplish the agencies' objectives while minimizing the impacts on small entities. The Act also requires agencies to ensure that small entities have an opportunity to participate in the rulemaking process and requires the Chief Counsel for Advocacy of the Small Business Administration (Office of Advocacy) to monitor agencies' compliance. Among other things, RFA also requires regulatory agencies to review, within 10 years of promulgation, existing rules that have or will have a significant impact on small entities to determine whether they should be continued without change or amended or rescinded to minimize their impact on small entities.

Congress amended RFA with the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).¹⁹ SBREFA made certain agency actions under RFA judicially reviewable. Other provisions in SBREFA added new requirements. For example, SBREFA requires agencies to develop one or more compliance guides for each final rule or group of related final rules for which the agency is required to prepare a regulatory flexibility analysis, and it requires agencies to provide small entities with some form of relief from civil monetary penalties. SBREFA also requires the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration to convene advocacy review panels before publishing an initial regulatory flexibility analysis.

More recently, in August 2002, President George W. Bush issued Executive Order 13272, which requires federal agencies to establish written procedures and policies on how they would measure the impact of their regulatory proposals on small entities and to vet those policies with the Office of Advocacy. The order also requires agencies to notify the Office of Advocacy before publishing draft rules expected to have a significant small business impact, to consider its written comments on proposed rules, and to publish a response with the final rule. The order requires the Office of Advocacy to provide notification of the requirements of the Act and training to all agencies on how to comply with RFA. The Office of

¹⁸RFA generally applies only where notice and comment rulemaking under the Administrative Procedure Act (APA) is required. When promulgating a final rule, agencies must also prepare a final regulatory flexibility analysis unless the agency finds that the rule will not have a significant economic impact on a substantial number of small entities.

¹⁹5 U.S.C. § 601 note.

Advocacy published guidance on the Act in 2003 and reported training more than 20 agencies on RFA compliance in fiscal year 2005.¹

GAO Reviews Found that Varying Interpretations of RFA Requirements Hampered Effective Implementation of the Act

In response to congressional requests, we have reviewed agencies' implementation of RFA and related requirements on many occasions over the years, with topics ranging from specific statutory provisions to the overall implementation of RFA.² Generally, we found that the Act's overall results and effectiveness have been mixed. This is not unique to RFA; we found similar results when reviewing other regulatory reform initiatives, such as the Unfunded Mandates Reform Act of 1995.³ Our past reports illustrated both the promise and the problems associated with RFA. RFA and related requirements have clearly affected how federal agencies regulate, and we identified important benefits of these initiatives, such as increasing attention on the potential impacts of rules and raising expectations regarding the analytical support for proposed rules. However, a recurring theme in our findings was that uncertainties about RFA's requirements and varying interpretations of those requirements by federal agencies limited the Act's application and effectiveness.

Some of the topics we reviewed, and our main findings regarding impediments to RFA's implementation, are illustrated in the following examples:

- We examined 12 years of annual reports from the Office of Advocacy and concluded that the reports indicated variable compliance with RFA across agencies, within agencies, and over time—a conclusion that the Office of Advocacy also reached in subsequent reports on implementation of RFA (on the 20th and 25th anniversaries of RFA's enactment).⁴ We noted that some agencies had been repeatedly characterized as satisfying RFA requirements, but other agencies were

¹See U.S. Small Business Administration, Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Washington, D.C.: May 2003).

²A list of related GAO products appears at the end of this statement.

³16 U.S.C. §§ 658-658(g), 1501-1571. See GAO, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO 06-226T (Washington, D.C.: Nov. 1, 2005) and GAO 05-337T.

⁴See GAO, *Regulatory Flexibility Act: Status of Agencies' Compliance*, CAOGGD-01-105 (Washington, D.C.: Apr. 27, 1991).

consistently viewed as recalcitrant. Agencies' performance also varied over time or varied by offices within the agencies. We said that one reason for agencies' lack of compliance with RFA requirements was that the Act did not expressly authorize the Small Business Administration (SBA) to interpret key provisions and did not require SBA to develop criteria for agencies to follow in reviewing their rules.

- We examined RFA implementation with regard to small governments and concluded that agencies were not conducting as many regulatory flexibility analyses for small governments as they might, largely because of weaknesses in the Act.²⁷ Specifically, we found that each agency we reviewed had a different interpretation of key RFA provisions. We also pointed out that RFA allowed agencies to interpret whether their proposed rules affected small governments and did not provide sufficiently specific criteria or definitions to guide agencies in deciding whether and how to assess the impact of proposed rules on small governments.
- We reviewed implementation of small business advocacy review panel requirements under SBREFA and found that the panels that had been convened were generally well received.²⁸ However, we also said that implementation was hindered—specifically, that there was uncertainty over whether panels should have been convened for some proposed rules—by the lack of agreed-upon governmentwide criteria as to whether a rule has a significant impact.
- We examined other related requirements regarding agencies' policies for the reduction and/or waiver of civil penalties on small entities and the publication of small entity compliance guides.²⁹ Again, we found that implementation varied across and within agencies, with some of the ineffectiveness and inconsistency traceable to definitional problems in RFA. All of the agencies' penalty relief policies that we reviewed were within the discretion that Congress provided, but the

²⁷See GAO, *Regulatory Flexibility Act: Inherent Weaknesses May Limit Its Usefulness for Small Governments*, GAO/HRD-91-16 (Washington, D.C.: Jan. 11, 1991).

²⁸See GAO, *Regulatory Reform: Implementation of the Small Business Advocacy Review Panel Requirements*, GAO/CGD-98-36 (Washington, D.C.: Mar. 18, 1998).

²⁹See GAO, *Regulatory Reform: Implementation of Selected Agencies' Civil Penalty Relief Policies for Small Entities*, GAO-01-380 (Washington, D.C.: Feb. 20, 2001), and *Regulatory Reform: Compliance Guide Requirement Has Had Little Effect on Agency Practices*, GAO-02-172 (Washington, D.C.: Dec. 28, 2001).

policies varied considerably. Some policies covered only a portion of agencies' civil penalty enforcement actions, and some provided small entities with no greater penalty relief than large entities. The agencies varied in how key terms were defined. Similarly, we concluded that the requirement for small entity compliance guides did not have much of an impact, and its implementation also varied across, and sometimes within, agencies.

- RFA is unique among statutory requirements with general applicability in having a provision, under section 610, for the periodic review of existing rules. However, it is not clear that this look-back provision in RFA has been consistently and effectively implemented. In a series of reports on agencies' compliance with section 610, we found that the required reviews were not being conducted.¹⁴ Meetings with agencies to identify why compliance was so limited revealed significant differences of opinion regarding key terms in RFA and confusion about what was required to determine compliance with RFA. At the request of the House Committee on Energy and Commerce, we have begun new work examining the subject of regulatory agencies' retrospective reviews of their existing regulations, including those undertaken in response to Section 610, and will report on the results of this engagement in the future.

We have not yet examined the effect of Executive Order 13272 and the Office of Advocacy's subsequent guidance and training for agencies on implementing RFA. Therefore, we have not done any evaluations that would indicate whether or not those developments are helping to address some of our concerns about the effectiveness of RFA.

Key Terms and Provisions of RFA Should Be Revisited and Clarified

While RFA has helped to influence how agencies regulate small entities, we believe that the full promise of the Act has not been realized. The results from our past work suggest that the Subcommittee might wish to review the procedures, definitions, exemptions, and other provisions of RFA, and related statutory requirements, to determine whether changes are needed to better achieve the purposes Congress intended. The central theme of our prior findings and recommendations on RFA has been the need to revisit and clarify elements of the Act, particularly its key terms. Although more recent developments, such as the Office of Advocacy's

¹⁴ See, for example, GAO, *Regulatory Flexibility Act: Agencies' Interpretations of Exemption Requirements Vary*, CAOIGCJ-98-56 (Washington, D.C.: Apr. 2, 1998).

detailed guidance to agencies on RFA compliance, may help address some of these long-standing issues, current legislative proposals, such as H.R. 682, make it clear that concerns remain about RFA's effectiveness—for example, that agencies are not assessing the impacts of their rules or identifying less costly regulatory approaches as expected under RFA—and the impact of federal regulations on small entities.

Unclear terms and definitions can affect the applicability and effectiveness of regulatory reform requirements. We have frequently cited the need to clarify the key terms in RFA, particularly "significant economic impact on a substantial number of small entities." RFA's requirements do not apply if an agency head certifies that a rule will not have a "significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor places clear responsibility on any party to define it consistently across the government. It is therefore not surprising, as I mentioned earlier, that we found compliance with RFA varied from one agency to another and that agencies had different interpretations of RFA's requirements.

We have recommended several times that Congress provide greater clarity concerning the key terms and provisions of RFA and related requirements, but to date Congress has not acted on many of these recommendations. The questions that remain unresolved on this topic are numerous and varied, including:

- Does Congress believe that the economic impact of a rule should be measured in terms of compliance costs as a percentage of businesses' annual revenues, the percentage of work hours available to the firms, or other metrics?
- If so, what percentage or other measure would be an appropriate definition of "significant?"
- Should agencies take into account the cumulative impact of their rules on small entities, even within a particular program area?
- Should agencies count the impact of the underlying statutes when determining whether their rules have a significant impact?
- What should be considered a "rule" for purposes of the requirement in RFA that agencies review rules with a significant impact within 10 years of their promulgation?

-
- Should agencies review rules that had a significant impact at the time they were originally published, or only those that currently have that effect?
 - Should agencies conduct regulatory flexibility analyses for rules that have a positive economic impact on small entities, or only for rules with a negative impact?

It is worth noting that the Office of Advocacy's 2003 RFA compliance guide, while reiterating that RFA does not define certain key terms, nevertheless provides some suggestions on the subject. Citing parts of RFA's legislative history, the guidance indicates that exact standards for such definitions may not be possible or desirable, and that the definitions should vary depending on the context of each rule and preliminary assessments of the rule's impact. For example, the guidance points out that "significance" can be seen as relative to the size of a business and its competitors, among other things. However, the guidance does identify factors that agencies might want to consider when making RFA determinations. In some ways, this mirrors other aspects of RFA, such as section 610, where Congress did not explicitly define a threshold for an agency to determine whether an existing regulation should be maintained, amended, or eliminated but rather identified the factors that an agency must consider in its reviews.¹⁹ We do not yet know whether or to what extent the guidance and associated training has helped agencies to clarify some of the long-standing confusion about RFA requirements and terms. Additional monitoring of RFA compliance may help to answer that question. Congress might also want to consider whether the factors that the Office of Advocacy suggested to help agencies define key terms and requirements are consistent with congressional intent or would benefit from having a statutory basis.

I also want to point out the potential domino effect of agencies' determinations of whether or not RFA applies to their rules. This is related to the lack of clarity on key terms mentioned above, the potential for agencies to waive or delay analysis under RFA, and the limitation of RFA's

¹⁹In conducting their reviews of existing rules under section 610, agencies are to consider the following factors: (1) the continuing need for the rule; (2) the nature of complaints or comments received concerning the rule from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules and, to the extent feasible, with state and local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed since adoption of the rule.

applicability to only rules for which there was a notice of proposed rulemaking. The impact of an agency head's determination that RFA is not applicable is not only that the initial and final regulatory flexibility analyses envisioned by the Act would not be done, but also that other related requirements would not apply. These requirements include, for example, the need for agencies to prepare small entity compliance guides, convene SBREFA advocacy panels, and conduct periodic reviews of certain existing regulations. While we recognize, as provided by the Administrative Procedure Act, that notices of proposed rulemaking are not always practical, necessary, or in the public interest, this still raises the question of whether such exemptions from notice and comment rulemaking should preclude future opportunities for public participation and other related procedural and analytical requirements. Our prior work has shown that substantial numbers of rules, including major rules (for example, those with an impact of \$100 million or more), are promulgated without going through a notice of proposed rulemaking.¹⁴

We also believe it is important for Congress to reexamine, not just RFA, but how all of the various regulatory reform initiatives fit together and influence agencies' regulatory actions. As I previously testified before this Subcommittee, we have found the effectiveness of most regulatory reform initiatives to be limited and that they merit congressional attention.¹⁵ In addition, we have stated that this is a particularly timely point to reexamine the federal regulatory framework, because significant trends and challenges establish the case for change and the need to reexamine the base of federal government and all of its existing programs, policies, functions, and activities.¹⁶

Our September 2000 report on EPA's implementation of RFA illustrated the importance of considering the bigger picture and interrelationships between regulatory reform initiatives.¹⁷ On the one hand, we reported about concerns regarding the methodologies EPA used in its analyses and

¹⁴See, for example, GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998).

¹⁵GAO-06-228T.

¹⁶See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325SP (Washington, D.C., February 2005) and GAO-05-097T.

¹⁷See GAO, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-195 (Washington, D.C.: Sept. 20, 2000).

its conclusions about the impact on small businesses of a proposed rule to lower certain reporting thresholds for lead and lead compounds.³⁹ The bigger picture, though, was our finding that after SBREFA took effect EPA's four major program offices certified that almost all (96 percent) of their proposed rules would not have a significant impact on a substantial number of small entities. EPA officials told us this was because of a change in EPA's RFA guidance prompted by the SBREFA requirement to convene an advocacy review panel for any proposed rule that was not certified. Prior to SBREFA, EPA's policy was to prepare a regulatory flexibility analysis for any rule that the agency expected to have any impact on small entities. According to EPA officials, the SBREFA panel requirement made continuation of the agency's more inclusive RFA policy too costly and impractical. In other words, a statute Congress enacted to strengthen RFA caused the agency to use the discretion permitted in RFA to conduct fewer regulatory flexibility analyses.⁴⁰

In closing, I would reiterate that we believe Congress should revisit aspects of RFA and that our prior reports have indicated ample opportunities to refine the Act. Despite some progress in implementing RFA and other regulatory reform initiatives since 1980, it is clear from the introduction of H.R. 682 and related bills that Members of Congress remain concerned about the impact of regulations on small entities and the extent to which the rulemaking process encourages agencies to consider ways to reduce the burdens of new and existing rules, while still achieving the objectives of the underlying statutes.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other Members of the Subcommittee might have at this time.

³⁹EPA had certified that the proposed rule would not have a significant impact and, therefore, did not trigger RFA's analytical and procedural requirements. Although we raised questions, we concluded that the analytic methods that EPA's program office used in its original and revised economic analysis, as well as the conclusions the office drew as a result of those analyses, were within the discretion provided by both RFA and EPA guidance.

⁴⁰We made no new recommendations in GAO-06-998T, but we referred to our prior recommendations, noting that clarifying what Congress intends the term "significant economic impact on a substantial number of small entities" to mean would make the implementation of RFA more consistent and help to prevent concerns about how agencies are implementing the Act.

**Contact and
Acknowledgements**

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, on (202) 512-6806 or at mihmj@gao.gov. Tim Bober, Jason Dorn, Andrea Levine, Latesha Love, Joseph Santiago, and Michael Volpe contributed to this statement.

Related GAO Products

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Mr. CANNON. Thank you, Mr. Mihm. We are actually sort of on a roll here. We had two people finish before the yellow light.

Mr. MIHM. We take your guidance, sir.

Mr. CANNON. I think you did this before, Mr. Mihm. Welcome back.

Mr. Shull, you are recognized for 5 minutes.

**TESTIMONY OF J. ROBERT SHULL, DIRECTOR OF
REGULATORY POLICY, OMB WATCH, WASHINGTON, DC**

Mr. SHULL. Thank you very much, and thank you, Mr. Chairman and Mr. Watt, for having me before you to talk about this really important issue.

I want to start from the simple proposition that no agency is in the business of producing regulations for the sake of producing regulations. We ask our agencies to produce regulations to protect the public, to protect all of us who are breathing the air, drinking the water, all of the men and women of America who have to work for a living and go to a job where they want to be safe and healthy.

And small businesses, like all businesses, contribute to the hazards that we face, when we are breathing the air, drinking the water, going on the job, driving on the highways. And it really doesn't matter to all of us, to someone who is breathing dirty air or drinking poisoned water, whether the hazards that we are suddenly experiencing have been put there into our environment by small businesses or large businesses.

But I also want to start from the proposition that small businesses want to be good corporate citizens, and that the best intention for helping small businesses and recognizing the fact that small businesses do face a different kind of hurdle than their larger counterparts when trying to comply with regulations, might need some assistance. But that the answer isn't to give them a free pass in any way, that the answer isn't to burden the agencies whose job it is to protect the public, but rather to help small businesses comply.

We did hear that regulations have produced some costs for the economy and for the businesses who have to comply with them, but I think we also have to recognize that the benefits of regulation have been extraordinary. I mean, you can even look and measure in terms of I.Q. points when we took out lead from gasoline and now that kids aren't breathing that lead in from the air. You can see the measurable benefits, and that is one of many, many examples.

I also want to recognize that, although the Reg Flex Improvements Act that we are looking at today has a lot of concerns about regulation and whether or not they are hindering the competitiveness of American business in the global marketplace, that the economics literature out there just doesn't support the case that in America our regulations are somehow hindering our businesses from competing.

You can look at evidence of, say, plant location decisions. When we have environmental regulations, do plants that manufacture goods suddenly move to areas where there are less stringent environmental regulations? Or you can look at the trade flows: when environmental regulations become more stringent, do pollution-in-

tensive goods start coming in from developing nations to developed nations? And that link just hasn't been shown.

And because of that concern, we really think that there is no basis for the Reg Flex Improvements Act that we are looking at today. And I am concerned that it will really hinder the agencies from doing the good job that they are doing of protecting the people. I am concerned that the analysis itself that agencies have to perform under the Reg Flex Act will become more burdensome.

I mean, already, there is a signal in the bill that a succinct statement is not enough, that we have to have a very detailed explanation. The burden will increase through the scope of it. It would no longer apply just to rule makings that go through the APA notice and comment process, but now it would also apply to guidance documents, general policy statements, interpretive rules, and land management plans, that the periodic re-reviews of rules under the Reg Flex Act, which were for 10-year reviews of rules found to have a SEISNOSE, a significant economic impact on a substantial number of small entities. Since the Regulatory Flexibility Act went into effect, that those now go back to all the rules on the books, even the rules that we know, like the ban on lead in gasoline, just are incredibly important, proven protections.

We are also concerned about SBREFA panels now applying not just to EPA and OSHA rules, which we think were bad enough—it is giving business interests a first bite at the apple for those rules, but also applying to a significant number of other rules. We are also concerned about the SBA Office of Advocacy being put in a compromised position: if it is given regulatory authority over implementing the new requirements of the Reg Flex Improvements Act, that will compromise their role as an independent voice of small business.

And we think that there is a better way. We have outlined some in our prepared statement, and I would like to offer a more complete version of that statement for the record after this hearing.

[The prepared statement of Mr. Shull follows:]

PREPARED STATEMENT OF J. ROBERT SHULL



Testimony of
 J. Robert Shull
 Director of Regulatory Policy
 OMB Watch

Before the
 Subcommittee on Administrative Law
 Committee on the Judiciary
 U.S. House of Representatives

July 20, 2006

Thank you for the opportunity to testify before you today. I am Robert Shull, Director of Regulatory Policy for OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in 1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

We are very concerned about the bill being discussed here today, H.R. 682, 'The Regulatory Flexibility Improvements Act.' While H.R. 682 purports to address the burdens faced by small businesses, the bill will only serve to further drown regulatory agencies in needless analysis, preventing them from promulgating and enforcing the regulations created to protect working families. More effective avenues exist to help alleviate the burden on small businesses while ensuring that workplace, environmental, and civil rights protections stay intact.

- I. **The Regulatory Flexibility Improvements Act is overly broad and will result in wasted public resources and reduced public protections.**

The Regulatory Flexibility Improvements Act amends the Regulatory Flexibility Act by requiring federal agencies to conduct comprehensive analyses of the impacts of federal rules on small businesses. The bill would effect substantial changes from current law, by

1. Expanding the RFA's coverage to include all regulations on the books, even long-proven safeguards such as the ban on lead in gasoline;
2. Inviting paralysis by analysis, by requiring agencies to examine both direct *and indirect* effects of the regulations;
3. Expanding the scope of the RFA to include agency guidance documents, human services rules and land management plans; and
4. Dramatically expanding the scope of rules subject to SBREFA panels.

This far-reaching proposal could have devastating effects, calling into question longstanding health, safety and environmental protections while needlessly burdening agencies and squandering agency resources. Specifically, the bill will do the following:

A. Wastes agency resources on highly speculative assessments.

The bill requires agencies to examine not only direct effects, which are currently assessed under the RFA, but also indirect effects. Agencies face substantial difficulties in attempting to calculate indirect effects. In fact, agency representatives at a recent Senate roundtable suggested this analysis would be so speculative as to be useless for policymakers. The courts have consistently held that RFA does not impose an obligation on agencies to analyze indirect economic effects on entities it does not regulate. Requiring consideration of indirect economic effects would drown agencies in burdensome and highly speculative analyses and paperwork that would impede their ability to promulgate needed protections, such as protections for workers against exposure to deadly chemicals, like crystalline silica.

B. Burdens agencies with redundant and unnecessary analysis.

The bill also requires reviews of all existing 10-year old rules affecting small business. These look-back studies needlessly spend staff time and money to re-justify important and proven health and environmental safeguards, such as airbag safety standards in cars or food safety inspections that prevent against foodborne pathogens like e-coli or listeria. These look-back studies would add to the lengthy regimen of regulatory assessments already performed by agencies, including those required under Executive Order 12866, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the National Environmental Policy Act, among others. The bill also expands the scope of rules subject to the Regulatory Flexibility Act by including amendments to land management plans, rules affecting Indian tribes, IRS recordkeeping requirements, and regulations governing grants to state and local governments, as well as *agency guidance documents*.

C. Threatens valuable protections.

Expanding RFA analysis to include look-backs and indirect effects could put longstanding protections in jeopardy. Agencies would be forced to re-justify proven regulatory safeguards such as lead in gasoline or arsenic in the drinking water. Industry advocates have already singled out EPA's ambient air quality standards for life-threatening soot and smog as a primary reason for expanding regulatory flexibility analysis to include indirect effects. H.R. 682 also extends analytical burdens to a whole new universe of public protections — human services rules, such as those protecting abused and neglected children in federally-funded child welfare programs — by including nonprofits in the definition of small entities and expanding the scope of the RFA to regulations governing grants to state and local governments.

D. Puts corporate special interests ahead of the public interest.

H.R. 682 gives corporate interests an even greater advantage in the regulatory process by giving the head of the Small Business Administration's Office of Advocacy a preview of proposed rules before they are published in the *Federal Register* and increased opportunities to intervene in the process. Current law requires EPA and OSHA to submit draft rules to panels of business lobbyists, and a section of this bill would expand these preview opportunities to all agencies. An additional section would actually give SBA's Office of Advocacy the power to write regulations governing all agencies' compliance with the Regulatory Flexibility Act. Given that Advocacy is a taxpayer-funded voice for business interests, this provision is particularly troubling.

II. Regulation does not always harm U.S. competitiveness and may actually improve it.

Burdensome anti-regulatory measures like H.R. 682 are born out of the idea that regulation will drive small American companies out of business. The real scholarly evidence, however, refutes this claim. While the business community may be hampered in competing in global trade, regulation is not at fault. The business community, however, has nothing to gain by publicizing the real reasons for its difficulties, such as lower wages paid in other countries with which we now have self-destructive free trade agreements. The idea that regulation causes competitive decline is the product not of careful scholarship but, rather, of a multi-million dollar public relations campaign.

These criticisms of regulation are insufficient for four reasons:

- (A) *Regulatory safeguards produce significant benefits for the public.* Citations to the high cost of regulation do not establish that regulation is unwarranted because they completely ignore what we gain from these expenditures. Protecting people and the environment may cost a lot of money, but it also produces far larger benefits. In fact, even the Office of Management and Budget, which is a main proponent of the idea that regulations are too costly, nonetheless reports every year that regulation in the United States generates aggregate benefits that greatly exceed the cost of the federal regulations.¹
- (B) *Not all costs have the same moral or ethical value.* Some regulatory costs represent the cost to industry of doing what it should have done as a good corporate citizen in the absence of regulation. For example, stunning new evidence reveals that U.S. automakers misled the government and the public for years by claiming that the strength of vehicle roofs is unrelated to the serious injuries sustained when vehicles crash and roll over. According to industry documents, Ford denied this link even though its Volvo subsidiary had conducted research demonstrating that strengthening

1. See 2006 Draft Report on the Costs and Benefits of Federal Regulation, (available on-line at <http://www.whitehouse.gov/OMB/inforeg/reports/2006_draft_cost_benefit_report.pdf> Previous reports on the costs and benefits of regulation available at <http://www.whitehouse.gov/OMB/inforeg/regpol-reports_congress.html>).

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car roofs and other improvements are the key to preventing injuries and saving lives in rollover crashes.² If and when the National Highway Traffic Safety Administration issues a rule to safeguard against vehicle roofs caving in during rollover crashes, the cost to the automakers of complying will mean little if it is not offset by the profits earned during the period that the automakers knew of the need for stronger roofs but failed to do anything about it.

- (C) Cost estimates are overblown. Moreover, many claims about regulatory costs are suspicious because they rely on cost estimates that come from industry sources that have an incentive to overstate the costs for regulatory and public relation purposes. According to a recent influential study,

ex ante cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred. This conclusion is not at all surprising in light of the strategic environment in which the predictions are generated. In preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon the regulated entities for information about compliance costs. Knowing that the agencies are less likely to impose regulatory options with high price tags (or to support them during the review process), the regulatees have every incentive to err on the high side.³

One particular estimate of costs, the discredited Crain and Hopkins study commissioned by the Small Business Administration, is significantly overblown.⁴ For example, the familiar estimates that the manufacturing sector in 2000 “shouldered \$147 billion of the \$497 billion onus of environmental, economic, workplace, and tax-compliance regulation”⁵ suffer the same problems just discussed and actually magnify those errors significantly, based on the assumption that regulatory compliance costs should be doubled to account for industry’s public relations campaign against regulatory protections and the expenses of lobbying this very Congress.⁶

2. See Press Release, Public Citizen, “New Report on Auto Industry Data Shows Automakers Misled NHTSA and Public When Denying Link Between Roof Strength and Injuries” (Mar. 30, 2005) (available on-line at <<http://www.citizen.org/pressroom/release.cfm?ID=1909>>).

3. Thomas O. McGarity & Ruth Rutenberg, *Counting the Cost of Health, Safety & Environmental Regulation*, 80 TEX. L. REV. 1997, 1998 (2002).

4. See W. MARK CRAIN & THOMAS D. HOPKINS, THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS (Office of Advocacy, Small Business Admin. RFP No. SBHQ-09-R-0027) (2001).

5. Testimony of National Assoc’n of Manufs. *Hearing on Impact of Regulations on U.S. Manufacturing Before the House Subcomm. on Reg. Affairs, House Comm. on Gov’t Reform*, 109th Cong. (April 12, 2005), at 5 (citing CRAIN & HOPKINS, *supra* note 11, at 27 THS93).

6. See CRAIN & HOPKINS, *supra* note 11, at 10.

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- (D) *Compliance costs are so minuscule that they have minor competitive consequences.* Finally, and most importantly for these purposes, regulation cannot be blamed for a decline in competitiveness or other economic ills because compliance costs are only a very small percentage of total value of the shipments made by manufacturers. On the basis of data from the World Bank, Professor Kevin Gallagher of Boston University finds the "sum of all marginal pollution abatement costs in the United States is less than one percent of value added production."⁷ Department of Commerce data confirm this estimate. This information indicates abatement expenditures are an average of 0.62 percent of the value of shipments of all industries. Industry sectors with high abatement costs only pay between 1.27 and 1.51 percent of the value of shipments.⁸ Indirect costs are derivative of direct compliance costs; since low direct costs generally will produce low indirect costs, regulation overall should have a minor competitive and labor impacts.

The scholarly evidence backs up this claim. Economists have considered the impact of environmental regulations on plant location decisions (do pollution-intensive industries build disproportionate number of new factories in countries or areas of the United States where there is weak environmental regulation?) and on trade flows (do exports from developing to developed countries show an increasing percentage of pollution-intensive goods?). Neither type of study supports a regulation-competitiveness link. I recommend a recent literature review by Professor Sidney Shapiro, which synthesizes the major research on the questions and comes to the following conclusions:

- The leading meta-study of plant location and trade flow studies found that "studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location-decisions have produced estimates that are either small, statistically insignificant, or not a robust to test of model specification." These authors concluded that there is "[o]verall ... relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined."⁹
- According to another survey of the literature, "The vast majority of studies have found no systematic evidence that the share of developing country exports and production is becoming more pollution-intensive. In addition, no studies have indicated that there is substantial evidence

7. Testimony of Prof. Sidney A. Shapiro, *Hearing on Impact of Regulations on U.S. Manufacturing*, 109th Cong. (April 12, 2005), at 5 (text accompanying note 5).

8. *Id.* at 5 (citing Adam B. Jaffe, Steven R. Peterson, Paul R. Portney, & Robert N. Stavins, "Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?", *ECOSYS. 1(1): 132, 141* (1995)).

9. *Id.* at 5-6 (citing Jaffe et al., *supra* note 15, at 141).

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that pollution-intensive industries flee developed countries with relatively high (and costly) environmental standards."¹⁰

III. The Regulatory Flexibility Improvements Act Will Not Meet the Need of Small Businesses.

H.R. 682 was put forward under the banner of relieving regulatory burden to small business, but this legislation puts public protections at stake while failing to get at the heart of what ails small business. The small business community is a major source of innovation and employment in this country. Like their larger counterparts, however, small businesses are also responsible for social ills addressed by regulations, ranging from workplace health and safety problems to environmental pollution.¹¹ Thus, we cannot simply give small businesses a free pass from regulation. At the same time, it can be relatively more expensive for small business to comply with regulations than large companies. Small businesses want to do their part and be responsible; real reforms, then, must help small businesses comply with regulations in order to level the playing field with large businesses while giving the public the protection it needs and deserves.

We already have these reforms. Small firms receive direct government subsidies such as outright and government-guaranteed loans from the Small Business Administration (SBA) as well as indirect preferential treatment through federal procurement requirements and tax provisions. Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with fewer than 15 employees are exempt from the Equal Employment Opportunity Act,¹² and OSHA levies lighter penalties for smaller firms, exempts businesses with fewer than 10 workers from recordkeeping requirements, and provides free on-site compliance consultations.¹³

Small business concerns are inscribed in law. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to give special consideration and voice to small business as part of the rulemaking process as well as expanded judicial review for small businesses wishing to challenge agency decisions.¹⁴ Likewise, the Equal Access to Justice Act gives small businesses special privileges when litigating against agencies: small businesses can recover attorney's fees if they prevail

10. *Id.* at 6 (citing KEVIN O. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 26 (2004)).

11. See Richard J. Pezzo, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998).

12. See 42 U.S.C. § 2000e(b).

13. See OSHA, *OSHA Small Business Assistance: OSHA Benefits for Small Business* (available on-line at <<http://www.osha.gov/dsp/smallbusiness/benefits.html>>).

14. See 5 U.S.C. §§ 601 *et seq.*

in court against a federal agency.¹⁵

Real reforms for small businesses would make these benefits meaningful by clamping down on the ways that large businesses game the rules and claim the status of "small business." Real reform would consider the role of small business in contributing to pollution and other harms to the public and would respond by adequately funding compliance assistance offices in every congressional district, which would be given the resources they need to give small businesses the help that they, in turn, need to be good corporate citizens and comply with the law. This bill does not come close to being real reform; it is a shameful giveaway of the protections we need, and it shamelessly exploits the real needs of small businesses in order to justify this dangerous exercise.

IV. There Is a Better Way.

A. National Business Regulatory Assistance Act

There are better ways to help small business without sacrificing longstanding public protections. The National Small Business Regulatory Assistance Act (S. 1411) would be the first step to strengthening Small Business Development Centers (SBDCs) around the country by launching a pilot in which SBDCs would provide compliance assistance to small businesses. This bill would help level the playing field for small businesses by giving them specialized assistance with understanding and complying with federal regulations, without compromising the public's protections, directly or indirectly; instead, it would actually help some businesses to comply with the regulations that are in place to protect the public.

B. Strengthening Petitions for Rulemaking

Processes already exist that allow both businesses and the public interest to ask federal agencies to address particular regulatory problems. Small businesses are already well aware of the regulations that are particularly burdensome or obsolete. Rather than expanding the Regulatory Flexibility Act to review all federal regulations on the books, small businesses already have the power to petition agencies to revisit specific regulations. Strengthening the petition process by making agencies more responsive to requests from the public would use existing mechanisms to open the door to reforms without drowning agencies in reviews of existing regulations. Moreover, rather than serving a particular constituency, strengthening petitions for rulemaking would benefit all members of the public. It can be used to identify both gaps in public protections as well as areas where reform may be needed.

15. See *id.*, § 504.

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Problems of H.R. 682

Regulatory Flexibility Act	Regulatory Flexibility Improvements Act (H.R. 682)
<ul style="list-style-type: none"> Applies only to rules with direct effects on small businesses 	<ul style="list-style-type: none"> Applies to rules, policy statements and guidance documents, land management plans, revisions or amendments to land management plans, recordkeeping requirements and formal rulemakings with direct and indirect effects to small businesses.
<ul style="list-style-type: none"> Includes regulations impacting small businesses and local governments 	<ul style="list-style-type: none"> Includes regulations impacting small businesses, local governments, Tribal organizations, local labor organizations and professional and trade associations
<ul style="list-style-type: none"> Requires agencies to prepare a regulatory flexibility analysis for all proposed rules and for all final rules, summarizing why the action is being taken and description of how small entities will be impacted. 	<ul style="list-style-type: none"> Regulatory flexibility analysis must contain all provisions of original regulatory flexibility analysis, but must also include a description of alternatives that might maximize benefits and an estimate of "the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities." Final analysis is no longer required to be "succinct," and explanations are amended to be "detailed explanations."
<ul style="list-style-type: none"> The agency is required to respond to public comments. 	<ul style="list-style-type: none"> The agency is required to specifically respond to comments filed by the Chief Counsel of Advocacy, including details of any changes made as a result of the comments.
<ul style="list-style-type: none"> Allows analysis to be either quantified or general. 	<ul style="list-style-type: none"> If agency gives a general description instead of a quantified analysis, it must include detailed explanation of why quantification is not "practicable or reliable."
<ul style="list-style-type: none"> Requires small business panel to review all rules by EPA and OSHA with a significant impact on small entities. 	<ul style="list-style-type: none"> Eliminates procedures for agency heads to delay the analysis before promulgating proposed or final rule.
<ul style="list-style-type: none"> Periodic review of all rules, "which have or will have a significant adverse impact on a substantial number of small entities," going back to ten years before the enactment of the RFA. 	<ul style="list-style-type: none"> Requires small business panel to review all rules that result in "an annual effect on the economy of \$100,000,000 or more," "a major increase in costs or prices," "significant adverse effects" on a variety of economic factors, "a significant impact on a substantial number of small entities."
	<ul style="list-style-type: none"> Periodic review of all rules, regardless of whether they have had or will have a significant impact on a substantial number of small entities. Agencies will submit a report to Congress regarding their findings. The review must include comments by the Regulatory Enforcement Ombudsman and the Chief Counsel of the Office of Advocacy and "the contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule."

Mr. CANNON. Thank you. Let us just ask unanimous consent that you have 5 additional days to submit that. Would that be sufficient?

Mr. SHULL. Thank you very much.

Mr. CANNON. Without objection, so ordered. And, frankly, we understand that you were drawn into this late. That was a compelling statement given what apparently was a short time to prepare, and we thank you for being here.

Mr. Frulla, you are recognized for 5 minutes. Thank you.

**TESTIMONY OF DAVID FRULLA, ESQUIRE, KELLEY DRYE
COLLIER SHANNON, WASHINGTON, DC**

Mr. FRULLA. Thank you, Mr. Chairman, Mr. Ranking Member.

My perspective on the Regulatory Flexibility Act is as a 10-year litigant. I have had over a dozen cases regarding six different agencies, rule-making proceedings, and we have prevailed about half the time. And we have gotten some substantive results. These aren't always things that are high profile, above-the-radar issues. In one case, we ended up with a settlement that involved a scientific re-review of a 67 percent reduction in a quota for sharks that were caught in the Gulf and Atlantic.

That review showed there was no scientific basis for that quota cut. Again, not every regulation is lead in gasoline. There is a lot that the Government does. Sometimes it goes awry. There needs to be checks and balances there. The Regulatory Flexibility Act is an important tool.

And I would also note that a Regulatory Flexibility Act victory is only a first step. It is often a long haul to get an agency to change course. And I also have to tell you, and it is probably not a news flash to anybody here, that Federal agencies don't always listen to Federal judges.

So SBREFA was a step in the right direction and this new legislation, H.R. 682, and equally importantly, the congressional attention that is being paid to the RFA, are right on point. Litigation does impose discipline. We get to see after 10 years weaknesses in the law that litigation shows in the same way as cross examination, but on the legal side.

I would like to applaud especially H.R. 682's efforts to clarify jurisdictional issues and timing issues. We lay this out extensively in my written testimony. To address the foreseeable indirect effects, let me give you one example. A couple of years ago, I think it was, Congress wanted to impose cost-containment standards on what they call WIC-only vendors in the Women, Infant and Children Food and Nutrition Program.

And it was clear that there were to be stores that are WIC-only vendors, that essentially service that community, that were to be regulated and were to have their costs contained. However, the States regulated that level and the directive was for the States to make these changes.

That is outside the Regulatory Flexibility Act as it currently stands, even though these small businesses were clearly the target, and the intended target. We also think it is going to be important to crystallize the Office of Advocacy's role in establishing how other agencies do reg-flex analyses. We had a case with the EPA at one

point, and the EPA's reg flex guidance asks the question in terms of determining economic impact as what the impact of the regulation is on a business's gross revenues.

They say, we don't need to look at profitability, and they said, well, you know, a 1 percent hit on gross revenues, that is not much. Well, it is a lot if you only have a 4 percent profit margin. But the court said the EPA had the discretion to use its own standards. That is something else that needs to be looked at, and that is something that the SBA has issued guidance on.

Other issues we note, the standard of review. Normally, there is essentially what they call a good-faith standard. It is kind of backing up from an arbitrary and capricious standard. That is starting to get pretty toothless in many cases.

I have addressed that in the testimony, some good results and some bad results. We submit that the arbitrary and capricious standard ought to apply to the no significant impact determinations. Clearly in the law, it is in the legislative history, and the same when the final regulatory flexibility analyses are reviewed.

It also should be stated that application of the Reg Flex Act to a particular rule ought to be handled under the *de novo* standard, as should the question of whether an agency has flexibility under a given law. Another case we had, one page of law ended up with 47 pages of regulations and the agency said that they had no flexibility, and it was all required. That doesn't seem to make sense.

Three other points I would like to mention quickly, expedition. Questions of whether the Regulatory Flexibility Act applies should be expedited. We are waiting 6 years for a final decision, when we know the answer from the D.C. circuit that the Reg Flex Act applies to nationwide permitting under the Clean Water Act. Attorneys' fees, got to put a plug in for that. If a small business prevails, they should be able to be awarded attorneys' fees. A victory on reg flex is only the start, and it shouldn't be a war of attrition. And, finally, make sure the Office of Advocacy has the resources they need.

Thank you very much.

[The prepared statement of Mr. Frulla follows:]

KELLEY DRYE
COLLIER SHANNON

H.R. 682:
Regulatory Flexibility Improvements Act

Testimony Before the U.S. House Judiciary Subcommittee
on Commercial and Administrative Law

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July 20, 2006

KELLEY DRYE
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Testimony of David E. Frulla
Before the Subcommittee on Commercial and Administrative Law
House of Representatives Committee on the Judiciary

July 20, 2006

Mr. Chairman and Members of the Subcommittee on Commercial and Administrative Law, I appreciate the opportunity to testify before the Subcommittee's July 20, 2006, legislative hearing on H.R. 682, the Regulatory Flexibility Improvements Act. This legislation should help ensure that the Regulatory Flexibility Act ("RFA"), as amended in 1996 by the Small Business Regulatory Enforcement and Fairness Act ("SBREFA"), is an effective and enforceable tool to require Federal agencies tailor their regulations to the scope and scale of small businesses and other small entities. H.R. 682 shows that its sponsors have been listening to the needs and concerns of small entities, with respect to RFA compliance.

EXECUTIVE SUMMARY

SBREFA made many salutary changes to the RFA, not the least of which are its judicial review provisions. As the Subcommittee knows, SBREFA added these judicial review provisions, at 5 U. S. C. § 611, to ensure federal agencies do more than pay "lip service" to the RFA. See 142 CONG. REC. S3242, S3245 (*daily ed.*, Mar. 29, 1996).

We have extensive experience litigating SBREFA cases.¹ That said, I am appearing before the Subcommittee today in my personal capacity, and not on behalf of

¹ In fact, I believe that I may have litigated as many RFA cases as anyone in the country since SBREFA was enacted. I have been involved in over a dozen RFA cases against six different agencies: the Department of Commerce (regarding various fisheries regulations), the Department of Health and Human Services (regarding the "interim payment" system for home health agency Medicare reimbursement), the Army Corps of Engineers (regarding modification of its Clean Water Act Nationwide Permit System), the Environmental Protection Agency (regarding its Lead Rule), the Federal Communications Commission (regarding its intermodal telephone number porting requirements), and the Food and Nutrition Service (as a friend of the court, regarding its cost-reduction program for so-called "WIC-only" vendors).

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any client. In summary, the decade-long crucible of the litigation process has demonstrated both strengths and weaknesses in the RFA's structure and processes. Congress should now use this experience to improve the RFA and ensure it serves its intended purposes. H.R. 682 addresses many important issues but more needs to be done.

I will first address important changes to the RFA that H.R. 682 would make. Then I will identify an important situation where H.R. 682 addressed an issue, but may not have gone far enough. Finally, I will identify a few issues that H.R. 682 did not address, but that Congress should address, whether in this legislation or elsewhere (for instance, in the appropriations process).

I. H.R. 682 ADDRESSES CERTAIN CHRONIC RFA/SBREFA IMPLEMENTATION PROBLEMS VERY WELL

First, Section 8 of H.R. 682 would clarify a jurisdictional and timing issue that we confronted in *Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 417 F.3d 1272 (D.C. Cir. 2005), reversing 297 F. Supp. 2d 74 (D.D.C. 2003). I represented the National Federation of Independent Business Legal Foundation and a small business homebuilder in their RFA challenge to a major Army Corps of Engineers Clean Water Act rulemaking that implemented new nationwide permits and supporting terms and conditions. The Army Corps had completely and, as the D.C. Circuit held, erroneously disclaimed its obligation to comply with the RFA, by baldly claiming that it was not issuing "regulations." More specifically, *NAHB* reversed a lower court decision which had dismissed RFA and APA claims on the ground that the Army Corps' issuance of these nationwide permits and their terms and conditions did not represent "final agency action." The RFA uses the term "final agency action" in its jurisdictional provisions, 5 U.S.C. § 611(a).

We were able to argue successfully at the appellate level in *NAHB* that the Army Corps' actions relating to the RFA were complete when the agency concluded its rulemaking proceedings and that no set of facts (such as the application of the nationwide permit standards in the context of an actual permit application), could or would make the RFA claim any more ready for review. By changing the finality standard in Section 611 from "final agency action" to "publication of the final rule," Section 8(c) of H.R. 682 would remove this point of confusion on jurisdiction and the timing of judicial review.

The clarity H.R. 682 would provide represents a real benefit to the small business community. We filed suit in *NAHB* in 2000, and it was not until 2005 that the appeals court made its decision. And we are still awaiting a final order from the district court effecting the settlement of the case that followed from the D.C. Circuit ruling. Meanwhile, the Army Corps is gearing up for a new permit rulemaking as these nationwide permits are only valid for five years.

Second, H.R. 682 would significantly enhance the Small Business Administration Office of Advocacy's coordinating role for Federal Government-wide RFA compliance. For instance, Section 10(a) of H.R. 682, proposing to enact a new RFA section, 5 U.S.C. § 613, would authorize the Office of Advocacy to develop omnibus RFA implementing regulations that all other agencies would be required to follow, absent approval from the Office of Advocacy. Currently, there are almost as many sets of agency RFA implementing regulations as there are Federal agencies. This is not constructive.

For instance, the Environmental Protection Agency's RFA implementing guidelines authorize the agency to conduct RFA economic impact analyses based on small businesses' revenues, rather than their profitability. While any fair assessment of a

regulation's economic impact ought to be measured against profits (and thus the entity's ability to pay for the regulation), a district court in Washington, D.C. recently deferred to the EPA guidelines. *Ad Hoc Metals Coalition v. Johnson*, 1:01cv0766 (PLF) (D.D.C., Jan. 20, 2006), *slip op.*, at 12-13.² Uniform Office of Advocacy regulations consistent with its Guide for Government Agencies would have changed the deference calculus.

More generally, the caselaw is mixed regarding the level of deference accorded to the Office of Advocacy in its efforts to ensure RFA compliance. Certain cases are very respectful of positions and submissions from the Chief Counsel. See, e.g., *Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1435 (M.D. Fla. 1998) (*SOPA I*) (terming the Office of Advocacy as the Federal Government's RFA "watch dog"). However, other cases are not deferential. *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1044 (D.C. Cir. 1999) (no deference owed to either EPA's or SBA's RFA interpretations), *modified on other grounds*, 195 F.3d 4 (D.C. Cir. 1999), *aff'd in part and rev'd in part on other grounds, sub nom.*, *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001).

Deference ought to be accorded to the Office of Advocacy. The Chief Counsel and his experienced staff have a detailed familiarity with the RFA and its requirements, small entities' ability to accommodate regulations, and the benefit of an overall perspective on the many and varied ways that rulemaking agencies attempt to avoid or defeat their RFA obligations. By law and Executive Order, the Office of Advocacy has been an RFA teacher. In granting the Office of Advocacy an explicit regulation-writing

² The court explained, "The RFA does not define 'significant impact on a substantial number of small entities,' grants neither authority nor responsibility to any entity to develop a uniform definition of SEISNSE, and provides no guidance as to how certification decisions are made. Instead, the RFA grants federal agencies broad discretion regarding how key terms in the act should be defined and how certification decisions should be made." *Id.*, *slip op.*, at 12.

role, H.R. 682 should not only promote more consistent RFA application and compliance across the government, but also confirm that the primacy of the expert Chief Counsel for Advocacy on the RFA issues within his ken. In addition, by extending the Chief Counsel's authority to comment and intervene to Administrative Procedure Act issues more generally (*see* H.R. 682, § 10(c)), the legislation recognizes the integral links between RFA compliance and APA standards.³

Section 4(b)(3) of H.R. 682 also requires rulemaking agencies to address specifically to Office of Advocacy comments in response to a proposed rule. This measure should help the small business community, and the courts, identify when rulemaking agencies are acting in the face of, or even inconsistent with, conclusions and guidance from expert agency.

For its part, Section 8(d) of H.R. 682 constructively clarifies the Chief Counsel's authority to intervene in actions under the RFA against Federal agencies, by specifically delineating that authority as coextensive with the scope of RFA judicial review. The SBA can have a unique role to play in RFA litigation, especially given the RFA's unique and tailored remedial provisions.

For instance, in *United States Telecom Ass'n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005), in my prior law firm, we represented small, generally rural wireline telephone carriers in their challenge to a Federal Communications Commission order requiring all wireline carriers to develop and maintain the infrastructure to permit their customers to transfer, or "port," their phone numbers to their wireless phones even if these customers moved from one physical location to another. In that case, the FCC had disclaimed its

³ For instance, the RFA's applicability is principally tied to the APA's standards for notice and comment rulemaking under 5 U.S.C. § 553. See 5 U.S.C. §§ 601(2) (defining a "rule" under the RFA); 604 (initial regulatory flexibility analysis standards); and 605 (final regulatory flexibility analysis standards).

RFA obligations, arguing that it had merely issued an interpretative ruling in response to a petition for rulemaking, which it also likened to adjudication. The D.C. Circuit disagreed, and held the agency had developed a "legislative rule" requiring RFA compliance. 400 F.3d at 40-41. The court enjoined the FCC from enforcing the rule against small entities until the agency had complied with the RFA. *Id.* at 43-44. While the injunction came approximately fifteen months after the rulemaking, with the SBA Office of Advocacy's assistance, our clients were still able to preserve enough of the *status quo* for the injunction to be effective.

More specifically, during the pendency of the case, state utility commissions had employed their limited authority to grant "waivers" to petitioning companies that were subject to the FCC's porting order. The FCC Bureau that developed the rule had preemptively informed these state commissions that they should not grant any of the waiver requests. Whether or not these state commissions would have complied with the bureau's edict, FCC Chairman Michael Powell ultimately countermanded it. He did so as part of a settlement with the SBA Office of Advocacy to resolve the SBA's intervention in our case, on the eve of the SBA's filing its *amicus* brief supporting our position. SBA's litigation role, even stopping short of briefing and argument, served an important and creative function in the overall arc of the litigation.

Third, H.R. 682 addresses another long-standing problem relating to what are called "indirect" regulatory impacts. More specifically, agencies often claim, based on a long-standing line of cases, that the impacts of their regulations should not be counted for RFA purposes if they do not directly impact small entities, or else they design their regulatory schemes to impact indirectly small entities, perhaps in part to avoid or limit

RFA requirements. See, e.g., *Nat'l Women, Infants, and Children Grocers Ass'n v. Food and Nutrition Svc.*, 416 F. Supp.2d 92, 109-10 (D.D.C. 2006) (rejecting RFA challenge because the interim final rule imposed its requirements on state agencies administering the WIC program even though small business WIC-only grocery stores were the professed "targets" of the rule). This case relied on *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001), which held that "application of the RFA does not turn on whether particular entities are the 'targets' of a given rule." The origins of this narrowing construction of the RFA's scope are sketchy, and non-statutory, and H.R. 682 should correct this matter.⁴

Section 3(b) of H.R. 682 would constructively address this situation by extending the term "economic impact" under the RFA to "any indirect economic effect on small entities which is reasonably foreseeable and results from such rule . . ."

II. H.R. 682 COULD DO MORE TO ENSURE COURTS RECOGNIZE THEIR AUTHORITY TO REQUIRE THAT AGENCIES UNDERTAKE DETAILED, CAREFUL RFA ANALYSES

H.R. 682's findings, set forth in Section 2, state clearly that rulemaking agencies need to do more to understand the impacts their proposed regulations have on small entities, undertake outreach to small entities in the regulated community, and develop ameliorative alternatives.⁵ To address these shortcomings in agency RFA analyses, the

⁴ These RFA "indirect regulation" cases stem from *Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327, 432 (D.C. Cir. 1985). See, e.g., *Cement Kiln*, 255 F.3d at 869. For its part, *Mid-Tex* derived the standard from the RFA's preamble, rather than its operative terms. See 773 F.2d at 341. A statute's operative terms should control over its preamble. *Ass'n of American Railroads v. Condit*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Yacco and Miss. Valley R.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889), particularly when the operative language establishes a specific definition which declares what a term "means" [and] is binding upon the court." *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1133-34 (8th Cir. 1982), *relying on Colantu v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979).

⁵ RFA applicability and Section 605(b) certifications have been the subject of much SBREFA litigation to date, but they are only threshold issues; ultimately, to be truly effective, as the findings

bill, in the main, imposes more detailed analytical requirements on agencies in Section 4. Section 4(a) also constructively requires agencies to affirmatively collect information to estimate the number and type of small entities to which a proposed rule would apply, rather than allowing an agency to excuse shoddy outreach and investigation based on 5 U.S.C. § 603(b)(4)'s current "feasib[ility]" limitation.⁶ The legislation would also promote more relevant RFA analyses by requiring an agency to consider the cumulative impacts of its regulations on small businesses, by adding a new sub-section (b)(6) to Section 603.

Simply requiring agencies to undertake more analyses may not, however, solve the problem that H.R. 682's Findings correctly identify. H.R. 682 does not, but should, ensure adequate enforcement authority for these new requirements. We have had success in RFA litigation when a court carefully considers an agency RFA's analyses under the APA's "arbitrary and capricious" standard. But in our experience, not all courts conduct sufficiently careful reviews of agencies' RFA analyses.

On the positive side of the ledger, in *SOFA I*, the Federal court in Tampa, Florida was able to recognize from personal, real world experience that a 50% shark fishing quota reduction would have a significant economic impact on a substantial number of small business shark fishermen, 995 F. Supp. at 1436, notwithstanding the Commerce

recognize, RFA requirements and attendant litigation must evolve to address whether agencies are conducting adequate regulatory flexibility analyses and effectively developing ameliorative alternatives.

⁶ Such an obligation has been created in certain contexts under the National Environmental Policy Act. "In general, NEPA imposes a duty on federal agencies to gather information and do independent research when missing information is 'important,' 'significant,' or 'essential' to a reasoned choice among alternatives." *Oregon Environmental Council v. Kutzman*, 817 F.2d 484,495 (9th Cir. 1987) (citations omitted). Certain courts have already found that NEPA's substantive requirements are analogous to duties imposed on resource agencies under the RFA. See *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997).

Department's repeated rationalizations and diversionary arguments to support its flawed Section 605(b) no significant impact certification. *Id.* at 1433-37. *See also Nat'l Ass'n of Psychiatric Health Sys. v. Shalala*, 120 F. Supp.2d 32, 43-44 (D.D.C. 2000) (carefully reviewing cursory, hedged, and contradictory Section 605(b) certification and granting relief).

In so doing, *SOFA I* applied the APA's "arbitrary and capricious standard" and rejected application of the more deferential "without observance of procedure" standard of review. 995 F. Supp. at 1425.⁷ This decision is consistent with SBREFA's legislative history⁸; for its part, the RFA currently states more generally that courts are to review agency RFA compliance under Administrative Procedure Act standards. *See* 5 U.S.C. § 611(a)(1). The SBA Chief Counsel for Advocacy had intervened in *SOFA I* on this point, recognizing the hollowness of the "without observance of procedure" standard of review.

⁷ The court's commitment to ensuring the Commerce Department complied with the RFA made *SOFA I* a seminal case – and one that provided effective relief. In November 2000, after repeated, failed agency efforts to rationalize its original Section 605(b) "no significant impact" certification, two stem reported decisions and a special master finding that the agency had acted in bad faith with respect to the plaintiffs' RFA claims, the shark fishermen and the Department of Commerce settled the case. *See Southern Offshore Fishing Ass'n v. Atienza*, 2000 WL 33171065 (M.D. Fla., Dec. 7, 2000) (prior proceedings reported sub nom. at *SOFA I*, *supra*, and *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp.2d 1336 (M.D. Fla. 1999) (*SOFA II*)). As part of the settlement, the parties agreed to an independent scientific review of the scientific data and analyses used by the Government to set these quotas. That independent review did not support the Commerce Department's scientific justifications for the quota reductions. The Committee should note that the Court lacked the expertise (and maybe the authority under the APA) to address the flaws in relevant agency scientific analyses that were so evident to the scientific review panel convened as a result of the settlement. *See SOFA I*, 995 F. Supp. at 1432-33.

⁸ According to SBREFA's legislative history: "[I]f the court finds that a final agency action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, the court may set aside the rule or order the agency to take other corrective action." 142 CONG. REC. 53245 (daily ed. Mar. 29, 1996) (statement of Sen. Bond). Similarly, SBREFA's main drafter confirmed sub-section 611(a)(1) & (2)'s express terms, stating:

... Review under these sections is not limited to the agency's compliance with the procedural aspects of the RFA; final agency actions under these sections will be subject to the normal judicial review standards of Chapter 7 of Title 5.

142 CONG. REC. E571-01, E574 (daily ed. Apr. 19, 1996) (remarks of Rep. Hyde). Chairman Hyde further specifically stated that the "normal" standards include the "arbitrary and capricious" standard. *Id.*

However, the standard of review for RFA analyses in certain cases is verging on this latter-referenced, essentially toothless standard. For instance, *Nat'l Women, Infants, and Children Grocers Ass'n* concluded that, "Agencies need only engage in a 'reasonable' and 'good faith effort' to carry out the mandate of the RFA Further, the RFA is a purely procedural, as opposed to a substantive, mandate; RFA 'requires nothing more than that the agency file a final regulatory flexibility analysis demonstrating a reasonable good-faith effort to carry out the RFA's mandate.'" 416 F. Supp.2d at 108 (quoting *Alenco Communs. Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000), and *United Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)) (citations omitted).

I am concerned that, under these latter cases, especially with the new provisions in Section 4 of H.R. 682, if it is enacted, an agency would be tempted to substitute bulk for quality in its analyses, expecting a court would consider the development of voluminous analyses to equate with a good faith effort, notwithstanding the quality of conclusions contained in the analyses. Recognizing courts are loath to tackle reams of data and analyses, some agencies are already on occasion, if not as a *modus operandi*, filling the RFA decision-making record with impenetrable layers of economic information, but failing to take the important, subsequent step of distilling and analyzing this information, so as to assist the decision-makers and the public to develop flexible regulatory alternatives.

H.R. 682 should thus amend Section 611 of the RFA to clarify the applicable standard of review: Agency decisions regarding whether the RFA applies and whether a an agency's authority to promulgate a rule under a statute permits regulatory flexibility⁹

⁹ Agencies often claim (sometimes, we believe, inappropriately) that their general statutory grants of authority do not accord them any flexibility regarding small entities as to the voluminous details of the

represent questions of law that a reviewing court should consider *de novo*. Subsequent agency analyses contained in Section 605(b) certifications and regulatory flexibility analyses should be subject to the APA's "arbitrary and capricious" standard of review.

Congress should also consider clarifying the RFA to state that agencies need to complete a full RFA analysis if there is a doubt. The RFA's legislative history makes this point. After reviewing the RFA's legislative history, a district court has explained "that '[t]he legislation is intended to be as inclusive as possible, and doubts about its applicability should be resolved in favor of complying with the provisions of the Act.'" *NAHC*, 135 F. Supp. 2d at 168 (quoting 126 CONG. REC. H24589 (Sep. 8, 1980) (House Statement of RFA Issues) (alteration in original)). Accordingly, "[t]he statement's context clearly shows that Congress intended that agencies err on the side of caution in determining whether to perform regulatory flexibility analyses." *Id.* However, the import of this important section of legislative history can be blunted, if not negated entirely, by the good faith review standard, under which certain agencies are back-stopping questionable Section 605(b) certification with cursory and flimsy regulatory flexibility analyses.

III. ADDITIONAL MATTERS THAT CONGRESS SHOULD ADDRESS

I would now like to offer some constructive, discrete steps that Congress can take to provide tools for those of us who sometimes need to secure agency RFA compliance through litigation.

regulations they implement. For instance, in *National Association for Home Care v. Shalala*, 135 F. Supp.2d 161 (D.D.C. 2001) (*NAHC*), the Health Care Financing Administration claimed that one page of statutory language in the Balanced Budget Act of 1997 accorded it essentially no flexibility in how it developed and implemented forty-seven Federal Register pages of regulatory analyses and requirements imposed on small home health care providers. See also *Greater Dallas Home Care Alliance v. United States*, 36 F. Supp.2d 765 (N.D. Tex. 1999).

First, Congress should explicitly provide for expedited judicial review regarding whether the RFA applies. Agencies are still claiming that binding, widely-applicable actions are not legislative rules subject to the RFA. *USTA* and *NAHB*, discussed above, are notable examples. In fact, in *NAHB*, we have been alternatively litigating and waiting since we filed suit in June 2000 for a final decision that the Army Corps should have applied the RFA. Indeed, we waited for well over three years for the district court to (erroneously) dismiss the case for lack of jurisdiction.

Second, the RFA's judicial review provisions should be amended to provide for attorneys' fees under the EAJA whenever a small entity prevails on an RFA/SBREFA claim. Small entities and associations representing them often lack the funds to sustain RFA litigation, particularly once it reaches the often-protracted remedy phase. RFA litigation and compliance efforts should not become a war of attrition for these often economically marginal entities and associations representing them. See, e.g., *United States Telecom Ass'n v. FCC*, 2005 U.S. App. LEXIS 18599 (D.C. Cir., Aug. 25, 2005) (denying EAJA award to prevailing small business associations).

Finally, Congress should recognize that the Office of Advocacy will likely require more resources, especially if H.R. 682 is to expand its regulatory and oversight role. Such a public investment in RFA compliance pays dividends in terms of "more just application of the laws and more equitable distribution of economic costs, which will ultimately serve both the society's and the government's best interests." See 126 Cong. Rec. H24589 (Sep. 8, 1980).

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I appreciate the opportunity to testify before the Subcommittee on Commercial and Administrative Law, and hope that the Committee on Judiciary and the Congress as a whole will act promptly and decisively to make the SBREFA-improved RFA even stronger and better.

Mr. CANNON. Thank you, Mr. Frulla.

I appreciate all your testimony, and I recognize myself for 5 minutes to ask some questions.

It sounds like there is consensus that there are some improvements we can make and we need to try and achieve that in addressing this bill.

Mr. Shull, recognizing you didn't have time to prepare, and you have heard what the other witnesses have said, I don't want to put you on the spot in this regard, but do you either have things that you would like to propose that we do better in the Regulatory Flexibility Act, or things that you have heard today—do things come to mind that you would oppose as you consider what has been said today?

Mr. SHULL. Yes, sir. I actually think that if the goal is to serve small businesses, that there are better ways other than the Reg Flex to go about serving that need. And, actually, something that would be in the jurisdiction of this Committee—and that would serve not just small businesses but really all of us—might be to look at the petitions for rule-making under the APA.

Because it can take a really long time for either public interest groups who have identified a need for new protections or more increased protections, or for business groups that have identified a standard that is out of date and they have a new way, a better way, of going about it.

With the petition for rule-making process, what we can do is bring to the agencies a specific rule that needs to be improved and call for specific improvements. But the agencies can take a really long time to respond to the petitions or to do anything about it once they have recognized the need for improvement. I mean, it took over 10 years, and I don't know how many court battles, to get OSHA, after it recognized the need for improving the standard on hexavalent chromium, to actually get about the work of doing it, of protecting workers.

So I think that that would be a better approach, something that is evenhanded that applies to business groups and public interest groups as well, and anybody else out there who sees a need for improvement, and it is more targeted. It doesn't drain the agencies' resources into going back and reopening the case for rules that we already know need to stay on the books and for just really sort of this meat ax approach, a clumsy approach, as opposed to a focused, targeted approach, where small businesses can bring up the rules they think need to be fixed, other groups can pull up needs that need to be met.

I mean, there are other approaches as well, and there I think things outside of this Committee's jurisdiction that might also be very helpful for small businesses, that would help businesses comply without burdening agencies or without giving them a free pass from regulatory compliance. And one of them would be compliance assistance and making sure that there are compliance assistance offices in every congressional district, that can go about the work of helping small businesses understand what regulations they need to comply with and to help them figure out how to go about doing it.

Plain language in regulation—if it is easier for businesses or anybody else to read the regulations and understand them. There was a bipartisan bill that Mrs. Miller and Mr. Lynch over on the Government Reform Committee proposed that would not do a thing about weakening regulatory standards, but just change the language in which they are written so that they are easier to comply with.

I think that is another way for reducing cost without reducing the level of protection. And there are other ideas—for example, the small business gateway I have heard proposed—basically, informational resources, helping small businesses get the information they need in order to go about the work of being a good corporate citizen, which I think that we all agree they want to be.

Mr. CANNON. Thank you. Have you been involved at all with our APA review process?

Mr. SHULL. Actually, I haven't, but I have followed it from afar and I look forward to getting more involved.

Mr. CANNON. It has been a little bit arcane in the sense of hidden away, boxed up in an ark with some very, very smart people working on it. I am hoping that we can move that at some phase into a Wikipedia format so that it is online and people can contribute. I think that might be an easy way for you to get engaged and see what academics and others are looking at and bring it down to the real world of advocacy that you are thinking of.

And we would invite you and you may want to talk to staff about how you can be engaged prior to that if you are interested. We appreciate your ideas.

Mr. SHULL. I appreciate that.

Mr. CANNON. I don't know if you know, we have a hearing next week on the 60th anniversary of the APA.

Mr. SHULL. I will be here.

Mr. CANNON. An arcane area of the law, but really actually, in the end, the most important. Thank you. My time has expired.

Mr. Watt, you are recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman, and I thank the witnesses for being here, apologize for being a little late.

At the end of the day, I guess this is about a bill that is before us and whether it is supportable as written. I think I heard Mr. Shull's opinion on that. I am not sure I heard anybody else's.

Mr. Sullivan, do you support H.R. 682 as written, or, if not, is there another, better bill? I understand there is a bill pending on the Senate side, S. 1388. Which one of those is better?

Mr. SULLIVAN. Both bills improve the Regulatory Flexibility Act. A little bit of a dilemma in H.R. 682, if it were passed into law tomorrow or next week, my office does not have the resources to implement it effectively.

The Senate bill that you refer to is a more targeted approach and contains many of the needed reforms of 682.

Mr. WATT. Mr. Mihm, does the Administration support this 682? Can you speak for the Administration?

Mr. MIHM. GAO, the Government Accountability Office. I was actually hoping Mr. Sullivan would take the whole 5 minutes, but since he didn't, I will have to answer your question.

As a congressional support agency, we don't typically support legislation—

Mr. WATT. I am sorry, and I am not trying to put you on the spot.

Mr. MIHM. But I will say, sir, that many of the types of concerns that our work has identified in the past about the lack of standardization and clarity in the RFA are, is what the bill is designed to address. In that sense, those types of legislative actions would be a step forward.

Mr. WATT. Mr. Sullivan, you have mentioned secondary and tertiary indirect impacts on small business. I was kind of shuddering to think if the current law requires an assessment of direct impact, I can't even think of anything that wouldn't have some secondary, tertiary, indirect impact on small business and whether we are setting Government agencies up to spend all their time evaluating secondary, tertiary, indirect impacts. It seems to me burdensome enough to require them, expect them to do an assessment of what is foreseeable, not an academic exercise of what may be some possible impact.

Talk to me about the cost of secondary, tertiary, indirect impact analysis, if you would.

Mr. SULLIVAN. Thank you, Congressman Watt. H.R. 682 actually balances that very question that you asked, and it does so by, I believe, expecting or mandating agencies to do impact analysis on those impacts that are reasonably foreseeable.

Let me use an actual case example of how this works, because the words secondary and tertiary I think do—

Mr. WATT. And that compares with what is the current standard?

Mr. SULLIVAN. Currently, when an agency regulates, they look at who must comply directly with a regulation. After September 11th, when the then-referenced agency, INS, decided to limit visitor visas, they were limiting foreign visitors who come to the United States the time allowed to stay in the United States. Those were the direct impact of an INS-proposed rule.

Now, how it should work, and what H.R. 682 would require INS to do, is to say, all right, is border security important? Yes. Let us look at how long we know visitors in the United States, foreign visitors, are legally in the United States, do the analysis.

Now, who is impacted by limiting that length of stay? Tourism, high-end vacation homes, pouring millions of dollars into many destination spots, millions of dollars for Canadians crossing the border and going to destination spots in the United States. That type of analysis, the analysis of looking, well, if we limit their stay to 15 days, this is the economic impact, if we limit their stay to 30 days, here is the economic impact—that type of analysis, which actually is not very difficult, is all secondary impact analysis.

And my office—

Mr. WATT. So you are talking about foreseeable under this—

Mr. SULLIVAN. Reasonably.

Mr. WATT. Reasonably foreseeable under this bill. What is the language in the current—

Mr. SULLIVAN. The language is silent on that, and, in fact, the courts have interpreted it only to require direct impact. So INS did

not violate the letter of the law as it has been interpreted in courts, and David Frulla's testimony mentions those court decisions, as well as my testimony.

But, when you step back, you have got to think, shouldn't INS have informed the public through the notice and comment process that you are more familiar with your understanding of the Administrative Procedure Act to say, we are thinking of limiting visitor stay. And we are thinking of limiting those foreign visitors for about 15 days, as opposed to the current 30-day period. This is how we believe it will impact travel agencies, tourist destinations, white water rafting and outfitting companies, and we want you, the public, to comment on that type of analysis.

That does not happen now under the Reg Flex Act, but it should happen, because it informs the regulatory process, and it informs agencies like INS on how to have a better, more well-informed regulation that is finalized. That is the need for the secondary impact analysis.

Mr. WATT. There is nothing in the bill that really requires a tertiary impact? You are just talking about reasonably foreseeable?

Mr. SULLIVAN. Reasonably foreseeable. And, again, it gets at what should agencies be doing that is responsible to inform the rule-making process? All over the country, we have States who are left in the position through delegated laws, whether that be environmental laws, safety and health laws, that passed these enormous mandates by the Federal Government that says protect the environment and you figure it out. Comply with the Clean Air Act standards, but you figure out how you regulate your own State.

And these folks don't have chief counsels for advocacy. They don't have reams of chief economists. They need help in the Federal Government to actually lay out, here is how it may impact when you choose these different decisions. So there is a responsibility, I think, to help the State regulators figure out what should they be doing that is both cost effective and protective through the regulatory regimen that they are faced with.

Mr. WATT. I am way out of time, but if the Chairman will indulge me, and I would like to get—

Mr. CANNON. I can't see the red light.

Mr. WATT. Mr. Mihm said he doesn't want to comment on which one of these bills is better. I did want to get Mr. Frulla on the record about whether he prefers the Senate bill or this bill, and even in light of Mr. Shull's disposition not to be doing any of this, I guess, even in that context, whether just kind of a straightforward one or two sentences on which one of these bills you would prefer. Just for the record.

Mr. FRULLA. I will be intensely practical. I think that the Senate bill is a little more targeted. This is obviously a little more thoroughgoing a bill. The most important thing is for folks to start to get to the business of reconciling these bills so that we can get the law fixed in a constructive way that everybody can agree on and work together on.

I think the bills ought to come together, same place as Mr. Sullivan, essentially, and I think it is an important thing to do. And I don't want a little bit of disagreement on the margins to be some-

thing that holds this up because this is important to a lot of small businesses.

Mr. WATT. Mr. Shull?

Mr. SHULL. I think maybe the way I can say it is by saying that although we object to the core elements that are there in both bills, it is worth noting that the Senate version of this bill does not have the sections that would give new regulatory authorities to the SBA Office of Advocacy, which we find a particularly additional problematic element of the bill. Because the voice of small business, we think, shouldn't be in the business of telling agencies how to comply with the law.

Mr. WATT. Rather than telling them what is too burdensome.

Mr. SHULL. Right.

Mr. WATT. Okay, thank you, Mr. Chairman.

I thank the witnesses. That was very informative.

Mr. CANNON. The gentleman yields back.

Let me also thank the witnesses.

I ask unanimous consent that the record be left open for 10 days for follow-up questions by Members of the panel. Without objection, so ordered.

Thank you for coming. This has been actually quite insightful, very interesting.

And I know, Mr. Shull in particular, the idea of speedy decisions, we are plagued today with a number of cases where agencies are just not deciding, and that is in some cases bad for business. Often, it is bad for consumers, and so we look forward to your suggestions if we ever get to a public forum with our APA review, which I think would be helpful.

Because I think, I think, is really the key to business. Industry moves so quickly, things happen so quickly in America today, a danger that didn't exist yesterday is here today and devastating.

Perhaps tomorrow, the opportunity for business to significantly improve the quality of their products by having standards like the FDA's good manufacturing practices for nutritional supplements, we are just waiting for them. It doesn't really matter much what they are. They just need to be there and then consumers will have an idea of what they are getting, what the quality is of what they are getting.

So the opportunity to improve how we regulate ourselves I think is significant. So we thank you for being here today.

And, with that, we will adjourn.

[Whereupon, at 1:06 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD
REVISED PREPARED STATEMENT OF J. ROBERT SHULL, DIRECTOR OF REGULATORY
POLICY, OMB WATCH, WASHINGTON, DC



Testimony of
J. Robert Shull
Director of Regulatory Policy
OMB Watch

Before the
Subcommittee on Administrative Law
Committee on the Judiciary
U.S. House of Representatives

July 20, 2006

Thank you for the opportunity to testify before you today. I am Robert Shull, Director of Regulatory Policy for OMB Watch. OMB Watch is a nonprofit, nonpartisan research and advocacy center promoting an open, accountable government responsive to the public's needs. Founded in 1983 to remove the veil of secrecy from the White House Office of Management and Budget, OMB Watch has since then expanded its focus beyond monitoring OMB itself. We currently address four issue areas: right to know and access to government information; advocacy rights of nonprofits; effective budget and tax policies; and the use of regulatory policy to protect the public.

We are very concerned about the bill being discussed here today, H.R. 682, "The Regulatory Flexibility Improvements Act." While H.R. 682 purports to address the burdens faced by small businesses, the bill will only serve to further drown regulatory agencies in needless analysis, preventing them from promulgating and enforcing the regulations created to protect working families. More effective avenues exist to help alleviate the burden on small businesses while ensuring that workplace, environmental, and civil rights protections stay intact.

- I. **The Regulatory Flexibility Improvements Act is overly broad and will result in wasted public resources and reduced public protections.**

The Regulatory Flexibility Improvements Act amends the Regulatory Flexibility Act by requiring federal agencies to conduct comprehensive analyses of the impacts of federal rules on small businesses. The bill would effect substantial changes from current law, by

1. Expanding the RFA's coverage to include all regulations on the books, even long-proven safeguards such as the ban on lead in gasoline;
2. Inviting paralysis by analysis, by requiring agencies to examine both direct *and indirect* effects of the regulations;
3. Expanding the scope of the RFA to include agency guidance documents, human services rules and land management plans; and
4. Dramatically expanding the scope of rules subject to SBREFA panels.

This far-reaching proposal could have devastating effects, calling into question longstanding health, safety and environmental protections while needlessly burdening agencies and squandering agency resources. Specifically, the bill will do the following:

A. Waste agency resources on highly speculative assessments.

The bill requires agencies to examine not only direct effects, which are currently assessed under the RFA, but also indirect effects. Agencies face substantial difficulties in attempting to calculate indirect effects. In fact, agency representatives at a recent Senate roundtable suggested this analysis would be so speculative as to be useless for policymakers. The courts have consistently held that RFA does not impose an obligation on agencies to analyze indirect economic effects on entities it does not regulate. Requiring consideration of indirect economic effects would drown agencies in burdensome and highly speculative analyses and paperwork that would impede their ability to promulgate needed protections, such as protections for workers against exposure to deadly chemicals, like crystalline silica.

B. Burden agencies with redundant and unnecessary analysis.

The bill also requires reviews of all existing 10-year old rules affecting small business. These look-back studies needlessly spend staff time and money to re-justify important and proven health and environmental safeguards, such as airbag safety standards in cars or food safety inspections that prevent against foodborne pathogens like e-coli or listeria. These look-back studies would add to the lengthy regimen of regulatory assessments already performed by agencies, including those required under Executive Order 12866, the Paperwork Reduction Act, the Unfunded Mandates Reform Act, and the National Environmental Policy Act, among others.

The bill also uses a more expansive definition of "rule" than used in the original Regulatory Flexibility Act. H.R. 682 amends the definition of rule to refer to 5 USC 551(4), which defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." This expanded definition means that regulatory flexibility analysis will also apply to guidance documents and policy statements as well as proposed and final rules. The bill also expands the scope of rules subject to the Regulatory Flexibility Act by including amendments to land management plans, rules affecting Indian tribes, IRS recordkeeping requirements, and regulations governing grants to state and local governments. These changes drastically expand the scope of the Regulatory Flexibility analysis requirements and will needlessly drown agencies in burdensome analysis every time the agency seeks to act in any way.

Moreover, the Regulatory Flexibility Improvements Act has made this analysis more onerous by requiring that the analysis to be more detailed and quantitative than it was previously. Not only will agencies have to perform Reg Flex analyses more often, they will have to spend more time doing each analysis. While the current law gives equal weight to narrative rather and quantitative explanations of the burden of regulations on small entities, H.R. 682 would compel agencies to

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perform quantitative analysis of burden by requiring agencies seeking to do non-quantitative analysis to explain why a quantitative analysis was not possible.

C. Threaten valuable protections.

Expanding RFA analysis to include look-backs and indirect effects could put longstanding protections in jeopardy. Agencies would be forced to re-justify proven regulatory safeguards such as lead in gasoline or arsenic in the drinking water. Industry advocates have already singled out EPA's ambient air quality standards for life-threatening soot and smog as a primary reason for expanding regulatory flexibility analysis to include indirect effects. H.R. 682 also extends analytical burdens to a whole new universe of public protections — human services rules, such as those protecting abused and neglected children in federally-funded child welfare programs — by including nonprofits in the definition of small entities and expanding the scope of the RFA to regulations governing grants to state and local governments.

The bill also ties the hands of agencies by eliminating procedures for delaying analysis. Under current law, the agency can continue to promulgate a regulation before it has finished the regulatory flexibility analysis, if the agency head believes it is necessary to do so. H.R. 682 eliminates these commonsense procedures, instead forcing agencies to delay needed protections until the analysis is finished. Imagine if emergency regulations to protect miners after the Sago incident, for instance, had to be delayed until the agency could finish this onerous and highly speculative analysis. Even when the need for the regulation has been clearly proven, the agency would have to wait for the regulatory flexibility analysis before it could proceed.

D. Put corporate special interests ahead of the public interest.

H.R. 682 gives corporate interests an even greater advantage in the regulatory process by giving the head of the Small Business Administration's Office of Advocacy a preview of proposed rules before they are published in the *Federal Register* and increased opportunities to intervene in the process. Current law requires EPA and OSHA to submit draft rules to panels of business lobbyists, and a section of this bill would expand these preview opportunities to all agencies. The bill would also expand the regulations that would require SBREFA panels by including all rules that result in "an annual effect on the economy of \$100,000,000 or more," "a major increase in costs or prices," "significant adverse effects" on a variety of economic factors, "a significant impact on a substantial number of small entities." An additional section would actually give SBA's Office of Advocacy the power to write regulations governing all agencies' compliance with the Regulatory Flexibility Act. Given that Advocacy is a taxpayer-funded voice for business interests, this provision is particularly troubling.

In another corporate giveaway, the bill would allow trade associations to be considered small businesses despite their net worth. This change to the current law would allow huge trade associations to masquerade as small businesses and seek the same protections and considerations as other small businesses.

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II. Regulation does not always harm U.S. competitiveness and may actually improve it.

Burdensome anti-regulatory measures like H.R. 682 are born out of the idea that regulation will drive small American companies out of business. The real scholarly evidence, however, refutes this claim. While the business community may be hampered in competing in global trade, regulation is not at fault. The business community, however, has nothing to gain by publicizing the real reasons for its difficulties, such as lower wages paid in other countries with which we now have self-destructive free trade agreements. The idea that regulation causes competitive decline is the product not of careful scholarship but, rather, of a multi-million dollar public relations campaign.

These criticisms of regulation are insufficient for four reasons:

- (A) *Regulatory safeguards produce significant benefits for the public.* Citations of the high cost of regulation do not establish that regulation is unwarranted because they completely ignore what we gain from these expenditures. Protecting people and the environment may cost a lot of money, but it also produces far larger benefits. In fact, even the Office of Management and Budget, which is a main proponent of the idea that regulations are too costly, nonetheless reports every year that regulation in the United States generates aggregate benefits that greatly exceed the cost of the federal regulations.¹
- (B) *Not all costs have the same moral or ethical value.* Some regulatory costs represent the cost to industry of doing what it should have done as a good corporate citizen in the absence of regulation. For example, stunning new evidence reveals that U.S. automakers misled the government and the public for years by claiming that the strength of vehicle roofs is unrelated to the serious injuries sustained when vehicles crash and roll over. According to industry documents, Ford denied this link even though its Volvo subsidiary had conducted research demonstrating that strengthening car roofs and other improvements are the key to preventing injuries and saving lives in rollover crashes.² If and when the National Highway Traffic Safety Administration issues a rule to safeguard against vehicle roofs caving in during rollover crashes, the cost to the automakers of complying will mean little if it is not offset by the profits earned during the period that the automakers knew of the need for stronger roofs but failed to do anything about it.
- (C) *Cost estimates are overblown.* Moreover, many claims about regulatory costs are

1. See 2006 Draft Report on the Costs and Benefits of Federal Regulation, (available on-line at <http://www.whitehouse.gov/OMB/inforeg/reports/2006_draft_cost_benefit_report.pdf> Previous reports on the costs and benefits of regulation available at <http://www.whitehouse.gov/OMB/inforeg/regpol-reports_congress.html>).

2. See Press Release, Public Citizen, "New Report on Auto Industry Data Shows Automakers Misled NHTSA and Public When Denying Link Between Roof Strength and Injuries" (Mar. 30, 2005) (available on-line at <<http://www.citizen.org/pressroom/release.cfm?ID=1909>>).

Testimony of J. Robert Shull
 Director of Regulatory Policy, OMB Watch
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suspicious because they rely on cost estimates that come from industry sources that have an incentive to overstate the costs for regulatory and public relation purposes. According to a recent influential study,

ex ante cost estimates have usually been high, sometimes by orders of magnitude, when compared to actual costs incurred. This conclusion is not at all surprising in light of the strategic environment in which the predictions are generated. In preparing regulatory impact assessments for proposed rules, agencies are heavily dependent upon the regulated entities for information about compliance costs. Knowing that the agencies are less likely to impose regulatory options with high price tags (or to support them during the review process), the regulatees have every incentive to err on the high side.³

One particular estimate of costs, the discredited Crain and Hopkins study commissioned by the Small Business Administration, is significantly overblown.⁴ For example, the familiar estimates that the manufacturing sector in 2000 “shouldered \$147 billion of the \$497 billion onus of environmental, economic, workplace, and tax-compliance regulation”⁵ suffer the same problems just discussed and actually magnify those errors significantly, based on the assumption that regulatory compliance costs should be doubled to account for industry’s public relations campaign against regulatory protections and the expenses of lobbying this very Congress.⁶

- (1) Compliance costs are so minuscule that they have minor competitive consequences. Finally, and most importantly for these purposes, regulation cannot be blamed for a decline in competitiveness or other economic ills because compliance costs are only a very small percentage of total value of the shipments made by manufacturers. On the basis of data from the World Bank, Professor Kevin Gallagher of Boston University finds the “sum of all marginal pollution abatement costs in the United States is less than one percent of value added production.”⁷ Department of Commerce data confirm this estimate. This information indicates abatement expenditures are an

3. Thomas O. McGarity & Ruth Rutenberg, *Counting the Cost of Health, Safety & Environmental Regulation*, 80 *Tex. L. Rev.* 1997, 1998 (2002).

4. See W. MARK CRAIN & THOMAS D. HOPKINS, *THE IMPACT OF REGULATORY COSTS ON SMALL FIRMS* (Office of Advocacy, Small Business Admin. RFP No. SBAHQ-00-R-0027) (2001).

5. Testimony of National Assoc’n of Manuf., *Hearing on Impact of Regulations on U.S. Manufacturing Before the House Subcomm. on Reg. Affairs, House Comm. on Gov’t Reform*, 109th Cong. (April 12, 2005), at 5 (citing C. RAIN & HOPKINS, *supra* note 11, at 27 (tbl.9A)).

6. See CRAIN & HOPKINS, *supra* note 11, at 10.

7. Testimony of Prof. Sidney A. Shapiro, *Hearing on Impact of Regulations on U.S. Manufacturing*, 109th Cong. (April 12, 2005), at 5 text accompanying note 5.

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average of 0.62 percent of the value of shipments of all industries. Industry sectors with high abatement costs only pay between 1.27 and 1.51 percent of the value of shipments.⁸ Indirect costs are derivative of direct compliance costs; since low direct costs generally will produce low indirect costs, regulation overall should have a minor competitive and labor impacts.

The scholarly evidence backs up this claim. Economists have considered the impact of environmental regulations on plant location decisions (do pollution-intensive industries build disproportionate number of new factories in countries or areas of the United States where there is weak environmental regulation?) and on trade flows (do exports from developing to developed countries show an increasing percentage of pollution-intensive goods?). Neither type of study supports a regulation-competitiveness link. I recommend a recent literature review by Professor Sidney Shapiro, which synthesizes the major research on the questions and comes to the following conclusions:

- The leading meta-study of plant location and trade flow studies found that "studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location-decisions have produced estimates that are either small, statistically insignificant, or not a robust to test of model specification." These authors concluded that there is "[o]verall ... relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined."⁹
- According to another survey of the literature, "The vast majority of studies have found no systematic evidence that the share of developing country exports and production is becoming more pollution-intensive. In addition, no studies have indicated that there is substantial evidence that pollution-intensive industries flee developed countries with relatively high (and costly) environmental standards."¹⁰

8. *Id.* at 5 (citing Adam B. Jaffe, Steven R. Peterson, Paul R. Portney, & Robert N. Stavins, *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LIT. 132, 141 Tbl.5 (1995)).

9. *Id.* at 5-6 (citing Jaffe et al., *supra* note 15, at 141).

10. *Id.* at 6 (citing KEVIN O. GALLAGHER, *FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND* 26 (2004)).

III. The Regulatory Flexibility Improvements Act will not meet the needs of small businesses.

H.R. 682 was put forward under the banner of relieving regulatory burden to small business, but this legislation puts public protections at stake while failing to get at the heart of what ails small business. The small business community is a major source of innovation and employment in this country. Like their larger counterparts, however, small businesses are also responsible for social ills addressed by regulations, ranging from workplace health and safety problems to environmental pollution.¹¹ Thus, we cannot simply give small businesses a free pass from regulation. At the same time, it can be relatively more expensive for small business to comply with regulations than large companies. Small businesses want to do their part and be responsible; real reforms, then, must help small businesses comply with regulations in order to level the playing field with large businesses while giving the public the protection it needs and deserves.

We already have these reforms. Small firms receive direct government subsidies such as outright and government-guaranteed loans from the Small Business Administration (SBA) as well as indirect preferential treatment through federal procurement requirements and tax provisions. Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with fewer than 15 employees are exempt from the Equal Employment Opportunity Act,¹² and OSHA levies lighter penalties for smaller firms, exempts businesses with fewer than 10 workers from recordkeeping requirements, and provides free on-site compliance consultations.¹³

Small business concerns are inscribed in law. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to give special consideration and voice to small business as part of the rulemaking process as well as expanded judicial review for small businesses wishing to challenge agency decisions.¹⁴ Likewise, the Equal Access to Justice Act gives small businesses special privileges when litigating against agencies: small businesses can recover attorney's fees if they prevail in court against a federal agency.¹⁵

Real reforms for small businesses would make these benefits meaningful by clamping down on the ways that large businesses game the rules and claim the status of "small business." Real reform would consider the role of small business in contributing to pollution and other harms to the public and would respond by adequately funding compliance assistance offices in every congressional district,

11. See Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998).

12. See 42 U.S.C. § 2000e(f).

13. See OSHA, *OSHA Small Business Assistance: OSHA Benefits for Small Business* (available on-line at <<http://www.osha.gov/dosp/smallbusiness/benefits.html>>).

14. See 5 U.S.C. § 601 et seq.

15. See *id.* § 504.

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which would be given the resources they need to give small businesses the help that they, in turn, need to be good corporate citizens and comply with the law. This bill does not come close to being real reform; it is a shameful giveaway of the protections we need, and it shamelessly exploits the real needs of small businesses in order to justify this dangerous exercise.

IV. There is a better way.

A. National Business Regulatory Assistance Act

There are better ways to help small business without sacrificing longstanding public protections. The National Small Business Regulatory Assistance Act (S. 1411) would be the first step to strengthening Small Business Development Centers (SBDCs) around the country by launching a pilot in which SBDCs would provide compliance assistance to small businesses. This bill would help level the playing field for small businesses by giving them specialized assistance with understanding and complying with federal regulations, without compromising the public's protections, directly or indirectly; instead, it would actually help some businesses to comply with the regulations that are in place to protect the public.

B. Strengthening Petitions for Rulemaking

Processes already exist that allow both businesses and the public interest to ask federal agencies to address particular regulatory problems. Small businesses are already well aware of the regulations that are particularly burdensome or obsolete. Rather than expanding the Regulatory Flexibility Act to review all federal regulations on the books, small businesses already have the power to petition agencies to revisit specific regulations. Strengthening the petition process by making agencies more responsive to requests from the public would use existing mechanisms to open the door to reforms without drowning agencies in reviews of existing regulations. Moreover, rather than serving a particular constituency, strengthening petitions for rulemaking would benefit all members of the public. It can be used to identify both gaps in public protections as well as areas where reform may be needed.

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Problems of H.R. 682

Regulatory Flexibility Act	Regulatory Flexibility Improvements Act (H.R. 682)
<ul style="list-style-type: none"> - Applies only to rules with direct effects on small businesses - Includes regulations impacting small businesses and local governments - Requires agencies to prepare a regulatory flexibility analysis for all proposed rules and for all final rules, summarizing why the action is being taken and description of how small entities will be impacted. - The agency is required to respond to public comments. - Allows analysis to be either quantified or general. - Requires small business panel to review all rules by EPA and OSHA with a significant impact on small entities. - Periodic review of all rules, "which have or will have a significant adverse impact on a substantial number of small entities," going back to ten years before the enactment of the RFA. 	<ul style="list-style-type: none"> - Applies to rules, policy statements and guidance documents, land management plans, revisions or amendments to land management plans, recordkeeping requirements and formal rulemakings with direct and indirect effects to small businesses. - Includes regulations impacting small businesses, local governments, Tribal organizations, local labor organizations and professional and trade associations - Regulatory flexibility analysis must contain all provisions of original regulatory flexibility analysis, but must also include a description of alternatives that might maximize benefits and an estimate of "the additional cumulative economic impact of the proposed rule on small entities beyond that already imposed on the class of small entities." Final analysis is no longer required to be "succinct," and explanations are amended to be "detailed explanations." - The agency is required to specifically respond to comments filed by the Chief Counsel of Advocacy, including details of any changes made as a result of the comments. - If agency gives a general description instead of a quantified analysis, it must include detailed explanation of why quantification is not "practicable or reliable." - Eliminates procedures for agency heads to delay the analysis before promulgating proposed or final rule. - Requires small business panel to review all rules that result in "an annual effect on the economy of \$100,000,000 or more," "a major increase in costs or prices," "significant adverse effects" on a variety of economic factors, "a significant impact on a substantial number of small entities." - Periodic review of all rules, regardless of whether they have had or will have a significant impact on a substantial number of small entities. Agencies will submit a report to Congress regarding their findings. The review must include comments by the Regulatory Enforcement Ombudsman and the Chief Counsel of the Office of Advocacy and "the contribution of the rule to the cumulative economic impact of all Federal rules on the class of small entities affected by the rule."

PREPARED STATEMENT OF THE HONORABLE DONALD A. MANZULLO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON SMALL BUSINESS

DONALD A. MANZULLO, ILLINOIS
CHAIRMAN

NYDIA M. VELAZQUEZ, NEW YORK

Congress of the United States
House of Representatives
109th Congress
Committee on Small Business
2501 Rayburn House Office Building
Washington, DC 20515-2515

Statement for the Record of the Hon. Donald A. Manzullo
Chairman, Committee on Small Business
Before the Subcommittee on Commercial and Administrative Law
of the Committee on the Judiciary
United States House of Representatives
Washington, DC
July 20, 2005

New small businesses open every year. Buffeted by a variety of economic and financial gusts, these businesses struggle mightily against the prevailing winds in an effort to reach their destination of profitability. One very strong gale through which small businesses must navigate is unnecessary and overly burdensome federal regulation. Small businesses, according to a study by the Office of Advocacy of the United States Small Business Administration, pay \$2,000 per employee per year more than large businesses to comply with the tornado of federal regulation. In some sectors, such as manufacturing, the per-employee cost is even higher than that average. Thus, it is not surprising to learn that nearly 500,000 businesses fall to the regulatory winds buffeting them.

More than 25 years ago, Congress recognized that the gusts of regulation were transforming into a hurricane. Congress reacted with a brilliant idea; force federal regulators to examine the impact that their rules will have on small business before the winds of regulation destroy the small business. That brilliant idea was the Regulatory Flexibility Act. Passed in 1980, it not only was supposed to force federal agencies to think before they regulated but it was to direct their thinking to consider specifically the effect that the regulatory steers have on small business.

Enactment of the RFA forced a small but perceptible shift in the tack of federal regulation. Some agencies used enactment to focus their thinking and develop less burdensome regulation. To many other agencies, though, the RFA was a gentle breeze wafting by, barely ruffling them on their course for more and more burdensome, overlapping, and unnecessary regulation.

Congress tried to strengthen the winds of change in 1996 with the enactment of the Small Business Regulatory Enforcement Fairness Act or SBREFA. That act made agency compliance with the procedural requirements of the RFA judicially reviewable independent of any challenge to the underlying agency rule. With the threat of litigation hanging over them, federal agencies began paying more attention to the RFA.

The added attention did not result in a significant change in wind direction for many agencies. President Bush noted the importance of the RFA as a means to reduce the regulatory storms lashing small business in a March 19, 2002. He also said that federal agencies were ignoring the law. The President went on to state that federal regulators "will care that the law is on the books." The small business owners in attendance at that speech wildly applauded. The President ultimately assigned the task to Dr. John Graham, the former head of the Office of Information and Regulatory Affairs at the Office of Management and Budget and Thomas Sullivan, the Chief Counsel for Advocacy at the United States Small Business Administration. Fearlessly flying into the eye of the regulatory storm, they tried to tame the winds of the federal bureaucracy. While they eliminated many of the gusts, the prevailing winds have not dramatically changed. Small businesses remain buffeted by regulation.

The efforts of Dr. Graham and Chief Counsel Sullivan have been hampered by the inadequacy of the RFA. Plagued by undefined terms and vague parameters, the RFA is far from an ideal statute. Loopholes exist that permit agencies to fly their regulatory proposals to fruition without much more than an occasional bout of turbulence. Some agencies go so far as to interpret their statutory mandate and the RFA in a way as to avoid any semblance of compliance.

The absence of uniform interpretation of the RFA among federal agencies is best demonstrated by a proposed rule published in the Federal Register on July 18, 2006. Six federal agencies that regulate financial institutions and debt collection proposed a joint rule to implement certain sections of the Fair and Accurate Credit Transaction Act (FACTA). Each agency's implementation of the RFA was dramatically different. For example, the Federal Reserve and the Federal Trade Commission provided detailed analyses and requested comments on significant alternatives. 71 Fed. Reg. at 40,803, 40,805. In contrast, the National Credit Union Administration had one paragraph that simply stated the proposal would not have a significant economic impact on a substantial number of small entities – a statement that does not even comply with existing requirements to provide a factual basis for the certification.

H.R. 682 significantly strengthens the RFA so that agencies, as President Bush stated, "will care that the law is on the books." The bill makes numerous technical improvements to the RFA, eliminates loopholes, and significantly empowers the Chief Counsel to do more than simply cajole and report on agency compliance with the RFA. The primary objective of H.R. 682 is to avoid the type of ad hoc implementation of the RFA evidenced by the joint proposed rule implementing FACTA.

One of the original purposes of the RFA was to create an economic impact statement that was akin to an environmental impact statement that agencies must prepare pursuant to the National Environmental Policy Act (NEPA). Court decisions, however, determined that while parallels exist between the RFA and NEPA, those parallels could only go so far since the level of detail required by NEPA exceeds that required by the RFA. The Small Business Committee regularly sees the impact that regulations have on small businesses struggling to survive and grow. Detailed analysis of the impact of regulations on small businesses is necessary to ensure that regulators are not making irreversible decisions that will reduce the competitive ability of small businesses, prevent them from expanding, and harm the growth of the American economy. After all, even

NEPA recognizes that a major federal action affecting the environment also will have socio-economic consequences that must be measured and assessed before going forward with a major federal action. Yet, the most pervasive and far-reaching federal action – the issuance of a legislative regulation – only need have a modicum of explanation and analysis. That makes no sense, undermines the concept of rational decisionmaking, and leaves small businesses exposed to significant costs and burdens that might otherwise be alleviated without any diminution in the ability of federal agencies to meet their statutory and regulatory mandates.

The other major change relates to the Office of Advocacy and its role under the RFA. Currently, the Chief Counsel's power is quite limited. He can use the power of persuasion, enlist the assistance of Dr. Graham at OIRA, embarrass agency officials in his annual report to Congress, and threaten agencies with the prospect of filing an amicus brief in federal court. But that is all of the Chief Counsel's power. Even though the Chief Counsel is required to instruct agencies in RFA compliance and monitor such compliance, the United States Court of Appeals for the District of Columbia Circuit determined that the interpretations of the RFA by the Chief Counsel do not deserve any deference except to the extent that the comments are like any other comments – persuasive to the agency. This stands in stark contrast to the interpretations of NEPA offered by the Council on Environmental Quality (CEQ). The Supreme Court, on more than one occasion, held that CEQ's regulations implementing NEPA should be given substantial deference.

The significance of the deference paid federal agency interpretation of statutes may be an esoteric point, but it is important nonetheless. The Supreme Court grants substantial deference to federal agency interpretations of ambiguous statutes. The Chief Counsel does not get that deference because he is not considered to be implementing the RFA. By granting the Chief Counsel the authority to write regulations for implementing the RFA, the Chief Counsel's interpretations will be accorded the same deference that courts grant to CEQ's interpretation of NEPA. This will force agencies to work even more closely with the Chief Counsel to ensure that the agency's interpretation of the RFA comports with that of the Chief Counsel.

The bill does not provide bright-line definitions for the two primary parameters in the RFA – "significant economic impact" and "substantial number of small entities." That oversight was purposeful. Given the stunning breadth of the federal bureaucracy, it is not possible to define these terms by either percentages or number of businesses. For example, a statutory definition of significant economic impact that sets an impact as significant if it reduces net profits by five percent seems reasonable. Yet, for the retail food industry, whose gross margins average from 2 to 4 cents on the dollar, a bright-line statutory change amounts to an exemption from compliance with respect to food retailing. Regulations, such as country-of-origin labeling, would never meet that statutory threshold. If the primary purpose of H.R. 682 is to close the loopholes in the RFA, no rational purpose exists by creating new ones. As primary author of this legislation, I would expect the Office of Advocacy, when it drafts implementing regulations, to adopt the tactic used by CEQ when it was faced with defining the parallel amorphous terms of "major federal action" and "significantly affecting the environment."

H.R. 682 also will hold agencies accountable for analyzing both the direct and indirect impacts of their rulemaking decisions on small businesses. Current court decisions are most emphatic in stating that an agency need only analyze the impact of their rules on those entities directly regulated by their actions. An agency may certify that a rule does not substantially impact a significant number of entities by creating rules that state and local governments must implement. Although businesses may suffer harsh and burdensome effects (effects that might well be analyzed in an agency's environmental impact statement and regulatory impact analysis), the obvious impacts on small businesses in such circumstances are ignored by the agency. This practice ignores how Congress delegates responsibility to federal agencies, the real world effect of regulations, and runs contrary to the purpose of the RFA.

H.R. 682 represents a comprehensive fix to current weaknesses in the RFA. When the RFA was enacted, opponents said it would slow the promulgation of rules. A comparison of the size of the Federal Register in 1980 with that today will show that the RFA has done no such thing. During the debate over the amendments to the RFA made by SBREFA, opponents argued that judicial review would create a gust of wind that would blow down the courthouse door. Shockingly, the federal courthouse doors remain standing. Any arguments about the horrors of H.R. 682 that will be raised by opponents of the bill that the regulatory process will come to a grinding halt also have no basis in fact. Nothing in H.R. 682 changes the underlying statutory mandates of federal agencies and their responsibilities. H.R. 682 simply forces agencies to take procedural steps to understand what they are doing when they regulate and those steps will make them regulate more sensibly.

Ultimately, what is at stake is the ability of small businesses to stay in business – based not on the whims and dictates of federal bureaucrats but on their capacities in the marketplace. Better, sounder rules will be beneficial to the regulatory objectives of the agencies through increased compliance and lower costs to small businesses. For example, if the Department of Justice completes its current rulemaking process for implementing the Americans with Disabilities Act in a manner that will force the closure of small businesses, those businesses will be unable to offer services to the disabled undermining the intent of Congress.

No good reason exists to oppose those goals and objectives that the sponsors of H.R. 682 have other than the fear of the unknown. But as President Roosevelt, paraphrasing Michel de Montaigne said: "The only thing we have to fear is fear itself." I stand ready to work with Subcommittee Chairman Cannon and others to ensure that H.R. 682 becomes law. Then the RFA really will be on the books and federal agencies will care that the law is on the books.

LETTER FROM ROBERT D. EVANS, DIRECTOR, GOVERNMENTAL AFFAIRS OFFICE,
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July 18, 2006

THE HONORABLE THAD COCHRAN
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The Honorable Thad Cochran
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THE HONORABLE ROBERT C. BYRD
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The Honorable Robert C. Byrd
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Re: Funding the Newly Reauthorized Administrative Conference of the
United States for Fiscal Year 2007

Dear Chairman Cochran and Ranking Member Byrd:

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On behalf of the American Bar Association ("ABA") and its more than 400,000 members nationwide, I write to express our strong support for funding the Administrative Conference of the United States ("ACUS") for fiscal year 2007 at the fully authorized level of \$3.2 million. As your Committee prepares to mark up the Transportation, Treasury Appropriations Bill later this week, we urge you to provide full funding for ACUS, which was just reconstituted in the last Congress by the enactment of the "Federal Regulatory Improvement Act of 2004" (P.L. 108-401, formerly, H.R. 4917). Once it is provided with this modest funding, the agency will be able to restart its operations and then begin addressing the many important tasks that may be assigned to it by Congress, including, for example, assisting the Department of Homeland Security to consolidate the administrative processes from the more than 20 federal agencies that were included in the new Department.

ACUS was originally established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1995. In 2004, Congress held several hearings on ACUS reauthorization, and during those hearings, all six witnesses, including Supreme Court Justices Antonin Scalia and Stephen Breyer, praised the work of the agency. The written testimony of Justices Scalia and Breyer is available on the ABA's website at <http://www.abanet.org/moladv/ACUSreauthorization.html>.

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Following these hearings, H.R. 4917 was introduced by Rep. Chris Cannon (R-UT), Chairman of the House Judiciary Subcommittee on Commercial and Administrative Law, for the purpose of reauthorizing and resurrecting the agency. That bipartisan legislation ultimately garnered 34 cosponsors—including 18 Republicans and 16 Democrats—before being approved unanimously by the House and Senate at the end of the 108th Congress. President Bush then signed the measure into law on October 30, 2004.

At the request of Chairman Cannon, the Congressional Research Service (“CRS”) prepared a short study describing the many benefits of ACUS, and a copy of the CRS Memorandum of October 7, 2004 is also available at <http://www.abnnet.org/polsdv/ACUSreauthorization.html>. As outlined by CRS, ACUS has many virtues, including the following:

- A newly-reconstituted ACUS would provide urgently needed resources and expertise to assist with difficult administrative process issues arising from the 9/11 terrorist attacks against the United States as well as other new administrative issues. The CRS Memorandum concludes that “[ACUS’s] reactivation would fill the current urgent need for an expert independent entity to render relevant, cost-beneficial assistance with respect to complex and sensitive administrative process issues raised by 9/11 restructuring and reorganization efforts,” including the creation of the Department of Homeland Security by consolidating parts of 22 existing agencies and the 9/11 Commission’s recommendations to establish a new intelligence structure. In addition, CRS noted that ACUS could provide valuable analysis and guidance on a host of other administrative issues, including public participation in electronic rulemaking, early challenges to the quality of scientific data used by agencies in the rulemaking process, and possible refinements to the Congressional Review Act. A fully-funded ACUS could effectively address these and myriad other issues involving administrative process, procedure, and practice at a cost that is minimal when compared to the benefits that are likely to result.

- ACUS enjoys strong bipartisan support and all observers agree that it has been extremely cost-effective. As CRS also noted in its Memorandum, all six of the witnesses who testified before the House Judiciary Subcommittee on Commercial and Administrative Law agreed that during the more than 25 years of its existence, “...the Conference was a valuable resource providing information and guidance on the efficiency, adequacy and fairness of the administrative procedures used by agencies in carrying out their missions.” ACUS was unique in that it brought together senior representatives of the federal government with leading practitioners and scholars of the private sector to work together to improve how our government functions. That collaboration has been sorely missed in many ways, as was so clearly brought out in the hearings. As CRS explained, ACUS produced over 180 recommendations for agency, judicial, and congressional actions over the years, and approximately three-quarters of these reforms were adopted in whole or in part. Because ACUS achieved these impressive reforms with a budget of just a few million dollars per year, CRS noted that “all observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation.”

- Before it was terminated in 1995, ACUS brought about many significant achievements. In addition to providing a valuable source of expert and nonpartisan advice to the federal government, ACUS also played an important facilitative role for agencies in implementing changes or carrying out recommendations. In particular, Congress gave ACUS facilitative statutory responsibilities for implementing a number of statutes, including, for example, the Equal Access to Justice Act, the

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Congressional Accountability Act, the Government in the Sunshine Act, the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act. In addition, ACUS' recommendations often resulted in huge monetary savings for agencies, private parties, and practitioners. For example, CRS cited testimony from the President of the American Arbitration Association which stated that "ACUS's encouragement of administrative dispute resolution had saved 'millions of dollars' that would otherwise have been spent for litigation costs." CRS also noted that in 1994, the FDIC estimated that "its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million." The CRS Memorandum provides numerous additional examples of ACUS' prior successes as well.

• ACUS' role in the regulatory process is totally separate and distinct from that of OIRA. In the past, some have suggested that ACUS' activities perhaps may duplicate some of the activities of OMB's Office of Information and Regulatory Affairs ("OIRA"). This reflects a misunderstanding of ACUS' fundamental role in the regulatory process. By virtue of its history and institutional design, ACUS is uniquely in a position to achieve bi-partisan consensus on administrative and regulatory improvements; to provide a forum for executive and independent agencies to exchange "best practices" ideas; and to bring private sector lawyers and academics together with political and career government officials to address ways to improve government operations.

OIRA is a very different type of entity that is neither inclined nor equipped to address many of the issues that ACUS has focused on. For example, there is no way that OIRA could have devoted so much time and attention to developing the ADR techniques that so many government agencies adopted. Nor does OIRA play any role in agency adjudication or judicial review issues. OIRA's principal role is to represent the President in making sure that the Administration's regulatory policy is followed. ACUS's role, on the other hand, is to be an independent catalyst for seeking to reform and improve administrative and procedural issues that accessarily tend to receive less attention in Congress or the White House in the face of what are deemed more pressing day-to-day matters.

In sum, now that Congress has enacted bipartisan legislation reauthorizing ACUS, the agency should be provided with the very modest resources that it needs to restart its operations without unnecessary delay. To accomplish this goal, we urge you to provide \$3.2 million in funding for ACUS for fiscal year 2007 during your Committee's mark up of the Transportation Treasury Appropriations Bill later this week.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact the ABA's senior legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098, or the Chair of the ACUS Task Force of the ABA Administrative Law Section, Warren Belmar, at 202/586-6758.

Sincerely,



Robert D. Evans

July 18, 2006
Page 4

cc: The Honorable Christopher S. Bond
The Honorable Patty Murray
All other members of the Senate Committee on Appropriations
The Honorable Arlen Specter
The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy
The Honorable Jeff Sessions
The Honorable Charles E. Schumer
The Honorable Jerry Lewis
The Honorable David R. Obey
The Honorable Joseph Knollenberg
The Honorable John W. Olver
The Honorable Chris Cannon

RESPONSE TO POST-HEARING QUESTIONS FROM THE HONORABLE THOMAS M. SULLIVAN, CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC



Advocacy: the voice of small business in government

August 11, 2006

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cannon:

Thank you for the opportunity to provide you with additional information related to my testimony on HR 682, the Regulatory Flexibility Improvements Act. This letter addresses the questions that you posed in your letter dated July 25, 2006.

Congress established the Office Advocacy pursuant to Public Law 94-305 to advocate the views of small business before Federal agencies and Congress. Because Advocacy is an independent office within the U.S. Small Business Administration (SBA), these views do not necessarily reflect the position of the Administration or the SBA. For the sake of clarity, I will repeat each of your questions, followed by our responses.

Q: What provisions of H.R. 682 stand out as the most constructive reforms?

A: H.R. 682 is a comprehensive bill that is meant to close the loopholes in the RFA. While many of the reforms are important, the most important reforms for small entities are:

- 1) Consideration of foreseeable indirect impacts
- 2) Expansion of the requirements for Section 610 review
- 3) Consideration of cumulative impacts of regulations

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4) Codification of Executive Order 13272 (i.e., a permanent mechanism to ensure that agencies respond to Advocacy's comments and provide early access to draft regulations when possible)

Q: *Some critics of the Regulatory Flexibility Act have suggested that its implementation could be improved if certain terms were better defined. For example, they note that "significant economic impact on a substantial number of small entities" should be defined with some specificity. What is your reaction to this suggestion?*

A: When the RFA was initially drafted, the lawmakers intentionally left the term "significant economic impact on a substantial number of small entities" vague to allow the agencies some flexibility to define the terms in the manner that best suit the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact. Some latitude is necessary to assure that agencies are able to perform the best analysis for the particular situation.

Q: *In 2002, President Bush signed Executive Order 13272, which requires federal agencies to establish written procedures and policies on how they measure the impact of their regulatory proposals on small entities.*

What has been your Office's experience with Executive Order 13272?

A: Overall, Executive Order (E.O.) 13272 has been successful. With the exception of the Department of State, all Cabinet-level departments have developed written plans in compliance with E.O. 13272. The performance of the independent agencies, however, has not been as successful. Of the 75 independent regulatory agencies, only 16 responded to the requirements of the E.O. Of those 16, only eight have provided written procedures, while six claimed that they do not regulate small entities, and two claimed to be exempt from the E.O.

E.O. 13272 also requires that Advocacy provide training to the agencies on compliance with the RFA. Since the E.O. was signed, Advocacy has held 55 training sessions at 45 different agencies. Agency attorneys, economists, policymakers, and other employees involved in the regulatory writing process have attended the hands-on sessions to learn how to comply with the RFA in a regulatory setting. Advocacy's current efforts are focused on rolling out an interactive electronic training module so that agencies can engage in periodic training and train new

employees. Like the classroom setting, the online training program explains the steps rule writers should follow to make RFA decisions accurately. As a result of Advocacy's training and the implementation of agency rulemaking, agency compliance with the RFA has improved.

Moreover, E.O. 13272 requires agencies to provide Advocacy with a draft copy of rules that will have a significant economic impact on a substantial number of small entities when the rules are forwarded to Office of Information and Regulatory Affairs (OIRA) and to give appropriate consideration to Advocacy's comments and address the comments in final rules. As such, Advocacy is getting involved earlier in the rulemaking process. This allows Advocacy to achieve improved agency compliance and cost savings for small entities.

Q: *Some have suggested that it should be codified. What is your reaction to that?*

A: E.O. 13272 has increased agency knowledge of and compliance with the RFA. Small entities would benefit by amending the RFA to codify the requirements of E.O. 13272, ensuring that independent agencies are covered and creating long-term certainty for small entities.

If it is codified, Advocacy would suggest that the requirements be expanded to require agencies to address Advocacy's comments if the agency certifies the rule at the final stage of the rulemaking. Currently, agencies must only address Advocacy's comments if a final regulatory flexibility analysis (FRFA) is prepared. In FY 2005, 12 percent of Advocacy comments addressed improper certifications and 17 percent of Advocacy comments addressed inadequate or missing initial regulatory flexibility analyses (IRFAs).

Q: *Please explain whether current section 610-dealing with periodic review-is or is not working?*

A: Unfortunately, agency compliance with section 610 has historically been minimal. Agencies ignore the requirement altogether or simply issue boilerplate language to the effect that an existing rule has been reviewed, and that the rule remains useful. Small entities are limited in what they can do with burdensome regulations on the books. As noted in my testimony, the

Crain study, *The Impact of Regulatory Costs on Small Firms*, indicates that the overall cost of federal regulation totals \$1.1 trillion, the cost per employee for firms with fewer than 20 employees is \$7,647. This is 45 percent higher than their larger counterparts with 500 or more employees.¹ Since new regulations are promulgated each year, the cumulative impact of regulations on small entities can be staggering.

In addition, a number of agencies interpret section 610 as only requiring review for rules that the agency determined to have a significant economic impact on a substantial number of small entities at the time that the rule was promulgated. As such, many rules that may become costly to small business due to changes in circumstances or additional cumulative rules are not reviewed. Advocacy recommends that the RFA be amended to review all rules periodically. This change would encourage agencies to revise their rules to ensure that regulations reflect current conditions and needs.

Q: *Some have suggested that a "plain English" summary of a final rule is beneficial. Please explain.*

A: Although SBREFA required compliance guides to explain small business regulatory requirements, the compliance guides are only required for rules that have a FRFA, not for final rules that are certified. Moreover, even though a compliance guide is required for rules with FRFAs, some agencies do not comply with that requirement.

A plain English summary of a final rule, in the form of a compliance guide, would be beneficial in terms of explaining the rule to small entities in an easily cognizable manner. Improving the current compliance guide requirement by establishing a date (prior to the implementation of the final rule) for the guide to be published, and establishing minimal criteria for drafting the guides (including a plain English requirement) would provide small entities with the information that they need to comply with new regulations and reduce the penalties that are incurred due to confusion about the requirements. In addition, it would prevent small entities

¹ The Crain report is located at <http://www.sba.gov/advo/research/m207let-264.pdf>.

from having to incur legal fees to understand the rules as well as losing valuable business time trying to decipher the new requirements.

Q: *Under H.R. 682, your office would have expanded responsibilities. Would your Office have the resources to execute these additional duties?*

A: No, the Office of Advocacy would not have the resources to perform all of the duties in H.R. 682.

Q: *Please explain how your office interfaces with OIRA at OMB?*

A: The Office of Advocacy and OIRA work together closely on regulations and paperwork reviews that have a small business impact. OIRA desk officers contact Advocacy's legal/policy team directly when they spot a problematic rule, and vice versa. Using our combined resources generally results in better, less burdensome regulations that still achieve the policy goals of the underlying legislative mandates.

I appreciate the opportunity to provide the requested information. If you have any questions, please contact my office. Thank you.

Sincerely,



Thomas M. Sullivan
Chief Counsel for Advocacy

RESPONSE TO POST-HEARING QUESTIONS FROM J. CHRISTOPHER MIHM, MANAGING
DIRECTOR FOR STRATEGIC ISSUES, UNITED STATES GOVERNMENT ACCOUNTABILITY
OFFICE, WASHINGTON, DC



August 4, 2006

The Honorable Christopher B. Cannon
Chairman
The Honorable Melvin L. Watt
Ranking Minority Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

On July 25, 2006, you requested that we respond to questions for the official record regarding your Subcommittee's July 20, 2006, hearing on H.R. 682, the Regulatory Flexibility Improvements Act. Our responses are included in this correspondence.

Responses to Questions

1. On July 20, 2006, you testified about various recurring problems regarding the implementation of the Regulatory Flexibility Act (RFA). What role—if any—could a reconstituted Administrative Conference of the United States (ACUS) play with respect to the problems you have identified regarding the Regulatory Flexibility Act?

As we have noted previously, ACUS provided a valuable forum to advise the federal government on administrative procedural reform. ACUS drew on legal experts from across the spectrum to study problems affecting federal administrative procedures and provided nonpartisan advice and recommendations on how to improve the efficiency, adequacy, and fairness of those procedures. We would expect a reconstituted ACUS to provide the same benefits if asked to review issues associated with RFA. ACUS, if funded, could plan and direct empirical research to reexamine RFA and generate a range of practical options for addressing weaknesses of the Act.

2. As you noted in your written testimony, President Bush issued Executive Order 13272 in August 2002, which requires federal agencies to establish written procedures and policies on how they measure the impact of their regulatory proposals on small entities and to vet these policies with the Small Business Administration's (SBA) Office of Advocacy. You also note that GAO has not evaluated whether the Executive Order is helping to address some of the concerns GAO has raised regarding the Act's

effectiveness. Would such an evaluation be useful to have before further reforms to the Act are considered?

In our testimony, we advocated continued monitoring of the implementation of Executive Order 13272, as well as the Office of Advocacy's related RFA guidance and training for federal agencies. Together, the Executive Order and the Office of Advocacy's guidance and training have the potential to reduce agencies' confusion about RFA and promote more effective compliance with the Act's requirements. The Office of Advocacy has reported on its and other agencies' responses to the Executive Order, but a broader independent evaluation of the effectiveness of those actions has not been conducted. Such an evaluation could help Congress to focus proposed amendments of RFA on the aspects of the Act that are still proving most troublesome to implement. As indicated in our response to the first question, such research would also be an appropriate charge for ACUS.

3. With regard to the implementation issues you have highlighted regarding the Regulatory Flexibility Act—particularly with respect to the disparate performance by various agencies—could some of these issues be addressed by more active guidance or involvement by OMB?

We have previously recommended that OMB, in consultation with SBA, take more action regarding oversight and guidance to agencies on compliance with RFA requirements.⁴ OMB acted on some of those recommendations, particularly regarding the RFA requirement for periodic reviews of existing regulations. Our reports have also documented the effects of active OMB involvement and oversight on agencies' rulemaking actions.⁵ With regard to RFA, for example, we noted in February 2000 that the Federal Emergency Management Agency (FEMA) began additional analysis of the impact of its draft regulations on small entities in response to OMB's concerns about the agency's compliance with RFA.⁶ However, there are limits to what OMB involvement could achieve. As we have pointed out in prior reports, OMB's Office of Information and Regulatory Affairs (OIRA), which has responsibility for handling a large volume of regulatory and paperwork reviews, is a relatively small office, so attention to RFA issues would compete with other priorities. Also, OIRA's oversight of rulemaking generally does not cover the rules of independent regulatory agencies.

4. Does the Office of Advocacy at the Small Business Administration provide sufficient guidance under the Regulatory Flexibility Act?

As noted in our testimony, the Office of Advocacy's 2003 RFA compliance guide appears to be helpful in addressing some of the issues we have raised regarding the Act. In particular, it discusses the interpretation of key terms in RFA and suggests factors that agencies might want to consider when making RFA determinations. The key, however, will be effective implementation, particularly the degree to which agencies successfully and consistently apply that guidance. We have not evaluated

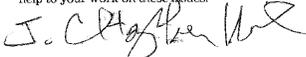
For a summary of some of those recommendations, see GAO, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-401T (Washington, D.C.: Mar. 6, 2002).
See GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-029 (Washington, D.C.: Sept. 22, 2003).
GAO, *Disaster Assistance: Issues Related to the Development of FEMA's Insurance Requirements*, GAO/GGD/OGC-00-62 (Washington, D.C.: Feb. 25, 2000).

the implementation of the Office of Advocacy's 2003 guidance. Therefore, we have no basis to judge whether the guidance, on the whole, is sufficient.

5. Since 1996, judicial review has been available under the Regulatory Flexibility Act. What impact, if any, has judicial review had on the problems GAO has cited over the years about the Regulatory Flexibility Act?

We have only addressed the impact of judicial review indirectly; it has not been a primary objective of any of our RFA evaluations. For example, in a December 2001 report, we noted that some officials indicated that their agencies may prepare voluntary final regulatory flexibility analyses to help ensure that their rules will not be overturned via judicial review. In a September 2000 report, we outlined the development of changes in EPA's RFA guidance documents over time. We noted that an EPA official said the provision allowing judicial review of regulatory flexibility analyses meant that the agency would have to make sure that all of its initial regulatory flexibility analyses could withstand judicial scrutiny, and, therefore, EPA no longer had the option of doing a limited analysis on rules that it believed would have a minimal impact on small entities. We also pointed out that, in a report marking the 20th anniversary of RFA, the Office of Advocacy noted that the addition of judicial review had been an incentive for agencies to comply with the Act's requirements and that small entities were not hesitant to initiate court challenges in appropriate cases.

Please contact me at (202) 512-6806 or mihm@gao.gov if you, other Subcommittee members, or your staffs have additional questions or if we can provide additional help to your work on these issues.



J. Christopher Mihm
Managing Director
Strategic Issues

(450624)

RESPONSE TO POST-HEARING QUESTIONS FROM J. ROBERT SHULL, DIRECTOR OF
REGULATORY POLICY, OMB WATCH, WASHINGTON, DC



J. ROBERT SHULL
Director of Regulatory Policy

Responses to Subcommittee Follow-Up Questions

1. Does the current rulemaking process adequately address the needs of small businesses?

It is not at all surprising that proponents of the House and Senate bills to change the Regulatory Flexibility Act frame their initiative as a service to small business; the public believes that small businesses need some help in order to operate on a level playing field with big corporations. The small business community is a major source of innovation and employment in this country. Like their larger counterparts, however, small businesses are also responsible for social ills addressed by regulations, ranging from workplace health and safety problems to environmental pollution.¹ Thus, we cannot simply give small businesses a free pass from regulation. At the same time, it can be relatively more expensive for small business to comply with regulations than large companies. Small businesses want to do their part and be responsible; real reforms, then, must help small businesses comply with regulations in order to level the playing field with large businesses while giving the public the protection it needs and deserves.

We already have these reforms. Small firms receive direct government subsidies such as outright and government-guaranteed loans from the Small Business Administration (SBA) as well as indirect preferential treatment through federal procurement requirements and tax provisions. Additionally, small business is treated to many exemptions or special treatment in the area of regulation. For example, employers with fewer than 15 employees are exempt from the Equal Employment Opportunity Act,² and OSHA levies lighter penalties for smaller firms, exempts businesses with fewer than 10 workers from recordkeeping requirements, and provides free on-site compliance consultations.³

1. See Richard J. Pierce, Jr., *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537 (1998).

2. See 42 U.S.C. § 2000e(b).

3. See OSHA, *OSHA Small Business Assistance: OSHA Benefits for Small Business* (available on-line at <<http://www.osha.gov/dcsy/smallbusiness/benefits.html>>).

Small business concerns are inscribed throughout the regulatory process. The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires agencies to give special consideration and voice to small business as part of the rulemaking process as well as expanded judicial review for small businesses wishing to challenge agency decisions.⁴ (Note that public interest advocates are not accorded similar privileges.) Likewise, the Equal Access to Justice Act gives small businesses special privileges when litigating against agencies: small businesses can recover attorney's fees if they prevail in court against a federal agency.⁵

Of course, these benefits accrue not just to the mom-and-pop storefront that we tend to think of when we talk about small business but also to very large multimillion dollar businesses that can game the rules and claim the status of "small business."⁶

Because of all these ways that the regulatory process already serves the special interests of small businesses, the real need is not for more burdens on that process — burdens which could put the public at risk. Real reform would consider the role of small business in contributing to pollution and other harms to the public and would respond by adequately funding compliance assistance offices in every congressional district, which would be given the resources they need to give small businesses the help that they, in turn, need to be good corporate citizens and comply with the law.

2. **You question the value of requiring agencies to assess the indirect effects of regulations on small businesses. Consider, for example, a situation where the Department of Homeland Security issues a regulation restricting the number of flights that can land at an airport. Under current law, the DHS would probably only have to consider the impact of the regulation on the airlines themselves. Shouldn't the DHS also be required to at least consider the indirect impact that the regulation could have on all the small shop owners and other entrepreneurs at the airport that will undoubtedly lose business as a result of this regulation?**

At the core of this question is a concern, which has been aggravated by the public relations machinery of corporate special interests and industry-funded think tanks, that regulatory protections for the public interest are a drag on the economy that impede the competitiveness of American businesses, large and small. The empirical literature tells us a much different story. I am attaching to this response an OMB Watch Issue Brief, *Regulation and Competitiveness*, which goes into more detail on this literature, as well as a more recent scholarly overview by economics professor Frank Ackerman, Ph.D. The short version of the story is that economic indicators fail to demonstrate a link between protective regulations and competitiveness, or any cost in jobs for American workers; in fact, consistent with the Porter "hypothesis," there are many cases in which regulation demonstrably *improved* business operations by inspiring companies to innovate and discover new efficiencies. Many of these cases are also briefly noted in another attached document, *The Going-Out-of-Business Myth*.

An additional driver of the concerns about the costs to small businesses of complying with regulations is a series of studies commissioned by the Small Business Administration's Office of

4. See 5 U.S.C. §§ 601 *et seq.*

5. See *id.* § 504.

6. See OMB Watch, *Small Business Not So Small*, Apr. 17, 2002, available at <<http://www.ombwatch.org/article/articleview/687/1/24371?opicID=3>>.

Advocacy that purport to estimate the burden on small businesses. This series of studies, in all its iterations, is a deeply flawed enterprise. I am attaching an excerpt from OMB Watch's comments to OMB's 2005 draft report on the costs and benefits of regulations, in which we pointed out the deep flaws of the SBA study — and repeated OMB's own criticisms of the study. The SBA study is based on other deeply flawed estimates of industry compliance costs, which a recent Public Citizen report debunked as systematically biased in an upward direction.⁷

More specific to the question posed here: if agencies were required to assess indirect effects of regulation on small businesses, where would the inquiry ever end? The small businesses operating at the hypothetical airport (which, given the rents at major airports, are most likely not small at all but actually large chain establishments, or franchise operations of larger corporate enterprises) buy supplies from other possibly small businesses, and they may contract for janitorial services from yet more small businesses. Those small businesses, in turn, have relationships with yet more small businesses. All of these attendant effects are most certainly indirect. To assess them quantitatively would be unhelpfully speculative, and it is unclear whether the resulting estimates would be helpful in the already fraught and difficult task of priority setting for policies to protect the public.

3. **Why do you cite as being particularly troubling those provisions in H.R. 682 allowing the Office for Advocacy to preview proposed rules before they are published in the Federal Register and giving that Office the power to write regulations governing agencies' compliance with the Regulatory Flexibility Act (RFA)?**

SBA's Office of Advocacy is, as the name implies, an *advocate* for the interests of business. An advocate for business has no place dictating anything to agencies charged with protecting the public health, safety, civil rights, environment, or social welfare. Moreover, a voice for business should not be given the first bite at the apple in previewing draft regulations; business interests ought to be forced to play on a level playing field with the public interest.

4. **What is your view of the value, if any, of Executive Order 13,272?**

Corporate special interests, whether or not they count as "small" under SBA rules, have an acute interest in fighting regulations and organized resources that they can bring to bear in those fights. The public, meanwhile, has a diffuse interest in regulations, and its interests are organized, if at all, in the under-resourced nonprofit sector. Accordingly, business interests are always already better organized and better resourced in their opposition to regulation than the public interest sector can ever be in its support for new protective standards. An executive order extralegally distorting the regulatory process to allow a government-funded voice for business interests to preview draft regulations and enjoy other special privileges in the regulatory process is the last thing we need. Moreover, any other layers of review before regulations can be published are delays that endanger the public, which can count the cost in lives.

7. See REITH RUFFENBERG & ASSOC'S, NOT TOO COSTLY, AFTER ALL: AN EXAMINATION OF THE INFLATED COST ESTIMATES OF HEALTH, SAFETY, AND ENVIRONMENTAL PRODUCTIONS (Public Citizen, Feb. 2004), available at <<http://www.citizen.org/documents/ACF187.pdf>>.

5. Do you think that some of the implementation issues which have been cited by the GAO and others regarding the RFA could be addressed by OMB?

OMB would undoubtedly do much to distort the process further in favor of corporate special interests, if given the excuse to do so and legal cover in the name of the Regulatory Flexibility Act. For reasons stated above, we do not support any such extraordinary efforts to use the Regulatory Flexibility Act to tilt the playing field any more than it already is. Additionally, OMB, through its Office of Information and Regulatory Affairs, has demonstrated an appalling willingness over the years to weaken or eliminate protective policies. For an overview of OMB's destructive legacy during the tenure of John Graham as administrator of OIRA, see our collection of web articles at www.OMBWatch.org/rcgs/grahamfiles. OMB should not be entrusted with any more legal authorities to disrupt protective policies.

6. Do you think the Administrative Conference of the United States — if it was reconstituted — could play a role in improving the implementation of the RFA?

ACUS is fondly remembered by many who follow regulatory policy. The general consensus is that the quality and utility of ACUS's work were dependent on the quality of the staffing and the resources allotted to ACUS. Because, however, we do not share the view that the RFA needs to become any more of a burden than it already is, I cannot address whether ACUS would or would not be effective in the job envisioned by RFA proponents.



Regulation and Competitiveness

Anti-regulatory arguments claim that regulation is inherently a burden that weakens the competitiveness of American businesses in the global market. Yet a plethora of scholarly studies indicates that the opposite is true: regulation not only does not hinder U.S. competitiveness but actually may increase the competitive advantage of the United States. Overall, factors such as wages and trade agreements play a much larger role than regulation in determining U.S. competitiveness. Economists have been unable to find the strong negative correlation between regulation and competitiveness. This finding may run counter to intuition, but it suggests that protecting public health, safety and the environment can have real economic advantages; the United States does not have to sacrifice public protections in order to promote U.S. competitiveness.

1. Economic indicators fail to show an environment/competitiveness tradeoff.

Economists look at several economic indicators to determine the impact of regulation on competitiveness, such as plant location, industry imports and exports, and foreign direct investment (FDI). The argument that regulation harms U.S. competitiveness is based primarily on the theory that pollution-intensive industries will move to areas with more lax environmental regulations ("pollution havens") in order to avoid the costs of compliance with more stringent environmental protections. If the pollution haven theory holds, then firms will choose to open new plant locations in areas with less regulation. Similarly, if regulation impacts competitiveness, then there should be a positive correlation between regulation and net imports of an industry: as regulation increases, countries with more lax regulations will gain a great share of the import market. Further, if the pollution haven theory is to hold, then stringent regulation in the United States will induce high polluting firms to disproportionately invest overseas.

Though some economists have found a pollution haven effect, many economists have discovered that regulation has no negative impact on competitiveness, and some have even argued that regulation may increase competitiveness. Even in studies that have found that regulation hampers competitiveness, the effect tends to be insignificant or, at most, significant but relatively minor. A 1995 survey of economic studies by Jaffe et al., for instance, concludes that "overall, there is relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined."² Eban Goodstein not only corroborated

1. February 2006. This issue brief was written by Genevieve Smith, Regulatory Policy Analyst.

2. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LIT. 132, 157 (1995).

Jaffe's conclusions but has also found that, between 1979-1989, the industries that spent more on regulation compliance actually exhibited superior performance compared to imports from developed and developing countries.³ Those who claim that regulation is overly burdensome tend to ignore the divergent economic opinion on regulation and competitiveness and instead focus only on inapposite evidence mischaracterized as corroborating a deregulatory agenda.

Regulation does not negatively impact plant location decisions.

The Jaffe et al. study looked at all three indicators of competitiveness and found on all accounts that regulation was not a major factor in competitiveness. In the case of plant location decisions, Jaffe et al. found that there is little evidence to support the conclusion that stringent regulation is a major determinant in plant location decisions. This finding is corroborated by a host of other economists. Timothy J. Barik studied the impacts of state government environmental regulation expenditures on plant location decisions and found that such expenditures had an insignificant effect on plant locations.⁴ Kevin Gallagher found that plants moving to Mexico are not the ones with highest pollution abatement costs; overseas movement of industries is affected more by labor costs than by regulation.⁵ A look at plant location within India found that increased government spending on environmental regulation not only did not deter plant location but actually had a positive impact.⁶

Clark, Marchese, and Zarrilli examined industry decisions to conduct offshore assembly in developing companies. Consistent with the findings on plant location, the authors found that pollution intensive industries were less likely to conduct offshore assembly. They argued that the U.S. has a comparative advantage in highly polluting industries, while developing countries have a comparative advantage in simple assembly industries. At the same time, "the cost of pollution control and abatement are too small to influence the competitive performance of location decision of these activities."⁷

Regulation does not increase dependence on imports.

Further, several economic studies have found that stringent regulations have not led to

3. Eban Goodstein, *A New Look at Environmental Protection and Competitiveness*, Briefing Paper for the Economic Policy Institute, Washington, DC (1997).

4. Timothy J. Barik, *The Effects of Environmental Regulation on Business Location in the United States*, 19 GROWTH CHANGE 22 (1988).

5. Kevin Gallagher, *Trade Liberalization and Industrial Pollution in Mexico: Lessons for the FTAA*, Working Paper for Global Development and Environment Institute (October 2000).

6. Mathukumara Mani, Shooli Paagal & Mainul Haq, *Does Environmental Regulation Matter? Determinants of the Location of New Manufacturing Plants in India in 1994*, World Bank Working Paper, at 1-26.

7. Don P. Clark, Serafino Marchese & Simonetta Zarrilli, *Do Dirty Industries Conduct Offshore Assembly in Developing Countries?*, 14 INT'L ECON. J. 75, 86 (2000).

increases in imports. Jaffe et al. examined a number of studies on the impact of regulation on imports and exports and concluded once again that regulation has no significant impact. Grossman and Krueger, for instance, looked at the impacts of NAFTA on net imports and found greater imports in industries with the lower pollution costs. Moreover, they found that "traditional determinants of trade and investment patterns" have a significant impact on net imports while environmental costs have a minor and insignificant impact.⁸

A 1997 briefing paper by Eban Goodstein confirmed the findings of Jaffe et al. Moreover, Goodstein's study also found that "over the 1979-89 period, industries that spend more money complying with environmental regulations actually demonstrated superior performance against imports from developed countries."⁹ Goodstein found the same relationship "for imports from developing countries, but the relationship was not as strong."¹⁰ Goodstein expanded on existing research on the effect of regulation on net imports by exploiting the large dataset made available by the National Bureau of Economic Research (NBER). Again, he concluded from the data that environmental regulation does not harm U.S. competitiveness. A look at the top 20 industries that experienced growth of import share by less-developed countries (LDC) from 1973-79 and 1979-89 shows that industries with high environmental costs were not the industries experiencing growth in net imports. In fact, "only three of the top 20 in the early period were industries with higher than average environmental costs; only one in the latter. It seems, then that low-wage industries, not 'dirty' ones, dominate the list of LDC import leaders."¹¹

Regulation does not send foreign investment abroad.

Despite predictions to the contrary, several economic studies have found foreign direct investment to increase with environmental stringency, implying that environmental regulation does not deter foreign investors. In a recently published article for the *International Trade Journal*, Elizabeth T. Cole and Prescott C. Ensign have found that U.S. FDI into Mexico is moving toward low polluting industries.¹² In fact, air pollution decreased in the United States at a time when foreign direct investment was increasing.¹³

8. Gene M. Grossman & Alan B. Krueger, *Environmental Impacts of a North American Free Trade Agreement*, in *THE US-MEXICO FREE TRADE AGREEMENT* 13 (Peter Garber ed. 1993).

9. Goodstein, *supra* note 3, at 2.

10. *Id.*

11. *Id.* at 6.

12. Elizabeth T. Cole & Prescott C. Ensign, *An Examination of U.S. FDI into Mexico and its Relation to NAFTA: Understanding the Effects of Environmental Regulation and the Factor Endowments that Affect Location Decision*, 19 *INT'L TRADE J.* 1 (2005).

13. DAVID WHEELER, RACING TO THE BOTTOM? FOREIGN INVESTMENT AND AIR POLLUTION IN DEVELOPING COUNTRIES (Development Research Group, World Bank, 2001), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=632594>. Wheeler's study shows a correlation and not causation.

Thus, the bulk of the economic literature contradicts the claim that regulation seriously hampers U.S. competitiveness. As Jaffe et al. conclude, “studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location decisions have produced estimates that are either small, statistically insignificant, or not robust to tests of model specification.”¹⁴ Other economic factors, such as labor costs, play a much more significant role in the movement of industries. Concludes Goodstein, “Highly polluting industries are relocating to poor countries; but the reason, overwhelmingly, is low wages.”¹⁵

Economic opinion on the existence of a pollution haven effect is by no means conclusive. Economic studies deviate broadly on the subject. According to one literature review, “much of the empirical literature that has attempted to test this assumption has arrived at differing conclusions, ranging from a modest deterrent effect of environmental regulatory stringency on economic activity to a counterintuitive modest attract effect.”¹⁶ Even in the most damning characterizations, regulation still is only said to have a modest impact on U.S. competitiveness.¹⁷

Even if *some* evidence does point to a pollution haven effect, one cannot dismiss the wide range of divergent economic opinion on the subject. As Tim Jeppesen, John List and Henk Folmer conclude in a 2002 article for the *Journal of Regional Science*, “casual perusal of the literature [on regulation and competitiveness] indicates that construction of a consensus point is akin to finding a needle in a haystack.”¹⁸

2. Regulation does not cost jobs.

Economists have also refuted the claim that increased regulation decreases jobs. Economist Eban Goodstein at the Economic Policy Institute has written substantially on the relationship of jobs and the environment. According to Goodstein, the jobs-environment trade-off is largely a myth. Goodstein’s book *Jobs and the Environment: The Myth of a National Trade-Off* finds a small positive effect of environmental regulation on overall employment, especially in the area of manufacturing

14. Jaffe et al., *supra* note 2, at 157-158.

15. EBAN GOODSTEIN, *JOBS AND THE ENVIRONMENT: THE MYTH OF A NATIONAL TRADE-OFF* 19 (1994).

16. Smita B. Brunnenmeier & Arik Levinson, *Examining the Evidence on Environmental Regulations and Industry Location*, 13 J. ENVI. & DEVEL. 6 (2004).

17. See Keller & Levinson, *Pollution Abatement Costs and Foreign Direct Investment Inflows to U.S. States*, 84 REV. ECON. & STATS. 691 (2002), in which they found that environmental regulation does have significant negative impact on FDI into the United States, but the magnitude is economically small. See also Arik Levinson, *Environmental Regulation and Manufacturers’ Location Choices: Evidence from the Census of Manufacturers*, 62 J. PUB. ECON. 5 (1996), in which Levinson found that the manufacturing sector is sensitive to environmental regulation, but again the impact is small in magnitude. Though the sector was sensitive to regulation, “the degree of aversion to stringent states does not seem to increase for pollution-intensive industries.”

18. Tim Jeppesen, John A. List, & Henk Folmer, *Environmental Regulations and New Plant Location Decisions: Evidence from a Meta-Analysis*, 42 J. REGIONAL SCI. 19, 36 (2002).

workers.¹⁹ Goodstein also finds that environmental regulation does not lead to manufacturing plant shutdowns.

Regulation leads to job creation and innovation of new technologies that can then expand the economy. Government spending on environmental regulation includes "investments in pollution control equipment and personnel, scientific studies to test pesticides and chemicals, the clean-up of hazardous wastes at Superfund sites, and the bill paid to your local garbage collector."²⁰ All of these costs *create jobs*. Moreover, these jobs are overwhelmingly blue collar and, by nature, domestic.²¹ According to Goodstein, "the one comprehensive estimate available suggests that, in 1992, just under 4 million jobs were directly or indirectly related to pollution abatement and environmental protection the United States."²²

Even the more equivocal work of Richard D. Morgenstern, William A. Pizer, and Jih-Shyang Shih cannot avoid the job-creating potential of environmental protection: they conclude that environmental regulation is *just as likely* to create jobs as to cause job losses. "While environmental spending clearly has consequences for business and labor, the hypothesis that such spending significantly reduces employment in heavily polluting industries is not supported by the data," they write.²³ Morgenstern et al. examined the pulp and paper, plastics, petroleum and steel sectors and found "that a million dollars of additional environmental expenditure is associated with an insignificant change in employment."²⁴

They explain: "Most importantly, there are strong positive employment effects in industries where environmental activities are relatively labor intensive and where demand is relatively inelastic, such as plastics and petroleum. In others, where labor already represents a large share of production costs and where demand is more elasticity, such as steel and pulp and paper, there is little evidence of a significant employment consequence either way."²⁵

Berman and Bui also found that regulation had no impact on labor demands. The authors examined the impact on labor demands of increased air pollution abatement in the Los Angeles area.

19. See generally Goodstein, *supra* note 15.

20. Eben Goodstein, *Jobs or the Environment? No Trade-Off*, 38 CHALLENGE 41, 46 (1995).

21. Frank Ackerman & Rachel Massey, *Prospering with Precaution: Employment, Economics, and the Precautionary Principle* (Precautionary Principle Project, Aug. 2002), available at <<http://www.healthytomorrow.org/pdf/prosper.pdf>>.

22. *Id.* at 42.

23. RICHARD D. MORGENSTERN, WILLIAM A. PIZER, & JIH-SHYANG SHIH, JOBS VERSUS THE ENVIRONMENT: AN INDUSTRY-LEVEL PERSPECTIVE (Resources for the Future Discussion Paper No. 99-01-REV, 2000) 25.

24. *Id.* at 24.

25. *Id.*

In looking at data from 1979 through 1992, a period that saw sharp increases in environmental regulation, they found that increased regulation had no effect on employment in refineries.²⁶

3. Regulation can improve efficiency.

Those posing an anti-regulatory agenda are forced to dismiss entirely the Porter "hypothesis" that regulation can actually increase productivity by increasing the efficiency of operations. Porter's theory was developed in response to real-world observations, such as OSHA's Cotton Dust Rule, in which regulations to protect the public had indirect benefits of inducing technological innovations and improved efficiencies in business operations. Since Porter elaborated his argument, the real world examples have continued to multiply. His "hypothesis" is now backed by a robust body of empirical evidence:

- Though regulation certainly does result in some cost to industry, it can also spur economic growth and increased efficiency. Jaffe points to a 1990 Barbera and McConnell study that "found that lower production costs in the nonferrous metals industry were brought about by new environmental regulations that led to the introduction of new, low-polluting production practices that were also more efficient."²⁷ EPA itself has in fact argued that environmental regulations generate "more cost-effective processes that both reduce emissions and the overall cost of doing business."²⁸
- A study of the impacts on food manufacturing of trade liberalization between Mexico and the U.S. found that free trade would benefit Mexican producers because of resulting productivity growth, not because of the country's more lax environmental regulation. In fact, increased environmental regulation actually stimulated greater productivity in Mexican food manufacturing. "Pollution abatement efforts encouraged by the Mexican Government's inspection program manifestly have stimulated improvements in food processing efficiency as well as in environmental quality."²⁹ The enhanced productivity offset any consequence for the profitability of Mexican food manufacturing in the aftermath of the new pollution controls. At the same time, the authors found "U.S. pollution regulations have had no impact on the

26. Eli Berman & Linda T. M. Bui, *Environmental Regulation and Labor Demand: Evidence from the South Coast Air Basin*, 79 J. PUB. ECON. 265 (2001).

27. Jaffe et al., *supra* note 2, at 155.

28. Office of Air and Radiation, Environmental Protection Agency, *The Clean Air Marketplaces: New Business Opportunities Created by the Clean Air Act Amendments—Summary of Conference Proceedings* (July 24, 1992).

29. Ebru Alpay, Steven Buccola, & Joe Kervilet, *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 AMER. J. AGR. ECON. 887, 894 (2002).

profitability or productivity of U.S. food manufacturing.⁹⁰

- Berman and Bui also found that in meeting more stringent environmental standards, oil refineries in the Los Angeles Air Basin actually increased their productivity and efficiency. Interviews with "plant managers and environmental engineers suggested that productivity increases were not accidental. They resulted from a careful redesign of production processes induced by the need to comply with environmental regulation."⁹¹
- Stephen Meyer compared regulation across states in the United States found that environmental regulation did impact economic prosperity. In fact, "states with stronger environmental regulations tended to have higher growth in the gross domestic products."⁹² Though the correlation does not suggest causation, it does indicate that environmental regulation does not hinder state's economies. The correlation held true even during times of recession. In an update focusing on the 1990-91 recession, Meyer found states with stronger environmental regulation were not more likely to face economic decline during a period of recession than states with weaker environmental standards.⁹³

Although the United States already has the least restrictive regulation in the world⁹⁴ and is third on the list of the world's top ten economies,⁹⁵ the business community has continued to assert that health, safety and environmental regulation is overly burdensome and must therefore be repealed. Yet the evidence shows that the cost to business of complying with regulation is negligible and that factors such as wages and trade agreements have a far greater impact on the competitiveness of U.S. business or the choice of an industry to move business overseas.

90. *Id.* at 887.

91. Eli Berman & Linda T. M. Bui, *Environmental Regulation and Productivity: Evidence from Oil Refineries*, 83 *REV. ECON. & STAT.* 498, 508 (2001).

92. Stephen Meyer, *Environmentalism and Economic Prosperity: An Update* (Department of Political Science, Massachusetts Institute of Technology, Feb. 1993), at 2.

93. *Id.* at 9.

94. OFFICE OF INFO. & REG. AFFS., OMB, 2005 DRAFT ANN. REPT. TO CONG. ON COSTS & BENS. OF FED. REG. at 33 text accompanying note 22.

95. *Id.* at 30 text accompanying note 16.



July 2005

The Going-Out-of-Business Myth

The public needs regulatory safeguards to protect our health, safety, environment, civil rights, and welfare. Corporate special interests, however, have an interest in avoiding spending a single dime to improve their destructive behavior. Again and again, when new regulatory protections have been proposed, corporate lobbyists have argued that business would be bankrupted and forced to go out of business. Again and again, they have been proven wrong.

Case Study	Ex ante	Ex post
Asbestos	"When the Occupational Safety and Health Administration (OSHA) instituted regulations covering exposure to asbestos in the early 1970s, [it] hired a consulting firm to estimate the cost of compliance." ⁹¹	"Two later studies found that the original prediction for the cost of compliance was more than double the actual cost, because of overly static assumptions." ⁹²
Benzene	"In the late 1970s, the chemical industry predicted that controlling benzene emissions would cost \$350,000 per plant." ⁹³	"Shortly after these predictions were made, however, the plants developed a process that substituted other chemicals for benzene and virtually eliminated control costs." ⁹⁴
CFCs	"In 1988, reducing CFC production by 50 percent within 10 years was estimated by the EPA to cost \$3.55 per kilogram. By 1993, the goal had become much more ambitious: complete elimination of CFC production, with the deadline moved up two years, to 1996." ⁹⁵	"Nevertheless, the estimated cost of compliance fell more than 30 percent, to \$2.45 per kilogram. And where substitutes for certain CFCs had not been expected to be available for eight or nine years, industry was able to identify and adopt substitutes in as little as two years." ⁹⁶ Additionally, regulated industry achieved substantial costs savings as a result of the CFC phase-out. For example, "when the international phase-out of ozone-destroying CFCs got underway, a company called Nortel began looking for substitutes. The company, which had used the chemicals as a cleaning agent, invested \$1 million to purchase and employ new hardware. Once the redesigned system was in place, however, Nortel found that it actually saved \$4 million in chemical waste-disposal costs and CFC purchases." ⁹⁷

CFCs in Automobile Air Conditioners	"In 1993 car manufacturers estimated that the price of a new car would increase by \$650 to \$1,200 due to new regulations limiting the use of CFCs." ⁸⁸	"In 1997 the actual cost was estimated to be \$40 to \$400 per car." ⁸⁹
Coke Ovens (1976/1987)	<i>OSHA Rule: Overall.</i> "The original OSHA estimate for the cost of complying with the 1976 coke oven standard was more than five times higher than estimates of actual costs. OSHA's contractor suggested that complying with the standard would cost from \$200 million to more than \$1 billion." ⁹⁰	"However, a Council on Wage-Price Stability study later estimated the actual cost of the standard to be \$160 million. . . . Ultimately, firms were able to meet the standard without incurring all of the capital costs in the first year, and actual compliance costs were dramatically lower than originally predicted." ⁹¹
	<i>OSHA Rule: RIA Sample.</i> "The OSHA consultant estimated that three steel firms in their sample would spend \$93 million on capital equipment and \$34 million in annual operating costs to comply with the regulations." ⁹²	"A later study by Arthur Andersen determined that the three firms actually spent between \$5 million and \$7 million in 1977 to comply with the standard, and only \$1 million to \$2 million on capital expenditures." ⁹³
	<i>EPA Rule.</i> "In the late 1980s, coke production again came under regulatory scrutiny, this time by the EPA. In 1987, the agency estimated that the cost of controlling hazardous air pollution from coke ovens would be roughly \$4 billion." ⁹⁴	"By 1991 that estimate fell to between \$250 million and \$400 million." ⁹⁵
Cotton Dust (1978)	<i>Total Cost.</i> "OSHA's estimate in the Final Regulatory Impact Analysis placed the textile manufacturing sector's cost of compliance at \$280.3 million annually (1982 dollars, for amortized capital spending, incremental operations and maintenance, and other new spending)." ⁹⁶	"However, actual spending is estimated to have been only about a third of this amount, \$82.8 annually (also 1982 dollars), chiefly because of the advantageous economics of the plant modernization push that was widely undertaken across the sector." ⁹⁷

	<p><i>Other Consequences.</i> "Concern was expressed in the rulemaking that smaller textile firms could encounter substantial constraints in raising capital for compliance-related improvements, and that the standard would tilt the sector's competitive center toward newer and more modern plants. . . . Also, control equipment suppliers argued during the rulemaking that serious bottlenecks would arise in trying to retrofit the industry's equipment in short order."¹⁹</p>	"Nonetheless, the actual effects in all these respects proved to be modest and generally bearable." ¹⁹
Ethylene Oxide (1984)	"There was little concern at the time of the rulemaking that the standard would entail substantial financial or economic consequences for the industry or the national economy, because average spending for compliance per hospital was estimated to total no more than \$1,500 to \$3,500 annually." ²⁰	"There is no evidence that the outcome differed from these expectations." ²¹
Formaldehyde (1987)	"OSHA's final estimate placed the industry's compliance costs at \$11.4 million annually (1987 dollars). (Cost savings of \$1.7 million annually from avoided medical expenses also were identified.)" ²²	"Actual spending appears to have been about half this level, \$6.0 million annually." ²³
Grain Handling Facilities (1987)	"OSHA estimated the sector's total compliance costs in the range of \$41.4 million to \$68.8 million annually (1985 dollars; spanning the incremental need for equipment and actions across the 13 separate provisions) and avoided property losses at \$35.4 million annually (as compliance reduced the number of facility explosions and serious fires). These calculations yielded an estimated net cost of compliance in the range of \$5.9 million to \$33.4 million annually." ²⁴	"Now that nearly five years have passed since full compliance with the terms of the 1987 standard was mandated, the evidence is that few if any facilities have ceased operation as a result of the standard—an outcome contrary to the economic impact estimates the industry submitted to the rulemaking. (The sector has, however, been subject to substantial economic pressures over this period for reasons not related to OSHA actions.)" ²⁵

Occupational Lead Exposures (1978)	<p>"OSHA did, however, outline an outer bound of about \$91 million (1976 dollars) in total capital spending, based on a complete rebuilding of the industry using the Bergsore smelter technology (then considered to be the most cost-effective option). In an early 1980s revision of the estimates, OSHA placed the cost of PEL compliance at a capital requirement of \$125 million (1982 dollars), or 1.3 cents annually per pound of production (\$150 million and 1.6 cents/lb, respectively, in 1992 dollars)."²⁶</p>	<p>"Nevertheless, the industry's actual spending to date (through early 1994) has been far below these levels. Cumulative capital investment appears to total no more than \$20 million (1992 dollars), and some of this overlaps with expenditures to meet the various environmental requirements to which the industry has also been subject. Annual compliance spending appears to be averaging 0.5 cents/lb to 1.0 cents/lb (1992 dollars), and perhaps as low as 0.3 cents/lb, i.e. well below OSHA's expectations at the time of the rulemaking and largely reflective of the industry's strategy of minimizing expenditures on engineering controls and relying much more heavily on respirator and hygiene programs to reduce exposures."²⁷</p>
Strip Mining (1978)	<p>"Prior to the passage of the 1978 Surface Mining Control and Reclamation Act, estimates for compliance costs ranged from \$6 to \$12 per ton of coal."²⁸</p>	<p>"Actual costs for eastern coal operations have been in the range of 50 cents to \$1 per ton. After the regulations were adopted, the market switched away from coal deposits with high reclamation costs. Ready substitutes included surface-minable coal in flatter areas (with lower reclamation costs), and underground deposits."²⁹</p>
Vinyl Chloride (1974)	<p>"The most credible figures put forth at the time were those of the agency's technical consultant, which estimated total costs at around \$1 billion (1974 dollars), including capital expenses for new equipment, replacement of lost capacity, and incremental operating expenses."³⁰</p>	<p>"According to the post-promulgation survey of industry members, however, actual spending amounted to only about a quarter of this estimate, \$228 million to \$278 million."³¹</p>

NOTES

1. Eban Goodstein, *Polluted Data*, AMER. PROSPECT, Nov.-Dec. 1997, available at <<http://www.prospect.org/web/page.wm?section=rostrname=ViewPrint&articleId=4757>>.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. OFFICE OF TECH. ASSESSMENT, U.S. CONG., GAUGING CONTROL TECHNOLOGY AND REGULATORY IMPACTS IN OCCUPATIONAL SAFETY AND HEALTH: AN APPRAISAL OF OSHA'S ANALYTICAL APPROACH 59 TB3-3 (Rep. No. OIA-ENV-635, Sep. 1995), available at <http://www.was.princeton.edu/~ota/disk1/1995/9531_a.html>.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 60 TB3-3.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 59 TB3-3.
27. *Id.*
28. Goodstein, *supra* note 1.
29. *Id.*
30. OIA, *supra* note 16, at 59 TB3-3.
31. *Id.*

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The Unbearable Lightness of Regulatory Costs

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The Unbearable Lightness of Regulatory Costs

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Abstract

Will unbearable regulatory costs ruin the US economy? This specter haunts official Washington, just as fears of communism once did. Once again, the prevailing rhetoric suggests, an implacable enemy of free enterprise puts our prosperity at risk. Like anti-communism in its heyday, anti-command-and-control-ism serves to narrow debate, promoting the unregulated laissez-faire economy as the sole acceptable goal and standard for public policy. Fears of the purported costs of regulation have been used to justify a sweeping reorganization of regulatory practice, in which the Office of Management and Budget (OMB) is empowered to, and often enough does, reject regulations from other agencies on the basis of intricate, conjectural, economic calculations.

This article argues for a different perspective: what is remarkable about regulatory costs is not their heavy economic burden, but rather their lightness. Section 1 identifies two general reasons to doubt that there is a significant trade-off between prosperity and regulation: first, regulatory costs are frequently too small to matter; and second, even when the costs are larger, reducing them would not always improve economic outcomes.

The next three sections examine evidence on the size and impact of regulatory costs. Section 2 presents cost estimates for a particularly ambitious and demanding environmental regulation, REACH – the European Union's new chemicals policy. Section 3 discusses academic research on the "pollution haven" hypothesis, i.e. the assertion that firms move to developing countries in search of looser environmental regulations. Section 4 reviews the literature on ex ante overestimation of regulatory costs, including the recent claims by OMB that costs are more often underestimated (and/or benefits overestimated) in advance.

Turning to the economic context, Section 5 explains why macroeconomic constraints may eliminate any anticipated economic gains from deregulation. Section 6 introduces a further economic argument against welfare gains from deregulation, based on the surprising evidence that unemployment *decreases* mortality. Section 7 briefly concludes.

1. Two arguments against the trade-off

In theory, it would unquestionably be possible to spend so much on environmental protection that basic economic needs could not be met. At a sufficiently high level of

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regulatory expenditures, protecting nature and cleaning up the air and water *could* absorb enough of society's resources to compete with the provision of more fundamental goods, such as food and shelter. From this it is a short leap to the conclusion that the clash between economy and environment actually *is* an urgent problem, requiring detailed analysis of regulations to prevent worsening the terms of the trade-off. But the latter statement only follows logically if environmental policy is in fact consuming substantial resources, which are transferable to other, more basic needs. That is, the assumed urgency of the trade-off rests on the implicit assumptions that the costs of environmental protection are both large and fungible. Either of these assumptions could fail in practice:

- The costs of environmental protection could be nonexistent, or too small to matter; or
- Reduction of regulatory costs might not produce the desired economic benefits.

Environmental protection with little or no costs

Costless environmental improvement is frequently assumed to be impossible by definition. The hidden premise underlying this form of the trade-off argument is that the market economy is already performing as well as possible; that is, it has reached a Pareto optimum. From this perspective, any new expenditure on environmental protection necessarily represents a loss, because it diverts resources away from the things that consumers in their wisdom have chosen for themselves. (Strong forms of this argument come close to denying the existence of public goods, or at least the possibility of efficient delivery of them. Like most discussion of environmental regulation, this article takes it for granted that the government can and should deliver public goods.)

Reverence for market outcomes is at odds with the beliefs of many environmental practitioners, who assume that environmental improvements can bring economic benefits as well. The rhetoric of joint economic and environmental progress includes such overused imagery as "win-win solutions," the "double [or triple] bottom line," and opportunities to pick the "low hanging fruit." The ubiquity of these phrases underscores the extent to which environmental advocates find that the market is improvable – implying that it could not have already been at an optimum.

In a more academic vein, the Porter hypothesis maintains that carefully crafted, moderately demanding regulations can improve economic competitiveness and success in the marketplace (Porter and van der Linde 1995). Likewise, studies of energy conservation and greenhouse gas reduction frequently find opportunities for energy savings at zero or negative net cost, as in the "no regrets" options for climate change mitigation (IPCC 2001, 474-476). The critique of these opportunities is not that they are undesirable; who could argue with free environmental improvements? Rather, economists have argued that, in their own overused metaphors, there are no free lunches, nor \$20 bills on the sidewalk. If lunch is expensive and the sidewalk is bare, then the Porter hypothesis must be impossible, and there must be hidden costs associated with energy conservation.

Without attempting a thorough review of this debate, it seems plausible that there are significant cases where essentially costless energy savings and other environmental improvements are possible. In such cases, the fears of regulatory cost burdens and concerns about trade-offs are presumably easy to resolve; there should be a broad consensus supporting the adoption of costless improvements.

However, literally costless improvements are not the only ones to escape from the trade-off; economic constraints do not immediately become relevant to real decisions as soon as regulatory costs are greater than zero. Very small costs of regulation presumably have very small impacts on the economy. Regulations could easily have costs that are too small to matter -- and Sections 2-4 will suggest that this is the case in many important instances. The theoretical consensus that supports costless environmental improvement may vanish once costs become positive, however small; but practical concerns about economic impacts need not arise until costs become large in some meaningful sense.

The question naturally arises: what counts as large? Here it is important to resist the illusion of superficially big numbers. Quantities in the billions, which are commonplace in federal programs and nationwide impact assessments, are essentially impossible to understand in isolation. Some standard of comparison is needed to bring them down to a comprehensible scale. (A million seconds is about 12 days; a billion seconds is about 32 years.) Amounts in the billions of dollars are inevitably thought of as part of a ratio: if X billion dollars is the numerator, what is the appropriate denominator? When none is specified, the default denominator tends to be the listener's personal finances -- in which case one or a few billions look very large indeed.

In contrast, a penny per person per day sounds small. But for the US with its population of about 300 million, a penny per person per day and a total of \$1 billion per year are roughly the same. Per capita impacts, as in this example, are sometimes appropriate, particularly when the costs of regulations are spread across the population as a whole. Comparison to the revenues of the affected industry is also a useful standard for evaluating regulatory impacts. For issues affecting the entire US (or the EU), or even a large industry, a few billion dollars (or euros) per year is not a large number. This issue is important in the discussion in Section 2.

Environmental costs that cannot be traded for economic gains

Even when environmental policies impose noticeable economic costs, it does not necessarily follow that these costs could be traded for greater private incomes and consumption, or for the benefits that are thought to accompany higher incomes. There are two strands to this unfamiliar argument, presented in Sections 5 and 6 below, and briefly anticipated here.

First, deregulation might not produce increased economic growth. If a regulation or other environmental policy has measurable economic costs, it consumes resources such as labor and capital that could have been used elsewhere in the economy. The

policy, then, can only be "traded" for whatever those resources could have produced elsewhere -- in economic terms, the opportunity cost of those resources.

During a recession, labor and capital are typically less than fully employed. Supplying more of resources that are already in surplus may not produce anything more; the short run opportunity cost of additional resources could be zero. On the other hand, during expansions such as the late 1990s, the Federal Reserve carefully controls the level of employment and rate of growth; making more resources available for increased growth might just lead the Fed to step harder on the brakes in order to maintain the (unchanged) target pace of expansion. Again, the short-run opportunity cost of additional resources could be zero.

Second, economic growth may not produce the expected or desired benefits. An increasingly common style of analysis converts regulatory costs into health and mortality impacts, based on correlations between income and health. In the extreme, regulatory costs that are thought to lower market incomes have been labeled "statistical murder", because richer people live longer.

This line of argument is flawed in several respects. Perhaps the most dramatic response to the "statistical murder" story is the epidemiological evidence that mortality decreases in recessions. If deregulation leads to economic growth, which boosts employment, the expected result is paradoxically not a reduction in mortality.

In the long run, the availability of resources such as labor and capital must have something to do with growth rates, economic opportunities, and improvements in health and welfare. However, the relationship is a subtler and more tenuous one than is often recognized.

2. The low cost of regulating Europe's chemicals

Expensive regulations are less likely to be adopted in the US at present, due to exaggerated fears about regulatory costs, and to an administration that is extremely sympathetic to industry's concerns. Examples of truly expensive regulations may be easier to find elsewhere, such as in the European Union. Regulation has a better name in the EU than in the US; government-imposed constraints on private business that are taken for granted in Brussels would be immediately dismissed as beyond the pale in Washington.

REACH, Europe's new chemicals policy, is one of the most ambitious and demanding EU environmental regulations. (The name is an acronym for Registration, Evaluation, and Authorization of Chemicals.) When it is adopted, likely by early 2007, REACH will require chemical manufacturers and importers to register and test their chemicals for safety. During the 11-year phase-in period, some 30,000 chemicals will likely be registered and tested. Depending on the outcome of the tests, some chemicals (probably a very small minority) may be subject to partial or complete restrictions on

their use in Europe. An appeals procedure allows economic and other arguments to be raised against restrictions on the use of a chemical.

As in the US, industry groups have claimed that the costs of regulation will be prohibitive. A German industry federation commissioned a study, performed by the consulting firm Arthur D. Little (ADL), which presented lengthy calculations purporting to show that REACH would devastate German manufacturing, and seriously weaken the German economy as a whole (Arthur D. Little 2002). A French industry group sponsored another study, to date released only in the form of PowerPoint slides, claiming that France, too, would be flattened by REACH (Mercer Management Consulting 2003).

Numerous studies done without industry funding have reached very different conclusions, finding that the costs of REACH would be much lower, and entirely manageable. The European Commission estimated that the costs of registration and testing would total €2.3 billion over the 11 year period. I directed a study sponsored by the Nordic Council of Ministers, representing the governments of the Scandinavian countries, which estimated the registration and testing costs at €3.5 billion (Ackerman and Massey 2004). Our cost estimate represents less than one euro per person per year, over the 11-year phase-in of REACH.

Perhaps a better standard of comparison is that the €3.5 billion cost, if fully passed on to customers, would increase the average prices of the European chemical industry by a ratio of .0006, or 1/16 of 1%. This is, by any reasonable standard, a very small price change. The spot price of crude oil changes by more than that, on average, 51 weeks out of the year. The cost of REACH, standing alone, might sound big (billions of euros!), but the revenues of the European chemical industry over 11 years amount to a much bigger number of euros. Even a noticeably larger ratio could still seem small: if, as industry has sometimes claimed, most of the costs of REACH will be borne by one third of the chemical industry, the affected companies would be burdened with a price increase of about 1/5 of 1%.

The German industry study, performed by ADL, is the only major study to explain why the costs might be much larger. Yet the authors used only slightly higher figures than everyone else for the direct costs of registration and testing. Their enormous estimates of the costs of REACH came from creative calculation of indirect costs such as decreases in productivity, delays in innovation, etc. In their economic model, industry displays little imagination or adaptability, and never responds to regulation by innovating or switching to safer substitutes. Rather, industry's sole answer to regulation is to notice that profits have decreased, and therefore to decide to cut back on production. A bizarre misreading of basic microeconomic theory led ADL to estimate that production losses would average 9 times any cost increase imposed on German industries. Meanwhile, they mistakenly assumed that costs of REACH would be incurred over only 7 years, rather than 11, thus inflating the annual costs during the phase-in period by more than 50%. These and other mistakes drove cost impacts sharply upward.

They identified many separate pathways by which REACH might conceivably affect industry. Specifically, ADL assumed that each regulatory impact pathway would cause a specified percentage reduction in industry output; all the separate reductions were assumed to be independent, and multiplied to obtain the cumulative reduction. Thus if one regulatory impact is believed to cause a 10% cutback in output, and another to cause a 20% cut, the combination causes output to fall to $90\% \times 80\% = 72\%$ of the original level. This strange, nonstandard methodology seems designed for exaggeration, as any mild overstatement in individual factors will be amplified through multiplication by all the other factors. If ADL has inappropriately doubled the size of one of the individual cost factors, the entire estimate of the cost and impacts of REACH will be doubled via the multiplicative method. The appendix to my Nordic Council study provides a detailed critique of both the individual impact pathways and the overall methodology of the Arthur D. Little study.

The predominant role of indirect cost impacts suggests another comparison: how large is the ratio of indirect costs of regulation to the direct compliance costs? The highest ratio that I am aware of in a government, NGO, or academic study of REACH is about 6 to 1. The implicit ratio in the Arthur D. Little study is 650 to 1. Without knowing precisely what this ratio should be, it is tempting to say that we know what it is not: in an advanced industrial economy such as Germany, there is no visible basis for the claim that regulations impose indirect costs of 650 times their direct compliance costs.

US industry and government have been emphatic in their opposition to REACH, issuing alarmist predictions of its possible impact on the US. (These, too, are greatly exaggerated; at worst, US companies exporting to Europe might face the same percentage cost increase as European companies. A small percentage is a small percentage, whether it is expressed in euros or in dollars.) It seems safe to say that no recent US regulations have approached the ambition or scope of REACH. If one of Europe's most demanding regulations will increase prices by 1/16 of 1%, imagine how much less the costs will be for the timid proposals that still pass muster in Washington.

3. Pollution havens: theory vs. reality²

If regulatory costs imposed significant burdens on the economy, it should be easy to find their footprints. Because the costs are not uniformly distributed, there should be dramatic extremes where regulations have trod most heavily on the human landscape. Companies that have closed because of environmental costs, moving to Mexico or other countries where the regulatory climate was more lenient; workers thrown out of jobs by rigid environmental strictures; formerly prosperous communities shut down by the economic burdens of command-and-control regulation -- they should be all around us. If the fabled regulations of mass destruction exist, there is no way to hide them in a bunker; they should be visible for all to see. But the actual, identifiable examples of jobs lost to regulations rarely extend beyond a handful of stories about small numbers of workers in

² This section draws heavily on the work of Eban Goodstein (Goodstein 1999) and Kevin Gallagher (Gallagher 2004).

the most directly environmentally damaging, rural industries such as logging and coal mining.

The economic impacts of environmental regulations have been intensively studied for years. As Eban Goodstein has demonstrated (Goodstein 1999), there is no evidence that significant numbers of jobs or businesses have ever been lost for environmental reasons. Companies don't move, between states or between countries, to avoid expensive environmental standards, because environmental standards aren't that expensive. Environmental compliance costs are above 2% of industry revenues only in a handful of the most polluting industries; Goodstein cites a maximum of 7% for pulp mills. Among the reasons for major layoffs, as reported by the Bureau of Labor Statistics, environmental and safety-related shutdowns are among the least common, accounting for about 0.1% of job losses (Goodstein 1999; Ackerman and Massey 2002). Contrary to predictions, the Clean Air Act Amendments of 1990 did not destroy jobs; the same is true for the stringent local air quality regulations imposed by the South Coast Air Quality Management District in Southern California. A study of the South Coast regulations concluded, "In contrast to the widespread belief that environmental regulation costs jobs, the most severe episode of air-quality regulation of industry in the [United States] probably created a few jobs." (quoted in Goodstein 1999, 54)

Economists have carried out extensive studies of the "pollution haven hypothesis," i.e. the notion that polluting industries will flee to countries with lax environmental standards. The results have been almost entirely negative. A 1995 review of the literature on the subject concluded

Overall, there is relatively little evidence to support the hypothesis that environmental regulations have had a large adverse effect on competitiveness, however that elusive term is defined... studies attempting to measure the effect of environmental regulation on net exports, overall trade flows, and plant-location decisions have produced estimates that are either small, statistically insignificant, or not robust to tests of model specification. (Jaffe et al. 1995, 157-158)

A more recent literature review reached similar conclusions (Jayadevappa and Chhatre 2000). Eric Neumayer demonstrated that neither the US nor Germany has had unusually large net outflows of investment in dirty industries; a section of his chapter on the subject is subtitled, "Why is there so little evidence for pollution havens?" (Neumayer 2001) Brian Copeland and Scott Taylor, in a very thorough theoretical and empirical analysis of trade and the environment, conclude that "the evidence does not support the notion that trade patterns are driven by pollution haven motives." (Copeland and Taylor 2003, 277) Kevin Gallagher shows that the dirtiest industries in the US have not been migrating to Mexico, either before or after NAFTA; while these industries have been declining in the US, their share of manufacturing has been declining even faster in Mexico. Moreover, a handful of major industries -- steel, aluminum, and cement -- appear to be cleaner (i.e., emit smaller amounts of criteria air pollutants per dollar of sales) in Mexico than in the US. A likely explanation for this unexpected pattern is that

the Mexican plants are newer than their US counterparts, and incorporate newer, cleaner technology (Gallagher 2004).

The economics literature is nearly, but not quite, unanimous on this question. Two recent articles have found modest empirical support for the pollution haven hypothesis. Matthew Kahn and Yutaka Yoshino use intricate and indirect methods of measuring the pollution intensity of trade inside and outside of regional trading blocs. They find that for trade outside of blocs, middle-income countries tend to expand dirty exports as they grow, while high-income countries expand cleaner exports. The effect is weaker inside regional trading blocs (Kahn and Yoshino 2004).

Matthew Cole presents superficially contradictory findings on trade between the US and Mexico (Cole 2004). (A careful reading shows that his results are not literally in conflict with each other.) On the one hand, the trade flows in both directions are becoming cleaner, but Mexico's exports to the US are becoming cleaner (declining in air pollution intensity) faster than US exports to Mexico. Since 1988, he finds, "The pollution embodied in US imports from Mexico [has been] less than that embodied in exports to Mexico and, furthermore, this gap has been widening rather than narrowing." (Cole 2004, 441) On balance, it is Mexico rather than the US that is escaping from trade-related air pollution on the other side of the Rio Grande, seemingly contradicting the pollution haven hypothesis. On the other hand, Cole also finds that US imports, from Mexico and from the world, are growing faster (as a share of US consumption) in industries that have higher pollution abatement costs, just as the pollution haven hypothesis would suggest.

Neither of these articles finds a strong effect, and neither presents a clear, easily interpreted picture of the movement of industry in response to US pollution control costs. Meanwhile, the bulk of the economics literature, as described earlier, continues to suggest that a good pollution haven is hard to find.

4. Advance overestimates of regulatory costs

By now there is a substantial literature demonstrating that the best-known claims of extraordinary costs imposed by environmental policy do not stand up to careful examination. Tales of billions of dollars spent per life saved by esoteric regulations are based on errors and misrepresentation; they represent, as Lisa Heinzerling put it, "regulatory costs of mythic proportions" (Heinzerling 1998), (Heinzerling and Ackerman 2002). No attempt will be made to summarize the full extent of that literature here.

However, one aspect of the issue is worth expanding upon, namely the biases in prospective estimates of regulatory costs. Prospective estimates are, of course, all that is available when a new policy is under discussion. And the evidence is clear: the costs of environmental protection are much more often overestimated, rather than underestimated, in advance.

A classic example is the 1974 OSHA standard for workplace exposure to vinyl chloride. Consultants to OSHA estimated the costs of reducing vinyl chloride exposure at around \$1 billion; industry estimates were even higher. Actual costs turned out to be around a quarter of OSHA's estimate, since industry quickly developed new, cost-effective technologies to comply with the regulation (U.S. Congress Office of Technology Assessment 1995).

Similar patterns have been found for many environmental standards. One study found that compliance costs for environmental regulations were overestimated in advance in 11 out of 12 cases (Hodges 1997). Another study found that advance cost estimates for environmental compliance turned out to be more than 25 percent too high in 14 out of 28 cases, while they were more than 25 percent too low in only 3 of the 28 cases (Harrington et al. 2000). A study for Environment Canada and the Ontario Ministry of Energy, Science and Technology, focusing specifically on the costs of controlling chlorinated substances, confirmed that overestimation of regulatory costs is more common than underestimation (Cheminfo Services 2000).

An in-depth examination of prospective cost estimates for regulations by Thomas McGarity and Ruth Rutenberg reviews most of these as well as quite a few other examples, and identifies a series of reasons why cost estimates are biased upward in advance: (McGarity and Rutenberg 2002)

- Regulators rely on regulated industries for empirical data, and the industries have a clear interest in secrecy and/or inflated cost estimates, either of which will discourage strict regulation.
- The likelihood of court challenges to strict regulations pushes agencies toward making conservative assumptions, again tilting in favor of the regulated industries.
- For lack of information, agency analyses often compare the costs of a proposed regulation to a zero regulation baseline, rather than the appropriate measurement of the incremental costs relative to existing regulations.
- Companies' reported costs of regulatory compliance sometimes include costs of upgrading other equipment at the same time that environmental controls are installed.
- Regulatory analyses frequently take a static approach, ignoring the learning curve effects, economies of scale, and regulation-induced productivity increases that may result from new environmental standards.

On the other hand, McGarity and Rutenberg note that there are also downward biases in cost estimates, including a tendency to ignore indirect social costs of regulation, reliance on vendors of control technologies that are eager to win new markets, and a failure to take sufficient account of "Murphy's law" in projecting responses to regulatory requirements. On balance, the factors producing upward bias appear more numerous and more powerful.

The OMB response: 2004

However, the opposite perspective continues to be argued in the annual reports from OMB's Office of Information and Regulatory Affairs (U.S. Office of Management and Budget 2004; U.S. Office of Management and Budget 2005). The 2004 report devoted three pages (U.S. Office of Management and Budget 2004, 51-53) to the discussion of ex ante versus ex post regulatory cost estimates, leading with the assertion that many commentators believe costs are underestimated in advance. OMB cites three studies in support of the view that regulatory costs are typically underestimated. Yet all three simply claim that costs are large, not that advance estimates are consistently low. The details of these claims are not impressive:

- Mark Crain and Thomas Hopkins, in a consultant report for the Small Business Administration, agonize at length over the plausible idea that there are economies of scale in regulatory compliance, so that smaller firms have a higher compliance cost per employee (Crain and Hopkins 2000). For its estimates of environmental regulatory costs, the study uses the high end of the range published by OMB. So in citing this study, OMB is effectively citing itself, not a new source of information.
- Harvey James estimates the costs of compliance with 25 OSHA regulations as of 1993 (James 1998). But he also observes that the cost per firm was 5.5 times higher in a 1974 study of OSHA compliance costs done by the National Association of Manufacturers. James then simply asserts that the costs per firm could not be lower today than in 1974. On that basis, he multiplies his 1993 numbers by 5.5 – thereby eliminating all empirical content in his study of 1993 costs, and simply recycling a 1974 estimate by an anti-regulatory industry group.³
- Finally, a detailed economic modeling exercise by Dale Jorgensen and Wilcoxon estimates the impact of the environmental regulations on US economic growth (Jorgensen and Wilcoxon 1990). They state at the outset that they have not attempted to assess any of the benefits, to consumers or to producers, of a cleaner environment. As a result, "the conclusions of this study cannot be taken to imply that pollution control is too burdensome or, for that matter, insufficiently restrictive." (Jorgensen and Wilcoxon 1990, 314-315)

Modeling costs but not benefits, they find that the growth rate was reduced by 0.19% due to regulations during 1974-1983. They analyze a scenario involving the complete absence of regulations, including removal of all limitations on the use of high sulfur coal, and all motor vehicle pollution controls. Even if one were willing to contemplate such a wholehearted embrace of smog, acid rain, and toxicity, there are two reasons why the effect on the growth rate would be smaller today: the study was based on a period when the first round of spending for compliance with the Clean Air Act and the Clean Water Act was underway; and it

³ The polemical nature of this study is suggested by its prominent table of the costs of compliance with OSHA regulations proposed in the late 1970s. Almost all of the costs in the table are for compliance with a generic carcinogen standard – presumably the standard that was rejected in the *Benzene* decision. Only in a note many pages later, at the end of the article, does James acknowledge that the generic carcinogen standard was never actually implemented.

was also a period when the dirty industries which account for most pollution control spending represented a larger fraction of the US economy than at present.

The OMB response: 2005

In its 2005 report, OMB takes a different tack. In a chapter entitled "Validation of benefit cost estimates made prior to regulation," the report reviews "47 federal rules where pre-regulation estimates of benefits and costs were made by federal agencies and some post-regulation information is published by academics or government agencies." (U.S. Office of Management and Budget 2005, 42) The bottom line judgment is that overestimates of benefit-cost ratios were more common than underestimates: 11 were declared accurate (meaning that advance estimates were within 25% of the retrospective judgments), 22 advance estimates were too high, and 14 were too low.

OMB's report is not strictly comparable to other literature on advance cost estimates. It differs from other analyses in restricting its attention to estimates made by federal agencies; many of the most controversial and politically significant estimates are made by or sponsored by industry groups. Thus it could still be the case that regulatory cost estimates that arise in political debates are typically overestimated, whether or not federal agencies have a tendency toward underestimates.

Moreover, OMB examines both costs and benefits, and finds advance estimates to be too high much more often for benefits than for costs. Evaluating OMB's judgments on benefits estimates would be a substantial task, which for the most part is not undertaken here. Regulations do not operate in a vacuum; even in hindsight, it is not immediately obvious how large the benefits from a regulation have turned out to be. If a regulation reduces the risk of death in an industry or community, it is necessary to distinguish the effects of the regulation itself from any other factors that may have altered death rates in the same period. In other words, a retrospective study would be needed to identify those benefits -- and methodological errors could bias the retrospective, as well as the prospective, estimate.

Despite these differences in approach, OMB's discussion of the 47 rules appears to be a response to the findings of advance overestimates of costs. Even on its own terms, accepting OMB's judgments on the individual rules, the report is fundamentally unpersuasive, for two reasons. First, the report does not establish a reasonable basis for inferring that federal agencies tend to overestimate; its data do not contain a statistically significant bias toward overestimates. Second, the report's main finding is entirely due to its treatment of OSHA estimates, which raise a number of unique issues unrelated to general biases in estimates.

The choice of rules was based solely on data availability, heavily skewed by a few sources that reviewed multiple rules. OMB refers to the rules as a "convenience sample" which is not necessarily representative of federal rules in general (U.S. Office of Management and Budget 2005, 48). But let us suppose for the moment that they were a

true random sample of federal rules and agency estimates, and see what the sample would imply about the overall tendency to overestimate.

With 11 advance estimates accurate, 22 over, and 14 under, OMB's sample is not terribly far from finding the average estimate to be accurate. Change just 4 of the overestimates to under, and all trace of bias would disappear. How likely is it that the appearance of bias has occurred purely by chance? For the purpose of statistical analysis, OMB's judgments can be converted to numbers: 0 for accurate, -1 for underestimates, and +1 for overestimates. Then the sample mean is 0.17, and the standard error is 0.13. The null hypothesis that the true mean is zero, i.e. no bias, cannot be rejected, with $p = .19$. In other words, if there was no bias in reality and we drew a random sample of 47 cases, there is a 19% probability that it would look at least as biased as the OMB sample. Of course, standard statistical practice, which OMB would certainly insist on in agency scientific analyses, requires $p = .05$ or less to reject the null hypothesis of no effect.

In contrast, the Harrington et al. study mentioned earlier (Harrington et al. 2000), which found 3 underestimates of costs, 14 overestimates, and 11 accurate, passes the significance test with flying colors: using the same numerical scoring, the sample mean is .38, with a standard error of .13. The null hypothesis that the true mean is zero is clearly rejected, with $p = .005$; there is less than a 1% probability of getting the Harrington et al. result by chance if there is no real bias in advance cost estimates. (Note that Harrington et al. find a tendency to overestimate regulatory costs, while OMB alleges a tendency to overestimate benefit-cost ratios. Thus "overestimate" has opposite implications in the two contexts.)

Not only does the slight appearance of bias in the OMB study turn out to be statistically insignificant; it is also entirely due to OMB's treatment of the 13 OSHA rules. As shown in Table 1, all of the tilt toward overestimates comes from the OSHA rules, where OMB believes that overestimates of benefit-cost ratios are essentially the norm. (OSHA's 1974 vinyl chloride rule, discussed above, a famous case in which advance estimates of costs were far too high, did not make it into OMB's "convenience sample.") Among the non-OSHA rules in OMB's sample, underestimates slightly outnumber overestimates, although with $p > .5$ (see table) it is completely clear that this pattern is not statistically significant.

	Total	OSHA	All other
Accurate	11	2	9
Overestimate	22	11	11
Underestimate	14	0	14
<i>p value for no bias</i>	.19	.00	.56

As can be seen from a glance at the data, there is essentially no chance that the true mean, or bias, is the same for the OSHA and non-OSHA rules (statistically, the hypothesis that the two groups have equal means is rejected with $p < .00001$).

So in the end, the scant evidence of overestimates provided by OMB comes down to their treatment of the 13 OSHA rules. In 6 of the 13 cases, OMB relied on a single source, an article by Si Kyung Seong and John Mendeloff (Seong and Mendeloff 2004). That article discusses OSHA's tendency toward prospective overestimates of benefits, suggesting several explanations. Prospective estimates from regulatory agencies typically assume complete implementation of proposed rules, whereas retrospective evaluations reflect actual, potentially incomplete implementation. The availability of data on workplace fatalities improved significantly in 1992, allowing more accurate estimates of reduced mortality due to regulations; 9 of the 13 OSHA rules in the OMB study were adopted before 1992. Seong and Mendeloff also suggest that OSHA is more likely to be inaccurate in analyzing less expensive rules, which naturally receive less analytical effort; and they conclude that OSHA systematically overestimates the benefits of training programs.

Thus the allegation that OSHA overestimates benefits could simply reflect the agency's beleaguered status. Ever since the Reagan administration, OSHA has been particularly hard-hit by industry and conservative attacks, budget cuts, and defeats in the courts. As a result, OSHA may be more constrained and powerless than other regulatory agencies. It is all too believable that OSHA is constantly planning on complete implementation of its rules but unable to achieve it, or that it has been forced to stick to small proposals, frequently involving nothing more than training programs. According to Seong and Mendeloff, the result would be a pattern of overestimation of benefits of OSHA regulations. This is an important story, but it bears no resemblance to OMB's suggestion of a pattern of systematic overestimation of benefit-cost ratios by government agencies.

5. Opportunity costs and growth-growth trade-offs

The previous sections have suggested several reasons to doubt that environmental regulations impose huge economic costs. This section turns to the economic context of the debate, arguing that even if regulatory costs look significant, deregulation might produce surprisingly little additional growth and personal consumption.

The costs of regulation do not consist of goods that would be of direct use to consumers; if regulation were rolled back, it would not be helpful to simply redistribute scrubbers, filters, catalytic converters and the like to other uses. Rather, the trade-off hypothesis must be that regulation requires the use of productive resources, principally labor and capital; in the absence of regulation, these resources could be used to produce consumer goods (or other desirable products). A related assumption, normally taken for

granted, is that expanding the available supplies of labor and capital would in fact increase the production of consumer goods.⁴

Yet the truth of that related assumption is less obvious than it might seem. Suppose that deregulation occurs during a recession. In that case, unemployed labor and capital are already available on the market; indeed, that is almost the definition of a recession. It is far from certain that increasing the surplus of idle labor and capital will produce any economic benefit in the short run.

Alternatively, suppose the deregulation occurs during an economic expansion. It is becoming increasingly standard practice for the Federal Reserve to maintain tight control of the pace of expansion, effectively preventing an acceleration of growth above a target level. In the late 1990s, for instance, economic growth was limited by Federal Reserve intervention -- not by regulations, or by the availability of labor or capital.

Again, an increase in available productive resources might not have led to any additional output, income, or consumption in the short run. If deregulation had put more labor and capital on the market, the Fed might have simply clamped down harder to achieve its targets (Goodstein 1999).

In the long run, the availability of labor and capital must have something to do with the pace of economic growth. The manner in which that long run effect occurs, however, depends on macroeconomic mechanisms about which there is no consensus. Would additional labor and capital somehow accelerate the recovery from recession, or make the next recession less deep? In an expansion, would the Fed quickly notice that increased output is now possible without risking inflation, or would it take years -- perhaps even another business cycle -- for the Fed's targets to adjust to the additional resources? Both theoretical and empirical macroeconomic analysis would be required to have confidence about the answer to these questions.

A common critique of risk-reducing regulation today is that it should examine "risk-risk" trade-offs, considering not only the risk directly addressed by regulation, but also the offsetting risks that might be indirectly created by the regulation. It is equally the case that calculations involving the costs of regulation should examine the "growth-growth" trade-offs, considering not only the resources used in regulatory compliance, but the actual benefits available from using those resources elsewhere. In the short run, there may be no foregone growth at all. If the claim is that deregulation would create additional growth only in the long run, via slow, complex pathways, then the usual arguments about the need to discount future benefits would apply to this economic gain. Not only the extent of growth, but the timing, needs to be calculated in order to determine the real opportunity cost of the resources used to comply with regulations.

⁴ The same discussion applies not just to consumer goods, but to any desirable goods that could be produced with the resources used for regulatory compliance. Likewise, it applies to the resources saved by avoiding new regulation, as well as the resources released by deregulation. For narrative simplicity, this section tells the story purely in terms of deregulation and consumer goods.

6. Is employment hazardous to your health?

A clever rhetorical strategy has appeared in recent economic arguments for deregulation. Rather than emphasizing the monetary costs of regulation per se, critics of regulation have converted these costs into numbers of deaths that supposedly result from the expenditures. Expensive regulations can thus be charged with "statistical murder." As Lisa Heinzerling and I have argued (Ackerman and Heinzerling 2004, chapter 3), the statistical murder theory is doubly fallacious. The correlation between income and mortality is weak in developed countries, except at very low income levels; different variants of the statistical murder story have used widely differing prices per life saved, resting on different indirect inferences from very limited data. Moreover, regulation does not remove money from the economy, so much as cause it to be spent in different sectors. Incomes decrease for those who produce and sell polluting products, but increase for those who develop, install, and operate pollution controls, monitor compliance, and research and debate regulatory options. Whether or not one considers this reallocation to be desirable, it is primarily a change in the composition, not the aggregate level, of national income.

But an even more decisive rebuttal is available. Remarkably enough, the statistical evidence shows that mortality decreases during recessions, and increases as employment rises. So even if the costs of regulation were large enough to matter (despite the evidence to the contrary in sections 2-4), and even if deregulation boosted economic growth and employment in the short run (despite the arguments to the contrary in section 5), the result might well be an increased death rate.

The evidence on mortality and business cycles is presented in a symposium in the December 2005 issue of the *International Journal of Epidemiology*. The lead article, by José A. Tapia Granados, presents and analyzes data for the US throughout the 20th century (Tapia Granados 2005a). Age-adjusted mortality rates are significantly, negatively correlated with unemployment rates -- meaning that death rates go up when unemployment goes down -- for the population as a whole, and separately for men and women, and for whites and nonwhites. The relationship is strongest for the working age population.

Looking at individual causes of death, in the late 20th century (after 1970) deaths from traffic accidents, major cardiovascular diseases, and cirrhosis of the liver were all significantly, negatively related to the rate of unemployment. In earlier periods, there was also a strong relationship between employment and flu and pneumonia deaths, and a weaker but significant relationship with cancer deaths, in the same "perverse" direction. Of the major causes of death examined in the article, only suicide shows the naïvely "expected" pattern of worsening when unemployment rises.

Another study, by Christopher Ruhm, similarly found that for 1972-1991, increased unemployment was associated with decreases in total mortality in eight of 10 major causes of death (Ruhm 2000). The two exceptions were Ruhm's findings of no

significant relationship between unemployment and cancer deaths, and, as in the study discussed above, more suicides at times of higher unemployment.

When more people are working, there is more traffic and therefore more traffic fatalities. There is also more stress at work and hence more cardiovascular disease. During economic upturns, alcohol and tobacco consumption increase, as does obesity; meanwhile, time spent on exercise, sleep, and social interactions all decrease. In the past, workplace contagion may have caused deaths by spreading infectious diseases such as flu and pneumonia. Even though some underlying causes of mortality, such as stress, involve chronic, long-term conditions, the timing of deaths may reflect short-term triggers related to employment. Heart attacks among the working age population are known to peak on Mondays (Willich et al. 1994).

Although counterintuitive, the finding of an association between increased employment and increased mortality is not new. Peer-reviewed publications making this point date back to 1922, and have continued throughout the intervening years. Most have been in public health journals, although at least one has appeared in a leading economics journal (Ruhm 2000). US, Canadian, and British data all support the idea that recessions are somehow better for health. One epidemiologist, M. Harvey Brenner, has long challenged this finding (Brenner 2005), but Tapia and Ruhm both provide effective critiques of Brenner's statistical methodology (Ruhm 2000; Tapia Granados 2005b). Tapia maintains that Brenner has used excessively complicated models with too little data to validate them, undermining the credibility of his time series results. Ruhm suggests that Brenner's earlier study of a 40 year span from the 1930s to the 1970s primarily reflects the decline in mortality that occurred as the US emerged from the 1930s depression. This era witnessed important medical and nutritional advances, as well as rising incomes and declining unemployment.

Two other major objections should be noted. First, at an individual level, death rates are higher for the unemployed than for the employed. This is not incompatible with the aggregate pattern. Perhaps mortality is always higher for the unemployed than for the employed, but is higher for each group during economic expansions than during recessions. Then it is easy to construct numerical examples in which overall mortality increases during expansions (Tapia Granados 2005b).

Second, over the long run it is clear that rising incomes have been associated with falling death rates. However, the correlation is not perfect; the periods of fastest declines in death rates are not the times of fastest increase in incomes. The long-run decreases in mortality may be caused by changes that are only loosely correlated with income, such as improvements in sanitation, public health, and achievement of minimum nutritional standards. Over the long run, the decrease in mortality rates is one of the most important effects of economic development; but this need not imply any relationship to short-term economic fluctuations in an already developed country. Small gains in average income, hypothesized to occur as a result of deregulation, could be associated with no improvement, or even worsening, in public health and nutritional standards for the poor.

Needless to say, there is not much left of the anti-regulatory "statistical murder" story once this perspective on unemployment and mortality is acknowledged.

7. Conclusion

This article has presented several pieces of the picture of regulatory costs; by way of conclusion, it may be helpful to briefly summarize the argument as a whole.

Reports of the economic burden imposed by regulatory costs have been greatly exaggerated. The widely imagined trade-off between economic prosperity and environmental protection rests on multiply mistaken premises. Many environmental policies impose little or no net costs on the economy; even when regulatory costs appear significant, there may be no short run opportunity to exchange those costs for additional economic growth, and even when growth occurs, it may not lead to desired outcomes such as reduced mortality.

Even a policy as ambitious as REACH will lead to very small cost increases, raising the price of chemicals sold in Europe by an estimated 1/16 of 1%. Claims of ominously greater impacts appear primarily in industry-funded studies, the most detailed of which relies on an idiosyncratic and indefensible methodology. Likewise, there is little evidence of jobs actually lost to regulations, outside of a few of the most environmentally damaging, extractive industries. The "pollution haven hypothesis," suggesting that companies move to regions or countries with more lenient environmental regulations, has been rejected by virtually all analysts who have studied the question.

Several researchers have found that prospective estimates of the costs of regulation are more likely to be too high than too low. One of the principal voices rejecting this finding is that of OMB, which has maintained in its annual reports that regulatory costs may be underestimated or benefit-cost ratios overestimated in advance. The grounds for this contrary conclusion include citation of a limited number of unconvincing studies, and manipulation of a regulatory data set which does not show a statistically significant tendency toward overestimates of benefit-cost ratios.

Even when regulations have significant costs, it is not necessarily the case that these costs are fungible. In a recession, idle economic resources are already available and are not creating short-run growth; in an expansion, the Federal Reserve may enforce predetermined limits on the pace of growth in order to prevent inflation. It is now common to discuss the need for a "risk-risk analysis," comparing old risks alleviated by policies to the new risks created by the same process. It is equally necessary to consider a "growth-growth analysis," comparing economic costs imposed by policies to the actual opportunity cost of the same resources used elsewhere.

Finally, even if growth were to occur as a result of deregulation, it is not certain that it would lead to the anticipated beneficial consequences, such as reduced mortality. A remarkable line of empirical research demonstrates that in the US and several other

countries in the 20th century, age-adjusted mortality rates increased during economic expansions and declined during recessions. The rhetorical equation of regulations with reduced growth and increased mortality, dubbed "statistical murder" by regulatory critics, turns out to be dead wrong.

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July 25, 2006

David Frulla, Esquire
Kelley Dye Collier Shannon
3050 K Street, N.W., Suite 400
Washington, D.C. 20007

Dear Mr. Frulla:

Thank you for appearing at the legislative hearing on H.R. 682, the "Regulatory Flexibility Improvements Act," on July 20, 2006. Your testimony, and the efforts you made to present it, are deeply appreciated and will help guide us in whatever action we take on this matter.

We have enclosed for your review a copy of the official transcript of this hearing. The transcript is substantially a verbatim account of remarks actually made during the hearing. Accordingly, please only make corrections addressing technical, grammatical, or typographical errors. No substantive changes are permitted. Please return any corrections you have by Friday, August 11, 2006, to Leslie Prill, Staff Assistant for the Subcommittee on Commercial and Administrative Law, B353 Rayburn House Office Building, Washington, DC 20515. If you have any questions, please feel free to contact Susan Jensen, Subcommittee Counsel, at (202) 225-2825.

In addition, Subcommittee Members were given the opportunity to submit written questions to the witnesses pursuant to the unanimous consent request agreed upon at the hearing. These questions are annexed. Your responses will help inform subsequent legislative action on

Mr. David Frulla

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July 25, 2006
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this important topic. Accordingly, please submit your written responses to these questions by Friday, August 11, 2006, to Ms. Prill at the aforementioned address. Your responses may also be submitted by e-mail to: leslie.prill@mail.house.gov.

Thank you for your continued assistance.

Sincerely,

CHRIS CANNON
Chairman
Subcommittee on Commercial and Administrative Law

CC:lbp
Enclosure

**Questions for David Frulla
Kelley Drye Collier Shannon**

1. As you may know, OMB Watch has criticized H.R. 682. I quote:

By requiring agencies to review all such rules every ten years, this bill would drain agency resources by diverting them away from protecting the public and into navel-gazing analyses. Even proven protections such as the ban on lead in gasoline and safeguards protecting workers against black lung would be subject to these reassessments. These analyses would be even more burdensome than under current law, because the bill would force agencies to calculate reasonably foreseeable indirect economic effects, which agency representatives at a recent Senate roundtable suggested would be so speculative as to be useless for policymakers.

What is your response?
2. The GAO has recommended that Congress provide greater clarity concerning the key terms and provisions of the Regulatory Flexibility Act.

To what extent does H.R. 682 address these concerns?
3. The GAO cites several questions that it says "remain unresolved." What is your response to the two questions noted below?

Should agencies review rules that had a significant impact at the time they were originally published, or only those that currently have that effect?

Should agencies conduct regulatory flexibility analyses for rules that have a positive economic impact on small entities, or only for rules with a negative impact?
4. How do you respond to OMB Watch's assertion that H.R. 682 purportedly gives corporate interests a greater advantage in the regulatory process by allowing the Office of Advocacy of the Small Business Administration to preview proposed rules before they are published in the Federal Register?

KELLEY DRYE
COLLIER SHANNON

August 11, 2006

VIA HAND DELIVERY

The Honorable Chris Cannon
 Chairman
 Subcommittee on Commercial and Administrative Law
 U.S. House of Representatives Committee on the Judiciary
 2138 Rayburn House Office Building
 Washington, D.C. 20515-3951

Re: **Your July 25, 2006, Letter Regarding July 20, 2006, Hearing on H.R. 682**

Dear Chairman Cannon:

Thank you again for the opportunity to testify on July 20th before the Subcommittee on Commercial and Administrative Law regarding H.R. 682, the Regulatory Flexibility Improvements Act. As I explained in my testimony, the Regulatory Flexibility Act is an important law, and it should be amended to effectuate its long-standing congressional purposes and address issues that have arisen since enactment of the Small Business Regulatory Enforcement Fairness Act.

In this letter, I will respond, in writing, as you requested, to your follow-up questions to me contained in your July 25, 2006 letter. In the interests of conserving space, I have not reproduced your detailed questions, but have attached them to this letter. I also attach corrections to my transcript consistent with the instructions in your letter. My answers to your questions are as follows:

- I. OMB Watch may criticize agencies' duty under the RFA, 5 U.S.C. § 610, to review their regulations every ten years, but that has been the law for more than 25 years. A newly published law review article by a former Assistant Chief Counsel for Advocacy has demonstrated empirically that Federal agencies have routinely failed to meet their Section 610 review obligations. In fact, the author's research into agency review rates reveals that agencies fail to review almost all required rules. Michael R. See, *Willful Blindness: Federal Agencies' Failure to Comply with the Regulatory Flexibility Act's Periodic Review Requirement—And Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199, 1214-18 (2006). (A copy of this law review article is attached.) Further, an agency that does conduct a Section 610 review is ten times more likely to do nothing or increase small business burdens than actually to reduce the impact of its rules on small entities. *Id.* at 1218-19; Congress should ensure that agencies comply with the laws it has passed. OMB Watch would certainly agree that agencies should comply in substance with the Nation's environmental and consumer protection laws. The RFA, and Section 610, should be accorded the same respect.

The Honorable Chris Cannon
August 11, 2006
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KELLEY DRYE
COLLIER SHANNON

Finally, with respect to the issue of indirect benefits, I explained in both my written and oral testimony, and SBA Chief Counsel for Advocacy Thomas M. Sullivan explained in his oral testimony, that the "indirect effects" standard should address reasonably foreseeable impacts on small businesses that are the targets of the agency regulation in question. This is a matter that can be addressed with careful legislative language, as well as with RFA implementing regulations developed by the SBA Chief Counsel. See my response to Question 2, *infra*.

2. For years, GAO has recommended revision of key RFA terms, such as "significant impact" and a "substantial number." Section 10(a) of H.R. 682 would, through enactment of a new 5 U.S.C. § 613, require the Chief Counsel for Advocacy to develop and promulgate "rules governing compliance with" the RFA. This important provision has two benefits that I explained in detail in my written testimony. First, it would allow the "expert" Office of Advocacy to develop a comprehensive set of definitions for the RFA's key terms and provisions. Based on its years of experience, the SBA Office of Advocacy can more effectively develop these definitions through a rulemaking process than the Congress could reasonably expect to do through legislation.

In my testimony, I also explained that, in my experience, certain agencies employ parochial and counter-statutory definitions of key RFA terms. For instance, the Environmental Protection Agency bases a determination of a significant economic impact on a small business's gross revenues, as opposed to its profitability, and a court has deferred to EPA's approach because the EPA had the authority to develop its own RFA implementing guidelines. *Ad Hoc Metals Coalition v. Johnson*, 1:01cv0766 (PLF) (D.D.C., Jan. 20, 2006). The SBA Office of Advocacy, however, correctly identifies profitability as the relevant metric in determining what impacts a business can withstand, rather than gross revenues. Small Business Administration Office of Advocacy, *A Guide for Government Agencies: How to Comply With the Regulatory Flexibility Act* (May 2003), 17-18. Second, providing such rule-writing authority to the Office of Advocacy would establish that courts should defer to the Office of Advocacy's regulations defining the types of RFA terms to which the GAO recommendations apply.

3. a. Having agencies determine in their Section 610 reviews which rules currently have a significant economic impact on a substantial number of small entities—assuming they do so in a fair and impartial way—would focus agency resources on those regulations that are burdening small businesses and other small entities at the present time. Such an approach could help tailor agency work-load to the greatest current effect. However, consideration of the current impact of rules that had a significant economic impact on a substantial number of small entities when implemented does not represent an academic exercise. For instance, industries that once had a preponderance of small entities may have changed in character through consolidation or other factors in a decade, perhaps due in whole or material part to the impactful regulatory regime. In fact, these regulations might have forced industry consolidation or served as an effective barrier to entry for small businesses. It is important for an agency to determine and recognize when its regulations are themselves either causing or contributing to a change in the economic structure of a sector of the regulated community. It may be equally important for an agency to mitigate such effects on small entities once these effects are recognized.

The Honorable Chris Cannon
August 11, 2006
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KELLEY DRYE
COLLIER SHANNON

- b. The RFA's legislative history provides that:

Agencies may undertake initiatives which would directly benefit such small entities. Thus, the term "significant economic impact" is neutral with respect to whether such impact is beneficial or adverse. The statute is designed not only to avoid harm to small entities but to promote the growth and well-being of such entities.

126 Cong. Rec. H8,468 (daily ed., Sept. 8, 1980). This is as true today as it was in 1980. Further, the law should make clear that the RFA is not designed to minimize any such beneficial impacts. Also, an economic impacts analysis that considers not only the burdens, but any benefits, of a proposed rule on small entities, would provide a fairer understanding of its impact. The Office of Advocacy has addressed this issue in detail in its *Guide for Government Agencies*, at 21-22.

4. In "corporate interests," OMB Watch appears to be including the millions of mom-and-pop businesses in the U.S. with fewer than five employees that are among the entities Congress intended to protect in the RFA. The RFA's legislative history explains that Congress found in the late 1970's that small businesses were confronting comparatively large and disproportionate regulatory burdens and that small businesses had no ability to contest or seek to ameliorate these regulatory impacts, even if they were aware that a proposed rule was being considered. Accordingly, Congress created the Office of Advocacy within the SBA to ensure these small businesses had a responsible entity available to assist them in a comprehensive and organized way. Congress reaffirmed and expanded the Office of Advocacy's leading role in SBREFA, including by developing the panel process.

Moreover, early notice can help make a rulemaking more efficient and minimize the potential for RFA analyses and regulatory adjustments to cause any potential delay in the rulemaking process—a goal OMB Watch would presumably support. Such notice can thus help ensure that a proposed rule employs accurate information and develops tailored and useful alternatives where appropriate. The rulemaking would then not have to be side-tracked to develop new alternatives or fix inaccurate information after the notice and comment stage. Furthermore, timely public input into the rulemaking process through panels and other informal means is fully consistent with recent trends in administrative law and procedure to ensure informed agency decision-making. For its part, the SBA Office of Advocacy has issued a series of reports to Congress which, among other things, detail how SBREFA has been effective in helping to tailor agency regulations overall and in specific instances.

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COLLIER SHANNON

Thank you for the opportunity to submit these additional views. Please do not hesitate to contact me if you have any questions or require additional information.

Sincerely,



David E. Frulla

Enclosures

- (1) List of Questions
- (2) Edited Transcript
- (3) Law Review Article

10TH ANNIVERSARY OF THE
CONGRESSIONAL REVIEW ACT

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

MARCH 30, 2006

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**10TH ANNIVERSARY OF THE
CONGRESSIONAL REVIEW ACT**

THURSDAY, MARCH 30, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:43 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. I'd like to call the Subcommittee to order.

We're here to—by the way, thank you, Howard. Thank you for being here. I want to thank Mr. Coble for being with us to start the hearing.

We're here today to look at the Congressional Review Act, a law passed to provide Congress with a tool in the oversight of administrative rulemaking. In the last 10 years, more than 41,828 rules have been reported to Congress under the Congressional Review Act.

When Congress passes complex legislation, it often leaves many details to the agencies authorized to enforce the laws, and this body must remain vigilant over those details and how they are filled in by the agencies through congressional oversight.

The Congressional Review Act established a mechanism for Congress to review and disapprove Federal agency rules through an expedited legislative process. It requires agencies to report to Congress and to the Comptroller General with information to help us assess the merits of the rules.

Now, today, we have a panel of experts who are here, who are going to be discussing this process in greater detail. As our panel of expert witnesses will attest, there are some areas of the CRA that could be changed to make it a more effective tool for Congress.

Today's hearing is part of the Administrative Law Process and Procedure Project that our Subcommittee is spearheading. The objective of the project is to conduct a nonpartisan, academic analysis of the Federal rulemaking process.

Scholars and experts from academic and legal institutions and organizations across the Nation are involved in this project. The project will conclude with a detailed report, including recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States.

As you may recall, my legislation reauthorizing ACUS was signed into law in the fall of 2004. The Administrative Conference is a nonpartisan public think tank—public-private think tank that proposes recommendations, which, historically, have improved administrative aspects of regulatory law and practice.

ACUS served as an independent agency charged with studying the efficiency, adequacy, and the fairness of the administrative procedure used by Federal agencies. Most of the recommendations made by ACUS were implemented and, in turn, helped save taxpayers millions of dollars.

Unfortunately, ACUS has yet to receive appropriated funds. The Congress must fund ACUS so that it can continue to provide valuable recommendations for improving the administrative law process.

Justice Breyer, in his testimony to the Subcommittee, noted that the conference's recommendations resulted in huge savings to the public. Let's work to bring that savings back into reality.

I look forward to testimony from our witnesses.

[The statement of Mr. Cannon follows:]

PREPARED STATEMENT OF OPENING STATEMENT OF THE HONORABLE CHRIS CANNON, CHAIR, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, FOR THE OVERSIGHT HEARING ON THE 10TH ANNIVERSARY OF THE CONGRESSIONAL REVIEW ACT

We are here today to look at the Congressional Review Act, a law passed to provide Congress with a tool in the oversight of administrative rulemaking. In the last ten years, more than 41,828 rules have been reported to Congress under the Congressional Review Act.

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I look forward to the testimony from our witnesses.

Mr. CANNON. When Mr. Watt arrives, we'll recognize him for an opening statement, if he would like to do that.

And at this point, without objection, all Members may place their statements in the record. Hearing no objection, so ordered.

Mr. CANNON. Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing none, so ordered.

Oh, and at this point, we'd like to recognize Mr. Coble for an opening statement.

Mr. COBLE. Mr. Chairman, I will not give an opening statement. I will commend you for having assembled a very distinguished panel, and I look forward to hearing from them.

I have another meeting, however, simultaneously scheduled. So I will probably be in and out.

But I thank you, Mr. Chairman.

Mr. CANNON. I thank the gentleman.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. Without objection, so ordered.

I am now pleased and honored to introduce the witnesses for today's hearing.

Our first witness is Chris Mihm, who is the managing director of GAO's Strategic Issues Team, which focuses on government-wide issues with the goal of promoting a more results-oriented and accountable—

[Pause.]

Mr. CANNON. We would certainly not like this Committee to be interrupted by what happens on the floor of the House.

We were talking about the Strategic Issues Team, which focuses on government-wide issues with the goal of promoting a more results-oriented and accountable Federal Government. The Strategic Issues Team has examined such matters as Federal agency transformations, budgetary aspects of the Nation's long-term fiscal outlook, and civil service reform.

Mr. Mihm is a fellow of the National Academy of Public Administration, and he received his undergraduate degree from Georgetown University.

Our second witness is Mort Rosenberg, a specialist in American public law in the American Law Division of the Congressional Research Service. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years, he has been associated with CRS and has appeared before this Committee a number of times.

In addition to these endeavors, Mort has written extensively on the subject of administrative law. He obtained his undergraduate degree from New York University and his law degree from Harvard Law School. And we welcome you back Mr. Rosenberg.

Todd Gaziano is our third witness. He is a senior fellow in legal studies and the director of the Center for Legal and Judicial Studies at The Heritage Foundation. Mr. Gaziano has served in all three branches of government.

In the executive branch, he worked at the U.S. Department of Justice in the Office of Legal Counsel during the Reagan, Bush, and Clinton administrations. In the judicial branch, he was a law

clerk in the 5th Circuit Court of Appeals for the Honorable Edith Jones.

And between 1995 and 1997, he was the chief counsel to the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. During that time, he was involved in regulatory reform legislation, including the Congressional Review Act of 1996. Mr. Gaziano graduated from the University of Chicago Law School.

Our fourth witness is Mr. John Sullivan, the Parliamentarian for the U.S. House of Representatives. This is an interesting experience to actually testify, isn't it?

Mr. Sullivan has served in the House of Representatives since 1984 as a counsel for the House Armed Services Committee, then as Assistant Parliamentarian and Deputy Parliamentarian before he was appointed as the Parliamentarian by the Speaker during the 108th Congress.

Prior to coming to the Hill, Mr. Sullivan served 10 years in the Air Force. He's a graduate of the U.S. Air Force Academy and earned his law degree from the Indiana University School of Law.

This is only the second time that a sitting Parliamentarian has testified in front of a House Committee. The first was on the same subject a year after the Congressional Review Act was passed. We truly appreciate your testimony today and your taking time out to do this.

Just as a side note, I understand, Mr. Sullivan, that your grandfather was Lefty Sullivan, one of the pitchers for the 1919 White Sox's. I had no idea, thank you. I am guessing that he would have been very happy with the White Sox season last year? That's great.

I extend to each of you my appreciation for your willingness to participate in today's hearing. Because your written statements will be included in the record, I request that you limit your oral remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system. Green means 4 minutes, yellow means 1 minute, and red means you're out of time. Generally, we're pretty loose with that, and depending on whether we have people here to ask questions, we may be more or less loose. But, I want to let you know that it's a travel day for some folks, and so we'd like to pay some attention to that.

After you've presented your remarks, the Subcommittee Members, in the order they arrive, will ask questions of the witnesses, and they'll be subject to the 5-minute limit. And, we're going to be quite strict with that one.

I ask unanimous consent that Members have 5 legislative days to submit additional questions for the witnesses. Hearing no objection, so ordered.

Pursuant to the directive of the Chairman of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that all of the witnesses answered in the affirmative. You may be seated.

Mr. Mihm, would you please go ahead with your testimony?

**TESTIMONY OF J. CHRISTOPHER MIHM, MANAGING DIRECTOR
FOR STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNT-
ABILITY OFFICE, WASHINGTON, D.C.**

Mr. MIHM. Thank you, Mr. Chairman. Mr. Chairman, Mr. Coble, it's indeed, a great honor to appear before you today to discuss the Congressional Review Act.

As you mentioned in your opening statement, Mr. Chairman, the CRA was enacted to ensure that Congress has an opportunity to review and possibly reject rules issued by executive agencies before they become effective. Under the CRA, two types of rules, major and nonmajor, must be submitted to both houses of Congress and GAO before they can be implemented.

Taking your guidance, Mr. Chairman, I'll limit my comments to discussing GAO's role under CRA and the role that the CRA plays in the broader regulatory context. First, on the first point—GAO's primary role under the CRA is to assess and to report to Congress, on each major rule, the relevant agency's compliance with certain prescribed procedural steps.

These requirements include preparation of a cost-benefit analysis when that is required, compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act—commonly known as UMRA, the Administrative Procedures Act, Paperwork Reduction Act, and relevant executive orders, including 12866.

GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days of the publication of the rule or submission of the rule by the agency, whichever is later.

While the CRA is silent in regard to GAO's role concerning nonmajor rules, we found that the basic information about those rules should also be collected in a manner that can be useful to Congress and the public. Specifically, since the CRA was enacted in 1996, we have received and submitted reports on 610 major rules and entered over 41,000 nonmajor rules into a database that we created and maintain.

To compile information on all of the rules—that is, major and nonmajor—submitted to us under the CRA, we established this database, available to the public through the Internet. Our database gathers basic information about the 15 to 20 major and nonmajor rules that we typically receive each day, including the title, the agency, the type of rule, proposed effective date, date published in the Federal Register, other pertinent information, and any joint resolutions of disapproval that may have been introduced.

Each year, we also seek to determine whether all final rules covered by the CRA and published in the Federal Register have been filed with both Congress and us. We do this review to both verify the accuracy of our database and to determine if agencies are complying with the CRA.

We forward a list of unfulfilled rules to OMB for their handling, and in the past, they have disseminated the list to the agencies, most of which file the rules or offer an explanation of why they do not believe the rule is covered by the CRA.

In the 10 years since the CRA was enacted, all major rules have been filed with us in a timely fashion. For nonmajor rules, the degree of compliance has remained fairly constant, but not as high, with roughly 200 nonmajor rules per year not filed with our office.

And, they're the ones that we have to go after and go back to OIRA on.

One major area of noncompliance with the CRA's requirements has been that agencies have not always delayed the effective date of the major rules for the required 60 days. More specifically, agencies did not delay the effective date for 71 of the 610 major rules filed with our office.

My written statement contains the agencies' explanation for that, and as I note in the statement, we don't view those as valid explanations.

My second broad point this afternoon is that agencies and GAO have provided Congress a considerable amount of information about the forthcoming rules in response to the CRA. The limited number of joint Congressional resolutions might suggest that this information generates little additional oversight of rulemaking.

However, as we have found in our review of the information generated on Federal mandates under UMRA, the benefits of compiling and making information available on potential Federal actions should not be underestimated. Further, as we've also found regarding UMRA, the availability of procedures for congressional disapproval may have some deterrent effect.

My good CRS colleague Mort Rosenberg has reported that several rules have been affected by the presence of the review mechanism, suggesting that the CRA review scheme does have some influence in helping Congress maintain some transparency and oversight of the regulatory process.

Let me add my statement at that point, Mr. Chairman, and I am happy to take any questions that you or any other Members of the Subcommittee may have.

[The prepared statement of Mr. Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

GAO

United States Government Accountability Office

Testimony
Before the Subcommittee on Commercial
and Administrative Law, Committee on
the Judiciary, House of Representatives

For Release on Delivery
Expected at 2 p.m. EST
Thursday, March 30, 2006

FEDERAL RULEMAKING

**Perspectives on 10 Years of
Congressional Review Act
Implementation**

Statement of J. Christopher Mihm,
Managing Director, Strategic Issues



GAO
Government Accountability Office

Highlights

Highlights of GAO's 2006 testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

This year marks the 10th anniversary of the Congressional Review Act (CRA), Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and reconciling the concerns of American citizens and businesses with the effects of federal agencies' rules. This statement provides an overview of the purpose and provisions of CRA; GAO's role and activities in fulfilling its responsibilities under the Act; and trends on CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking.

www.gao.gov/gao/brwa/117/GAO-06-001.T

To view the full product, click on the link above. For more information, contact Christopher Mihm at (202) 512-6809 or mihm@cra.gao.gov.

March 29, 2006

FEDERAL RULEMAKING**Perspectives on 10 Years of Congressional Review Act Implementation****What GAO Found**

CRA gives Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget specifies which rules are designated as major rules based on criteria set out in the CRA. Major rules cannot be effective until 60 days after publication in the *Federal Register* or submission to Congress and GAO, whichever is later. Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. Members of Congress seldom have attempted to use this process.

GAO's role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process. GAO compiles information on the rules it receives under CRA in a database containing basic information about major and nonmajor rules. GAO also conducts an annual review to determine whether all final rules covered by the Act and published in the *Federal Register* have been filed with the Congress and GAO. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time.

There have been a limited number of CRA joint resolutions, but the benefits of compiling and making information available on potential federal actions should not be underestimated. The procedures for congressional disapproval also may have some deterrent effect. Efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies' rules.

- Facts on CRA since its Enactment on March 29, 1996**
- 57 Joint Resolutions of Disapproval introduced affecting 28 rules
 - 1 rule nullified by Congress through Joint Resolution procedures
 - 610 major rules received and reported on by GAO
 - 41,219 nonmajor rules entered into GAO database
 - About 200 nonmajor rules per year not filed with GAO
 - 48 of 610 major rules filed with GAO in a timely fashion
 - 71 of 610 major rules—effective date not delayed for required 60 days

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today on the 10th anniversary of the enactment of the Congressional Review Act (CRA).¹ As you know, CRA was enacted to ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. We are required to provide Congress with a report on each major rule concerning our assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process.

Over the past 10 years, agencies have submitted information on thousands of rules as required by the CRA. Although we generally found that agencies complied with CRA's requirements, one main area of noncompliance has been that agencies have not always delayed the effective date of their major rules for 60 days, as required by the Act. While considerable information on agencies' rules has been reported under CRA, to date Congress has used the Act to disapprove only one rule, the Department of Labor's rule on ergonomics in 2001. In contrast, our reviews indicated that efforts to increase presidential influence and authority over the regulatory process have become more significant and widely used over the years.

In my statement today, I will focus on three topics. First, I will provide a quick overview of the purpose and provisions of CRA. Second, I will discuss GAO's role in fulfilling its responsibilities under the Act and summarize our CRA activities over the years. Finally, I will address CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking. My statement is based on our activities and observations implementing our responsibilities under CRA over the past decade and our related body of work reviewing federal regulatory issues.

¹ U.S.C. §§ 801-808. CRA was enacted as Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, on March 29, 1996.

Overview of CRA Purpose, Procedures, and Requirements

Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and accommodating the concerns of American citizens and businesses with the effects of federal agencies' rules. As we noted early in the implementation of CRA, it is important to assure that executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations, without compromising the statutory mission given to those agencies.⁴ CRA seeks to accomplish this by giving Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.

With certain exceptions, CRA applies to most rules issued by federal agencies, including the independent regulatory agencies.⁵ Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. CRA defines a "major" rule as one which results or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. CRA specifies that the determination of what rules are major is to be made by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). Major rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later. Nonmajor rules become effective when specified by the agency, but not before they are filed with Congress and GAO.

CRA established a procedure by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. If such a resolution becomes law, the rule then

⁴GAO, *Congressional Review Act*, GAO/T-OC-97-29 (Washington, D.C.: Mar. 6, 1997).

⁵In addition to some general exceptions, such as one regarding any rule relating to agency management or personnel, CRA does not apply to any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act. Nor does CRA apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

cannot take effect or continue in effect. In addition, CRA prohibits an agency from reissuing such a rule in substantially the same form, or a new rule that is substantially the same as the disapproved rule, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. Members of Congress seldom have attempted to use this disapproval process. Over the past decade, 37 joint resolutions of disapproval have been introduced regarding 28 rules. Only once has Congress used this disapproval process to nullify a rule, when it disapproved the Department of Labor's rule on ergonomics in 2001.⁴

GAO's Role and Activities under CRA

GAO's only stated role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's "compliance with the procedural steps" required by various acts and executive orders governing the regulatory process. These include preparation of a cost-benefit analysis, when required, and compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995 (UMRA), the Administrative Procedure Act (APA), the Paperwork Reduction Act, and Executive Order 12866. GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days of the publication of the rule or submission of the rule by the agency, whichever is later. While the CRA is silent with regard to GAO's role concerning nonmajor rules, we found that basic information about those rules also should be collected in a manner that can be of use to Congress and the public.

To compile information on all the rules submitted to us under CRA, we established a database, available to the public on the Internet.⁵ Our database gathers basic information about the 15-20 major and nonmajor rules that we receive each day, including the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, the date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may have been introduced. We created a standardized submission form available on the Internet, which is used by almost all the agencies, to allow more consistent

⁴Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

⁵GAO's Federal Rules Database is publicly available at www.gao.gov under the "Legal Products" link. The reports we prepare on major rules under CRA are also available on that site.

information collection. Since CRA was enacted on March 29, 1996, we have received and submitted timely reports on 610 major rules and entered 41,218 nonmajor rules into the database.⁷

As noted earlier, before a rule can become effective, it must be filed in accordance with CRA. We conduct an annual review to determine whether all final rules covered by the Act and published in the Federal Register have been filed with the Congress and us. We perform the review to both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA. We forward a list of unfiled rules to OIRA for their handling, and, in the past, they have disseminated the list to the agencies, most of which file the rules or offer an explanation of why they do not believe a rule is covered by CRA.

Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time. In general, we have found the degree of compliance to have remained fairly constant, with roughly 200 nonmajor rules per year not filed with our office. In the 10 years since CRA was enacted, all major rules have been filed in a timely fashion.

In the past 10 years, we also have issued eight opinions regarding what constitutes a "rule" under CRA in response to requests from congressional committees and members concerning various agency pronouncements and memorandums. CRA contains a broad definition of the term "rule," including more than the usual notice and comment rulemakings published in the Federal Register under APA. Under CRA, "rule" means the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy. For example, in 1996 we concluded that a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a rule under CRA and should have been submitted to Congress and GAO before it could become effective.⁸ Similarly, in 2001, we concluded that a Fish and Wildlife Service Record of Decision entitled "Trinity River Mainstem Fishery Restoration" was a rule covered by CRA.⁹ We believe these opinions have strengthened the reach of CRA by insuring

⁷Number of major and nonmajor rules are as of March 21, 2006.

⁸See B-274505, Sept. 16, 1996.

⁹See B-287057, May 14, 2001.

compliance with the main thrust of the Act, which was to insure that agency actions, whether labeled a "rule" by the agency or not, are subject to congressional review. We have noted that certain congressional committees, such as the Joint Committee on Taxation, were taking an active role in overseeing agency compliance with CRA. As a result, for example, Internal Revenue Service procedures, rulings, regulations, notices, and announcements are forwarded as CRA submittals.

The one major area of noncompliance with the requirements of the Act has been that agencies have not always delayed the effective date of major rules for 60 days as required by the Act.⁵ Agencies have filed 610 major rules with our office, and, for 71 of those rules, the agencies did not delay the effective date for the required 60 days.

One reason for noncompliance with the 60-day delay is that the agencies have misapplied the "good cause" exception which waives the delay of the rule if it would be impracticable, unnecessary, or contrary to the public interest.⁶ Since the enactment of CRA, our office has consistently held that the "good cause" exception is only available if a notice of proposed rulemaking was not published and public comments were not received.⁷ Many agencies, following a notice of proposed rulemaking and receipt of comments, have stated in the preamble to the final major rule that "good cause" existed for not providing the 60-day delay.

The other reason for noncompliance is that the statute that an agency is implementing by issuing the final major rule contains a date by which the Secretary or Administrator must issue the regulation, and the date, in many instances, does not permit the 60-day delay. However, the CRA states that it shall apply notwithstanding any other provision of law.⁸

⁵ 5 U.S.C. § 801(a)(3)(A).

⁶ 5 U.S.C. § 808(2).

⁷ See B-275549, B-275562, Dec. 9, 1996.

⁸ 5 U.S.C. § 806(a).

Trends in Presidential and Congressional Review of Rulemaking

Agencies and GAO have provided Congress a considerable amount of information about forthcoming rules in response to CRA. The limited number of CRA joint resolutions introduced might suggest that this information generates little additional oversight of rulemaking. However, as we found in our review of the information generated on federal mandates under UMRA, the benefits of compiling and making information available on potential federal actions should not be underestimated.¹² Further, as we also found regarding UMRA, the availability of procedures for congressional disapproval may have some deterrent effect. The Congressional Research Service has reported that several rules have been affected by the presence of the review mechanism, suggesting that the CRA review scheme has had some influence.

Still, as I noted in my testimony before this Subcommittee last November, efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight.¹³ In particular, our reviews have noted the growing influence and authority of OIRA in the oversight of the regulatory process.¹⁴ Some of this increased activity reflects administration initiatives, but it also includes some new responsibilities assigned by Congress through statute, such as the requirement for OMB to issue governmentwide guidance to implement the Information Quality Act.¹⁵

In contrast, there does not appear to have been a similar expansion of direct congressional influence and authority over the regulatory process, although bills have been introduced over the years to enhance the mechanisms available for congressional oversight of agencies' rulemaking. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while

¹²See GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-027 (Washington, D.C., May 12, 2004) and *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-151 (Washington, D.C., Mar. 31, 2005).

¹³See GAO, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-05-2287 (Washington, D.C., Nov. 1, 2005).

¹⁴See GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-05-220 (Washington, D.C., Sept. 22, 2005).

¹⁵The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations Act 2001, Pub. L. No. 106-54, 111 Stat. 2763, 2763A-150-54 (Dec. 21, 2000).

others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies' rules.

As the major example of the first category of proposals, Congress passed the Truth in Regulating Act (TIRA) in 2000 to provide a mechanism for it to obtain more information about certain rules.⁷ In contrast to the essentially procedural reviews that GAO now conducts under CRA, TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

Congress has considered reauthorizing TIRA, and we have strongly urged that any reauthorization of TIRA continue to contain language requiring a specific annual appropriation for GAO before we are required to undertake independent evaluations of major rulemakings. Such an expansion of GAO's current lines of business without additional dedicated resources would pose a serious problem for us, especially in light of what will likely be increasing budgetary constraints in the years ahead. It would also likely serve to adversely affect our ability to provide the same level of service to the Congress in connection with our existing statutory authorities. We have also recommended that TIRA evaluations be conducted under a pilot project basis.

Members of Congress have also introduced several bills over the past year that would provide additional mechanisms for direct review and approval (or disapproval) of agencies' rules.⁸ Some of these proposals would modify how Congress reviews information submitted under CRA and how the disapproval procedures would work. These bills could, for example, create a joint committee that would be tasked with reviewing all rules to determine whether a disapproval resolution under CRA should be introduced. We have conducted no work that would provide information on the potential effectiveness of such changes.

⁷Pub. L. No. 106-312, 114 Stat. 1218 (Oct. 17, 2000), 5 U.S.C. § 801 note.

⁸See, for example, H.R. 576, H.R. 931, and H.R. 3118.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other Members of the Subcommittee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6896 or mihmj@gao.gov.



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Mr. CANNON. Thank you.
Mr. Rosenberg.

**TESTIMONY OF MORTON ROSENBERG, ESQ., SPECIALIST IN
AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF THE
CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CON-
GRESS, WASHINGTON, D.C.**

Mr. ROSENBERG. Thank you very much, Mr. Chairman and Mr. Coble.

I'm pleased to be here again, dealing with an important issue involved in our administrative law project. I have submitted a report of the 10 years of action under the CRA and also my statement for the record. Let me just make certain points, as quickly as I'm able to. As you know, I'm verbose.

Point one is that when the House and Senate passed this legislation, they understood that they were addressing a fundamental institutional concern. That institutional concern involved the development of the administrative state, the fact that there is tremendous amount of delegation of rulemaking and law-making authority to the agencies, that those delegations are broad and vague, and that they're absolutely necessary.

Point two is that Congress, over the years, has been criticized as abdicating its responsibility with respect to oversight of those delegated authorities. The sponsors of the legislation said, and I quote, "In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of Congress in enacting laws and the executive branch in implementing those laws. This legislation will help address the balance, reclaiming for Congress some of its policymaking authority without at the same time requiring Congress to become a super regulatory agency."

Well, the statistics that have been compiled by GAO and reflected in their testimony and in my report indicate that those hopes seem to have been dashed. That, indeed, the anticipation that the agencies, because of the existence of the CRA, become a factor in the rule development process—a key factor—and level the playing field and provide the kind of regulatory accountability to Congress and the responsibility of Congress for overseeing it, appear to have been dashed.

And indeed, events over the last decade have exacerbated very much the CRA, in addition to the flaws of the CRA. Some of the flaws—and the major ones, that I would pick out, the two major ones are the lack of a screening device for Congress to be able to identify particularly the rules that need to be looked at by Congress and the absence of an expedited procedure in the House for House consideration of a joint resolution of disapproval that is, you know, concurrent with and complementary to the Senate's procedure.

Again, as I said, compounding the problem of a flawed mechanism is the development of a strong presidential review process. That started with President Reagan's establishment of the Office of Information and Regulatory Affairs as the clearinghouse for all rules during the—in the first month of the Reagan administration.

Those executive orders were very, very effective, and Congress was well aware during the '80's and the—and the '90's of how effective those executive orders were in sensitizing the agencies to the President's agenda and diverting it from Congress' agenda and Congress' intent in delegating authority with respect to certain kinds of rulemakings.

Those executive orders and that concept of what has been called the new presidentialism have been continued—were continued during the Clinton administration and has continued today in the Bush administration. The administration of John Graham of OIRA has been even more effective than it was during the Reagan administration.

Congress passed the CRA with that in mind and with the understanding that even during the Reagan administration, there was strong congressional opposition to presidential controls that were being developed at that particular time.

More recently, what we have seen is what I would call a denigration by the Executive Branch of Congress' abilities and Congress' role in the law-making process and in the oversight process. In a very widely cited article, the current dean of the Harvard Law School posits the notions of the new presidentialism, and suggests that when Congress delegates administrative and law-making power specifically to a department or agency head, it is at the same time making a delegation of those authorities to the President himself, unless the legislative delegation specifically states otherwise.

From this, she asserts, flows the President's constitutional prerogative to supervise, direct, and control the discretionary actions of all agency officials. The author states that, and I quote, "A Republican Congress proved feckless in rebuffing Clinton's novel use of directive power, just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory process."

And she goes on to explain that, "The reasons for this failure are rooted in the nature of Congress and the law-making process. The partisan and constituency interests of individual Members of Congress usually prevent them from acting collectively to preserve congressional power or, what is the same thing, to deny authority to other branches of the Government."

She then goes on to effectively deride the ability of Congress to restrain a President—a presidential intent on controlling the administration of the laws. She states, "Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain. And because Congress' most potent tools of oversight require collective action and presidential agreement, its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration did not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto the congressional oversight system. That, taken on its own and for the reasons just given, has notable holes."

Dean Kagan's observations were like a blueprint for what has been occurring during the Bush administration.

Let me conclude by saying that the CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rule-making process. It also rests on an understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future.

The Supreme Court's most recent decision, rejection of an attempted revival of the nondelegation doctrine, adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, the lack of full reporting of covered rules under the CRA, limited judicial review, and what I've just pointed out, an increasing presidential control over the rulemaking process, is likely to continue.

As I said, there are two major things that I think should be done to help ameliorate this. One is a screening mechanism, and the second is expedited procedures. One might say that, you know, putting them in legislation would be subject to presidential veto. But I believe that you could accomplish this by the action of Congress alone without presidential veto, and that would be utilizing Congress' rulemaking authority.

A joint committee that has power to screen and recommend with respect to—to the jurisdictional committees and send to the jurisdictional committees in the House and the Senate recommendations for disapproval resolutions can be established by concurrent resolution.

An expedited procedure in the House needs only a resolution of the House to establish. And I think in determining whether—what the next step to do is it may be too politically difficult to pass a law, this might be a way to go.

Thank you.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG, ESQ.

Mr. Chairman and Members of the Subcommittee,

I am very pleased to be before you again, this time to discuss a statute, The Congressional Review Act (CRA), that I have closely monitored since its enactment ten years ago yesterday. Your commencement of oversight of this important piece of legislation is opportune and perhaps propitious.

As my CRS Report on the decade of experience under the CRA details, we know enough now to conclude that it has not worked well to achieve its original objectives: to set in place an effective mechanism to keep Congress informed about the rule-making activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules. The House and Senate sponsors of the legislation made clear the fundamental institutional concerns that they were addressing by the Act:

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policy-

making authority, without at the same time requiring Congress to become a super regulatory agency.

The numbers accumulated over the past ten years are telling. Almost 42,000 rules were reported to Congress over that period, including 610 major rules, and only one, the Labor Department's ergonomics standard, was disapproved in March 2001. Thirty-seven disapproval resolutions, directed at 28 rules, have been introduced during that period, and only three, including the ergonomics rule, passed the Senate. Many analysts believe the negation of the ergonomics rule was a singular event not likely to soon be repeated. Furthermore not nearly all the rules defined by the statute as covered are reported for review. That number is probably at least double those actually submitted for review. Federal appellate courts in that period have negated all or parts of 60 rules, a number, while significant in some respects, is comparatively small in relation to the number of rules issued in that period.

It was anticipated that the effective utilization of the new reporting and review mechanism would draw the attention of the rulemaking agencies and that its presence would become an important factor in the rule development process. Congress was well aware at the time of enactment of the effectiveness of President Reagan's executive orders centralizing review of agency rulemaking, from initial development to final promulgation, in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in the face of aggressive challenges of congressional committees. The Clinton Administration, with a somewhat modified executive order, but with an aggressive posture of intervention into and direction of rule-making proceedings, continued a program of central control of administration.¹ The expectation was that Congress, through the CRA, would again become a major player influencing agency decisionmaking.

The ineffectiveness of the CRA review mechanism, however, soon became readily apparent to observers. The lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, and numerous interpretative uncertainties of key statutory provisions, may have deterred its use. By 2001, one commentator opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote, "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rules."²

Compounding such a perception that Congress would not likely intervene in rule-making, particularly after 2001, has been the emergence of what has been called by one scholar as the "New Presidentialism,"³ that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President; and the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" (because he alone is elected by the entire nation). One of the consequences of this presidentially centered theory of governance is that it diminishes the other important actors in our collaborative constitutional enterprise. Were it maintained that the Congress is constitutionally and structurally unfit for running democratic responsiveness, public-regardness, managerial efficiency and technocratic rationality, this scholar's suggested response is: why bother talking with Congress about what is the best way to improve the practice of regulatory government?

In a widely cited 2001 article,⁴ the current dean of the Harvard Law School, posits the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise*. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions

¹ See, Christopher Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," 90 Iowa L. Rev. 601, 690-729 (2005) (detailing the history of presidential control of administrative actions of departments and agencies in the Reagan, Bush I, Clinton and Bush II administrations) (Yoo).

² Mark Seidenfeld, "The Psychology of Accountability and Political Review of Agency Rules," 51 Duke L.J. 1059, 1090 (2001).

³ Cynthia R. Farina, "Undoing The New Deal Through The New Presidentialism," 22 Harv. J. of Law and Policy 227 (1998).

⁴ Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2246 (2001) (Kagan).

of all agency officials. The author states that “a Republican Congress proved feckless in rebuffing Clinton’s novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan’s use of a newly strengthened regulatory review process.”⁵ She explains that “[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is the same thing, to deny authority to other branches of government.”⁶ She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress’s most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.⁷

Dean Kagan’s observations and theories appear to have been almost a blueprint for the presidential actions and posture toward Congress of the current Administration.⁸

The CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court’s most recent rejection of an attempted revival of the nondelegation doctrine⁹ adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, judicial review, and increasing presidential control over the rulemaking process will likely continue.

There have been a number of proposals for CRA reform introduced in the 109th Congress that address more effective utilization of the review mechanism, most importantly a screening mechanism and an expedited consideration procedure in the House of Representatives. Two such bills, H.R. 3148, introduced by Rep. Ginny Brown-Waite, and H.R. 576, filed by Rep. Robert Ney, both provide for the creation of joint committees to screen rules and for expedited House consideration procedures. H.R. 3148 also suggests a modification of the CRA provision that withdraws authority from an agency to promulgate future rules in the area in which a disapproval resolution has been passed with the enactment by Congress of a new authorization. That provision has been seen as a key impediment to the review process. Both proposals are expected to receive further consideration.

Mr. CANNON. You’re always provocative, and I really enjoyed that testimony. We’ll come back in just a few minutes. But those are very good points.

Mr. GAZIANO, you’re recognized for 5 minutes.

TESTIMONY OF TODD F. GAZIANO, ESQ., SENIOR FELLOW IN LEGAL STUDIES, AND DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. GAZIANO. Good afternoon, Mr. Chairman.

⁵ Kagan at 2314.

⁶ *Id.*

⁷ Kagan at 2347.

⁸ See Yoo at 722–30.

⁹ *Whitman v. American Trucking Assn’s*, 531 U.S. 457 (2001).

Thank you for inviting me to talk about the operation of a law that too often is neglected.

In my written testimony, I talk about some of the democratic and separation of powers theory that supports this legislation. But I'm going to try to confine my oral testimony to more practical concerns.

I want to first turn to an evaluation of the effectiveness of the CRA, and I want to talk about the three purposes of the CRA. And the first is, as Mr. Mihm has suggested, is to advance public record-keeping of agency rulemaking.

The CRA's legislative history makes clear that the broad definition of a rule was chosen for several reasons; one of them was to help Congress and its supporting agencies better catalogue the corpus of agency rules that affect the public.

I am somewhat disappointed that compliance has not been complete, and I actually think that the incidence of noncompliance may be higher than that which GAO has been able to record. Anecdotal evidence and investigation by other Committees of this House has suggested as much.

Nevertheless, the catalogue of nearly 42,000 rules and the public database that GAO has set up, together with the required reports, is no doubt a very valuable resource for Congress and for scholars of the regulatory process.

The second purpose of the Congressional Review Act is to change agency rulemaking behavior. Now it's true that the CRA has not been invoked as often as its sponsors and early commentators expected. But as opposed to the "glass is half empty" conclusion that Mort talked about, I think that it is not wise to conclude that it's necessary that it's had no impact on agency behavior and legislative accountability.

In fact, there is anecdotal evidence that when Congress invokes the CRA, particularly during the rulemaking process, it can have an effect. What that evidence suggests to me, Mr. Chairman, is that it can be a tool to increase Congress' leverage when Members choose to use it.

Now some point to the ergonomics rulemaking and say the only time that we can enact a law is when a rule is issued, unpopular rule is issued at the end of an Administration that isn't supported by the incoming Administration.

In my written testimony, I explain why I'm not sure that that is the case. But even if that is one limitation to the rule, that's an important use of the CRA: to put a stop to such midnight regulations.

But I do want to address one other limitation that I think has been exaggerated, and that is the assumption that Presidents will veto any resolution of disapproval for rules that come out of their Administrations. Certainly, it is the case that Presidents might consider such vetoes. But in my written testimony, I mention three reasons why a President might not veto such resolutions of disapproval.

But even if a President does veto such resolutions of disapproval, let me suggest two positive outcomes from the standpoint of democratic theory. The first is that the President would be more directly accountable for the regulation—both he and his Administration

would not be able to hide behind the “Congress made me do it. We had no discretion, but to issue this particular regulation” excuse.

The second benefit, even of a presidential veto, of course, that isn’t immediately overridden is that once Congress expresses its will in that way, it usually can get its—have its will enacted in some other way, by adding a rider to a different piece of legislation or through other means. Creative minds, of course, can certainly influence the enforcement of a particular rule and change its operation in the future.

The third major purpose of the Congressional Review Act is to enhance legislative accountability for agency rulemaking. And I submit to you that by its action or inaction, Congress is now more accountable for agency rules. I think that the CRA was designed by its sponsors and does make it harder for both the President and Congress to evade their particular share of responsibility.

To the extent that the CRA does have some limitations, I certainly believe Congress should make further reforms. But Congress is, ultimately, responsible.

In my remaining time, I just want to mention one interpretive issue and three possible reforms, just almost by name. The first interpretive issue is that that the courts have somewhat disagreed on, and that’s the scope of the limitation on judicial review that’s contained in section 805.

The key question is this. May a court consider whether a rule that has never been submitted to a Congress is in effect? And I submit that the better interpretation of the statute is that the courts can properly pass on that issue.

But I’m requesting this Committee or suggesting to this Subcommittee, respectfully, that this issue merits special attention in the future. No matter what the courts decide about this issue, I suggest that this Subcommittee should ensure that there’s at least limited judicial review of that triggering mechanism in the future, even if it requires future legislative amendment.

The other matters that I would commend to this Subcommittee’s further consideration is I do think that there is a desperate need for an OIRA-like organization in Congress. I feel somewhat presumptuous—it would be somewhat presumptuous of me to suggest exactly what that is, but I also think that it makes no sense from a separation of powers standpoint for you to be so seriously outmanned in the regulatory review. So I think the Committees of jurisdiction also need to significantly increase their staff.

The two other, more dramatic proposals that I would suggest are that Congress consider requiring congressional approval of major rules. Not make them subject to disapproval, but actually require affirmative congressional approval.

And the final reform that I certainly think is justified is to prevent the proliferation of crimes from being defined in regulations. I think that if it is worthy to criminalize, Congress ought to define the contours of crimes.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gaziano follows:]

PREPARED STATEMENT OF TODD F. GAZIANO

TESTIMONY OF

TODD F. GAZIANO

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

REGARDING

“THE TENTH ANIVERSARY OF THE CONGRESSIONAL REVIEW ACT”

30 MARCH 2006

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Good afternoon, Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify today on the operation of a law that is too often neglected. For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan public policy, research, and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. During different periods in the Reagan, Bush, and Clinton Administrations, I served in the U.S. Department of Justice, Office of Legal Counsel, where I provided legal advice to the White House and four Attorneys General on a variety of matters, including administrative law issues related to the rulemaking process.

As the Subcommittee Members also may know, I was honored to serve as a Subcommittee Chief Counsel in this body in 1996 when the Congressional Review Act (CRA) was debated and enacted. The original House version of the CRA was introduced as an amendment to another bill by Rep. David M. McIntosh, then-chair of the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, which employed me. I also had the privilege of working closely with Senator Nickles, the original Senate sponsor, and his legislative staff, as well as with House Judiciary Committee Chairman Henry Hyde and his senior staff, on the final language of the bill before it was added as a subtitle to a larger bill that was signed into law ten years ago yesterday.

I mention my personal involvement as an agent of Congress not to relate long-irrelevant details regarding the legislative debate over the CRA—and certainly not to claim any more credit than that of one of several scriveners—but simply as bearing on my detailed familiarity with its text, structure, and legislative history. To the extent that I discuss the legislative intent of the CRA and the expectations of its sponsors, I attempt to confine myself to the public record, including the joint legislative history introduced in the House and the Senate by all of the principal legislative sponsors.

Nevertheless, my personal experience probably has also caused me to think, write, and speak about the CRA more than I otherwise would as an administrative law scholar. It is therefore a special pleasure to share with you some of my thoughts about its successes, limitations, and promise as a part of our administrative law. My testimony begins with a brief statement regarding the democratic theory behind the Congressional Review Act. I then touch on the effectiveness of the CRA, discuss some interpretive issues and possible reforms to make it more powerful, and conclude with additional thoughts on how the CRA (and more extensive congressional review of agency rulemaking in general) could better approximate the separation of powers ideal.

Democratic Theory and the Separation of Powers

The Congressional Review Act requires executive agencies to submit covered rules to Congress before they may go into effect. The Act provides special procedures in both Houses that enable Congress to expeditiously consider special, unamendable resolutions of disapproval that would overrule the regulation. If passed by Congress, such resolutions of disapproval are then presented to the President for his signature or veto as is the case with any other bill.¹

Before turning to more practical issues, it is helpful to note that the Congressional Review Act was intended to increase democratic accountability for rulemaking and to reinvigorate, at least in a minor way, one aspect of the constitutional separation of powers that has been weakened over time. In

¹ For a more detailed discussion of the operation of the Act, see Morton Rosenberg, "Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years," CRS (March 27, 2006).

short, the Framers would have approved of a device like the CRA because it reinforces the constitutional scheme that they so carefully crafted.

The Framers' concern was tyranny, not just by a monarch, but by his many administrative officials as well. One of my favorite passages of the Declaration of Independence lists this as a justification for revolution: "He has erected a multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance." Agency bureaucrats can be as dangerous and harassing today as they were in 1776—unless they are constrained in some meaningful way.

One of the most important devices adopted by the Framers to prevent tyrannical government was the separation of powers. The Framers were familiar with Montesque's admonition that there can be no liberty where the legislative and executive powers are united in the same official. This idea of separating government powers had begun to be implemented in the colonial governments and later in the state governments at the time of the framing of the United States Constitution.

The separation of powers is expressed in various ways in the Constitution, including the structure of the Constitution and several of its explicit provisions. Nevertheless, Madison acknowledged a common fear of the proposed government when he noted in *Federalist 46* that, "The accumulation of all power, legislative, executive and judiciary in the same hands may justly be pronounced as the very definition of tyranny." (This formulation actually trumps Montesque's.) In several of the subsequent *Federalist Papers*, Madison explained that citizens need not fear that the new Constitution neglected the separation of powers. The Constitution, he argued, would keep the powers of government more effectively separated than the early state governments because it pitted ambition against ambition to keep the different branches of government perpetually in check.

The clearest expression of the separation of powers can be found in the vesting clauses, which are the first sentences of Articles I, II, and III. Article I begins thus: "All legislative Powers herein granted shall be vested in a Congress of the United States..." Article II begins in a similar fashion: "The executive Power shall be vested in a President..." And Article III begins with an analogous grant of power: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Note there is no mention of independent agencies, or anything else "independent" for that matter.²

As this Subcommittee knows, the purpose of the separation of powers was not to protect government officials' power for sake of those officials, but to protect individual liberty. Power was understood to be corrupting, and the more power concentrated in one person or branch, the greater the threat to liberty. It was for this reason that the Framers struggled to divide the necessary powers of the government. But they also paid special attention to keeping them separate for the long run.

What legal scholars and historians refer to as the delegation (or nondelegation) doctrine is a necessary corollary to this separation of powers framework. As it applies to Congress, it is the simple notion that Congress may not delegate its core legislative power to the executive or judicial branches or to other entities. Congress must write the laws itself. It cannot delegate the law-writing power because that would upset the balance of powers and ultimately endanger our individual liberties.

² Executive branch agencies include many so-called "independent" agencies. Congress may designate an agency as "independent" for various statutory purposes, but all agencies that exercise significant discretion under the laws of the United States are in the executive branch for constitutional purposes. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

When does Congress's delegation of rulemaking authority to executive branch agencies cross the line between filling in administrative gaps in the laws Congress has enacted and actually writing what are the equivalent of new laws? This is one of the more difficult questions of constitutional law. The Supreme Court once policed this line actively, but it has largely abdicated this responsibility since the late 1930s.³ Nevertheless, there are still some clear limits on delegated authority beyond which Congress cannot go.⁴ Although Congress's delegation of rulemaking power may be very broad, it cannot be completely standardless. Recent decisions of the Supreme Court have held that a law that authorizes rulemaking must contain an "intelligible principle" to guide agency action.

The most significant recent pronouncement by the Supreme Court was a disappointment to those who had hoped for a minor re-invigoration of the nondelegation doctrine. In *Whitman v. American Trucking Association*, the Court found an "intelligible principle" in the Clean Air Act that grants the EPA extremely broad discretion to regulate thousands of potential pollutants, even if those rules impose billions of dollars in costs and bankrupt entire industries.⁵ Some might reasonably wonder whether the discretion accorded to the EPA amounts to "the accumulation of [practically] all power, legislative, executive and judiciary in the same hands" that Madison equated with the "very definition of tyranny."⁶ No matter how well meaning it might be, the EPA decides what pollutants to regulate, how specifically to control those pollutants, and when and where its regulations apply. It then writes voluminous rules, enforces its own regulations, and adjudicates many actions subject to a very limited and deferential standard of judicial review.

Only Justice Thomas expressed serious concern with the delegation in *Whitman*, though he cast his opinion as a concurrence because the issue was not properly raised by the litigants. Thomas's opinion is wonderful, as usual. My paraphrase of his opinion is this: "I agree the Clean Air Act has an intelligible principle, like other laws the Court has heretofore approved. But that is not the relevant test under the Constitution. The Constitution confers *all* legislative powers to Congress. The real question is whether the delegation is anything other than legislative."⁶ According to a solid majority of justices still on the Court, however, Congress need only provide vague but intelligible principles to enable the executive to legislate as it sees fit. This is not the separation of powers ideal.

That the courts allow Congress to delegate sweeping regulatory power to executive agencies does not mean it *should* do so, especially when it exercises no further control over the matters delegated. With broad delegation now the norm, Congress ought to increase oversight and control over the agency rulemaking process. In other words, if the delegation doctrine is on life support, then Congress must devise other procedures to approach and reinforce the separation of powers ideal. The Congressional Review Act was a small step to restore constitutional government and the constitutional separation of powers. The joint statement of its principal sponsors expresses that intent:

As the number and complexity of federal statutory programs has (sic) increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and

³ Legal scholars continue to debate the appropriateness of this change, but almost all agree that the courts have significantly increased the deference they accord to congressional delegations of regulatory authority since the late 1930s.

⁴ For example, the Supreme Court still has not overruled its early New Deal cases of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵ 531 U.S. 457, 472-76 (2001).

⁶ 531 U.S. at 486-87 (Thomas, J., concurring). Thomas ends his three-paragraph concurrence expressing a willingness to address that specific question in a future case.

more of Congress[s] legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

* * *

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.⁷

Evaluating the Effectiveness of the CRA

1. Enhanced public recordkeeping of agency rulemaking

Prior to the CRA, the public record of agency rulemaking was even spottier than it is today. Only certain regulations must be published in the *Federal Register*, and the *Federal Register* includes many proposals and other materials that are not final rules. The CRA's broad definition of a rule was chosen for several reasons, among them to help Congress and its supporting agencies to catalogue the corpus of agency rules that affect the public. As its text and legislative history make clear, the CRA was not designed to cover matters related to agency internal management or organization but was intended to cover any "agency statement of general applicability and future effect" that substantially affects the rights or obligations of those outside the agency.⁸ Notice-and-comment rules, interpretive rules, and guidance documents all fall within this standard.⁹

Although this broad definition should encompass almost every final agency statement that affects the public, investigations by GAO and the Government Reform and Oversight Committee have confirmed that agencies are not submitting all covered rules as the CRA requires, and instead, are principally submitting only those that are published in the *Federal Register*.⁹ It is also problematic that OMB has not satisfactorily complied with a separate mandate that it issue guidance to the agencies to improve compliance with the CRA.¹⁰ That could change if the regulated community prevails in one or more high profile challenges to, for example, an agency guidance document or handbook that was never sent to Congress.

I defer to the other witnesses to describe the number and nature of the rules that have been filed

⁷ 142 Cong. Rec. E571, E575. See also 142 Cong. Rec. 6922 and 142 Cong. Rec. S 3683 (containing the identical joint legislative history of the CRA).

⁸ See 5 U.S.C. §§ 551 and 804(3).

⁹ See Morton Rosenberg, CRS Report, *supra* note 1, at 24-27 and accompanying citations.

¹⁰ *Id.* at 27 and note 46.

with Congress pursuant to the CRA. Undoubtedly, though, the catalogue of approximately 41,800 major and non-major rules, together with required reports on agencies compliance with various statutory and presidential review requirements, is a valuable resource for Congress and scholars of the regulatory process.

2. Changing agency rulemaking behavior.

The CRA probably has not been invoked as often as its sponsors and early commentators had expected, but that does not mean that it has had no impact on agency behavior and legislative accountability. Anecdotal evidence suggests that Congress has influenced controversial rules by invoking the CRA. Even if the number of rules so influenced has not been large, this evidence demonstrates that the CRA gives Congress some additional leverage with agencies—when Members choose to use it. This may influence agencies' work on controversial rules even when the CRA is not invoked and even though Congress has made little direct use of its power to overturn rules.

The Occupational Safety and Health Administration's ergonomics rule is the only rule overturned by a resolution of disapproval that became law.¹¹ Some, including my distinguished co-panelist Morton Rosenberg, argue that the ergonomics rule is a *sui generis* example because it was promulgated at the end of one administration and was not supported by the incoming administration. There is much truth to this observation, but that is still an important use of the CRA. Putting a check on midnight regulations that might bankrupt entire industries and needlessly strain our economy is valuable. Regulations should not be rushed to publication in the face of expected opposition by the democratically elected President-elect. Among its other purposes, the CRA exists to undo such regulations that a lame-duck administration has attempted to finalize.

There are other advantages to using the CRA to overturn a controversial major rule rather than relying on the next administration to attempt a repeal of the rule. An agency repeal is costly and time-consuming, and depending on the statute that authorized the rule, the attempt might be subject to lengthy litigation. If successful, repeal may create inequities between citizens who were subject to agency enforcement actions before and after the repeal. Under the CRA, however, rules may be overturned relatively quickly, with little legal uncertainty. Moreover, rules disapproved pursuant to the CRA are treated as if they were never in effect, eliminating any inconsistencies in treatment.

Nevertheless, the effect of the CRA is lessened over time if it is used in only rare cases. The CRA would have a greater impact on agency behavior if Congress used it even a few times to invalidate rules during the middle of an administration. In geopolitical terms, just a few missiles in the hands of an emerging state can change the balance of power in an entire region. One OMB official described the CRA as a Minuteman Missile, deterring conduct by its mere existence. For this analogy to ring true, however, there would have to be a credible threat of that missile being launched.

One reason Congress may not have used the CRA as often as anticipated is that Congress has other tools at its disposal, such as legislative riders on appropriations bills, to accomplish the same end. With recent interest in reforming the appropriations process, these other tools may become disfavored.

One clear limitation of the CRA is that a president might be inclined to veto any resolution disapproving a rule that made it through his own regulatory review process. Yet, this limitation should not be exaggerated to the point that it becomes a self-fulfilling prophesy—or is never tested because

¹¹ See Public Law 107-5 (2001).

Congress offers no resolutions to veto. There are at least three reasons why a president might not veto a resolution of disapproval regarding a rule issued by his administration:

- (a) The rulemaking may be one mandated by Congress that the president is not particularly fond of. In short, a president may not like each rule some long-ago Congress set in motion just because it came to fruition in his administration.
- (b) The rule may be issued by one of the so-called “independent” agencies Congress has attempted to insulate from direct presidential control. In such case, the president may have had fewer opportunities to shape the rule’s final development. For this or similar reasons, the president might prefer to have the particular agency (which may soon have more of his own appointees in office) start over and draft a substantially different rule.
- (c) A president may simply be reluctant to veto any legislation and decide that a particular resolution of disapproval is not worth making an exception to his usual practice.

But even if a president did veto a resolution of disapproval for a rule issued by his administration and the Congress could not immediately override his veto, there are two positive outcomes from the standpoint of democratic theory. The first is that the president would be more directly accountable for the regulation. His administration could not hide behind the “Congress-made-it/we-had-no-discretion-but-to-issue-the-regulation” excuse.

The Framers intended that the president be personally responsible and accountable for his administration. To this end, the Framers rejected several proposals at the Constitutional Convention for a Council of Revision and for a constitutional Privy Council for fear that the president would hide behind their advice and that would diminish his accountability to the people.¹² The Framers even changed early drafts of the Opinion Clause of the Constitution to ensure that any advice to the president and any cabinet government was initiated and dispensed with at the president’s choosing.¹³ With the growth of the administrative state, Congress must restore of the lines of accountability so that modern presidents are not able to hide behind agency officials with supposed technical expertise.

The second beneficial result of a veto would be to set other democratic forces in motion. Congress often can find ways to enforce its will without directly overriding the president’s veto, such as by including a vetoed measure in a must-pass bill or employing other political means. CRS recently estimated that 95 percent of all recent earmarks were contained in report language or other non-binding legislative documents.¹⁴ The president could legally ignore all of these earmarks, especially if he seeks (as all modern presidents do) line-item veto authority. Nevertheless, modern presidents abide by almost all report-language earmarks for the simple reason that upsetting powerful members of Congress is costly. Creative minds can craft a variety of exceptions, interpretations, and other enforcement guidelines than can significantly alter the enforcement decisions of a particular agency.

3. Enhancing legislative accountability for agency rulemaking.

The CRA has enhanced legislative accountability for agency rulemaking even if it could be

¹² See Todd Gaziano, “Opinion Clause,” in *The Heritage Guide to the Constitution*, pp. 201-03 (Edwin Meese III, et al., eds., Regnery 2005).

¹³ *Id.* The Opinion Clause is Art. II, § 2, cl. 1.

¹⁴ See Robert Novak, “Bush cool to idea to cut spending,” *Chicago Sun-Times*, March 27, 2006.

shown that the CRA has not substantially changed agency behavior or improved the regulations that are issued. By its action or inaction, Congress is now more accountable for agency rules. This is analogous to the increased presidential accountability when Congress does pass a resolution of disapproval. The president is directly accountable, whether he signs or vetoes the resolution.

In short, the CRA makes it much more difficult for the president and for Congress to avoid their respective share of responsibility. Like the president, Members of Congress sometimes play the blame game to the detriment of responsible government. Public choice theory suggests that congressional authorizers have the most to gain if they can claim credit for doing something about a perceived public problem but shift the costs of decision-making to someone else. By passing a vague law, they may claim credit for the perceived good, and if the agency writes regulations that are unpopular, they can often shift the blame onto the "out-of-control" agency. That's the best of both worlds for a politician but the worst of all worlds for the body politic.

The predictable, and sometimes truthful, response from an agency official who issues an unpopular regulation is "Congress made me do it." As discussed, the president can hide behind this response as well, unless Congress takes positive steps to disapprove the regulation. As ever, success has a thousand fathers, but no one takes responsibility for a misguided or unpopular regulation. The CRA makes it harder for Congress to claim that an agency is "out of control" because Congress can more clearly control the rules agencies write now.

Some in Congress never liked the Congressional Review Act because it does help, in a minor way, to increase political accountability for agency rulemaking. After overturning the ergonomics regulation in 2001, many Members now appropriately see the CRA as a double-edged sword. The CRA's congressional sponsors always understood this.

Agency claims that they have no discretion in the issuance of particular regulations present special concerns, and the CRA applies to them in a unique way. If such a claim is true, the CRA refocuses attention on who is responsible and gives Congress an easy opportunity to reconsider the underlying mandate. Too often, however, an agency's claim of limited discretion is overstated. With enactment of the CRA, trying to shift blame to Congress became riskier. If Congress accepts the agency's claim and disapproves the rule anyway, the agency's future range of discretion is narrowed even more, and possibly eliminated, because the agency is forbidden from re-issuing a substantially similar rule without express congressional authorization.

Agencies' attempts to avoid responsibility will not disappear, but they are now more difficult, as they should be in a functioning democracy. Likewise, Congress has made itself more accountable for agencies' rules, whether it exercises its authority under the CRA or not. To the extent that the CRA has serious limitations, Congress should consider further reforms.

Even without changes to the statute, Congress can take several steps to make better use of the CRA. Members, especially committee chairs, should conduct oversight during the rulemaking process of particularly problematic rules and cite the potential for CRA disapproval when communicating with agency officials. Congress should not cross the line and attempt to micromanage proper executive functions under other chapters of the Administrative Procedure Act, but it ought to express itself forcefully if an agency proposes a rule that is strongly opposed by a majority in Congress. After the ergonomics rule disapproval, this threat carries some weight.

The earlier Congress engages in the rulemaking process, the more effective Congress's

engagement will be. Although some tools Congress has used to investigate enforcement actions are inappropriate (such as depositions of career staff), broad oversight of the rulemaking process is justified because modern rulemaking is at least quasi-legislative to begin with. It is arguably Congress's power that is being exercised. Active congressional involvement is appropriate to rein in agency excess or simply a few bad regulations.

And if a statute really does require an agency to issue a particularly draconian rule, Congress still can use the expedited procedures of the CRA to change course or make corrections. No one is immune from the law of unintended consequences. Congress should not pretend that it has perfect foresight either. In sum, Congress should use the CRA to correct its own mistakes as well as those of executive agencies.

Resolving Interpretive Issues

Morton Rosenberg's report for the Congressional Research Service on the CRA is helpful in discussing various issues of CRA statutory interpretation that remain unresolved.¹⁵ For the most part, I agree with his analysis and conclusions regarding the proper resolution of those issues, but I add a few thoughts here as well.

(a) Courts should not consult legislative history unless the text of the statute is inherently ambiguous, and courts should give some types of legislative history evidence more weight than others. Nevertheless, there are several reasons why the courts should accord the Joint Explanatory Statement of the House and Senate Sponsors of the CRA greater weight than is normally granted to post-enactment legislative material.

First, the Joint Explanatory Statement is the only document written by the sponsors and relevant committee chairmen responsible for the legislation. It does not conflict with other committee reports because there are none. Second, it is found in the Congressional Record in the House on the day of passage. See 142 Cong. Rec. 6922-6930 (March 28, 1996). My own memory is unreliable and I have not found a unanimous consent request that would have permitted such a placement, but without contrary evidence, the courts should accord a presumption of regularity to the proceedings of the coordinate branches. Thus, there is every reason to conclude that at least the House collectively wanted the Joint Explanatory Statement to be treated as a contemporaneous legislative history. Third, even if deemed "post-enactment" legislative history, it is only a few weeks post-enactment. Some of the reasons to be distrustful of such material remain, but the Statement was not written in the midst of litigation or an ongoing battle with the executive branch. The Statement is not a mere "litigation position." Finally, it has many of the hallmarks of a joint conference report, explaining the nature of the compromises between earlier House and Senate versions and containing a brief legislative history, a summary of major provisions, definitions, etc. It was not written with a narrow purpose to affect one provision or change the legislative debate. Indeed, its general purpose, to substitute for a conference report on the CRA, is set forth at the beginning of the Statement's coverage of the Act.

(b) The most important unresolved issue may be the scope of the limitation on judicial review in section 805. The key question is this: may a court recognize that a rule has no legal effect due to the undisputed fact that it was not delivered to Congress as required by the CRA? The text of the limitations provision is somewhat ambiguous, and the text of other sections of the CRA further compounds the ambiguity. For example, section 801(g) contains a separate prohibition on courts

¹⁵ Morton Rosenberg, CRS Report, *supra* note 1, at pp.23-39.

inferring any intent from Congress's failure to enact a resolution of disapproval. If the limitation on judicial review in section 805 were absolute, there would have been no reason for Congress to include section 801(g).

Where possible, statutes must be read not to render one of their provisions irrelevant. I agree with Morton Rosenberg that the Department of Justice's interpretation and two early court decisions on section 805 are not persuasive and that court decisions on analogous statutes are on point. The legislative history explains how to resolve the apparent ambiguity. The courts may consider pure issues of law relating to whether certain rules or laws are in effect—e.g., what legal effect to give enacted resolutions of disapproval and whether regulations are or are not in effect as a matter of law. Subsidiary determinations of fact or matters involving internal congressional procedure, such as a major rule determination by the Office of Information and Regulatory Affairs or each House's determinations regarding its calendar and the applicability of the expedited review provisions, are not subject to judicial review.

This issue merits special attention by this Subcommittee in the future. To the extent that the courts are not consistent in interpreting the limitation on judicial review in this way and read it as a complete bar on any judicial review of the effectiveness of a rule that was never submitted to Congress, the Judiciary Committee should consider legislation to clarify the matter and affirm the judgment of the court in *United States v. Southern Indiana Gas and Electric Co.*¹⁶ Mort Rosenberg's analysis is persuasive that the absence of any judicial review on the triggering mechanism of the CRA would permit the complete frustration of its purpose. The legislative history shows that the original sponsors did not expect that result. Whether the limitation on judicial review currently is ambiguous or not, this Subcommittee should ensure that limited judicial review is available in the future.

Potential Improvements in Congressional Review Procedures

Proposals for improved screening mechanisms to pinpoint rules that need congressional review also are worthy of serious consideration. As a separation of powers matter, it makes no sense for Congress to be so seriously outmanned compared to the executive branch when it comes to the review of regulations issued by the ever-expanding administrative state—especially when rulemaking is at least a quasi-legislative endeavor. (In my view, some regulations are purely legislative and beyond the constitutional power of Congress to delegate, but a majority of the Supreme Court is not currently persuaded of this view. See *infra*.)

Congress does not need as many people to review final rules as the executive branch employs formulating them. In my view, Congress needs the equivalent of an Office of Information and Regulatory Affairs and it needs to increase the regulatory staff of its substantive authorizing committees. Evaluating a cost-benefit analysis does not take the same manpower as performing it originally, but evaluation does require a similar expertise and management direction. At the committee level, it does not even require the same level of technical expertise as that relied upon by an agency to identify the outside witnesses and experts who can help the committee examine a particular rulemaking record and agency determinations. An additional number of smart and dedicated generalists who can aid the committee to find the right experts is all that is essential.

H.R. 1704 in the 105th Congress and H.R. 3356 in the 108th Congress would create different congressional institutions to focus attention on rules that need congressional review, and both are

¹⁶ 55 ERC (BNA) 1597 (D. S.D. Ind. 2002).

respectful of existing lines of committee jurisdiction. H.R. 3356 has the additional advantage of meshing well with the CRA by amending its review provisions. It seems presumptuous of me to comment further on what is best for your internal organization. Moreover, the perfect often is the enemy of the good in such reform debates. But Congress should do something, both to create more effective centralized management of congressional review responsibilities and to increase the total number of committee staff devoted to the review of agency regulations.

Reinvigorating The Separation of Powers Ideal

1. Congressional approval of agency rules

H.R. 931 in the 109th Congress and similar bills introduced by different Members over the past ten years would go much further than focusing Congress's attention on particular rules for possible disapproval. They would require that certain covered rules must be statutorily ratified or approved before they could go into effect. To avoid constitutional problems, such a reform statute would have to amend existing and future grants of regulatory authority so that the affected agencies could not issue certain types of final rules. Instead, agency authority for certain matters would be to conduct hearings, formulate, and propose final rules to Congress.

One disadvantage with the language of H.R. 931 is that it would not amend the CRA but would supersede it. Proposals from prior Congresses would use the major rule definition in the CRA and amend the Act to require that major rules receive congressional approval. A practical argument for such a change is that major rules often have a bigger impact on the American economy than many of the laws Congress enacts. This Subcommittee conducted hearings on at least one such proposal in the year after the Congressional Review Act was enacted. These extremely valuable proposals have already received commentary in the administrative law literature, not the least of which by two of us on this panel.¹⁷ With a further expression of interest by the Subcommittee, I would be happy to elaborate on the virtues of such proposals in reinvigorating the separation of powers ideal.

2. Preventing abuses of the criminal law

The House and Senate Judiciary Committees should also act to curb the disturbing trend of agencies (aided in large part by other authorizing committees) creating a host of new regulatory offenses punishable by criminal sanctions. The operation of the criminal law is the government's most awesome and fearful tool from the standpoint of individual liberty. Traditionally, crimes were limited to offenses that were known to be inherently wrongful and done with a malicious intent (e.g., intentional killing, theft, battery). It makes sense to punish these traditional and knowingly culpable acts with special sanctions, but special protections of liberty were developed as well.

Some of those protections are still present in the courts, but Montesque's old fear did not extend to the trial process. Montesque's admonition was that there can be no liberty where the legislative and executive powers are united. That warning haunts us today as criminal offenses are increasingly being written and enforced by the same administrative agencies. At least in this one area, Congress should reserve to itself the power to write criminal laws and thereby separate the drafting and enforcement of the criminal code.

¹⁷ See Todd Gaziano, "Can the Separation of Powers Endure the Age of Muddled Thinking?," *Regulation*, vol. 20, no. 1 (1997); Morton Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform," 51 *Admin. L. Rev.* 1051 (Fall 1999).

The U.S. Constitution mentions only three federal crimes, and yet it has been estimated that there are now some 4,000 federal crimes and that this is an increase of roughly 1,000 federal crimes in the last decade alone.¹⁸ Many of these offenses do not fit within the traditional categories of criminal law, and unfortunately, many of them do not concern inherently wrongful conduct (what the law refers to as *malum in se*) but violations of norms that are only wrongful because Congress has declared them to be so (what the law would label *malum prohibitum*). As bad as the proliferation of federal statutory crimes is—particularly the newer crimes that are not inherently wrongful—the proliferation of regulations punishable by criminal sanctions is even more troubling.

Typically, Congress passes a statute that makes the violation of some future agency regulation a crime. Such laws may even include criminal penalties for violations of permitting schemes, with the terms of every permit being different. Often the only intent requirement is that the defendant knew that he was taking certain actions and not that the actions violated the permit or the regulation. The civil liberties concerns associated with these schemes make those raised in the homeland security context pale in comparison.

The Congressional Research Service seemingly is unable to estimate how many federal regulations now carry criminal penalties.¹⁹ The American public has no chance of mapping the contours of regulatory criminal law, a basic prerequisite to following the law and avoiding criminal punishment.

Congress should enact a prohibition against crimes being defined in agency regulations. If it is serious enough to criminalize, Congress should define the offense. In the alternative, agencies should only be allowed to propose such crimes, which Congress could then enact with resolutions of approval.

Conclusion

Those who would declare the Congressional Review Act moribund mistake dormancy for a lack of any potential vitality. Reconstruction era statutes enacted to protect the civil rights of newly freed slaves lay largely dormant for about 100 years before private litigants rediscovered them. They have been used extensively ever since to vindicate fundamental civil rights for all Americans. The Alien Tort Claims Statute (really just one brief section of a larger act) was passed by an early Congress in the eighteenth century and has been rediscovered by private litigants almost 200 years later and validated by the Supreme Court. The CRA's impact in its first ten years has not been dramatic, but that does not dictate its future course.

Both Congress and private litigants have an opportunity to make better use of the CRA in the next decade (the latter if the effectiveness of a rule that was not submitted to Congress is subject to judicial review). Congress has both an institutional interest to re-assert its legislative primacy and an obligation to the American people to safeguard our liberties. The constitutional separation of powers requires no less vigilance.

¹⁸ John S. Baker, Jr., "Measuring the Explosive Growth of Federal Criminal Legislation," The Federalist Society for Law and Public Policy Studies, available at www.fed-soc.org.

¹⁹ See Paul S. Rosenzweig, "The Over-criminalization of Social and Economic Conduct," Heritage Foundation Legal Memorandum No. 7, at 2 and note 3 (2003). Our understanding is based in part on conversations we have had with congressional staff, who have supposedly requested the information, and in part on informal conversations we have had with senior CRS officials. We would be happy to be proven wrong about CRS's ability to reliably estimate the number of crimes defined in regulations, e.g., if they provided a reliable number.

Mr. CANNON. Thank you.
Mr. Sullivan, you're recognized for 5 minutes.

**TESTIMONY OF JOHN V. SULLIVAN, ESQ., PARLIAMENTARIAN,
OFFICE OF THE PARLIAMENTARIAN, U.S. HOUSE OF REP-
RESENTATIVES, WASHINGTON, D.C.**

Mr. SULLIVAN. Thank you, Mr. Chairman.

May it please the Committee, thank you for the welcome and for the kind words about the Office of the Parliamentarian, most especially for the gracious acknowledgment of Lefty Sullivan, who I'm told in his Major League career lost but one game.

My predecessor, Charlie Johnson, was with you in 1997, and he assured me that this was a very pleasant experience. So I'm pleased to be here.

I am glad for the opportunity to help illuminate maybe one part of the factual predicate on which the Committee might decide whether to adjust the CRA or whether it's currently optimized to meet its desired ends.

As I indicate graphically in my written testimony, the CRA has engendered a tripling of the executive communications traffic to the Speaker. This flow of paper poses a significant increment of workload in the institution of the House. But, of course, this paperwork, mass though it may be, does serve a purpose.

When I read the testimony of my learned colleagues about a desirable deterrent effect of the act, it rings true to me. But I'm also reminded of the last 10 or 15 years of the Cold War, when we saw the key to our own nuclear deterrent shift dramatically away from megatonnage and in favor of accuracy.

I think that the Committee may want to assess whether a lesser volume of communications traffic might better optimize the oversight of the regulatory Committees of the rulemaking process, dwelling greater attention on a more selective universe of rule-making actions.

I note that the act already differentiates among rulemaking actions on the basis of certain hallmarks of salience, and it might be time to consider whether additional discriminators might be sensible to constrict the flow and dwell stronger focus on the remaining stream.

Certainly, the Office of the Parliamentarian would be pleased to work with the Committee and with the staff on trying to identify ways to avoid any duplication of effort or any undue weight of paper.

I won't reiterate the rest of the written testimony, brief though it may be. I'm pleased to be here and happy to engage any questions you might have.

[The prepared statement of Mr. Sullivan follows.]

PREPARED STATEMENT OF THE HONORABLE JOHN V. SULLIVAN

Committee on the Judiciary)	Hon. John V. Sullivan
Subcommittee on Commercial)	Parliamentarian
and Administrative Law)	U.S. House of Representatives
U.S. House of Representatives)	
)	
)	
)	
March 30, 2006)	Testimony
)	Congressional Review Act

Mr. Chairman, members of the committee: I appreciate the opportunity to participate in your review of this important matter.

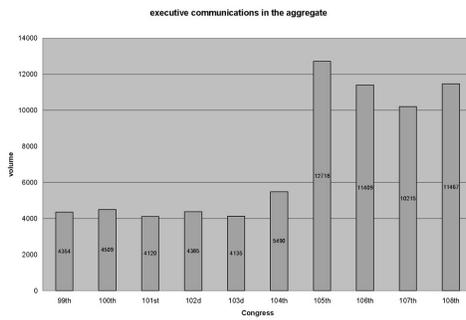
Several laws within the jurisdiction of the Committee on the Judiciary ensure that the exercise of quasi-legislative authority by the executive branch is subject to rigorous scrutiny. Some have long ensured that the public can follow and react to rulemaking actions as they develop. For 10 years now, chapter 8 of title 5, United States Code — colloquially known as the Congressional Review Act (CRA) — has separately focused on Congressional review of executive regulations. I am pleased to help illuminate one part of the factual predicate on which the Committee might judge whether the CRA is optimized to achieve its desired ends.

In the 103d Congress — the last full Congress before the enactment of the CRA — the executive departments transmitted 4,135 communications to the Speaker that warranted referral to committee.¹ In the 108th Congress — the most recent full Congress under the CRA — that number rose to 11,467.² The following pair of graphs depict the effects of the CRA on executive communications traffic.

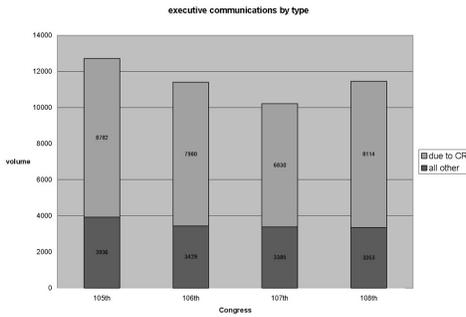
¹ See *Calendars of the United States House of Representatives and History of Legislation*, Final Edition, 108th Congress, 2003-2004, at p. 19-71.

² *Id.* at p. 19-76.

The first graph shows that executive communications have roughly tripled.



The second graph shows that, in each of the past three Congresses, the number of CRA communications has, indeed, been more than twice the number of other executive communications.



These communications transmit regulations promulgated by executive agencies for Congressional review. Under rule XII, they are received by the Speaker. Under rule XIV, the Speaker refers them to the committees having jurisdiction over their subject matters. The Speaker delegates to the Parliamentarian the task of identifying committees of referral — typically the committees having jurisdiction over the enabling statutes for the particular rulemaking actions.

This flow of paper poses a significant increment of workload. Although it is relatively easy to identify the appropriate committees of referral for the vast majority of these communications, the sheer volume of them affects not only the parliamentarians who must assess their subject matter but also the clerks who must move the paper and account for dates of transmittal. Some of the processing of this paper has been streamlined. Unlike other executive communications, multiple rules submitted by a single agency pursuant to the CRA may be bundled under a single cover letter.

Of course, this mass of paperwork has a purpose. The fundamental fulcrum of the CRA is that rulemaking agencies must submit proposed regulations to each House of Congress and to the Comptroller General and wait a statutory interval³ before major rules may be given effect. During this interval, Congress may deliberate on whether a proposed regulation might merit legislative disapproval.

In the first decade under the CRA, 21 joint resolutions of disapproval were introduced in the House and 16 were introduced in the Senate. None of the House joint resolutions passed the House. Three of the Senate joint resolutions passed the Senate. One of those also passed the House. Thus, the disapproval mechanism established by the Act has yielded one Congressional disapproval.⁴

³ Because of the need to track this interval, the date of receipt of a rule submitted pursuant to the CRA is published in the Congressional Record. With most other executive communications, only the date of referral to committee is published.

⁴ Public Law 107-5.

The Committee may want to assess whether a lesser volume of executive communications traffic might better optimize Congressional oversight of a more selective universe of rulemaking actions. The Act already differentiates among various rules on the basis of their salience. Some additional discrimination might be sensible. The Office of the Parliamentarian will be pleased to continue to consult with the Committee and its staff on initiatives to eliminate duplication of effort and reduce paperwork like those proposed in H.R. 5380 of the 106th Congress.⁵

Mr. Chairman, I am grateful for your attention and will be pleased to try to answer any questions you might have.

⁵ H.R. 5380 of the 106th Congress was introduced by Mr. Hyde (for himself, Mr. Conyers, Mr. Gekas, and Mr. Nadler) and referred to the Committee on the Judiciary. It proposed that the CRA be amended to no longer require separate submission to Congress of rules that are published in the Federal Register and to require the Comptroller General to submit weekly reports to each House of rules published in the Federal Register to the end that they be noted in the Congressional Record with a statement of referral to committee.

Mr. CANNON. Thank you, Mr. Sullivan.

If I might, Mr. Sullivan, I have just a couple of questions. Then we have a series of questions that we'll probably send you all that you can use to help us understand a little more about what we're doing here.

But if I might, Mr. Sullivan, you talked about Committees of jurisdiction, meaning I suppose authorizing Committees. And so, when you're talking about this amazing—and I just looked at your chart—this tripling of communications. And of course, we're organized by Committees now and have some more and less vague Committee jurisdictions. We have Government Reform, for instance, which would have some role here.

But if you—so when talking about the rules of jurisdiction and whether or not it makes sense, I think Mr. Rosenberg was talking about a Committee or Committees, would it make sense to have a Committee that is fairly heavily staffed deal with these issues of CRA? And that way, you don't put limiters or, I forget the term you used for it, but some way to describe the importance of this, but rather you have a Committee that is in place that reviews all of it, and we go through a—maybe a Committee process?

So instead of all the Committees of jurisdiction who would have a person assigned, does it make sense to have a Committee, for instance, obviously, I think this Committee, which oversees these activities generally, would have staff to review and deal with the paperwork and then focus, as is appropriate, politically on what some of these regulations are and, therefore, make the determination of importance based upon a single Committee overseeing the complex process?

Do you have any thoughts on that?

Mr. SULLIVAN. That sounds worthy of your consideration, Mr. Chairman.

As I understand it right now, until such time as the Speaker refers the communication to the Committee of jurisdiction over the enabling statute for the rulemaking, the only filtering that occurs really is by the words of the statute. The discriminators that exist under the status quo are just textually recited in the statute.

And as I understand Mr. Rosenberg's idea, it would be to achieve a higher level of granularity in that filtering process by having live experts applying their notions of discrimination, their own discriminatory sense to rulemakings as they come in.

And that certainly is one way to refine the flow to the regulatory Committees so that when they do hit the Committee of jurisdiction over the Clean Water Act, the counsel who specialize in that area will be able to bring the full force of their more concentrated expertise on it.

Any kind of filtering process I think is worthy of consideration. And as I said, right now, the filter is just the text of the statute, it might be worth considering putting an organ there.

Mr. CANNON. What I'm wondering is—I've spent a lot of my life doing administrative procedure, rulemaking stuff. I worked in the Reagan administration on coal mining and really created a third-tier of coal mine reclamation regulations. It was an amazing process early in my career.

But I'm wondering if—two things, Mr. Sullivan. First of all, what would the rules have to—how would they have to be changed for the House to do what I'm about to suggest? And then how would it actually, as a practical matter, work?

As I understand, you have communications now coming to the Speaker from the Administration, and those have increased significantly. Would it not be fairly simple, and I'm wondering about the effectiveness of the process to take those communications from the Speaker and then send them to a Committee, and that Committee would tend to look at all regulations? And to the degree that you needed the expertise of an authorizing Committee, there could be some sort of joint procedure.

Now that has to be done in a way that there is actually an appropriate use of discretion. But at some point, you have to say this is not worth something, and somebody has to—a Chairman has to say, "This is not worth it, this is worth it," and then follow up on that.

It would seem to me that that Committee would also require a lot of expertise over time, and we have a rule currently that term limits chairmen. So I'm giving you sort of an amorphous question.

But just wondering, given the rules today, could we take a pathway where you take all of these communications. They go through a well staffed process, but a political process that then works its will with the majority and minority and also works with other Committees, authorizing Committees that have the specific or special area expertise and possibly also with the appropriating Committees.

What changes would you see that would have to be made to do that? And does it make sense to even pursue that idea?

Mr. SULLIVAN. I think that that sort of thing could be pursued without touching the statute, although it would be in the jurisdiction of the Committee on Rules. The House could ordain a 21st standing Committee and confer on it, call it the Committee on Filtering Rulemakings.

Mr. CANNON. Let me just say that it would seem to me that making a 21st Committee, maybe it would justify it. But what you would have in that Committee, it would not—let me just ask you this.

If you took a sitting Committee, either Government Reform would be possibly appropriate or Judiciary, where I think it actually is appropriate, and expanded one of the Subcommittees, and maybe you got rid of term limits or something like that. So you could have somebody who actually liked doing it, would do it over a longer period of time and add some continuity. It would seem to me that that makes some sense as opposed to creating a new Committee. So I realize we're now dealing with some pretty big things here.

Mr. SULLIVAN. Conceptually, it's exactly the same thing. The House could just add a new element to the subject matter jurisdiction of the Judiciary Committee or of the Government Reform Committee that said "review of executive rulemaking actions" and tell that Committee to have one of its Subcommittees or a new Subcommittee become expert at filtering and at ushering recommendations to the Committees of regulatory jurisdiction.

Mr. CANNON. And would the House need a rule change—part of that rule change would be and so communications to the Speaker would then be delegated to that Committee?

Mr. SULLIVAN. If Rule X said that that was the Committee that had jurisdiction over executive tenders of rulemaking actions under the CRA, then the Speaker would refer them to that new jurisdiction instead of his current practice of referring them to the sundry Committees who have enacted the enabling statutes for these rule-making powers.

Mr. CANNON. Do you have a recommendation in mind? Your job—I don't mean to put you in an uncomfortable position, but your job is to figure out how the rules work, and we're now suggesting a new context rule.

Would you put jurisdiction in all of the authorizing Committees to review regulations, or would you see it better working through either a new Committee or as a new Subcommittee of one of the existing Committees?

Mr. SULLIVAN. I think that's too substantive a question for a proceduralist like me.

Mr. CANNON. But procedurally, we don't have a problem doing that if we decide to do something like that?

Mr. SULLIVAN. No. And the basic philosophy of the Committee system is to develop and apply expertise in compartments, and maybe this is a compartment in which the House would like to develop and apply expertise on a special basis.

Mr. CANNON. And what we have now is just untenable, as your charts show. We have this massive communication with no—we haven't changed how we operate in the context of this massive communication, and then we get back to what Mr. Rosenberg called our dashed hopes or the dashed hopes of people who wanted to see a little more of this happening. So there is some high inconsistency here.

Let me just say, anybody else want to comment on how we should do this? That is, a new Committee or using existing Committees and having a new Subcommittee or as opposed to using the current—the authorizing Committees?

Sorry, Morton?

Mr. ROSENBERG. I could comment on that, just to be provocative.

What we have here is a congressional process. You know, in order to do what the framers of this legislation wanted to do, they had two houses involved. And what they—what wasn't thought through or didn't realize the problems at the time is that in order to—there are so many authorizing Committees, jurisdictional Committees out there, as you're pointing out, what might be a solution is not simply a special Committee, but a joint Committee, which has only the authority to recommend with respect to who will screen, has staff enough to make some analyses of rules that come over, pick out the particular ones that appear to be appropriate for congressional review.

There would be House Members and Senate Members. And the recommendations would be sent to the jurisdictional Committees of each House with a recommendation, if it's such, that they exercise their authority and issue a—you know, file a resolution of disapproval.

It has a lot of benefits, it seems to me, because, one, it provides the screening mechanism necessary, it provides some necessary expertise, and it also may take care of the political problem of taking away jurisdiction from current jurisdictional Committees.

What happens is those Committees have recommendations, and those recommendations are up to the jurisdictional Committees to go to the expedited procedures, you know, to formulate that.

I think that while your Committee would be a good one with regard to looking at this, it would probably be very difficult to get everybody to agree, even a House resolution, you know, of vesting you with all that authority. It's a problem that we see with the House Homeland Security Committee.

Mr. CANNON. I'm hoping most people think this is boring and not worthy of their attention. [Laughter.]

Mr. ROSENBERG. Just one idea. I'm for a separate Committee, and I'm much more for a joint Committee that helps both houses do the job.

Mr. CANNON. Thank you.

Mr. GAZIANO. In my written testimony, I said that I'm reluctant to say too much about this because the perfect sometimes is the enemy of the good in reform. And I think that the imperative is that you do something, that you create some sort of structure and increase staff to help with this.

But I—but I do think I know why, and here I may be stepping out of my—you know, into my personal memory versus the public record—why the parliamentarian was given the task of making referrals because: that was who everyone could agree with. That's the parliamentarian's traditional job.

I think there was an understanding that it would significantly increase their office workload. But let me suggest a couple of possibilities. One certainly is that Congress recognize that the parliamentarian's office at least needs sufficient increased manpower and staff or an adjunct or whatever to help with those referrals.

There is a concern by the authorizers that any other Committee but their Committee wouldn't have the expertise to know when the rulemaking is a good or bad rulemaking. So I think that you want to avoid the perfect being the enemy of the good.

Another possibility is to create more expertise somewhere else in Congress, whether it then advises the parliamentarian's office or the individual Committees. But I think part of what the permanent structure of that Committee would be is expertise in cost-benefit analysis and some cost-cutting expertise about the rulemaking process.

So there would be some permanent staff like the OIRA staff. And beyond that, you know, I think that there are these other issues and concerns that might come up. I would love for this Committee or any Committee to retain the jurisdiction, but I would fear that your "below the radar screen" approach might not go unnoticed as the legislation moved forward.

Mr. CANNON. And here I thought you were a person of great historical perspective. Given the attention these matters have had, I'm fairly sure the radar screen is not so sensitive.

I'd like to apologize for Mr. Watt, who—we had late votes and then an emergency meeting, and so he was not able to get down here and join us.

And I have just one other question sort of following up on this question and going back, I think, really to Mr. Mihm and Mr. Rosenberg talking about dashed hopes or talking about the number of reviews and these sorts of things.

What if you changed the premise of CRA away from a disapproval and to a requirement that Congress affirmatively act. Now that changes the nature of this discussion about what Committee it would go through. What it would mean, as a practical matter, is that we pass a lot of legislation all at a time, but it would—it would meet many of the criticisms we've had of the CRA.

Assume for a moment, it's politically possible. Does that make sense? And I think that most of you all would have some comment on that.

Do you want to start? Go ahead, Mort. Sure.

Mr. ROSENBERG. Seven years ago I suggested that in an article in the Administrative Law Review, That the most effective way of controlling administrative regulations is through a process whereby there has to be affirmative approval of regulations.

This creates some problems. If you have all rules that are subject to it, you have an enormous volume of rules that are going to come across. But I think that problem could be solved, and I addressed that in the article that I wrote in 1999. I believe that a screening committee that would deal with this could use a deeming process and take care of about 99.9 percent of the rules.

That is, deeming that rules that are sent over passed on a particular day, a CRA Wednesday that takes place each month, and you wouldn't have more than a 30- or a 60-day delay for 99.9 percent of the rules. And those that are pinpointed as needing more review would then go through a more rigorous approval process.

I think it could be created. I think it's constitutional. And assuming it's politically possible, I think that is the most viable way to go and the most effective way from Congress' institutional point of view.

Mr. CANNON. Would you get us a copy of the article you referred to for the record

Mr. ROSENBERG. Certainly.

Mr. CANNON. I'd appreciate that.

Chris?

Mr. MIHM. Mr. Chairman, we haven't looked at this issue directly, but I'd offer just two kind of broad observations on this.

One is that in response to your earlier question and some of Mr. Sullivan's charts, we talked about the enormous increase in workload and burden on the Congress that was required to review these things after the fact. It probably, that would be augmented several fold perhaps if Congress wanted to review them before implementation, that is, to pass on them.

Again, it's Congress' judgment as to whether or not it wants to go down that road. But I would just observe that it would probably entail quite a bit of additional work on behalf of the Congress, even taking, I think, context, some point that you could just focus on the major rules which would be the 610 or so.

The second thing that I would just observe, and this gets back to the broader agenda of this Subcommittee and in particular the hearing that you held last November, is that the Congress may want to spend more time looking more at the back end of the regulatory process.

That is, you know, one of the things that's really flown below the radar screen is after regulations are put in place, we almost never go back and say, "Gee, did we get what was promised as a result of this?" You know, we were promised either savings or better health or increased, you know, safety or whatever the case may be.

And in many cases, that probably plays out, but I'm willing to bet in some cases it does not. And we never go back and look at that. And so, a kind of a more retrospective analysis or focus on retrospective analysis we think would be very beneficial.

Mr. CANNON. Does that mean like a 3-year sunset? So suppose for a moment you had a joint Committee or each house had a Committee, and we had an expedited process. So something worked here. Would it make sense then to add a sunset to regulations so they came up automatically for political/congressional review?

Mr. MIHM. I'm not sure that I can go so far—I mean, we haven't done the work to justify whether or not there would be sunset. But certainly, it would be beneficial to require at least a periodic re-examination and perhaps in a report to the Congress. And that's something that we could be helpful in, in GAO, and we've tried to be in the past. To look at this, are we actually getting from a particular rule that was promised when we promulgated it, especially some of these major rules?

Mr. GAZIANO. Mr. Chairman, 10 years ago almost, last month, the House was set to vote on H.R. 994, the Sunset and Review Act, which, by the way, is maybe something you want to look at again, which would have sunsetted regulations in the congressional—in the CFR by part. So that's one option.

As far as the major rule, I think that what Mort has suggested is one approach. I think that this Subcommittee held a hearing about 9 years ago where the alternative to require major rules to receive affirmative authorization was discussed. I know that the sponsors of the CRA 10 years ago anticipated that, and that's why they created in the statute that distinction between major and nonmajor rules.

That did not exist in the statute at the time. It was only a function of executive order, and they codified that distinction so that some future Congress could make that. That would be roughly 61 rules a year divided between all the relevant authorizing Committees.

And it was understood by those who hoped that that would some day be considered by Congress that, of course, it wouldn't—it doesn't take as much legislative record to decide whether a rule should be enacted into law or not. That's already received the agency's attention. So it would not—let's say if a given Committee had five or so a year, it would not take the same level of attention as passing five other pieces of legislation.

But the democratic theory was major rules have bigger impact on the American economy than most laws Congress passes, at least if

it's in a major rule. Maybe you could define it in some other way. But at least if it's a major rule, Congress ought to enact it into law.

Mr. ROSENBERG. There's a problem here that can be overcome perhaps. Right now, under the CRA, a major rule is defined as major by OIRA, the OIRA Administrator. Who is going to do this differentiating between major and nonmajor rules? Congress can't do it on a piecemeal basis. That would probably be Chadha and be a problem.

That's why I struggled with that in writing the article about how you could do this. I've often thought of a tiered kind of structure where, but who would designate what it is? Could you write a definition that would cover all the rules that you want to come over?

There are some rules that nobody's going to think of as major until they explode upon you or they're looked at. So that's a problem that has to be addressed from a constitutional point of view, as well as a pragmatic point.

Mr. CANNON. Which is why you focus on a joint Committee. Personally, I'm not sure that works as well as two Committees that would have responsibility.

Mr. ROSENBERG. Well, you don't have a joint Committee if you have—

Mr. CANNON. But you have a single—

Mr. ROSENBERG. Joint Resolution of approval, then you don't need a joint Committee. But you still have—

Mr. CANNON. You have the underlying problem?

Mr. ROSENBERG. Yes.

Mr. CANNON. Which means you don't—it doesn't work through all the—the authorizing Committees because there's no way to have coherence.

Mr. ROSENBERG. But there can be a process whereby there can be a screening of all rules that come over as proposed rules. Then there can be a deeming process which gets rid of most of them and puts them into law after 30 or 60 days.

Mr. GAZIANO. I don't know that some people would like the effect of 42,000 laws, and courts having to interpret them. But there are—but Mort is right about the problem. There are two other possible solutions. Right now, there is no—Congress, in its wisdom for various reasons of expediency, decided not to make the OIRA determination subject to judicial review.

The two alternatives, if you were going to enact this, I think, very important reform, would be to make the OIRA determination subject to judicial review. So there is some risk, and that does avoid the *Chadha* problem. And that's why all regulations still have to come to Congress so that circumvention can be dealt with.

So that—and then you still need, I think, these other Committees because major rules are the minimum that Congress should be enacting into law. But then you make the nonmajor ones subject to—still subject to disapproval, but more effectively.

Mr. CANNON. Let me ask, John, suppose you had a single Committee of jurisdiction without the subject matter expertise. Is it possible to have a rule that allows or requires the joint Committee or the single Committee to work with other Committees? You know, we do that currently with the concurrent jurisdiction in Committees on some matters.

Is there a way to do that with a Committee that handles all of them and then somehow coordinates with Committees of expertise?

Mr. SULLIVAN. Yes, Mr. Chairman.

For example, you could contemplate that this panel would report not to the House, but to its sister Committees. It would make recommendations to the Committees that enacted the enabling statutes in the first instance.

Mr. CANNON. So serial jurisdiction?

Mr. SULLIVAN. Yes, sir.

Mr. CANNON. Interesting. All right.

Can I ask one other question? This is sort of technical, but if we had reports submitted electronically, is it possible to speed up this process, from your perspective as the parliamentarian, so that you take and delegate electronically some of this material? Would that speed up the referral process out of your office?

Mr. SULLIVAN. It might speed up the referral process. It certainly would make more efficient the movement of the paper and the tracking of submittal dates and so forth, the things that the clerk's office has to do with the flow.

The parliamentarian would still have to examine the substance of the rulemakings to discern the Committee jurisdictions in them, but I think it would materially assist the Legislative Resource Center and the others who have to move this paper.

Mr. CANNON. So do we need to do something to establish a requirement by the Administration to in some consistent manner submit these things electronically?

Mr. SULLIVAN. I assume that that might require that you visit the statutory text. I'm personally leery about going virtual on anything. Committees frequently want to teleconference instead of meet together face to face, or poll their Members instead of having them in the same room and voting, we constantly try to impress on them notion of Jeffersonian collegiality and the importance of Members being together in the flesh. So crossing the threshold of a virtual submission I would want to be very cautious about that.

But in terms of batch processing, if the comptroller bundled communications and had a covering electronic submission that could manage the submittal dates and the tracking and that sort of thing, I think that would be very helpful.

Mr. CANNON. Great. Thank you.

Obviously, this is a panel of experts who've been here before, and you all have given very thoughtful, insightful testimony on this issue. We appreciate your involvement in the broader APA review.

And with that, we will stand adjourned.

[Whereupon, at 3:43 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD



May 12, 2006

The Honorable Christopher B. Cannon
 Chairman
 The Honorable Melvin L. Watt
 Ranking Minority Member
 Subcommittee on Commercial and Administrative Law
 Committee on the Judiciary
 House of Representatives

On April 25, 2006, you requested that we respond to questions for the official record regarding your subcommittee's March 30, 2006, hearing on the Congressional Review Act. Our responses are included in this correspondence.

Responses to Questions from Chairman Cannon

1. Your testimony mentions that GAO has issued eight opinions regarding what constitutes a rule under the Congressional Review Act (CRA). Could you expand on how the GAO has defined what a rule is under the CRA, and what may be left out under that definition?

The CRA definition of what constitutes a rule is based on the meaning, with some exclusions, given the term in 5 U.S.C. 551(4) which defines rules subject to the Administrative Procedure Act (APA). As noted in our opinions, a rule is the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.

The CRA's enumerated exclusions from being a covered rule are found at 5 U.S.C. 804(3):

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services or allowances therefore, corporate or financial structures, reorganizations, mergers or acquisitions thereof, or accounting practices or disclosure bearing on any of the foregoing;

(B) any rule relating to agency management or personnel, or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.¹

The APA exception is much broader, including "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."²

According to the legislative history, the CRA deliberately narrowed the exclusions to capture those agency actions which attempted to circumvent notice and comment requirements and affected the rights or obligations of nonagency parties.

Most of our opinions in this area have involved an agency's claim that an agency statement or action is not a rule because it falls under the exclusion concerning agency procedure or practice. The agency argues that the statement only instructs agency personnel what to consider in a certain decision-making process. However, when we looked at the impact of the rules, it was clear that they had a substantial effect on the rights or obligations of nonagency parties. Such a finding was reached regarding the Tongass National Forest Land and Resource Management Plan, the Farm Credit Administration's National Charter Initiative, and the Trinity River Record of Decision.³

2. When you receive information required under the CRA from the agencies on a rule, are the agencies across the administration consistent in the information they provide? Is there consistency within the agencies?

Approximately 90 percent of the rules we receive from the agencies are submitted with the CRA Rule Submission Form developed by GAO and found on the GAO Web site. The agencies that use their own forms still supply our office with the information needed to comply with the CRA and enable GAO to enter the rule in our database.

Consistency within an agency has not been a problem because most of the executive agencies and independent regulatory agencies that submit the majority of the rules have designated a central control person who oversees the submission of the rules to our office and Congress to assure compliance with the CRA. This practice has also allowed our office to have a single contact person if we have further questions or need additional information concerning a submission.

3. Is there additional information, not currently required by the CRA, that GAO would find beneficial for the assessments of the reported rules?

Our office finds that the information required by the CRA and submitted by the agencies with the rule is sufficient for our assessment of the rule's compliance with the various regulatory statutes' and executive orders' requirements.

¹ 5 U.S.C. 552(b)(3)(A).

² See B-275178, July 3, 1997; B-286298, Oct. 17, 2000; B-487537, May 14, 2001.

Please contact me at (202) 512-6906 or mihmi@epa.gov if you, other subcommittee members, or your staffs have additional questions or if we can provide additional help to your work on these issues.



J. Christopher Mihm
Managing Director
Strategic Issues

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Order Code RL30116

CRS Report for Congress

Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Updated March 29, 2006

Morton Rosenberg
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American Law Division



Prepared for Members and
Committees of Congress



Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Summary

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules. In its current form, however, some have questioned the efficacy of the review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight. These questions have been raised despite the use of the CRA to nullify OSHA's controversial ergonomics standards in March 2001. In the view of some observers, the OSHA action was the result of a unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule by some in Congress and by a broad coalition of business interests; and encouragement of repeal by the President. On the other hand, some maintain that a number of major rules have been affected by the Agency recognition of the existence of the review mechanism, and argue that the review scheme has had a significant influence.

Among potential impediments to the law's use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1996 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. Some might argue that these potential impediments and uncertainties have contributed to the fact that of a total of 37 joint resolutions of disapproval that have been introduced to date since April 1996, only one has succeeded in passing and that one may have been *sui generis* because of the unique circumstances accompanying its passage. During that period 41,218 major and non-major rules have been reported and become effective.

This report will provide a brief explanation of how the structure of review scheme describes the criticisms of some observers concerning the way it has been utilized.

This report will be updated as warranted.

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Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Introduction

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules. In its current form, however, some have questioned the efficacy of the review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight. These questions have been raised despite the use of the CRA to nullify OSHA's controversial ergonomics standard in March 2001. It has been argued that the action on the OSHA proposal was the result of a unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule by some in Congress and by a broad coalition of business interests; and encouragement of repeal by the President. On the other hand, some maintain that a number of major rules have been affected by Agency recognition of the availability of the review mechanism, and argue that the review scheme has had a significant influence.

Those who maintain that the CRA has not been appropriately utilized assert that the current procedure provides no expedited consideration procedure in the House of Representatives; lack of screening mechanism to identify rules that may require special congressional attention; and, that a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands. They further maintain that a number of critical interpretive issues and questions remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. From these critics' perspective potential impediments and uncertainties have contributed to the fact that of a total of 37 joint resolutions of disapproval that have been introduced to date since April 1996, only one has passed. They point out that during that period over 41,828 major and non-major rules have been reported and become effective.

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This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has been utilized. The possible reasons for the relatively limited use of the formal review mechanism thus far are assessed and congressional possible proposals are discussed.

Obviously, there are those who do not support increased utilization of the CRA review process. Those holding this opinion may represent a number of views including concern that expanded use of the process will lead to the disproportionate influence on Federal regulations by powerful interest groups or that many regulations have become too technical to be judged by "non-experts". However, since those holding these or similar views have been notably silent during recent discussions of CRA issues, this report does not attempt to predict or describe these positions.

Review of Agency Rules

The congressional review mechanism, codified at 5 U.S.C. 801-808, and popularly known as the Congressional Review Act (CRA), requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. Section 801(a)(1)(A). Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee. Section 801(a)(1)(C). In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made "available" to each House. Section 801(a)(1)(B).

Section 804(3) adopts the definition of "rule" found at 5 U.S.C. 551(4) which provides that the term rule "means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy."¹ The legislative history of Section 551(4) indicates that the term is to be broadly construed: "The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well."² The courts have recognized the breadth of the term, indicating that it encompasses "virtually every statement an agency may make,"³ including interpretive and substantive rules, guidelines, formal and informal statements, policy

¹ Section 804(3) excludes from the definition "(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties."

² Attorney General's Manual on the Administrative Procedure Act 13 (1948).

³ *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

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proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.

The Comptroller General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a "major rule," defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA, Section 804(2). If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG's report "shall include an assessment of the agency's compliance with the procedural steps required by Section 801(a)(1)(B)." Section 801(a)(2)(A). The CG has interpreted his duty under this provision relatively narrowly as requiring that he determine whether the prescribed action has been taken, i.e., whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not to examine the substantive adequacy of the actions.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)⁴ or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto

⁴ See, e.g., *Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993)(memorandum of understanding); *Caddill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F.Supp 1346 (E.D. La. 1988)(federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995)(affirming lower court's ruling that SEC "no action" letter was a rule within section 551(4)).

⁵ The General Counsel of the Government Accountability Office (GAO) has ruled that the 60-day period does not begin to run until both Houses of Congress receive the required report. See B-289880, April 5, 2002, opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel. The situation involved a Department of Health and Human Service's (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 15, 2002, 60 days following the Senate's receipt, relying on the language of Section 801(a)(1)(A) of the act requiring that a copy of a covered rule must be submitted "to each House of Congress" in order to become effective.

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message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted), Section 801(a)(3).

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds "good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."⁶ Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement. Section 801(c). Finally, a third route is available under Section 801(a)(5) which provides that "the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802."⁷

All other rules take effect "as otherwise allowed by law" after having been submitted to Congress under Section 801(a)(1). Section 801(a)(4). Under the Administrative Procedure Act, a final rule may go into effect 30 days after it is published in the Federal Register in final form. 5 U.S.C. 553(d). An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

All covered rules are subject to disapproval even if they have gone into effect. Congress has preserved for itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1). Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the

⁶ Reviewing courts have generally applied the Administrative Procedure Act's good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. See, e.g., *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any "determination, finding, action or omission under this chapter", there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

⁷ In *Leisegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (Fed. Cir. 2002), the appeals court held that Section 801(a)(3) "does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation." At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superseding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

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House in the succeeding session and as though a report under Section 801(a)(1) was submitted on that date. Section 801(d)(2)(A), (e)(2). But a held over rule takes effect as otherwise provided. 801(d)(3). The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time. Section 801(f). If a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Section 803. A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is "substantially the same" as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule. Section 801(b)(2).

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.⁸ A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 801(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to pass it and thereby get the benefit of expedited consideration procedures, retroactive nullification of an effective rule, and the limitation on an agency from promulgating a "substantially similar" rule without subsequent congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of. Section 802(d)(1). Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order. Section 802(d)(2). At the conclusion of debate an up or down vote on the joint resolution is to be taken. Section 802(d)(3).⁹

⁸ For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, see Richard S. Beth, CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, October 10, 2001 (CRA Procedure).

⁹ There is some question whether a motion to proceed is nondebatable because of the absence of language so stating. Arguably, the nondebatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the (continued...)

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There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution "shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House." Section 802(f)(1)(2).

Section 805 precludes judicial review of any "determination, finding, action or omission under this chapter." This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that "good cause" requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General's assessment of an agency's report. The legislative history of this provision indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule. This appears not to be a judicially settled matter.⁹

Finally, the law provides a rule of construction providing that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute. Section 801(g).

Utilization of the Review Mechanism Since 1996

As of March 24, 2006, the Comptroller General had submitted reports pursuant to section 801(a)(2)(A) to Congress on 610 major rules.¹¹ In addition, GAO had cataloged the submission of 41,218 non-major rules as required by Section 801 (a) (1)(A). To date, 37 joint resolutions of disapproval have been introduced relating to 28 rules. One rule, OSHA's ergonomics standard in March 2001, has been disapproved, an action that some believe to be unique to the circumstances of its passage. Two other rules have been disapproved by the Senate. One, the Federal Communication Commission's 2003 rule relating to broadcast media ownership was disapproved by the Senate during the 108th Congress but was not acted upon by the House. The second, a 2005 Department of Agriculture rule relating to the establishment of minimal risk zones for introduction of bovine spongiform

⁹ (...continued)

CRA's statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as "all debatable motions," to 10 hours. Ultimately, a resolution of this question by the Senate Parliamentarian, or the Senate itself, may be necessary. However, at the commencement of the debate on S.J. Res. 6, to disapprove the ergonomics rule, the presiding officer declared that "The motion to proceed is not debatable. The question is on agreeing to the motion." The motion was agreed to. 147 Cong. Rec. S 1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was nondebatable despite the silence of the act on the matter. See, 127 Cong. Rec. S 4871 (May 12, 1981).

¹⁰ See discussion *infra* at pp 24-29.

¹¹ General Accounting Office, Reports on Federal Agency Major Rules, which may be found at [http://www.gao.gov/dcsisions/majrule/majrule.htm].

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encephalopathy (Mad Cow Disease) was disapproved on March 3, 2005, but its counterpart, H.J.Res. 23, has not yet been acted upon by the House. A third joint resolution, S.J.Res. 20, seeking disapproval of a rule promulgated by the Environmental Protection Agency to delist coal and oil-direct utility units from the new source category list under the Clean Air Act, was defeated in the Senate by a vote of 47-51 on September 13, 2005. The following chart details the subjects and actions taken on the introduced resolutions.

**Resolutions of Disapproval Introduced Under the Congressional Review Act
(April 1996 - March 2006)**

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
104th Congress					
9/17/1996	S.J.Res. 60	Sen. Trent Lott	HCEA/ HHS	Hospital reimbursement under Medicare	Failed in passage in Senate by UC
105th Congress					
3/4/1997	H.J.Res. 59	Rep. Don Young (+5)	USFWS/ DOI	Polar bear trophies from Canada	Hearing (House Committee on Resources)
3/20/1997	H.J.Res. 67 (Same as S.J.Res. 25)	Rep. Roger Wicker (+54)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Subcommittee of House Committee on Education and the Workforce
4/10/97	S.J.Res. 25 (Same as H.J.Res. 67)	Sen. Thad Cochran (+5)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Senate Committee on Labor and Human Resources
6/18/1997	H.J.Res. 81	Rep. Joe Scarborough	FCC	Revision of cable television leased commercial access rules	Referred to Subcommittee of House Committee on Commerce
6/10/98	S.J.Res. 50 (Same as H.J.Res. 123)	Sen. Christopher Bond	HCEA/ HHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Senate Committee on Finance

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Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
6/17/1998	H.J. Res. 123 (Same as S.J. Res. 50)	Rep. Jim Nussle (+65)	HCFA/ IHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Subcommittees of House Committees on Ways and Means and Commerce
106th Congress					
5/20/1999	H.J. Res. 55	Rep. Ron Paul (+68)	USPS	Delivery of mail to a commercial mail receiving agency	Referred to Subcommittee of House Committee on Government Reform
7/13/2000	H.J. Res. 104	Rep. Ron Paul	EPA	National pollutant discharge elimination system program and federal antidegradation policy and the water quality planning and management regulations concerning total maximum daily load	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/17/2000	S.J. Res. 50 (Same as H.J. Res. 106)	Sen. Michael Crapo (+18)	EPA	Water pollution under the total maximum daily load program	Referred to Senate Committee on Environment and Public Works
7/18/2000	H.J. Res. 105	Rep. Marion Berry (+23)	EPA	Total maximum daily loads under the Federal Water Pollution Control Act	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/18/2000	H.J. Res. 106 (Same as S.J. Res. 50)	Rep. Jay Dickey	EPA	Water pollution under the total maximum daily load program	Referred to Subcommittee of House Committee on Transportation and Infrastructure

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Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
107th Congress					
3/1/2001	S.J.Res. 6 <i>(same as H.J.Res. 35; H.Res. 79 provided for its consideration in the House)</i>	Sen. Don Nickles (+6)	OSHA/ DOL	Ergonomics	Became P.L. 107-5 on 3/20/2001
3/7/2001	H.J.Res. 35 <i>(same as S.J.Res. 6)</i>	Rep. Ann Noribrup (+32)	OSHA/ DOL	Ergonomics	Referred to Subcommittee of House Committee on Education and Workforce
3/15/2001	H.J.Res. 38	Rep. Ron Paul (+14)	HHS	Standards for privacy of individually identifiable health information	Referred to Subcommittees of House Committees on Energy and Commerce, Ways and Means, and Education and the Workforce.
3/20/2001	S.J.Res. 9	Sen. Barbara Boxer (+6)	USAID	Restoration of the Mexico City Policy	Referred to Committee on Foreign Relations
4/4/2001	H.J.Res. 43	Rep. Joe Knollenberg	DOE	Residential central air conditioners and heat pumps	Referred to Subcommittee of House Committee on Energy and Commerce
4/4/2001	H.J.Res. 44	Rep. Joe Knollenberg	DOE	Clothes washers	Referred to Subcommittee of House Committee on Energy and Commerce
5/22/2001	S.J.Res. 14	Sen. Barbara Boxer	EPA	Delay in the effective date of new arsenic standard	Referred to Senate Committee on Environment and Public Works

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Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
5/22/2001	S.J.Res. 15	Sen. Barbara Boxer	DOE	Postponement of the effective date of energy conservation standards for central air conditioners	Hearing by Senate Committee on Energy and Natural Resources (7/13/2001)
5/14/2002	H.J.Res. 92 (Same as S.J.Res. 37)	Rep. Eliot Engel (+56)	HHS	Modification of Medicaid upper payment limit for non-State government owned or operated hospitals	Referred to Subcommittee of House Committee on Energy and Commerce
5/14/2002	S.J.Res. 37 (Same as H.J.Res. 92)	Sen. Paul Wellstone (+13)	CMS/ HHS	Modification of upper payment limit for non-State government owned or operated hospitals	Referred to Senate Committee on Finance
10/8/2002	S.J.Res. 48 (Same as H.J.Res. 119)	Sen. John McCain (+10)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to Senate Committee on Rules and Administration
10/8/2002	H.J.Res. 119 (Same as S.J.Res. 48)	Rep. Christopher Shays (+1)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to House Committee on House Administration
108th Congress					
1/7/2003	H.J.Res. 3	Rep. William Thomas (+106)	CMS/ HHS	Revisions to payment policies under the Medicare physician fee schedule for calendar year 2003 and other items	Referred to House Committees on Energy and Commerce and Ways and Means

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Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
3/20/2003	H.J.Res. 41	Rep. Lane Evans	DVA	Acquisition procedures for health-care resources.	Referred to House Committees on Veterans Affairs and Government Reform
5/22/2003	H.J.Res. 58	Rep. Thomas Trancendo (+7)	Treasury	Section 326(a) of USA PATRIOT ACT (acceptance of certain unverifiable forms of identification by financial institutions)	Referred to Subcommittee of House Committee on Financial Services
7/15/2003	S.J.Res. 17 (Same as H.J.Res. 72)	Sen. Byron Dorgan (+24)	FCC	Broadcast media ownership	Passed Senate without amendment by Yea-Nay vote (55-40); not acted on by the House
10/16/2003	H.J.Res. 72 (Same as S.J.Res. 17)	Rep. Maurice Hinchey (+2)	FCC	Broadcast media ownership	Referred to Subcommittee of House Committee on Energy and Commerce
4/7/2004	S.J.Res. 31 (Same as H.R. 4236)	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/7/2004	S.J.Res. 32 (Same as H.R. 4237)	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/28/2004	H.R. 4236 (Same as S.J.Res. 31)	Rep. Luis Gutiérrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services
4/28/2004	H.R. 4237 (Same as S.J.Res. 32)	Rep. Luis Gutiérrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services

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Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
109th Congress					
2/14/2005	S.J.Res. 4 (Same as H.J.Res. 24)	Sen. Kent Conrad (+8)	Agriculture	Establishment of minimal risk zones for introduction of mad cow disease	Passed Senate by 52-46 Yea-Nay vote 3/3/05; not acted on by House
2/17/2005	H.J.Res. 23 (Same as S.J.Res. 4)	Rep. Herseth (+1)	Agriculture	Establishment of minimal risk zones for introduction of mad cow disease	Referred to House Agriculture Committee. No action taken
6/29/2005	S.J.Res. 20 (Same as H.J.Res. 56)	Sen. Leahy (+31)	EPA	Removal of coal and oil-fired generating units from list of major sources of hazardous pollutants	Defeated in Senate by 47-51 vote, 9/13/05
6/29/2005	H.J.Res. 56 (Same as S.J.Res. 20)	Rep. Meacham (+4)	EPA	Removal of coal and oil-fired generating units from list of major sources of hazardous pollutants	Referred to Committee on Energy and Commerce. No action taken

Note: Not included in this tabulation are bills designed to disapprove agency rules but that were not joint resolutions under the Congressional Review Act. For example, H.R. 3735, introduced on April 28, 1998, by Rep. Ron Paul, was intended to disapprove a rule requiring the use of bycatch reduction devices in the shrimp fishery of the Gulf of Mexico. The bill was in response to Amendment 9 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, issued as a final rule implementing the amendment on April 14, 1998. The bill's findings section indicated that approval of the amendment was inconsistent with the requirements of the Magnuson-Stevens Fishery Conservation Act and the Administrative Procedure Act. The disapproval section indicated that the rule "shall have no force or effect."

1. On June 22, 2001, Senator Boxer also introduced S.J.Res. 17, which was intended to disapprove a memorandum issued by the President on March 29, 2001, (66 FR 17301) restoring the Mexico City Policy. However, the Congressional Review Act does not apply to actions by the President. See text at pp. 16-17.

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush Administration.¹² OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests and the formation of an umbrella organization, the National

¹² The turbulent history of the development of the ergonomics standard is recounted in CRS Report 97-724, *Ergonomics in the Workplace: Is It Time for an OSHA Standard?*

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Coalition on Ergonomics, to oppose its adoption. In 1995 OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics proposals during the fiscal years 1995, 1996, and 1998.¹³ The riders did not prohibit OSHA from continuing its development work, however, which included responding to concerns that scientific knowledge of ergonomics was inadequate for rulemaking and that the cost of industry implementation of a broad standard would be extraordinarily costly. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms are not understood. In 2000, congressional attempts to pass another appropriation rider, as well as stand alone prohibitory legislation, failed, and on November 14, 2000, OSHA issued its final standard which became effective on January 16, 2001.¹⁴ Most employer responsibilities under the new standard, however, were not to begin until October, 2001.

As soon as the rule was issued two industry groups filed suit in the Court of Appeal for the District of Columbia Circuit challenging OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation with the election of a president and effective control of both Houses of Congress in the same political party. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J. Res. 16, on March 1, 2001. A discharge petition was filed on March 5, and debate on and passage of the resolution occurred on March 6 by a vote of 56-44. That evening the House Rules Committee issued a rule for floor action the next day, and after an hour of debate H.J. Res. 35 was passed on March 7 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2002.¹⁵

In sum, the veto of the ergonomics standards could be seen as the product of an unusual, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a president seeking to undo a contentious, end-of-term rule from a previous administration.

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members, which in some instances was successful. For example, H.J. Res. 67 (1997) was aimed at disapproving an Occupational Health and Safety Administration (OSHA) rule setting exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Representative Roger Wicker, contended that the rule would harm small businesses without

¹³ In a close floor vote, the rider proposed for FY1997 was deleted.

¹⁴ 65 Fed. Reg. 68261 (2000).

¹⁵ P.L. 107-5.

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increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY1998 Labor, HHS and Education appropriations measure¹⁶ which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House Appropriations and Commerce Committees.¹⁷

The disapproval resolution mechanism was effectively utilized to accomplish the suspension of a highly controversial rulemaking by the then Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998, had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made immediately effective. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry-wide concerns. On June 10, Senator Bond, for himself and 13 other co-sponsors, introduced S.J. Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J. Res. 123, was introduced in the House. Thereafter, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) a General Accounting Office report would be requested by the committee that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress about the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.¹⁸ The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either House.

Another illustration of the manner in which the review mechanism has been utilized is shown by S.J. Res. 60 (1996), concerning another HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on

¹⁶ P. L. 105-78.

¹⁷ See Allan Freedman, "GOP's Secret Weapon Against Regulations: Finesse," CQ Weekly, September 5, 1998, at 2318-19 (Freedman).

¹⁸ Freedman, *supra* note 17, at 2319-20.

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October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one House, "the effective date of a rule shall not be delayed by operation of this chapter..." On the morning of September 17, 1996, Senator Lott introduced S.J.Res. 60 and that afternoon, by unanimous consent, the resolution "was deemed not passed."¹⁹ The HCFA rule went into effect on October 1 as scheduled.

A final interesting utilization of the CRA process that had an impact and resulted in an unusual outcome, involved President George W. Bush's restoration, on February 15, 2001, of President Reagan's so-called Mexico City Policy, which limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs which support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.²⁰ A president's authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the Foreign Assistance Act of 1961.²¹ The provision vests the authority to make these determinations exclusively in the Chief Executive. President Reagan delegated his authority to make the determinations to the Administrator of the U.S. Agency for International Development (AID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID Administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID Administrator²² who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution on March 20, 2001, S.J.Res. 9, to nullify the Administrator's action, reasoning that it was a covered rule under the CRA since the implementing action was taken by an executive agency official and not by the President himself, and thus was reviewable by Congress.²³ The President responded by rescinding his earlier directive to the AID Administrator and thereafter issuing an executive directive under his statutory authority personally implementing the necessary conditions and limitations for NGO

¹⁹ See 142 Cong. Rec. S 10723 (daily ed. Sept. 17, 1996).

²⁰ 29 Weekly Comp. Pres. Doc. 88 (1993).

²¹ 22 U.S.C. 2151b(b) and b(0)(1) (2000).

²² 37 Weekly Comp. Pres. Doc. 216 (2001).

²³ Compare *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1994), holding that the President is not subject to APA procedures since he is not expressly covered by its definition of agency, with *Chamber of Commerce v. Reich*, 74 F.3d 1311 (D.C. Cir. 1998) and *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992), allowing challenges to agency rules that were issued pursuant to presidential directive.

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grants.²⁴ The presidential action mooted the disapproval resolution, and rendered a subsequent attempt to veto by S.J.Res. 17 ineffective because the CRA does not reach such actions by the President.

Discussion

In the ten years since its passage, the CRA process has been used sparingly. Several criticisms and questions concerning the process have been raised by those supporting the wider use of the regulatory disapproving mechanism. These have included a need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives' or consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; the scope of the law's coverage; the judicial enforceability of its key requirements; whether a disapproval resolution may be directed at part of a rule; and the effect of a rule nullification on future agency rulemaking in the same area, which, critics believe, have introduced uncertainties and impediments to concerning the use of the process.

1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review; Proposals for Change.

Proponents of an expanded use of the CRA process have called for screening mechanism that will alert committees to rules that may raise important or sensitive substantive issues. In this view, their perceived lack prevents busy committees from prioritizing such issues. As indicated above, the Comptroller General's reports on major rules serve as check lists as to whether legally required agency tasks have been done and not as substantive assessments of whether they were done properly or whether the rules accord with congressional intent.

Lack of knowledge of the existence of such sensitive rules by jurisdictional committees or interested Members is rarely the case. What critics say is absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that may provide the basis for triggering meaningful congressional review.

Support for an independent substantive screening body was signaled by the introduction by Representative Sue Kelly of H.R. 1704 in the 105th Congress, a bill that would have established a Congressional Office of Regulatory Analysis.²⁵ The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees both of which favorably reported differing versions of the legislation.²⁶ Both versions would have established an independent Congressional Office of Regulatory Analysis (CORA) to be headed by a director appointed by the House

²⁴ See, Restoration of the Mexico City Policy; Memorandum for the Administrator of the U.S. Agency for International Development, March 28, 2001, 66 Fed. Reg. 17303-17313 (March 29, 2001).

²⁵ A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. Feb. 25, 1998).

²⁶ See H.Rept. 105-441, Parts 1 and 2 (105th Cong., 2d Sess.) (1998).

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Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the Comptroller General under the CRA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance with the procedural steps for "major rules" required by CRA, directs the proposed CORA to "conduct its own regulatory impact of these "major rules."²⁷ The bill as reported by the Government Reform Committee would have allowed the CORA director to use "any data and analyses generated by the Federal agency and any data of the Office" in analyzing the submitted rule. Both bills provided that a similar analysis of non-major rules was to be conducted when requested to do so by a House or Senate Committee or by individual members of either House. First priority for the conduct of such analyses was given to all major rules. Secondary priority was assigned to committee requests. Tertiary priority was given individual member requests. Finally, under the Judiciary Committee version, the report was to be furnished within 45 days after Congress receives notification of the rule; the Governmental Reform bill would have allowed 30 days. H.R. 1704 received no floor action during the 105th Congress.

Critics maintain that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. In their view, it would also provide credibility and impetus for wider utilization of the review mechanism. Further, by providing intensive review of certain non-major rules, the possibility of OIRA "hiding" significant rules by not designating them as "major" is forestalled. Those opposing the establishment of an office of this kind might argue that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive. The requirement of the Judiciary Committee's version that a CORA do its own cost-benefit analysis from scratch could be pointed to as an unknown cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

Congress agreed upon a limited test of the CORA concept, late in the 106th Congress, with the passage of the Truth in Regulating Act of 2000.²⁸ That legislation established a three year pilot project for the General Accounting Office (now renamed the Government Accountability Office (GAO)) to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either House of Congress may request the Comptroller General (CG) to review the rule. The CG was to report on each rule within 180 calendar days. The report had to contain an "independent evaluation" by the CG of the agency's cost-benefit analysis. We are aware of only one request ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture's forest planning and roadless area rule. GAO advised the requesters that although Act authorized \$5.2 million per year for

²⁷ Section 4 (a)(3)(A).

²⁸ P.L. 106-312, 114 Stat. 1248-50, 5 U.S.C. 801 note.

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the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh exactly with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of proposed rules might coincide with such reviews. In any event, the pilot program established by the act expired in January 2004.

In the 109th Congress, Representative Sue Kelly introduced H.R. 1167, which would make permanent the authority of Congress to request GAO to perform regulatory analyses. The new Truth in Regulating Act (TIRA), if enacted as a permanent responsibility of GAO, would not appear that require a specific appropriation to require agency performance of the vested task as was the case when it was established as a "pilot project." It would, in effect, be an unfunded mandate. Although GAO currently does (and historically has always done) some reviews of agencies' rules at Members' requests under its current appropriations, both the volume and nature of the reviews are likely to be substantially different and may affect its ability to conduct other agency reviews. A similar bill, H.R. 725, section 5, would also make TIRA permanent, but would authorize up to \$5 million for the reviews. Although GAO may view this bill as preferable, if the authorized funds are not appropriated, GAO could be in the same "unfunded mandate" situation as it would under H.R. 1167.

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, Representative Ginny Brown-Waite introduced H.R. 3356, the Joint Administrative Procedures Committee Act of 2003, in the 108th Congress which would amend the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA.²⁰ The responsibilities are in addition to the current statutory framework providing for review of new rules that are required to be reported. A new provision permits the joint committee to recommend disapproval of new rules to jurisdictional committees. The proposed Joint Administrative Procedures Committee (JAPC) would be composed of 12 members from each House with no more than 7 from one political party, selected by the Senate Majority Leader and the Speaker of the House. The JAPC would receive all agency submissions of covered rules and provide copies to all jurisdictional committees. The JAPC has sixty days to consider the rule. The agency could be required to submit such reports as is required by the joint committee such as a cost-benefit analysis or risk assessment. If no action is taken by JAPC, the rule may go into effect. If a majority determines that rule is inconsistent with congressional intent in the area, JAPC may recommend a disapproval resolution to the House and Senate jurisdictional committees. In its report to the jurisdictional committees JAPC is to pinpoint the objectionable provisions of the rule. The proposal would establish a new expedited consideration procedure for disapproval resolutions in the House of

²⁰ See introductory remarks on the measure at 147 Cong. Rec. H 2454 (daily ed. Oct. 21, 2003).

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Representatives. On the third legislative day after a joint resolution is recommended by JACP, it is in order for any member of the House to move to proceed to consideration of the disapproval resolution. It is a privileged, non-debatable motion and once agreed to must be considered before any other business under expedited procedures. Only one hour of debate would be allowed. Finally, Section 801(b)(2) of the CRA is amended to provide that an agency may promulgate a new rule without new statutory authorization if it carries out the recommendation set forth in the report submitted by the JACP to the jurisdictional committees. The bill was referred to the House Committees on Rules and Judiciary. The Judiciary Committee referred it to its Subcommittee on Commercial and Administrative Law. No action was taken by either Committee. Representative Brown-Waite's proposal was reintroduced in the 109th Congress as H.R. 3148 but has received no action as yet.

Another bill, H.R. 576, introduced by Representative Ney in the 109th Congress, is similar in many respects to H.R. 3148, but quite different in certain fundamental ways. Both would create a 24 member House-Senate joint committee capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. Both also provide for an expedited consideration procedure in the House. Significant differences appear, however, with respect to the roles assigned to the joint committees. Under H.R. 3148, the current process established by the CRA for congressional review of new agency rules is maintained: required reports on new rulemakings are submitted to each House and such reports are sent to the jurisdictional committees of each House for action. Rules required to be reported are also sent to the joint committee. Special rules are provided for discharge from committees in the Senate and, under proposed H.R. 3148, from House committees. Expedited procedures are in effect for floor proceedings in each House. The only part to be played by the joint committee in the new rule review process under H.R. 3148 is to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions. Deference to the current roles of jurisdictional committees is also maintained under H.R. 3148 with respect to the new duties given to the joint committee to selectively review existing federal agency rules in effect before the enactment of the CRA and existing major rules of federal agencies promulgated since April 1996. The joint committee may only recommend to jurisdictional committees that they take appropriate legislative action to amend or repeal such laws.

Under H.R. 576, the joint committee, rather than the jurisdictional committees of each House, receives the report of covered rules submitted for review by federal agencies as well as cost-benefit analyses and other materials. Jurisdictional committees receive copies of these materials from the joint committee. GAO is to submit its report on major rules to the joint committee, not the jurisdictional committees concerned. Major rules take effect no earlier than 60 days after the rule is published in the Federal Register or is received by the joint committee. Joint resolutions of disapproval are reported by the joint committee to the respective Houses for action. The joint committee may also report "by bill ... recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the joint committee or otherwise within the jurisdiction of the joint committee." It would appear, then, that the joint committee would have the predominant role in the congressional review process, which might inject a highly controversial issue - - diminution of the role of jurisdictional committees - - in a

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reform debate already freighted with difficult and sensitive political and legal considerations.

A third bill introduced in the 109th Congress is H.R. 931, by Representative Hayworth, would prohibit any regulation proposed by a federal agency from going into effect until a bill enacted under expedited consideration procedures applicable to the rule is signed into law. The term "regulation" is given the broad meaning of the term "rule" as defined in 5 U.S.C. 551(4). The bill does not specifically reference the current CRA process. In fact, it would supersede it and require rulemaking agencies to seek approval of all covered "regulations." There is no provision for congressional processing in a timely and expeditious manner a potentially huge number of proposed regulations.

2. Lack of an Expedited House Procedure.

Those unsatisfied with the current procedure indicate that the current absence of an expedited consideration procedure in the House of Representatives may well be a factor affecting use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, it is argued that only the most well situated in the body will be able to gain access within the limited period of review.³⁰ It is also maintained that a perception that no action will be taken in the House might deter Senate action.

3. The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule.

A consideration that critics maintain limits expanded use of the full CRA review mechanism has been the realization that any joint resolution disapproving a rule that does not have the support of the administration would be vetoed and require a two-thirds vote in each House to override. The deterrent potential of the need for a supermajority in each House to overcome a presidential veto is likely to be significant, unless the object of the exercise is simply to provide the impetus for informal accommodations, such as occurred in the FICPA surety bond matter, or to influence Members to support alternative legislation. Critics assert that a realization by agencies over time that passage of a disapproval resolution is highly unlikely could substantially reduce the efficacy of such a threat. Additionally, they maintain that a possible consequence of such an assumption is that agencies will not factor in congressional disapproval as part of the rule development process.³¹ Since the

³⁰ The experience with respect to the repeal of the ergonomics standard, discussed *supra* at 12-13, would appear to bear this out.

³¹ See, Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *Duke L.J.* 1059, 1089 (2001) ("The paucity of motions for disapproval resolutions indicates that agencies are not apt to focus on fast-track review as a check on their rulemaking discretion at least until late in the rulemaking process. Agencies might be likely to focus on such review when they adopt rules that they know will be unpopular in (continued...)")

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ergonomics veto, 19 resolutions of disapproval with respect to 14 rules have been introduced, only one of which has been acted upon (by one House),²⁷ which some see as a return to the prior practice of using the mechanism to facilitate bargaining.

Thus, even with the successful disapproval of the ergonomics standard, critics are concerned that the supermajority hurdle still remains. One solution they have proposed is to establish a multi-tiered disapproval mechanism. That is, instead of all rules, major or non-major, being treated equally in that they can only be overturned by a joint resolution of disapproval, a process in which the entire burden of action is on the Congress, some rules might be designated for more selective, special review. For example, they argue that major or significant rules might be subject to a joint resolution of *approval*. Under such a scheme a major or significant rule would not become effective unless a joint resolution approving it passed both Houses within a specified period of time.²⁸ To make such a scheme effective someone or some body, other than the OIRA Administrator or a congressional agency, such as the proposed CORA, might be vested with the authority to designate which rules are "major" or "significant" and thereby subject to the affirmative approval requirement. A benefit from the critics' standpoint is that the burden for supporting and justifying such rules falls on the promulgating agencies. All other rules would be subject to disapproval resolutions. Another proposal is to subject all covered rules to congressional approval and establish an expedited procedure whereby non-controversial rules may be sped through leaving only a few for close consideration.²⁹

4. The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection.

Section 808 of the review provision sets forth the mandatory text of any joint resolution of disapproval: "That Congress disapproves the rule submitted by the _____ relating _____, and such rule shall have no force or effect. (The blank spaces being appropriately filled in)." The quoted text refers to "the rule" and

²⁷ (...continued)

Congress, but even then they need not fear the ramifications of fast-track review unless they also believe that the president opposes the rule or is willing to compromise it to win other political battles. Fast-track review may have greater significance for midnight rules that are subject to review when a different president is in office." (Skidlenfeld).

²⁸ S.J. Res. 17, dealing with the FCC's media ownership rule, which passed in the Senate but was not acted upon in the House.

²⁹ See e.g., Reorganization Act Amendments of 1984, providing that both Houses of Congress had to pass a joint resolution approving a reorganization plan within 90 days of continuous session after the date of presidential submission or else it is deemed disapproved. 5 U.S.C. 906 (a) (1994).

³⁰ Two bills introduced in the 106th Congress to revise the CRA utilized the joint resolution of approval approach. See S. 1348, 106th Cong., 1st Sess. (1999)(Sen. Brownback) S. 2670, 106th Cong., 2nd Sess. (2000)(Sen. Thomas). A similar approach is reflected in H.R. 110 introduced by Rep. Hayworth (with 25 co-sponsors) in the 108th Congress. All agency rules must be reported to Congress and may become effective only on passage, by means of a fast-track procedure applicable to both Houses, of an approval law, which is not subject to judicial review.

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"such rule," indicating a rule in its entirety. The experience of 33 joint resolutions of disapproval thus far introduced is that the first blank is filled with the name of the promulgating agency and the second with a generic title or description of the rule.⁵⁵ Similarly, the text of the review provision refers to "such rule," "a rule," or "the rule," with no language expressly referring to a part of any rule under review. The procedure leading to a vote on the proposed disapproval resolution allows for no amendments, and the final vote is up or down on the joint resolution as introduced.

The legislative history of the provision is similarly uniform in using language that would ordinarily indicate a reference to a submitted rule in its entirety, except in one instance. During a discussion of the Section 802 procedure that would obtain when one House completes its action on a joint resolution and sends it to the other House before the second House has yet to complete any action, the following comment is made:

... Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval if originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(c). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). *If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.*⁵⁶ (Emphasis supplied).

⁵⁵ S.J.Res. 50 and H.J.Res. 123, "relating to surty bond requirements for home health agencies under the medicare and medicaid programs..."

⁵⁶ Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. E 571, at E 577 (daily ed. April 19, 1996); 142 Cong. Rec. S 3683, at S 3686 (daily ed. April 18, 1996) [Legislative History] (emphasis added). These identical detailed explanations by the legislative sponsors of the intent and scope of the CRA's provisions appeared in the daily editions of the Congressional Record some three weeks after SBREFA was signed into law. In the absence of committee hearings and the sparse commentary during floor debate, these explanations represent the most authoritative contemporary understanding of the provisions of the law. It is, however, post-enactment legislative history and does not carry the weight that committee report explanations and floor debates provide. As one court dealing with the interpretation of a CRA provision stated, the post-enactment legislative history "buttresses the 'limited scope' of the CRA judicial review provision" but warned that "the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome." See *United States v. Southern Indiana Gas & Electric Co.*, discussed *infra* at note 54 and accompanying text. It has recently come to our attention that the permanent edition of the Congressional Record for the 104th Congress places the Senate sponsors Joint Explanation at April 18, 1996, the same date it appeared in daily edition. See 142 Cong. Rec. 8196- (continued...)

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The last two sentences as seen by some as raising uncertainty. The next to last sentence would appear to contemplate the possibility of a conference to resolve differences in resolutions. The last sentence minimizes what those differences could be. Some have suggested that the explanation contemplates that parts of rules may be the subject of disapproval resolutions, arguing that the framers of the provision would have known that many rules are complex and contain a variety of provisions, only one or a few of which may be objectionable, and would not have required a whole rulemaking to be brought down simply because of one offending portion out of many. It has also been argued that in light of the Section 801(b)(2) prohibition against agency issuance of a rule "in substantially the same form" after passage of a disapproval resolution unless Congress by subsequent law authorizes it, not allowing rejection of part of a rule would have a draconian result.

In fact, an up or down vote on the entire rule would appear to have been the intent of the framers of the review provision. The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings,³⁷ international trade agreements,³⁸ and presidential reorganization plans,³⁹ among others. Each dealt with complex, politically sensitive decisions which allowed only an up or down vote by the Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicate that Congress intended the process to focus on submitted rules as a whole and not to allow veto of individual parts. Perhaps a proper reading of the quoted portion of the legislative history is that it was contemplating the possibility that the blank to be filled in after "relating to" might have different generic descriptions of the rule subject to disapproval. A broader reading of these sentences would not otherwise appear warranted by either the legislative language itself or the rest of the explanatory legislative history.

As a practical matter, if this reading is correct it may be a factor in the limited use of the mechanism. As indicated, nullifying a rule means disabling an agency from regulating in the area covered by the rule unless Congress passes further authorization legislation, a significant consequence of any disapproval action. On the other hand, expressly authorizing nullification of portions of a rule might allow

³⁶ (...continued)

8201. The House sponsors' Joint Explanation, which originally appeared in the daily edition of April 19, 1996, is now placed during the floor debate on SBREFA on March 28, 1996, the date of its passage. See 142 Cong. Rec. 6922-6930. There is no explanation for the earlier placement. As a consequence, we have determined to continue to treat the Joint Explanation as post-enactment legislative history that arguably merits close consideration by a reviewing court as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law. See discussion, *infra*, at pp. 27-33.

³⁷ Defense Base Closure and Realignment Act of 1990, P.L. 101-510, sec. 2908(b) 104 Stat. 1808, in note following 10 U.S.C. 2687 (2000).

³⁸ See, 19 U.S.C. 2191-2193 (2000).

³⁹ See, e.g., Reorganization Act of 1984, 5 U.S.C. 909-912 (2000).

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competing disapproval resolutions within each House and the certainty of a long, drawn out conference with the possibility of no agreement.

5. The Uncertainty of Which Rules Are Covered By the CRA.

The framers of the congressional review provision intentionally adopted the broadest possible definition of the term "rule" when they incorporated Section 551(4) of the APA. As indicated previously,⁴⁶ the legislative history of Section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents — such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like — which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adoption of the Section 551 (4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: "The committee's intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties."⁴⁷ The framers of the legislation indicated their awareness of the practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically,⁴⁸ and noted that it was the intent of the legislation to subject just such documents to congressional scrutiny:

. . . The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.⁴⁹

It is likely that virtually all the 35,490 no-1-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. This would mean that

⁴⁶ See footnotes 1-4, *supra*, and accompanying text.

⁴⁷ Legislative History, *supra* n. 36, at E 579, S 3687.

⁴⁸ This practice has been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311 (1992). Cf. also, General Accounting Office, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (August 1998).

⁴⁹ Legislative History, *supra* n. 36, at E 578, S 3687.

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perhaps thousands of covered rules have not been submitted for review.⁴⁴ Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously.

Eight such agency actions have come to the attention of committee chairmen and Members and were referred to the Comptroller General for determinations whether they were covered rules. In five of the eight cases the CG determined the action documents to be covered rules. See letter to Honorable Lane Evans, Ranking Minority Member, House Committee on Veterans' Affairs, B-292045 (May 19, 2003) (Department of Veterans Affairs memorandum terminating the Department's Vendee Loan Program is not a rule that must be submitted to Congress because it is exempt under Section 804(3)(B) and (C) as a rule relating to "agency management" or "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Ted Strickland, B-291906 (February 28, 2003) (Department of Veterans Affairs memorandum instructing all directors of health care networks to cease any marketing activities to enroll new veterans in such networks is excluded from CRA coverage by Section 804(3)(C) which excludes "any agency rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Doug Ose, Chairman, House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, B-287557 (May 14, 2001) (Department of Interior's Fish and Wildlife Service's Trinity River "Record of Decision" is a rule covered by the CRA because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy and is an "agency action[] that substantially affect[s] the rights and obligations of outside parties."); letter to the Hon. James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000) (Farm Credit Administration's national charter initiative held to be a rule under the CRA); letter to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999) (EPA "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.); letter to Senator Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by presidential executive order and direction and the President is not an

⁴⁴ An indication of the vast number of unreported covered rules came as a result of an investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See "Non-Binding Legal Effect of Agency Guidance Documents," [http://www.congress.gov/cgi-bin/cpquery/T?&report=hr1009&dynamic=ep106&JH.Rept.106-1009,106th Cong., 2nd Sess. \(2000\).](http://www.congress.gov/cgi-bin/cpquery/T?&report=hr1009&dynamic=ep106&JH.Rept.106-1009,106th Cong., 2nd Sess. (2000).)

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"agency" under the APA and is not subject to the provisions of the APA); letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy); letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to be a covered rule because it is of general applicability and interprets and implements the statutory program.).

The GAO opinion on the American Heritage River Initiative rests its rationale that a presidential directive to an agency that results in substantive action by that agency is not thereby covered by the CRA based on the Supreme Court's rulings in *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1994). In light of *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) and *National Family Planning v. Sullivan*, 979 F. 2d 227 (1992), which successfully challenged substantive changes in rules that were directed by a presidential directive, the GAO General Counsel's conclusions may be problematic.

Also questionable is the General Counsel's analysis in its February 28, 2003 opinion concluding that a Department of Veterans Affairs (DVA) memo terminating a long-time veterans health outreach program was an exempt agency practice that had no substantial effect on the rights of non-agency parties. In contrast with its May 19, 2004, opinion dealing with a termination of a DVA vendee loan program, where it closely examined the statutory basis of the loan program and found that it was established on the basis of *discretionary* authority of the Secretary and provided no direct benefits to veterans, the General Counsel made no mention that the Congress had charged the Secretary of DVA "with the affirmative duty of seeking out eligible veterans and eligible dependants and providing them" with federal benefits and services. Representative Strickland joined with the Vietnam Veterans of American in a suit seeking declaratory and injunctive relief to restore the program. In *Vietnam Veterans of America v. Principi*, 2005 WL 961133 (D.D.C. March 11, 2005), the district court found that "[u]nder 38 U.S.C. 7721, 7722, and 7227, Congress charges the Secretary of the Department of Veterans Affairs with the affirmative duty to 'provide outreach services.' This duty is not discretionary but must be done in accordance with Congress' wishes." The court concluded, however, that since Congress appropriated a lump-sum for both outreach services and health care services, and the record showed that some monies had been expended for outreach services, it indicated that Congress meant to allow the Secretary the discretion to decide "the manner in which [outreach services] are to be provided." The critique here is that the Comptroller General's failure to examine the Secretary's duty under the statute in question eliminated the possibility finding a substantial effect of the agency's action on the rights or obligations of non-agency parties, thereby forestalling the opportunity for legislative review under CRA procedures. It is interesting to note that subsequent to the CG's decision and the filing of the lawsuit, Congress enacted a limitation on the Fiscal Year 2004 VA appropriation stating, "[n]one of the funds made available may be used to implement any policy prohibiting the Directors of the Veterans Integrated Service Networks from conducting outreach or marketing to enroll new veterans within their respective networks," an apparent

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indication that Congress thought the controverted policy could be having an impact on potential beneficiaries. See Pub.L. 108-199, H.R. 2673, sec. 418 (2004).

Believing such instances to be only a small portion of unreported agency actions, GAO, at the behest of the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, engaged in discussions with the Office of Management (OMB) during 1998 for the creation of a uniform reporting form for use by agencies in reporting covered rules to the CG, and for the promulgation of an OMB guidance document covering such matters under the review provision as the definition of a covered rule, reporting requirements, the good cause exemption, and the consequences of failing to report a rule, among others. The failure to issue such guidance prompted insertion of the following directive in the FY1999 appropriation for OMB: "OMB is directed to submit a report by March 31, 1999, to the Committees on Appropriations, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform and Oversight that . . . issues guidance on the requirements of 5 U.S.C. Sec. 801 (a) (1) and (3); sections 804 (3), and 808 (2), including a standard new rule reporting form for use under section 801 (a)(1)(A)-(B)."⁴⁵ OMB, in the view of the Subcommittee, has failed to substantially comply with that statutory directive.⁴⁶

If the guidance issued in compliance with the statutory direction is not consonant with the congressional understanding of the intent, meaning and scope of the congressional review provision, it might be considered as a vehicle for oversight hearings and possible remedial legislation.

6. The Uncertainty of the Effect of An Agency's Failure to Report a Covered Rule to Congress.

Section 801(a)(1)(A) of the CRA provides that "[b]efore a rule can take effect," the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. Section 805 states that "no determination, finding, action or omission under this chapter shall be subject to judicial review." The Department of Justice (DOJ) has broadly hinted that the language of Section 805 "precluding judicial review is unusually sweeping" so that it would presumably prevent judicial scrutiny and sanction of an agency's failure to report a covered rule.⁴⁷ DOJ has succeeded with its preclusion argument in two federal district court rulings. More recently the rationale of those opinions has been called into question and rejected by a third district court.

⁴⁵ P.L. 105-277, Division A, title III.

⁴⁶ See [<http://www.congress.gov/cgi-bin/cpquery/F?&report=hr1009&dbname=cpl106&>] H.Rept. 106-1009, *supra* n. 44 at 4-5.

⁴⁷ See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Foix, Assistant Attorney General, Office of Legislative Affairs, DOI, and accompanying analysis dated June 10, 1997, at pp 9-11 (DOJ Memorandum).

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In *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*,⁴⁸ three thrift associations and two of their trade associations sued the Federal Housing Finance Board challenging one of its policies regarding the home mortgage lending industry. The plaintiff's argued, *inter alia*, that the policy was a rule required to be reported to Congress under the CRA and the failure to report it precluded its enforcement. The government argued that Section 805 was a blanket preclusion of judicial review. In response to plaintiff's contention that Section 805 only precluded review of any "determination, finding, or omission" by Congress, the court held that "the statute provides for no judicial review of any 'any determination, finding, action or omission under this chapter,' not 'by Congress under this chapter.'" The court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts.⁴⁹ The court made no reference to the scheme of the act or its legislative history.

The Texas district court's "plain meaning" rationale was cited with approval by an Ohio district in *United States v. American Electric Power Service Corp.*⁵⁰ That case was one of many involving an extensive litigation campaign by the Environmental Protection Agency (EPA), begun in the mid-1990's to establish the extent to which a power plant or factory may alter its facilities or operations without bringing about a "modification" of that emission source so as to trigger the Clean Air Act's New Source Performance Standards and pre-construction "new source review."⁵¹ Among the issues common in these cases, and raised in this case, was whether EPA's determination to begin a campaign of litigation enforcement after many years of no enforcement was a substantive change that had to be reported to Congress under the CRA. It was among 123 affirmative defenses raised by defendants, nine coal-fired power plants in Ohio, Virginia, and West Virginia, which the Government moved to dismiss. Citing the *Texas Savings* case approvingly, the district court agreed "that the language of Section 805 is plain" and that "[d]eparture from the plain language is appropriate in the 'rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters ... or when the statutory language is ambiguous.' ... In all other cases, the plain meaning of the statute controls."⁵² The court did not indicate whether it had attempted to discern whether there was any evidence of congressional intent at odds with the court's plain meaning reading. It did, however, provide an alternative rationale: "Furthermore, this Court is not convinced that the instant

⁴⁸ 1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), aff'd 201 F.3d 551 (5th Cir. 2000).

⁴⁹ *Id.* at note 15.

⁵⁰ 218 F.Supp. 3d 931 (S.D. Ohio 2002).

⁵¹ For background on the legal development of the issue, see Robert Meltz, "Air Pollution: Legal Perspective on the 'Routine Maintenance' Exception to New Source Review," CRS Report RS21424 (February 20, 2004).

⁵² 218 F.Supp. 2d at 949.

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enforcement action amounts to rulemaking which would be covered by 5 U.S.C. 801 *et. seq.*, in the first instance," without elaboration.⁵³

In *United States v. Southern Indiana Gas and Electric Co.*,⁵⁴ the court faced the same issue in a motion for summary judgment by the power company defendant. Rejecting the *Texas Savings* and *American Electric Power* precedents, it found that Section 805 is ambiguous and susceptible to two possible meanings: that Congress did not intend for any court review of an agency's compliance with the CRA or that Congress only intended to preclude judicial review of its own determination, findings, actions or omissions made under the CRA *after* a rule had been submitted to it for review. Adopting the first alternative, argued for by the Government and adopted by the *Texas Savings* and *American Electric Power* courts, would, according to the court, allow agencies "to evade the strictures of the CRA by simply not reporting new rules and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which is to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual."⁵⁵ The court found that the post-enactment legislative history "buttresses the 'limited scope' of the CRA's judicial review provision" but was careful to acknowledge that "the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome." However, the court made it clear that "this court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the act. The legislative history only serves to further reinforce the Court's conclusion."⁵⁶

It is certainly arguable that the *Southern Indiana* court's view of the limited preclusiveness of Section 805 is plausible and persuasive. Indeed, an even stronger case can be made from a closer analysis of the text and structure of the act taken as a whole. Moreover, although the court was correct as a general matter that post-enactment legislative history normally is given less weight, there are a number of Supreme Court rulings that recognize that under certain circumstances, arguably applicable here, contemporaneous explanations of key provisions' intent have been found to be an "authoritative guide" to a statute's construction. In one instance the Court relied on an explanation given eight years after the passage of the legislation.

The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and possible nullification through joint resolutions of disapproval.⁵⁷ The scheme provides for the delayed effectiveness of some rules

⁵³ *Id.*

⁵⁴ 2002 U.S. Dist. LEXIS 20936; 55 ERC (BNA) 1597 (D.C. S.D. Ind. 2002).

⁵⁵ 2002 U.S. Dist. LEXIS 20936 at 13-14.

⁵⁶ *Id.* at 15-16 and note 3.

⁵⁷ "This legislation establishes a government-wide congressional review mechanism for most (continued...)"

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deemed innately important ("major rules"), Section 801(a)(3), and temporarily waives the submission requirement of Section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or for a rule an agency "for good cause" finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest. Section 808. Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of "major rule". But all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect. Sections 801(b)(1), §801(f). Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval. Section 801(b)(2).

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the Comptroller General must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or publication of the rule (Section 801(a)(2)(A)); the Administrator of OIRA determines whether a rule is a "major rule" (Section 804(2)); and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures. Section 802. But Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress adjourns a session of the Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1).

Thus the statutory scheme is geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], action[s], or omission[s] *under this chapter*," a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend, as is more fully described below, to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself. However,

¹⁷ (Continued)
new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." Legislative History, *supra* note 36, at E 575 and S 3683.

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without the potential of court invalidation of enforcement actions based on the failure to submit covered rules, agencies are not likely to comply with submission requirements. If Section 805 is read so broadly, it would arguably render ineffective as well the Section 801(b)(2) prohibition against an agency promulgating a new rule that is "substantially the same" as a disapproved rule unless it "is specifically reauthorized by a law enacted after" the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued rule is "substantially the same" as a disapproved rule is one that a court will be asked to make.⁵⁸ Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in Section 801(g) that "[i]f Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any interest of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval."

The legislative history of the review provision confirms this view of the limited reach of the judicial review preclusion language. A key sponsor (Representative Hyde) of the legislation, Representative McIntosh, explained during the floor debate on H.R. 3136 that "Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress."⁵⁹

Shortly thereafter, the principal Senate and House sponsors of H.R. 3136 published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the congressional review provision of the CRA and its legislative history. Senator Nickles explained:

Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day. . . . Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been

⁵⁸ The disapproval of the ergonomics rule underlines a possible need for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. That rule, which was broad and encompassing in its regulatory scope, raises the question as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute. This issue is addressed in the next section.

⁵⁹ 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

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submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.⁶⁰

The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter". Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings". U.S. Const. art. I, §5, cl. 2, which includes each house being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval", or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(2).⁶¹

The Justice Department has suggested that such post-enactment legislative history should not carry any weight, particularly in view of the unambiguous nature of the preclusion language at issue.⁶² However, as discussed below, the courts appear to have taken a contrary view in analogous interpretive situations.

The Joint Explanatory Statement is a contemporaneous explanation of the congressional review provision by the legislative sponsors of the legislation which is consonant with the text and structure of the legislation. Such statements by legislative sponsors have been described by the Supreme Court as an "authoritative guide to the statute's construction." *North Haven Bd. of Education v. Bell*, 456 U.S.

⁶⁰ Legislative History, *supra* note 36, at 142 Cong. Rec. S 3683.

⁶¹ *Id.*, at E 577 and S 3686.

⁶² See DOJ memorandum, *supra* n. 47, at 10 n.14.

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512, 526-27 (1982)(citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983)(relying on a 1965 explanation by "an important figure in the drafting of the 1957 [Atomic Energy Act]"); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)(remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

Finally it may be noted that analogous preclusion of judicial review provisions in the original Paperwork Reduction Act of 1980, P.L. 96-511 and in the 1995 revision of the act, P.L. 104-13, have been uniformly construed by the courts to allow enforcement of its public protection provision. Thus 44 U.S.C. 3504 (1994), which authorized the Director of OMB to review and approve or disapprove information collection requirements in agency rules, and to assign control numbers to such forms, provided that "there shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule." 44 U.S.C. 3504(b)(9). A similar provision appears in the 1995 revision of the Paperwork Reduction Act.⁶³ The 1980 legislation also contained a "public protection" provision which absolved a person from any penalty for not complying with an information collection request if the form did not display an OMB control number or failed to state that the request was not subject to the act.⁶⁴ The public protection provision, Section 3512, has been the subject of numerous court actions, some finding it applicable and providing a complete defense to noncompliance, others finding it inapplicable. But no court has ever raised a question with respect to preclusion of judicial review.⁶⁵

A reviewing court construing the language of the congressional review provision, the structure of the legislation, and its legislative history, including post-enactment statements, is therefore likely to hold that a court is not precluded from preventing an agency from enforcing a covered rule that was not reported to Congress in compliance with Section 801(a)(1)(A).

7. The Uncertainty of the Breadth of the Prohibition Against An Agency's Promulgation of a "Substantially Similar" Rule After the Original Rule Has Been Vetoed.

Enactment into law of a disapproval resolution has several important consequences. First, a disapproved rule is deemed not to have had any effect at any time. Thus, even a rule that has become effective for any period of time is

⁶³ 44 U.S.C. 3507(d)(6)(2000).

⁶⁴ See 44 U.S.C. 3512 (1994).

⁶⁵ Compare *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1980)(failure of Forest Service to file a plan of operations with OMB control number precluded conviction for failure to file) and *Cameron v. IRS*, 593 F.Supp. 1540, *aff'd* 773 F.2d 126 (6th Cir. 1984)(failure of IRS forms to have OMB control numbers did not violate section since it was a collection of information during the investigation of a specific individual or entity which is exempt under the provision).

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retroactively negated.⁶⁶ Second, a rule that does not take effect, or is not continued because of the passage of a disapproval resolution, cannot be "reissued in the same form" nor can a "new rule" that is "substantially the same" as the disapproved rule be issued unless such action is specifically authorized by a law enacted subsequent to the disapproval of the original rule.⁶⁷ The full text of this provision states:

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

Finally, if a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the disapproval resolution.⁶⁸

It can be anticipated that opponents of a disapproval resolution will argue that successful passage of a resolution may disable an agency from ever promulgating rules in the "area" covered by the resolution without future legislative reauthorization since a successful disapproval resolution must necessarily bring down the entire rule. Or, at the very least, it may be contended that any future attempt by the agency to promulgate new rules with respect to the subject matter will be subject to judicial challenge by regulated persons who may claim that either the new rules are substantially the same as those disapproved or that the statute provides no meaningful standard to discern whether a new rule is substantially the same and that the agency must await congressional guidance in the form of a statute before it can engage in further rulemaking in the area. The practical effect of these arguments, then, may be to dissuade an agency from taking any action until Congress provides clear authorization.

A review of the CRA's statutory scheme and structure, the contemporaneous congressional explanation of the legislative intent with respect to the provisions in question, the lessons learned from the experience of the March 2001 disapproval of the OSHA ergonomics rule, and the application of pertinent case law and statutory construction principles suggests that (1) it is doubtful that Congress intended that all disapproved rules would require statutory reauthorization before further agency action could take place. For example, it appears that Congress anticipated further rulemaking, without new authorization, where the statute in question established a deadline for promulgating implementing rules in a particular area. In such instances, the CRA extends the deadline for promulgation for one year from the date of disapproval. (2) A close reading of the statute, together with its contemporaneous congressional explanation, arguably provides workable standards for agencies to reform disapproved regulations that are likely to be taken into account by reviewing courts. Those standards would require a reviewing court to assess both the nature of

⁶⁶ 5 U.S.C. 801(f).

⁶⁷ 5 U.S.C. 801(b)(2).

⁶⁸ 5 U.S.C. 803.

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the rulemaking authority vested in the agency that promulgated the disapproved rule and the specificity with which the Congress identified the objectionable portions of a rule during the floor debates on disapproval. An important factor in a judicial assessment may be the CRA's recognition of the continued efficacy of statutory deadlines for promulgating specified rules by extending such deadlines for one year after disapproval. (3) The novelty of the issue, the uncertainty of the weight a court will accord the post enactment congressional explanation, and the current judicial inclination to give deference to the "plain meaning" of legislative language, make it difficult to reliably anticipate what a court is likely to hold.

A blanket contention that enactment of a joint resolution disapproving an agency's rules would disable that agency from promulgating future rules in the "area" of concern until Congress passes new legislation authorizing it to issue rules on that subject would not appear to have a substantial basis in the CRA. Such argumentation would apparently be based on the notion that the "plain meaning" of the CRA's disapproval mechanism forecloses further rulemaking with respect to that subject matter unless Congress specifically reauthorizes such action in subsequent legislation. That is, since Congress can apparently only disapprove a rule as a whole, rather than pinpointing any particular portions, there is no sound basis for the agency to act without further legislative guidance where a rule deals exclusively with an integrated subject matter. The statute gives no indication as to how an agency is to discern what actions would be "substantially the same" and it would run the risk of a successful court challenge if it guessed wrong. It might be further argued that even if the agency promulgates new rules, which of course would be subject to CRA scrutiny, and Congress did not act to disapprove the new rules, that would not provide the necessary reauthorization since Section 301(g) of the act provides as a rule of construction that in the event of the failure of Congress to disapprove a rule "no court ... may infer any intent of Congress from any action or inaction of the Congress with regard to such, related statute, or joint resolution of disapproval."

It is, of course, fundamental that statutory language is the starting point in any case of statutory construction. In recent years, the Supreme Court has shown a strong disposition to hold Congress to the letter of the language it uses in its enactments. In its ruling in *Barnhardt v. Sigmon Coal Co.*⁶⁹ the Court advised that the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."⁷⁰ "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent.'⁷¹ In such cases, the Court has held, resort to "legislative history is irrelevant to the interpretation of an unambiguous statute."⁷² In *Barnhardt* the Court

⁶⁹ 534 U.S. 438 (2002).

⁷⁰ *Id.* at 450.

⁷¹ *Id.*

⁷² *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3. *Accord Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Daas*, 198 F.2d 1167, 1175 (9th Cir. 1999), *cert. denied* 531 U.S. 999 (2000).

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warned, "parties should not seek to amend [a] statute by appeal to the Judicial Branch."⁷³

The plain meaning rule, however, is not an unalterable, rigid rule of construction and has been held inapplicable where it would "lead to an absurd result,"⁷⁴ or "would bring about an end completely at variance with the purpose of the statute."⁷⁵ "It is 'a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme' ... Thus it is a more faithful construction of [a statute] to read it as a whole, rather than as containing two unrelated parts. It is the classic judicial task of construing related statutory provisions to make sense in combination."⁷⁶ In the instant situation, it is arguably not likely that a court would hold that the "substantially the same" language of Section 801(b)(2) is unambiguous, either on its face or in the context of the statutory scheme. The direction of the provision is not a self-enforcing mandate; it clearly requires a further determination whether rules have been reissued in "substantially the same form" or whether a new rule is "substantially the same" as the one disapproved. The ambiguity raised is who makes those determinations and on what basis.

The language of the provision, however, does not naturally or ineluctably lead to the conclusion that no further remedial rulemaking can take place unless Congress passes a new law. This reasoning is buttressed by Section 803(a) which contemplates that agency rulemaking must take place after a disapproval action if the authorizing legislation of the agency mandates that rules disapproved had to have been promulgated by a date certain. That provision extends the deadline for promulgation for one year "after the date of enactment of this joint resolution," not one year after Congress reauthorizes action in the area. The reasonable conclusion is that Congress understood that after disapproval, an agency, if it was under a mandate to produce a particular rule, had to try again. The question then is, how was it to perform this task. The answer lies in the legislative history of the act.

The Congressional Review Act was part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996. That Title was a product of negotiation between the Senate and House and did not go through the committee process. Thus there is no detailed expression of its legislative history, apart from floor statements by key House and Senate sponsors, before its passage by the Congress on March 28, 1996 and its signing into law by the President on March 29. Thereafter, the principal sponsors of the legislation in the Senate (Senators Nickles, Reid and Stevens) and House (Representative Hyde) submitted identical joint explanatory statements for publication in the Congressional Record "intended to provide guidance to the agencies, the courts, and other interested parties when

⁷³ 534 U.S. at 462.

⁷⁴ *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

⁷⁵ *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1978).

⁷⁶ *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (holding, *inter alia*, that it is appropriate for a court to look at the history and background against which Congress was legislating).

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interpreting the act's terms.⁸⁷⁷ Although it is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.⁸⁷⁸

The Joint Explanatory Statement directly addresses a number of issues that may arise upon enactment of a disapproval resolution and attempts to provide guidance for both Congress and agencies faced with repromulgation questions. At the outset, the Statement notes that disapprovals may have differing impacts on promulgating agencies depending on the nature and scope of the rulemaking authority that was utilized. For example, if an agency's authorizing legislation did not mandate the promulgation of the disapproved rule, and the legislation gives the agency broad discretion, the authors deem it likely that it has the discretion whether or not to promulgate a new rule. On the other hand, the Statement explains that "if an agency is mandated to promulgate a particular rule and its discretion is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."⁸⁷⁹ By implication, a congressional mandate to issue regulations that is not circumscribed would still be operative. But how would the agency be guided in that circumstance? The Statement addresses that very question: it is the obligation of Congress during the debate on the disapproval resolution "to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after the enactment of a joint resolution of disapproval."⁸⁸⁰ Thereafter, "the agency must give effect to the resolution of disapproval."⁸⁸¹ The full statement on the issue is as follows:

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproval rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing

⁸⁷⁷ Legislative History, *supra*, n. 36.

⁸⁷⁸ See e.g., *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530-31 (1982); *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 n.25 (1983); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

⁸⁷⁹ Legislative History *supra* note 36 at S 3686.

⁸⁸⁰ *Id.*

⁸⁸¹ *Id.*

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agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

The congressional experience with the disapproval of the OSHA ergonomics standard provides a useful lesson.⁸² This rule became the first, and only, rule to be disapproved thus far under the CRA. The principal sponsor of the resolution, Senator Jeffords, at the outset of the debate addressed the issue whether disapproval would disable OSHA from promulgating a new rule. Senator Jeffords referred to the above-discussed Joint Statement and noted that OSHA "has enormously broad regulatory authority," citing pertinent sections of the OSH Act providing expansive rulemaking authority. The Senator concluded that "I am convinced that the CRA will not act as an impediment to OSHA *should* the agency decide to engage in ergonomics rulemaking."⁸³ What Senator Jeffords apparently understood was that while the agency had broad authority to promulgate rules, there was no congressional mandate to issue an ergonomics rule in the underlying law. As a consequence it was possible that no further rulemaking would occur, as implied by a letter to Senator Jeffords from Secretary Chao which indicated that a new rulemaking was only one of many options available to the Department should the rule be disapproved.⁸⁴ In fact, OSHA made it clear on April 5, 2002, that no rulemaking was in the offing.⁸⁵ On April 17, 2002, Senator Breaux and 26 co-sponsors, many of whom had voted in favor of the disapproval resolution, introduced S. 2184, which would direct the Secretary of Labor to promulgate a new ergonomics rule and specifies in detail what should be included, what should not be included, and what evidence should be considered. Section 1 (b)(4) of the bill deems the direction to issue the rule "a specific authorization by Congress in accordance with Section 801 (b)(2)" of the CRA.⁸⁶

An interesting contrast with the ergonomics situation was the consideration given by the key Senate sponsors of the Bipartisan Campaign Reform Act 2002 (BCRA),⁸⁷ which requires that the Federal Election Commission (FEC) promulgate rules implementing the soft money limitations and prohibitions of Title I of the act

⁸² See CRS Ergonomics Report, *supra* note 12.

⁸³ 147 Cong. Rec. S 1832-33 (daily ed. March 6, 2001) (emphasis added).

⁸⁴ 147 Cong. Rec. at S 1832.

⁸⁵ CRS Ergonomics Report, *supra* note 12.

⁸⁶ *Id.*

⁸⁷ P.L. 107-55, 116 Stat. 81 (March 27, 2002).

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no later than 90 days after its date of enactment,⁸⁸ whether to introduce a CRA disapproval resolution with respect to the rules issued by the FEC on July 17, 2002.⁸⁹ The Senate sponsors believed that the new rules, which became effective on November 6, 2002, undermine the BCRA's ban on the raising and spending of soft money by federal candidates and officeholders and on national party use of soft money. Since the FEC was mandated to promulgate rules to implement the BCRA by a date certain, it could have been argued that, in contrast with the general discretion OSHA has with respect to whether to issue any ergonomics standard, if Congress disapproved the FEC's soft money rule, the agency would be obligated to undertake a new rulemaking (to be completed within a year after the disapproval resolution was signed into law) that would reflect congressional objections to the rule. At the same time, in accordance with the understanding of the Joint Statement, it would have been arguably incumbent on Congress in its debates on any such resolution to clearly identify those provisions of the rule that are objectionable as well as those that are not.

Whether this line of argument will be sufficient to withstand a challenge in the courts cannot be answered with any degree of certainty. Foreseeable obstacles may be the novelty of the issue, the amount of weight, if any, that a court will accord the post-enactment congressional explanation of the CRA, and the current inclination of the courts to give deference to the plain meaning of statutory language and to eschew legislative history. A new rule may be challenged on grounds of lack of authority as a consequence of the disapproval resolution either because Congress failed to articulate its objections to the rule, thereby providing no standards for the agency to apply in its rulemaking, or that the new rules were "substantially the same" as the old, disapproved rules and therefore invalid under the CRA.

In the future, if Congress considers a disapproval resolution, it should be mindful of the guidance provided by the Joint Statement. The Joint Statement declares that it is the congressional intent to make clear and specific identification of the options available to the agency, including identification of objectionable provisions in the proposed rule during the floor debates. In this way Congress provides an agency clear and direct guidance as to what it expects in the repromulgation process as well as a possible defense to a challenge based on the "substantially the same" language of the CRA.

Conclusion

This report identifies structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval process in the ten years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. The

⁸⁸ Section 402 (c)(2).

⁸⁹ Kenneth P. Doyle, Wertheimer, Bauer Debate Move to Void Soft Money Rule Before Senate Democrats, Bureau of National Affairs, July 19, 2002. A disapproval resolution of the FEC rules was introduced in the Senate, S.J.Res. 48, on October 8, 2002, but was never acted upon by either House.

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one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. Presently, the Congress and the White House are in the hands of the same political party, the rules of the previous administration are no longer subject to the CRA, and the current administration appears to be establishing firm control of the agency rulemaking process through its administration of Executive Order 12,866.⁶⁰ One commentator has observed that if the perception of a rulemaking agency is that the possibility of congressional review is remote "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rule."⁶¹ Indeed, there is growing evidence that a significant number of covered rules are not being submitted for review at all. Also, a potentially effective support mechanism, the in-depth, individualized scrutiny of selected agency cost-benefit and risk assessment analyses by GAO authorized under the Truth in Regulating Act of 2000, was never implemented for lack of appropriated funds.

The CRA reflects a recognition of the need to restore the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court's most recent rejection of an attempted revival of the nondelegation doctrine⁶² adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, intrusive judicial review, and increasing presidential control over the rulemaking process will likely continue.

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⁶¹ Seidenfeld, *supra* note 31, at 1090.

⁶² *Whitman v. American Trucking Assn's*, 531 U.S. 457 (2001).

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**ADMINISTRATIVE LAW, PROCESS AND
PROCEDURE PROJECT**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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**ADMINISTRATIVE LAW, PROCESS AND
PROCEDURE PROJECT**

TUESDAY, NOVEMBER 1, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. If you would all like to take your seats. Thank you all for coming this morning.

I don't have a gavel. We are now in order. Don't worry about it. It is not life or death here.

The current Federal regulatory process faces many significant challenges. Earlier this year the head of OMB's Office of Information and Regulatory Affairs testified that "no one has ever tabulated the sheer number of Federal regulations that have been adopted since passage of the Administrative Procedure Act," which I might add parenthetically was in 1946. He further acknowledged, "Sad as it is to say, most of these existing Federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been." A rather depressing statement.

In September 2005, the SBA's Office of Advocacy reported that the annual cost to comply with Federal regulations in the United States in 2004 exceeded \$1.1 trillion, about 10 percent of our whole economy, which means that if every household received a bill for its equal share, each would have owed \$10,172, an amount that exceeds what the average American household spent on health care in 2004, which is just under \$9,000.

Other problematic trends include the absence of transparency in certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposal basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the EPA was enacted nearly 60 years ago, a fundamental question that arises is whether the act is still able to facilitate effective rulemaking in the 21st century.

In an attempt to answer that question, House Judiciary Chairman Sensenbrenner earlier this year requested that our Sub-

committee spearhead the Administrative Law, Process and Procedure Project.

The object of the project is to conduct a nonpartisan, academically credible analysis of Federal rulemaking that will focus on process, not policy concerns. Some of the areas that will be studied include the role of public participation in the rulemaking process, judicial review of rulemaking, and the utility of regulatory analysis and the accountability requirements.

For the purpose of soliciting scholarly papers and promoting a robust dialogue, the Subcommittee intends to facilitate colloquia at various academic institutions and organizations that analyze Federal rulemaking.

In addition, the Congressional Research Service has been asked to make some of its leading administrative law experts available to guide the project, one of whom is testifying today. Under the auspices of CRS, several independent empirical studies of various issues conducted by some of the most respected members of academia are already underway as part of the project, and we will hear about one of those ongoing studies as part of today's hearing.

The project will also benefit from the wealth of expertise that the Government Accountability Office provides. To date, GAO has produced more than 60 reports on various aspects of the Federal regulatory process, and one of our witnesses will explain the work of GAO in this critical area.

The project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States.

As you may recall legislation reauthorizing ACUS was signed into law last fall. ACUS was a nonpartisan, private-public think tank that proposed many valuable recommendations which improved administrative aspects of regulatory law and practice. Over its 28-year existence ACUS has served as an independent agency charged with studying the efficiency, adequacy and fairness of the administrative procedure used by Federal agencies. Most of its approximately 200 recommendations were implemented. They in turn helped save taxpayers millions of dollars.

In a rare expression of unanimity, the Supreme Court Justices Scalia and Breyer jointly testified before our Subcommittee last year in support of ACUS. In complete unison they extolled the Conference's virtues. Justice Breyer in particular cited the value of the Conference's recommendations, noting that they resulted in "huge" savings to the public. Likewise Judge Scalia stated the Conference was "an enormous bargain." Accordingly, it is critical that ACUS be appropriated its funding if not before, at least by the time the project report is completed.

This is truly an exciting undertaking. I look forward—can you imagine an exciting undertaking in administrative procedures? It actually really is, and I look forward to the testimony from our witnesses as we get this project going.

I now turn to my colleague, Mr. Watt, the distinguished Ranking Member of my Subcommittee, and ask him if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The current federal regulatory process faces many significant challenges. Earlier this year, the head of OMB's Office of Information and Regulatory Affairs testified that "no one has ever tabulated the sheer number of federal regulations that have been adopted since passage of the Administrative Procedure Act," which I might add parenthetically was in 1946. He further acknowledged, "Sad as it is to say, most of these existing federal rules have never been evaluated to determine whether they have worked as intended and what their actual benefits and costs have been." A rather depressing statement.

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Other problematic trends include the absence of transparency at certain stages of the rulemaking process, the increasing incidence of agencies publishing final rules without having them first promulgated on a proposed basis, the stultification of certain aspects of the rulemaking process, and the need for more consistent enforcement by agencies.

Given the fact that the APA was enacted nearly 60 years ago, a fundamental question that arises is whether the Act is still able to facilitate effective rulemaking in the 21st Century?

To help us answer that question, House Judiciary Committee Chairman Sensenbrenner earlier this year requested our Subcommittee to spearhead the Administrative Law, Process and Procedure Project. The objective of the Project is to conduct a nonpartisan, academically credible analysis of federal rulemaking that will focus on process, not policy concerns.

Some of the areas that will be studied include the role of public participation in the rulemaking process, judicial review of rulemaking, and the utility of regulatory analysis and accountability requirements.

For the purpose of soliciting scholarly papers and promoting a robust dialogue, the Subcommittee intends to facilitate colloquia at various academic institutions and organizations that analyze federal rulemaking. In addition, the Congressional Research Service has been asked to make some of its leading administrative law experts available to guide the Project, one of whom is testifying today. Under the auspices of CRS, several independent empirical studies of various issues conducted by some of the most respected members of academia are already underway as part of the Project, and we'll hear about one of those ongoing studies as part of today's hearing. The Project will also benefit from the wealth of expertise that the Government Accountability Office provides. To date, GAO has produced more than 60 reports on various aspects of the federal regulatory process. And, one of our witnesses will explain the work of the GAO in this critical area.

The Project will culminate with the preparation of a detailed report with recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States. As you may recall, legislation reauthorizing ACUS was signed into law last fall. ACUS was a nonpartisan "private-public think tank" that proposed many valuable recommendations which improved administrative aspects of regulatory law and practice. Over its 28-year existence, ACUS served as an independent agency charged with studying the efficiency, adequacy, and fairness of the administrative procedure used by federal agencies. Most of its approximately 200 recommendations were implemented, and they, in turn, helped save taxpayers many millions of dollars.

In a rare expression of unanimity, Supreme Court Justices Scalia and Breyer jointly testified before our Subcommittee last year in support of ACUS. In complete unison, they extolled the Conference's virtues. Justice Breyer, in particular, cited the value of the Conference's recommendations, noting that they resulted in "huge" savings to the public. Likewise, Justice Scalia stated that the Conference was "an enormous bargain." Accordingly, it is critical that ACUS be appropriated its funding, if not before, at least by the time the Project report is completed.

This is a truly exciting undertaking and I look forward to the testimony from our witnesses.

Mr. WATT. Thank you, Mr. Chairman, and thank you for convening this hearing, and thank Chairman Sensenbrenner and Ranking Member Conyers for enlisting the able assistance of the

Congressional Research Service to provide guidance, supervision and a structural framework for this important, massive, bipartisan undertaking.

As I indicated last year in our hearing in which Justices Scalia and Breyer offered their insights on the role that the defunct Administrative Conference of the United States had played prior to its demise, I found it somewhat ironic that the agency that had actively worked to make Government smaller, more efficient and more accountable was itself a victim of the end of the era of big Government mantra of the 90's by reauthorizing the Administrative Conference last term. Congress has now taken the first steps toward restoring an invaluable mechanism created to improve the content, implementation and processes of Federal administrative law.

Now, if we could get funding appropriated to fund the Administrative Conference, this project will serve as a useful device to sort through and prioritize those systematic issues in the administrative law arena that cry out for examination and possible reform.

There is no greater example, as noted by several of our witnesses in their written testimony, of the need for review of the effectiveness of administrative law and procedures before us today than the bureaucratic morass that seemingly and tragically undermined efforts to save and provide prompt relief to the countless families and individuals caught in the path of Hurricane Katrina.

While there will be probing investigations into what went wrong in the aftermath of Katrina, bureaucratic flexibility in the face of national disasters or emergencies together with the interoperability and coordination of efforts at all levels of Government are vitally important to be considered in this examination of the current state of administrative process and procedure.

In addition to disaster-related areas of inquiry, there are other areas that are deserving of the in-depth review the project seeks to provide. I believe that overall review not only of our administrative agencies themselves but also of the judicial, presidential and congressional roles in the administrative process, will provide us with a thorough understanding of how each branch of Government contributes to furthering or impeding the goals of that process.

As the project progresses to evaluate e-Government and e-rule-making, I believe the questions of security, privacy and access must be considered. While technological advances have broadened the possibilities of delivering and managing some governmental services quicker with greater efficiency, these advances have also broadened the potential for abuse, misuse, and exclusion.

For example, transparency may invite security concerns, assembly of vast amounts of personal data may invite privacy concerns, and the mere use of advanced technology to administer governmental programs and policies might invite access concerns for small, disadvantaged or minority stakeholders who have yet to cross the digital divide.

There are many other issues, privatization, attorneys fees, judicial comity and the role of executive orders to name a few, that are important aspects of our system of administrative law and procedure.

I look forward to continuing to work with you, Mr. Chairman, on this comprehensive and balanced bipartisan examination of the state of our administrative law system, and I thank the witnesses for the insights they will provide to us today and yield back the balance of my time.

Mr. CANNON. Thank you, Mr. Watt. I have often said that the most interesting questions of our day are not partisan questions. This is certainly, I believe, one of them. When we consider a tenth of the economy is involved in the Federal regulatory process it is amazing.

Without objection, all Members may place their statements in the record at this point. Without objection, so ordered.

Without objection, the Chair will be authorized to declare recesses at any point in this hearing. Hearing none, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusions in today's hearing record. Without objection, so ordered.

I am now pleased and honored to introduce our witnesses for today's hearing. Our first witness is Mort Rosenberg, Specialist in American Public Law in the American Law Division of the Congressional Research Service. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years, he has been associated with CRS. Prior to his service with that office he was Chief Counsel for the House Select Committee on Professional Sports, among other public servant positions he has held.

In addition to these endeavors, Mort has written extensively on the subject of administrative law. We are proud that he will later this month receive the American Bar Association's Mary C. Lawton Award for Outstanding Government Service. Mort obtained his undergraduate degree from New York University and his law degree from Harvard Law School. Thank you for being here with us.

Our second witness is Chris Mihm, who is the Managing Director of GAO's Strategic Issues team, which focuses on government-wide issues with the goal of promoting more results-oriented and accountable Federal Government. The strategic issues team has examined such matters as Federal agency transformation, budgetary aspects of the Nation's long-term fiscal outlook and civil service reform. Sort of the easy things, right? Government reform?

Mr. Mihm is a Fellow of the National Academy of Public Administration, and he received his undergraduate degree from Georgetown University.

Professor Jeffrey Lubbers is our third witness. A Fellow in Law and Government at American University Washington College of Law, Professor Lubbers brings a unique perspective to today's hearing with respect to ACUS. As many of you know, Professor Lubbers worked at ACUS for 20 years, including 13 years as the Conference's Research Director. A prolific writer on the subject of administrative law, Professor Lubbers obtained his undergraduate degree from Cornell University and his law degree from University of Chicago Law School.

I would also like to mention that about 3 years ago, Professor Lubbers testified before this Subcommittee at an oversight hearing regarding the administrative law and privacy ramifications in-

volved in establishing the Department of Homeland Security. As a result of this hearing, our Subcommittee spearheaded the creation of the first statutorily mandated privacy officer as part of DHS's enabling legislation.

Welcome back, Professor Lubbers. We appreciate that. That actually has worked out awfully well, we think.

Our fourth witness is Professor Jody Freeman. Professor Freeman teaches administrative law and environmental law at Harvard Law School, where she is the Director of the Environmental Law Program. Prior to joining Harvard Law School, Professor Freeman taught at UCLA for 10 years. I appreciate some good Western perspective here. Currently, she serves as Vice Chair of the ABA Administrative Law Section Subcommittee on both Dispute Resolution and Environmental Law and Natural Resources. She also chairs the AALS Executive Committee on Administrative Law.

Professor Freeman received her undergraduate degree from Stanford University and her law degree from the University of Toronto, where I have a son living now. She thereafter received her master's and doctorate of law from the Harvard Law School.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statement is being included in the record, I request that you limit your remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system that starts with a green light. After 4 minutes, it turns to a yellow light and then 5 minutes it turns to a red light. It is my habit, interestingly it is actually captured here in my notes, to tap the gavel at 5 minutes. We would appreciate it if you would finish up your thoughts within that time frame. We don't want to cut people off in the middle of their thinking, but it works better if everybody has that rule. It is not a hard rule, just so you know recognizing 5 minutes has gone by. We are actually quite interested in what you have to say and if it goes beyond that, I don't think today anybody is doing to be very exercised.

We would appreciate that, and I if really start tapping hard then you know I am bored or Mel is nudging me or something. After you have presented your remarks, Subcommittee Members, in the order they arrive, will be permitted to ask questions of the witnesses subject to the 5-minute limit and possibly subject to more than one round.

Pursuant to the direction of the Chairman of the Judiciary Committee, I ask that the witnesses please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Thank you. You may be seated. The record should reflect that the witnesses answered in the affirmative.

And Mr. Rosenberg, we would be pleased if you proceed with your testimony.

**TESTIMONY OF MORTON ROSENBERG, ESQUIRE, SPECIALIST
IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF
THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF
CONGRESS**

Mr. ROSENBERG. Thank you, Mr. Chairman. Mr. Chairman, Mr. Watt, I am very pleased to be here today. I have enjoyed for many, many years working with your Subcommittee and Raymond Smietanka and Susan Jensen and with other parts of your full Committee. I am a wonk in administrative law. I get off on these kind of things and I have for over 30 years in CRS.

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

In my prepared remarks, I have detailed the genesis of your project, from the coincidence of the briefing that T.J. Halstead, one of the CRS team, and I gave a full Committee staff briefing on emerging issues in law and ad process and your first hearing in the attempt to revive ACUS with Justices Scalia and Thomas [sic].

My sense at that time was that there was a close nexus between the demise of ACUS in 1995 and the growing number of seemingly insoluble process and practice issues over the last decade, a sense that I tried to convey to the Committee. I was perhaps influenced by an unknowing dependence upon ACUS. I do not exaggerate when I say that I have always had within arm's reach in my 33 years at CRS a full and, until 1995, complete growing set of ACUS reports and recommendations, which were often my first resource in responding to clients such as your Committee.

I was fortunate in the 80's and 90's, when I was deeply involved in issues involving Executive Order 12291, presidential review of rulemaking, and some of the first major efforts at regulatory reform that were going on in those days, and I was fortunate to call upon for assistance and occasionally work with Jeff Lubbers when he was Research Director at ACUS. In any event, I was excited—and I am excited—at the prospect of working with your Subcommittee, with the CRS team that includes T.J. Halstead of the American Law Division and Curtis Copeland, of our Government and Finance Division, in which to assist in the two-track effort that you have started. That is, by providing it with background materials and information to inform the bipartisan effort to reauthorize ACUS and identifying the issues that might be the subject of either further study by a revived ACUS and/or legislative action by the Committee during the 109th Congress.

As you mentioned, success was achieved with regard to the first effort with the enactment of the Federal Regulatory Improvement Act of 2004 in October of 2004. But as of this date, funding legislation has not been passed.

The Subcommittee, however, anticipated the possibility of an extended delay in the operational startup of ACUS after passage of the reauthorization legislation and directed its staff to consider, with the assistance of the CRS team, the options that would be available to it to accumulate the information and the data necessary to determine whether action on a particular issue required

immediate legislative attention or was best referred to ACUS for further in-depth studies and recommendations.

And after extended discussions, such traditional approaches that have been used in the past, such as a series of informative hearings by the Committee, possible establishment of a study commission, or the creation by the Committee of a study group, were rejected in favor of seeking and utilizing the assistance of resources outside of Congress and the Committee, such as academic institutions, think tanks, CRS, the Government Accountability Office, among others, and the potentiality of utilizing forums for the airing of issues outside of Washington were deemed important.

The staff proposed and the Committee adopted a unique course of action. And I underline that what you're doing here is pretty unique. It is novel in the way it is reaching out beyond the Beltway to try to get a diversity of opinions and compile a record outside which might be more reflective of what is really going on and what real practical thoughts are out there.

What you did was pursuant to the House rule requiring Committee adoption of an oversight plan for the 109th Congress. The full Committee made a study of emergent administrative law and process issues a priority oversight agenda item for the Subcommittee. Among the benefits of so identifying the study as a Subcommittee priority was to give it the imprimatur of official legislative legitimacy and importance which might, in turn, be useful in enlisting the voluntary assistance and services of individuals and institutions throughout the Nation.

The oversight plan identified seven general areas for study: public participation in the rulemaking process, congressional review of rules, presidential review of agency rulemaking, judicial review of rulemaking, the adjudicatory process, the utility of regulatory analyses and accountability requirements, and the role of science in the regulatory process.

The CRS team was designated by the Chairman and Ranking Minority Member to coordinate this project. Its first task was to take these seven broad study areas and identify or define potential questions or issues for research. The thought was not to limit research to those matters within the combined experience and expertise of the team members, but to develop theme packages in order to sell a package or a particular issue to a law school or university graduate school, a public agency or a consortium of those institutions for systematic, in-depth studies by means of empirical studies and papers conducted and prepared by leading experts in the particular areas which might be followed by public presentations and findings of symposia that would reflect these competing views.

Hopefully, the end product of that exercise is to be a compilation of the papers and the transcripts of the various public symposia similar to the two-volume working papers of the National Commission on Reform of Federal Criminal Laws published by your Committee in 1970, which contains 59 studies covering all aspects of the then current issues in criminal law reform. Those studies actually informed Congress' subsequent successful reform efforts.

As of this date, two major empirical studies are underway, and one forum is scheduled for this room on December 5th.

One, being conducted under the direction of Professor Jody Freeman of Harvard Law School, is looking at the nature and impact of judicial review of agency rulemaking over what appears to be now a 13-year period in the 11 Federal Circuit Courts of Appeals. Professor Freeman is a fellow panelist today and will describe her plan for this very daunting and important undertaking.

The second study is being led by Professor William West of the Bush School of Government and Public Service at Texas A&M and will be looking into the influences on the initiation, design and development of new rules at 20 agencies during the period prior to the publication of notices of proposed rulemaking for public comment in the Federal Register. Professor West will be assisted by eight graduate students, and the study is in part funded by CRS's Capstone Program grant.

Both studies are expected to provide at least preliminary results by the spring of 2006. The third thing is the forum that is going to be lead by Professor Cary Coglianese here on e-rulemaking. There will be two panels of experts from the private sector, from the public sector, from Government, and they will be speaking with regard to the problems and potentialities of e-rulemaking as a way of fostering public participation.

Some other projects that we hope to place include a mega-project dealing with the problems that appear to be arising with presidential rulemaking, through executive orders, and the Congressional Review Act. That is the mechanism by which in 1996 Congress hoped to have a more effective oversight role and to balance what was going on under the executive order system.

It appears apparent that there are problems. In the last few years under the leadership of OMB Administrator John Graham, it appears the balance between Congress' review efforts and the control and direction of, and influence on agency rulemaking has extended to the extent that one could say that perhaps there is a constitutional imbalance that needs to be redressed. But again, as Professor Freeman notes in her statement, empirical study is really necessary to understand just exactly how effective and perhaps untoward the presidential review mechanisms are.

Let me stop here and allow others to talk. There are a few other projects that we want to institute, but we can talk about those from your questions. I thank you.

[The prepared statement of Mr. Rosenberg follows:]

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PREPARED STATEMENT OF MORTON ROSENBERG



STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

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

CONCERNING

THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT

PRESENTED ON

NOVEMBER 1, 2005

Mr. Chairman and Members of the Subcommittee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Public Participation in the Rulemaking Process

- Should efforts to include the public in the rulemaking process before publication of a proposed rule (e.g., negotiated rulemaking, SBREFA panels) be expanded? How much do these processes currently add in terms of public participation?
- How effective is the *Unified Agenda of Federal Regulatory and Deregulatory Actions* in identifying future rulemaking (hereby giving the public advance warning of forthcoming regulatory actions)? What changes could make this *Agenda* a more effective means of notification?
- What has been the impact of agencies' use of "nonrulemaking" approaches (e.g., guidance documents, notices, etc.) and attenuated rulemaking approaches (e.g., use of the APA's "good cause exception to skip notices of proposed rulemaking) on the public's opportunities for participation? Should the public be able to comment on those approaches before they become final?
- Should all agencies be required to make comments received immediately available to the public (to allow comments on the comments)? Or, alternatively, should agencies provide "reply comment periods" (to discourage waiting to the end of the comment period)?
- What effect has "e-rulemaking" (including the use of e-mail comments and "comments on comments," on-line dialogues, the new Regulations.gov web site, agency-specific and the new governmentwide electronic dockets) had on the amount and nature of public participation in the rulemaking process, and how do agencies view those comments? Specifically:
 - How should agencies deal with the sometimes hundreds-of-thousands of e-mail comments generated by special interest groups?
 - Should all agencies be required to offer "list serves" that allow members of the public to be notified of certain rules being available for comment?
 - Has e-rulemaking allowed more people to participate in the rulemaking process, or simply facilitated access to traditional commenters?
- The APA does not specify how long public comment periods should be (although EO 12866 suggests 60 days). Should there be a minimum comment period specified in the statute? If so, what should it be? Also, under what circumstances can/should agencies extend comment periods?
- Are agencies always required to respond to public comments, even if they take no further action on the proposed rule for years? How soon should they respond, and in what form? Is there a point when public comments

become too “stale” to permit issuance of a rule based on those comments (without further public comments)?

- Currently, there are no governmentwide standards for what should be in the rulemaking record (e.g., a copy of the proposed rule, public comments, etc.) or a standard order of presentation of the documents? Should there be such standards? If so, who should establish them (OMB, NARA, other)?
- Under what circumstances is it appropriate for agencies to allow commenters to file confidential comments? How should this procedure be regularized?
- Currently, the Administrative Procedure Act prohibits *ex parte* contacts in formal rulemaking, but is silent about such contacts in the much more common informal “notice and comment” rulemaking. Should Congress extend those prohibitions, and clearly establish when and what types of contacts are prohibited?
- Currently, the Administrative Procedure Act does not mention two relatively common forms of rulemaking that avoid traditional notice and comment requirements — interim final rulemaking and direct final rulemaking. Should Congress codify these forms of rulemaking and how they should (and should not) be used? More generally, should Congress revisit agencies’ use of all forms of the “good cause” exception?
- Currently, some of the statutory analytical requirements in rulemaking (e.g., the Regulatory Flexibility Act and the Unfunded Mandates Reform Act) do not apply to rules for which there is no notice of proposed rulemaking. Should these incentives for agencies to avoid NPRMs be eliminated? At a minimum, should the exemptions for interim final and direct final rules be eliminated?
- OMB’s new peer review bulletin allows agencies to decide whether to permit public comment on their peer review processes. Should agencies have that discretion, should agencies be required to permit public comments, or should public comments on what is supposed to be an “expert” process not be permitted (because, among other things, it could slow down rulemaking)?
- To what extent does public participation in its various forms (e.g., comment periods, public meetings, SBREFA panels, etc.) have an effect on agency decisionmaking during the rulemaking process? What empirical evidence is there of that effect?
- What is the proper role of consultants in the development stage of a rulemaking? Should there be a balance of views of competing stakeholders in the pre-NPRM period? Should agencies be required to invite competing views to ensure “balance”?

2. Congressional Review of Rules

- How effective has the Congressional Review Act been in improving congressional oversight of the rulemaking process? Does the Act need to be amended/replaced? For example:
 - Should agencies still be required to send all rules to the House, Senate, and GAO?
 - Should more rules be exempt from this process?
 - How are GAO's reports handled by Congress? Do they need refinement?
 - Should there be an expedited procedure for House consideration of rules?
 - Should Congress clarify how not to run afoul of the "substantially the same" prohibition in the CRA?
 - Should the "legislative day" measure be clarified since it is so unpredictable in terms of calendar days?
 - Should Congress adopt the changes in the CRA process that were contemplated by H.R. 3356 in the 108th Congress, including the proposal to establish a joint congressional committee to screen and recommend proposed rules for disapproval?
- Other than the Congressional Review Act, what other options does Congress have to prevent the implementation of an agency rule (e.g., appropriations riders)? How common are such approaches? Are they effective?
- Should Congress establish a "Congressional Office of Regulatory Analysis" to help it oversee the agencies' compliance with various rulemaking requirements? If so, should it follow the format envisioned in the Truth in Regulation Act (e.g., be established within the Government Accountability Office, require assessment of all rulemaking requirements, etc.)? If so, should Congress simply reauthorize and fund TIRA?
- Should Congress affirmatively approve all major rules (e.g., those with a \$100 million annual impact on the economy) before they take effect?

3. Presidential Review of Rules

- To remove any question of its legitimacy, should Congress codify presidential review of agency rulemaking? If so, how detailed should that codification be? For example, should it simply authorize the President to issue an executive order on this issue (thereby giving future Presidents the flexibility to change its provisions), with certain other requirements for transparency and limits on delay? Or should the codification spell out in detail the process by which Presidents should review rules before they are published?
- Should independent regulatory agencies' rules be subject to presidential review (as they are now under the Paperwork Reduction Act)? Or would presidential review adversely affect the independence intended for these agencies?

- What role should OMB play in the presidential rule review process? Should OMB be a “counselor” to the agencies (as during the Clinton Administration), suggesting improvements to the agencies but generally deferring to agencies’ statutory expertise? Or should it be more of a “gatekeeper” (as during the current Bush Administration) establishing strict standards and ensuring that regulations meet certain standards before publication?
- What rules should govern OMB’s contacts with outside parties during the presidential review process? For example, should OMB be allowed to meet with regulated entities outside of the period when agencies are not permitted to do so (because of restrictions on *ex parte* communications)? Should OMB be required to disclose to the public not only that such a meeting occurred, but also a summary of what was said (as some agencies are required to do) to provide an administrative record for any subsequent changes?
- How transparent should the presidential review process be to the public? Are improvements in review transparency currently needed (either administratively or by statute)? Specifically:
 - Should OMB clearly define what types of “substantive” changes to rules need to be disclosed?
 - Should agencies or OMB be required to disclose substantive changes made to rules during “informal” reviews (when OMB says it can have its greatest effect)?
 - Should OMB clearly indicate in its database which rules were changed at its suggestion?
- A number of actions by OMB during the Bush Administration have had the effect of centralizing rulemaking authority in the Executive Office of the President. For example, within the past four years OMB has revitalized the regulatory review function under EO 12866 (emphasizing cost-benefit analysis, returning rules to the agencies); and issued governmentwide guidelines on data quality and peer review (with OMB able to determine when agencies’ rules should be peer reviewed and at what level). Have these executive actions taken too much authority away from the agencies in whom Congress vested rulemaking authority, thereby upsetting the balance of power between Congress and the President in this area?
- How has the OIRA “prompt letter” process worked in the past four years?
- How is the OIRA logging provision in EO 12866 working?
- Should a new President be authorized to stay the effectiveness of “midnight rules” that are promulgated shortly before a new administration takes office? If so, should there be limits on the amount of time rules can be delayed?

4. Judicial Review of Rules

- Should Congress clarify whether the Information Quality Act permits judicial review?
- In light of the Supreme Court's 2001 ruling in *U.S. v. Meade*, is it time for Congress to establish rules of "deference" when a court finds a statutory delegation "ambiguous?"
- If studies showing that appellate courts are overturning more than 50% of challenged agency rules prove accurate, should Congress statutorily modify the "reasonable decisionmaking" standard, or limit judicial review in some other way?
- Should the APA be amended to make more clear when the courts can remand a rule without vacating it?
- The Chief Counsel for Advocacy of the Small Business Administration has been given unique power under SBREFA to file amicus briefs in cases challenging agency action. How effective/problematic has this been?
- Should Congress address the increasing use of consent decrees that modify or alter the substantive content of agency rules?

5. The Agency Adjudicatory Process

- Is there a need to reassess the role of ALJs and how they are selected and evaluated? Should regulatory ALJs be treated differently from benefits ALJs?
- Should the notion of a centralized ALJ corps be revisited?
- Is there a need to examine and review the role of non-ALJ hearing officers?
- Should the split-enforcement model of agency adjudication (e.g., OSHA-OSHRC) be used more often?
- Should the APA contain a provision regarding informal adjudication?
- Should the APA's adjudication provisions be extended to all evidentiary hearings required by statute?

6. The Utility of Regulatory Analysis and Accountability Requirements

- Should Congress reassess statutory requirements that prohibit agencies' considerations of cost in setting health and safety standards?
- Is cost-benefit analysis inherently biased in that the benefits of health and safety rules are often difficult or impossible to monetize?

- Executive Order 12866 requires agencies to assess the costs and benefits of all significant rules, and requires a full cost-benefit analysis of all “economically significant” rules. Does OMB apply these requirements and use cost-benefit information in a balanced way? For example, does OMB require all rules to have a cost-benefit analysis, or are certain rules exempt (e.g., Homeland Security rules)? Does OMB use cost-benefit analysis to prompt rulemaking or to increase regulatory requirements, or only to stop or limit rulemaking?
- How effective have been the regulatory requirements designed to protect small businesses and other small entities (e.g., the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act)? Do they give federal agencies too much discretion in their application? Should SBA or some other entity be required to define key terms (e.g., “significant economic impact on a substantial number of small entities”)? Or should there even be special protections for small businesses and other small entities?
- How effective have been the regulatory requirements designed to protect federalism (e.g., Executive Order 13132)? Do they give federal agencies too much discretion in their application? Should OMB or some other entity be required to define key terms (e.g., “significant federalism implications”)? Or should there even be special protections for federalism?
- Should agencies be required to reexamine their rules periodically to ensure that they are still needed or impose the least burden? (Currently, agencies are only required to do so for rules that had/have a “significant economic impact on a substantial number of small entities.”) Or, should Congress take on that reexamination responsibility (perhaps as contemplated in H.R. 3356 in the 108th Congress)? Relatedly, should agencies’ final rules include a “sunset” provision that requires them to be reexamined and republished?
- Should the myriad of analytical and accountability requirements in various statutes and executive orders be rationalized and codified in one place?
- To what extent have the analytical and accountability requirements contributed to what is called by some the “ossification” of the rulemaking process?
- How accurate are agencies’ pre-promulgation cost and benefit estimates?
- How much does it cost for agencies to conduct cost-benefit analyses, risk assessments, regulatory flexibility analyses, federalism assessments, etc.?

7. The Role of Science in the Regulatory Process

- How should scientific advisory panels be constructed to ensure that they are unbiased?
- Under what circumstances should agencies’ regulatory policies deviate from the recommendations of their scientific staff and advisory bodies?

- In February 2002, OMB published governmentwide standards for information quality (as required by the Information Quality Act). Do agencies have too much discretion to deny correction requests? Should agencies' correction denials be subject to judicial review? What effect has the act had on the length of time it takes agencies to issue rules? Do the Shelby Amendment and the Information Quality Act, in tandem, potentially restrict the release of research findings that would have significant social impact?
- What is the appropriate role of the courts in reviewing science-based agency regulatory decisions?
- In December 2004, OMB published governmentwide standards for peer review of scientific information. Are governmentwide standards for peer review needed? Does OMB have the authority to issue such standards? What effect will these requirements have on the length of time it takes agencies to issue rules?
- What has been the effect of the Supreme Court's ruling in *Danbert v. Merrell Dow Pharmaceuticals, Inc.* (regarding the acceptance and understanding of scientific evidence to be used in the legal system) on regulatory policymaking?

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

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

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes,

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

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

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

ACUS evolved a structure to develop objective, non-partisan analyses and advice, and a meticulous vetting process, which gave its recommendations credence. Membership included senior (often career) management agency officials, professional agency staff, representatives of diverse perspectives of the private sector who dealt frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of

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

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

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

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

disciplines, and respected jurists. Although in the past the Conference's predominant focus was on legal issues in the administrative process, which was reflected in the high number of administrative law practitioners and scholars, membership qualification has never been static and need not be. Hearing witnesses and commentators on the revival of ACUS have strongly suggested that the contemporary problems facing a new ACUS will include management as well as legal issues. The Committee can assure that ACUS's roster of experts will include members with both legal backgrounds and those with management, public administration, political science, dispute resolution, and law and economics backgrounds. It could also encourage that state interests be included in the entity's membership.

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

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

The Katrina catastrophe has raised a number of questions as to the organization, authority and decisionmaking capability of DHS' Federal Emergency Management Agency (FEMA). Previously an independent, cabinet-level agency reporting directly to the President, FEMA was made a subordinate agency in the creation of DHS and saw some of its authority withdrawn and placed elsewhere and its funding reduced. Suggestions have been made that these and other administrative operating deficiencies contributed to ineffective planning and responses that included communications break-downs among Federal, State and local officials, available resources not being used, and official actions

taken too late or not taken at all, among others.⁵ It has also been suggested that FEMA revert to its previous independent status outside of DHS.

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

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

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

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

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

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

Many of our recommendations call for the government to increase its presence in our lives— for example, by creating standards for the issuance of forms of identification, by better securing our borders, by sharing information gathered by many different agencies. We also recommend the consolidation of authority over the now far-flung entities constituting the intelligence community. The Patriot Act vests substantial powers in our federal government. We have seen the government use the immigration laws as a tool in its counter-terrorism effort. Even without changes we recommend, the American public has vested enormous authority in the U.S. government.

At our first public hearing on March 31, 2003, we noted the need for balance as our government responds to the real and ongoing threat of terrorist attacks. The terrorists have used our open society against us. In wartime, government calls for greater powers, and then the need for those powers recedes after the war ends. This struggle will go on. Therefore, while protecting our homeland, Americans should be mindful of threats to vital personal and civil liberties. This balancing is no easy task, but we must constantly strive to keep it right. This shift of power and authority to the government calls for an enhanced system of checks and balances to protect the precious liberties that are vital to our way of life.

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

Finally, in addition to the impact of 9/11, the decade-long period since ACUS's demise has seen significant changes in governmental policy focus and emphasis in social and economic regulatory matters, as well as innovations in technology and science, that appear to require a fresh look at old process issues. For example, the exploding use of the Internet and other forms of electronic communications presents extraordinary opportunities for increasing government information available to citizens and, in turn, citizen participation in governmental decisionmaking through e-rulemaking. A number of recent studies have suggested that if the procedures used for e-rulemaking are not carefully developed, the public at large could be effectively disenfranchised rather than having the effect of enhancing public participation. The issue would appear ripe for ACUS-like guidance. Among other public participation issues that may need study include the peer review

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

process; early challenges to special provisions for rules that are promulgated after a November presidential election in which an incumbent administration is turned out and a new one will take office on January 20 (the so-called "Midnight Rules" problem); and the continued problem of avoidance by the agencies of notice and comment rulemaking by means of "non-rule rules." Control of agency rulemaking by Congress and the President continues to present important process and legal issues. Questions that might be presented for ACUS study could include: Should the Congress establish government-wide regulatory analyses and regulatory accountability requirements? Should the Congressional Review Act be revisited to make it more effective? Is there an effective way to review, assess and modify or rescind "old" rules? Is the time ripe for codification of the process of presidential review of rulemaking that is now guided by executive order. Finally, recent studies have raised questions as to the efficacy of judicial review of agency rulemaking. Statistical evidence has shown that appellate courts are overturning challenged agency rules at rates in excess of 50%. Is it appropriate for Congress to consider statutorily modifying the "reasonable decisionmaking standard" now prevailing, or to limit judicial review of rulemaking by, for example, having all "major" rules come to Congress and be subject to joint resolutions of approval? These are among a myriad of process, procedure, and practices issues that could be addressed by a revived ACUS.

Appendix A*

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

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

National Security/Civil Liberties Issues

1. **Anderson, David R., and Diane M. Stockton.** Ombudsmen in Federal agencies: the theory and the practice. 1990 ACUS 105. *Also:* Federal ombudsmen: an underused resource. 5 ADMIN. L.J. AM. U. 275 (1991). Recommendation 90-2: "The Ombudsman in Federal Agencies." 1 C.F.R. § 305.90-2 (1993), and 55 FED. REG. 34,211 (Aug. 22, 1990). Reason for inclusion: Ombudsman mechanisms might be useful at DHS to deal with other tensions arising from national security/protection of civil liberties issues.
2. **Bonfield, Arthur E.** "Military and foreign affairs function" rulemaking under the APA. 3 ACUS 226 (1975), and 71 MICH. L. REV. 221 (1972). Recommendation 73-5: "Elimination of the 'Military or Foreign Affairs Function' Exemption From APA Rulemaking Requirements." 1 C.F.R. § 305.73-5 (1993), and 39 FED. REG. 4,847 (Feb. 7, 1974). Reason for inclusion: Early recommendations concerning how to accommodate public participation with military and foreign affairs needs.
3. **Fenton, Howard N., III.** Recommendations for injecting needed openness and due process reforms into the U.S. export control procedures. 1991 ACUS 173. *Also:* Reforming the procedures of the Export Administration Act: a call for openness and administrative due process. 27 TEX. INT'L. L.J. 1 (1992). Recommendation 91-2: "Fair Administrative Procedure and Judicial Review in Commerce Department Export Control Proceedings." 1 C.F.R. § 305.91-2 (1993), and 56 FED. REG. 33,44 (July 24, 1991). Reason for inclusion: The need to review export control procedures is arguably greater than ever.
4. **Kress, Jack M., and Carole D. Iannelli.** Administrative search and seizure: whither the warrant? 31 VILL. L. REV. 705 (1986). Reason for inclusion: Touches upon issues that are of particular importance in the national security and civil liberties contexts.

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

5. **Legonsky, Stephen H.** Forum choices for the review of agency adjudication: a study of the immigration process. 1985 ACUS 505, and 71 IOWA L. REV. 1297 (1986). Recommendation 85-4: "Administrative Review in Immigration Proceedings." 1 C.F.R. § 305.85-4 (1993) and 50 FED. REG. 52,894 (Dec. 27, 1985). Reason for inclusion: With the substantial changes that have occurred at INS, the need to rationalize the appeals process is arguably greater than ever.
6. **Nafziger, James A. R.** Report on reviewability of visa denials by consular officers. 1989 ACUS 587. Also: Review of visa denials by consular officers. 66 WASH. L. REV. 1 (1991). Recommendation 89-9: "Processing and Review of Visa Denials." 1 C.F.R. § 305.89-9 (1993), and 54 FED. REG. 53,496 (Dec. 29, 1989). Reason for inclusion: While focused primarily on due process issues, this study is pertinent to the extent that Visa processes have become increasingly controversial.
7. **Perritt, Henry H., Jr.** Electronic acquisition and release of Federal agency information. 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989). Also: Federal electronic information policy. 63 TEMPLE L. REV. 201 (1990). Also: Electronic records management and archives. 53 U. PITT. L. REV. 961 (1992). *Partially reprinted:* At Appendix 7H in: Stein, Jacob A., Glenn A. Mitchell, and Basil J. Mezines. Administrative law. New York: Matthew Bender. Recommendation 88-10: "Federal Agency Use of Computers in Acquiring and Releasing Information." 1 C.F.R. § 305.88-10 (1993), and 54 FED. REG. 5,209 (Feb. 2, 1989). Reason for inclusion: this study considers electronic FOIA and privacy concerns, an issue of particular importance in the national security and civil liberties contexts.
8. **Perritt, Henry H., Jr.** Federal agency electronic records management and archives. 1990 ACUS 389. Also: Electronic records management and archives. 53 U. PITT. L. REV. 963 (1992). Recommendation 90-5: "Federal Agency Electronic Records Management and Archives." 1 C.F.R. § 305.90-5 (1993) and 55 FED. REG. 53,270 (Dec. 28, 1990). Reason for inclusion: As with the previous recommendation, this study considers FOIA and privacy issues of particular importance in the national security and civil liberties contexts.
9. **Shane, Peter F.** Negotiating for knowledge: administrative responses to Congressional demands for information. 1990 ACUS 611. Also: Administrative responses to Congressional demands for information. 44 ADMIN. L. REV. 197 (1992). Recommendation 90-7: "Administrative Responses to Congressional Demands for Sensitive Information." 1 C.F.R. § 305.90-7 (1993), and 55 FED. REG. 53,272 (Dec. 28, 1990). Reason for inclusion: The need for better ways to resolve executive/legislative disputes over access to information is a pressing issue in the national security context.
10. **Stevenson, Russell B., Jr.** Protecting business secrets under the Freedom of Information Act: managing Exemption 4. 1982 ACUS 81 (Vol. 1), and 34 ADMIN. L. REV. 207 (1982). Recommendation 82-1: "Exemption (b)(4) of the Freedom of Information Act." 1 C.F.R. § 305.82-1 (1988), and 47 FED. REG. 30,702 (July 15, 1982), as amended at 54 FED. REG. 6,862 (Feb. 15, 1989). [Note: The President in 1987 issued Executive Order 12600, which requires agencies to follow procedures similar to those

recommended by ACUS]. Reason for inclusion: This Recommendation precipitated an Executive Order on the issue by President Reagan, but the protection of such information remains an important issue.

11. **Verkuil, Paul R., Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey S. Lubbers.** The Federal administrative judiciary. 1992 ACUS 773. *Also:* Verkuil, Paul R. Reflections upon the Federal administrative judiciary. 39 UCLAL REV. 1341 (1992). *An extract of this report also published as:* Lubbers, Jeffrey S. The Federal administrative judiciary: establishing an appropriate system of performance evaluation for ALJs. 7 ADMIN. L.J. AM. U. 589 (1994). *Supra* no. 234. Recommendation 92-7: "The Federal Administrative Judiciary." 1 C.F.R. § 305.92-7 (1993), and 57 FED. REG. 61,760 (Dec. 29, 1992). Reason for inclusion: This recommendation was the result of a major study by ACUS on ALJs and AJs, and included information on the need for performance evaluation. Similar issues adhere in the national security and civil liberties contexts given the expanded authority of certain agencies in this regard.
12. **Wright, Ronald F.** The right to counsel during agency investigations. 1993 ACUS 509. Statement 16: "Right to Consult with Agency Counsel in Agency Investigations." 59 FED. REG. 4,677 (Feb. 1, 1994). Reason for inclusion: Agency investigative procedures are relevant to both national security and civil liberties concerns.

Health/Safety Issues

13. **Aman, Alfred C., Jr.** Institutionalizing the energy crisis: some structural and procedural lessons. 1980 ACUS 205, and 65 CORNELL L. REV. 491 (1980). Recommendation 80-2: "Enforcement of Petroleum Price Regulations." 1 C.F.R. § 305.80-2 (1982), and 45 FED. REG. 46,774 (July 11, 1980). Reason for inclusion: Responsive to the energy crisis of the 1970's.
14. **Baram, Michael S.** Risk communication by regulatory agencies in protecting health, safety, and the environment. 1990 ACUS 207. Recommendation 90-3: "Use of Risk Communication by Regulatory Agencies in Protecting Health, Safety, and the Environment." 1 C.F.R. § 305.90-3 (1993), and 55 FED. REG. 34,212 (Aug. 22, 1990). Reason for inclusion: Risk communication has taken on new urgency.
15. **Hamilton, Robert W.** Role of nongovernmental standards in the development of mandatory Federal standards affecting safety or health. 1978 ACUS 247, and 56 TEX. L. REV. 1329 (1978). Recommendation 78-4: "Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation." 1 C.F.R. § 305.78-4 (1993), and 44 FED. REG. 1,357 (Jan. 5, 1979). Reason for inclusion: The use of outside standard setting organizations is especially important in the national security arena.
16. **Shapiro, Sidney A.** Biotechnology and the design of regulation. 1989 ACUS 475, and 17 ECOLOGY L.Q. 1 (1990).

Recommendation 89-7: "Biotechnology and the Design of Regulation." 1 C.F.R. § 305.89-7. Reason for inclusion: Biotechnology has become particularly relevant as a national security issue.

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

Personnel and Contracting Issues

18. **Fidell, Eugene R.** Federal protection of private sector health and safety whistleblowers. 1987 ACUS 219, and 2 ADMIN. L.J. AM. U. 1 (1988), and 134 CONG. REC. S1447 (Daily ed., Feb. 23, 1988).
 Recommendation 87-2: "Federal Protection of Private Sector Health and Safety Whistleblowers." 1 C.F.R. § 305.87-2 (1993), and 52 FED. REG. 2363 (June 24, 1987). Reason for inclusion: Whistleblowers serve an effective and valuable function in providing the government with information regarding security breakdowns, etc.
19. **Grad, Frank P.** Contractual indemnification of government contractors. 1988 ACUS 103, and 4 ADMIN. L.J. AM. U. 433 (1991).
 Recommendation 88-2: "Federal Government Indemnification of Government Contractors." 1 C.F.R. § 305.88-2 (1993), and 53 FED. REG. 26,027 (July 11, 1988), and 53 FED. REG. 39,588 (Oct. 11, 1988). Reason for inclusion: The need to provide for optimum protection of government contractors is arguably greater than ever.
20. **Luneburg, William V.** The Federal personnel complaint, appeal and grievance system: a structural overview and proposed revisions. 1989 ACUS 895, and 78 KEN. L.J. 1 (1989-90).
 Statement 15: "Procedures for Resolving Federal Personnel Disputes." 1 C.F.R. § 310.15 (1993) and 54 FED. REG. 53,498 (Dec. 29, 1988). Reason for inclusion: The need to upgrade civil service appeal and grievance procedures is arguably greater than ever.
21. **Michael, Douglas C.** Federal agency use of audited self-regulation as a regulatory technique. 1994-1995 ACUS 65, and 47 ADMIN. L. REV. 171 (1995).
 Recommendation 94-1: "The Use of Audited Self-Regulation as a Regulatory Technique." 59 FED. REG. 44,701 (Aug. 30, 1994). Reason for inclusion: Provides an overview of issues pertaining to self-regulating organizations.

Organizational/Regulatory Issues

22. **Asimow, Michael.** When the curtain falls: separation of functions in Federal administrative agencies. 1981 ACUS 141, and 81 COLUM. L. REV. 759 (1981). Reason

for inclusion: With the creation of DHS, special problems of separating investigatory and adjudicative functions might arise.

23. **Bermann, George A.** Regulatory cooperation with counterpart agencies abroad: the FAA's aircraft certification experience. 1991 ACUS 63, and 24 LAW & POL'Y INT'L BUS. 669 (1993).
Recommendation 91-1: "Federal Agency Cooperation with Foreign Government Regulators." 1 C.F.R. § 305.91-1 (1993), and 56 FED. REG. 33,842 (July 24, 1991). Reason for inclusion: The need for international cooperation in regulatory activities is arguably greater than ever, and this study was one of the first to focus on the issue.
24. **Fallon, Richard H., Jr.** Imposing civil money for violations of Federal aviation regulations: implementing a fair and effective system. 1990 ACUS 43. *Also:* Enforcing aviation safety regulations: a case for the split-enforcement model of agency adjudication. 4 ADMIN. L.J. AM. U. 389 (1991).
Recommendation 90-1: "Civil Money Penalties for Federal Aviation Violations." 1 C.F.R. § 305.90-1 (1993), and 55 FED. REG. 34,209 (Aug. 22, 1990). Reason for inclusion: This study recommended a fair, restructured process for dealing with FAA/NTSB enforcement of aviation penalties and could thus serve as a model for DHS related activities.
25. **Gellhorn, Ernest.** Public participation in administrative proceedings. 2 ACUS 376 (1973), and 81 YALE L.J. 359 (1972).
Recommendation 71-6: "Public Participation in Administrative Hearings." 1 C.F.R. § 305.71-6. Reason for inclusion: An early study touching upon public participation issues.
26. **Kovacic, William E.** The choice of forum in bid protest disputes. 1994-1995 ACUS 507. *Also:* Procurement reform and the choice of forum in bid protest disputes. Forthcoming ADMIN. L.J. AM. U., Vol. 9, no. 3 (1995).
Recommendation 95-6: "Government Contract Bid Protests." 60 FED. REG. 43,113 (Aug. 18, 1995). Reason for inclusion: The importance of fair and efficient bid protest procedures is especially important in wartime.
27. **Szanton, Peter L., ed.** Federal reorganization: what have we learned? Chatham, N.J.: Chatham House, 1981. Reason for inclusion: This publication, sponsored by ACUS, provides information on how to carry out effective executive reorganizations.
28. **Weaver, Russell L.** Organization of adjudicative offices in executive departments and agencies. 1993 ACUS 547. *Also:* Management of ALJ offices in executive departments and agencies. 47 ADMIN. L. REV. 303 (1995). Reason for inclusion: Provides information relating to the organization of departments and agencies.

Mr. CANNON. Thank you, Mort. The gentleman from North Carolina and Ranking Member of the Subcommittee is also the Chairman of the Congressional Black Caucus and has been extraordinarily busy with the passing of Rosa Parks, and so he has been concerned about his time. I leaned over and asked him if he thought I should tap, and his response was more or less no, this is great because we don't have to read it. And so I suggest that is exactly my view, by the way. And so we are going to be a little bit liberal, in fact, forget the clock. Just be interesting and, if you see one of us nodding off, then you know you have probably gone on too long.

Mr. ROSENBERG. I have one or two—

Mr. CANNON. We would like to hear that. Before you do so, let me suggest that we may be a little bit loose on the questioning too. As you were going through what were saying, Mort, it had occurred to me, are you familiar with WIKIsikis or Wikipedia, any of the panel? This is like a way for people to get online and work together. And you should look up Wikipedia, W-i-k-i-p-e-d-i-a, not the word spelling with the extra 'a,' and it is actually remarkable. It is a great encyclopedia that is created by people all over the world. And I suspect that, while we don't have this broad a base for the Administrative Procedure Act as we do have for an encyclopedia, there are many people that are interested and so a public forum, it might be interesting as part of the process you're considering. There are other tools. My office uses a tool called Net Documents, which most large law firms use, and it is a way to work collaboratively online. You may want to think about some of these tools in the process because if some wonk somewhere can take 5 minutes and review the latest activity and says, "Wow, you're wrong, you have missed an idea," it is a great way to really get a collaborative process. In the end, what we need here is not just a bipartisan process, we need a process the American people buy into because we are talking about 10 percent of our economy here. And that 10 percent does many things.

We were joking earlier about whether it does good things or not and it probably does, but it also limits the output of our economy in a dramatic way. So to the degree that we can remove obstacles that are not helpful, maybe create new obstacles that would be more helpful to what we don't have right now, and be more rational, we would do well. And that I think means that you might have a very, very large group of people that get engaged in that process.

Thanks, Mr. Mihm. You're recognized for 5 minutes or whatever.

**TESTIMONY OF J. CHRISTOPHER MIHM, MANAGING DIRECTOR
OF STRATEGIC ISSUES, UNITED STATES GOVERNMENT AC-
COUNTABILITY OFFICE**

Mr. MIHM. Thank you, Mr. Chairman and Mr. Watt. It is an honor to be here. And Mr. Chairman, I will try and take your challenge of being interesting. That is a high bar but I am very pleased to be here and to contribute to your overview of Federal rule-making and obviously we look forward to supporting this Subcommittee in its comprehensive and bipartisan review as you move forward.

As you mentioned in your opening statement, sir, over the last decade or so, at the request of Congress, we have prepared over 60 reports and testimonies reviewing cross-cutting aspects of rulemaking procedures and practices. Overall that work has found that—has identified important benefits of the efforts to enhance Federal rulemaking. At the same time, we have also pointed out some potential weaknesses and impediments to realizing those expected improvements. We have also identified some trends and challenges in the rulemaking environment that have emerged over the years that in our view merit closer congressional attention and consideration.

I will touch on each of these points in turn. In terms of the benefits then, as detailed in my written statement, our review has identified at least four overall benefits associated with existing regulatory analysis and accountability requirements. First, encouraging and facilitating greater public participation in rulemaking that clearly gives opportunities for the public to communicate with agencies by electronic means have expanded and requirements imposed by some of the regulatory reform initiatives have encouraged additional consultation with affected parties.

Second, improving the transparency of the rulemaking process. Initiatives implemented over the past 25 years have helped to make the rulemaking process more open by facilitating public access to information, providing more information about the potential effects of rules and available alternatives, and requiring more documentation and justification of agency decisions.

Third, increasing the attention directed to rules and rulemaking. Our reports have pointed out that the oversight of agencies' rulemaking can and has resulted in useful changes to those rules and furthermore that agencies' awareness of this added scrutiny may provide an important and direct effect, potentially leading to less costly, more effective rules.

And finally, increasing expectations regarding the analytic support for proposed rules. The requirements that have been added over the years have raised the bar regarding information and analysis needed to support regulations. Such requirements have also prompted agencies to provide more data on the expected benefits and costs of their rules, and encouraged the identification and consideration of available alternatives.

On the other hand, as I mentioned, we have also identified at least four recurring reasons why reform initiatives have not been as effective. I think these are certainly consistent with the research agenda that the Subcommittee is putting forward.

First, there has been a lack of clarity and other weaknesses in key terms and definitions. For example RFA's analytical requirements, which were intended to help address concerns about the impact of rules on small entities, do not apply if an agency head certifies that the rule will not have, "a significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor, importantly, places responsibility on any party to define it consistently across the Government, which not surprisingly has led to quite a bit of variance.

Second, the limited scope and coverage of various requirements. For example, we pointed out last year that the relatively small

number of rules identified as containing mandates under the unfunded mandates legislation could be attributed in part to the 14 different exemptions, exclusions and other restrictions on the identification of regulatory mandates under the act.

Third, the uneven implementation of the initiatives' requirements. For example, our reviews of economic assessments that analyze regulations prospectively has found that those assessments are not always useful for comparisons across Government, because they are often based on different assumptions of the same key economic variables.

And finally, a predominant focus on just one part of the regulatory process, and Mr. Chairman, in your opening statement this is certainly a point you were making. We have placed more analytic and procedural requirements on agencies' development of rules than on other phases of the regulatory process, from the underlying statutory authorization, through effective implementation and monitoring of compliance with rules, to an evaluation of existing rules. What are we actually getting in terms of benefits and costs associated with rules?

Thus, while rulemaking is clearly an important point in the regulatory process, other phases can also help determine the effectiveness of Federal regulation.

The findings and emerging issues reported in our body of work on Federal rulemaking suggest a few areas in which Congress might consider legislative action or further study, which are of course certainly consistent with those issues that are laid out in the Subcommittee's oversight plan and also as Mort was touching on in his written statement.

We believe that first there is a need to reexamine rulemaking structures and processes, including APA, again a point, Mr. Chairman, you made in your opening statement.

Second, there is a need to address previously identified weaknesses of existing statutory requirements.

Third, we should promote additional improvements in the transparency of agencies' rulemaking actions.

And fourth, a point, Mr. Watt, that you were making in regards to information technology, we need to open a broader examination of how developments in information technology might effect the notice in common under rulemaking process. And as you pointed out, sir, there are key issues of security, transparency and access that all need to be carefully weighed and balanced off against one another.

Mr. Cannon, Mr. Watt, this concludes my statement. I will be happy to answer any questions you may have.

[The prepared statement of Mr. Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

GAO

United States Government Accountability Office

Testimony

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

For Release on Delivery
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FEDERAL RULEMAKING

**Past Reviews and
Emerging Trends Suggest
Issues That Merit
Congressional Attention**

Statement of J. Christopher Mihm
Managing Director, Strategic Issues





Why GAO Did This Study

Federal regulation is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent.

GAO, at the request of Congress, has prepared over 60 reports and testimonies during the past decade that review aspects of federal rulemaking procedures and practices. This testimony summarizes some of the general findings and themes that have emerged from GAO's body of work on federal regulatory processes and procedures, including areas on which Congress might consider taking legislative action or sponsoring further study. GAO's prior reports and testimonies contain a variety of recommendations to improve various aspects of rulemaking procedures and practices.

www.gao.gov/cgi-bin/gettr?GAO-06-228T.

To view the full product, including the scope and methodology, click on the link above. For more information, contact J. Christopher Mihm at (202) 512-6806 or mihm@gao.gov.

November 1, 2005

FEDERAL RULEMAKING

Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention

What GAO Found

GAO's prior evaluations highlighted both benefits and weaknesses of rulemaking procedures and practices in areas such as (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and (3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).

GAO's reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements: encouraging and facilitating greater public participation in rulemaking; improving the transparency of the rulemaking process; increasing the attention directed to rules; and increasing expectations regarding the analytical support for proposed rules. On the other hand, GAO identified at least four recurring reasons why such requirements have not been more effective: unclear key terms and definitions; limited scope and coverage; uneven implementation by agencies; and a predominant focus on just one part of the regulatory process.

With regard to executive branch and congressional oversight of agencies' rulemaking, GAO has noted that efforts to increase presidential influence and authority over the regulatory process, through mechanisms such as the Office of Management and Budget's reviews of agencies' rulemaking, have become more significant over the years. However, mechanisms intended to increase congressional influence, such as procedures for disapproval of regulations under the Congressional Review Act, appear to have been less able to influence changes in agencies' rules to date.

GAO's reviews of agencies' compliance with rulemaking requirements under APA pointed out that agencies often did not published notices of proposed rulemaking (to solicit public comments) before issuing final rules, including some major rules with an impact of \$100 million or more on the economy. APA provides exceptions to notice and comment requirements for "good cause" and other reasons, but GAO noted that agencies' explanations for use of such exceptions were sometimes unclear. Also, several analytical requirements for proposed rules do not apply if an agency does not publish a proposed rule. However, some of the growth in final rules without proposed rules appeared to reflect increased use of "direct final" and "interim final" procedures intended for noncontroversial and expedited rulemaking.

The findings and emerging issues reported in GAO's body of regulatory work suggested four areas on which Congress might consider taking action or studying further: (1) generally reexamining rulemaking structures and processes, (2) addressing previously identified weaknesses of existing statutory requirements, (3) promoting additional improvements in the transparency of agencies' rulemaking actions, and (4) opening a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

United States Government Accountability Office

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to contribute to your overview of administrative law, process, and procedure, including issues associated with federal rulemaking. In my statement today, I will summarize some of the general findings and themes that have emerged from our body of work on federal regulatory processes and procedures, including areas on which the subcommittee might consider taking legislative action or sponsoring further study.

In brief, our prior work identified important benefits of laws and executive orders designed to enhance federal rulemaking, such as enhanced transparency of the process. But we have also pointed out potential weaknesses and impediments to realizing expected improvements in the process, such as a lack of clarity in key terms and definitions associated with some regulatory analysis and accountability requirements. In addition, some trends and changes in the rulemaking environment that have emerged over the years might merit closer congressional attention and consideration of whether adjustments in federal rulemaking procedures and practices are needed to keep pace.

Prior GAO Work Identified Benefits and Weaknesses of Rulemaking Procedures and Practices

Federal regulation, like taxing and spending, is one of the basic tools of government used to implement public policy. Agencies publish thousands of regulations each year to achieve goals such as ensuring that workplaces, air travel, and food are safe; that the nation's air, water, and land are not polluted; and that the appropriate amounts of taxes are collected. Because regulations affect so many aspects of citizens' lives, it is crucial that rulemaking procedures and practices be effective and transparent. Over the last decade, at the request of Congress, we have prepared over 60 reports and testimonies reviewing crosscutting aspects of those rulemaking procedures and practices.¹

I would like to focus my remarks on topics or themes emerging from this work that are most relevant to this subcommittee's oversight agenda. These include: (1) regulatory analysis and accountability requirements, (2) presidential and congressional oversight of agency rulemaking, and

¹Attached to this statement are the highlights pages from some of these reports and testimonies. We have also included a more extensive list of related GAO products at the end of this statement.

(3) notice and comment rulemaking procedures under the Administrative Procedure Act (APA).²

**Regulatory Analysis and
Accountability
Requirements**

Congress has frequently asked us to evaluate the effectiveness of requirements that were initiated over the past 25 years to improve the federal regulatory process. Among the goals of these requirements are reducing regulatory burdens, requiring more rigorous regulatory analysis, and enhancing oversight of agencies' rulemaking. We have paid repeated attention to agencies' compliance with some of these requirements, such as ones in the Paperwork Reduction Act (PRA),³ Regulatory Flexibility Act (RFA),⁴ Unfunded Mandates Reform Act (UMRA),⁵ Congressional Review Act (CRA),⁶ and Executive Order 12866 on regulatory planning and review.⁷

Our reviews identified at least four overall benefits associated with existing regulatory analysis and accountability requirements:

- *Encouraging and facilitating greater public participation in rulemaking*—Some initiatives have encouraged and facilitated greater public participation and consultation in rulemaking. Opportunities for the public to communicate with agencies by electronic means have expanded and requirements imposed by some regulatory reform initiatives encouraged additional consultation with the parties that might be affected by rules under development by federal agencies.
- *Improving the transparency of the rulemaking process*—The initiatives implemented over the past 25 years have helped to make the rulemaking process more open by facilitating public access to information, providing more information about the potential effects of rules and

²Pub. L. No. 404, 60 Stat. 237 (1946), codified in 1966 in scattered sections of title 5, United States Code.

³44 U.S.C. §§ 3501-3520.

⁴5 U.S.C. §§ 601-612.

⁵Pub. L. No. 104-4, 109 Stat. 48 (1995), codified as amended in scattered sections of title 2, United States Code.

⁶5 U.S.C. §§ 801-808.

⁷Exec. Order No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

available alternatives, and requiring more documentation and justification of agencies' decisions. Although we have often recommended that more could be done to increase transparency, we have also highlighted the valuable contribution made when agencies had particularly clear and complete documentation supporting their rulemaking.

- *Increasing the attention directed to rules and rulemaking*—Our reports have pointed out that oversight of agencies' rulemaking from various sources—including Congress, the administration, and GAO, among others—can result in useful changes to rules. Furthermore, we noted that agencies' awareness of this added scrutiny may provide an important indirect effect, potentially leading to less costly, more effective rules.
- *Increasing expectations regarding the analytical support for proposed rules*—The analytical requirements that have been added over the years have raised the bar regarding the information and analysis needed to support policy decisions underlying regulations. Such requirements have also prompted agencies to provide more data on the expected benefits and costs of their rules and encouraged the identification and consideration of available alternatives.

On the other hand, we also identified at least four recurring reasons why the requirements imposed by such initiatives have not been more effective:

- *Lack of clarity and other weaknesses in key terms and definitions*—Unclear terms and definitions can affect the applicability and effectiveness of certain requirements. For example, we have frequently cited the need to clarify key terms in RFA. RFAs analytical requirements, which are intended to help address concerns about the impact of rules on small entities, do not apply if an agency head certifies that a rule will not have a "significant economic impact on a substantial number of small entities." However, RFA neither defines this key phrase nor places clear responsibility on any party to define it consistently across the government. Not surprisingly, we found that agencies' compliance with RFA varied widely from one agency to another and agencies had different interpretations of RFA's requirements. In another example, our review of agencies' compliance with a requirement to adjust civil monetary penalties for inflation under the Federal Civil

Penalties Inflation Adjustment Act (Inflation Adjustment Act),⁵ indicated that both a lack of clarity and apparent shortcomings in some of the Act's provisions appeared to have prevented agencies from keeping their penalties in pace with inflation.⁶ Although we recommended changes to address these shortcomings, to date Congress has not acted on our recommendations.

- *Limited scope and coverage of various requirements*—Simply put, some rulemaking requirements apply to few rules or require little new analysis for the rules to which they apply. For example, we pointed out last year that the relatively small number of rules identified as containing mandates under UMRA could be attributed in part to the 14 different exemptions, exclusions, and other restrictions on the identification of regulatory mandates under the Act. We also observed unintended “domino” effects of making certain requirements contingent on other requirements. For example, some requirements only apply to rules for which an agency published a notice of proposed rulemaking, but, as I will discuss later, we found that agencies issue many final rules without associated proposed rules. In addition, the requirement for “look back” reviews of existing regulations under section 610 of RFA only applies if the agency determined that its rule would have a significant economic impact on a substantial number of small entities. When RFA was amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (SBREFA)⁷ to require additional actions, such as preparing compliance guides and convening advocacy review panels for certain rules, this appeared to prompt a reduction in the number of rules that the Environmental Protection Agency identified as affecting small entities (and would therefore trigger the new requirements).
- *Uneven implementation of the initiatives’ requirements*—Sometimes, agencies’ implementation of various requirements serves to limit their effectiveness. For example, a recurring message in our reports over the

⁵28 U.S.C. § 2461 note.

⁶GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409 (Washington, D.C., Mar. 14, 2003). We also addressed issues regarding civil penalties in GAO, *The Administration: Systematic Information Sharing Would Help IRS Determine the Deductibility of Civil Settlement Payments*, GAO-05-717 (Washington, D.C., Sept. 15, 2005).

⁷5 U.S.C. § 601 note.

years is that some agencies' economic analyses need improvement. Our reviews have found that economic assessments that analyze regulations prospectively are often incomplete and inconsistent with general economic principles.¹⁰ Moreover, the assessments are not always useful for comparisons across the government, because they are often based on different assumptions for the same key economic variables.¹¹ In our recent report on UMRA, we noted that parties from various sectors expressed concerns about the accuracy and completeness of agencies' cost estimates, and some also emphasized that more needed to be done to address the benefits side of the equation.¹² Our reviews have found that not all benefits are quantified and monetized by agencies, partly because of the difficulty in estimation. In our recent report on the Paperwork Reduction Act, we noted that the Act requires chief information officers (CIO) to review and certify information collections to help minimize collection burdens, but our analysis of case studies showed that CIOs provided these certifications despite often missing or inadequate support from the program offices sponsoring the collections.¹³

- *A predominant focus on just one part of the regulatory process*—More analytical and procedural requirements have focused on agencies' development of rules than on other phases of the regulatory process, from the underlying statutory authorization, through effective implementation and monitoring of compliance with regulations, to the evaluation and revision of existing rules. While rulemaking is clearly an important point in the regulatory process, these other phases also help determine the effectiveness of federal regulation.

¹⁰See GAO, *Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses*, GAO-05-323 (Washington, D.C., May 26, 1998), and *Clean Air Act: Observations on EPA's Cost-Benefit Analysis of Its Mercury Control Options*, GAO-05-252 (Washington, D.C., Feb. 28, 2005).

¹¹See also GAO, *Economic Performance: Highlights of a Workshop on Economic Performance Measures*, GAO-05-796SP (Washington, D.C., July 2005).

¹²GAO, *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-154 (Washington, D.C., Mar. 31, 2005).

¹³GAO, *Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public*, GAO-05-151 (Washington, D.C., May 20, 2005).

Oversight of Agency Rulemaking

Closely related to regulatory analysis and accountability requirements are efforts to enhance the oversight of agencies' rulemaking by Congress, the President, and the judiciary. In general, efforts to increase presidential influence and authority over the regulatory process, primarily through the mechanism of Office of Management and Budget (OMB) review of agencies' rulemaking, have become more significant and widely used over the years. However, our reviews suggest that mechanisms to increase congressional influence, such as procedures for Congress to disapprove proposed rules, appear to have been less able to influence changes in agencies' rules to date. We have not done work that directly addresses issues regarding judicial review of agencies' rulemaking.

In our September 2003 report on OMB's role in reviews of agencies' rules, we recounted the history of centralized review of agencies' regulations within the Executive Office of the President.⁴⁵ We noted the expansion of OMB's role in the rulemaking process over the past 30 years under various executive orders. Although not without controversy, this expansion of a centralized regulatory review function has become well established. OMB's role in the rulemaking process has been further enhanced by provisions in various statutes (such as the Information Quality Act,⁴⁶ PRA, and UMRA) that placed additional oversight responsibilities on OMB. The formal process by which OMB currently reviews agencies' proposed and final rules has essentially remained unchanged since Executive Order 12866 was issued in 1993, but we reported on several changes in OMB policies in recent years that affected the process, such as increased emphasis on economic analysis, stricter adherence to the 90-day time limit for reviews of agencies' draft rules, and improvements in the transparency of the OMB review process (although some elements of the transparency of that process are still unclear). Based on our review of OMB and agency dockets on 85 rules reviewed by OMB during a 1-year period, we also showed that OMB's reviews sometimes result in significant changes to agencies' draft rules.

⁴⁵GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-020 (Washington, D.C.: Sept. 22, 2003).

⁴⁶The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations—Fiscal Year 2001, Pub. L. No. 107-554, § 315, 114 Stat. 2703A to 2703A-154 (2001).

The Congressional Review Act was enacted as part of SBREFA in 1996 to better ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. CRA established expedited procedures by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. However, this disapproval process has only been used once, in 2001, when Congress disapproved the Department of Labor's rule on ergonomics.¹⁷ CRA also requires agencies to file final rules with both Congress and GAO before the rules can become effective. Our role under CRA is to provide Congress with a report on each major rule (for example, those with a \$100 million impact on the economy) that includes GAO's assessment of the issuing agency's compliance with the procedural steps required by various acts and executive orders governing the rulemaking process. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after its enactment, compliance improved.¹⁸

Congress also passed the Truth in Regulating Act¹⁹ (TIRA) in 2009 to provide a mechanism for it to obtain more information about certain rules. TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

¹⁷Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

¹⁸As noted in GAO-04-037, our Office of General Counsel also takes several steps to assure the completeness of the list of major rules identified in GAO's compilation of reports on major rules. GAO's Federal Rules Database is publicly available at www.gao.gov/under/Legal/Products.

¹⁹Pub. L. No. 106-312, 114 Stat. 1248 (Oct. 17, 2000), 5 U.S.C. § 801 note.

**Rulemaking Procedures
under the Administrative
Procedure Act**

Some of our reviews have touched on agencies' compliance with APA. APA established the most long-standing and broadly applicable federal requirements for informal rulemaking, also known as notice and comment rulemaking.²⁰ Among other things, APA generally requires that agencies publish a notice of proposed rulemaking (NPRM) in the *Federal Register*.²¹ After giving interested persons an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule. However, APA provides exceptions to these requirements, including cases when, for "good cause," an agency finds that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest," and interpretive rules.²² When agencies use the "good cause" exception, APA requires that they explicitly say so and provide a rationale for the exception's use when the rule is published in the *Federal Register*. An agency's claim of an exception to notice and comment procedures is subject to judicial review. The legislative history of APA, and associated case law, generally reinforce the view that the "good cause" exception should be narrowly construed. In addition, the Administrative Conference of the United States (ACUS) encouraged agencies to use notice and comment procedures where not strictly required by APA and recommended that Congress eliminate or narrow several of the exceptions in APA.

In various reports over the years, we noted that agencies had not issued NPRMs before publishing certain final rules.²³ When we reported on this issue in 1998, we estimated that about half of all final actions published in 1997 had been issued without an associated NPRM.²⁴ Although many of those final actions without proposed rules were minor actions, 11 of the 61

²⁰5 U.S.C. § 553.

²¹APA includes exceptions to notice and comment procedures for categories of rules such as those dealing with military or foreign affairs and also agency management and personnel. 5 U.S.C. § 553(a).

²²5 U.S.C. § 553(b).

²³An earlier study concluded that NPRMs were not published for about one-third of final regulatory actions published in the *Federal Register*. See Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 Admin. L. J. 317 (1989).

²⁴GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-128 (Washington, D.C., Aug. 31, 1998).

major rules (for example, those with an impact of \$100 million or more) did not have NPRMs.²⁵ While we have not studied this issue in depth since 1998, we continued to find the prevalence of final rules without proposed rules during our reviews. For example, during our review of the identification of federal mandates under UMRA in 2001 and 2002, we found that 28 of the 65 major rules that imposed new requirements on nonfederal parties did not have NPRMs.²⁶

We have also reported that agencies' explanations for use of APAs "good cause" exception were sometimes unclear, for example, simply stating that notice and comment would delay rules that were, in some general way, in the public interest. We noted that, when agencies publish final rules without NPRMs, the public's ability to participate in the rulemaking process is limited. Also, several regulatory reform requirements that Congress has enacted during the past 25 years—such as RFAs and UMRA's analytical requirements—use as their trigger the publication of an NPRM. Therefore, it is important that agencies clearly explain why notice and comment procedures are not followed.

At the same time, the number of final rules without proposed rules appears to reflect, at least in part, agencies' acceptance of procedures for noncontroversial and expedited rulemaking actions known as "direct final" and "interim final" rulemaking that were previously recommended by ACUS.²⁷ Although we observed some differences in how agencies implement direct final rulemaking, it generally involves publication of a rule with a statement that the rule will be effective on a particular date unless an adverse comment is received within a specified period of time (such as 30 days). For example, the Federal Aviation Administration (FAA) has used direct final rulemaking procedures nearly 40 times this year to modify the legal descriptions of controlled airspace at various airports across the country. FAA issued these modifications as direct final rules

²⁵Of the 122 major rules submitted to GAO during the first 2 years of the Congressional Review Act (April 1996 through March 1998), 23 were issued without a previous NPRM. See GAO, *Regulatory Reform: Major Rules Submitted for Congressional Review During the First 2 Years*, GAO/RS-98-1025 (Washington, D.C.: Apr. 21, 1998).

²⁶GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004).

²⁷See recommendation 95-4, 60 Fed. Reg. 43908 (Aug. 18, 1995). In 1993, the National Performance Review also encouraged agencies to use direct final rulemaking for noncontroversial rules.

because it anticipated no adverse or negative comments. FAA also noted that these regulations only involve an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. If an adverse comment is received on a direct final rule, the agency withdraws the direct final rule and may publish the rule as a proposed rule under normal notice and comment procedures. For interim rulemaking, an agency issues a final rule without an NPRM that is generally effective immediately, but with a postpromulgation opportunity for the public to comment. Public comments may persuade the agency to later revise the interim rule. Although neither direct nor interim final rulemaking are specifically mentioned in APA, both may be viewed as an application of the "good cause" exception in APA.

Direct and interim final rules appear to account for hundreds of the final regulatory actions published each year. In our report on final rules without proposed rules, we identified 718 interim and direct final regulatory actions published by agencies during 1997. A quick search of recent *Federal Register* notices showed that agencies published over 550 notices in 2004 for which the subject rulemaking action was identified as a direct final, interim final, or interim rule. Through October 21 of this year, agencies had published nearly 400 such notices. Direct final rules accounted for almost 60 percent of these notices.

Some Issues and Emerging Trends Merit Attention

The findings and emerging issues reported in our body of work on federal rulemaking suggest a few areas on which the subcommittee might consider taking legislative action or sponsor further study:

- generally reexamine rulemaking structures and processes, including the APA;
- address previously identified weaknesses of existing statutory requirements;
- promote additional improvements in the transparency of agencies' rulemaking actions; and
- open a broader examination of how developments in information technology might affect the notice and comment rulemaking process.

Generally Reexamine
Rulemaking Structures and
Processes, Including the
APA

As we have noted in several products this year, we believe that it is appropriate and necessary to begin taking a broad reexamination of what the federal government does and how it does it, especially given the fiscal challenges facing the country.²⁸ Although the federal rulemaking process does not have much direct impact on the federal budget—given that most costs of regulation fall on regulated parties and their customers or clients—we have testified that it nevertheless should be part of that reexamination. We recognize that a successful reexamination of the base of the federal government will entail multiple approaches over a period of years. No single approach or reform can address all of the questions and program areas that need to be revisited. However, as we have previously stated, federal regulation is a critical tool of government, and regulatory programs play a key part in how the federal government addresses many of the country's needs. This subcommittee has already begun such a reexamination through its current oversight agenda, and ACUS, if funded, might well play a valuable role in carrying out the detailed research that will be needed.

One emerging trend that any such reexamination should take into account is the evolution of the markets and industries that federal agencies regulate. Changes in the regulatory environment, especially the growing influence of the global economy, have implications for federal rulemaking procedures and practices. For example, agency officials pointed out to us in 1999 the growing importance of international standards and standard-setting bodies, alongside the role of international agreements, in producing certification standards of interest and importance to American businesses. More recently, international developments regarding global harmonization of regulatory standards, chemical risk-assessment requirements, Internet governance issues, and compliance with capital standards and requirements for financial institutions have attracted attention in the regulatory arena.

More specifically, Congress might want to revisit APA in view of changes in agencies' practices over time, such as greater use of interim and direct final

²⁸See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-05-325P (Washington, D.C. Feb. 2005); *21st Century Challenges: Transforming Government to Meet Current and Emerging Challenges*, GAO-05-389T (Washington, D.C.: July 13, 2005); and *Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements*, GAO-05-393T (Washington, D.C. July 27, 2005).

rulemaking for certain regulations. For example, we observed that some agencies differed in their policies and practices regarding direct final rulemaking. Whether there should be one standard approach to such rulemaking by federal agencies is an open question. In addition, although direct final rulemaking had been viewed by ACUS as permissible under the APA, ACUS nevertheless suggested that Congress may wish to expressly authorize the process to alleviate any uncertainty and reduce the potential for litigation. With regard to interim final rulemaking, ACUS had similarly recommended that, when APA is reviewed, Congress amend the Act to mandate use of postpromulgation comment procedures for rules issued under the "good cause" exception.

Address Previously Identified Weaknesses of Existing Statutory Requirements

Our prior reviews have identified many opportunities to revisit and refine existing regulatory requirements. Although progress has been made to implement recommendations we raised in past reports, there are still unresolved issues. We still believe, for example, that the promise of RFA may never be realized until key terms and definitions, such as "substantial number of small entities," are clarified and/or an entity with the authority and responsibility to do so is established. Similarly, we believe that civil penalties are an important element of regulatory enforcement and deterrence, but we found that agencies are unable to fully adjust their penalties for inflation under the provisions of current law. Congressional action is needed to address these issues.

Promote Additional Improvements in the Transparency of Agencies' Rulemaking Actions

As pointed out earlier, we have identified many positive developments regarding the transparency of the regulatory process, but more could be done. For example, additional attention could be paid to agencies' explanations for statements or certifications that certain requirements do not apply. This is another area that might merit additional study of available options. Some uses of exemptions, such as agencies' claims that a rule does not contain a federal mandate as defined by UMRA or that a proposed rule has no federalism impacts, do not require the agency to provide any more support than the certification itself. Other uses, such as claims of "good cause" to publish final rules without proposed rules, require agencies to provide a clear statement and explanation (although even here we noted that sometimes agencies' explanations were vague). This raises the question of whether there should be a more demanding requirement for agencies to essentially "show their work" behind such certifications, and, if so, what form such requirements might take.

Open a Broader Examination of How Developments in Information Technology Might Affect the Rulemaking Process

One emerging trend we have observed in our work is the expanded role of technology-based innovations in enhancing the regulatory process. Agencies' use of the Internet and other technologies to enhance the regulatory process has rapidly increased in importance. In about 5 years, we have gone from reporting on and encouraging the early development of some innovative technologies in support of rulemaking to reporting on the implementation of governmentwide e-government initiatives, such as Regulations.gov and the centralized electronic docket for executive branch agencies.²⁹ The increased use of technology-based innovations may provide opportunities to transform the rulemaking process, not simply to replace "paper" processes with electronic versions. Continued study is therefore warranted of how such initiatives can open additional opportunities for public participation in and access to information about federal rulemaking, as well as how information technology can be used to improve the federal government's ability to analyze public comments.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the committee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or mihm@gao.gov.

²⁹See GAO, *Federal Rulemaking: Agencies' Use of Information Technology to Facilitate Public Participation*, GAO/IGD-06-1378 (Washington, D.C.: June 30, 2006); *Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies*, GAO/AMT-05-282 (Washington, D.C.: Sept. 15, 2005); *Regulatory Management: Commentaries About Technology-Based Innovations Can Be Improved*, GAO-04-232 (Washington, D.C.: Feb. 12, 2004); *Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved*, GAO-03-091 (Washington, D.C.: Sept. 17, 2003); and *Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System*, GAO-05-777 (Washington, D.C.: Sept. 9, 2005).

Related GAO Products

Electronic Rulemaking: Progress Made in Developing Centralized E-Rulemaking System. GAO-05-777. Washington, D.C.: September 9, 2005.

Regulatory Reform: Prior Reviews of Federal Regulatory Process Initiatives Reveal Opportunities for Improvements. GAO-05-838T. Washington, D.C.: July 27, 2005.

Economic Performance: Highlights of a Workshop on Economic Performance Measures. GAO 05-798SP. Washington, D.C.: July 2005.

Paperwork Reduction Act: New Approach May Be Needed to Reduce Government Burden on Public. GAO-05-424. Washington, D.C.: May 20, 2005.

Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement. GAO-05-454. Washington, D.C.: March 31, 2005.

21st Century Challenges: Reexamining the Base of the Federal Government. GAO-05-325SP. Washington, D.C.: February 2005.

Electronic Government: Federal Agencies Have Made Progress Implementing the E-Government Act of 2002. GAO-05-12. Washington, D.C.: December 10, 2004.

Unfunded Mandates: Analysis of Reform Act Coverage. GAO-04-687. Washington, D.C.: May 12, 2004.

Paperwork Reduction Act: Agencies' Paperwork Burden Estimates Due to Federal Actions Continue to Increase. GAO-04-676T. Washington, D.C.: April 20, 2004.

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Electronic Rulemaking: Efforts to Facilitate Public Participation Can Be Improved. GAO-03-901. Washington, D.C.: September 17, 2003.

Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law. GAO-03-409. Washington, D.C.: March 14, 2003.

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Regulatory Flexibility Act: Key Terms Still Need to Be Clarified. GAO-01-669T. Washington, D.C.: April 24, 2001.

Regulatory Reform: Implementation of Selected Agencies' Civil Penalties Relief Policies for Small Entities. GAO-01-289. Washington, D.C.: February 20, 2001.

Regulatory Management: Communication About Technology-Based Innovations Can Be Improved. GAO-01-292. Washington, D.C.: February 12, 2001.

Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule. GAO/GGD-00-199. Washington, D.C.: September 20, 2000.

Electronic Government: Government Paperwork Elimination Act Presents Challenges for Agencies. GAO/AMD-00-262. Washington, D.C.: September 15, 2000.

Regulatory Reform: Procedural and Analytical Requirements in Federal Rulemaking. GAO/TGGT/OGC-00-157. Washington, D.C.: June 8, 2000.

Certification Requirements: New Guidance Should Encourage Transparency in Agency Decisionmaking. GAO/GGD-99-170. Washington, D.C.: September 24, 1999.

Federalism: Previous Initiatives Have Little Effect on Agency Rulemaking. GAO/TGGD-99-131. Washington, D.C.: June 30, 1999.

Regulatory Accounting: Analysis of OMB's Reports on the Costs and Benefits of Federal Regulation. GAO/GGD-99-69. Washington, D.C.: April 20, 1999.

Related GAO Products

Regulatory Flexibility Act: Agencies' Interpretations of Review Requirements Vary. GAO/GGD-89-55. Washington, D.C.: April 2, 1989.

Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit. GAO/GGD-89-30. Washington, D.C.: January 8, 1989.

Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules. GAO/GGD-88-126. Washington, D.C.: August 31, 1988.

Regulatory Management: Implementation of Selected OMB Responsibilities Under the Paperwork Reduction Act. GAO/GGD-88-120. Washington, D.C.: July 9, 1988.

Regulatory Reform: Agencies Could Improve Development, Documentation, and Clarity of Regulatory Economic Analyses. GAO/RCEID-88-142. Washington, D.C.: May 26, 1988.

Regulatory Reform: Implementation of Small Business Advocacy Review Panel Requirements. GAO/GGD-88-36. Washington, D.C.: March 18, 1988.

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Regulatory Reform: Agencies' Section 610 Review Notices Often Did Not Meet Statutory Requirements. GAO/T-GGD-88-64. Washington, D.C.: February 12, 1988.

Unfunded Mandates: Reform Act Has Had Little Effect on Agencies' Rulemaking Actions. GAO/GGD-88-30. Washington, D.C.: February 4, 1988.

Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented. GAO/GGD-88-31. Washington, D.C.: January 8, 1988.

Regulatory Reform: Agencies' Efforts to Eliminate and Revise Rules Yield Mixed Results. GAO/GGD-88-3. Washington, D.C.: October 2, 1987.

Regulatory Reform: Implementation of the Regulatory Review Executive Order. GAO-T-GGD-88-185. Washington, D.C.: September 25, 1986.

Regulatory Flexibility Act: Status of Agencies' Compliance. GAO/GGD-84-105. Washington, D.C.: April 27, 1984.

Appendix I



GAO
Highlights

Highlights of GAO-06-777, a report to the Chairman and Ranking Member, Committee on Homeland Security and Governmental Affairs, U.S. Senate

September 2006

ELECTRONIC RULEMAKING

Progress Made in Developing Centralized E-Rulemaking System

Why GAO Did This Study

The E-Government Act of 2002 requires regulatory agencies, to the extent practicable, to ensure there is a Web site the public can use to comment on the numerous proposed regulations that affect them. To accomplish this, the Office of Management and Budget named the Environmental Protection Agency (EPA) as the managing partner for developing a governmentwide e-Rulemaking system that the public can use for these purposes. Issues GAO was asked to address include:

- EPA's basis for selecting a centralized system,
- how EPA collaborated with other agencies and agency views of that collaboration, and
- whether EPA used key management practices when developing the system.

What GAO Recommends

GAO recommends that, to build on the success of this initiative, the Administrator of EPA, as managing partner of the initiative, take steps to ensure there are written agreements between EPA and participating agencies that include performance measures that address issues such as system performance, maintenance, and cost savings. These measures are necessary to provide criteria for evaluating the effectiveness of the initiative. E-Rulemaking Initiative officials said they agree with GAO's recommendation and they plan to implement it.

www.gao.gov/cgi-bin/gettr?pdocid=06-777

To view the full product, including the scope and methodology, click on the link above. For more information, contact Steve Williams (505) 312-5807 or williams@gao.gov.

What GAO Found

E-Rulemaking officials and the e-Rulemaking Initiative Executive Committee considered three alternative designs and chose to implement a centralized e-Rulemaking system based on cost savings, risks, and security. Officials relied on an analysis of the three alternatives using two cost and risk assessment models and a comparison of the alternatives to industry best practices. Prior to completing this analysis, officials estimated the centralized approach would save about \$91 million over 3 years. They said when they developed this estimate, there was a lack of published information about costs related to paper or electronic rulemaking systems. They used their professional judgment and information about costs for developing and operating EPA's paper and electronic systems, among other things, to develop the estimate.

E-Rulemaking officials extensively collaborated with rulemaking agencies and most officials at the agencies we contacted thought the collaboration was effective. E-Rulemaking officials created a governance structure that included an executive committee, advisory board, and individual work groups that discussed how to develop the e-Rulemaking system. We contacted 11 of the 27 agencies serving on the advisory board and most felt their suggestions affected the system development process. Agency officials offered several examples to support their views, such as how their recommendations for changes to the system's design were incorporated.

While managing the development of the centralized system, e-Rulemaking officials followed all but a few of the key practices for successfully managing an initiative. For example, officials did not have written agreements with participating agencies that included system performance measures. The first agencies began migrating to the centralized system in May 2005 with the public scheduled to have access in September 2005. Eventually, all rulemaking agencies will migrate to the centralized system, however, the schedule is tentative due in part to funding issues. As agencies migrate, e-Rulemaking officials are planning changes to the system including adding capabilities that exist in electronic systems operated by some agencies.

Centralized e-Rulemaking Process



Agencies are able to:	Centralized system provides:	Customer benefits include:
<ul style="list-style-type: none"> create and submit rules into the e-Rulemaking system manage their own content 	<ul style="list-style-type: none"> enhanced security and management enhanced usability by agency website users improved regulatory coordination enhanced regulatory search capabilities 	<ul style="list-style-type: none"> ability to view and submit public comments enhanced website agency transparency access to e-mail type notifications

Source: GAO.



Highlights
Highlights of GAO-06-831 - testimony before the Subcommittee on the Federal Workforce and Agency Organization, Committee on Government Reform, House of Representatives

Why GAO Did This Study
The daunting challenges that face the nation in the 21st century establish the need for the transformation of government and demand fundamental changes in how federal agencies should meet these challenges by becoming flatter, more results-oriented, externally focused, partnership-oriented, and employee-enabling organizations.

This testimony addresses how the long-term fiscal imbalances facing the United States, along with other significant trends and challenges, establish the case for change and the need to reexamine the base of the federal government, how federal agencies can transform into high performing organizations, and how multiple approaches and selected initiatives can support the reexamination and transformation of the government and federal agencies to meet these 21st century challenges.

www.gao.gov/cgi-bin/gettr.asp?GAO-06-831
To view the full product, including the scope and methodology, click on the link above. Previous versions, dated 12/15/05, 12/15/05, and 12/15/05, are available at www.gao.gov.

21ST CENTURY CHALLENGES

Transforming Government to Meet Current and Emerging Challenges

What GAO Found
Long-term fiscal challenges and other significant trends and challenges facing the United States provide the impetus for reexamining the base of the federal government. Our nation is on an imprudent and unsustainable fiscal path driven by known demographic trends and rising health care costs, and relatively low revenues as a percentage of the economy. Unless we take effective and timely action, we will face large and growing structural deficit shortfalls, eroding our ability to address the current and emerging needs competing for a share of a shrinking budget pie. At the same time, policymakers will need to confront a host of emerging forces and trends, such as changing security threats, increasing global interconnectiveness, and a changing economy. To effectively address these challenges and trends, government cannot accept all of its existing programs, policies, functions, and activities as "givens." Reexamining the base of all major existing federal spending and tax programs, policies, functions, and activities offers compelling opportunities to redress our current and projected fiscal imbalances while better positioning government to meet the new challenges and opportunities of this new century.

In response, agencies need to change their cultures and create the capacity to become high performing organizations, by implementing a more results-oriented and performance-based approach to how they do business. To successfully transform, agencies must fundamentally reexamine their business processes, outmoded organizational structures, management approaches, and, in some cases, missions. GAO has hosted several forums to explore the change management practices that federal agencies can adopt to create high performing organizations. For example, participants at a GAO forum broadly agreed on the key characteristics and capabilities of high performing organizations, which can be grouped into four themes:

- a clear, well-articulated, and compelling mission;
- focus on needs of clients and customers;
- strategic management of people; and
- strategic use of partnerships.

A successful reexamination of the base of the federal government will entail multiple approaches over a period of years. The reauthorization, appropriation, oversight, and budget process should be used to review existing programs and policies. However, no single approach or institutional reform can address the myriad of questions and program areas that need to be revisited. GAO has recommended certain other initiatives to assist in the needed transformation. These include (1) development of a governmentwide strategic plan and key national indicators to assess the government's performance, position, and progress; (2) implementing a framework for federal human capital reform; and (3) proposing specific transformational leadership models, such as creating a Chief Operating Officer/Chief Management Official with a term appointment at select agencies.

GAO
Highlights
Highlights of GAO-06-228T, a report to congressional requesters

Why GAO Did This Study

Americans spend billions of hours each year providing information to federal agencies by filling out information collections (forms, surveys, or questionnaires). A major aim of the Paperwork Reduction Act (PRA) is to balance the burden of these collections with their public benefit. Under the act, agencies' Chief Information Officers (CIO) are responsible for reviewing information collections before they are submitted to the Office of Management and Budget (OMB) for approval. As part of this review, CIOs must certify that the collections meet 10 standards set forth in the act (see table).

GAO was asked to assess, among other things, the review and certification process, including agencies' efforts to consult with the public. To do this, GAO reviewed a governmentwide sample of collections, reviewed processes and collections of four agencies that account for a large proportion of burden, and performed case studies of 12 approved collections.

What GAO Recommends

GAO recommends that OMB and the agencies take steps to improve review processes and compliance with the act. Also, the Congress may wish to consider mandating pilot projects to target some collections for process analysis that includes public outreach. In commenting on a draft of this report, OMB and the agencies agreed with parts of the report and disagreed with others.

www.gao.gov/publications/gao-06-228t
To view the full product, including the scope and methodology, click on the link above. For more alternatives, contact Linda Kozlowski at (202) 512-4040 or kozlowski@gao.gov.

PAPERWORK REDUCTION ACT

New Approach May Be Needed to Reduce Government Burden on Public

What GAO Found

Governmentwide, agency CIOs generally reviewed information collections and certified that they met the standards in the act. However, GAO's analysis of 12 case studies at the Internal Revenue Service (IRS) and the Departments of Veterans Affairs, Housing and Urban Development, and Labor showed that CIOs certified collections even though support was often missing or partial (see table). For example, in nine of the case studies, agencies did not provide support, as the law requires, for the standard that the collection was developed by an office with a plan and resources to use the information effectively. Because OMB instructions do not ask explicitly for this support, agencies generally did not address it. Further, although the law requires agencies both to publish notices in the *Federal Register* and to otherwise consult with the public, agencies governmentwide generally limited consultation to the publication of notices, which generated little public comment. Without appropriate support and public consultation, agencies have reduced assurance that collections satisfy the standards in the act.

Processes outside the PRA review process, which are more rigorous and involve greater public outreach, have been set up by IRS and the Environmental Protection Agency (EPA), whose missions involve numerous information collections and whose management is focused on minimizing burden. For example, each year, IRS subjects a few forms to highly detailed, in-depth analysis, including extensive outreach to the public affected and the information users. IRS reports that this process—performed on forms that have undergone CIO review and received OMB approval—has reduced burden by over 200 million hours since 2002. In contrast, for the 12 case studies, the CIO review process did not reduce burden. Without rigorous evaluative processes, agencies are unlikely to achieve the PRA goal of minimizing burden while maximizing utility.

Support Provided by Agencies for Paperwork Reduction Act Standards in 12 Case Studies

Standards. The information collection—	Total	Yes	Partial	No
Is necessary for the proper performance of agency functions.	12	6	4	2
Avoids unnecessary duplication.	11	2	2	7
Reduces burden on the public, including small entities.	12	5	7	0
Uses language that is understandable to respondents.	12	1	0	11
Will be compatible with respondent recordkeeping practices, including extent to which records may be retained.	12	3	3	6
Gets required information in a timely response to respondents.	12	4	8	0
Was developed by an office with necessary plan and resources.	11	2	0	9
Uses appropriate statistical survey methodology (if applicable).	1	1	0	0
Employs appropriate use of information technology.	12	8	4	0
Total	101	35	30	36

Source: Paperwork Reduction Act, Pub. L. 94-142, 104 Stat. 1764, as amended.
*The total is not always 12 because not all standards are applied to all collections.

United States Government Accountability Office



Why GAO Did This Study

The Unfunded Mandates Reform Act of 1995 (UMRA) was enacted to address concerns about federal statutes and regulations that require nonfederal parties to expend resources to achieve legislative goals without being provided federal funding to cover the costs. UMRA generates information about the nature and size of potential federal mandates on nonfederal entities to assist Congress and agency decision makers in their consideration of proposed legislation and regulations. However, it does not preclude the implementation of such mandates.

At various times in its 19-year history, Congress has considered legislation to amend various aspects of the act to address ongoing questions about its effectiveness. Most recently, GAO was asked to consult with a diverse group of parties familiar with the act and to report their views on (1) the significant strengths and weaknesses of UMRA as the framework for addressing mandate issues and (2) potential options for refining the strengths or addressing the weaknesses. To address these objectives, we obtained information from 52 organizations and individuals reflecting a diverse range of viewpoints. GAO analyzed the information acquired and organized it into broad themes for analytical and reporting purposes.

GAO makes no recommendations in this report.

www.gao.gov/asset/REPORTS/06-2281
To view the full product, including the scope and methodology, click on the link above. For more information, contact Chae M. Williams at (301) 512-0827 or williams@gao.gov.

March 2006
UNFUNDED MANDATES

Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement

What GAO Found

The parties GAO contacted provided a significant number of comments about UMRA, specifically, and federal mandates, generally. Their views often varied across and within the five sectors we identified (academic/think tank, public interest advocacy, business, federal agencies, and state and local government). Overall, the numerous strengths, weaknesses and options for improvement identified during the review fell into several broad themes, including UMRA-specific issues such as coverage and enforcement, among others, and more general issues about the design, funding, and evaluation of federal mandates. First, UMRA coverage was, by far, the most frequently cited issue by parties from the various sectors. Parties across most sectors that provided comments said UMRA's numerous definitions, exclusions, and exceptions leave out many federal actions that may significantly impact nonfederal entities and should be revisited. Among the most commonly suggested options were to expand UMRA's coverage to include a broader set of actions by limiting the various exclusions and exceptions and lowering the cost thresholds, which would make more federal actions mandates under UMRA. However, a few parties, primarily from the public interest advocacy sector, viewed UMRA's narrow coverage as a strength that should be maintained.

Second, parties from various sectors also raised a number of issues about federal mandates in general. In particular, they had strong views about the need for better evaluation and research of federal mandates and more complete estimates of both the direct and indirect costs of mandates on nonfederal entities. The most frequently suggested option to address these issues was more post-implementation evaluation of existing mandates or "look backs." Such evaluations of the actual performance of mandates could enable policymakers to better understand mandates' benefits, impacts and costs among other issues. In turn, developing such evaluation information could lead to the adjustment of existing mandate programs in terms of design and/or funding, perhaps resulting in more effective or efficient programs.

Going forward, the issue of unfunded mandates raises broader questions about assigning fiscal responsibilities within our federal system. Federal and state governments face serious fiscal challenges both in the short and longer term. As GAO reported in its February 2005 report entitled *21st Century Challenges: Reexamining the Base of the Federal Government* (GAO-05-22287), the long-term fiscal challenges facing the federal budget and numerous other geopolitical changes challenging the continued relevance of existing programs and priorities warrant a national debate to review what the government does, how it does business and how it finances its priorities. Such a reexamination includes considering how responsibilities for financing public services are allocated and shared across the many nonfederal entities in the U.S. system as well.

United States Government Accountability Office



Highlights
Highlights of GAO-06-406, a report to the Senate Committee on Governmental Affairs and the House Committee on Government Reform

Why GAO Did This Study
Civil penalties are an important element of regulatory enforcement, allowing agencies to punish violators appropriately and to serve as a deterrent to future violations. In 1995, Congress enacted the Inflation Adjustment Act to require agencies to adjust certain penalties for inflation. GAO assessed federal agencies' compliance with the act and whether provisions in the act have prevented agencies from keeping their penalties in pace with inflation.

What GAO Recommends
Congress may wish to consider amending the act to (1) require or permit agencies to adjust their penalties for lost inflation; (2) make the calculation and rounding procedures more consistent with changes in inflation; (3) permit agencies with exempt penalties to adjust them for inflation; and (4) give some agency the responsibility to monitor compliance and provide guidance.

The Department of Justice, the Department of the Treasury, and the Office of Management and Budget did not comment on the first three matters for congressional consideration. The agencies suggested changes to the fourth matter, but we did not make those changes.

www.gao.gov/highlights/06-406-406
To view the full report, including the scope and methodology, click on the link above. For more information, contact Peter Paulsen at (301) 437-4000 or paulsenp@gao.gov.

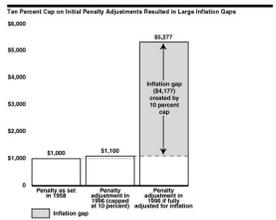
March 2006

CIVIL PENALTIES

Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law

What GAO Found
As of June 2002, 16 of 89 federal agencies with civil penalties covered by the Inflation Adjustment Act had not made the required initial adjustments to their penalties. Nineteen other agencies had not made required subsequent adjustments, and several other agencies had made incorrect adjustments. The act does not give any agency the authority to monitor compliance or to provide guidance to agencies. More important, several provisions of the act have prevented some agencies from fully adjusting their penalties for inflation. One provision limited the agencies' first adjustments to 10 percent of the penalty amounts, even if the penalties were decades old and hundreds of percent behind inflation. The resultant "inflation gap" can never be corrected under the statute and grows with each subsequent adjustment. (The figure below illustrates the effect of the cap on one agency's \$1,000 penalty set in 1995.) Also, the act's calculation and rounding procedures require agencies to lose a year of inflation each time they adjust their penalties, and can prevent some agencies from making adjustments until inflation increases by 45 percent or more (i.e., 15 years or more at recent rates of inflation). Finally, the act exempts penalties under certain statutes from its requirements entirely. Consequently, more than 150 exempted penalties have declined in value by 50 percent or more since Congress last set them.

Ten Percent Cap on Initial Penalty Adjustments Resulted in Large Inflation Gaps



Year	Penalty Value
1995 (set)	\$1,000
1995 (adjusted 10%)	\$1,100
2002 (100 years of inflation)	\$6,377
Inflation gap (84.17% of total)	\$5,277

Source: GAO.

United States General Accounting Office

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Mr. CANNON. I thank you very much. You know you talk about a high bar. For APA wonks, the bar appears substantially lower. Like a heartbeat probably works.

Mr. Lubbers, we appreciate your testimony now.

TESTIMONY OF PROFESSOR JEFFREY S. LUBBERS, FELLOW IN LAW AND GOVERNMENT PROGRAM, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. LUBBERS. Thank you, Mr. Chairman, Mr. Watt. It's great to be here with my distinguished panel members today, and I guess I do qualify as an administrative procedure wonk having worked in the area for so long.

I found much to agree with in my fellow panelists' statements and very little to disagree with.

I first want to applaud you and your Committee for leading the successful effort to reauthorize the Administrative Conference, which had to close its doors—exactly 10 years ago yesterday, by the way.

I truly believe it was one of the Federal Government's most cost effective institutions and it has been sorely missed.

I view this hearing as an opportunity to suggest a research agenda for ACUS that would help convince the appropriators that the relatively small investment in ACUS would be repaid many times over.

I also applaud the Committee for sponsoring a series of empirical research projects that would provide reliable data for a reconstituted ACUS to use in making recommendations to use in improvements in the administrative process. I think it is a great idea and the two projects already underway to be carried out by Professor West and by Professor Freeman should be invaluable to all of us.

Let me say that I think there is one analog that I can recall the Senate Governmental Affairs Committee back in the late 70's, maybe early 80's, late 70's, did a series of empirical studies that provided a very good basis for regulatory reform proposals in the 80's.

I have provided the Committee with a lengthy menu of topics that I believe might form the research agenda of a revived ACUS. I group these topics into several major areas.

First, the rulemaking process. The notice-and-comment rulemaking process is the preferred way for most agencies to make policy. However, this process has become much more complicated in the last 35 years due to additional procedural and analytical requirements, to the point where many commentators are worried that the process has become too difficult—or ossified, to use the two-dollar word. And agencies seem to be increasingly trying to avoid these requirements by making policy through less visible types of nonrule rules, such as guidance documents that are not subject to notice and comment.

Therefore, I believe that one area researchers should pursue is the increasing complexity of the rulemaking process. For example, agencies are required to prepare about a dozen separate analyses in rulemaking. A study of the costs and benefits of these impact analyses and how they could at least be consolidated would be useful.

I also agree with Mort Rosenberg that the systems for both White House and congressional review of agency rules should be examined to see what kinds of changes agencies have made in proposed rules, and how the length of the rulemaking process has been affected.

There is also a renewed emphasis on the need for sound science in rulemaking. Last January OMB issued a bulletin that requires administrative agencies to conduct a peer review of, "scientific information disseminations." This followed enactment in year 2000 of the Information Quality Act, which was inserted as an undebated amendment into an omnibus appropriations bill.

The IQA requires every agency to issue guidelines to ensure the quality, objectivity, utility and integrity of information disseminated by the agency.

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

Another study I recommend is to find out what is holding back negotiated rulemaking. Since the mid-90's its use has plateaued or even fallen despite its great promise. It would be useful to mount a major study of why it is faltering and what should be done to revive it.

The other major change, as others have mentioned, to the rulemaking process has been the impact of the Internet, leading to what is called e-rulemaking. Since ACUS's defunding, there have been enormous developments in this area especially in the technology. But the legal developments are moving more slowly. I have tried to catalog the legal issues that provide challenges to the twin goals of better information dissemination and increased public participation in the rulemaking process.

These legal issues include such things as how to best integrate the data, docketing questions, archiving, copyright protection, security, and privacy just to name a few.

Beyond the rulemaking process itself, there are a lot of broader regulatory issues that need study: regulatory prioritization, retrospective reviews of agency rulemakings to see how the actual costs and benefits match the predicted costs and benefits, alternative approaches to regulation and enforcement—something that my colleague Jody Freeman has written very excellent articles about. Use of waivers and exceptions—something we have heard a lot about after the Katrina hurricane—federalism issues, and agency structural issues, such as how should departments and commissions be structured.

There are also some pressing issues of administrative adjudication. The ALJ program, Administrative Law Judge program, is still having problems with agencies seeking to use other types of hearing officers too often. Agency appeal boards are coming under scrutiny in the immigration, Social Security and patent and trademark areas. And mass adjudication programs like the Social Security Disability program are facing huge backlogs and caseload pressures.

And finally, there are recurrent issues concerning judicial review. The agency-court partnership is of obvious concern to all three

branches of Government as exemplified by the Chevron case, in which the Supreme Court basically told the judiciary to defer to reasonable interpretations of statutes made by executive agencies. This simple dictum has spawned many cases concerning what this deference should consist of and to what types of interpretations it should be applied.

There is no shortage of scholarly commentary on these cases. But there is an absence of consensus-building around this issue. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.

One other judiciary issue I will mention, which relates to attorneys' fee issues. This is something that ACUS had a role in, in overseeing the rules under the Equal Access to Justice Act. But a recent Supreme Court decision has limited what is meant by the term "prevailing party", which allows parties to get attorneys' fees. The impact of this decision should be of great interest to Congress, which could of course make its intent clear if it so wished.

In conclusion, let me say that this is a short summary of a lengthy list. But even the full list is hardly a comprehensive menu of projects that could be tackled by a revived ACUS. It is a collection of issues that have accumulated in the past decade. The new ACUS chairperson and his or her counsel would obviously have their own priorities. But I hope that this listing does show the need for a revised and continuing focus on the administrative procedural issues that often get short shrift but can make or break the success of governmental programs.

For 28 years ACUS provided a low cost center of research scholarship and consensus-building on administrative law within the Federal Government and I believe that now, through the efforts of you and your Committee, that ACUS has been reauthorized, it should be funded as soon as possible. Thank you, and I look forward to your questions.

[The prepared statement of Mr. Lubbers follows:]

PREPARED STATEMENT OF JEFFREY S. LUBBERS

STATEMENT OF JEFFREY S. LUBBERS*

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

Mr. Chairman and Members of the Committee:

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

Unfortunately the first year of the three-year reauthorization has now occurred without the necessary appropriations to actually re-start ACUS, and I view this hearing as an opportunity to suggest a research agenda for ACUS that would help convince the appropriators that the relatively small investment in ACUS would be repaid many times over. I do this with the perspective of having served as ACUS's Research Director from 1982-1995 and from having taught Administrative Law at American University's Washington College of Law since 1996.³

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

* Fellow in Law and Government, Washington College of Law, American University. Research Director, Administrative Conference of the United States (1982-1995).

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

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

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

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

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

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

I would group the topics into several broad areas:

I. The Rulemaking Process.

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

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

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

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

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

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

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

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

3. Congressional Review. Similar questions could be asked about the congressional-review-of-rules provisions enacted in 1996.¹⁰ The law requires agencies to submit all final rules to Congress before they become effective—a constitutional form of the “legislative veto.” While tens of thousands of rules have been transmitted to Congress and GAO for review,¹¹ only one has been disapproved under the procedures and relatively few resolutions of disapproval have been introduced.¹² “Major” rules are subject to a delayed effective date—normally for at least 60 days—under these provisions. And there is a special problem that can develop at the end of each

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

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

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

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

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

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

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

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

5. What’s Holding Back Negotiated Rulemaking? One of ACUS’s proudest achievements was the development of a more participatory and consensus-based form of rulemaking known as negotiated rulemaking.¹⁵ With the passage of the Negotiated Rulemaking Act of 1990¹⁶ and its permanent reauthorization in 1996,¹⁷ negotiated rulemaking seemed on the verge of taking off. Congress still requires it from time to time in specific statutes,¹⁸ but since the mid-90’s its use has plateaued or even fallen, despite its great promise. One reason, of course, may be the absence of ACUS’s support and assistance to the agencies in undertaking these proceedings.¹⁹ But there are cost, timing, and effectiveness questions as well. Perhaps the advent of electronic rulemaking (discussed below) will help breathe new life into the idea, but it would be useful to mount a major study of why it is faltering and what should be done to revive it.

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

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

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

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

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

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

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

6. "Midnight" Rules. Outgoing presidential administrations have characteristically issued a large number of important rules at the very end of their administrations. In some circumstances, (where the new President is from a different party), the incoming administration attempts to freeze, delay, or withdraw these "midnight rules."²⁰ This can create some practical and legal difficulties for the agencies and the courts.²⁰ It would be good to have a set of standards for how both outgoing and incoming administrations (and organs like the Office of Federal Register) should behave in these situations.

7. "Lookback" at Existing Regulations. In recent years there has been a new emphasis on agency review and reevaluation of their *existing* regulations. The Regulatory Flexibility Act requires agencies to undertake periodic reviews of regulations that have "a significant economic impact upon a substantial number of small entities."²¹ President Bush I mandated a "top to bottom review" of existing regulations in 1992 when he ordered a 90-day moratorium on new regulations.²² President Clinton institutionalized that mandate in Executive Order 12,866, which required agencies to review existing regulations to ensure that they are still timely, compatible, effective, and do not impose unnecessary burdens.²³ In the Bush II Administration, OIRA has regularly solicited nominations of rules that should be reviewed for ineffectiveness or inefficiency.²⁴ These efforts should be evaluated.

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

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

²¹ 5 U.S.C. § 610.

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

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

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

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

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

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

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

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

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

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

1. Issues Concerning the Informational Goal.

a. How should we best integrate existing sources of information? The Office of Federal Register now is able to constantly update the electronic C.F.R.—which in itself is a great boon to anyone who needs to know what government regulations are in effect at the moment. As www.regulations.gov evolves, it should be a one-stop shop for all agency rules and related documents. This should include related guidance documents as well—a sort of "*C.F.R. Annotated*."

b. Docketing issues. The planned new integrated federal rulemaking docket needs to incorporate (i) consistent data fields, both across agencies and over time, (ii) flexibility of search, and (iii) ease of downloading.²⁶ Other docketing issues include:

- *Scanning issues.* Optimally, written (paper) comments should be scanned immediately so that a complete online docket is available. Apparently agencies will soon have the assistance of the Government Printing Office in some of these issues, "including scanning, high-level scanning, OCR processing, long-term docket storage for paper and microform, and other tangible items, and the ability to establish contracts for retrospective and supplemental scanning services."²⁷ In any event, agencies are faced with the need to develop a strategy for handling a combination of electronic and paper comments.
- *Archiving issues.* Do (redundant) paper copies need to be kept, due to federal archiving requirements? How about cover e-mails? As part of its implementation of the E-Government Act, the National Archives and Records Administration has an "Electronic Records Archives" project underway to "efficiently and effectively address the challenges presented by the increasing volume and complexity of records (in particular, electronic records) which it must manage, preserve, and make available."²⁸
- *Attachments.* How should exhibits, forms, photographs, etc., be dealt with? Attachments can pose a risk of viruses and of overloading systems, and electronic technology makes it all too easy for commenters to "dump" huge files or links within their electronic comments. What should the agency's responsibility be to sift through everything that is "sent over the transom"?
- *Copyright concerns.* As public comments have been transformed from easily controlled physical files in Washington DC to internet-accessible digitized documents, copyright issues have emerged—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copyrighted work without permission. The submission of others' materials raises difficult issues. Various technological fixes have been suggested such as software controls that would code such documents so that downloading and copying can be regulated.²⁹
- *Different levels of user classifications.* In some circumstances might it be appropriate for one type of participants (like agency staff) to see everything, while others have more limited access? Should agencies be allowed to ask viewers to register?
- *Authentication issues.* Agencies now have some benchmarks on the subject of electronic signatures because, as required by the Government Paperwork Elimination Act, in 2003,

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

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

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

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

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

- *Security issues.* In a post 9/11 world, security issues have become of heightened concern—both in terms of preventing unauthorized tampering, and in making sure that sensitive information is not made available to potential terrorists.
- *Privacy issues.* Should anonymous comments be permitted? Ought commenters be identified, or searchable by name?
- *Mandating e-comments.* What legal impediments prevent agencies from *requiring* e-comments to the exclusion of paper comments? The “digital divide” continues to exist—not everyone owns or is comfortable using a computer, so agencies will have to continue to accept mailed, messengered, or hand-delivered comments. On the other hand, problems with the mail, especially in Washington after 9/11 and the anthrax scare, have made e-mail even effective by comparison.

2. Issues Concerning the Participatory Goal.

a. How can we best reach the goal of better, more targeted notices? Agencies are increasingly offering an opportunity to join listservs. How well has this worked?

b. Can we also provide easier, more convenient comment opportunities? Can agencies efficiently segment a proposed rule to allow for comment on a specific part as well as on the whole? Should they use numbered questions or numbered issues to help organize the comments?³¹

c. What rules should govern rulemaking “chatrooms”? First Amendment issues are tricky in this area. What rules should pertain to archiving of chats? To be consistent with the above informational goals, this should be done, but how much flexibility should there be, opportunity for correction, disclaimers, etc.? Should participants should be permitted to send attachments to their e-mails in such chat rooms. Do the Paperwork Reduction Act and the Privacy Act prevent agencies from collecting demographic and interest group affiliation data on participants? Finally, what about electronic “negotiated rulemaking”? Would this just become a more formalized, more highly moderated, version of “regular” electronic rulemaking? Or would it add value by liberating negotiated rulemaking from the up-front cost concerns (of convening meetings) that seem to be holding it back now.³²

II. Broader Regulatory Issues.

A. Regulatory Prioritization. Many regulatory agencies have limited budgets and broad jurisdictions, and thus must devote much more attention to prioritization. They will have to

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

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

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

develop better ways to decide on the best targets for regulation, for standard setting, and for enforcement. Some pioneering work was done by the EPA Science Advisory Board in trying to set priorities among all the environmental hazards that EPA might choose.³³ Such efforts need to be expanded.

B. Retrospective Reviews of Agency Rulemakings. A related topic is the need for studies comparing the projected cost-benefit impacts of agency rules (when issued) with the actual cost-benefit impact or rules after they have been in effect for a period of time. The conventional wisdom is that agencies overestimate the benefits and regulated industries overestimate the costs. OMB has discussed this growing body of literature in its 2005 Report to Congress,³⁴ and signaled its intention to release a report on this issue soon.³⁵

C. Alternative Approaches to Regulation. Agencies must develop regulations that are more effective, yet less burdensome and more acceptable to the regulated community. This need fueled ACUS's work in the area of negotiated rulemaking.³⁶ ACUS also looked at the need to take advantage of voluntary industry consensus standards³⁷ and the need to achieve international harmonization of regulations.³⁸ A lot more research is needed in all those areas.

D. New Approaches to Enforcement. At the time of its shutdown, ACUS had just begun to look at ways that agencies could leverage their enforcement resources through the use of audited self-regulation.³⁹ For example, the Securities and Exchange Commission (SEC) relies on intermediaries such as the stock exchanges to do the front-line regulating, while the SEC serves as a backstop and overseer of the way the stock exchanges do the regulating. ACUS also began to look at what was called cooperative enforcement—reliance on the employees of the regulated

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

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

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

³⁶ See note 15, *supra*.

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

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

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

entity itself rather than a third-party intermediary. The best known example of this is the method that is now used in food safety regulation, called Hazard Analysis and Critical Control Point (HACCP) in which the agency approves the company's plan, reviews operating records, and verifies that the program is working.⁴⁰ EPA and OSHA also undertook experiments in cooperative regulation as well, and subsequent research, led by Professor Freeman, has shed new light on the pros and cons of this.⁴¹

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

E. Waivers and Exceptions. The Gulf Coast disaster has focused attention on agency authorities and procedures for issuing waivers from existing statutes and regulations. What process is required for waivers? How should third-party beneficiaries of existing laws and regulations be heard in such proceedings? Is it rulemaking or adjudication? This is a neglected area.

F. Alternative Dispute Resolution. Another area of heavy ACUS involvement was in the encouragement of agency use of alternative dispute resolution (ADR). With increasing budget stringency, ADR is one way of avoiding costly enforcement adjudication. Every enforcement case that is mediated saves the government many times the cost of the mediation. Thus ACUS should pick up where it left off in terms of its concentrated studies of ADR use in the government.⁴⁴ A major issue is the need for confidentiality in such proceedings—an issue that must of course be balanced by the needs for open government.

G. Cooperative Federalism. Another major issue bearing on regulation and the provision of government services is federalism. The aftermath of Katrina showed just how important it is to have cooperative linkage between federal, state, and local governments.

Moreover, many important regulatory programs involve state implementation of federal environmental and safety standards—the Clean Air Act, Clean Water Act, Surface Mining Control Act, and the Occupational Health and Safety Act, just to name a few. Under these Acts,

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

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

⁴² 31 U.S.C. §§ 3729-3733.

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

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

states retain the ability to leave enforcement to the feds, but most states prefer to administer these programs themselves. This approach of “cooperative federalism”⁴⁵ is seen as an alternative to direct federal enforcement. But, inevitably, tensions arise as the federal agency retains the ultimate authority to oversee and even veto state implementation activities. Because this model is so prevalent, it deserves a close study—with all the stakeholders represented in the study.

Finally, the movement over the last few decades to devolve more responsibility onto state and local governments in federally funded assistance programs such as Medicaid, Medicare, public housing, supplemental security income, food stamps, and welfare has required the states, with their fifty different administrative procedure acts, to deal with an influx of rulemaking and adjudication responsibilities. In part, the Unfunded Mandates Reform Act of 1995 was an attempt to address this.⁴⁶

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

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

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

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

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

⁴⁸ 523 U.S. 726 (1998).

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

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

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

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

I. Agency Structure. Is the multi-member board or commission an expensive anachronism? Is there such a thing as an independent agency, or should there be? Why does Congress create three-member agencies like the Occupational Safety Review Commission (OSHRC), or even worse, six-member commissions, like the Federal Election Commission and the International Trade Commission, with too many opportunities for paralysis? Does it really make any difference if the EPA becomes a Cabinet department? How well does the “holding company” model of a Department, like the Department of Transportation or the Department of Homeland Security, function? What about all the hybrids, such as government-sponsored enterprises,⁵² government corporations,⁵³ and administrative quasi-courts, like OSHRC and the National Transportation Safety Board, that are split off from their rulemaking agencies? And what about all the independent power centers developing within agencies: presidentially appointed general counsels, division heads, inspectors general,⁵⁴ chief financial officers,⁵⁵ and so on?

III. Administrative Adjudication

A. The Administrative Law Judge Program. I mentioned expensive anachronisms. Sometimes I think that agencies believe that administrative law judges (ALJs) fit that description. I believe the state of administrative adjudication is something that also needs to be addressed again. It was in 1979 that then-Professor Antonin Scalia began an article by saying “the subject of administrative hearing officers is once again on the agenda of federal regulatory reform.”⁵⁶ Today Congress seems little concerned about the state of administrative adjudication even though agencies seem to be using all sorts of non-ALJ adjudicators instead of ALJs. In fact, other than the over 1100 ALJs in the Social Security Administration, the numbers at the other agencies have fallen from 410 in 1978 to 209 in March 2002.⁵⁷ Meanwhile, agencies are using thousands of other administrative hearing officers, administrative judges, immigration judges, asylum officers, etc.⁵⁸

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

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

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

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

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

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

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

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

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

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

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

B. Administrative Appeal Boards. The APA does not prescribe how agencies must organize their internal appeal procedures for review of ALJ initial decisions. This has resulted in many different variations, ranging from a single "Judicial Officer" at the Department of Agriculture, to an Appeals Council at the Social Security Administration, to appeal boards at EPA and the Department of Labor.⁶¹ In other large-volume non-APA adjudication programs involving patent and trademark appeals and immigration appeals, agencies have also set up appeal boards. Most of these boards lack the independence and stature of the judges whose decisions are being reviewed. In some agencies the agency head controls the make-up and assignments of these boards. This seems to undercut the adjudicative model, but it also recognizes the policymaking accountability of the agency head. This is a neglected area that needs some rethinking.

C. Mass Adjudication Programs. How should we handle high-volume benefits programs such as the Social Security Disability Program, which now has upwards of 500,000 hearings a year with no sign of slowing down,⁶² or immigration adjudication, which is burgeoning at a very fast rate? The Black Lung Benefits program is another high caseload program, and a new Medicare appeals adjudication program⁶³ shows signs of becoming the next big program. Which cases are best assigned to agencies and which are best assigned to Article III courts or the more specialized Article I courts? Can administrative tribunals handle mass tort cases?⁶⁴ These are all questions that I think should be on the research agenda in coming years.

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

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

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

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

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

IV. Judicial Review of Administrative Agency Action

A. Chevron-Related Issues. The APA essentially creates an agency-court partnership. Agencies make rules and decide cases, and the Article III courts review these actions with a careful but deferential scope of review. This relationship is of obvious concern to all three branches of government, as exemplified by the *Chevron* case, in which the Supreme Court basically told the judiciary to defer to reasonable interpretations of legislative statutes made by executive agencies.⁶⁵ This simple dictum has spawned a plethora of cases concerning what this deference should consist of and to what types of interpretations it should be applied. There is no shortage of scholarly commentary on these cases, but there is an absence of consensus-building around this issue. The courts are struggling with these issues, and a renewed ACUS could help provide some focus for the courts.

B. Access to the Courts. Just as the *Chevron* doctrine has become prohibitively complex, so have the courts' decisions on private rights of action, standing, ripeness, finality, and exhaustion of remedies—the key doctrines governing the ability of people to challenge administrative agency action. Moreover, some of these doctrines seem to be asymmetric—tending to favor challenges by regulated interests and to disfavor challenges by plaintiffs seeking stronger regulation.

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

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

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

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

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

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

Mr. CANNON. My sentiment about funding exactly. I have been sitting here trying to figure out how we in an era of reducing programs by number as opposed to improving Government through a process is more important. We are working on that. Thank you, and appreciate your comments.
Professor Freeman.

**TESTIMONY OF PROFESSOR JODY FREEMAN,
HARVARD LAW SCHOOL**

Ms. FREEMAN. Mr. Chairman, Mr. Watt, members of the staff, I am delighted to be here today. As you know, I specialize in administrative law and I want to line up on your side in terms of being excited all the time about administrative law issues. If anybody wants to keep talking about it after the end of the hearing I will stay as long as anyone likes. It is hard to find friends. Administrative law and administrative process issues have a PR problem in this regard, and I think that is part of the reason.

I have spent a lot of time trying to think about how to rename the field. Things like "Government, power and you" come to mind. But I want to focus on two points of my testimony. I have gone on at length in my written testimony, and I won't repeat all of it.

First, I want to express the absolute clarity of the need for empirical research on what Government agencies do and how well they do it. We know precious little. We don't know much at all about the very important process of generating rules which, as you all well know, reach every corner of our economy and every aspect of social life. The high volume of rules coming out of agencies like DHS and EPA and HHS and DOT, these rules have the power, the effect of legislation. And yet we know almost nothing about how well we are doing this and how we might improve it. And there is a clear need, as this Committee well knows, for an informed approach to congressional law reform efforts.

As you know, Congress passes a few hundred laws every year. The Supreme Court issues maybe between 70 and 100 cases every year. And yet we have thousands of rules coming from the Federal Government every year, and we have almost no—I feel safe in saying—only almost no careful empirical analysis of what agencies are doing.

And this is a really serious, I think, problem because we can't answer some essential questions. We can't answer the question yet, how well is congressional review of agency rulemaking going? We can't answer whether OMB oversight is effective and whether it is effective for some agencies or not. Some agencies may perform cost-benefit analysis particularly well, some agencies maybe fairly poorly. We can't answer the question, have we heaped on too many of these analytic burdens so that we are actually undermining the ability of agencies to promulgate rational, defensible, smart rules?

Intuitively you would expect more oversight, more analysis, more information to help the rulemaking process. But the problem is that we don't know how well we are actually performing.

So we have only scratched the surface in starting to explore these issues, and I think a coherent, comprehensive empirical research project would be enormously helpful to your efforts in Congress to either avoid law reform that is wasteful and distracting

and just a bad idea, and to target your law reform efforts and your money and your time on things, on measures that will be beneficial. There will be short term measures, longer term measures, but what you want I believe is a list of priorities and a sense of where you will get the most bang for your proverbial buck. And I think that is something that a revived ACUS that is appropriately funded can really contribute to.

There are many myths about the administrative process. There is a figure that we all know about which circulated for years which was a figure that claimed that 80 percent of EPA's rules got challenged, and administrators of EPA cited this and people cited it in congressional testimony. And the truth is there was absolutely no empirical basis for the figure. People just thought it was 80 percent.

This is not the way one ought to go about law reform and planning for administrative decision making.

There is a similar figure floating around, and I believe there is a preliminary study that CRS did—I may be wrong about that—but there is a figure floating around that 50 percent of rules that get challenged upon judicial review get struck down.

Some people believe it is as high as 50 percent. This is something the study I am doing is looking at, and the truth of the matter is we just don't know. We don't know how well rules fair when they get challenged.

So I will be happy to talk a little bit about the study and give you a sense of it. We are at the preliminary stage, but this is the kind of thing we want to know about. Because it would be a big mistake and a waste of resources to conclude that so many rules are being challenged and so many rules have been struck down that the process isn't working and Congress ought to intervene to fix it if in fact that is not the case.

So we really need to know the answers to these questions.

Just briefly, the study that I am conducting I think can help shed some light on at least how one project is going about looking at the judicial review of rulemaking and also I think shed a little bit of light on the cost involved.

This study grew out of conversations between me and staff at the Congressional Research Service, in particular, Curtis Copeland, which of course stem from this Committee's interest in sponsoring empirical work. And we focused on the fate of agency rules upon judicial review. This study is the most comprehensive study I am aware of. We look at a database initially of 10,000 cases but culled to 3,000 cases, of which we think there are about 20 percent involving rulemaking, challenges to rules. So we think we are going to end up with about 600 cases, which is a very big database of cases, and every one of them is being coded in the most deliberate manner so that what we can pull out of this data would be preliminary inferences, preliminary answers to questions like how many rules do get struck down across all of the 11 circuit courts? How often do interest groups of a particular type succeed in challenging rules? Does it make a difference what agency promulgated the rules? Do some agencies always win, do some agencies always have their rules struck down?

We don't know the answers to these questions, and we are coding the data for even more than that. So if we want to ask even more detailed questions; for example, how do you do across the circuits? How does the Fifth Circuit compare to the First Circuit? Does it matter which panel of judges you come before in terms of the rate at which they strike rules down?

All of these questions we are asking and we should be able we hope to infer something here as well about how closely judges are really reviewing rules because we are going to code the reasons why the rules are struck down, the basis for challenging why they are struck down when they are struck down. So we should be able to tell something about whether the courts are reviewing rules with a very serious, rigorous kind of approach which we would call "hard look review" or whether they are giving these rules rather a soft glance and not being particularly rigorous in reviewing them.

So I am happy to talk more about that study. I will tell you something about what it costs, and this leads to this problem of incentives to do this kind of research. I will be very honest with you, law professors really don't want to do this. And the reason is not because we are not interested but you don't get tenure for it. These kind of empirical studies give us very few rewards. Luckily I have tenure. I can just be interested in it. But without incentivizing this kind of work that means without a body like ACUS that can draw on academic expertise and tempt academics by saying—guess what, you can interact with some of the best minds in practice, some of the best minds in agencies, you will have lots of access to this collaborative, cooperative exercise, without incentives—it is going to be very hard to generate this kind of work, the work that you need to inform your efforts.

The other thing I want to mention about empirical work is it takes time and money. It is slower going than we would like. It is hard to do. My project involved an empirical expert who directs empirical research at UCLA School of Law where I formerly was a professor before I joined Harvard. You need someone with that kind of statistical expertise to do this work so it's reliable and credible for your purposes. I have a team of four research assistants. These people are very underpaid, and I need even more of them to do this properly. The project is probably easily costing \$10,000 for the first cut through the data, and I imagine it will get easily to \$20,000, and the generosity of the Dean of the Harvard Law School is making this possible. There is no other source of funding to do it.

As you well know, Mr. Chairman, it is very hard to go out to foundations or anybody and say I am doing a fascinating project on the administrative process, even though it is about the way the American Government works and how well it works.

Finally, my second big point and my most important point I think here for your purposes may be to reinforce the need to invest in ACUS. A small investment is going to go a very long way. This is a body that is going to be able to make recommendations in a way that no other body can. The American Bar Association doesn't have the legislative clout and the credibility with agencies that ACUS will have. There is a Center for Rulemaking that Professor Kerwin has initiated at the American University. It is a very inter-

esting center, but it doesn't have the resources. It doesn't have the ability to do the kinds of things that ACUS can do. And as Justice Scalia noted very clearly, there is a big difference when ACUS comes to agencies and says we want to study you. They perceive that as potentially helpful, and not as something that will potentially be an obstacle that will get in their way.

I really believe that ACUS is a bargain for Congress. And as you mentioned, Mr. Chairman, as other panelists have mentioned, it is clear that funding ACUS to a tune of the several million dollars should not be seen as in competition with other efforts that are very pressing in the Federal Government. ACUS can help to improve our efforts, as you mentioned, in terms of disaster relief response and also in terms of security, national security concerns. If you make Government work better and you figure out ways to improve it, you're going to assist in all those endeavors. It is well worth the investment.

I just want to add to Professor Lubbers' long list a few ideas for what I believe is really the next generation of ACUS. Ten years is a long time. Things have changed since ACUS was around, and there is, as Professor Lubbers has mentioned, a backlog of work to do. But in particular a few things have developed that I think are very worthy of ACUS's time. One has been mentioned here today, privatization and contracting out. We really do not have administrative procedures adequate to guide privatization and contracting out. Private service providers are increasingly performing functions we have traditionally thought of as public, including functions associated with the military functions, prisons, national security. And the truth of the matter is most of these actions typically fall outside of the administrative law process and protections. And we need to think carefully about that. ACUS can spearhead in a bipartisan way a project to think about that.

Second, I do want to mention it is the 10th anniversary of the Small Business Regulatory Enforcement Fairness Act and there have been concerns that small businesses are not the ones benefiting from getting an early look at these rules, but rather that, potentially, big business is driving the small business agenda. It is something that Congress may be interested in, something certainly that ACUS could look at.

And finally, where ACUS could direct further research, as again has been mentioned here today and I want to reinforce it, is the reconciliation of the administrative law principles of fairness and openness and transparency and effectiveness with the clear imperatives of national security. This was not on the radar screen 10 years ago, and it is front and center on the radar screen right now.

There are agencies in the Federal Government that are not subject at the moment to the kind of rigorous cost-benefit analysis and the kind of other requirements that we impose on—that we normally impose on the process. And how are we going to reconcile the need to protect our national security while at the same time not abandon the norms and principles that inform administrative law? I think that's a huge challenge. I don't know the answer.

But we are operating with a 60-year-old document, the Administrative Procedure Act, and we need to think very carefully about

where and how to engage in reform. And I think ACUS will be well worth a small investment of Congress' time and money. Thank you. [The prepared statement of Ms. Freeman follows:]

PREPARED STATEMENT OF JODY FREEMAN

Mr. Chairman and Members of the Subcommittee:

Thank you for the invitation to testify at the Oversight Hearing on the Administrative Law, Process and Procedure Project.

I am a Professor of Law at Harvard Law School. I specialize in administrative law and environmental law. My scholarship focuses on congressional delegation of authority to agencies, inter-agency coordination, public-private collaboration, dispute resolution, regulatory innovation, and privatization. I am the Vice-Chair of the American Bar Association Administrative Law Section Sub-Committee on Dispute Resolution as well as the Vice Chair of the Sub-Committee on Environmental Law and Natural Resources. I am the current Chair of the American Association of Law Schools (AALS) Executive Committee on Administrative Law.

My testimony focuses on two points: (1) the need for empirical research to support congressional law reform efforts in administrative law; and (2) the benefits to be gained by funding the Administrative Conference of the United States (ACUS) to produce and sponsor such empirical research. I will also describe the empirical project on agency rulemaking that I have undertaken in consultation with the Congressional Research Service (CRS), a project that I hope will further this Subcommittee's Oversight Plan and which might help to inform other empirical studies sponsored by ACUS, should it be funded. Although I will confine most of my remarks to the topic of rulemaking, the scope of what ACUS can and should undertake to study is broader. I will briefly touch upon some other matters ACUS might examine if it is funded, but a more developed proposal for the agency's agenda will be offered by my co-panelist, Jeffrey S. Lubbers.

I. THE NEED FOR EMPIRICAL RESEARCH TO ASSIST CONGRESSIONAL LAW REFORM

As this Subcommittee has noted, Congress needs more information on rulemaking and other aspects of the administrative process in order to focus its law reform efforts. We know precious little about the administrative process. Consider: Each year, Congress enacts a few hundred laws, the Supreme Court hands down fewer than a hundred decisions, and regulatory agencies promulgate several thousand rules. Yet while the legislative and judicial processes are the object of very close scrutiny and rigorous empirical analysis, the rulemaking process attracts strikingly little scholarly attention. Are rules effective? Are they produced in a timely manner? Are they produced with sufficient public input? Are they cost-effective? Do congressional and executive oversight mechanisms improve rules? Are rules challenged frequently? Do most challenged rules survive judicial review? We simply cannot answer these questions. The dearth of empirical research on rules is especially problematic given the importance of rulemaking as a vehicle for social and economic policy. Many rules have very significant social and economic effects. The agencies that produce a high volume of rules, including the Department of Transportation, the Environmental Protection Agency, the Department of Homeland Security, and Health and Human Services affect virtually every corner of the U.S. economy and every aspect of social life. Yet our empirical knowledge of the effectiveness of their rulemaking processes remains woefully thin.

Without the benefit of reliable empirical research, Congress might waste both time and money on law reform efforts that are neither necessary nor effective. It would be a mistake, for example, to add more oversight mechanisms to rulemaking if the existing measures, such as cost-benefit analysis and peer review, work well. Intuitively, one would expect these additional steps to improve the quality of rulemaking, yet we cannot say with confidence whether or not this is true. Among the questions to be investigated are: How well do agencies perform these analyses? Do these oversight mechanisms improve the quality of rules? Do they slow down the rulemaking process unnecessarily? Are they a net benefit or a net cost? While we have some preliminary evidence on these questions, scholarly work to date has only scratched the surface.

Moreover, to the extent that scholars do study the rulemaking process, the majority of attention focuses on *ex ante* processes in rulemaking (such as cost-benefit analysis). There is virtually no *ex post* empirical study of the rules themselves. To put a finer point on it, we do not know how well rules are implemented and whether they achieve their goals, and we lack mechanisms for feeding such *ex post* evaluation back into the rulemaking process.

Indeed, we have not even agreed upon what measurement tools we would use to answer the most basic questions. For example, how would we answer the question, *Are regulatory agencies getting better at rulemaking?* Would we look to see if the agency is doing a better job of setting its priorities? Whether it is issuing rules faster than it used to? Doing a superior job of analyzing scientific data? Obtaining more feedback about the effect of its rules, and integrating it into decision making? Congress might be interested in knowing the answer to these questions before it undertakes reform. Perhaps agencies that are less successful at one or more of these steps might be encouraged to adopt the “best practices” of the more successful agencies. Congress might wish in some instances to require the adoption of certain practices across the board. With only anecdotal and impressionistic evidence, however, Congress would simply be guessing at what works.

There are many myths about the administrative process that persist for years, despite their dubious origins. For example, scholars and practitioners of administrative law long subscribed to the widely-held belief that the vast majority—80 *per cent*—of regulations issued each year by the Environmental Protection Agency (EPA) were challenged in court. This statistic was relied upon by academics, legislators, and journalists, quoted by successive administrators of EPA, and cited before congressional committees as truth. The only problem was that the statistic had no factual basis. Indeed, one empirical study investigating its accuracy determined that no more than 35 *per cent* of the EPA’s rules were challenged. This rate of challenge is still significant, and might justify law reform efforts aimed at reducing legal challenges to rules. Yet the example ought to make us cautious. Some concerns about the administrative process might be overstated, and some understated. There may be similar mistaken assumptions about how many rules are invalidated upon judicial review. Some believe the figure is as high as 50 *per cent*, but we don’t really know. It would be a mistake to conclude, without knowing the real rate, that Congress needs to intervene to address this perceived problem. Only with good data can Congress choose wisely where to invest its resources, and prioritize which law reform efforts are most needed now, and which might be longer-term efforts.

In its Oversight Report, this Subcommittee has already identified issues that require further study, including (1) public participation in the rulemaking process; (2) Congressional review of rules; (3) Presidential review of agency rulemaking; (4) judicial review of agency rulemaking, (5) the agency adjudicatory process; (6) and the utility of regulatory analysis and accountability requirements; and (7) the role of science in the regulatory process. I agree that these are important areas for examination and, after discussions with the CRS, I agreed to undertake an empirical study of one of these issues: the judicial review of rulemaking. I describe the study below.

II. DESCRIPTION OF FREEMAN/DOHERTY EMPIRICAL STUDY: JUDICIAL REVIEW OF RULEMAKING

Origin of the Study

This study grew out of conversations with the CRS about this Subcommittee’s interest in empirical work on the administrative process. Among the important subjects CRS identified for scrutiny at the behest of this Subcommittee is the fate of agency rules upon judicial review. I agreed to do an empirical study on this topic together with Joseph Doherty, Associate Director for Research in the Empirical Research Group at the UCLA School of Law, and with the help of a team of research assistants at Harvard Law School. We expect to have preliminary results in January 2006 and a final report by the end of August 2006.

Purpose of the Study

The goal of the study is to investigate what happens to rules upon judicial review, including the rate at which they are struck down; the reasons why they are struck down or upheld; and any trends in the cases that might be attributable to differences in (1) the agencies generating the rules; (2) the litigants challenging them; or (3) the Circuits hearing the cases. While this study is only a beginning, we expect it to yield useful data on what is actually happening to agency rules after they are promulgated and once they are challenged.

Database

We are using a comprehensive database consisting of all federal appellate cases involving administrative agencies (not just challenges to agency rules) from 1991 to 2003. The database consists of 3,075 cases that were decided in the Circuit courts during this thirteen-year period. The database was culled from an initial database of 10,000 cases, which was collected and partially coded by the Administrative Office of the Courts. We obtained the original database with the assistance of the CRS.

To my knowledge, this database is unique in its breadth and in the time span it covers.

Preliminary Report

We are in the process of identifying those cases in which an agency's conduct in promulgating a rule was challenged. This includes both formal and informal rulemaking. Preliminary analysis suggests that approximately 20 *per cent* of the cases will be identified as rulemaking cases. Thus, we expect to analyze approximately 600 cases of rulemaking, a significant number and far in excess of the number of cases that have been examined to date. We will read every case in this group, and collect highly detailed information about who challenged the rule, the basis for the challenge, and the reasoning behind the court's decision to uphold or overturn the agency's action. This information will be collected and entered into a database. Analysis of the data will permit us to make inferences about general characteristics and trends in the courts' reasoning.

Relevance

Why does this research matter? Right now, we simply do not know whether agency rules are generally upheld or not, or whether some agencies are more likely to have their rules struck down compared to others. Nor do we know whether challenges brought by certain types of groups are more successful than those brought by others. Moreover, we lack comparative knowledge about different Circuits i.e., whether outcomes vary across the Circuits, or indeed across specific panels of particular judges. In addition to shedding light on these matters, the study should enable us to say something about the extent to which courts are taking a "hard look" at agency rules (meaning that courts closely examine the rulemaking process), *versus* a more cursory "soft glance" kind of review (in which review is less exacting). Without answers to these questions, we cannot begin to answer the broader question of whether the rulemaking process is producing effective rules (or at least rules resistant to judicial invalidation), and whether judicial review is performing its intended function.

III. THE BENEFITS OF FUNDING THE ADMINISTRATIVE CONFERENCE
OF THE UNITED STATES

Funding ACUS requires a relatively small investment but has the promise of big returns. I echo what this Subcommittee heard in the 108th Congress from Justices Scalia and Breyer, among others, about the unique role that ACUS has played in the past by serving as a remarkably productive and bipartisan "think tank" for administrative law reform. I agree with the consensus view that at past funding levels, and at funding levels being considered by the 109th Congress, ACUS was and will continue to be a bargain. Its key strength is in bringing together academics, experienced practitioners, and agency officials—people of great distinction from both the public and private sectors—to think carefully and systematically about sensible good government reform. As Justice Scalia only half-jokingly pointed out, many of these people charge very high billable rates; Congress gets their help for free.

As I argued above, and as this Subcommittee well knows, there is an obvious need for empirical study of the administrative process, and ACUS is the institution best situated to generate and sponsor high quality research. The need for empirical research, particularly in the area of administrative law, is increasingly being recognized. In July 2004, the American University launched the Center for the Study of Rulemaking, which has as its mission examining and improving the processes used by government agencies to develop regulations. The Center has organized two conferences: one on e-rulemaking and another on the state of rulemaking in the federal government. While not devoted solely to empirical research, the Center has encouraged such study. Likewise, the American Association of Law Schools (AALS), a non-profit association of 166 law schools, has set "empirical scholarship" as the theme of its annual meeting in 2006. I am Chairing the Administrative Law Section meeting this year at the AALS and, in line with the overall theme, we are focusing on empirical study of administrative law. But this will be a one-time event.

The shift toward empirical study—what Roscoe Pound described as "law in action"—may be ascendant, but it is neither coordinated nor coherent. While they can partner with ACUS, neither the Center for rulemaking, the AALS, the Administrative Law Section of the American Bar Association (ABA) nor any other body can by itself organize and direct a program of empirical study of administrative law issues. Moreover, as Justice Scalia testified before this Subcommittee last year, agencies view any review by these non-governmental bodies with suspicion. ACUS, on the other hand, is a "government insider," with legislative clout. Justice Scalia described the difference as follows:

I was Chairman of the Ad. Law Section for a year, and there's a big difference between showing up at an agency and saying, "I'm from the American Bar Association, I want to know this, that, and the other," and coming there from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world.

Only ACUS is positioned to sustain these studies over the longer-term, and to shape a coherent research agenda in coordination with Congress.

IV. THE ADMINISTRATIVE CONFERENCE'S AGENDA

This Subcommittee has already identified research questions that it would like to see ACUS pursue, and other witnesses on today's panel will have more to say on that topic. While I would not characterize the administrative state as being in crisis, it is operating with a sixty year old manual—the Administrative Procedure Act—and there are critical areas in need of closer examination and reform. Jeffrey S. Lubbers, in his submissions, has provided a list of issues that require further study, and I am in full agreement with him. I wish only to underscore that I believe that ACUS could be the incubator for the next generation of administrative law research and I would suggest three other research areas on which it might focus.

The first is privatization and contracting out. Private entities increasingly perform what we traditionally view as government functions, including some functions associated with the military, prisons and national security. Private service providers have contractual obligations vis-à-vis the government, but their actions typically fall outside of administrative law protections, process and regulation. How, if at all, should we conceive of these actors in administrative law? Is there a need for administrative law reform to address the issues raised by contracting out? This is a topic of considerable relevance at the moment, and it will only become more important over time.

The second area of research relates to the impact of the Small Business Regulatory Enforcement Fairness Act (SBREFA). In 1980, Congress enacted the Regulatory Flexibility Act (RFA), mandating that federal agencies consider the impact of regulatory proposals on small entities. The RFA was strengthened in 1996 by the enactment of the SBREFA. In the context of rulemaking, SBREFA grants small businesses the opportunity to see rules at a very early stage, before they are even proposed. While this seems to be a fair accommodation in principle, there is at least some anecdotal evidence that the process may not be working well and may even be abused. While small businesses may ostensibly be fronting the early review of rules, big business may in fact be driving the process behind the scenes. Next year is the tenth anniversary of SBREFA and it is an appropriate time to examine its effectiveness. ACUS could inquire into SBREFA's implementation and determine whether Congress' intended purpose of assisting smaller entities is, in fact, being met.

Finally, the third area where ACUS could direct further research is the reconciliation of the principles of administrative law with the imperatives of national security. Like other agencies, the various agencies within the Department of Homeland Security (DHS) undertake administrative processes and promulgate rules. However, unlike the other agencies, the DHS has not, perhaps understandably, been subject to commensurate scrutiny or cost-benefit analysis. How are the administrative law principles of transparency and accountability, fairness and effectiveness, to be reconciled with national security interests? Can the Administrative Procedure Act, which is now 60 years old, deal with contemporary matters of national security? These are not easy questions to answer but ACUS could provide a forum for their consideration.

These are among the next generation of issues that ACUS might profitably explore, along with coordinating empirical study of how well the administrative state currently performs its functions. A small financial investment in ACUS could lead to significant cost savings down the road by directing Congress to high priority issues that are most in need of reform, illuminating opportunities where Congress can get the biggest bang for its proverbial buck, and directing Congress away from reform measures that may be unnecessary.

This concludes my remarks. I would be happy to take any questions that you might have.

Mr. CANNON. Thank you. I just want you all to know that I've made all these arguments about funding ACUS, and I think we're making progress there. We'll be submitting written questions that I think will take the bulk of what I would otherwise do. I'd like to

take just a few moments and talk about where I'd like to see us go.

You know, the reason we—the reason the only program, or the only program that was actually defunded was ACUS is because people didn't understand it. They didn't share our heartbeat over what it does. And so we are spending some time trying to raise the level of interest in that.

And it was a bipartisan elimination. I mean, nobody knew much about what it did except those people who really understood, and they were not persuasive enough.

And so one of the things that I hope, as we proceed in this project, as I mentioned earlier, that we have, is we try and reach out to other interest groups. And there are a lot of people out there who care a lot about it if they thought there was a way to make some progress. And so I think it's our duty, as part of the project, to help look at those groups out there and draw them in. You do that by contacting them and by sending them an e-mail with a link and having them pop the link and then having a large corporation task a staff attorney or someone to follow the progress.

And most corporations are spending a great deal of money on these issues. And as you tap into them and tap into the interest groups like the small business groups and the Chamber of Commerce and others, you end up with the ability to reach out and actually get people engaged in the process. And that means the process will be better, but it also means that we may actually be able to get something done.

And so, I would, since we are all going to be working together on this over a long period of time, if I might suggest, you have WIKIs and blogs, you have Web sites and e-mails, and we need to be using sort of these tools that are out there to promote what we are doing. And, in fact, we need to do something, as you said, Ms. Freeman, about changing the name, because APA puts you to sleep if you could remember what it stands for. But something like, "The Government power and you"—that does touch people and it especially touches people who have deep pockets and who care about this stuff, but who have grown inured to the enormity of what's happening to them partly because the issues have been partisan.

If you're talking about environmental issues, you have people who are pro and con before the issue is on the table. And so you can't say what is the process that leads us to an appropriate conclusion. And there are some people who will actually say that they specifically view the world that way. They don't want it to be touched because walking on public lands or stopping categorical exclusions for drilling, those things are good, regardless of the cost and the outcome in a world where technology has changed.

We just had over the weekend a news report that the local gas company has been awarded a 20 percent increase in its costs and what people pay. And they met with me the day before that happened and said it was going to be 30 percent. So you—now you have a bunch of guys say 20 percent, how do we do it on 20 percent? And what they have to do is come up with more oil and gas.

They have several oil wells that have been completed, but not ready to produce because they are waiting for a signature by a bureaucrat in a system. And at the same time they believe they

should get categorical exclusions which will allow them to drill enough wells between now and next November that prices could come down by 30 percent in November. And we are doing that in a context of people arguing at a level that is absolutely unrelated to either the production of more gas and, therefore, the lowering of costs or to the effectiveness of drilling when the technology is so radically different that we are not regulating the same thing that we produce the rules for.

So this is a remarkably important time, and we are going to produce more oil and gas. The question is, do we do it thoughtfully? And what we do as a group here is likely to be a significant portion of that.

So I am going to turn the time over to my Ranking Member in a moment, but I just want to thank you all for being here and tell you that this, I think, is about as important a thing as can be done in Government because we can regulate much more efficiently. We can accomplish our objectives without the kind of costs that we are imposing, and human beings and other species that share our world can enjoy it to a much better degree if we are faithful and articulate about what our goals are and how we achieve them than if we just live with an old structure that is in many ways probably not serving us very well.

So I yield back my time. And Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I couldn't help but have my mind wonder at one point during this exciting testimony and your exciting response to the testimony, that a new stenographer came in the middle and she's probably wondering what in the world is a WIKI. You ought to at least try to explain that to her so she can get it in the record. I mean, there was a different reporter here.

Mr. CANNON. W-I-K-I. And Google it, G-O-O-G-L-E. I am sure you know what that is.

Mr. WATT. Don't make it worse.

Mr. CANNON. It'll be great.

Mr. WATT. She was having enough trouble following your Utah accent without all these extraneous words.

Let me start by asking a global question, and then I want to just go down and ask each one of you a question or two that got sparked by your exciting testimony.

Global question: I take it that all of you would agree that this project in which you all are engaged is not a satisfactory substitute for ACUS.

Ms. FREEMAN. As somebody conducting one of the few studies ongoing, let me say, absolutely not. As much as I appreciate the enormous help of the Congressional Research Service and their tremendous ability to help me do this, the truth is, it is very ad hoc. It depends on what a few people are interested in. This is not a comprehensive, well-thought-out exercise by those of us who are picking it up on the go. We need a body to say, here are the priorities.

Mr. WATT. I thought that would be the—I guess that's kind of the uniform response of all of the witnesses.

Mr. LUBBERS. I think the results of the project could provide some good raw data and empirical information that an ACUS could use.

Mr. WATT. I have got a question, a specific question, about that that I'll come back to in a little bit. In light of your response, I think I will take a more frontal assault on the Contract with America that I took—

Mr. CANNON. It preceded me.

Mr. WATT. That, I took a gentle swipe at in my opening statement.

I think, actually, doing away with ACUS is probably the most dramatic demonstration that the Contract was political, rather than practical. I mean, I just can't think of a more dramatic example of it, so I'll let that go.

All right, I'm going on to my list of questions, and I'll just go down the questions, and maybe if you've got a thought or two about these questions that you want to do quickly, for each one of you—but it might be helpful to have you be more thoughtful and address these questions maybe as a follow-up to today's hearing because some of them are kind of more long term.

Mr. Rosenberg, the question I had of you is, how systematic is the outreach in the project? Has the project itself become more of an inside game for inside players?

In my role as Chair of the Congressional Black Caucus, one of the things I'm always concerned about is whether there is systematic or any effort to reach out to historically black colleges and universities, for example, to do any of these research projects. It is refreshing to see one female here on the panel, but I'm always wondering whether there is any diversity going on in any of this research or whether it is all an inside game. That was my question to Mr. Rosenberg.

Mr. Mihm, you listed a series of things that you refer to as areas in which congressional action may be required—weaknesses, transparency, technology, impact. I might suggest that some more specific examples of that, of those areas, might be worthwhile to give us a context.

Maybe that's included in your testimony, your written testimony; maybe it's not. As the Chairman said, one of the reasons you all went on and on and on beyond the 5 minutes was because probably neither one of us has read, had the opportunity to read your testimony.

Mr. Lubbers, a more concise statement of how ACUS has been missed and in what areas. You got to that issue, kind of indirectly by listing a bunch of things that the new ACUS might want to focus on, but there are probably some very dramatic examples that could be pointed to within the last 10 years of mistakes or things that would not have happened had ACUS been in existence, or possibly would not have happened had ACUS not been—it seems to me that that would be a good laundry list of things.

I'm trying to build a case for ACUS. I forgot to give you my mantra at the outset, ACUS ASAP. What about that? You like that?

Mr. CANNON. We're going to have to act like Senators and then figure out something that has meaning for that acronym.

Mr. WATT. ACUS ASAP. That was kind of my overall mantra. I forgot to give it to you at the beginning. Okay, I'm almost through.

I absolutely agree with Professor Freeman that we don't have a clue of whether our Federal Government agencies and/or the rules and regulations they promulgate are being effective or not, or how they could be improved. And I want to second that emotion.

I am especially interested in some of the things that you mentioned about the next generation of ACUS privatization, and contracting out is a major, major concern of ours when we start contracting out fighting a war. And there is some excellent research out there about how much of the Iraq war is being contracted out to private contractors, security providers, the whole effort in Iraq which—none of which is subject or little of which—is subject to any kind of governmental oversight or administrative oversight or rules or regulations. And then when some of these private contractors get captured or taken as prisoners, we don't even know whether we have the responsibility to send the military in to rescue them or whether that is a private obligation.

Even down to that level, when we start contracting out the interrogation of prisoners—this has been a major issue of ours domestically for years. When it comes to privatization of prisons, whether the private contractors are subject to the same set of responsibilities that the Government was subject to is a major issue, and I hope you'll elaborate on that.

And then, of course, the issue that I raised in my opening statement, of reconciling these imperatives of privacy and transparency with national security is a major issue that I think we're just missing the boat on without ACUS doing systematic research. Not that the episodic research that you all are doing under the project is not good, but this needs to be systematic; and I want to join the Chairman of the Subcommittee in saying, it may not be exciting, but it is absolutely critically necessary.

Might not be politically something that people want to spend money on, but when we start—what is it my mama used to say about saving, spending a little bit now to save more, penny wise and pound foolish, I think was the phrase she used. It is a dramatic demonstration that a lot of these suggestions that were implemented in the aftermath of the Contract with America have been just penny wise and pound foolish, in my opinion.

So I won't get off on that. I didn't mean to politicize it.

Mr. CANNON. Would the gentleman yield?

Mr. WATT. I'm going to yield back.

Mr. CANNON. Well, don't yield back.

Mr. WATT. Sure, I yield.

Mr. CANNON. You've asked several questions of the individuals. Can I just add another question to that? And probably, Professor Lubbers, you are best equipped, but others may want to comment.

Is it possible for ACUS to operate with private funding? I am just thinking, due to the legislation, it's a Government agency almost, or it's a sort of private thing. I don't think it's a not-for-profit, but there are many agency groups out there, I think, who would like to see it operate, and I don't know that we're going to be able to do much this year.

Mr. WATT. I've got an idea for you.

Mr. CANNON. Yield back.

Mr. WATT. I've got an idea for you. It'll cut down on regulations if you just have each agency's budget assessed when they do a regulation or a rule to fund ACUS.

Mr. CANNON. As a Republican, I agree with that.

Mr. WATT. Get the money out of the various agencies.

Mr. CANNON. I get the sense you're trying to revive a new Contract with America from the Republican point of view. I got elected during the period of reaction to the Contract with America. I was only one of two Republicans who beat incumbent Democrats, whereas I think we lost eight or—

Mr. WATT. Not enough.

Mr. CANNON. Thank heavens.

Anyway, I yield back to you; and I think you have asked your questions.

Mr. WATT. If there are any quick responses to any of the things I have raised, but I, I mean, maybe some more thoughtful, longer-term written responses would be just as well. So go right ahead if you all want to comment.

Mr. ROSENBERG. My wife last night asked me what in the world I was doing working so late, and I explained to her, you know, what we were doing, and about ACUS and its reauthorization with no funds. She looked at me and said why didn't they do the Lance Armstrong solution. There must be enough wonks out there who will buy a bracelet, red, white and blue, you know, for a buck each. Maybe there are three million of them out there, we can get it going into next term.

With regard to your question—

Mr. WATT. Is this a policy wonks bracelet? Is that what you're advocating for?

Mr. ROSENBERG. Yes. A policy wonks bracelet. There should be three million of them out there for at least 1 year's work.

These are just preliminary thoughts. What is the selection process? It isn't systematic. We are on the team and are familiar with various administrative law issues, administrative practice issues; and the way we know them is reading other—what people have done, things that have been published by people wherever they are.

One of the things that I was hoping is that this hearing would get some notice out there in the industry, where the wonks would say, I have an idea, I'm willing to do that, I have the resources, or whatever it may be, and would come to us. We're trying to find people in various areas and encourage them.

The difficulty, as Professor Freeman has noted, is that whatever the university, graduate school, law school, whatever it is, unless there is some funding, they're not going to be able to do it. It takes time to do some of these things.

Not all these projects that we're looking at by the way, are mega studies; some of them are mini studies. One of them involves consent decrees. Your Committee is dealing with a big, broad issue on consent decrees. But one thing it doesn't deal with is a problem that—or at least it's an anecdotal thing that I have come across—is that there's been a trend in the last 5 to 7 years of agencies whose rules are being challenged, are entering into consent decrees about those rules and changing the substantive thrusts of those rules. And under the law today, the only way those rules can then

be changed is by Congress passing a law. It's set in stone, and it is undermining public participation.

Now, that is a mini study. We want to—what I'm trying to do is get people who have written about consent decrees in this area to look at them very carefully and say, is this a real problem, is this a trend in the way the administrative agencies are evading public participation and being able to change the rules themselves? And once that is done, maybe there can be a solution with regard to—well, H.R. 1229, the Federal Consent Decree Fairness Act, tries to do it by limiting the duration of any consent decree. I don't think that will particularly work with this, but that would be one part of the solution.

So they have a mini thing. And what you do is, you try to find somebody out there who has written about consent decrees and knows about this process and gets it, wherever they are, you know, whatever it is. We will try to make this as diverse as possible, but we have—it's difficult enough finding people like Jody Freeman, you know, to do this kind of thing.

Mr. WATT. Are you all funding—who's funding even the basic part of this? Are there grants?

Ms. FREEMAN. Harvard Law School.

Mr. WATT. Harvard Law School has taken your project completely. So you've got to go ask somebody to do something for free.

Mr. ROSENBERG. Yes. But there is a partial funding of this public participation study at Texas A&M. It's coming from CRS, which has links with about four or five graduate schools, universities, where they have, where—this is a unique funding thing. Most of them are to help CRS do various studies. This is the first one in which we are aiding a Committee and funding, you know, the eight graduate students, you know, to do this massive study of—

Mr. WATT. But think about what we're saying here. That's almost guaranteeing a lack of diversity because the people who are less—the institutions that are least likely to be able to pick up that kind of economic burden are the ones that are just not going to. I mean, an HBCU is not going to be able to do that. Harvard can; a small university can't. A big university may be able to, if, you know, so you're almost guaranteeing a lack of diversity through this project, I think.

Anyway—

Ms. FREEMAN. And, Mr. Watt, the problem's even worse because it is very unstable and unreliable, so even if you can pick up some funding for a little while, it gets cut off when you're mid-project.

Mr. MIHM. Mr. Watt, in the question that you directed to me, I'm going to take you up on your kind offer to provide a more complete and perhaps thoughtful answer for the record. But at least three things right off the top in terms of statutory changes that Congress may want to consider.

One, as I mentioned earlier, was revisiting the "significant economic impact on a substantial number of small entities" and providing—this isn't a regulatory flexibility act, providing either some additional guidance to agencies on what that means, or more likely, I would think, requiring some consistent guidance that be provided on that so that we can get comparability across agencies; or when

it's not comparable, make sure that it's done for known reasons, rather than just kind of idiosyncratic reasons.

The second is that I think that we've published in the past that we think that Congress ought to revisit the Inflation Adjustment Act which allows agencies to increase their civil penalties to capture inflation. There've been problems with that both in kind of the technical aspects, some technical aspects of that, as well again as the need for some cross-cutting guidance across Government. We found that as a result of that lack of guidance that there was some inconsistency in how agencies work.

Mr. WATT. Are they required to increase them? Or some of them are doing it and some of them are not?

Mr. MIHM. They are required, and some are doing it and some are not.

Mr. WATT. But not consistently in the way they do it, is what you are saying?

Mr. MIHM. Right. Yes, sir.

And then the third and perhaps this is actually building on an ACUS recommendation to go back and look at APA, and in particular with, you know—APA, as you know, allows for good cause an agency not to have a notice of proposed rulemaking. That good-cause definition has been expanded and stretched and is perhaps at the screaming point in some places.

Some clarified guidance on that or expectations from Congress, I think would also be helpful. But again, we will provide a more complete list for you.

Mr. LUBBERS. Mr. Watt, it is a little hard to come up with dramatic examples of things that might not have happened if ACUS were there. It's a little bit like proving a negative. And ACUS did not have any power, per se. It was a recommendatory agency. But let me try to give you a few thoughts that occurred to me.

For example, the Department of Homeland Security, when that was created, a lot of agencies were brought together and there were some organizational issues that I think could have benefited from ACUS's consideration. Don't forget, ACUS was a large body of experts who were serving as volunteers, and it brought together people from all sides of the political spectrum. So I think one benefit of ACUS was that it reduced the partisanship that we see in Washington these days. So you had public interest groups from the left and the right talking to each other and Government people talking to private lawyers about some of these problems.

Another issue that was sort of partisan was the midnight regulation issue. When the Clinton administration went out and the Bush administration came in, there were lots of crises about regulations that were issued at the end of the Administration and then withdrawn or delayed by the Bush administration. I think that is an issue that the Administrative Conference could have worked on.

All of the issues regarding electronic rulemaking that I have mentioned I think would have benefited from scholarship and a coordinated set of studies. The Administrative Law Judge hiring program was frozen for 6 years at the Office of Personnel Management. Agencies could not hire new ALJs from the register of ALJs because of litigation over controversy concerning the Veterans Pref-

erence Act, and I think the Administrative Conference could have helped to solve that problem a lot earlier than 6 years.

The asbestos compensation issue, which I know Chairman Cannon is very concerned about and this Committee is concerned about, is something that I think could have benefited from Administrative Conference review. Maybe an administrative forum could have been developed to help resolve that issue.

Sarbanes-Oxley is another issue that receives a lot of concern. And I think that law was necessary because of some failings of self-regulatory organizations in the securities and accounting area. So that is another thing I think we could have worked on.

Waivers and exceptions, we have seen that with respect to Katrina. People didn't know whether or how waivers and exceptions should be granted. I think that was on our list back in 1995, and I think we would have gotten around to that before 2005. So those are some issues.

Now, I just—I want to also respond to Chairman Cannon's question about private funding. The Administrative Conference statute, of course, is very broad and it does permit the agency to accept private gifts, private donations, volunteer services, dollar-a-year people, and anybody who wants to work, agency transfers of funds.

ACUS has a very flexible statute, and it would permit all these sorts of funding—sources of funding to be used at ACUS. Whether you could come up with a completely private analog of ACUS that would be as effective, I have some doubts.

And let me just mention one other thing while I have the microphone which is, I'm working on an advisory committee, National Academy of Sciences official advisory committee now, which is concerning one slice of the Social Security program. And this is the part of the program that has to do with beneficiaries who cannot handle the benefits. Because of their disability, or they're drug addicts or something like that, they have to have a representative payee to get these checks. And not surprisingly, there are some abuses in this area.

So Congress has funded the Social Security Administration to then fund the National Academy of Sciences to study this issue. And this study, alone, I think, was funded at an \$8 million level. And our Committee just received bids from Beltway organizations to do a nationwide survey of about 4,000 representatives and beneficiaries; and that's going to be, I think, about a \$5 million study. So that's just one slice of one obviously important program that's being funded for \$8 million. And we're talking about a \$3 million budget for the Administrative Conference.

Ms. FREEMAN. I just have a couple of brief remarks in response to the questions and concerns.

First, these very potentially politically contentious issues around contracting out, privatization, and harmonizing national security and administrative law procedures, the great value ACUS can aid here is obviously not solving this problem, not making the hard choices. That's for Congress to make, but steering a course through it by at least beginning to explain what kinds of contracting are not so problematic, what kinds of contracting are more problematic, what issues get raised, what rules apply.

You know, procurement law. There is an elaborate set of rules and regulations because of procurement.

But then there is an entirely different arena of contracting where almost nothing governs. And it's that kind of explaining what's going on, dissecting what the issues are, proposing potential solutions that can be so useful when delivered to Congress, and you can decide what you wish to do. But that function is being lost here.

And I think, too, with the—the same thing with the contentious dimensions of the national security administrative law conflict here, the question is, what are the options and what are the perceived benefits, what are the perceived costs, and how ought we to think about it? That's a very important function that you want to put in the hands of a body that has this great reputation for being quite bipartisan and quite professional.

And the final thing I want to mention that goes back to the mention of consent decrees and the problems of what I would call back-door rulemaking, whenever you tighten up discretion in one area, the funny thing with administrative agencies is it pops out somewhere else. And there is a relationship between additional oversight mechanisms from both Congress and the executive and the great search within agencies for areas where they can operate more freely.

So it's something ACUS might look at; that is, the relationship between adding more analytic requirements and agencies feeling the need to go elsewhere, that is, operate through consent decrees, use exceptions that they can drive a truck through. These are related. And ACUS can look at that in a more comprehensive way than somebody who does a piecemeal study, part by part.

And the very last thing, the problem, the PR problem with administrative law, this is a failure—I hate to admit this—of law schools. It's a failure of policy schools, it's a failure of public administration schools, because we have not developed a robust capacity to talk about how Government's working.

We talk about Congress plenty and we talk about judges a lot. But we do not focus on the heart and soul of the Federal Government, and that is the rulemaking and adjudicatory processes. And ACUS can be a spark to reignite interest in this important topic.

Mr. WATT. Mr. Chairman, I've gone way over my time. I'll just close by saying, ACUS ASAP. Yield back.

Mr. CANNON. And that "P" probably needs to stand for private funding or some other source of funding, because we need to talk about it. Thank you very much, Mr. Watt.

And we want to thank the panel. It is very insightful. We've, I think, learned a lot here today. I have. And we look forward to working with you over a long term on this, and maybe we can come up with some ways of actually getting people to realize that 10 percent of the economy is a lot more than whatever judges do or that these elections for Congress aren't really very important in that context either.

Thank you a lot. We appreciate it. And see you soon.

[Whereupon, at 11:32 a.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

RESPONSES TO ADDITIONAL QUESTIONS FROM MORTON ROSENBERG, ESQUIRE, SPECIALIST IN AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS

Responses to Questions from Chairman Cannon

- 1. If you could personally address the Congressional appropriators who have jurisdiction over the Administrative Conference of the United States (ACUS), what would be your principal and most persuasive arguments for funding ACUS?**

Funding to make ACUS operational in the near future would be opportune and beneficial. Current congressional scrutiny of the Department of Homeland Security is (DHS) preparation for and response to Hurricane Katrina has revealed fundamental flaws and deficiencies in the organizational structure and decisional mechanisms of the Department with respect to emergency management. The initial hasty mingling of 22 existing, often disparate agencies with overlapping missions and conflicting administrative decisional processes and cultures assumed that a lengthy period of adjustment, integration and stabilization would be required before an efficient and reliably functioning bureaucratic mechanism became a reality. The Katrina catastrophe and growing national security concerns flowing from the exposed Katrina failures have inspired calls for immediate remedial action. Quick legislative fixes can be anticipated, but long-term examination of the bureaucratic structural and decisional problems of DHS are required.

ACUS' 28 history of pragmatic, cost-effective and successful recommendation commends its revival. A reactivated operational ACUS could be tasked, for example, with reviewing, assessing and making recommendations with respect to FEMA's role, where and how it should play that role, and the authorities it needs to fulfill that role. It could also study and help rationalize the administrative process of the 22 agencies transferred to DHS. Each of those agencies had its own special organizational rules and rules of practice and procedure. Additionally, many of the agencies transferred have a number of different types of adjudicative responsibilities. These include such

diverse entities as the Coast Guard and APHIS which conduct formal-on-the record adjudications and have need for ALJ'S, and formal rules of practice; the Transportation Security Administration and the Customs Service, which have a large number of adjudications but do not use ALJs, and the Immigration and Naturalization Service units transferred, which also perform discrete adjudicatory functions. The statute is silent as to whether, and to what extent, these adjudicatory programs should be combined and careful decisions about staffing and procedures are still required. Similarly, all the agencies transferred have their own statutory and administrative requirements for rulemaking that likely will have to be integrated. Also, the legislation gives broad authority to establish flexible personnel policies. Further, provisions of the DHS Act eliminated the public's right of access under the Freedom of Information Act and other information access laws to "critical infrastructure information" voluntarily submitted to DHS. The process of integration and implementation of the various parts of the legislation goes on and is likely to need administrative fine tuning for some time to come. ACUS has a clear role to play here.

A reactivated ACUS could be utilized to facilitate the process of implementation of the restructuring and reorganization of the bureaucracy for national security purposes. ACUS could serve to identify measures that might slow down the administrative decisional process, thereby rendering the agency less efficient in securing national security goals, and also to assist in carefully evaluating and designing security mechanisms and procedures that can minimize the number and degree of necessary limitations on public access to information and public participation in decisionmaking activities that affect the public, and minimize infringement on civil liberties and the functioning of a free market.

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

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

ACUS' past accomplishments in providing non-partisan, non-biased, comprehensive, and practical assessments and guidance with respect to a wide range of agency processes, procedures, and practices is well documented. During the hearings considering ACUS' reauthorization, C.

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

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

In addition, ACUS produced numerous reports and recommendations that may be seen as directly or indirectly related on issues pertinent to current national security, civil liberties, information security, organizational, personnel, and contracting issues that often had government-wide scope and significance.

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

All observers, both before and after the demise of ACUS in 1995, have acknowledged that the Conference was a cost-effective operation. In its last year, it received an appropriation of \$1.8 million. But all have agreed that it was an entity that throughout its existence paid for itself many times over through cost-saving recommended administrative innovations, legislation and publications. At the heart of this cost saving success was the ability of ACUS to attract outside experts in the private sector to provide hundreds of hours of volunteer work without cost and the most prestigious academics for the most modest stipends. The Conference was able to "leverage" its small appropriation to attract considerable in-kind contributions for its projects. In turn, the resulting recommendations from those studies and staff studies often resulted in huge monetary savings for agencies, private parties, and practitioners. Some examples include: In 1994, the FDIC estimated that its pilot mediation program, modeled after an ACUS recommendation, had already saved it \$9 million. In 1996, the Labor Department, using mediation techniques suggested by the

Conference to resolve labor and workplace standard disputes, estimated a reduction in time spent resolving cases of 7 to 11 percent. The President of the American Arbitration Association testified that ACUS's encouragement of administrative dispute resolution had saved "millions of dollars" that would otherwise have been spent for litigation costs. ACUS's reputation for the effectiveness and the quality of its work product resulted in contributions in excess of \$320,000 from private foundations, corporations, law firms, and law schools over the four-year period prior to its defunding. Finally, in his testimony before the Subcommittee Justice Scalia commented, when asked about the cost-effectiveness of the Conference, that it was difficult to quantify in monetary terms the benefits of providing fair, effective, and efficient administrative justice processes and procedures

2. Why do we need an entity like ACUS as opposed to a commission?

ACUS was, and is contemplated to be, an ongoing, independent governmental study entity whose purpose is to provide a resource for all departments and agencies to assist them in finding pragmatic and cost-effective solutions to administrative process and procedure problems. It is not intended to address one grand problem and fold its tent, such as the Warren or 9/11 Commissions. As indicated in our response to question 1, the decade since ACUS demise in 1995 has seen a dramatic change in the nature and complexity of administrative process issues simply because of changes in technology and the government's changes in focus on agency missions, among other factors. Administrative process is not static, it needs to be flexible and have the ability to evolve to meet new challenges. The purpose of establishing an entity like ACUS is to develop and maintain an administrative expertise for the long run that allows it address both agency specific problems and government-wide issues.

- 3. In your testimony, you discuss the informal study that CRS conducted with regard to judicial review of agency rulemaking, which estimated a 50% reversal rate. Why should we in Congress care about this?**

Judicial review of agency rulemaking provides a vital democratic check on administrative lawmaking. Of necessity, Congress delegates such lawmaking authority to administrative agencies to implement its less than specific policy goals. In the absence of an effective congressional review mechanism, Congress has placed reliance on the courts to assure that agency exercises at this delegated lawmaking authority is being carried in the manner it intended. A high rate of successful challenges of rules in the courts would be an important signal that something may be going awry. It may be that agencies are not doing their jobs in developing and supporting the rules and the courts are calling them to task. Or it could be that, as some commentators have charged, that reviewing courts are substituting their own judgement as to what is good or wise policy for that of the agency decisionmakers. Or perhaps the fault lies, as some entities contend, with Congress in either the lack of clarity of its legislative directions in its inability to effectively oversee the agency rulemaking process. A comprehensive study of judicial decisionmaking in this area can clarify if there really is such a problem and, if so, where the "fault" lies. In the end, if there is a problem, the solution is likely to lie in Congress' hands, either to establish a more confined standard of review, establish a more effective congressional or presidential review mechanism, provide more clarity in its legislative decisions, or some combination of the foregoing solutions.

4. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?

A close examination of the historic roles and missions of ACUS and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) makes it quite clear that their tasks and functions are totally dissimilar.

While ACUS and OIRA could be viewed as operating within the same sphere to the extent that they are both concerned with regulatory matters, it would appear that there are substantial, concrete differences between their respective structures and missions that in turn give rise to a fundamental difference between the nature and manner of their respective assessments of agency performance in the administrative process.

Most importantly, ACUS is an independent entity, whereas OIRA is responsible for effectuating a given administration's regulatory agenda. As touched upon above, ACUS was widely regarded as an independent, objective entity that was tasked with the unique role of assessing all facets of administrative law and practice with the single goal of improving the regulatory process. As stated by one commentator, "[t]his level of bipartisanship contributed greatly to the ability of the Administrative Conference to reach consensus on issues for their merits rather than because of any particular ideology or party agenda; this in turn contributed to the credibility of the Conference's work and the willingness of academics and private attorneys to volunteer their time to the Administrative Conference." Conversely, OIRA has none of the indicia of independence or objectivity that characterized ACUS, nor does it claim such a character. As an arm of OMB, situated within the Executive Office of the President, OIRA is quintessentially executive in nature, with a predominant mission to advance the policy goals of the President. As such while OIRA might be characterized as serving a coordinating function in the administrative context, it naturally follows

that this function is exercised under the influence of the President. Indeed, the activities of OIRA during the Reagan, Clinton, and George W. Bush Administrations, as touched upon above, would appear to establish that this coordinating function has been employed to further the regulatory agenda of those administrations.

The distinction between ACUS as an independent entity and OIRA as an executive agency may also be seen as having practical effects that give further credence to the ability of ACUS to serve uniquely in the consideration of agency specific issues. For instance, Loren A. Smith, currently serving as a Senior Judge on the United States Court of Federal Claims and a former Chairman of ACUS, has stated:

[T]he very fact of ACUS' smallness and its lack of investigative powers and budget sanctions, made agencies willing to come to ACUS and listen to ACUS. OMB or the General Accounting Office were threatening. The General Services Administration and the Office of Personnel Management were often perceived as the enemy. ACUS on the other hand, was seen as the kind counselor, one who gave useful, and generally palatable remedies. It thus had the confidence of most of the Executive branch and the Congress. And a place like this is not to be valued lightly.

Apart from concerns regarding independence and objectivity, it has been suggested that while the staff of OIRA possess a significant degree of expertise with regard to administrative issues, there are nonetheless fundamental structural issues that would inhibit OIRA's efficacy in this context, such as the "multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system." Justice Breyer echoed this sentiment

in his testimony discussing the mission of ACUS, stating “I have not found other institutions readily available to perform this task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons....The Office of Management and Budget does not normally concern itself with general procedural proposals.”

Also, the broad scope of ACUS’ mission, coupled with its independence and expertise could be seen as making it the appropriate entity to analyze the efficacy of the functions of OMB itself. In his testimony before the Subcommittee, C. Boyden Gray identified OMB activities as being ripe for study by ACUS, suggesting “empirical research on the innovation of the OMB ‘prompt’ letter, matters relating to data quality and peer review issues,” as particularly suitable topics for inquiry.

These issues of independence and objectivity, the widely recognized expertise and bipartisan nature of ACUS, and the broad scope of the work it conducted in all facets of the administrative process could thus be taken to belie the notion that the activities of a reconstituted ACUS would be duplicative of the functions of OMB or its Office of Information and Regulatory Affairs.

It may be noted that the former Administrator of OIRA, John Graham, has publically agreed that the nature of the tasks and functions of ACUS and OIRA are totally dissimilar.

5. What safeguards will be in place to ensure that the studies performed as part of the Administrative Law, Process and Procedure Project (Administrative Law Project), which you and your colleagues at the Congressional Research Service are overseeing, will be objective analyses supported by empirical evidence?

The quality and reliability of the research products we will be getting will, in the first instance, depend on the researcher we engage for the particular study. It is our intention to

select researchers with an expertise in the subject area as well as prior empirical research experience. In addition, since we intend to hold discussion forums on the findings of the research papers produced, an effective vetting mechanism is built into our program.

6. For the Administrative Law Project to be deemed a valuable or meaningful endeavor, what would it need to accomplish?

One ultimate judgement of the success of this endeavor will rest on the number of administrative process issues or problems identified and whether they are successfully addressed legislatively or resolved voluntarily by affected agencies through further analyses and recommendations of ACUS.

7. Please explain how ACUS, if it was in existence, could have ameliorated some of the problematic aspects of the response to Hurricane Katrina by the Department of Homeland Security.

A response to this query is entirely speculative. However, when the legislation passed, FEMA was not brought over as a "distinct entity" whose function and responsibilities could not be changed, such as the Coast Guard and the Transportation Safety Administration. As we understand it, its emergency preparation and much of its grant funding authority was placed elsewhere in DHS and it was left with its response functions. ACUS could have been asked whether the severance of its preparation and funding functions from its response functions weakened its potential operational effectiveness; whether lines of authority and communication within DHS and with state and local responders allowed for effective

responses; and whether maintaining FEMA's independent outside of DHS would have better maintained its prior level of effectiveness.

8. Please expound upon the role that ACUS could play in facilitating the implementation and restructuring of the Office of the National Intelligence Director.

See response to question 1.

9. Please provide a brief overview of the Congressional Review Act and an explanation of how it has worked since its enactment.

10. Approximately, how many regulations are promulgated each year that are subject to the Congressional Review Act?

11. How often has Congress, pursuant to the Congressional Review Act, overturned a regulation since the Act's enactment?

12. Why is the Congressional Review Act so rarely used by Congress?

The Congressional Review Act (CRA), codified at 5 U.S.C. 801-808, establishes a mechanism by which Congress, for the first time, can review and disapprove, by means of a partially expedited legislative process, virtually all federal agency rules. The CRA was enacted as part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, 110 Stat. 857-874. The framers of the congressional review provision adopted broadest possible understanding of the term "rule" by incorporating the definition found in Section 551 (4) of the Administrative Procedure Act (APA). The legislative history of the CRA emphasizes that by adoption of the Section 551 (4) definition of rule, the review

process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: "The committee's intent in these subsections is... to include matters that substantially affect the rights or obligations of outside parties. The essential focus of his inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties." The framers of the legislation indicated their awareness of the now widespread practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically, and noted that it was the intent of the legislation to subject such documents to congressional scrutiny:

... The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, "guidelines," and agency policy and procedure manuals. The committees admonish the agencies that the APA's broad definition of "rule" was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.

See joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. E571, E578 (daily ed. April 19, 1996); 142 Cong. Rec. S 3686, 3687 (daily ed. April 18, 1996).

All covered ruled rules, in order to become effective, must be reported to Congress and the Controller General (CG), in order to become effective. If a rule is designated as "major" by the Administrator of the Office of Information and Regulatory Affairs (OIRA), the CG must prepare a report within 15 calendar days of the submission of the agency report. A major

rule may go into effect no earlier than 60 days after its submission. All covered rules are subject to disapproval even if they have gone into effect. Congress has reserved to itself a review period of at least 60 session or legislative days during a session, which is extended to the next session of the Congress if the full 60 days is not available. If a joint resolution of disapproval is enacted into law, the rule is deemed not to have any effect at any time. A rule that does not take effect, or is not continued because of a passage of disapproval resolution, may not be reissued in substantially the same form unless it is specifically authorized by a law enacted subsequent to the disapproval of the original rule. The law spells out in detail an expedited procedure for the Senate, but no special procedure for expedited conduction and processing of joint resolution in the House.

Since the effective date of the CRA in April 1996, the Controller General has submitted reports to Congress on some 600 major rules and has cataloged the submission of almost 40,000 non-major rules. Virtually all the 40,000 non-major rules thus far reported to the CG have been either notice and comment rules or agency documents required to be published in the Federal Register. This likely means that perhaps thousands of covered rules have not been submitted for review. Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously. As of July 2005, 37 joint resolutions of disapproval had been introduced relating to 28 rules. Only one rule, OSHA's ergonomics standard in March 2001, has been disapproved, an action that may prove to be unique to the circumstances of its passage. Two other rules, the FCC's 2003 rule relating to broadcast media ownership, and a 2005 Department of Agriculture relating to the establishment of minimal risk zones for introduction of bovine spongiform encephalopathy (Mad Cow Disease), were disapproved by the Senate, but no action was taken in the House.

In its current form, the efficacy of the CRA review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight appears to some observers to be problematic despite the nullification of OSHA's controversial ergonomics standard in March 2001. In retrospect, it appears that that action was the result of unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule in Congress and by broad coalition of business interests; and encouragement of repeal by the President. On the other hand, several rules have been affected by the presence of the review mechanism, suggesting that the review scheme has had some influence.

Among potential impediments to the law's use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rules is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1966 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. It is persuasively arguable that these potential impediments and uncertainties have contributed to the negligible number of actions taken under the authority of the CRA over the years since its passage.

For a comprehensive overview and discussion of how the review scheme was expected to operate, how it has in fact been utilized, an assessment of the reasons for its limited use, and a review of congressional remedial proposals, see CRS Report No. 30116, "Congressional Review of Agency Rulemaking: An Update and Assessment after Nullification OSHA's Ergonomics Standard."

13. Some have suggested that ACUS be privately funded. What is your response?

ACUS was and will be a governmental entity performing governmental functions. While it would not be inappropriate for it to be authorized to accept gifts and donations many agencies have such authority total private funding would raise potential conflict of interest questions. The legitimacy and acceptability of its reports and recommendations rested upon its reputation for non-partisanship and unbiased work. Private funding is likely to require a perpetual search for future resources that would require the diversion of time and effort and run the risk of appearing to compromise objectivity if the donees have an arguable interest in pending studies.

14. During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?

Agency decisionmaking is not solely concerned with rulemaking and ACUS' work in the past was not exclusively concerned with rulemaking. Adjudication, informal decisional

processes and other agency decisional processes occupied much of ACUS' efforts. It therefore could be argued to be unfair to a few high volume rulemaking agencies to bear the entire ACUS funding burden. Fairer, and arguably more realistic, would be to "tax" all agency's annual budget at the same rate so that 1717 ACUS receives its statutorily authorized appropriation. Such a scheme not only would be a fair allocation of financial burden but might encourage more agencies to come to ACUS for assistance.

Response to Questions from Ranking Member Mel Watt

1. Is the Administrative Law Project a satisfactory substitute for ACUS?

The Administrative Law Project is no substitute for ACUS. It hopefully provide evidence of a need for immediate legislative action by the Committee, or, more likely, the need for further review by a reactivated ACUS.

2. How systematic is outreach of the Administrative Law Project?

Our plan is to find the most qualified, available researchers with expertise in the issue and a track record for empirical studies. The issue areas the Committee has identified are relatively arcane. Moreover time, availability and funding constraints narrow the choices. We have been, and continue to reach out to academics with specialities that reach the issues we seek to cover. Our outreach has included announcements at major academic functions. We intend to ensure diversity by contacting by letters academic institutions that our informal announcements and personal contacts are not likely to reach.

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3. Has the Administrative Law Project become more of an inside game for inside players?

This is not our intention nor is it our expectation.

RESPONSES TO ADDITIONAL QUESTIONS FROM J. CHRISTOPHER MIHM, MANAGING DIRECTOR OF STRATEGIC ISSUES, UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE



December 12, 2005

The Honorable Christopher B. Cannon
Chairman
The Honorable Melvin L. Watt
Ranking Minority Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

On November 21, 2005, you requested that we respond to questions for the official record regarding your Subcommittee's November 1, 2005, hearing on the Administrative Law, Process, and Procedure Project. Our responses are included in this correspondence.

Responses to Questions from Chairman Chris Cannon

1. Please describe the benefits that a reauthorized Administrative Conference of the United States (ACUS) would provide.

We have not done specific work on the subject, but concur with the general consensus expressed by other witnesses before the subcommittee on this issue. The record of its past work shows that ACUS provided a valuable forum to advise the federal government on administrative procedural reform. As others have testified, ACUS was able to draw together legal experts from across the spectrum to study problems affecting federal administrative procedures and to provide expert, non-partisan advice and recommendations on how to improve the efficiency, adequacy, and fairness of those procedures. We would expect a reconstituted ACUS to provide the same benefits.

2. How would a reconstituted ACUS interface with the Government Accountability Office (GAO)?

Our primary client is the Congress, and our work is intended to help Congress make effective policy, funding, and oversight decisions. In doing so, we must maintain our independence from the entities that might be the subject of our work, including ACUS. However, we are committed to maintaining constructive working relationships and continuing communication with other agencies and organizations. Such working relationships and communications may take several forms, as facts and

circumstances warrant, including periodic meetings with other agencies' leadership and executives and specific communications pertaining to planned and ongoing work.¹

Cooperation between ACUS and GAO would also be in accordance with the specific purposes outlined in the legislative reauthorization of ACUS, which include providing suitable arrangements through which federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action.² Given our shared focus on studying problems affecting government operations and processes, we expect that ACUS and GAO would identify ways to complement each other's work in seeking to improve the efficiency of federal administrative procedures, including rulemaking.

3. With respect to the weaknesses of federal rulemaking procedures described in your written testimony, what role would ACUS be able to play in response to those problems?

As we noted in our testimony, ACUS, if funded, could play a valuable role in carrying out the detailed research needed for a reexamination of the federal rulemaking structure and processes. In particular, ACUS could plan and direct empirical research by experts to identify the most significant issues underlying weaknesses in federal rulemaking procedures and generate a range of practical options for addressing those weaknesses. Research by ACUS might also help to identify options regarding the other three major challenges we identified—addressing weaknesses in existing statutory requirements, improving the transparency of the rulemaking process, and adapting to changes associated with increased use of information technology.

4. Based on the four emerging issues cited in your testimony, does it appear that the Administrative Procedure Act may need to be amended in order to better deal with these matters?

Amending the Administrative Procedure Act (APA) could be among the options available to address some of the issues we identified, particularly regarding a reexamination of federal rulemaking structures and processes. For example, in our testimony, we noted that ACUS had recommended potential amendments to APA regarding interim final and direct final rulemaking. Whether other specific amendments to APA might address emerging issues requires further study. In some cases, Congress might need to amend other statutes—for example, to address weaknesses we previously identified in various regulatory reform statutes.

5. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?

¹See, for example, the policies and practices on how GAO interacts with executive branch agencies in GAO, *GAO's Agency Protocols*, GAO-05-35G (Oct. 2004). Also, under the Inspector General Act of 1978, 5 U.S.C. App. 3 §4(c), GAO works with Inspectors General with a view toward avoiding duplication and insuring effective coordination and cooperation.
²Pub. L. 108-401, § 2.

From our perspective, OMB/OIRA generally performs a very different role than ACUS, although OMB/OIRA and ACUS both can contribute to improving federal rulemaking. Though OMB and OIRA sometimes provide general guidance to agencies (as discussed in our response to the next question), they primarily have a transactional focus on reviewing and overseeing individual draft rules and proposed information collections. Further, as we have pointed out in prior reports, OIRA is a relatively small office with responsibility for handling a large volume of such regulatory and paperwork reviews. As such, OIRA is unlikely to be able to spare resources to devote to extensive empirical research on administrative procedure issues. Also, with regard to its oversight of rulemaking, OIRA generally does not cover the independent regulatory agencies. Finally, OMB and OIRA are part of the Executive Office of the President, and the President is their chief client. In contrast, ACUS' role is to focus on empirical research and evaluation regarding administrative procedures, in general, and to provide expert, nonpartisan advice on that topic to all three branches of government. One of the perceived values of ACUS, according to witnesses before this subcommittee, is that its evaluations and recommendations were viewed as independent and nonpartisan, and not reflecting just the view of the current administration.

6. Can OMB or OIRA provide the guidance or direction to federal agencies in order to address these four emerging issues?

OMB or OIRA sometimes provide guidance or direction to federal agencies regarding specific rulemaking issues. For example, as directed by Congress, OMB issued information quality guidelines for agencies.⁵ OMB also recently released a proposed bulletin for agencies outlining "good guidance practices."⁶ Further, as we have noted in prior products, OMB and OIRA have a responsibility under Executive Order 12866 to instruct agencies on such matters.⁷ However, with regard to administrative rulemaking processes and procedures, it has been our experience that OMB and OIRA also have sometimes declined to issue guidance to agencies. For example, OIRA deferred to the rulemaking agencies in response to our recommendations that OIRA issue guidance regarding use of the "good cause" exception under APA and that OIRA encourage agencies to use "best practices" in disclosing changes made to their draft rules.⁸

7. What role can GAO play with respect to the Administrative Law, Process and Procedure Project (Administrative Law Project)?

As in the case of any other work we perform for Congress, we can conduct specific research on request to address issues and questions that are part of the

⁵For the updated final version of the guidelines see *67 Fed. Reg.* 8452 (Feb. 22, 2003).

⁶See *70 Fed. Reg.* 71,866 (Nov. 30, 2005).

⁷Section 2(h) of the Executive Order states "to the extent permitted by law, OMB shall provide guidance to agencies" and that OIRA "is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency."

⁸See GAO, *Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules*, GAO/GGD-98-126 (Washington, D.C.: Aug. 31, 1998), and *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-4929 (Washington, D.C.: Sept. 22, 2003).

Administrative Law Project agenda. In the course of our work for Congress, we can examine the use of federal funds, evaluate federal programs and activities, conduct investigations, and provide information, analyses, options, recommendations, and other assistance. Similar to the work that some academic scholars are currently doing for the project, our contribution would be focused on specific requests and research engagements, rather than a broad, systematic effort.

8. Some have suggested that ACUS be privately funded. What is your response?
- and
9. During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?

Both questions 8 and 9 deal with alternative funding mechanisms for a reconstituted ACUS. We have not done work directly on this question. In general, however, there are a number of issues to consider when deciding on use of a funding mechanism other than appropriations. For example the funding mechanism suggested in question 9 implies that funds would be appropriated to executive branch agencies and then transferred by them to ACUS. Would these funds then be available for use by ACUS without further Congressional action? If ACUS was to be funded privately—as raised in question 8—how would that funding be obtained? What would be the source of the private funding? Would this be like a user fee? On whom would it be imposed? At what level? How would they be determined? Would these funds then be available for obligation by ACUS without further Congressional action? How would the funding mechanism affect Congressional oversight?

The funding structure suggested in question 9 is not identical to but is somewhat similar to the funding structure used for the General Services Administration's Federal Buildings Fund—an assessment imposed on other agencies which are expected to pay it out of their appropriations. The committee might wish to look at that experience as well as consult the Appropriations Committee about how this might work in a time of tight spending constraints.

Responses to Questions from Ranking Member Mel Watt

1. In your testimony, you listed a series of areas where Congressional action may be required, dealing with weaknesses, transparency, technology, and impact. Please suggest some specific examples of these areas.

We identified four general areas on which the subcommittee might consider taking legislative action or sponsor further study. Some specific examples in each of the four areas follow.

Reexamine rulemaking structures and processes—The subcommittee has begun such a reexamination through its current oversight agenda and, specifically, the Administrative Law Project. In addition to the topics already included in that project, our prior work suggests at least two other subjects for reexamination and potential congressional action. First is the effect of changes in the markets and industries

regulated by federal agencies. For example, we stated in our report on 21st century challenges that increased global interdependence and rapid technological advancement in the financial services industry pose significant challenges to U.S. regulatory institutions. Such changes raise questions about whether it is time to modernize the regulatory system and whether the current regulatory framework is appropriately structured.⁷ The second subject is the effect of changes in agency practices on the rulemaking processes established by the APA. In particular, we mentioned in our testimony that agencies appeared to be making increased use of procedures that by-pass notices of proposed rulemaking. Other witnesses at the hearing also commented that the increasing complexity of the rulemaking process (due to additional procedural and analytical requirements) might encourage agencies to avoid public notice and comment procedures by, for example, issuing guidance rather than rules. Such guidance and policy statements have been the subject of judicial challenges as having the effect of rules, and OMB recently issued a proposed “good guidance practices” bulletin to address some concerns about agencies’ documents that might have the effect of rules.

Previously identified weaknesses of existing statutory requirements—Two main examples from our prior work concern weaknesses in the Regulatory Flexibility Act (RFA) and the Federal Civil Penalties Inflation Adjustment Act (Inflation Adjustment Act). With regard to RFA, we previously identified the need for Congress to clarify key terms and definitions, such as “significant economic impact” and “substantial number of small entities,” and/or explicitly charge an entity with the authority and responsibility to do so, if RFA’s promise is to be realized.⁸ With regard to the Inflation Adjustment Act, we found that agencies are unable to fully adjust their civil monetary penalties for inflation under current law.⁹ We suggested that Congress may wish to consider amending the act to (1) require or permit agencies to adjust their penalties for lost inflation; (2) make the calculation and rounding procedures more consistent with changes in inflation; (3) permit agencies with exempt penalties to adjust them for inflation; and (4) give some agency the responsibility to monitor compliance and provide guidance.

Transparency—To prompt further improvements in the transparency of federal rulemaking processes, we noted in our testimony that additional attention could be paid to agencies’ explanations for certifications that certain analytical or procedural requirements do not apply. We have sometimes found it difficult to determine the underlying support or rationale for such certifications and statements.¹⁰ Furthermore, agencies need to provide clear statements and explanations for only some of the requirements, such as when claiming the “good cause” exception from notice and comment requirements under APA. Therefore, we raised the question of whether there should be more demanding requirements for agencies to show the

⁷See GAO, *21st Century Challenges: Reexamining the Base of the Federal Government*, GAO-06-325SP (Washington, D.C.: Feb. 2005).

⁸See GAO, *Regulatory Flexibility Act: Clarification of Key Terms Still Needed*, GAO-02-491Y (Washington, D.C.: Mar. 6, 2002).

⁹See GAO, *Civil Penalties: Agencies Unable to Fully Adjust Penalties for Inflation Under Current Law*, GAO-03-409 (Washington, D.C.: Mar. 14, 2003).

¹⁰See, for example, GAO, *OCC Preemption Rulemaking: Opportunities Existed to Enhance the Consultative Efforts and Better Document the Rulemaking Process*, GAO-06-8 (Washington, D.C.: Oct. 17, 2005).

analyses or more fully explain the rationale behind such certifications and, if so, what form such requirements might take.

Information technology—Along with other witnesses at the November 1 hearing, we pointed out the rapid pace of developments regarding information technology and e-rulemaking. The two examples of specific issues that we highlighted in our testimony as meriting additional study were how information technology could (1) impact public participation in the rulemaking process and (2) be used to improve agencies' ability to analyze public comments. As discussed at the hearing, consideration of the first issue should include both questions of how technology can facilitate and expand opportunities for public participation and also questions of how to ensure participation of all interested parties when some do not have ready electronic access to rulemaking proposals and their supporting materials.

2. Is the Administrative Law Project a satisfactory substitute for ACUS?

We have not studied this issue, but in general it does not appear that the Administrative Law Project can substitute for the long-term, systematic investigation and monitoring of the administrative process that a reconstituted ACUS could provide. Nor was it ever intended to do so. As Morton Rosenberg of the Congressional Research Service pointed out in his testimony, in anticipation of a delay in the operational start-up of ACUS after passage of the reauthorization legislation, the project was intended to accumulate information to help determine whether action on particular issues required immediate legislative action or was best referred to ACUS for further in-depth studies and recommendations. Also, because its current research is dependent on the availability, interest, and resources of individual researchers and institutions, the Administrative Law Project is likely to be more limited in the number and types of research projects that it can carry out, compared to the body of work that ACUS had been able to sponsor in the past and, presumably, would continue to conduct in the future, if funded.

Please contact me at (202) 512-6806 or mihmi@gao.gov if you, other Subcommittee members, or your staffs have additional questions or if we can provide additional help to your work on these issues.



J. Christopher Mihm
Managing Director
Strategic Issues

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RESPONSES TO ADDITIONAL QUESTIONS FROM JEFFREY S. LUBBERS, FELLOW IN LAW AND GOVERNMENT PROGRAM, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

QUESTIONS FOR PROFESSOR JEFFREY LUBBERS
FROM CHAIRMAN CHRIS CANNON

1. Based on your long-experience with the Administrative Conference of the United States (ACUS), could you estimate the savings in taxpayer dollars that the Conference produced over the course of its existence?

Answer:

Although there are no hard data on this point, my own educated guess is that ACUS probably saved, directly or indirectly, hundreds of millions of dollars during its 28 year existence—certainly far more than the \$30-40 million dollars of cumulative appropriations it received over those years.

One reason I say this is that ACUS saved Congress from having to earmark numerous special appropriations for expensive contract research studies in the area of government procedure. Experience has shown that such special individual studies themselves often cost millions of dollars each. The ability of ACUS to undertake studies inexpensively due to its volunteer membership and its ability to attract low-cost academic consultants provided a cost-effective alternative to such earmarks. ACUS also provided no-cost training to agency lawyers and commissioners, and a continuous stream of informal consultations to agency lawyers on procedural matters of concern to their agencies.

Second, there were some ACUS recommendations that directly saved the government millions of dollars. One for example was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*. Enactment of Public Law 100-236 in 1988 was directly based on this recommendation, and it has ever since prevented large number of expensive and costly court battles over which court should hear an appeal.

Other ACUS recommendations have stimulated reforms that have saved the government a great deal of money. The most notable such reform was in the area of "alternative means of dispute resolution," or ADR. ACUS issued over a dozen recommendations in the 1980's and early 1990's that encouraged and facilitated agency use of ADR. While it is hard to quantify these savings, former Acting Chair Sally Katzen's April 21, 1994 testimony before this subcommittee quoted from the President of the American Arbitration Association, who cited "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs." Another set of recommendations, ACUS Recommendations 72-6, and 79-3, concerning the procedures in agency enforcement actions, led to congressional enactment of numerous streamlined civil money penalty adjudication laws that ultimately resulted in a huge increase of penalty collections into the federal treasury.

2. Why should anyone care about the early stage development of proposed rules, which as you know is the subject of Professor West's study?

Answer:

Rulemakings vary significantly in their manner and pace of development, and the events or external interests that “trigger” a rulemaking may be a major factor influencing the way the rulemaking is conducted. Congress, the courts, OMB, the public, and other entities may be instrumental in causing an agency to undertake a rulemaking. Also, because this early “pre-rulemaking” stage of federal agency rulemaking is not regulated by the APA, there are no legal restrictions concerning outside participation in this process.

A recent critical report on an EPA rulemaking that was influenced at an early stage by industry ex parte comments illustrates some of the issues that can arise. See EPA, Office of Inspector General, *Rulemaking on Solvent-Contaminated Industrial Wipes*, Evaluation Report No. 2006-P-00001 (Oct. 4, 2005) at 13, available at www.epa.gov/oig/reports/2006/20051004-2006-P-00001.pdf (finding that the “reusable wipes industry” influenced the EPA rulemaking but this is allowable, although “appearances of favoritism contributed to perceptions of impropriety”).

3. Why has the rulemaking process, at least in certain respects, become “ossified”?

Answer:

The term “ossified” has been applied to the effects caused by the increasing procedural complexity of rulemaking. Beginning around 1970, Congress enacted a variety of specific regulatory statutes that mandated additional rulemaking procedures to supplement or supersede the APA’s provisions. In addition, many administrative agencies significantly modified their rulemaking procedures in response to court-mandated refinements and the increasing complexity and controversial nature of many rulemakings. Succeeding Presidents, beginning with Nixon, have, by executive order, imposed procedural and analytical requirements on rulemaking by executive branch agencies that went beyond procedures required by the APA. Additional “regulatory reform” initiatives enacted during the 104th Congress have also prescribed procedural requirements for rulemaking. The combination of these add-ons to the rulemaking process, without much thinking about how they all fit together, has led numerous commentators to fret over the “ossification” of rulemaking.

4. If you could personally address the Congressional appropriators who have jurisdiction over ACUS, what would be your principal and most persuasive arguments for funding ACUS?

Answer:

(A) ACUS actually produces real cost savings for the federal government, as explained in Answer #1;

(B) ACUS provides a proven consensus-building mechanism (public-private partnership) to address administrative and regulatory controversies in a way that that diminishes, rather than exacerbates, partisanship in Washington;

(C) ACUS provides a continuing monitoring and implementation role for successful government-wide reform initiatives such as ADR, negotiated rulemaking, open government, whistleblower protection, audited self-regulation, agency ombudsmen, the ALJ program, and adjudicatory case management;

(D) ACUS provides a low-cost way to provide “procedural audits” of particular agency programs, such as environmental, health and safety, and other regulatory programs as well as mass adjudication programs such as social security, Medicare, immigration and customs; and

(E) ACUS provides a way to maintain and carry out a cutting-edge research agenda that can benefit all three branches of the federal government.

All this and more for \$3 million a year!

5. In your testimony, you discuss the administrative issues presented by mass adjudication programs. Do you see any role that ACUS could play with respect to asbestos litigation?

Answer:

In 1991, ACUS studied the National Vaccine Compensation program (ACUS Recommendation 91-4), which provided reform suggestions for this type of mass tort program. The federal government has also set up apparently successful compensation programs for other mass tort situations, such as those victimized by the 9/11 disaster and victims of radiation poisoning from atomic testing in the mountain states. The Black Lung Benefits program is a larger-scale mass compensation program that is modeled on workers compensation programs. My thought was that such examples could be studied by ACUS and their lessons applied to other mass tort situations such as the asbestos problem.

6. Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?

Answer:

As you know, OMB/OIRA is one of the most powerful and highly influential actors in Washington. OIRA serves as the President’s team in coordinating regulatory policy, and in implementing presidential executive orders and directives. For the most part OIRA acts as a regulator—of the executive branch regulatory agencies themselves.

ACUS had and would have a very different role. Unlike OIRA, an ACUS has no power, other than the power to persuade. Its recommendations are consensus-based. Its research agenda is forward looking and extends to all aspects of government procedures—beyond the regulatory area that OIRA itself regulates. And its ability to follow up on its recommendations is a continuing one.

ACUS also provides a degree of independence from the Administration, and a degree of closeness to Congress that distinguishes it from OIRA. Although the ACUS Chair and Council are appointed by the President, it is not a White House entity; its membership is finely balanced with members from all the key agencies in the government as well as different interest groups. It also, unlike OIRA, can have close affiliations with independent regulatory agencies.

This is not to say that ACUS and OIRA cannot work together. Executive Order 12,866, for example promotes agency use of negotiated rulemaking, and the just-issued OIRA draft bulletin on Good Guidance Principles cites two ACUS recommendations on that subject. And to some extent, OIRA can be a clearinghouse for best practices in the regulatory area.

Of course OIRA can also play an influential role in ACUS projects and debates, and ACUS can review and study the impact of OIRA initiatives.

7. Some have suggested that ACUS be privately funded. What is your response?

Answer:

As I suggested in my testimony, ACUS's statute is a flexible one that allows the agency to accept intergovernmental transfers, outside donations or grants, and voluntary services. These augmentations can be quite useful. But ACUS would not be ACUS in my opinion if it were not an agency of the federal government with an annual appropriations.

I say this for two main reasons. First, if ACUS were entirely dependent on outside funders, there would be at least a perception of undue influence by the outside funder. Even foundations these days are often identified as aligned with narrow or partisan interests. Second, agency members of ACUS would have a harder time attending meetings, participating in studies, and cooperating with research consultants, if ACUS were not a federal agency.

8. During the hearing, Ranking Member Warr and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?

Answer:

It was an interesting suggestion, but my suspicion is that if ACUS's funding were derived from an assessment tied to agency activity, this would create such resentment among the paying agencies, that soon ACUS would have some real bureaucratic enemies. (It would also be hard to define what a "regulation" is for this purpose.)

If any sort of a widely-shared assessment were to be established, it would probably be better for Congress to specify that it should be some sort of an across-the-board tiny percentage (or rounding off amount) transferred from the appropriation of each member agency.

I note for example that a number of the current Administration's E-Government initiatives are funded by participating agencies. The E-rulemaking initiative is one of those. As the GAO has described the funding arrangements:

A common strategy used in fiscal years 2003 and 2004 was to reach agreement among the participating agencies on monetary contributions to be made by each—10 of the 25 initiatives used this strategy. Initiatives used different approaches in determining how much an agency should contribute. For example, some adopted complex allocation formulas based on agency size and expected use of the initiative's resources, while others decided to have each agency contribute an equal share. In most cases, the funding strategy and allocation formula adopted for an initiative was determined by its governing board, with input from partner agencies and OMB. To further reinforce the strategy of having partner agencies make financial contributions, OMB generally reflected planned agency allocations in its annual budget guidance to partner agencies, known as passback instructions. GAO report at 7.

The GAO report also pointed out noted that there were some shortfalls in funding. For example: "The e-Rulemaking initiative, managed by EPA, received only \$5,850,208 (51 percent) of its planned fiscal year 2004 budget of \$11,505,000 in partner agency contributions." GAO report at 10. But the amounts of these contributions, when compared to ACUS's authorized budget, are still quite large.

QUESTIONS FOR PROFESSOR JEFFREY LUBBERS
FROM RANKING MEMBER MEL WATT

1. Could you provide a concise statement of how ACUS has been missed and in what areas? For example, there are probably some very dramatic examples that could be pointed to within the past ten years involving mistakes or things that would not have happened had ACUS been in existence.

Answer.

I can think of several areas where ACUS's involvement could have improved government activities or helped to avoid mistakes. The first area is the application of electronic technology to the administrative process. The Internet was just becoming a reality in government offices when ACUS was shut down. In fact ACUS sponsored one of the very first series of studies of electronic information collection and docketing, by Professor Henry Perritt [Henry H. Perritt, *Electronic acquisition and release of Federal agency information*, 1988 ACUS 601, and 141 ADMIN. L. REV. 253 (1989); *Federal Electronic Information Policy* 63 TEMPLE L. REV. 201 (1990); *Electronic Records Management and Archives*, 53 U. PITT. L. REV. 961 (1992)]. Since that time the government has been playing catch-up in adapting electronic technology to its adjudicative and regulatory activities. ACUS sponsored several of the first studies concerning electronic dockets and electronic FOIA, and I believe we could have hastened a more orderly adoption of a government-wide electronic docket and helped to solve some of the nagging legal problems still apparent in the area of e-rulemaking.

A second area has to do with the creation of the Department of Homeland Security. Besides the difficult consolidation issues, there were numerous privacy and openness-vs.-security issues presented. Chairman Cannon thanked me for my testimony on your committee's hearing on these matters, which I appreciated, but I have to admit that I was speaking off the cuff and without the benefit of any underlying studies. If ACUS had existed after 9/11, I believe it would have been able to help achieve consensus and some careful solutions pertaining to some of these issues.

A third area is administrative adjudication. As I said in my statement, agencies are finding numerous ways to circumvent the Administrative Law Judge (ALJ) program. I think this is a shame because it undermines the consistency, uniformity, and independent adjudicative values that are at the heart of the APA. The Office of Personnel Management, which has the statutory responsibility for administering the ALJ program, has largely abandoned its statutorily-mandated role of overseeing the ALJ program. It abolished its separate Office of ALJs, and became embroiled in a long-lasting lawsuit that saw its register of eligible candidates for the ALJ position frozen for many years. See *Meeker v. MSPB*, 319 F.3d 1368 (Fed. Cir. 2003). I believe that ACUS could have played a role in highlighting these problems and helping to fix them expeditiously.

And finally, ACUS has definitely been missed in the area of promotion of ADR and negotiated rulemaking. Although the Department of Justice did create an interagency working group on ADR, which has done some good work, the concentrated attention and expertise that had grown up among ACUS members and staff was dispersed in October 1995. I don't think it is coincidental that negotiated rulemaking has faltered since.

2. What are some of the areas that the next generation of ACUS could focus upon?

Answer:

In my testimony I attempted to lay out a research agenda for ACUS. If I had to choose the areas that seem most pressing, I would suggest: electronic rulemaking, negotiated rulemaking's faltering, alternative approaches to agency regulation and enforcement, cooperative federalism, and bringing more rationality and predictability to judicial review of agency action.

3. Is the Administrative Law, Process, and Procedures Project a satisfactory substitute for ACUS?

Answer:

In my opinion the ALPP Project is an excellent idea, but should not be seen as a substitute for ACUS. I think if your Committee asked itself whether it wanted to take on the responsibility of designing and overseeing pro bono administrative law research on an ad hoc basis for the foreseeable future, it would probably realize that such a task would not be sustainable for long.

Moreover, there needs to be a process for digesting the results of the studies and turning them into recommendations for reform. This is a job for a permanent dedicated group of expert members and staff in the executive branch.

RESPONSES TO ADDITIONAL QUESTIONS FROM JODY FREEMAN, HARVARD LAW SCHOOL



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**QUESTIONS FOR PROFESSOR JODY FREEMAN FROM CHAIRMAN CHRIS
 CANNON**

Question 1: *Why should anyone care about the percent of rules invalidated upon judicial review?*

Answer: Congress, the President, the judiciary and the general public should care about the percentage of rules invalidated or remanded (and why they are invalidated or remanded) because if the rate of reversal is high, it is a fair inference that the rulemaking process is not working well. Ideally, we want rules to be of sufficient quality to survive legal challenge. This has real consequences for congressional efforts to reform agency process. Policymakers and scholars often assert that a high percentage of rules are struck down or remanded, and claim that this proves the regulatory process is flawed. Yet these assertions are based on almost no data. We do not really know the truth about the rate of reversal or remand. If critics are right, and federal agencies are spending significant resources producing rules that do not pass judicial muster, we need to know that, and we need to know why. The first step is to calculate the rate at which rules successfully survive legal challenge in the first place.

The next step is to look for trends in the data that could explain why rules are struck down. From there, we can look for opportunities to improve the rulemaking process. For example, perhaps we will discover that the invalidated rules tend to have undergone less rigorous cost-benefit analysis than the rules that are upheld. If that were the case, Congress might wish to change how agencies conduct such analyses. Maybe the invalidated rules share other features that suggest relatively easy opportunities for improvement. For example, perhaps the invalidated rules tend to lack the public participation necessary to ventilate all of the important policy considerations. To remedy this, Congress could reform how agencies conduct public participation. Perhaps the invalidated rules disproportionately come from a few agencies with relatively weak rulemaking practices. In such a case, Congress could require these agencies to adopt the "best practices" of the more effective agencies.

On the other hand, if it turns out that most challenged rules are upheld, then perhaps we can infer that most agencies are performing their rulemaking responsibilities relatively well. If this were the case, Congress could avoid unnecessary and expensive intervention in the rulemaking process.

However, we cannot do anything to improve the regulatory process without basic research about how many rules get challenged, how many get reversed, and why they get reversed.

- **Question 2:** *What are some of the key possible findings from your study that you think could be helpful to us in Congress?*

Answer: We might find that relatively few challenged rules are struck down, and that agencies do not really face significant legal obstacles implementing their rules. We might find on the other hand that a relatively high percentage of rules are struck down, suggesting the need for some reform of the rulemaking process. These reforms might include any or all of the following: requiring agencies to develop improved records to support rules; requiring agencies to change how they perform cost-benefit analysis or peer review; requiring increased congressional review of rulemaking; requiring agencies to take additional procedural steps prior to rule promulgation; alternatively, where warranted, reducing the number of procedural steps for certain kinds of rules; requiring more or different kinds of consultation with the public and interested parties; requiring greater use of alternative dispute resolution; require greater use of technology in rulemaking.

In addition, we might find that some interest groups prevail much more than others in challenging rules, something that Congress might wish to remedy or recalibrate. We might find great variation in how rigorously courts use generic standards of review (such as the arbitrary and capricious test), something Congress could adjust by statute.

This basic research should be seen as a down payment on future studies that will help Congress to make the rulemaking process both more effective and more efficient.

- **Question 3:** *If you could personally address the Congressional appropriators who have jurisdiction over the Administrative Conference of the United States (ACUS), what would be your principal and most persuasive arguments for funding ACUS?*

Answer: I would emphasize to appropriators that ACUS provides great value for relatively little money. As I stated in my oral testimony, ACUS is a bargain. First, ACUS saves Congress from earmarking appropriations on a piecemeal basis to conduct individual studies of the administrative process. An ad hoc approach to funding research can be needlessly expensive, and too uncoordinated. ACUS can undertake and sponsor studies at low cost because it can rely on its volunteer membership to conduct them. Moreover, these studies can be linked together as part of a coherent research agenda that ACUS oversees. ACUS can set research priorities, oversee the research and develop reform proposals from the results. ACUS can also provide consistent oversight and monitoring of agencies, which would enable it to identify new issues that require Congress's attention. By playing this ongoing role, ACUS can help to ensure that important issues of government procedure do not fall through the cracks. By contrast, for Congress to try to conduct research on a piecemeal basis would be both more expensive and less effective.

Second, many of ACUS's recommendations have been focused on reforms that not only improve the administrative process but also save money. For example, the numerous ACUS recommendations on alternative dispute resolution during the 80s and early 90s were aimed at reducing costly litigation. These money-saving opportunities still exist—the federal government could use ADR more effectively and it could make better use of new technology like “e-rulemaking”. ACUS could add value by proposing these kinds of reforms.

Third, funding ACUS is a low-cost way for Congress to obtain the benefit of a non-partisan “think tank” made up of experienced professionals from both the public and private sector. Because of the expertise of its membership, ACUS can perform a variety of functions: ACUS can monitor the performance of government agencies over time to identify and promote the adoption of “best practices;” ACUS can recommend procedural reforms tailored to the needs of particular agencies (i.e., DHS will confront different challenges in rulemaking than EPA); ACUS can recommend reforms that ought to be adopted government-wide; ACUS can anticipate problems that ought to be addressed early before they become acute. To take just one example, had ACUS still existed after the attacks of September 11, 2001, it might have proposed ways in which the new Department of Homeland Security could delicately balance the need for secrecy to protect national security with the need for openness in the regulatory process.

ACUS is unique. It has traditionally taken a holistic view of federal agency performance rather than looking only at narrow problems and individual agencies. Its membership has the combination of expertise necessary to generate thoughtful and sensible reforms. ACUS enjoys heightened credibility with both independent and executive agencies, which is necessary to ensure their cooperation in both generating and adopting reforms. The fact that ACUS has attracted the support of two individuals of such different perspectives as Justices Breyer and Scalia is testimony to the way in which it has managed to rise above the political fray and provide a much needed service.

Question 4: *Earlier this year, we heard assertions that OMB and/or OIRA essentially perform the same tasks as ACUS. What are your views about the validity of such statements?*

Answer: OMB/OIRA cannot perform the functions of ACUS because OMB/OIRA represents the interests and policy imperatives of the White House. By comparison, ACUS is more independent. Though the leadership of ACUS is appointed by the President, its membership is balanced and broadly representative. And unlike OMB/OIRA, ACUS can help all three branches in their efforts to oversee agency process.

In addition, although OIRA plays a very powerful role in overseeing executive agency rulemaking, and in enforcing executive orders and presidential directives, this encompasses only part of what federal agencies do. OIRA does not oversee agency adjudication, agency grants and contracts, and other important agency actions. And OIRA does not engage in programmatic research with an eye to more general reform of the administrative state. These are gaps that ACUS can fill.

Also, because of the oversight role OIRA plays for the Administration, OIRA can sometimes be placed in an adversarial posture toward the executive agencies it oversees.

ACUS operates differently. Its recommendations are based on consensus, and it works cooperatively with agency staff to develop and adopt reforms. ACUS has not traditionally represented a particular set of interests or a particular branch, which gives it special credibility with both independent and executive agencies.

- **Question 5:** *With respect to Small Business Regulatory Enforcement Fairness Act and in light of its upcoming tenth anniversary, what areas in particular would you recommend be studied with respect to the Act's effectiveness?*

Answer: I am not an expert on SBREFA, but I have heard anecdotal reports that perhaps it is not serving the interests of smaller business entities, as Congress intended. I would recommend research into the role that larger businesses might be playing behind the scenes in SBREFA's implementation. And more generally I would recommend conducting research into whether the benefits that Congress sought to confer on smaller businesses are being realized.

- **Question 6:** *Some have suggested that ACUS be privately funded. What is your response?*

Answer: There is nothing wrong with allowing ACUS to accept funding from a variety of sources, and indeed ACUS's statute permits this. But I believe it would be a mistake to have private funding as the exclusive source of ACUS's support. First, private funding always raises suspicion about potential influence by the funder. ACUS's recommendations have been influential in the past because they are perceived to be non-partisan and unbiased. Private funding would likely change that perception. (Incidentally, this could also be the case if funding were to come exclusively from just one government agency, like the Department of Homeland Security). Finally, ACUS has special standing with both independent and executive agencies in large part because it too is a federal agency funded by annual appropriations. This gives ACUS clout and legitimacy, which it would lose if privately funded.

- **Question 7:** *During the hearing, Ranking Member Watt and I discussed the possibility that each agency's budget be assessed each time it issues a regulation and that such assessment be earmarked to fund ACUS. What is your reaction to this suggestion?*

Answer: It is valuable to think creatively about how to fund ACUS but I think this would likely create animosity between the "taxed" agencies and ACUS. This could poison what has traditionally been a cooperative relationship. Moreover, this proposal appears to penalize regulation and could create an incentive for agencies not to regulate, even where regulation might be warranted. However, an across-the-board assessment from agency budgets could be an alternative idea. And perhaps those agencies that stand to benefit most from a particular ACUS research project might pay a disproportionate share of its cost. This could be done on a project-by-project basis.

**QUESTION TO PROFESSOR JODY FREEMAN FROM
RANKING MEMBER MEL WATT**

- **Question :** *Is the Administrative Law, Process, and Procedures Project a satisfactory*

substitute for ACUS?

Answer: No, it is not. Though the Administrative Law, Process and Procedures Project is valuable, it is too limited in scope and too ad hoc in its approach to substitute for a federal agency like ACUS. The Congressional Research Service has, to its credit, tried to enlist scholars in conducting research for the Project, but only a small number of administrative law experts have agreed to study a few limited questions. Empirical work is time consuming and requires an investment of resources. The Project does not appear to have significant financial support or a long-term research plan.

A funded ACUS offers significant advantages over the Project. First, scholars may be more likely to respond to an invitation or request for research from ACUS, a body that has historically been a professional association with a strong record of bipartisanship. Second, a funded ACUS would have the financial support to sustain a coordinated long-term research program. Third, a funded ACUS would have the advantage of the broad expertise of its large membership. Finally, a funded ACUS would be able to take the results of empirical research and develop those results into recommendations, something that the Project does not seem equipped to do.

Although the Project is a laudable effort to obtain some preliminary information about how agencies are performing, it is a stop-gap measure. By contrast, ACUS will be able to undertake both short and long term studies in a coordinated and comprehensive way. Its leadership will be able to prioritize among the most important questions and establish a research agenda. ACUS's independence and reputation for professionalism will afford it real credibility with the agencies it is studying.

This concludes my responses. Thank you for the opportunity to respond to your questions.

**REAUTHORIZATION OF THE ADMINISTRATIVE
CONFERENCE OF THE UNITED STATES**

HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS
SECOND SESSION

—————
MAY 20 AND JUNE 24, 2004
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**REAUTHORIZATION OF THE ADMINISTRATIVE
CONFERENCE OF THE UNITED STATES**

THURSDAY, MAY 20, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:06 p.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. The Subcommittee will please come to order. I expect we will have several other Members who told us they would like to join us will join us soon.

It is indeed an honor and a pleasure to welcome to our Subcommittee today two of our Nation's most esteemed jurists. I am informed that it's fairly rare to have a Justice from the Supreme Court, let alone two Justices, testify before Congress, particularly with respect to matters not pertinent to the judiciary's funding or operations. According to the Congressional Research Service, the last time a Supreme Court Justice testified before the House Judiciary Committee was in May 1971, when Associate Justice Potter Stewart discussed legislation concerning the Federal Judicial Center and the Administrative Office of the United States. The presence of Justices Breyer and Scalia, I believe, underscores the significance of today's hearing, which focuses on the value of reauthorizing the Administrative Conference of the United States.

For those of you who are not familiar with the work and accomplishments of the Conference, let me briefly explain.

Over the course of its 28-year existence, the Conference issued more than 200 recommendations, some of which were Government-wide and others were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to judicial review of agency actions and encouraging less costly consensual alternatives to litigation.

The fruits of these efforts included enactment of the Administrative Dispute Resolution Act of 1990, which established a framework for the use of ADR. In addition to this legislation, ACUS served as the key implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty Federal Trade Commission Improvement Act.

The Conference also made recommendations regarding implementation of the Congressional Accountability Act and played a

key role in the Clinton administration's National Performance Review with respect to improving the regulatory systems. Further, ACUS served as a resource for Members of Congress, congressional Committees, the Internal Revenue Service, Department of Transportation, and the Federal Trade Commission.

With respect to specific agencies, the Conference, for example, during the 1970's undertook an exhaustive study of the procedures of a single agency, the Internal Revenue Service, which resulted in 72 proposals concerning the confidentiality of taxpayer information, IRS settlement procedures, and the handling of citizen complaints, among other matters. The IRS ultimately adopted 58 of these recommendations.

Some may ask: Why should we reconsider—or consider reauthorizing the agency at this time or the Conference at this time? We've gotten along without the Conference over the last 8 years—I might say, not very well. How can we justify re-establishing the agency at the attendant expenditures, especially in a fiscal belt-tightening environment? The answer, at least to me, is obvious. Just this week, Congress passed the Paperwork and Regulatory Improvements Act by an overwhelming bipartisan vote of 373–54. This legislation is intended to assist Congress in its review of final agency rules under the Congressional Review Act and to improve the quality and quantity of information provided in the annual regulatory accounting statement prepared by the Office of Management and Budget.

While a good bill, problems with the current administrative law environment are much greater than either the Congress or OMB by itself, or even jointly, can address. According to the Congressional Research Service, there are growing patterns of evasion among agencies with respect to notice and comment requirements. An increasing number of regulations are being successfully challenged in courts. An informal study by CRS indicates that 51 percent of these rules were struck down by the courts. Needless litigation hurts everyone. It slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers millions of dollars, a lot more than the budget that we're proposing here.

Another serious area of concern is the need to have a coherent approach among the agencies with respect to emerging issues and technologies. These areas include issues dealing with privacy, national security, public participation in the Internet, and the Freedom of Information Act. There are also concerns about the need to have peer review and to have regulations based on sound science.

Our Nation's people and business communities depend upon Federal agencies to promote scientific research and to develop science-based policies that protect the Nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences, as well as cause private industry to incur unnecessary and burdensome expenses to comply with such regulations. Restoring the Conference in some form, from my perspective, would provide a cost-effective, highly valuable solution to these problems. It is my hope that today's hearing will be the

first step toward establishing a strong evidentiary base to support the reauthorization of the Conference.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will please come to order.

It is indeed an honor as well as a pleasure to welcome to our Subcommittee two of our nation's most esteemed jurists. I am informed that it is a fairly rare event to have a Justice of the Supreme Court—let alone two Justices—testify before Congress, particularly with respect to matters not directly pertinent to the Judiciary's funding or operations. According to the Congressional Research Service, the last time that a Supreme Court Justice testified before the House Judiciary Committee was in May of 1971, when Associate Justice Potter Stewart discussed legislation concerning the Federal Judicial Center and the Administrative Office of the United States.

The presence of Justices Breyer and Scalia—I believe—underscores the significance of today's hearing, which focuses on the value of reauthorizing the Administrative Conference of the United States. For those of you who are not familiar with the work and accomplishments of the Conference, let me briefly explain.

Over the course of its 28-year existence, the Conference issued more than 200 recommendations—some of which were government-wide and others that were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to the judicial review of agency action and encouraging less costly consensual alternatives to litigation. The fruits of these efforts include the enactment of the Administrative Dispute Resolution Act in 1990, which established a framework for the use of ADR.

In addition to this legislation, ACUS served as the key implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act. The Conference also made recommendations regarding implementation of the Congressional Accountability Act and played a key role in the Clinton Administration's National Performance Review with respect to improving regulatory systems. Further, ACUS served as a resource for Members of Congress, Congressional Committees, the Internal Revenue Service, Department of Transportation, and the Federal Trade Commission.

With respect to specific agencies, the Conference, for example, during the 1970s undertook an exhaustive study of the procedures of a single agency—the Internal Revenue Service—which resulted in 72 proposals concerning the confidentiality of taxpayer information, IRS settlement procedures, and the handling of citizen complaints, among other matters. The IRS ultimately adopted 58 of these recommendations.

Some may ask, "Why should we consider reauthorizing the Conference at this time?" We've gotten along without the Conference over the last eight years. How can we justify re-establishing an agency with the attendant expenditures especially in this belt-tightening environment?"

The answer—at least to me—is obvious. Just this week, Congress passed the Paperwork and Regulatory Improvements Act by an overwhelming bipartisan vote of 373 to 54. This legislation is intended to assist Congress in its review of final agency rules under the Congressional Review Act and to improve the quality and quantity of information provided in the annual regulatory accounting statement prepared by the Office of Management and Budget. While a good bill, problems with the current administrative law environment are much greater than either the Congress or OMB can singularly or even jointly address.

According to the Congressional Research Service, there are growing patterns of evasion among agencies with respect to notice and comment requirements. An increasing number of regulations are being successfully challenged in the courts. An informal study by CRS indicates that 51% of these rules were struck down by the courts. Needless litigation hurts everyone—it slows the rulemaking process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers millions of dollars.

Another serious area of concern is the need to have a coherent approach among the agencies with respect to emerging issues and technologies. These areas include issues dealing with privacy, national security, public participation and the Internet, and the Freedom of Information Act. There are also concerns about the need to have

peer review and to have regulations based on sound science. Our nation's people and business communities depend upon federal agencies to promote scientific research and to develop science-based policies that protect the nation's health and welfare. Integral to the federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences as well as cause private industry to incur unnecessary and burdensome expenses to comply with such regulations.

Restoring the Conference in some form—from my perspective—would provide a cost-effective, yet highly valuable solution to these problems. It is my hope that today's hearing will be the first step toward establishing a strong evidentiary basis of support for reauthorizing the Conference.

Mr. CANNON. I will now turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee, and ask him if he has opening remarks.

Mr. WATT. Thank you, Mr. Chairman, and I will take a brief moment here just to thank the Chairman for convening today's hearing and to welcome our distinguished guests, Justices Breyer and Scalia.

As I indicated to the two Justices, this must be my Supreme Court day because we—a judicial caucus has now been started in the House, and its first visitor just before this meeting was convened was Justice Rehnquist, Chief Justice Rehnquist. So I think I've had more exposure, direct, personal exposure to Justices of the Supreme Court in one day than I have in my entire life, although I guess most people know I've had quite a bit of exposure, not personal but in other respects, with the Justices. So I'm delighted to be here and honored that you would share your insights on the topic of this hearing.

The purpose of the hearing is to determine whether the state of administrative law and procedure warrant the reauthorization of the Administrative Conference of the United States. And as we know, the Administrative Conference was initially established in 1964 as a permanent body to serve as the Federal Government's in-house adviser on and coordinator of administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of Government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy, and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that, certainly in my opinion, has not ceased. So the topic before us today is one that has truly been non-partisan, bipartisan, and I think we are blessed to have these two distinguished witnesses who—both of whom have personal experience with the Conference and its workings. And I understand also that the Chairman is expecting to have additional hearings to further information the Subcommittee and the Judiciary Committee about the need for the Administrative Conference, and I look forward to those hearings.

Again, I welcome Justice Scalia and Justice Breyer, and I bring you the regards of your Chief Justice from the prior meeting. Thank you for being here.

I yield back.

Mr. CANNON. The gentleman's time has expired.

We would like to thank the Members who have joined us here: Mr. Coble from North Carolina; Mr. Chabot from Ohio; Mr. Watt, of course, from North Carolina, the Ranking Member; Mr. Delahunt from Massachusetts; Mr. Conyers from Michigan; and Mr. Scott from Virginia. We appreciate your attendance.

We received a letter from the American Bar Association expressing its support for the reauthorization of the Administrative Conference, and without objection, we will submit that for inclusion in the record. So ordered.

[The information referred to follows:]

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In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

I stress the fact that over a quarter century the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government. The lack of a particular constituency was its undoing when a political need for visible symbols of budget cutting and a special interest attack on the Conference combined in a perfect storm of politics. The error of that penny-wise, pound foolish decision to sacrifice the Conference stands out today, when a divisive and corrosive partisanship on issues of national concern cry out for the kind of independent, respected expert view that the Conference exemplified.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today, adapting administrative processes to make best use of the internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

It is a testament to the Conference's unique position that today persons of such differing judicial philosophies as Justices Scalia and Breyer can rally behind the re-creation of the Conference. Nor is it hard to find many others from across the political spectrum who will similarly commend the re-creation of the Conference to your subcommittee. Past chairs of the Conference, such as Professors Marshall Breger and Robert Anthony and Judge Loren Smith from one side of the aisle, can join hands with lawyer Sally Katzen and administrative judge Thomasina Rogers on the other side.

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The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

Thank you for considering the views of the ABA on this important issue. If you would like to discuss the ABA's views in greater detail, please feel free to contact me at 503/768-6606 or the ABA's legislative counsel for administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



William Funk

cc: All members of the Subcommittee on Commercial and Administrative Law

Mr. CANNON. Without objection, all Members may place their statements in the record at this point. Is there any objection? Hearing none, so ordered.

Mr. Coble has asked for a quick 1-minute opening statement. We're pleased to yield to the gentleman.

Mr. COBLE. Mr. Chairman, I will not exceed 1 minute. I just want to reiterate what Mr. Watt said. I was with Mr. Watt, Mr. Scott, and other colleagues with the Chief Justice at a meeting today. We very much enjoyed having him here, and we very much appreciate you two Justices being with us.

And, Mr. Chairman, I regret it but I've got another meeting going on now, so I may have to bolt before you conclude. But I thank you for having called this hearing.

Mr. CANNON. I thank the gentleman, and we appreciate that many things are going on.

Mr. Conyers, did you—

Mr. CONYERS. Mr. Chairman, could I be permitted a brief welcome to—

Mr. CANNON. Absolutely, Mr. Conyers. The Ranking Member of the full Committee, Mr. John Conyers from Michigan.

Mr. CONYERS.—the two distinguished Justices. I'm so glad that you're here. And I just wanted Justice Scalia to know that you look much more friendly in our setting than you do in your own. [Laughter.]

Justice SCALIA. It's the black robe.

Mr. CONYERS. That might have something to do with it as well.

I have also about several hundred questions which, regrettably, are not appropriate to this hearing. But you might want to extend to the Ranking senior Member of Judiciary an invitation to lunch or something else to examine my viewpoint and I yours. And we might reach a greater degree of comity than exists at the present moment.

Thank you very much.

Mr. CANNON. Thank you, Mr. Conyers.

Mr. WATT. Could I ask the gentleman to yield just for a second?

Mr. CONYERS. Of course.

Mr. WATT. Just long enough to invite him to become a member of the newly established Judiciary Caucus, which had its first meeting today and met with Justice Rehnquist. So we're trying to encourage comity and exchange across judiciary and—

Mr. CONYERS. Excellent idea.

Mr. CANNON. Is this a bipartisan caucus?

Mr. WATT. Yes, it is. It's chaired, actually, by Representative Schiff and Representative Biggert, Republican and Democrat.

Mr. CANNON. This is a caucus that goes beyond the Judiciary Committee itself?

Mr. WATT. Yes.

Mr. CANNON. Okay. Thank you.

Without objection, the Chair will be authorized to declare recesses of the Subcommittee at any point. Hearing none, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. So ordered.

I also want to remind my colleagues of the obvious: Our witnesses are guided by Canon 3 of the Code of Conduct for United States Judges, which advises the judiciary to avoid making public comments with respect to the merits of pending or impending actions. We should endeavor to respect those constraints and limit our questions to the matter of our hearing. Adherence to this admonition will promote a greater dialogue, I think, at this point in the hearing and encourage the judiciary to participate in future hearings.

Although I'm now pleased to introduce our witnesses for today, I'm sure that our colleagues are very well acquainted with their extensive accomplishments.

Justice Antonin Scalia was nominated by President Ronald Reagan to the United States Court of Appeals for the District of Columbia Circuit and assumed the bench in 1982. Thereafter, he was nominated by President Reagan as Associate Justice of the United States Supreme Court and took the oath of office on September 26, 1986.

Prior to his service in the judicial branch, Justice Scalia was general counsel for the Office of Telecommunications Policy in the Executive Office of the President from 1971 to 1972 and Assistant Attorney General in the Office of Legal Counsel at the Justice Department from 1974 to 1977. Between those two assignments, and of particular relevance to today's hearing, Justice Scalia served as chairman of the Administrative Conference from 1972 to 1974. In addition, he chaired the American Bar Association Section of Administrative Law from 1982 to 1983.

Our next witness is Justice Stephen Breyer. Justice Breyer began his illustrious legal career as a law clerk to Justice Arthur Goldberg during the Supreme Court's 1964 term. He then served as special assistant to the head of the Justice Department's Antitrust Division from 1965 to 1967. In 1973, Justice Breyer, having by this time worked for the judicial and executive branches of the Federal Government, now applied his talents to the legislative branch, where he worked as assistant Watergate special counsel in 1973, special counsel to the Senate Judiciary Committee in 1975, and as the Committee's chief counsel from 1979 to 1980. Thereafter, he was appointed Judge to the United States Court of Appeals for the First Circuit. President Clinton nominated him to the Supreme Court, and he took office in August 1994. Justice Breyer has authored numerous books and articles in the field of administrative law and regulation.

I extend to each of you our warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the hearing record, I request that you limit your oral remarks to 5 minutes, but we are not going to be very hard on that time frame. We are mostly interested in your comments and ideas. Accordingly, please feel free to summarize and highlight the salient points of testimony.

You'll note that we have a lighting system. It starts with green, goes to yellow, it stays yellow for a minute, and then we'll sort of ignore it if it turns red.

On the other hand, because we have a number of Members, we'll try and keep the questioning to about 5 minutes using the same

system, and I'll tend to tap the gavel when the 5 minutes runs, just so people are aware. I don't think that we'll have a problem with people going over time today.

Justice Scalia, would you now proceed with your testimony?

STATEMENT OF THE HONORABLE ANTONIN SCALIA, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

Justice SCALIA. I would be happy to. Mr. Chairman, Members of the Subcommittee, Congressman Conyers, I'm happy to be here today to provide information about the Administrative Conference. I obviously think it was a worthwhile organization and I guess demonstrated that belief by devoting 2 years of my life to it.

I've described the organization of the Conference and some of its accomplishments, particularly during my tenure as Chairman, in my written testimony, and I will not go over that.

I was Chairman from September 1972 until August 1974. Like the first two Chairmen, who were Professor Jerre Williams of the University of Texas Law School and Professor Roger Crampton of the University of Michigan Law School, and like my successor, Professor Robert Anthony of Cornell Law School, I was an academic and at that time on leave from the University of Virginia Law School. And, frankly, it was very much an academic job. I viewed it somewhat as returning from an online executive branch job, which I had had before then—I was general counsel of an agency—to a job that mainly dealt with examining procedures within the executive branch, trying to line up consultants (generally academic consultants) who would be competent to assist our committees in studying those procedures, and then assisting the full Assembly in preparing recommendations.

I found the Conference to be a unique combination of talents from the academic world, from within the executive branch—because many of the members of the Conference were representatives of the agencies, usually general counsels—and, thirdly, from the private bar, especially lawyers particularly familiar with administrative law. I did not know another organization that so effectively combined the best talent from each of those areas.

I think the Conference's ability to be effective hinged in part on the fact that we were a Government agency, and when we went to do a study at an agency, we were not stonewalled. Very often, a member of that agency was on our Assembly, and so the agency would cooperate in the study that we did. I think it's much harder to do that kind of a study from the outside. The agencies tended to look upon us as essentially other people from the executive branch trying to make things better.

I think we were successful in improving many procedures throughout the Government. Very little of it made headlines. Most of the changes had to be made agency by agency. Nobody who was not involved in the particular work of that particular subsection of that particular agency would even know that any changes had been made. But, all in all, I think the Conference was successful in improving the efficiency and the economy of the executive branch in many areas.

Mr. Chairman, at the Court we really don't let counsel blather on without being interrupted by questions for very long, so I feel

constrained to set the example myself. I will just refer you to my written testimony for the rest. I'm mainly here to answer your questions.

[The prepared statement of Justice Scalia follows:]

PREPARED STATEMENT OF THE HONORABLE ANTONIN SCALIA

Mr. Chairman and Members of the Subcommittee:

I am happy to accept your invitation to provide information concerning the Administrative Conference of the United States. I was the third Chairman of the Conference, and served in that capacity from September 1972 to August 1974. Like the first two Chairmen (Professor Jerre Williams of the University of Texas Law School, and Professor Roger Crampton of the University of Michigan Law School), and like my successor (Professor Robert Anthony of Cornell Law School), I was an academic—at that time on leave from the University of Virginia Law School. The Conference was then, and I believe continued to be, a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise. My testimony will generally pertain to the time period in which I served as Chairman, since I did not follow the Conference's activities closely after moving on.

At the outset, let me describe why the Conference was instituted and how it was organized. The Administrative Conference of the United States was established as a permanent independent federal agency by the Administrative Conference Act, signed by President Lyndon Johnson in 1964; and it was activated by the appointment of its first Chairman in January 1968. Its purpose was to identify the causes of inefficiency, delay, and unfairness in administrative proceedings affecting public rights, and to recommend improvements to the President, the agencies, the Congress, and the Courts.

The Conference was composed of three parts: a Chairman, a Council, and an Assembly. The Chairman was appointed by the President, with the advice and consent of the Senate, for a term of five years. He was the Chief Executive of the Conference. He presided at plenary sessions of the Assembly and at Council meetings, and was the official spokesman for the Conference in relations with the President, the Congress, the Judiciary, the agencies, and the public. His most important responsibility, however, was to identify subjects appropriate for study by the Conference, and—if the relevant Committee of the Assembly was willing to pursue a particular subject—to line up an academic consultant qualified to assist in the research. It was also the Chairman's responsibility to seek implementation of Conference recommendations—a task that required some diplomacy and charm, since needless to say the Conference had no enforcement powers over the agencies, much less over the President and Congress if the recommendations were directed to those quarters. The Chairman was served by a small permanent staff whose principal duties were to furnish administrative and research support to the Assembly of the Conference and its Committees, to follow and assist in the work of consultants, and to help the Chairman in securing implementation of recommendations.

The Council of the Conference consisted of the Chairman and 10 other members who were appointed by the President for three-year terms, of whom not more than one-half could be drawn from Federal agencies. Its functions were similar to those of a corporate board of directors. It had the authority to call plenary sessions of the Conference and to fix their agenda, to recommend subjects for study, to receive and consider reports and recommendations before the Assembly considered them, and to exercise general budgetary and policy supervision.

The Assembly of the Conference was composed of the entire membership, which by statute could not be less than 75 members nor more than 91. The Chairman and the other members of the Council accounted for 11 of this number; the remaining members fell into the following groups: First, the Act conferred membership upon the Chairman of each independent regulatory board or commission, or an individual designated by the board or commission. Second, the Act granted membership to the head of each Executive Department or other administrative agency (or his designee) named by the President. The final group consisted of the public members, appointed by the Chairman with the approval of the Council for two-year terms. These members, who had to comprise not less than one-third nor more than two-fifths of the total membership, were selected in such a manner as to provide broad representation of the views of private citizens of diverse experience. They were chosen from among members of the practicing bar, prominent scholars in the field of administrative law, and others specially qualified by knowledge and experience to deal with matters of federal administrative procedure.

The Assembly, which had ultimate authority over all activities of the Conference, operated much like a legislative body. It adopted By-laws establishing nine standing committees: (1) Agency Organization and Personnel, (2) Claims Adjudications, (3) Compliance and Enforcement Proceedings, (4) Grant and Benefit Programs, (5) Informal Action, (6) Judicial Review, (7) Licenses and Authorizations, (8) Rulemaking and Economic Regulation, and (9) Rulemaking and Public Information. These committees were the real work-horses of the Conference. They met periodically to direct and supervise research by academic consultants and by the Conference's professional staff. On the basis of that research they framed proposals for consideration by the Assembly at its annual meeting. When a study or tentative recommendation had been prepared, it was circulated to the affected agencies for comment and reexamined by the committee in light of the replies. After final committee approval, a proposed recommendation would be transmitted to the Council and then to the Assembly for final action in plenary session. The Assembly could adopt the recommendation in the form proposed, amend it, refer it back to the committee, or reject it entirely.

The purpose of the Conference was to apply the talents of its diverse group of agency officials, practitioners, and academic members to improving the efficiency and fairness of the thousands of varieties of federal agency procedures. In my judgment, it was an effective mechanism for achieving that goal—usually through voluntary acceptance of its recommendations by the affected agencies. Inefficiency and unfairness in agency procedures often exist simply by reason of bureaucratic inertia, and a well reasoned study and recommendation, prepared with the cooperation of the affected agency, can often produce desirable change. A few of the Conference's projects have had major, government-wide impact—for example, its recommendation leading to Congress's adoption of Public Law 94-574, which abolished the doctrine of sovereign immunity in suits seeking judicial review of agency action. For the most part, however, each of the Conference's projects was narrowly focused upon a particular agency problem, and was unlikely to attract attention beyond the affected community. This should be regarded, not as a sign of ineffectiveness, but as evidence of solid hard work. Administrative procedure is not a one-size-fits-all operation; most procedural regimes are unique, and have to be fixed one-by-one.

The Administrative Conference made several important strides in the area of implementation and saw some of its earlier recommendations bear fruit. Some examples that come to mind are the Justice Department's almost verbatim adoption of the Conference's guidelines for implementation of the Freedom of Information Act; the Civil Service Commission's publication of proposals substantially applying the Conference's recommendation concerning adverse actions against Federal employees; the Board of Parole's indication of its readiness to adopt the Conference proposals concerning parole procedures; and the Department of Labor's adoption of a field memorandum that substantially implemented the Conference's proposals regarding labor certification of immigrant aliens. Agencies that engaged in publicity as a regulatory tool adopted procedures conforming to the Conference's recommendations for protecting against unfair publicity that could harm a private party. The Conference's recommendations regarding procedures for resolution of environmental issues in licensing proceedings were embodied in regulations adopted by five of the six affected agencies.

Some of the Conference's work also bore fruit at the legislative level. The Parole Commission and Reorganization Act of 1976, P.L. 94-233, implemented Recommendation 72-3's call for a right to counsel in parole proceedings, and other procedural guarantees recommended by the Conference. The 1974 Freedom of Information Act Amendments, Pub. L. No. 93-502, adopted many of the Conference's recommended improvements to FOIA. The Conference's encouragement of granting agencies authority to impose civil money penalties has had a major, and I think beneficial, impact. Many separate statutes implemented the Conference's recommendation regarding the appropriate standard of pre-enforcement judicial review of rules of general applicability. (That recommendation was also cited by court opinions that looked to it for guidance. See *Ass'n of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F. 2d 677, 684 (CADC 1984); *Home Box Office, Inc. v. F. C. C.*, 567 F. 2d 9, 57 n.130 (CADC 1977).) Some recommendations were effectively implemented through a combination of congressional and agency action. For example, the Department of Treasury agreed to carry out most of the provisions of Recommendation 73-4, which called for increased access to customs representatives, greater disclosure, and written findings; and 1974 legislation implemented the suggested improvements in coordination between Customs and other relevant agencies. Of course some recommendations were framed not in terms of what to do, but rather in terms of what to avoid—for example, the rec-

ommendation cautioning against Congress's imposition of complex rulemaking procedures, which has been followed with few exceptions.

The Conference made itself useful in ways beyond specific proposals for legislation, or executive or judicial action. As Chairman, I gave testimony before Congress on legislation pertaining to the Freedom of Information Act, the procedures of the U. S. Board of Parole, the establishment of a Consumer Protection Agency, possible amendments to the Federal Food, Drug, and Cosmetics Act and the Fair Packaging and Labeling Act, and the opening of the administrative process to the public. The Conference responded to numerous informal requests for advice from congressional committees and committee staffs on a wide variety of procedural matters.

Agencies also sought the Conference's informal advice and assistance, particularly in connection with their initiation of new programs or procedures. I regarded this sort of pre-implementation advice as a particularly beneficial activity, since it is obviously preferable to get things started on the right foot than to criticize the deficiencies of a program already in operation. During my first year alone, the staff and consultant resources of the Conference were called upon for advice with respect to several programs under development—for example, the Department of Transportation's program to facilitate public participation in their rulemaking process, and the Justice Department's congressionally mandated study into the feasibility of a special court for environmental matters. Especially noteworthy was the study which the Chairman's Office prepared, at the request of the Office of Management and Budget, covering the procedural provisions of what was then the most significant piece of regulatory legislation that had been adopted in years, the Consumer Product Safety Act. This study was completed before the members of the new Consumer Product Safety Commission had yet been named, and was therefore a prime example of applying the Conference's expertise at the point where it is most useful—before procedures have been adopted and institutional commitments made. The Conference also conducted seminars for agency attorneys, emphasizing those aspects of administrative procedure that had special relevance to the attorneys' agency, but also refreshing the attorneys' recollection of basic administrative law principles to which they had had no systematic exposure since law school.

The Conference also conducted studies that, while not producing recommendations in and of themselves, were useful in enabling particular administrative functions to be understood and evaluated. An example of this is the study completed during the first year of my chairmanship by the Committee on Informal Action, systematically examining, for the first time, the agencies' practices in providing advice to the public. Or the study by the Chairman's Office concerning the various means by which agencies handle citizen complaints.

One way of judging the worth of the Conference without becoming expert in the complex and unexciting details of administrative procedures with which it deals, is to examine the roster of men and women who have thought it worthwhile to devote their time and talent to the enterprise. Over the years, the academics who have served as consultants to or members of the Conference have been a virtual Who's Who of leading scholars in the field of administrative law; and the practitioners who have served as members have been, by and large, prominent and widely respected lawyers in the various areas of administrative practice.

I would not presume to provide the Subcommittee advice on the ultimate question of whether, in a time of budget constraints, the benefits provided by the Administrative Conference are within our Nation's means. But I can say that in my view those benefits are substantial. The Conference was a proved and effective means of opening up the process of government to needed improvement.

Mr. CANNON. Thank you, Mr. Justice. That was very enlightening, raised points I hadn't considered in the past. We have strict rules here because there's a tendency that we blather on, and so we will adhere at least on our behalf. Thank you very much.

Mr. Justice Breyer, would you mind presenting your testimony now?

STATEMENT OF THE HONORABLE STEPHEN G. BREYER, ASSOCIATE JUSTICE, SUPREME COURT OF THE UNITED STATES

Justice BREYER. In the Court, when the red light goes on, people stop. [Laughter.]

Mr. CANNON. We'd like to inject some of that DNA around here, but we've long since given up.

Justice BREYER. Mr. Chairman and Members of the Committee, I'm very pleased to be here with my colleague Justice Scalia. I think we're completely in agreement. I think it's a very good thing that you're looking into the question of reauthorization. The reason I think it is good is I think Americans have problems that call for some Government solutions. They might need Social Security. They might need a permit in the environmental area. They might need—they might be veterans. There are just millions and millions of interactions between ordinary citizens and Government.

If you tell the citizens that they just have only to do what the Government says or go to court, their life becomes impossible because courts are too expensive and they take too long. So we have administrative processes which are supposed to be simple and they're supposed to be less expensive. That's where the Administrative Conference comes in, because it's hard to create those processes—very hard. And it's done at a level that's highly technical. You could say, "What person actually cares about separation of functions rules for rulemaking?" All you have to do is mention that phrase, and they're already asleep. But, in fact, whether you have one set of rules or another set of rules matters. And if you were to say, "What's the right set of rules?" I couldn't tell you in theory. In theory, there is no right set. You have to have people who know about it. And I have been an academic for many years, and I will absolutely swear that they don't know.

We are very good in the academy at getting theories, but we're not necessarily so good in finding out how they operate in practice. This is where the Administrative Conference came in.

My first book I ever wrote, a book that I think was extremely popular—I think it sold 23 copies. But it was aimed at certain questions: How do people actually set rates at the Federal Power Commission? Do you remember the Federal Power Commission? Well, that was back in the 1960's, and that was FERC before FERC was born.

So Paul McAvoy and I actually went to the Federal Power Commission. It was impossible in Washington to find anyone who knew where it was. We found it. We found the administrators who actually set the rates. It was a woman named Georgia Ledaukis. I remember her. I said, "How do you set a rate?" And she explained it. No one had ever asked her that question. But it was that system that only she, I think, at the Federal Power Commission knew about, and that was really the system that they, in fact, used.

So, I think that was a good idea. And what the Administrative Conference did was formalize that kind of thing. There were four kinds of members: there were actual commissioners. I can remember when—it was Dean Burch—do you remember Dean Burch who was Chairman of the Federal Communications Commission? And he would tell us about the problem of *ex parte* communications in practice. Would you like to know what he said? It's sort of interesting. He said—I can remember this talk. He said, "You know, I was from Arizona. I was appointed Chairman of the Federal Communications Commission. My neighbors congratulated me. And then I came to Washington. I thought I was a pretty important person. But I discovered nobody was the slightest bit interested. Oh, no," he said, "there was one group of people, one group of very po-

lite, very charming, really hospitable people who seemed to be interested in everything I said. They were lawyers, and they worked for the communications company.” He said, “No, that was in really practical form the problem of *ex parte* communications.”

Well, I’m just giving you examples. But I’m saying when you put the academics together with the agency staffs, the agency commissioners, the heads of the agency, and then some lawyers who are actually practical people outside the agency who know what it is to deal with them every day. And they discuss things at a technical level, sometimes things can change—a little bit for the better.

What kinds of rules should we have for a proceeding of informal rulemaking? How formal should informal rulemaking be? Should it be very formal, like formal rulemaking? Hardly formal? Somewhere in the middle? The same for every agency? Have exceptions, as we do sometimes for some of these procedures?

The Conference would try to address that kind of question. Someone would write a report. The report would be criticized. It would be discussed. Something would emerge, and then recommendations would flow, either to the agencies themselves or to Congress. When they passed Congress—and sometimes they did—it was not because people thought there was a lot of political force behind it one way or the other. It was because they thought it was simply good Government. That’s what the commission—that’s what the Conference did. It is a matter of good Government. Its recommendations were not perfect, but I think they helped. And it’s a great forum for bringing people together and discussing what will really happen, not what the politics or the general policy is about procedure and at a technical level.

So I’m very glad you’ve looked into this. I’m glad you’re doing it. I very much hope you reauthorize the Administrative Conference.
[The prepared statement of Justice Breyer follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN BREYER

Mr. Chairman and Members of the Subcommittee. Thank you for the invitation to comment upon the Administrative Conference of the United States. I participated in its activities from 1981 to 1994 as a “liaison” to the Administrative Conference from the Judicial Conference. I believe that the Conference was a unique organization, carrying out work that is important and beneficial to the average American, at low cost.

During that time, the Administrative Conference primarily examined government agency procedures and practices, searching for ways to help agencies function more fairly and more efficiently. It normally focused upon achieving “semi-technical” reform, that is to say, changes in practices that are general (involving more than a handful of cases and, often, more than one agency) but which are not so controversial or politically significant as likely to provoke a general debate, say, in Congress. Thus, it would study, and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of negotiation, or ways of making judicial review of agency action less technical and easier for ordinary citizens to obtain. While these subjects themselves, and the recommendations about them, often sound technical, in practice they can make it easier for citizens to understand what government agencies are doing to prevent arbitrary government actions that could cause harm.

The Administrative Conference was unique in that it developed its recommendations by bringing together at least four important groups of people: top-level agency administrators; professional agency staff; private (including “public interest”) practitioners; and academicians. The Conference would typically commission a study by an academician say, a law professor, who often has the time to conduct the study thoughtfully, but may lack first-hand practical experience. The professor would spend time with agency staff, which often has otherwise unavailable facts and expe-

rience, but may lack the time for general reflections and comparisons with other agencies. The professor's draft would be reviewed and discussed by private practitioners, who bring to it a critically important practical perspective, and by top-level administrators such as agency heads, who can make inter-agency comparisons and may add special public perspectives. The upshot was likely to be a work-product that draws upon many different points of view, that is practically helpful and that commands general acceptance.

In seeking to answer the question, "Who will control the regulators?" most governments have found it necessary to develop institutions that continuously review, and recommend changes in, technical agency practices. In some countries, ombudsmen, in dealing with citizen complaints, will also recommend changes in practices and procedures. Sometimes, as in France and Canada, expert tribunals will review decisions of other agencies and help them improve their procedures. Sometimes, as in Australia and the United Kingdom, special councils will advise ministries about needed procedural reforms. Our own Nation developed this rather special approach (drawing together scholars, practitioners, and agency officials) to bringing about reform of a sort that is more general than the investigation of individual complaints yet less dramatic than that normally needed to invoke Congressional processes. Given the Conference's rather low cost (a small central staff, commissioning academic papers, endless amounts of volunteered private time, and two general meetings a year), it is indeed a pity that by abolishing this Conference, we have weakened our federal government's ability to respond effectively, in this general way, to the problems of its citizens.

I have not found other institutions readily available to perform this same task. Individual agencies, while trying to reform themselves, sometimes lack the ability to make cross-agency comparisons. The American Bar Association's Administrative Law Section, while a fine institution, cannot call upon the time and resources of agency staff members and agency heads as readily as could the Administrative Conference. Congressional staffs cannot as easily conduct the technical research necessary to develop many of the Conference's more technical proposals. The Office of Management and Budget does not normally concern itself with general procedural proposals.

All of this is to explain why I believe the Administrative Conference performed a necessary function, which, in light of the cost, should have been maintained. I recognize that the Conference was not the most well known of government agencies; indeed, it was widely known only within a fairly small (administrative practice oriented) community. But, that, in my view, simply reflects the fact that it did its job, developing consensus about change in fairly technical areas. That is a job that the public, whether or not it knows the name "Administrative Conference," needs to have done. And, for the reasons I have given, I believe that the Administrative Conference was well suited to do it.

I hope these views will help you in your evaluation of the need to re-establish the Conference. I highly recommend that Congress do so.

Mr. CANNON. Thank you very much, Mr. Justice Breyer.

Mr. COBLE, would you like 5 minutes?

Mr. COBLE. Thank you, Mr. Chairman. And, again, I apologize for my imminent departure, but it's good to have both of you with us.

Justice SCALIA, should ACUS in your opinion be established as a part of another agency such as Department of Justice or GSA, for example, A? And should it be privatized, B?

Justice SCALIA. A is easy. I don't think it would be effective if it were a part of any other agency. It was set up originally as an independent agency, and I think it has to be that in order to have the confidence of the other agencies with which it's dealing. As you know, there are some interagency jealousies and reservations which I think would make its studies more difficult if it were a subunit of some other department. Besides which, I think being accountable to a Secretary of some Department or to the Attorney General would eliminate its independence, which is its whole value. It's not supposed to reflect the view of the current Administration or of the current Justice Department. It's supposed to rep-

resent the intelligent, informed view of those who are expert within the academic community, the practicing bar, and the Government. So if you want to have that, I think you have to make it an independent agency. I think it would hurt it to put it under something else.

Now, the second question, should it be privatized? I'm not sure what you mean by that. I think it has to be within the Government because, as I indicated in my initial comments, you have an entree to the agencies. No agency likes to be studied. Anybody who says, you know, "We welcome a study," they're kidding you. Everybody would like people to go away and leave me alone.

But if you have an agency that has the respect of other agencies and in which a representative from that agency itself is on the Conference, which was usually the case, 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 operation.

Mr. COBLE. Thank you, sir.

Justice Breyer, in this town much is made over, oh, it must bipartisan. Well, I'm an advocate of bipartisanship as well, but by the very nature of this city, it's the capital city of a Republic of 50 States, and some issues by their very nature and make-up are going to be partisan. Justice Scalia I think answered this, but let me put it to you, if I may.

How important is it to preserve the bipartisan, nonpolitical nature of ACUS?

Justice BREYER. It's fairly important. I can't recall in the time I was there—I don't want to say none, but I can't recall any significant number of issues coming up where partisanship made much of a difference. You know, there could have been some, but it's at a level where what is the partisan view of separation of functions in rulemaking? You know, for most—that's not true 100 percent, but most of it, it doesn't take place in the discussion at a partisan level.

Mr. COBLE. Thank you, sir.

Mr. Chairman, I want you to take judicial notice that I beat the red light, and I yield back my time. And thank you, again, gentlemen, for being with us.

Mr. CANNON. I thank the gentleman.

Mr. Watt, would you like 5 minutes?

Mr. WATT. Thank you, Mr. Chairman.

Justices, reading from the briefing memo that the Committee Members got, just to establish a foundation for a question that I want to follow up with, the Administrative Conference was established as a permanent, independent agency in 1964 and became operational 3 years later. The Conference was created to develop recommendations for improving procedures by which Federal agencies administer regulatory, benefit, and other Government programs. It served as a private-public think tank that conducted basic research on how to improve the regulatory and legal process. After failing to be appropriated funds for fiscal year 1996, ACUS ceased operations as of October 31, 1995, and the statutory provisions establishing ACUS have not been repealed.

Justice Breyer gave us a great snapshot of some of the things that the Conference did to formalize and clarify procedures that

were absolutely necessary. I sense that we are probably continuing to benefit from the work that the Conference did over the years of its existence in establishing knowable and uniform procedures.

I'm wondering if either of you may have examples of some of the problems that have been created since 1995 when the Conference went out of existence that might have been avoided had the Conference been in place.

Justice BREYER. We won't know. I remember one of the things they were working on earlier when I was—it was before I was appointed to the Supreme Court. I was on the court of appeals. A question that's always been a tough one, but very interesting, is the problem of negotiated rulemaking. Rules take us sometimes a very long time to write, and the problem they deal with almost goes away by the time they get them written and through the courts. And there was an idea that we could produce a negotiated process, and that's not an easy thing to do because sometimes there are people left out of the table.

They've done studies on that, and maybe that's made a lot of progress without them. Maybe it hasn't. I haven't heard too much about it.

Mr. WATT. That was still a work in progress at the end of the—

Justice BREYER. I think a continuous set of works in progress. But the short answer is I don't know.

Justice SCALIA. That's my answer, too, Congressman. And it's not easy to know. The biggest part of my job when I was Chairman was precisely identifying problems to study. Most of them are under the surface. They don't leap out at you. If they leapt out at you, there would be legislation covering the problem. That's usually not the case. It takes some work to discover what the real problems are and to discover how to solve them.

Anyway, you know, I have been out of that business for a while now. I'm now in the business of creating problems rather than solving them. [Laughter.]

Justice BREYER. That's what I was thinking. I was thinking that since we've both been on the Court, my guess is that we could get a pretty good agenda for them.

Mr. WATT. I would sense that maybe the people who would be most knowledgeable about the problems that may be surfacing as a result of not having the Conference in place would be ordinary citizens who are trying to work their way through a process that there's really—or improve a process that there's really no formalized procedure in place at present to improve. So I—

Justice SCALIA. Either citizens, Congressman, or the specialized bar that services that particular segment of the community—maybe the immigration bar or the bar that handles Veterans Administration appeals, things of that sort. That's where you usually get the signals from.

Mr. WATT. Now, the ABA's letter has certainly been vigorously in favor of doing this. It may be that some of their committees have stepped into that void and they'd like to get back out of it and formalize it in a different sense, or be participants in it but not necessarily the only voice that's being heard in that—

Justice BREYER. That's exactly right, because the Administrative Law Section of the American Bar Association has always been active in this area, and both, they co-existed. But what the Conference could do that the Ad. Law Section couldn't do is just what Justice Scalia is talking about: they could get the access to the information inside the Government and the off-the-record reactions of people in charge of those agencies. So it produced a conversation that you can't have as easily just through the ABA.

Justice SCALIA. I was Chairman of the Ad. Law Section for a year, and there's a big difference between showing up at an agency and saying, "I'm from the American Bar Association, I want to know this, that, and the other," and coming there from the Administrative Conference which has a statute that says agencies shall cooperate and provide information. It makes all the difference in the world.

Mr. WATT. Thank you, Mr. Chairman. I've always wanted to question Supreme Court Justices and be on the other side of the fence.

Mr. CANNON. This is actually pretty cool, isn't it?

Mr. WATT. Yes, this is nice. [Laughter.]

I will yield back. I'll resist the temptation to go well beyond the 5 minutes. I thank both witnesses and thank you for being here, and I yield back.

Mr. CANNON. The gentleman yields back.

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman. I apologize for being a little bit late, but I want to also thank Justice Breyer and Justice Scalia for all that you do to help our country in administering the third branch of Government under article III. I want to tell you that I think everybody on this Committee, regardless of their partisan nature, wants to work with you to find ways to facilitate the administration of justice in a manner that best serves our country under the principles of the Constitution.

And I guess to try to throw you what I hope will be a soft ball, maybe in my short time—I've read your testimony and we appreciate just how far we've come since 1946, for example, in the Administrative Procedure Act. I'd like to ask both of you, given that you're not only, you know, great Justices but that you've got a great historical background in terms of the judicial system and with the changes from Justice Marshall right up through today, if you would maybe give us some predictions about what our court system will look like not 50 years ago but 50 years from now as we continue to evolve as a society. Maybe you could some forward thinking for us, if it's not asking too much.

Justice SCALIA. I'm hesitating, Congressman, because Justice Breyer and I came here to talk about the Administrative Conference, and I am afraid that if I answer your question, I am going to be on what is known as the slippery slope. We really didn't come to talk about the courts, and—

Mr. CANNON. May I just suggest, we were just talking with staff, and, frankly, we would appreciate it if all the Members of the Committee would focus on ACUS. I don't mean to correct you because that's a fascinating question that I'd like to—

Mr. FEENEY. In that case, I'll withdraw my question.

Mr. CANNON.—sit around with a root beer and talk to the Justices about.

Justice BREYER. I'll say one thing about the difference. An administrative process, by and large, is individuals dealing with a bureaucracy. It's absolutely necessary, it's supposed to be accessible, and it's supposed to help. The judicial branch is the last place, I think—maybe Congress still is—where an individual who has a problem with the Government comes into a courtroom and looks face to face at the sole individual, usually a district judge, who is going to make that decision.

Now, to me, that's an incredibly valuable thing. And to me as well, although the judicial process is too expensive and it takes too long, I think it's essential to preserve its nature, which is not an administrative bureaucracy. And there is room for both. So I can't predict but I can hope, and I hope that 50 years from now the judicial branch will still not be a bureaucracy; it still will be a place where the individual comes face to face with that high Government official who will decide his or her case; and I also hope it will be a lot less expensive and will be run more expeditiously.

But as I say, those are hopes and they are not predictions.

Justice SCALIA. He's provoked me now. [Laughter.]

If I were going to compare the two, one of the great things about our judicial system is that our courts are not a bureaucracy. It is the principal difference between our judicial system and the judicial systems of most of the civil law countries. In the Anglo-Saxon system, a judge becomes a judge, at least on a prestigious court such as a Federal district court or any of the Federal courts, at the summit of a successful legal career. He not only has not been a bureaucrat his entire life, he has usually been litigating against the Government. So he comes on to the bench with a really independent mind. He is not inclined to swallow everything the Government tells him and so forth.

In the civil law system, you become a judge right after law school. You pick your career. If you want to become a judge, you start off as a baby judge and you get promoted through the whole judicial system. This creates a wholly different mindset. The strength of our courts is precisely that they are not a bureaucracy. And that's why they can help the citizen confronted with a sometimes misunderstanding bureaucracy. But I don't want to talk about the court—

Mr. CANNON. If the gentleman yields back, let me just point out that the comments from the panel are very important in the context of what we're doing here because, before you get to a judge, you often have to go through a very long process. And the fact that a judge who may be a little bit contrary to the Government, has an independent streak, is going to oversee that, is a remarkably important part of the process. But, of course, how we get that person through the process, his claims are adjudicated, are dealt with early, saving him time and money is very, very important. So we appreciate that.

I'd like to inform the panel that we expect five votes within about 10 minutes from now, so I am going to actually tap the gavel at

5 minutes. And I hope that we have—Mr. Delahunt, did you want to take 5 minutes?

Mr. DELAHUNT. I will try to limit myself.

Mr. CANNON. Let me just poll the panel here. I take it, Mr. Conyers, you'd like to ask questions. Mr. Scott, yes. Good. Let me recognize Mr. Delahunt. We'll go to Mr. Scott. If there is some time left, I will wrap. But we do have votes coming, so let's watch the clock.

Thank you, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. And welcome to both judges, and a particularly warm welcome to Justice Breyer, who served, as you've indicated and as he's alluded to, in the First Circuit, where he served so well and earned the admiration of the Massachusetts Bar and the citizens of Massachusetts and obviously other States encompassed in it. It's good to see you, Judge.

Justice BREYER. Thank you.

Mr. DELAHUNT. Clearly, both of you indicate, you know, support for reauthorization, and as we discuss it among ourselves, I dare say there's a consensus that when it was functioning, it served a very valid purpose. I think both of you have at least implicated that it resulted in efficiencies, improvements that translated into savings—savings of tax dollars.

I'd speculate that this panel and most likely the full Committee would support reauthorization. I think that's the inclination of the Chair of the Subcommittee. I can't find any reason not to. Is there any reason not to? Let me pose that question to you.

Justice SCALIA. Well, there's always money, but I guess nobody's mentioned, and I meant to mention at some point in my testimony, that I think the Administrative Conference was an enormous bargain because you are really getting the benefit of the legal advice of, I think, some very good private lawyers whose time nowadays probably goes out at 500 bucks an hour or something like that. Their time was contributed. They got no compensation for serving on the Assembly of the Conference. The only expense to the Government was their travel expenses to come to Washington for the meetings. But they expended a considerable amount of time in committee meetings, in preparing drafts of recommendations—and all of this was provided to the Government gratis.

Mr. DELAHUNT. It's a good investment. You know, earlier, I think it was you, Justice Scalia, that indicated—I mean, this is not an issue that's attracting a standing-room-only crowd. You know, it's tough to keep your eyes open.

Justice SCALIA. I'd worry for the country if it did, Congressman. [Laughter.]

Mr. DELAHUNT. Right. And I would concur with those sentiments. But I think it was you, Justice Breyer, that indicated that during your tenure there and during the course of the AC's existence, you know, there were significant savings, that it's a good investment. It wasn't just a question of taking advantage of high-priced talent, but the results translated into efficiencies that, in fact, saved considerable dollars.

We have to—if this Committee at some point in time should have legislation before it and it leaves here, our responsibility is going to be to sell it to our colleagues to ensure passage. And I think

what our responsibility is—and I think your testimony, both of your testimony here today have provided a record to be able to honestly relate that this is a way to save money, as well as to make it more streamlined.

Mr. CANNON. Would the gentleman yield?

Mr. DELAHUNT. Sure.

Mr. CANNON. Justice Scalia, you just said that you compared the value or the cost to the Government with the value of the inputs, that is, a \$500-an-hour lawyer. And I think Mr. Delahunt is moving toward another perspective, which is that we got a lot of value out. We would just love, for the record, if you have some way to give us a comparison between, say, the \$3 million we're looking at authorizing and the value Government gets as product.

Justice BREYER. Suppose, for example, that you—and I think this is a fair example. In a world where it did at one point take an average of several years from the time a rulemaking was considered until the time it went into effect as a result of improved procedure you cut a month or two off that process, as undoubtedly regulatory rulemaking negotiation, even where imperfect, did, and cut off far more than that, well, you've saved your \$3 million right there.

Mr. CANNON. That might be billions of dollars.

Justice BREYER. It could. It easily could, a major environmental rule, and that's not even taking account of the fact that the environment will then be protected that much sooner. So there is huge saving directly to the public, I think, through a more efficient set of rules.

Mr. DELAHUNT. Mr. Chairman, what I would recommend is that you, along with the Ranking Member, request either the CRS or some appropriate agency to conduct a review, if you will, that could prospectively provide us at least a vague range of the savings that could be effected if it was reauthorized, and maybe we could end up passing this, getting it on the suspension calendar, and go where we should.

Thank you. Thank you, Judge.

Mr. CANNON. We expect to have another panel at some point in the future. Maybe we can get that cost/benefit then. But let me just say for the record now, it appears to me that we're talking about a few million dollars compared to billions of dollars in cost to industry, and as Justice Breyer pointed out, a failure to implement protections to save the environment which may be incalculable in value.

Justice Scalia, I think you—

Justice SCALIA. I was just going to say, don't judge it just on how much money it saves, because not all of its recommendations are money-saving recommendations. There are two values involved here: one is efficiency, the other one is fairness. 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.

So I don't think you can just judge it on the basis of financial cost saving, although I wouldn't be surprised if it ended up having saved money overall in its recommendations.

Mr. CANNON. Thank you, Justice Scalia.

We've had Mrs. Blackburn from Tennessee join us. We have a short—time is—we have a vote coming up, and I was going to rec-

ognize Mr. Watt first, if that would be okay with you—pardon me. My Ranking Member is so prominent in my mind that I sometimes mistake that. Mr. Scott, would you like to be recognized for 5 minutes?

Mr. SCOTT. Thank you, Mr. Chairman.

When Justice Breyer talked about a rate setting, it reminded me of that line in “A Man for All Seasons” when Sir Thomas More was charged more than the regulated rate for a boat trip, and the response from the boatsman was that the fee coming this way downstream is the same as the fee going back upstream. Whoever set the rate doesn’t row a boat. [Laughter.]

Justice SCALIA. I remember that line.

Mr. SCOTT. And I’ve remembered that.

The Conference presents nonpartisan, well-documented facts and analysis. We ought not be afraid of intelligent experts’ advice, even if it disagrees with our political position. And so I’ve always been a supporter of the Conference.

Let me just ask one question. The members of the Conference don’t fall out of the sky. The executive branch, the President appoints the Chairman. Who appoints the others? And should that be looked at?

Justice SCALIA. That’s in my testimony. The Chairman is confirmed by the Senate, so it’s not just a Presidential appointment. The private members of the Conference are appointed just by the President. And—I think that’s right. Yes. And I think one of the jobs of the Chairman is to make sure that the organization does not become a partisan organization, that it is not used in order to further the policies of the current Administration. If that happens, it is deprived of all of its usefulness.

Mr. SCOTT. Is there something we can do in the appointment—membership appointment process to make that more likely?

Justice SCALIA. I think you have to be very careful in selecting the Chairman. I think it’s the Chairman’s job. You have to remain friendly to the Administration. You know, if the Administration thinks that you’re a bomb thrower and, you’re going to be hostile to them, you’re not going to get the kind of access you need. But, on the other hand, you cannot let the Administration load up the Conference with people who don’t have the expertise that you want or with people who have axes to grind. It’s up to the Chairman to fight against that. And to the extent he’s unsuccessful, the Conference will not be what it ought to be.

Justice BREYER. You might, Congressman, put a word “bipartisan” somewhere, you know, appropriate as an objective. I used to attend the meetings when President Carter was President and then again when President Reagan was President. And so I saw that change of Administrations. I don’t think it makes a big difference. It made some difference. I wouldn’t say zero. But I don’t think it made an enormous difference to the output of the Conference.

Mr. SCOTT. Were Chairmen reappointed?

Justice BREYER. No. There were different Chairmen, and it was viewed as a prerogative of the Administration. But as I say, the nature of the entity was such that they were searching for bipartisan members. It mostly—there were law professors and there were pri-

vate practitioners. So that's why I say—I didn't think it was a problem, but I can't say it's a zero impact. So urging I think helps. I don't think it's necessary to legislate it.

Mr. SCOTT. Thank you, Mr. Chairman.

Justice SCALIA. I take back what I said earlier. The public members were appointed by the Chairman with the approval of the Council. So it wasn't a matter of the President appointing the private members. The Chairman did have good control over who went into the body of the Conference. And so long as he was able to resist any untoward pressures from the Administration to appoint people that they for some reason—I don't know—owed a debt to or wanted to put in there so that they could push Administration policies, it was the job of the Chairman to resist that. And he had the power to do it because ultimately he was the one who nominated the members of the Assembly. And it worked very well in that manner, for as long as I knew it anyway.

Justice BREYER. I would hope that they would go back for the first set of appointments and look for some people that have a historic memory—there are a lot of them around—to try to reconstruct the mores of the institution.

Mr. CANNON. It is my sense that the power of the Administrative Conference is actually derived from the credibility of the members, and that if you ever got in a partisan situation, it would destroy the reputation of the Chairman, principally, and would set the Conference back a year or two or three before you would get it changed out and get new people in. And no man or woman who is of the stature to become Chairman of the Administrative Conference is going to allow his or her reputation to be destroyed over partisanship when, in fact, no matter how partisan you are, the rules are the critical thing here. And administrative interests are best protected by having clear rules that then the Administration and political people can play with.

Justice SCALIA. That is absolutely true. And let me mention one other factor. As I said in my prepared testimony and in my opening remarks, the initial Chairmen of the Conference—and I think this continued for a long time—were academics. And you can't push academics around too much because, you know, "I'll just go back to teaching, which is a great racket. I don't have to stay in Washington." So, that was, I think, one of the strengths of the Conference, that it usually had an academic as the Chairman. You just can't push them around too much.

Justice BREYER. I agree.

Mr. CANNON. Thank you. That is a bell for votes. We have 15 minutes. That should leave us time, Mrs. Blackburn?

Mrs. BLACKBURN. Thank you, Mr. Chairman.

Mr. CANNON. The gentlelady is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman. And we do have the vote, and we need to get out of here. And I've enjoyed listening to your comments.

I would just say very quickly, you've talked a little bit about the importance of the bipartisan, nonpolitical nature of the ACUS, and what I—and I'll have to say this: sometimes in the day and age in which we live, when our constituents hear about trying to eliminate waste and red tape and reports from the GAO and the CRS

and Government reform and the Inspector Generals and the CFO and the CFO Act, many times their eyes just glaze over. And so we appreciate you all and your concern and your attitude toward this and toward the hearing.

What I'd like to hear from you very quickly is, in light of all of this and looking at the bipartisan, nonpolitical nature, if you will, of the ACUS, what would you see as being the top priorities for a reconstituted ACUS?

Justice SCALIA. I think it's similar to a question that was asked earlier, and my response to that was I have been out of the business for too long to know what the first things I would investigate are. Probably the most difficult job of the Chairman was precisely to identify those areas that are worthy of study. That's what I spent most of my time doing; it doesn't jump up at you. You have to take some time to speak to a lot of people and find out what are the most pressing concerns in the administrative field—which, as you point out, is a very dull field that not many people are interested in. But there are those of us who love it.

Justice BREYER. Yes. We are administrative law buffs. [Laughter.]

I can't say what's the most important for the same reason, but it does come to mind the fact that we in our Court have divided about five ways about the correct 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 to 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.

Mrs. BLACKBURN. Well, I agree with you. I think those could be instructive. And for those of us in each branch of Government and across the field that do appreciate an effective, efficient administrative process, it would be a question worth answering. And I think we will depart for the votes, and, Mr. Chairman, I thank you for the time.

Mr. CANNON. Thank you. I do have a couple of questions to follow up.

Just along this line, while I recognize that you both are out of this business, it seems to me there's some large trends in society that might be appropriate for the Administrative Conference. For instance, litigation has increased, especially in some of the environmental areas. We have a phenomenal flourishing of science in America, and we're not integrating that very well, I don't think yet, into our administrative process. We have communication processes that are remarkable, online processes that allow people to keep track of everybody's comments and everybody's input and communications between people within and without an agency. And, of course, there's always the need to create an environment where we can have more transparency, and there are probably limits on that.

So it would seem to me that some of those areas—and there may be others in your mind—where as a matter of broad scope, the nature of society has changed, and, therefore, the focus of ACUS may be appropriate to be adjusted to look at those things.

Justice SCALIA. Well, I would certainly tell the new Chairman, one thing you might look into is whether teleconferencing couldn't

be used by agencies more than it is. I don't know whether that's something that is taken advantage of as much as it ought to be. Certainly there have been enormous strides in the facility of that procedure, the cost of it, and how close it comes to being in the same room. I don't know if the agencies are doing enough with that. Maybe that's one thing the Conference might look into. Instead of having lawyers and citizens come to Washington or to Peoria—wherever they have their hearings—maybe things could be done over the phone. I don't know.

Justice BREYER. I think science is a very, very good idea, good subject, because scientists disagree about a lot of things, but, still, the serious scientists are within a range of disagreement. And how to create a process that focuses the actual controversy within what I would call the consensus range is a hard topic to do. It's been very difficult in the courts. We've had cases trying to focus on that issue. In Britain and in continental Europe, they've had major studies and major efforts to reform their judicial system in that respect, and they've proved reasonably successful.

So there's a lot to look at, and I think if you could make progress in that area, that would be very helpful to everyone.

Mr. CANNON. Do either of you have an opinion as to whether it would be useful to have Members of Congress on the Administrative Conference?

Justice BREYER. I'm not sure that it would.

Justice SCALIA. I don't know any Member of Congress who is an expert in administrative procedure. And I don't want anybody on the Conference who's not an expert in administrative procedure.

Justice BREYER. The nature of the job is so different. I mean, the nature of the job as a person in Congress is to respond to those issues that are at a level where they have a generalized response—a generalized impact upon—

Mr. CANNON. You're cutting me out of the process, which is sort of painful, I might say, with all due respect. [Laughter.]

Justice SCALIA. You have enough work to do, Mr. Chairman.

Mr. CANNON. What I was thinking, actually, is perhaps Members of—or Chairmen of the Committees that deal with administrative law may have an ad hoc or some other sort of role.

Justice SCALIA. Well, they're welcome to attend all of the plenary sessions, and I'm sure any of the committees would be delighted to have a Member of Congress sit in on the committee meeting. I think maybe one useful thing that could be done is to keep Congress informed of when all of these committee meetings occur. If they want to attend, fine.

Justice BREYER. Congressional staffs I think did sometimes come.

Justice SCALIA. Staff did come to the plenary sessions. I'm sure of that.

Mr. CANNON. Let me just ask then a very general question. Are there any recommendations you would have for how to change what was the Administrative Conference as we go forward in the future?

Justice BREYER. No, I haven't thought about that.

Justice SCALIA. I haven't given thought to it, Mr. Chairman, and I don't want to do it off the top of my head. Nothing immediately occurs to me. The most important thing is what I mentioned ear-

lier. You have to be very, very demanding in the selection of the chief executive officer. I think it makes a big difference if you get people like Jerre Williams and Roger Crampton, good, solid people who will keep it on the right track.

Mr. CANNON. I must say that I—you've said many of the things that I have wanted in this record. We appreciate that. The Administrative Conference has been great and been effective because of the kind of people that have run it and the kind of people that have contributed their time. I certainly would like to see it reestablished. I think it would have a great benefit to the American people, far beyond the nominal costs that we're looking at right now.

We thank you very much, both of you, for coming down. You honor us with your presence, and you've done great service to our cause of bringing back the Administrative Conference to America. Thank you.

Justice BREYER. Thank you.

Justice SCALIA. Thank you, Mr. Chairman, Members of the Committee.

Mr. CANNON. We will now be adjourned. Thanks.

[Whereupon, at 3:08 p.m., the Subcommittee was adjourned.]

**WHY IS THERE A NEED TO
REAUTHORIZE THE CONFERENCE?**

THURSDAY, JUNE 24, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:30 p.m., in Room 2237, Rayburn House Office Building, Hon. Chris Cannon (Chair of the Subcommittee) presiding.

Mr. CANNON. The Subcommittee will please come to order. I apologize for being late. We appreciate your being here and I apologize to this esteemed panel for keeping you waiting. This is a matter of great interest and great concern and great importance. I think that you are important people and so I appreciate your suffering because I believe you all believe the same thing about the Administrative Conference.

Last month, as you may recall, our Subcommittee held its first of two oversight hearings regarding the issue of whether the Administrative Conference of the United States should be reauthorized. Supreme Court Justices Antonin Scalia and Stephen Breyer, the two witnesses at last month's hearing, enthusiastically testified about the many benefits and accomplishments of ACUS. The Justices concurred in what may be for them a rare unanimous opinion in their unqualified support for the Conference's reauthorization. This first hearing, at which not one but two esteemed Supreme Court Justices extolled the virtues of ACUS, clearly underscores the importance of the Conference and significance of our efforts to reauthorize it.

To build on that record, today's hearing is intended to focus in greater detail on exactly how we should go about reauthorizing the Conference. Specifically it is my hope that our witnesses will further explain the need for reauthorizing ACUS and provide guidance with respect to the form in which the Conference should be reauthorized, the priorities that a reauthorized ACUS should consider, and the anticipated amount of funding necessary to reauthorize the Conference.

For those who are not familiar with the work and the accomplishments of the Conference let me briefly explain. Over the course of its 28-year existence the Conference issued more than 200 recommendations, some of which were Government-wide and others that were agency-specific. It issued a series of recommendations eliminating a variety of technical impediments to the judicial re-

view of agency action and encouraging less costly consensual alternatives to litigation. The fruits of these efforts included the enactment of the Administrative Dispute Resolution Act in 1990, which established a framework for the use of ADR.

In addition to those accomplishments, ACUS served as the chief implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Congressional Accountability Act. The Conference also played a key role in the Clinton administration's National Performance Review Project with respect to improving regulatory systems. Throughout its existence, ACUS has served as a valuable resource for Members of Congress, Congressional Committees and various Federal agencies.

Some might ask, how can we justify reestablishing and funding another Government agency, especially in this belt-tightening environment? The answer, at least to me, is obvious. According to the Congressional Research Service, there are growing patterns of evasion among the agencies with respect to notice and comment requirements as evidenced by the increasing number of regulations being successfully challenged in the courts. An informal study by CRS indicates that 51 percent of these rules were struck down by the courts. Needless litigation hurts everyone. It slows the rule-making process, encourages agencies to try to circumvent public comment requirements, and costs taxpayers, I might add industry, millions or billions of dollars.

Another serious area of concern is the lack of a coherent approach among the agencies with respect to emerging issues and technologies. These issues include, for example, how the Government should handle private information it collects from our Nation's citizens and how agencies in this Internet age can promote greater public participation in the regulatory process. There are also concerns about the need to have peer review and to have regulations well grounded in more or less clear science. Our Nation's people and business communities depend upon Federal agencies to promote scientific research and develop science based policies that protect the Nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health and environmental impact of proposed regulations. Regulations lacking scientific support can present serious safety and health consequences as well as cause the private sector to incur unnecessary and burdensome compliance costs. Businesses suffer with the ability to prioritize their investments, and that is a very serious problem. Restoring the Conference in some form, from my perspective, would provide a cost effective yet highly valuable solution to these problems.

It is against this backdrop that I look forward to hearing from our witnesses today. Now I turn to my colleague, Mr. Watt, the distinguished Ranking Member of the Subcommittee and ask if he has any opening remarks.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

The Subcommittee will please come to order.

Last month, as you will recall, our Subcommittee held the first of two oversight hearings regarding the issue of whether the Administrative Conference of the United States should be reauthorized. Supreme Court Associate Justices Antonin Scalia and Stephen Breyer, the two witnesses at last month's hearing, enthusiastically testified about the many benefits and accomplishments of ACUS. The Justices concurred—in what may be for them a rare unanimous opinion—in their unqualified support for the Conference's reauthorization.

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In addition to these accomplishments, ACUS served as the chief implementing agency for the Negotiated Rulemaking Act, the Equal Access to Justice Act, and the Congressional Accountability Act. The Conference also played a key role in the Clinton Administration's National Performance Review Project with respect to improving regulatory systems. Throughout its existence, ACUS served as a valuable resource for Members of Congress, Congressional Committees, and various Federal agencies.

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Another serious area of concern is the lack of a coherent approach among the agencies with respect to emerging issues and technologies. These issues include, for example, how the government should handle private information it collects from our nation's citizens and how agencies—in this Internet Age—can promote greater public participation in the regulatory process.

There are also concerns about the need to have peer review and to have regulations based on sound science. Our nation's people and business communities depend upon Federal agencies to promote scientific research and to develop science-based policies that protect the nation's health and welfare. Integral to the Federal regulatory process is the need to assess the safety, public health, and environmental impact of proposed regulations. Regulations lacking sound scientific support can present serious safety and health consequences as well as cause the private sector to incur unnecessary and burdensome compliance expenditures. Restoring the Conference in some form—from my perspective—would provide a cost-effective, yet highly valuable solution to these problems.

It is against this backdrop that I look forward to hearing from our witnesses today.

Mr. WATT. Thank you, Mr. Chairman, and I thank the Chairman for convening another hearing on this subject, the reauthorization of the Administrative Conference of the United States. If this works, the process that we are following, this will be a classic example of how the legislative process should work, which is to say you start by thinking about whether there is a need for something to be reauthorized or to be approved and you have a series of legis-

lative hearings to document the need that you think exists and to document the arguments against whatever you are proposing and to evaluate how you ought to implement or reauthorize.

We started this process, thanks to the Chairman, with two distinguished members of the United States Supreme Court and both of them were in agreement about the need for the Administrative Conference of the United States, and we are taking this second step in the process with what appears to be an equally distinguished panel of witnesses, and I am looking forward to hearing their testimony. We obviously have our predilections about the need for reauthorizing the Administrative Conference of the United States, but need to hear from people who have dealt with it more close up, more hands on and to justify having such an entity in place and, if there is a need for it, justify how it ought to be reauthorized.

So I thank the witnesses for being here, and I am looking forward to your testimony, and I am looking at the reporter now who is saying, man, he talks a lot slower than that other guy, which was the reaction that I used to get when I was practicing law. All of the court reporters loved me because I do talk slow enough that they can take down what I am saying.

Mr. CANNON. You are thinking as you are talking, and I was reading and that is probably why. I just try to get through the reading so we can get to the real stuff and ask questions.

Mr. WATT. All right. Well, I yield back. I appreciate you having a hearing and I certainly support the process and the objective.

Mr. CANNON. I thank the gentleman. Without objection, the gentleman's entire statement will be placed in the record. It has been a pleasure to work with the Ranking Member on this issue and on many other issues. He and his staff have worked with us and it has been good to move this process forward. I think it has been a thoughtful process, and I think we are at a point where after this testimony we are able to refine what we project to do and get some legislation moving.

Without objection, all Members may place their statements into the record at this point. Any objection? Hearing none, so ordered.

Without objection, the Chair will be authorized to declare a recess of the Subcommittee today at any point. Hearing no objection, so ordered.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record.

In that regard I ask unanimous consent that the record include two letters we received in support of reauthorizing the Conference, both of which were previously distributed to the Subcommittee Members. The first is from Richard Chernick on behalf of the American Bar Association's Section of Dispute Resolution. The other is from Professor Paul Verkuil of the Benjamin N. Cardozo School of Law of Yeshiva University. Professor Verkuil is the Chair-elect of the Association of American Law School's Section on Administrative Law.

[The information referred to follows:]

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Reply to:

June 21, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Melvin L. Watt
Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Subcommittee Hearing on the Reauthorization of the Administrative Conference of the United States, Scheduled for June 24, 2004

Dear Chairman Cannon and Ranking Member Watt:

As the Chair of the American Bar Association's Section of Dispute Resolution, I write to express our support for the reauthorization and refunding of the Administrative Conference of the United States, the subject of the Subcommittee hearing. I ask that this letter be included in the official record of the hearing.

The ABA Dispute Resolution Section, with over 9,000 members nationwide, is one of the ABA's fastest growing Sections. The Section's objectives include maintaining the ABA's national leadership role in the dispute resolution field; providing information and technical assistance to members, legislators, government departments and the general public on all aspects of dispute resolution; adapting current legal procedures to accommodate court-annexed and court-directed dispute resolution processes; and conducting a program of research and development including programmatic and legislative models.

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

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The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

Over a quarter century, the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government. The lack of a particular constituency was its undoing when a political need for visible symbols of budget cutting and a special interest attack on the Conference combined in a perfect storm of politics. The error of that penny-wise, pound foolish decision to sacrifice the Conference stands out today, when a divisive and corrosive partisanship on issues of national concern cries out for the kind of independent, respected expert view that the Conference exemplified.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today,

June 21, 2004
Page 3

adapting administrative processes to make best use of the internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

Thank you for your consideration, and if you have any questions regarding our views on this matter, please feel free to contact me at 213/253-9790 or the ABA's legislative counsel for alternative dispute resolution and administrative law issues, Larson Frisby, at 202/662-1098.

Sincerely,



Richard Chernick
Chair
ABA Section of Dispute Resolution

cc: All members of the Subcommittee on Commercial and Administrative Law

CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

Paul R. Verkuil
Professor of Law

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June 22, 2004

Honorable Chris Cannon
Honorable Mel Watt
Chairman and Ranking Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs Cannon and Watt:

I am writing in support of the reauthorization of the Administrative Conference of the United States (ACUS). I write as someone who has served both as a frequent consultant and as a long term member of ACUS. I am currently Professor of Law at Cardozo Law School and Chair elect of the Association of American Law Schools Section on Administrative Law and I have served as Chair of the ABA Section on Administrative Law and Regulatory Practice. While I do not speak for those organizations, I believe I reflect the views of many of my colleagues who are teachers of administrative law and related disciplines or are lawyers in regulatory practice.

The ACUS has a long and distinguished place in the evolution of research about administrative law and the federal government. The people our profession admires most have been involved with the conference, starting with Walter Gellhorn and including Supreme Court Justices Breyer and Scalia along with many others too numerous to name.

ACUS's unique role has not been absorbed by any other institutions of government and it is sorely missed. The administrative law community is collectively poorer for the lack of real-world research that used to emanate from ACUS. But more importantly, government agencies, Congress and Executive branch are all the poorer for the absence of the bi-partisan forum the Conference provided. It was that rare thing in government—an agency devoted to hearing all sides and getting the answers right, without ideological preconceptions or commitments. This was a place where members left their politics at the door.

JACOB EHRICH INSTITUTE FOR ADVANCED LEGAL STUDIES

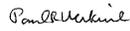
BROOKDALE CENTER • 55 FIFTH AVENUE • NEW YORK, NY 10003-4391

It would be enormously in the public interest if the ACUS is reauthorized. Its mission is in the best traditions of government and is especially needed today when a lack of exposure to differing points of view threatens the objectivity that makes for the most successful decisions of our government.

The legal academic community and the bar are implicit allies of sound government processes but often cannot find ways to participate or even to be heard. The ACUS was able to bring people together on often seemingly small issues of administrative procedure that, when properly addressed, actually made the government program involved work better. And, on occasion, these suggestions led to legislative changes that either improved processes or helped determine they were unnecessary. Deregulatory as well as regulatory changes was championed. And all this was done at virtually no cost to the United States, for the members contributed their time pro bono.

I heartily endorse a revival of ACUS on behalf of all those who believe in the enlightened processes of government.

Respectfully yours,



Paul R. Verkuil
Professor of Law

Mr. CANNON. And now I would like to recognize the gentleman from North Carolina for 5 minutes for the purpose of making a statement on the record.

Mr. COBLE. Well, thank you, Mr. Chairman. I will be very brief, Mr. Chairman. I have another meeting I have got to attend, but I want to commend you and Mr. Watt. I think you two have done a good job of steering the Subcommittee on Commercial Administrative Law very adeptly through the sometimes shoals, reefs, and rocks that await you up here. But you all have managed to avoid those.

As you pointed out, this is a very significant issue and, Mr. Chairman, you have assembled a very distinguished panel, not the least of whom is Mr. Watt's and my fellow Carolinian, Mr. Boyden Gray. But it is good to have all of you here. I apologize, Mr. Chairman, for departing, which is going to be in about 12 or 15 minutes, but I thank you.

Mr. CANNON. Thank you for coming. Mr. Feeney, did you want to make any comments to start.

Mr. FEENEY. Well—

Mr. CANNON. The gentleman is recognized 5 minutes.

Mr. FEENEY. Well, like Mr. Coble, I will have to be leaving early, too, but I have read the testimony of all the witnesses. Appreciate you being here. I am very optimistic, like Mr. Watt is especially, about this meeting. My short time here in Congress leads me to believe that there is an inverse relationship between how much work we get done in Committee and how many live TV cameras and microphones there are, so I am optimistic.

Mr. CANNON. The suggestion being that we do boring and important stuff.

Mr. Chabot, did you want to address the—

Mr. CHABOT. I enjoy boring stuff as much as anybody else does, Mr. Chairman. I am happy to be here this afternoon. But important stuff.

Mr. CANNON. Thank you.

Mr. WATT. Mr. Chairman, can I ask unanimous consent to submit for the record the testimony of Sally Katzen that has been offered for the record.

Mr. CANNON. Without objection, so ordered.

[The prepared statement of Ms. Katzen follows:]

PREPARED STATEMENT OF SALLY KATZEN

Mr. Chairman and Members of the Subcommittee:

I greatly appreciate the invitation to testify in favor of the reauthorization of the Administrative Conference of the United States (ACUS). For the last several years, I have been teaching undergraduates (at Smith College) and graduate students (most recently at the University of Michigan Law School and at Johns Hopkins University); among the courses I teach are Administrative Law and The Regulatory Process. During the Clinton Administration, I served as the Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget (1993–1998), where I was responsible for the development and implementation of the Administration's regulatory policy. Before joining the Clinton Administration, I was a partner in the Washington DC law firm of Wilmer Cutler and Pickering, where I specialized in administrative law. I also served as the Chair of the American Bar Association Section on Administrative Law and Regulatory Practice (1988–89).

Most relevant in establishing my credentials on the subject of today's hearing is the extensive experience I have had with ACUS. I was first appointed a Public

Member in 1988 while I was in private practice. I served on several of the ACUS committees, eventually chairing the Committee on Judicial Review. I was therefore actively involved in the preparation and presentation of various reports and recommendations of ACUS in the late 80's and early 90's. In 1994, President Clinton appointed me one of the five government members of the Council (the governing board of ACUS) and designated me as the Vice Chairman. I served in that capacity (and for a time as Acting Chairman) until ACUS was closed.

In fact, I was privileged to testify before this Committee on April 21, 1994, in support of reauthorization of ACUS. [A copy of that testimony, which was reprinted in 8 Admin. L.J. Am. U. 649 (1994), is attached.] Today, I again urge your favorable consideration to authorizing ACUS as an independent agency to study administrative law issues and make recommendations to improve the efficiency, adequacy and fairness of the federal government's administrative procedures (paraphrasing the 1964 Administrative Conference Act).

Others have testified about the significant substantive contributions made by ACUS, citing specific studies or recommendations or advice to the Congress, the Executive Branch and even the Judiciary. Others have made the point that the structure and composition of ACUS enabled a relatively modest amount of taxpayer funding (less than \$3 million annual appropriations) to be leveraged by the far greater contributions in kind by practicing lawyers and academics. And you have heard that several of the recommendations of ACUS actually saved the federal government significant amounts of money by increasing the efficiency of administrative processes without decreasing fairness for the participants. I do not want to repeat what others (including my earlier testimony) have said.

The point I want to emphasize is that my (and others') judgment on the value of ACUS have only strengthened with the passing of time. It is often said that you do not appreciate what you have until you no longer have it. That, I believe, sums up the past decade for those of us who work in the field of administrative law.

After ACUS closed and while I was still in government, there were several occasions when I and other senior government policy officials would have greatly benefited from having ACUS opine on pending developments—from how to conduct rule-making proceedings in an electronic age to how to implement a new program in the most efficient, effective and equitable way. We knew from past experience that the ideas being considered, while meritorious, might well be improved as the result of an objective, non-partisan appraisal/critique. I cannot imagine that those in the current Administration would have any different view. In fact, at a conference held recently at American University on electronic rulemaking, several participants in the session on "next steps" (some with government experience and others currently in government) called for resurrecting ACUS to provide the kind of broad-based public and private input that is essential for good decision making in this area.

There are two aspects of ACUS that I think are sorely missing. First, on matters of substance, ACUS provided an invaluable institutional memory. Invariably, administrations change, and with each new administration there are some bright new ideas about how to conduct or carry out administrative processes. Some of these ideas are fresh and productive and welcome. Some, however, may sound good or appear simple at first look, but they have in fact been tried before and failed or been seriously flawed for one reason or another. What ACUS provided was a forum for those who worked and wrote in the field to discuss, evaluate, and provide constructive suggestions based on real life experience. Now when senior government officials are presented with a proposal to address or resolve a particular problem in administrative practice, they can—and presumably do—seek out the views of some in the academy, individual private practitioners, or their colleagues in other federal agencies (if they know or can find out that these officials have dealt with this or a similar issue). But there is no central repository of expertise and experience that can provide a collective view—incorporating the considered judgment of those in the public and private sectors, those in academics and those in public administration, and importantly, both Democrats and Republicans. That was the beauty, or genius, of ACUS—for its very small staff was able to reach out to almost 100 of the most knowledgeable and experienced people in the field and tap the accumulated wisdom of the profession for the public good. The absence of ACUS is a tremendous loss to good government.

The second aspect follows from a point made above. As I said, the members of ACUS came from, and brought with them, varied perspectives. This diversity of views was enhanced by the long-standing and time-honored tradition of appointing the public members—those from the private sector—across party and philosophical lines. And the bi-partisan and collegial nature of ACUS was maintained not only in the selection of members, but also in the operating committees and the plenary sessions. Simply stated, ACUS was one place where Democrats and Republicans

worked together. We might have disagreed (strenuously) on the substance of the proposal—should there be a government program in this area or not—but if, in the wisdom of Congress, there was to be such a program, we could all agree that it should be conducted fairly and efficiently. It is significant, I believe, that both Justices Scalia and Breyer testified in favor of reauthorizing ACUS. Today, Boyden Gray and I both speak as stalwart supporters of ACUS. With divided government and the increased partisanship that has characterized the last several decades in Washington, there are very few such bi-partisan institutions—I should probably say non-partisan institutions—where people with vastly different political views can and do see eye to eye on administrative processes. That too was the beauty, or genius, of ACUS—for those with differing positions to be heard and be reconciled for the public good, and that too has been sorely missed.

I thank this Subcommittee for reexamining this issue and for favorably considering the reauthorization of ACUS.

ATTACHMENTS

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Administrative Law Journal of The American University
Fall 1994

Commentary

*649 TESTIMONY BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON
ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS IN SUPPORT OF THE REAUTHORIZATION
OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The Role of the Administrative Conference in Improving the Regulatory Process

Sally Katzen [ENaa]

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Katzen

April 21, 1994

Testimony of Sally Katzen, Acting Chairman, The Administrative Conference of
the United States

(Editor's Note: The Administrative Conference of the United States, created in 1964 by the Administrative Conference Act, studies administrative law issues in the federal government and makes recommendations to improve the efficiency, adequacy, and fairness of administrative procedure. In 1994, Congress considered the Conference's quadrennial reauthorization. The hearings reproduced below address the Conference's reauthorization. Although the House Committee on the Judiciary reported favorably on reauthorization, the 103rd Congress did not resolve the matter before adjournment. Meanwhile, Congress appropriated \$1.8 million for the Conference for fiscal year 1995, [ENaa] the same amount the Conference received in fiscal year 1994.

The Administrative Law Journal of The American University takes no position on the Conference's reauthorization. In the interest of fostering debate in the administrative law community, however, the Journal presents the submitted statements of five witnesses who testified earlier this year in favor of reauthorizing the Conference before the House Subcommittee on Administrative Law and Governmental Relations. The Journal received permission from the authors to publish their statements. Also, the Journal, in cooperation with the authors, made a limited number of stylistic changes and added a few citations for clarity. The opinions expressed in the statements represent the views of the authors only and not necessarily those of The Administrative Law Journal of The American University.

*650 Although the subcommittee invited testimony from individuals who might oppose reauthorization, no dissenting witnesses appeared or submitted written statements for the record. Consequently, the Journal invites comments, responses, or rebuttals suitable for publication in its Commentary section. In the interest of timeliness, the Journal will work with interested authors to expedite publication of statements in immediately forthcoming books. For more information, please call The Administrative Law Journal of The American University at (202) 885-3412.)

Introduction

I am pleased to appear in support of the request of the Administrative Conference of the United States (ACUS or Administrative Conference) for a reauthorization of its appropriations. The Office of Management and Budget (OMB) has authorized the Administrative Conference to request the following ceiling amounts on appropriations for the next four years:

FY 1995 \$2.6 million
FY 1996 \$2.704 million

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FY 1997 \$2.814 million
 FY 1998 \$2.928 million.

*651 The Structure of the Administrative Conference

The structure of the Administrative Conference is unique within the federal government, and this unique structure underlies its "genius." Created in 1964 by the Administrative Conference Act [FN1] as a permanent, independent advisory agency, the Administrative Conference has a statutory maximum of 101 members. [FN2] The Administrative Conference is headed by a chairman who is appointed by the President with the advice and consent of the Senate. [FN3] The chairman acts as the chief executive officer of the Administrative Conference, [FN4] presides over its meetings, [FN5] and heads the Office of the Chairman, which consists of a small career staff of eighteen to twenty employees. [FN6]

The Administrative Conference includes a council of ten presidential appointees who serve much like a board of directors. [FN7] Typically, five Council members are senior government officials, and the other five are prominent lawyers or experts on government operations from the private sector. The President designates one of the council members to serve as vice chairman. [FN8] As you know, I am ACUS's vice chairman, and serve as acting chairman until the President nominates, and the Senate confirms, a full-time chairman. A short time ago, the President announced his intention to nominate Thomasina V. Rogers to a five-year term as the Administrative Conference's full-time chairman.

By statutory design, a majority of the Administrative Conference's members represent government departments and agencies. All major departments and agencies are represented and each department or agency chooses its own representative. The caliber of the individuals who represent these agencies attests to the importance that the agencies, as well as the Administration, assign to the Administrative Conference's functions. Many government members are Clinton administration political appointees like me, while others are senior career civil servants. We take on this added responsibility because of the importance we assign to the Administrative Conference's mission.

The government officials join forces with distinguished private citizens, *652 called "public members"--law professors, public interest lawyers, private practitioners, economists, public administrators--who volunteer their time and talent because they share the view that this unique public-private partnership significantly improves the way government regulates its citizens or delivers services to them. The Administrative Conference Act requires that the Administrative Conference chairman select members from the private sector who are "members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure." [FN9] The overall membership shifts gradually because public members of the Administrative Conference serve two-year staggered terms [FN10] and the terms of half of the members expire each June. [FN11] The Administrative Conference has a long-standing tradition of private sector membership that crosses party and philosophical lines--a tradition that I honored recently in making fourteen appointments.

The participation of these volunteer "citizen-members" allows the government to leverage a relatively small appropriation to attract considerable in-kind contributions for its programs. As a consequence, the Administrative Conference receives hundreds of thousands of dollars each year in donated services from leading U.S. experts in administrative law and government, making it one of the "best bargains" in the federal government. [FN12]

Various government entities that are not members of the Administrative Conference, as well as private sector organizations that are interested in the proper functioning of the administrative process, maintain liaison arrangements with the Administrative Conference. Among them is the federal judiciary. The judiciary has traditionally assigned two of its most distinguished jurists to participate in Administrative Conference activities. Chief Judge Stephen Breyer of the U.S. Court of Appeals for the First Circuit and Judge Stephen Williams of the U.S. Court of Appeals for the District of Columbia Circuit have been designated by Chief Justice Rehnquist as the judicial branch's official representatives to the *653 Administrative Conference. Judges Breyer and Williams are prominent administrative law scholars and participate actively in the Administrative Conference's work. [FN13]

Administrative Conference bylaws also establish a category of emeritus membership, called Senior Conference Fellows, for former chairmen and those individuals who have served at least eight years as Administrative Conference members. [FN14]

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By this means, the Administrative Conference retains the expertise of these distinguished administrative law authorities while permitting new members to contribute their ideas. The bylaws also authorize the chairman to appoint "special counsels" who assist the membership in areas of their special expertise. [FN15] Liaison representatives, senior fellows, and special counsels participate in Administrative Conference activities, but cannot vote at plenary sessions.

The Reason for ACUS's Creation

[T]he heavy pressures on Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity; and the demands of the daily job may lessen the will to achieve change . . . The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government . . . [T]he current need is for continuous attention to somewhat technical problems, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. [FN16]

The idea of having an organization dedicated to recommending improvements in agency procedures goes back almost fifty years and has received support from all three branches of government on a bipartisan basis. Temporary committees or conferences to review administrative procedures and develop methods of preserving fair process without undue time and expense were created in the 1940s, 1950s, and 1960s. One thing became clear from these efforts: What was needed was a permanent *654 government-sponsored institution, melding the expertise of the government, the academic community, and the private sector, to monitor on an ongoing basis the way government interacts with those it is intended to serve. The current Administrative Conference is a direct outgrowth of President John F. Kennedy's "New Frontier" vision.

On swearing in the first Administrative Conference chairman in 1968, President Lyndon B. Johnson set forth the principles that have guided the Administrative Conference's mission since its creation:

The success of two temporary conferences—both chaired very ably by Judge Prettyman—convinced us that we needed a permanent agency for continuing review of the administrative process.

We needed a forum for the constant exchange of ideas between the agencies and the legal profession and the public.

We want the Administrative Conference to be the vehicle through which we can look at the administrative process and see how it is working and how it could be improved and how it could best serve the public interest. [FN17]

The Administrative Conference had advised the President and federal departments and agencies on ways to improve the fairness and efficiency of federal agencies' administrative procedures. It has advised the Judicial Conference of the United States [FN18] on the relationship between agency action and subsequent judicial review. A critical part of the Administrative Conference's work, although much less publicized, has been its provision of nonpartisan advice to Congress on agency administrative procedure.

The Need for ACUS Today

The Administrative Conference . . . provides advice and assistance on a continuing basis to Federal agencies charged with the implementation of new laws and regulations—to help those agencies improve and simplify their regulatory, enforcement, and adjudicatory functions. The agency also assists Congress by recommending or analyzing legislative changes intended to increase the efficiency and fairness of agency procedures.

In short, the Administrative Conference acts as an ongoing mini-national performance review in its area of expertise, just as the . . . Judicial Conference does in overseeing the operations of the judiciary. [FN19]

*655 The Administrative Conference provides unique, expert advice to the executive branch, the independent regulatory agencies, the Federal courts, and to the Congress. As a member of the Judiciary Committee, I have frequently relied on the Conference's expertise in drafting and formulating legislation. It is the only entity in the U.S. Government which focuses on administrative law, in all of its many facets. Decisions made as part of the Federal regulatory process . . . have a tremendous impact on the substantive direction of important public policy issues. We are talking here about health, education, public safety, the environment, transportation and consumer protection—just to cite a few areas impacted by Federal administrative

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procedure and regulatory enforcement. [FN20]

ACUS is needed more today than ever before. One researcher has estimated that federal regulatory programs affect \$500 billion of the gross domestic product, and that figure likely will increase as we move toward the year 2000. [FN21] New statutes continue to be enacted, and programs are much more complicated than they were twenty-five years ago. The procedures by which agencies implement these programs critically affect the daily lives of countless Americans with real problems—farmers whose farms might not have been foreclosed had statutory mediation programs worked better, public housing tenants who would not need to wait in line to have housing discrimination complaints resolved in court if their complaints could be resolved through administrative adjudication, or disability claimants who would have their claims handled more promptly if the mechanism for producing the necessary information was better at the outset. ACUS is the only entity that addresses these nitty-gritty procedural problems. Chairman Brooks is correct that ACUS is, in a real sense, an ongoing, mini-National Performance Review for administrative process issues.

Advice and Assistance to the Executive Branch

Since its creation, ACUS recommendations have had a major effect on the workings of the federal government. Many of ACUS's proposals—such as the creation of a regime of administratively imposed civil penalties, including the drafting of a prototype statute that became the model for more than 200 civil penalty laws—are so ingrained in our administrative process today that the Administrative Conference's role in developing them has either been forgotten or is taken for granted.

*656 ACUS continues to address important administrative process problems. Over the period of its current authorization, for example, ACUS adopted twenty-eight recommendations that cover the administrative process spectrum from promoting simplified procedures for hearing appeals from the Occupational Safety and Health Administration (OSHA) citations; [FN22] to improving the process by which four million Social Security beneficiaries who cannot care for themselves receive payments through "representative payees"; [FN23] to making it easier for so-called "de minimis parties" to avoid significant legal and consultant fees by reaching early settlements with the Environmental Protection Agency to clean up hazardous waste sites under the Superfund program; [FN24] to streamlining attorney fee litigation under the Equal Access to Justice Act. [FN25] Additionally, at the request of the National Commission on Migrant Education, we examined the many federal migrant and seasonal farmworker programs and suggested improvements in the coordination of these programs; [FN26] the Commission incorporated our findings into its final report in 1992.

ACUS's Role in Alternative Dispute Resolution

In recent years, the Administrative Conference has assigned a high priority to assisting agencies in streamlining the rulemaking process and reducing or eliminating needless administrative adjudication. It does so by encouraging the use of consensual techniques known as alternative means of dispute resolution, or "ADR," that allow parties, including government agencies, to resolve conflicts in mutually acceptable ways. These activities are in furtherance of the responsibility Congress gave the Administrative Conference in 1990 to implement the Administrative Dispute Resolution Act [FN27] and the Negotiated Rulemaking Act. [FN28]

*657 Passage of these laws represented the congressional response to ACUS initiatives to foster less costly alternatives to traditional litigation and rulemaking. But, as Congress realized, passage of the new laws is not enough. Continuing coordinated effort to implement these statutes is essential if the government (and, coincidentally, the public) is to reap the benefits of these innovative approaches.

About half of our staff time goes to these ADR activities. We have a congressionally imposed responsibility to compile data under both statutes and report to Congress before the ADR Act's statutory sunset on October 1, 1995, [FN29] and the Negotiated Rulemaking Act's statutory sunset on November 29, 1996. [FN30]

ACUS also assists agencies in developing and putting into effect statutorily required policy statements for using ADR. ACUS has assisted many agencies, such as the Nuclear Regulatory Commission, the Equal Employment Opportunity Commission (EEOC), and the U.S. Air Force in developing their ADR programs. ACUS provides support and assistance to a recently established intergovernmental coordinating committee and five interagency working groups to help ensure uniform compliance with the statute throughout government, avoid needless duplication of effort, and tackle problems that are beyond

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the capability of a single department or agency. Among the groups' many activities in 1993 were presenting programs to educate agencies' Equal Employment Office directors on using ADR to improve the fairness and efficiency of civil rights complaint handling, creating a system for interagency sharing of the services of federal employees trained as mediators to resolve employee discrimination and other workplace disputes, and developing prototype training courses and materials that agencies across the government can use.

Last year, the Administrative Conference published several guidance documents and "primers" to assist agency officials responsible for implementing the ADR statute, including English and Spanish language versions of a brochure on the use of mediation in federal disputes. Administrative Conference staff recently participated in agency ADR implementation programs sponsored by the Federal Deposit Insurance Corporation (FDIC), the U.S. Army, the Departments of Transportation, Interior, Health and Human Services, Labor, Agriculture, and Justice, the Office of Personnel Management, the Internal Revenue Service, the EEOC, the *658 Federal Energy Regulation Commission, the General Services Administration and the Small Agency Council. In cooperation with the Society for Professionals in Dispute Resolution, ACUS presented a day-long program for more than 300 federal employees on implementing the ADR Act. We also sponsored a full-day roundtable to assist agencies in finding and hiring qualified ADR neutrals.

The Administrative Conference also has assisted the local federal district court in developing programs on use of ADR.

Our work for these entities is well understood by those we assist. Labor Secretary Robert Reich has observed: As a result of study and recommendations developed (by ACUS) over many years, Congress adopted both the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act several years ago. The Department of Labor has experimented with the use of the approaches authorized under these laws, and believes that, in appropriate circumstances, they may be very productive. In particular, these approaches can facilitate public participation and trust in the processes of government and avoid wasteful litigation. The ACUS staff has devoted considerable time to educating and assisting the Department in this regard, and in turn has conveyed the lessons learned here to other agencies of the government which are experimenting with such approaches . . . While not a part of this Department, ACUS has considerably benefited our efforts. It has set an example which will facilitate the reinvention of government and its procedures in order to better serve the needs of the public. [FN31]

Those segments of the private sector that are concerned about the improvement of the federal administrative process also recognize the value of the Administrative Conference's work in this area. The President of the American Arbitration Association, for example, has noted the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs. Many of us in the private sector are doing our part to move the administration and its various agencies in this direction . . . But ACUS has done a splendid job of creating a network of ADR specialists in the Federal government, and represents a prudent investment for the future. [FN32]

The President of the National Institute for Dispute Resolution has observed: ACUS has been a major proponent of dispute resolution in the federal government, *659 serving as an information resource on dispute resolution tools and techniques, as a central contact for information on qualified and competent third parties, and as an advocate and innovator in applying dispute resolution to the tasks of the federal government. [FN33]

The private sector has even contributed funds to support ACUS's efforts. [FN34] A set of private grants from the Hewlett and Culpeper Foundations illustrates an unusual commitment of money in recognition of the value that the private sector attaches to the Administrative Conference's promotion of consensual decisionmaking throughout government.

Tangible savings are already evident. The FDIC, relying on ACUS recommendations, began a pilot mediation program that saved more than 9 million dollars in legal fees and expenses during the first eighteen months. A pilot project by the Department of Labor, on which ACUS has worked closely, has, according to the Department, reduced the cost of litigation in cases resolved by mediation by seventeen percent and expedited resolution of disputes by six months, or more than sixty percent.

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I am convinced that we have just scratched the surface of cost savings. Increased use of ADR over the next four years can produce very substantial savings if agencies are encouraged and trained to use it. ACUS is the one agency that is doing that job today and, with the committee's encouragement, hopes to continue its efforts to foster the use of ADR.

Advice and Assistance to Congress

Congress has numerous resources, both inside and outside government, including the General Accounting Office and the Congressional Research Service, to which it can turn for assistance in resolving legislative issues. Yet, on issues of administrative law and procedure, members of Congress and congressional committees and their staffs routinely turn to the Administrative Conference because ACUS provides a level of expertise and assistance that Congress cannot obtain elsewhere.

Most of our work is done behind the scenes, at times on a confidential basis. ACUS hears from congressional staff members literally every week. Not too long ago our General Counsel received a call from a *660 congressional staff member requesting information regarding how staff adjudicatory officers in the executive branch were supervised. "Can you fax something to me within an hour?" she asked. He did. That is routine business for our staff. Once in a while our behind-the-scenes work receives public acknowledgment. When introducing legislation that incorporated ACUS Recommendation 83-1: "The Certification Requirement in the Contract Disputes Act," [EN35] bringing to an end wasteful litigation between the government and scores of small and large businesses that contract with the government every year, Senator Howard Heflin, the Chairman of the Senate Subcommittee on Courts and Administrative Practice, acknowledged that "[t]he language [include today is the result of much discussion between the Administrative Conference, members of the Judiciary Committee, and the Claims Court." [EN35]

At times, Congress publicly asks ACUS to provide its institutional expertise. When the savings and loan crisis was front page news, two congressional committees were studying a critically important, but far less visible, aspect of the problem--namely, the structure of the Resolution Trust Corporation (RTC) and its Oversight Board. They asked ACUS to provide them with an overview of structural arrangements for regulatory oversight. ACUS had never studied the issue in the context of the RTC, but the Chairman and the professional staff promptly provided testimony that outlined a framework within which the committees could devise a solution to the relevant problems. Representative Bruce F. Vento, the Chairman of the House Task Force on the RTC, described ACUS's efforts as follows:

What was so good about the Conference's work was that they had no stake in the outcome. Rather, they provided us with an extremely valuable, impartial overview of structural arrangements within the government, highlighting the strong and weak points of each arrangement. . . . I know these are tough times. But, from my experience, at least, the Conference provides a lot of "hang for the buck" for Congress. [EN37]

On occasion Congress has asked ACUS to formulate a specific solution to a practical, perhaps seemingly intractable, legislative problem. In 1980, ACUS conducted a major study of how the Federal Aviation Administration (FAA) had implemented a two-year demonstration civil *661 penalty program affecting the safety of the national air transportation system. The congressional committees reviewed the Administrative Conference report and decided to extend the program for another two years. As part of the extension legislation, Congress directed ACUS to do a follow-up study and submit recommendations. [EN38] The Administrative Conference's proposals, made within the one-year time-frame requested by the House Aviation Subcommittee, led directly to passage of Pub. L. No. 102-345, the Federal Aviation Administration Civil Penalty Administrative Assessment Act of 1992, [EN39] which made the civil penalty program permanent and transferred authority over the adjudication of civil penalties affecting pilots and flight engineers from the FAA to the National Transportation Safety Board. [EN40] Your colleague, Aviation Subcommittee Chairman James Oberstar and Ranking Minority Member William Clinger, described ACUS's work as follows:

The Aviation Subcommittee has benefited greatly from the work of the Conference. Over the past few years we have had to deal with the controversial issue of allowing the Federal Aviation Administration to assess civil penalties for violations of aviation safety and security regulations. During our deliberations, the Conference supplied us with two very important studies which were instrumental in informing the Congress and the aviation community on whether the procedures for FAA civil penalties followed general principles of administrative procedure and practice. It was invaluable to our ability to develop legislation on civil penalties to have the benefits of the Conference's thorough and objective studies. [EN41]

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The Judiciary's Reliance on ACUS Scholarship

The courts continue to rely on the scholarship of the Administrative Conference, its staff and consultants. During its most recently completed term, the Supreme Court expressly referred to one of ACUS's recommendations and another of its studies. Justice Blackmun's opinion for a unanimous Court in *Darby v. Cisneros* [EN42] pointed to one of ACUS's *662 oldest, but most influential, proposals "urging Congress to adopt the very language (regarding the abolition of sovereign immunity) that was eventually incorporated verbatim into the 1976 amendment" to the Administrative Procedure Act. [EN43] In *Lincoln v. Grover Vigil*, [EN44] the Court took note of a 1992 consultant study for the Administrative Conference entitled *Interpretive Rules, Policy Statements, Guidance, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?* [EN45]

The Administrative Conference's views with respect to the applicability of the Equal Access to Justice Act (EAJA) [EN46] and the Model Rules developed by the staff of the Office of the Chairman to implement EAJA were noted in six separate court of appeals decisions in recent years. [EN47] Chief Judge Merritt of the U.S. Court of Appeals for the Sixth Circuit explained that ACUS's Model Rules "provide guidance (or the court's inquiry" because of the role assigned to the Office of the Chairman by Congress for promulgating model rules to govern EAJA awards in administrative proceedings. [EN48]

Administrative Law Assistance to Foreign Countries

In 1992, Congress gave ACUS a new statutory responsibility—to provide administrative law assistance to foreign governments. [EN49] Under the new law, any assistance initiative must be provided on a fully reimbursable basis and receive the concurrence of the Department of State, the U.S. Agency for International Development, or the U.S. Information Agency (USIA). In 1993, ACUS planned and carried out two overseas seminars, one in the Ukraine and the other in China. ACUS has just entered into a two-year interagency agreement with USIA to provide assistance in recruiting law professors, judges, court administrators, and administrative law experts as part of a major "rule of law" initiative in several African countries. [EN50]

*663 The Role of ACUS's Staff

Most of the Administrative Conference's budget each year goes toward staff salaries. That may seem peculiar at first blush because the ACUS members donate their time, ACUS contracts for much of its research, and its recommending function gets most of the public attention. The staff, though, is deeply involved in ACUS's day-to-day research, implementation, clearinghouse, outreach, and coordination activities.

To begin with, the staff is directly involved at all critical stages in the research and recommendation function. The Chairman and Research Director select the research projects, the Research Director maintains ongoing contacts with the academic and legal communities so as to find and select qualified consultants, and the staff defines the project. The staff works with the consultant during the course of each project and reviews the draft report to ensure that the product covers all relevant areas and is of high quality. Working with the chairman of the relevant committee, the staff thereafter drafts recommendations for consideration by the full committee. Committee consideration typically spans several months and includes many meetings. The small professional staff oversees twenty to twenty-five projects at any one time.

The professional staff also provides independent research. As I noted before, the staff prepares testimony before Congress and gives informal assistance to congressional and agency staffs. It offers comments to the OMB on pending legislation and responds to agency requests for comment on proposed regulations. From time to time, the staff undertakes individual research projects or portions of projects. Recommendation 92-1: "The Procedure and Practice Rule Exemption from the APA Notice- and-Comment Rulemaking Requirements" [EN51] was entirely the product of staff research.

The staff writes or edits books on a regular schedule—at least one major book per year—that contain materials useful to other government departments and agencies. In FY 1992, ACUS staff published the second edition of the *Federal Administrative Procedure Sourcebook*. [EN52] which contains the text, a short analysis, a legislative history, bibliographic *664 references, and related Code of Federal Regulations citations for eighteen procedural statutes applicable to federal agencies government-wide. Before issuance of the first Sourcebook in 1985, [EN53] agencies typically compiled and reproduced the needed copies of the statutes individually. Centralized publication by ACUS saved the government approximately \$500,000.

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As required by the ADR Act, the staff maintains a roster of neutrals [FN54]--a computerized database of about 1000 dispute resolution specialists (e.g., mediators, arbitrators, and neutral evaluators) available to agencies to help resolve conflicts. The staff reviews both Sunshine Act [FN55] regulations proposed by the multi-member agencies under the Government in the Sunshine Act [FN56] and proposed agency regulations under the Equal Access to Justice Act. [FN57] The staff collects statistics on awards under the Equal Access to Justice Act and reports annually to Congress. [FN58]

The staff produces a periodic newsletter that contains information useful to agency personnel concerning ongoing research activities and other Administrative Conference initiatives. By alerting agencies to these projects, ACUS saves them the time and expense of independent research. The entire publication is prepared in-house, using desktop publishing equipment, at a substantial cost savings over outside contracting.

ACUS has a part-time professional librarian and maintains a library that not only includes ACUS publications and the archived records of past Administrative Conference research projects, but also specialized collections of materials on administrative law subjects. It is a Federal Depository Library and is open to other agencies and the public.

Importantly, the career staff, under the chairman's direction, has primary responsibility for implementing Administrative Conference recommendations. Because the Administrative Conference has advisory powers only, the professional staff closely monitors congressional and agency activities to discover windows of opportunity. At times, the chairman or the staff initiates contacts with appropriate agencies or congressional committees to encourage reform efforts. The staff or the chairman ensures that the interested body is made aware of the Administrative Conference *665 recommendation and offers Administrative Conference assistance. As a result of these implementation efforts, over the years about three-fourths of the Administrative Conference's recommendations have been favorably acted on, in whole or in part.

The Administrative Conference's Research Budget

Historically, ACUS devoted as much as twenty percent of its annual appropriation to basic research leading to its recommendations. That percentage has steadily declined, as salaries, benefits, rent, and other less controllable costs have risen and the Administrative Conference, responding to suggestions from our Appropriations subcommittees, increasingly relied on interagency transfers of funds to conduct research on behalf of other agencies. [FN59] Direct research funding in both FY 1992 and FY 1993 was approximately four to five percent of the total Administrative Conference budget.

A special committee of ACUS members established in 1992 to review the operation of the Administrative Conference--a committee on which I served while a public member of the Administrative Conference--expressed concern about undue reliance on outside funding of research. The committee recognized the value of responding favorably to requests from other agencies for studies of their programs. But the committee concluded that "excessive reliance on interagency transfers to fund the research program can skew the Conference's research toward narrow topics, undermine the public's confidence in the objectivity of the Conference's research, and introduce instability in the Conference's research program because a constant flow of funds from other agencies cannot be assured." The special committee urged the Administrative Conference to seek sufficient appropriations to undertake "a reasonable number of directly funded studies" during each fiscal year. [FN60] ACUS actively will continue to seek opportunities to perform studies for particular agencies, especially when those agencies are prepared to underwrite those studies with funds transferred to the Administrative Conference *666 under the Economy in Government Act. [FN61] At the same time, the reauthorization levels we are seeking will ensure that the Administrative Conference maintains an ability to initiate autonomous studies and thus permit some balance between independent research and that funded by other agencies.

Implementation of National Performance Review Recommendations

Last September, Vice President Al Gore issued Creating A Government that Works Better & Costs Less, Report of the National Performance Review (NPR or Report), which includes many initiatives to streamline the administrative process. [FN62] Enhanced use of ADR and negotiated rulemaking are prominent Reinventing Government procedural initiatives. [FN63] Specifically, the Report's section on cost-cutting initiatives (Section Four) recommends:

"Agencies will expand their use of alternative dispute resolution techniques." [FN64]

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"All agencies should establish alternative dispute resolution methods and options for the informal disposition of employment disputes." [EN65]

"Agencies will make greater use of negotiated rulemaking." [EN66]

The Department of Labor should "provide administrative guidance more quickly and cheaply through negotiated rulemaking" and "expand the use of alternative dispute resolution" to "reduce litigation and produce significant long-term savings." [EN67]

ACUS is a primary coordinating and implementing agency for this *667 effort. The Administrative Conference's Research Director participated in the NPR as head of one of the teams. Recently, the Administrative Conference brought together the country's leading dispute resolution organizations--public and private--to work together to assist the NPR in getting agencies to carry out the recommendations for increased use of ADR.

Last September, President Clinton issued a memorandum directing the heads of selected executive departments and agencies to identify at least one rulemaking that would be appropriate for use of negotiated rulemaking. [EN68] Negotiated rulemaking is a procedure originally developed by the Administrative Conference, which has a decade-long experience with its use. I have already participated in a seminar, co-sponsored by ACUS and OMB's Office of Information and Regulatory Affairs, to acquaint agency officials with the negotiated rulemaking process. Several agencies are drawing on ACUS's staff expertise to assist them with new negotiated rulemaking proceedings.

The Administrative Conference was selected by NPR to undertake a pilot demonstration of the use of electronic mail as a means of enhancing ADR processes. A planned part of the demonstration is an "electronic reg neg" that will allow interactive rule development to occur simultaneously at a number of technical and policy levels. This project, which is now in progress, implicates a range of novel administrative law issues.

NPR also recommended creation of a basic training program for presidential appointees assigned to regulatory agencies. [EN69] For the past several years, ACUS has provided the only training for such presidential appointees--an annual, half-day seminar addressing issues of common concern, and NPR urged the President to "direct ACUS, which has expertise in the administrative adjudication and rulemaking processes and access to experts across the federal government and academia, to establish . . . an ongoing training program for presidential appointees." [EN70] At a recent meeting of the Regulatory Working Group, which was created by Executive Order 12,866 [EN71] and consists of most of the agencies with domestic regulatory authority, ACUS was charged with developing a training program and working with the agencies to encourage its early *668 implementation.

FY 1995-98 Reauthorization Levels

Four years ago Congress approved legislation that authorized modest and gradual increases in the Administrative Conference's appropriation from \$2 million to \$2.4 million over four years, essentially to accommodate inflationary increases. [EN72] Since then, Congress has passed several measures that have given ACUS new roles. Most important for present purposes are --

Pub. L. No. 101-552, which assigned to the Administrative Conference the principal responsibility for promoting and coordinating alternative means of dispute resolution by federal agencies to reduce needless litigation costs to agencies and the private sector; [EN73] and

Pub. L. No. 101-648, which gave the Administrative Conference the primary leadership role in encouraging and assisting agency use of negotiated rulemaking. [EN74]

As I noted earlier, the OMB has authorized the Administrative Conference to request appropriations for the next four years. [EN75] Our reauthorization request is designed to do two things--allow ACUS over the next four years to continue to perform the many statutory missions already assigned to it by Congress, and to undertake important new responsibilities in support of the recommendations of the National Performance Review to streamline government operations." [EN76] The President has requested an FY 1995 appropriation of \$2.6 million, which currently is pending before the Appropriations

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committees in both Houses of Congress.

As this committee is aware, Congress reduced ACUS's actual appropriation for FY 1994 to only \$1.8 million—twenty-three percent below the FY 1993 appropriation and ten percent below the authorized FY 1990 level. Given the budget reduction, no money can be earmarked for independent research in FY 1994. No new major publications are scheduled *669 to be released, except for a revised Manual For Administrative Law Judges that had already been scheduled for release and paid for with funds previously obligated. [EN72] Acquisitions for the ACUS library, which is part of the Federal Depository Library chain, have been sharply reduced, and computerized legal research has been largely eliminated. Seminars on important topics have been cancelled or postponed. Systematic monitoring of legislation has stopped.

Four members of ACUS's staff—two lawyers and two secretaries—have left. To reduce expenses further, several lawyers have been temporarily detailed to another agency (one full-time for three months, the others part-time) and still another lawyer, who was granted a nine month leave of absence without pay to work in Eastern Europe, was not replaced.

Temporary measures—including the acquisition of two key employees from other agencies on temporary, nonreimbursable loans, prepayment of certain expenses, and concentration on projects previously paid for and already in the pipeline—have permitted ACUS to function at a reasonably high level despite the budget reduction. These interim steps cannot become a permanent part of the Administrative Conference's operation over the next four years. The budget and staff reductions have seriously compromised ACUS's ability to accomplish its many statutory missions this year. Unless remedied, these reductions also will impair ACUS's ability to play the active role envisioned for it by the Administration in implementing certain NPR recommendations.

In short, we ask the committee to approve the ceiling amounts authorized by the OMB.

The Role of ACUS's Public Members

Apart from extending the Administrative Conference's authorization of appropriations for another four years, at the levels requested, we also ask the committee to clarify the terms of the Administrative Conference Act to reflect precisely the functions the Administrative Conference's public members actually perform. Although that role has not changed significantly over more than twenty-five years, we ask for this clarification in light of recent concerns by the Department of Justice that individuals from the private sector who serve on the Administrative Conference should be considered to hold "Office(s) of . . . Trust" under the *670 Emoluments Clause of the U.S. Constitution; [EN78] therefore, the Clause may proscribe service on the Administrative Conference by (a) members of firms that had a foreign government as a client, whether or not the Administrative Conference member represented or performed any service for the foreign government, and (b) professors who teach, even only occasionally, at universities that are instrumentalities of a foreign government. ACUS believes that it is important to clarify whether private sector members of the Administrative Conference exercise functions that make them holders of an "office of profit or trust" under the Constitution.

The members appointed by the chairman from the private sector participate in the Administrative Conference's advisory activities in much the same manner as members of most of the hundreds of other advisory committees across the government. They meet intermittently in small committees to review consultant reports and formulate recommendations and, collectively in semi-annual plenary sessions, to act on committee recommendations. They are expected to bring their personal and professional perspectives to their deliberations. Indeed, since its inception, the Administrative Conference has had a bylaw that reads as follows: "Each member is expected to participate in all respects according to his own views and not necessarily as a representative of any agency or other group or organization, public or private." [EN79]

The Administrative Conference's advisory activities are conducted in accordance with the provisions of the Federal Advisory Committee Act (FACA), [EN80] which require, among other things, that the committee membership "be fairly balanced in terms of the points of view represented" [EN81] and that its advisory activities be open to the public." [EN82]

Public members do not participate in the administration or operation of the Administrative Conference as an agency. The responsibilities and functions of the Administrative Conference in its role as a federal agency—e.g., the collection and exchange of information; [EN83] the development of inter-agency arrangements; [EN84] the coordination of assistance efforts for *671 foreign governments; [EN85] and the implementation of recommendations and the conduct of various

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administrative functions, such as the preparation of the Administrative Conference's annual budget or the appointment and supervision of staff [EN87]—are in the hands of the presidentially appointed chairman, the presidentially appointed council, or the career staff.

From time to time, Congress asks the Administrative Conference to undertake specific tasks. Those tasks fall generally into two distinct categories: (1) providing advice and making recommendations, and (2) undertaking government-wide coordination activity. As a general matter, the public members participate only in the advisory and recommendation function. [EN87] Other, more operational tasks, such as interagency coordination, are typically assigned to, and performed by, the chairman and the permanent staff in the Office of the Chairman. [EN88]

We ask this committee to add a final sentence to section 593(b)(6), which concerns the non-government members of the Administrative Conference appointed by the chairman, that will expressly recognize that the Administrative Conference's public members undertake their functions as citizen-advisors and not as government officials. [EN89] The sentence would read: "The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, *672 therefore, shall not be considered to hold an office of profit or trust for purposes of Article I, Section 9, Clause 3 of the U.S. Constitution." [EN90]

The first clause is identical to that contained in President Kennedy's Executive Order establishing the Temporary Administrative Conference in 1961. [EN91] It is similar to that included in early versions of legislation to establish the permanent Administrative Conference. [EN92] The language was removed by the House Judiciary Committee, which explained:

The Committee was concerned lest this requirement be thought to prohibit agency personnel or, for that matter, non-Government personnel from recognizing problems encountered by their own agency or outside organizations. While the committee expects conference members to exercise intellectual independence, it believes it best to omit from the bill any instruction on this point. [EN93]

As explained in a contemporaneous analysis, by removing this provision "the House implicitly recognized that the members will naturally tend to represent the preconceptions and practices of their own backgrounds." [EN94]

In light of the uncertainty occasioned by the recent Justice Department advice, ACUS believes it is important to restore a provision that sets forth the traditional—and contemporary—understanding regarding the function Administrative Conference public members are expected to play in ACUS's activities. We emphasize that we are not asking Congress to consent to the acceptance of any emolument that should otherwise be prohibited. We are asking only that the Administrative Conference's governing statute be clarified to reflect with precision the role that the Administrative Conference's public members are expected to carry out, and actually perform. [EN95]

*673 Reimbursement for Publications Costs

During ACUS's House Appropriations Subcommittee hearing last month, several committee members suggested that the Administrative Conference could obtain additional revenues by charging interested persons or organizations outside the government for publications produced by the Administrative Conference. The Administrative Conference uses the Government Printing Office (GPO) to produce its major publications, such as the Federal Administrative Procedure Sourcebook [EN96]. The Administrative Conference orders a number of copies of these publications for its own use, including some distribution. GPO offers government agencies the opportunity to order copies of these publications at a prepublication price that reflects only the printing cost for the additional copies ordered, typically no more than a few dollars per copy. GPO prints additional copies for sale to the public at a higher price. [EN97] Smaller, less elaborate publications, such as consultant reports and pamphlets, are produced by the Administrative Conference using its desktop publishing equipment and are not sold by GPO. Upon request, the Administrative Conference distributes individual copies of all of its publications free of charge to government agencies or members of the public, as long as supplies last, but directs requesters to GPO for multiple copies of those publications that are offered for sale by GPO.

In response to questions from Appropriations subcommittee members, ACUS stated that it was our understanding that we lacked the necessary statutory authority to charge members of the public for our publications and retain the proceeds. We

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believe that such authority would be useful. If such authority should be added to the Administrative Conference Act, we could establish a reduced price for academic institutions, nonprofit organizations, and the like. Guidance from the committee would be most welcome.

Conclusion

In my mind, the ACUS's mission is an ongoing and vital one which cannot be replaced. The ACUS is the voice of authority on many administrative issues that *674 remain invisible to most Americans, yet affect them profoundly The ACUS works to make our federal agencies more efficient, more effective, and, most importantly, more cognizant of the rights of the Americans affected by their activities. The ACUS is the voice of authority in this regard and it's imperative that it not be silenced. [FN28]

In these times of limited resources, finding ways of reducing the costs of government--and of government regulation and government program administration--presents an enormous challenge. As an agency that effectively combines public and private expertise to tackle the single-minded task of improving federal administrative processes, the Administrative Conference is uniquely suited to meet this challenge. [FN29]

The fundamental justification for the Administrative Conference lies in the reason for its creation--namely, the need, in a complicated modern democracy in which citizens depend on government, or are regulated by it, for a permanent, independent watchdog over the fairness and efficiency of the administrative process. ACUS's studies and recommendations are nonpartisan and nonideological. Over its twenty-six year history spanning seven presidential administrations, ACUS has taken pride in saying that it is the Administrative Conference, not the Administration's Conference. Its independent advisory role cannot be duplicated by another executive branch agency.

ACUS has never precluded its recommendations through any presidential administration. That is undoubtedly one reason why distinguished law professors are prepared to serve as ACUS consultants and prominent private citizens of both major political parties are willing to donate their time to ACUS's deliberations. ACUS enforces its proposals solely by persuasion or force of logic. So it is important not only that the advice it provides be objective, but that it be perceived as objective.

The appropriations ceilings requested by ACUS will provide modest and gradual increases in the Administrative Conference's appropriation over the next four years. They will permit ACUS to continue its efforts--both short-term and long-term--to end needless litigation and streamline government administrative procedures and make them less costly to the taxpayer and the private citizen. They will allow the Administrative *675 Conference to continue this vital work of streamlining the administrative process while ensuring that the government deals fairly with its citizens.

[FN1] Pub. L. No. 103-329, 108 Stat. 2382 (1994).

[FN2] Sally Katzen is now Vice Chairman of the Administrative Conference of the United States. At the time of this hearing, she served as the Acting Chairman of the Conference. The Senate confirmed Thomasina V. Rogers as Chairman in October 1994.

[FN3] 5 U.S.C. §§ 591-596 (Supp. V 1993).

[FN4] Id. § 593(a).

[FN5] Id. § 593(b)(1).

[FN6] Id. § 595(c).

[FN7] Id.

[FN8] 1 C.F.R. § 301.5 (1994).

[FN9] 5 U.S.C. § 595(b) (Supp. V 1993).

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[FN8] Id.

[FN9] 5 U.S.C. § 503(b)(6) (Supp. V 1993).

[FN10] 1 C.F.R. § 302.2 (1994).

[FN11] Id.

[FN12] Members from the private sector, who make up about 45% of the Conference membership, donated more than 1,000 hours of time in 1992 participating in ACUS committee meetings and plenary sessions. That does not include the substantial additional time spent reading reports, revising recommendations, and participating in other ACUS activities.

[FN13] Congress recently confirmed Judge Breyer as the 108th Justice of the Supreme Court.

[FN14] 1 C.F.R. § 302.2(e) (1994).

[FN15] Id. § 302.2(f).

[FN16] Letter from Judge E. Barrett Pretyman to President John F. Kennedy (Dec. 17, 1962) (urging establishment of permanent Administrative Conference) (on file with ACUS).

[FN17] Remarks of President Lyndon B. Johnson at the swearing in of Jerre S. Williams, Chairman, Administrative Conference of the United States, 1 Pub. Papers 68 (Jan. 25, 1968).

[FN18] 5 U.S.C. § 331 (Supp. V 1993) (comprising federal judges who direct policy and research for court-related activities).

[FN19] 139 Cong. Rec. H6575-76 (daily ed. Sept. 9, 1993) (statement of Rep. Brooks).

[FN20] 139 Cong. Rec. H6575 (daily ed. Sept. 9, 1993) (statement of Rep. Fish).

[FN21] Budget of the Government of the United States, Fiscal Year 1993, 397 (citing Thomas D. Hopkins, Costs of Regulation, Rochester Inst. Tech. Pub. Policy Working Paper (Dec. 1991)).

[FN22] Administrative Conference of the United States, Recommendation 90-6: Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission, 1990 ACUS 27.

[FN23] Administrative Conference of the United States, Recommendation 91-3: The Social Security Representation Payee Program, 1991 ACUS 17.

[FN24] Administrative Conference of the United States, Recommendation 92-9: De minimus Settlements Under Superfund, 1992 ACUS 45.

[FN25] Administrative Conference of the United States, Recommendation 92-5: Streamlining Attorney's Fee Litigation Under the Equal Access to Justice Act, 1992 ACUS 19.

[FN26] Administrative Conference of the United States, Recommendation 92-4: Coordination of Migrant and Seasonal Farmworker Service Programs, 1992 ACUS 15.

[FN27] 5 U.S.C. §§ 571-583 (Supp. V 1993).

[FN28] 5 U.S.C. §§ 561-570 (Supp. V 1993).

[FN29] Pub. L. No. 101-552, § 11, 104 Stat. 2747 (1990) (codified as amended at 5 U.S.C. § 571 note (Supp. V 1993)).

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[FN30] 5 U.S.C. § 561 (Supp. V 1993).

[FN31] Letter from Robert B. Reich, Secretary of Labor, to Sen. Dennis DeConcini (July 20, 1993) (on file with ACUS).

[FN32] Letter from Robert Coulson, President, American Arbitration Association, to Rep. Steny Hoyer (Sept. 3, 1993) (on file with ACUS).

[FN33] Testimony of Marge Baker, President, National Institute for Dispute Resolution (Mar. 23, 1994) (on file with ACUS).

[FN34] The Conference has statutory authority to accept gifts from outside sources. 5 U.S.C. § 595(c)(12)(Supp. V 1993).

[FN35] Administrative Conference of the United States, Recommendation 83-1: The Certification Requirement in the Contract Disputes Act, 1983 ACUS 3.

[FN36] 138 Cong. Rec. S11228, 11236 (daily ed. Aug. 3 1992) (statement of Sen. Heflin).

[FN37] Letter from Rep. Bruce F. Vento, to Rep. Steny Hoyer (June 17, 1993) (supporting ACUS funding) (on file with ACUS).

[FN38] Administrative Conference of the United States, Recommendation 91-8: Adjudication of Civil Penalties Under the Federal Aviation Act, 1991 ACUS 44.

[FN39] Pub. L. No. 102-345, 106 Stat. 923 (codified as amended in scattered sections of 49 U.S.C.).

[FN40] *Id.*

[FN41] Letter from Rep. James L. Oberstar, Chairman, House Committee on Aviation, and Rep. William F. Clinger, Jr., Ranking Minority Member, House Subcommittee on Aviation, to Rep. Steny Hoyer, Chairman, Subcommittee on Treasury, Postal Serv., and Gen. Gov't (June 15, 1993) (supporting funding for ACUS) (on file with ACUS).

[FN42] U.S. , 113 S. Ct. 2539 (1993).

[FN43] *Id.* at 2548 n.13.

[FN44] U.S. , 113 S. Ct. 2024 (1993).

[FN45] *Id.* at 2032 (citing Robert A. Anthony, *Incentive Rules, Policy Statements, Guidelines, Manuals, and the Like -- Should Federal Agencies Use Them to Bias the Public*, reprinted in 41 Duke L.J. 1311, 1321 (1992)).

[FN46] 5 U.S.C. § 504 (1988).

[FN47] See, e.g., *National Truck Equip. Ass'n v. National Highway Traffic Safety Admin.*, 972 F.2d 669, 672 (6th Cir. 1992); *M. Lewis Pack and Supply Co. v. FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989); *Preons v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1989); *Ruiz v. INS*, 838 F.2d 1020, 1024 (9th Cir. 1988) (en banc).[FN48] *National Truck Equip. Ass'n*, 972 F.2d at 672.

[FN49] 5 U.S.C. § 594 (Supp. V 1993).

[FN50] Administrative Conference of the United States, Foreign Assistance Initiatives (1994) (on file with ACUS).

[FN51] Administrative Conference of the United States, Recommendation 92-1: The Procedural and Practice Rule Exemption from the APA Notice-and-Comment Rulemaking Requirements, 1992 ACUS 1.

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- [FN52] Administrative Conference of the United States, *Federal Administrative Procedure Sourcebook*, (2d. ed. 1992).
- [FN53] Administrative Conference of the United States, *Federal Administrative Procedure Sourcebook*, (1985).
- [FN54] 5 U.S.C. § 573 (Supp. V 1993).
- [FN55] 5 U.S.C. § 552(b)(4) (1988).
- [FN56] *Id.* § 552b.
- [FN57] 5 U.S.C. § 504(c) (1988).
- [FN58] 5 U.S.C. § 504(e) (1988).
- [FN59] See, e.g., Senate Comm. on Appropriations, S. Rep. 101-411, Treasury, Postal Service, and General Government Appropriations Bill, 1991, 101st Cong., 2d Sess. (1990) (stating "The Committee expects the Conference to increase its efforts to secure funding transfers from other Federal agencies as well as private foundations to support its research agenda.").
- [FN60] Report of the Special Comm. on the Future of the Administrative Conference, at pp. 2-3 (May 1992) (on file with ACUS).
- [FN61] *Id.* at 1-3.
- [FN62] See generally Al Gore, Report of the National Performance Review, *Creating a Government that Works Better & Costs Less* (1993) (hereinafter Gore, National Performance Review) (suggesting methods of improving government efficiency).
- [FN63] 62. *Id.* at 118-19.
- [FN64] *Id.* at 119.
- [FN65] *Id.* at 163 (listing Recommendation 11RM08 that called for improvement of processes and procedures established to provide workplace due process for employees and elimination of jurisdictional overlaps, recommending that all agencies establish alternative dispute resolution methods and options for informal disposition of employment disputes).
- [FN66] Gore, National Performance Review, *supra* note 62, at 18.
- [FN67] *Id.* at 146 (listing Recommendations DOL03, calling for the expansion of negotiated rulemaking and improvement of up-front teamwork on regulations; and DOL04, recommending expansion of use of alternative dispute resolution by Dept. of Labor).
- [FN68] Memorandum, 58 Fed. Reg. 52391 (1993).
- [FN69] Gore, National Performance Review, *supra* note 62, at 168.
- [FN70] Al Gore, *Improving Regulatory Systems* (Sept. 1993) at 71, accompanying Al Gore, Report of the National Performance Review, *Creating a Government That Works Better & Costs Less* (1993).
- [FN71] Exec. Order No. 12,866, 3 C.F.R. 638 (1993).
- [FN72] Pub. L. No. 101-422, 104 Stat. 910 (codified as amended at 5 U.S.C. § 596 (Supp. V 1993)).
- [FN73] Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. § 573 (Supp. V 1993)).

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[FN74] Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. 560 (Supp. V 1993)).

[FN75] *Supra* p. 653.

[FN76] The Administrative Conference Act sets out ACUS's primary missions. Numerous other statutes and regulatory documents assign additional responsibilities to the Administrative Conference.

[FN77] Morell E. Mullins, *Manual for Administrative Law Judges* (3d ed. 1993).

[FN78] U.S. Const. art. I, § 9, cl. 8.

[FN79] 1 C.F.R. § 302.2 (1994) (enacting bylaw adopted at ACUS's initial plenary session in 1968).

[FN80] 5 U.S.C. app. I (1988).

[FN81] *Id.* § 5(b)(2) (1988).

[FN82] *Id.* § 5(a), (b) (1988).

[FN83] 5 U.S.C. §§ 594(2), (3) (Supp. V 1993).

[FN84] 5 U.S.C. § 594(4) (Supp. V 1993).

[FN85] 5 U.S.C. § 594(5) (Supp. V 1993).

[FN86] 5 U.S.C. §§ 595(b), (c) (Supp. V 1993).

[FN87] For example, in the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act, Pub. L. No. 93-637, Congress asked the Administrative Conference to study and make recommendations regarding the so-called "hybrid rulemaking" procedures in the statute. The statutorily mandated study culminated in ACUS Recommendations: Administrative Conference of the United States, Recommendation 79-1: Hybrid Rulemaking Procedures of the Federal Trade Commission, 1979 ACUS 3; Administrative Conference of the United States, Recommendation 79-5: Hybrid Rulemaking Procedures of the Federal Trade Commission - Administration of the Program to Reimburse Participants' Expenses, 1979 ACUS 29; and Administrative Conference of the United States, Recommendation 80-1: Trade Regulation Rulemaking Under the Magnuson Moss Warranty-Federal Trade Commission Improvement Act, 1980 ACUS 3.

[FN88] For example, the EAJA requires agencies to issue regulations for the award of fees and expenses "(a)fter consultation with the Chairman of the Administrative Conference of the United States," 5 U.S.C. § 594(c)(1)(1988); and the Government in the Sunshine Act requires agencies to issue regulations regarding open meetings "following consultation with the Office of the Chairman of the Administrative Conference of the United States," 5 U.S.C. § 552b(g) (1988) (emphasis added).

[FN89] 5 U.S.C. § 593(b)(6) (Supp. V 1993).

[FN90] The members of the council appointed by the President have statutory responsibilities that are not shared by the other conference members. 5 U.S.C. § 595(b) (Supp. V 1993). Therefore, the statutory change is limited to those members of the public appointed by the chairman with the approval of the council.

[FN91] Exec. Order No. 11924, 26 Fed. Rep. 3233 (1961).

[FN92] Section 6(e) of S. 1664, 88th Cong., 2d Sess. (1964) provided that "(e)ach member of the Conference shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization." Section seven of H.R. 7201, 88th Cong., 1st Sess. (1963) provided that "(e)ach member of the Assembly shall participate in his individual capacity and not as a representative of any governmental or nongovernmental organization." See *Establishing*

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Administrative Conference: Hearings Before Subcomm. No. 3 of the House Comm. on the Judiciary, 88th Cong., 2nd Sess. 4, 8 (1964).

[1893] H.R. Rep. No. 1565, 88th Cong., 2d Sess., reprinted in 1964 U.S.C.A.N. 3202, 3204.

[1894] Note, The Administrative Conference Act, 53 Geo. L.J. 457, 472 (1965).

[1895] We are focusing narrowly on the Emoluments Clause and not on any other statutory or regulatory conflict-of-interest provisions. Moreover, this statutory change is not intended to affect the various requirements of the Federal Advisory Committee Act that will continue to govern ACUS's activities.

[1896] Administrative Conference of the United States, Federal Administrative Procedure Sourcebook (2d ed. 1992).

[1897] For example, the GPO sells our most recent publication, The Manual for Administrative Law Judges, for \$9.50.

[1898] Letter from Rep. Joel Hefley to Rep. Steny Hoyer (Sept. 10, 1993) (on file with ACUS).

[1899] FY95 Appropriation for the Administrative Conference of the United States Before the Subcomm. on Treasury, Postal Serv. and Gen. Gov't, 103d Cong., 2d Sess. (1994) (testimony of Thomas Susman, on behalf of the American Bar Association).

END OF DOCUMENT

Mr. CANNON. I would now like to introduce our witnesses for today's hearing.

Our first witness is C. Boyden Gray. Mr. Gray is a partner in the newly reconstituted firm of Wilmer Cutler Pickering Hale and Dorr. His practice focuses on a broad range of regulatory issues with emphasis on environmental matters, including those related to biotechnology, clean air, trade and the management of risk.

Mr. Gray received his undergraduate degree from Harvard University and his law degree from the University of North Carolina. After serving as a law clerk for Chief Justice Earl Warren of the United States Supreme Court, Mr. Gray joined the predecessor of his current law firm. In 1981, he served as Legal Counsel for Vice President George Bush. He also served as Counsel for the Presidential Task Force on Regulatory Relief. Thereafter, Mr. Gray was Counsel to President Bush from 1989 to 1993. Mr. Gray appears today on behalf of the American Bar Association.

Joining Mr. Gray is Professor Gary Edles. Professor Edles is a Fellow in Administrative Law at American University Washington College of Law. He is also a visiting professor at the University of Hull Law School in England. In addition to an extensive academic career, Professor Edles has had a wide-ranging legal career as a senior civil servant, specializing in Government regulation and the administrative process. Of particular interest, he served as General Counsel of ACUS from 1987 to 1995.

Professor Edles received his law degree from New York University and his Master of Laws and Doctor of Juridical Sciences Degrees from George Washington University Law School.

Our next witness is Professor Sallyanne Payton. Professor Payton teaches at the University of Michigan Law School. During her professional career she has worked in the public and private sectors. In the 1970's, for example, she was a Staff Assistant to the President for the White House Domestic Council. She later became Chief Counsel for the Urban Mass Transportation Administration of the U.S. Department of Transportation. Over the course of nearly 20 years, Professor Payton served as either a Public Member or Senior Fellow at ACUS.

Professor Payton received both her undergraduate and law degrees from Stanford University. She appears today on behalf of the Executive Organization and Management Standing Panel of the National Academy of Public Administration.

Our final witness is Professor Philip Harter. I understand that you interrupted your vacation in Vermont to attend today's hearing, for which you are to be commended. We thank you. Professor Harter is the Earl F. Nelson Professor of Law At the Center for the Study of Dispute Resolution at the University of Missouri-Columbia School of Law. Over the course of his 35-year career in academia and the private sector, Professor Harter worked closely with ACUS in various capacities. While the Conference's senior staff attorney, he created a program on regulatory reform. As a consultant to ACUS, he developed the concept of negotiated rulemaking and authored a series of articles on the use of dispute resolution techniques by the Federal Government.

Professor Harter received his undergraduate degree from Kenyon College and his law degree from the University of Michigan.

I extend to each of you my warm regards and appreciation for your willingness to participate in today's hearing. In light of the fact that your written statements will be included in the hearing record, I would request that you limit your oral remarks to 5 minutes accordingly. Please feel free to summarize and highlight the salient points of your testimony.

You will note that we have a lighting system before you that starts with a green light. After 4 minutes it turns to a yellow light and then 5 minutes it turns to a red light. My habit is to tap the gavel at 5 minutes. We would appreciate if you finish up your thoughts within more or less that time frame. We don't like to cut people off in their thinking and so we are not strict on this point, but it works better especially—well, I am not sure how many people we have here to question but I have some questions of the witnesses. We will go through those and you will have an opportunity to flesh out your thinking thereafter. After the witnesses have presented their remarks, the Subcommittee Members in the order of the time of their arrival will be permitted to ask questions of the witnesses, also subject to the 5-minute rule.

That said, Mr. Gray, would you precede with your testimony?

STATEMENT OF C. BOYDEN GRAY, ESQ., WILMER CUTLER PICKERING HALE AND DORR LLP, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. GRAY. Mr. Chairman, thank you very much for inviting me and inviting me, and I testified before, I think, this very same Subcommittee a couple of years ago against the termination of ACUS. So I am very honored to be back to help support its reauthorization.

I just want to make a couple of observations in addition to what my prepared text says, which is the official position of the ABA. The U.S. administrative law system I believe is the best in the world. It is the most transparent, the fairest and the most economically productive, especially when you look at it in comparison to the emerging EU, European Union, system, which is far more bureaucratic, biased against innovation, opaque, and encouraging support for incumbents rather than for a level playing field and equal opportunity for all competitors. I think ACUS deserves some of the credit for this state of affairs.

The Administrative Procedure Act is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of the congressional intent, but to flesh out what the words mean, ACUS was an important part of this evolving growth and we have a very, very sophisticated administrative system as a result. There are now, I think, some strains in the system.

OIRA, the nerve center at OMB, the Office of Information and Regulatory Affairs, often provoked a polarized political response notwithstanding the fact that I believe Dr. Graham has done a great job, especially with his innovations of the so-called prompt letter, which is a guide to agencies to do something if to do so would produce a result where its benefits greatly exceed cost. He has been very, very evenhanded in his administration of that office, I believe, but it would be an enormous help, I think, to the Govern-

ment as a whole, if he could have a forum for ventilation of arguments for and against his administration of that office.

There are some other issues that have come up during his tenure, issues involving data quality and related issues involving peer review. I think that these three issues would be very useful subjects of study by ACUS if it were to be reauthorized. And I would add to this that the notion of looking at the European Union and comparative study of its procedures. The Administrative Law Section of the ABA has embarked now on such a study. I am not sure it wouldn't be better if this study could be picked up by a neutral, obviously neutral Government entity, rather than have the private sector do it with questions about where the funding came from and what the funding influence is. I am not sure this transfer could be made, but to do a comparison I think is something that hopefully ACUS would be in a position, if it were reauthorized, to do.

Many of the problems that—and they are not serious problems, but they are serious enough to warrant the reauthorization of this entity. Many of the problems result, if you step back, from a lack of dialogue and nonpartisanship or bipartisanship which has characterized the development of the administrative system in this country. We need to reinject some bipartisanship into the administrative process. That was the genius of ACUS.

You asked how it should be reauthorized, the form. I am not sure I understand exactly the question, but I am not sure I would make it any different than it was before. There was a town hall air to much of what it did, a little boisterous, a little out of hand sometimes, people shouting at each other, but it was all in an effort to maintain a dialogue in the public meetings, and it was enormously successful. I should point out that the history of substantive administrative law has been one of bipartisanship, often forgotten.

We perhaps think today, and we shouldn't do this but we probably do, of deregulation as a Republican idea to be opposed by Democrats, something that Reagan started, to be frustrated by Democratic Presidents. This is, I think, an erroneous view. The major deregulation that we have was started really by Senator Kennedy and then Professor Breyer, doing transportation deregulation. It was picked up and carried by President Carter with Stu Eizenstat taking the lead as Domestic Policy Adviser. Then of course it was picked up by Reagan in a more intensive way. But there is a direct line of antecedence going all the way back, actually to President Nixon, I think, and it is shared by all Democratic Presidents, and I think it would be a mistake to lose this sense of shared bipartisanship which has made our system the envy of the world. And I do think that ACUS would be very critical to getting us back to where we were some years ago.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY

I am pleased to be asked to testify here on behalf of the Administrative Law and Regulatory Practice Section of the American Bar Association, and the ABA itself, on the question of the reauthorization of the Administrative Conference of the United States ("ACUS"). The views expressed in this testimony are similar to the letter previously sent to this Subcommittee by Professor William Funk, Chairman of the Administrative Law Section. I am myself a former member of the Conference,

as well as a former Chair of the Administrative Law Section of the ABA, and I testified before this Committee on May 11, 1995 to oppose the termination of ACUS (testimony attached).

As you know, the Administrative Conference was established in 1964 as a permanent body to serve as the federal government's in-house advisor on, and coordinator of, administrative procedural reform. It enjoyed bipartisan support for over 25 years and advised all three branches of government before being terminated in 1996.

Through the years, the Conference was a valuable resource providing information on the efficiency, adequacy and fairness of the administrative procedures used by administrative agencies in carrying out their programs. This was a continuing responsibility and a continuing need, a need that has not ceased to exist.

The Conference's work in some cases resulted in bipartisan legislation to improve the administrative process. For example, both the Negotiated Rulemaking Act of 1990 and the Administrative Dispute Resolution Act were the product of the Conference's work, both in terms of the studies and reports that underlay the justification for these two laws and also in terms of the interested persons and agencies brought together to support the law.

In other cases, the Conference's work made legislation unnecessary. For example, early studies indicated that the exemption from notice and comment in the original Administrative Procedure Act for rulemakings involving public property, grants, contracts, loans, and benefits was no longer necessary or desirable. As a result of the Conference's work, virtually every agency voluntarily subjected itself to notice-and-comment rulemaking when dealing with these subjects, improving the transparency and acceptability of government rules without the need for legislative amendment.

The hallmark of the Conference's work was its ability to provide expert and non-partisan advice to the three branches of government. Drawing on the large number of volunteer public members of the Conference, as well as representatives from a wide spectrum of agencies, the Conference fostered a conversation among all interested persons and agencies. Utilizing academics for empirical research, which was reviewed first by subject matter committees staffed by members of the Conference and then by the full Conference, the Conference was able to provide a factual predicate for improvements in the administrative process that were not identified as ideologically or partisan-based proposals.

I stress the fact that over a quarter century the Administrative Conference of the United States maintained a reputation for non-partisan, expert evaluation of administrative processes and recommendations for improvements to those processes. It had no power but the power to persuade, and no political constituency other than those interested in improving administrative government.

Not only was the Conference a source of expert and nonpartisan advice, the Conference played an important facilitative role for agencies in implementing changes or carrying out recommendations. Thus, a number of statutes, including the Government in the Sunshine Act and the Equal Access to Justice Act, specified that the Conference work with agencies in adopting the agencies' initial regulations. More recently, the Conference worked tirelessly to help agencies understand and utilize the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Today, adapting administrative processes to make best use of the Internet is a hot topic, but one for which there is no central organization to study different techniques, assess them, and then facilitate the implementation of those that are best.

It is a testament to the Conference's unique position that today persons of such differing judicial philosophies as Justices Scalia and Breyer can rally behind the re-creation of the Conference. Nor is it hard to find many others from across the political spectrum who will similarly commend the re-creation of the Conference to your subcommittee. Past chairs of the Conference, such as Professors Marshall Breger and Robert Anthony and Judge Loren Smith from one side of the aisle, can join hands with lawyer Sally Katzen and administrative judge Thomasina Rogers on the other side.

The Conference proved itself effective at promoting efficiency in government for over 25 years. The American Bar Association has long supported the Conference and the role it played in advancing administrative procedural reform. We urge you to support legislation that would reauthorize the Conference and provide it with funds that are sufficient to permit it to continue its important mission.

You have asked for comments on the form in which the reauthorization should take place, and for the regulatory reform priorities a reauthorized Conference should examine. I see nothing obvious to change in the way the Conference worked before; sometimes it behaved like a town meeting, but that was, and hopefully will again be, part of its success as a non-partisan venue. As for items to study, we

would suggest some empirical research on the innovation of the OMB "prompt" letter, matters relating to data quality and peer review issues.

ATTACHMENT

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF C. BOYDEN GRAY, COUNCIL MEMBER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND PARTNER, WILMER, CUTLER & PICKERING

Good morning, Mr. Chairman. My name is C. Boyden Gray. I am a partner at Wilmer, Cutler & Pickering and a member of the Council of the Administrative Conference, appointed by President Bush.

The Administrative Conference is a tiny but unique and valuable body that provides an important link to the private sector on critical issues of administrative law and legal reform that would otherwise be orphaned because they benefit or affect no particular special interests.

Most of the Administrative Conference's support is, in fact, volunteer and most of its influence stems from this volunteer effort. But the central support staff does have to be paid to provide a coordinating role. It is unrealistic to expect its tiny budget to be volunteered by the private sector as well.

Although others have said and will say it again, let me emphasize that the Administrative Conference is uniquely bipartisan, having been chaired by Justice Scalia and having frequently benefited from the participation of Justice Breyer. It is the only place where administrative law experts from all parts of the ideological spectrum can meet to share insights on administrative law which is essential to the workings of the regulatory process. If ACUS were lost I think the country would lose a highly valuable meeting place where civil discourse develops free of any political or special interest rancor.

I should add that the Administrative Conference has been a pioneer in alternative dispute resolution and, therefore, on the vanguard of legal reform. It has also been an effective proponent of negotiated rulemaking, which is a key building block of regulatory reform because of the elimination of legal challenges to rulemaking. In this sense it is also a good implementing agency for Vice President Gore's effort to reinvent government. While not everybody supports everything the current Administration is doing, few oppose its efforts to improve the functioning of government's regulatory process.

In conclusion, I would just like to urge that this tiny agency be retained. It is an investment repaid many times over in the volunteer activities that its budget generates.

Indeed, because of its unique insight into government process, the Conference has been called upon with increasing frequency by Congress to assist in the implementation of a wide variety of statutes. My guess is that if Congress terminates ACUS now, it will have to recreate it some time in the future, at considerable extra expense.

Mr. CANNON. Thank you, Mr. Gray. You have packed an enormous amount of ideas into 5 minutes. I want to go back and explore some of those. Let me just point out here in conjunction with what Mr. Watt said and what I would also say. Some of the most important issues we have before us today are some of the things that we believe will make a difference, are absolutely not partisan and have been kept out of the partisan environment. They ought to be developed in a nonpartisan environment like ACUS so that we can work on some of those very important issues.

Appreciate your testimony. Mr. Edles.

STATEMENT OF PROFESSOR GARY J. EDLES, FELLOW IN ADMINISTRATIVE LAW, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW AND GENERAL COUNSEL, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1987-1995)

Mr. EDLES. Mr. Chairman and Members of the Subcommittee, I am truly delighted to be here this afternoon to participate in these hearings that I do hope will lead to the reauthorization and re-creation of the Administrative Conference. I served in both Republican and Democratic Administrations at ACUS, and I thoroughly endorse the thoughtful comments offered by Justice Scalia and Justice Breyer last month as to the need to reestablish ACUS at this point in time. But it is certainly reasonable to ask, it seems to me, why there is a need for ACUS nearly a decade after it was abolished.

The simple answer I think is that new regulatory issues have arisen in the past decade so that the type of analytical work that ACUS once did again needs to be done, and there really isn't any other institution capable of taking on the task in quite the same way. So even if one believes that ACUS had to some extent completed its earlier mission by 1995, it is certainly time to start it up again. Other individuals or institutions, law professors, experts in public administration, bar associations have to some degree stepped into the vacuum that was created by ACUS's demise. But those individuals or groups rarely have the type of resources or the inclination to take on day in and day out the numerous and various issues that ACUS did, to see projects through from a recognition of the problem to its meticulous examination to the design of a solution and eventually its implementation.

I should also add on a personal note that judging from the voice mails and e-mails that I get in my American University office from Government employees even to this day, there is obviously still a need for the type of institutional memory and expertise that ACUS once provided.

I don't have the precise agenda for an ACUS of the 21st century, but I do know that much has changed in the 9 years since ACUS was abolished. The era of electronic communication and its role in Government decision making, for example, was just beginning in 1995, and it is now in full flower. Problems affecting immigration procedures are surely different today in light of our country's security needs occasioned by 9/11. There are certainly new questions concerning the organization of the Federal Government. What's the proper role for public-private partnerships, self-regulatory organizations, Government contractors for example? Are there problems of governmental organization or interagency coordination that impede our country's ability to compete in world markets. And, Mr. Chairman, you mentioned a number of items that I think would also warrant ACUS style analysis.

I think that ACUS's historic structure, which was a mix of Government officials, leading academics, lawyers from the private and public interest bars, plus a range of non-lawyer experts such as public administrators, remains the best blend of talent to accomplish ACUS's mission. The key ingredient for any revitalization, though, is it must be a genuinely nonpartisan and independent in-

stitution that is both objective and impartial and seen as objective and impartial.

ACUS's operation and budget were tiny in absolute terms when it comes to Government entities. It had 18 employees and \$1.8 million budget when it was eliminated in 1995. Perhaps more important, it was extremely small relative to its mission. It was the only Federal agency with exclusive responsibility for improving administrative justice and Federal programs that at the time affected about \$500 million in gross domestic product and involved agencies and departments that adjudicated more cases than the Federal courts. In fact, the money saved by both the Government and the private sector by ACUS's seminal work in alternative dispute resolution alone far exceeds its annual budget. Those are, I think, ACUS's real value for money.

My prepared statement offered some modest organizational and technical suggestions regarding the revitalization of ACUS. But more important than any precise modifications that Congress might have, being desirable modifications over the past 9 years, I believe that there has to be a political recognition that it is worth spending a tiny amount of taxpayers' money to obtain genuinely independent, nonpartisan, expert analysis of issues bearing on the governmental process with a view toward improving the fairness and efficiency of that process.

As Justice Breyer pointed out last month, other countries with significant administrative systems—Britain, France, Australia, for example—have permanent oversight bodies. In fact, the Canadian Parliament, which abolished its advisory review body in 1992 during a period of retrenchment and budget cutting that was not terribly different from what went on in this country, quickly realized that it had made a mistake and reestablished its commission only 4 years later. Our citizens, it seems to me, Mr. Chairman, deserve no less.

I want to applaud the work of this Committee and staff in holding these hearings, and I hope they will be the first step leading to the reauthorization and funding of the Administrative Conference. I will try as best I can to answer any questions that you may have.

[The prepared statement of Mr. Edles follows:]

PREPARED STATEMENT OF GARY J. EDLES

Mr. Chairman, members of the subcommittee. I want to applaud the subcommittee's decision to hold these hearings and I hope that they will lead to the long-overdue reauthorization and funding of the Administrative Conference of the United States, or ACUS. I served as ACUS' General Counsel from 1987 to 1995, and urged its re-creation in a 1998 law review article, *The Continuing Need for an Administrative Conference*, 50 Admin. L. Rev. 101 (1998). I thoroughly endorse the thoughtful comments offered at the subcommittee's hearing last month by Justices Scalia and Breyer, and the observations of the American Bar Association, setting out the reasons for—indeed, the need for—ACUS' re-establishment at this time.

THE NEED FOR AN ADMINISTRATIVE CONFERENCE

I strongly believe there is a need for the reauthorization of an Administrative Conference and that ACUS is "very good value for money." Despite the presence of a written Constitution and a government-wide procedural statute (the APA), the federal administrative process, by design and evolution, is characterized by a considerable degree of procedural flexibility and agency discretion. Given that flexibility and discretion, some form of independent oversight entity is needed to help ensure

that the process is effective, accountable, and, perhaps most important, fair to our citizens. ACUS successfully played a key oversight role in the past and I believe such an institution is still needed.

As a practical matter, there are no other entities that can play the unique role that ACUS played. The courts are ill suited to perform a meaningful role as supervisor of the details of agency operations. Very few agency actions, even those that significantly affect members of the public, turn into litigated cases, in part because they are not amenable to judicial remedy or the average citizen simply can't afford the cost of litigation. So, many agency procedures and practices don't find their way into the courts. And the best a court can do in any event is to correct a problem in the case before it. The courts are simply not set up to be pro-active in proposing systematic change.

Likewise, Congress cannot be expected to oversee the minutiae of agency operations and procedures. Congressional oversight of administrative agencies has always been episodic. Congress, quite frankly, has many more fundamental issues on its plate. For example, Title II of Public Law 104-121, the Small Business Regulatory Enforcement Fairness Act of 1996, gave Congress an opportunity to review agency regulations before they became effective and enact legislation to prevent them from going into effect. But the provision is limited to rulemaking initiatives, which make up only a portion of overall agency activity. Moreover, agencies place several thousand regulatory actions in the Federal Register annually, but Congress has historically managed to enact only 150-200 bills each year. As a consequence, to my knowledge, Congress has used its rulemaking review power only once since the statute was enacted. Congress, in short, rarely involves itself in the type of procedural particulars that ACUS regularly examined.

It is doubtful that centralized review by the President, or even his senior deputies, can effectively oversee the finer points of the regulatory process. Although presidential review is theoretically possible, my colleague, Professor Thomas Sargentich, has suggested several factors that necessarily limit the President's power as a practical matter: the multitude of issues flowing through agencies daily, the severely limited resources of executive oversight, and the variety of control relationships that exist in the administrative system.

Nor can agencies be expected to devote their time and energy to critical self-examination. In an era when resources are scarce and must be channeled into accomplishing the numerous tasks assigned to them by Congress, agencies can devote very little time to reflection unless pressed to do so by outside political pressure.

Individual scholars or ad hoc advisory groups can study agency practices and procedures to some degree. Indeed, the Section of Administrative Law and Regulatory Practice of the American Bar Association has done an excellent job of picking up some of the slack after ACUS was abolished. But the details of day-to-day administrative procedure are often arcane and typically agency-specific, so they rarely attract the attention of academic scholars, who prefer to devote their time and energy to doctrinal or policy issues that have a larger audience. Moreover, neither academic researchers nor ad hoc advisory groups have the time or incentive to pursue research or recommendations to the implementation phase, particularly where such phase can last a decade or more.

A permanent, independent body such as ACUS also melds the expertise and perspectives of the government agencies, the private sector, including, importantly, the practicing bar, and members of the judiciary and the academic community. The participation of senior government officials—especially career civil servants—brings a unique form of expertise and experience. Agency officials are typically thoroughly familiar with the intimate workings of their own agencies. That expertise is essential to effective procedural reform. But agency officials can also have a stake in existing procedures that they administer or may even have created. And I have always found it surprising how unfamiliar agency officials often are with the experience of sister agencies. So sensible oversight requires the bringing together of expertise from numerous agencies across the government.

The participation of non-government members is crucial. It helps ensure that recommendations reflect the problems and perspectives of those who must actually deal with government and have experienced the frustration of trying to work their way through the bureaucracy or perceive government procedures as unfair. Judges lend their perspectives as generalist experts in fair procedure and reviewers who examine administrative action when it is challenged in court. Participation by members of the academic community helps guarantee that studies are thorough and doctrinal elements are not ignored.

Finally, a permanent institution allows a career staff to develop expertise in the areas of administrative law and government organization and process and devote time and resources to implementing recommendations. Judging from the number of

telephone calls or e-mails I received at my American University office after ACUS was abolished, the need for some form of institutional memory is critical.

Over 40 years ago, federal Court of Appeals Judge E. Barrett Prettyman, reporting on behalf of the temporary Administrative Conferences created by President Kennedy, summarized ACUS' value as follows:

The heavy pressures of Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity, and the demands of the daily job may lessen the will to achieve change.

The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems. . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government. . . . The current need is for continuous attention to somewhat technical problems, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. Letter from Judge E. Barrett Prettyman to President John F. Kennedy (Dec. 17, 1962), Legislative History of ACUS (on file, ACUS Collection, American University Washington College of Law Library).

Those reasons help explain why other countries with significant administrative systems have permanent oversight bodies. For example, Britain has its Council of Tribunals that continuously monitors the work of that country's numerous tribunals and makes recommendations for procedural improvement. Much like ACUS, its detailed work is its greatest strength. The Australian Administrative Review Council has responsibility for giving advice on the workings of the administrative review system in that country. Canada too has a Law Commission that advises its Parliament on how to improve and modernize Canadian law. In fact, in 1992, a new Canadian government introduced a budget package designed to reduce both the federal budget and the deficit. It proposed abolition, privatization or consolidation of 46 separate agencies or programs. The Law Commission of Canada was one of the agencies abolished. The Commission was smaller than ACUS, but its jurisdiction was far broader, extending to "the statutes and other laws comprising the laws of Canada." It employed the same general methodology as ACUS—systematic review and oversight of Canadian legal matters and the submission of recommendations for improvement to Parliament and the agencies and departments of government. The government quickly realized that abolishing the Commission had been "penny-wise and pound foolish" and the Canadian Parliament re-established the Commission, in a somewhat modified form, only 4 years later.

NEED FOR INDEPENDENCE

The need for a genuinely nonpartisan and independent advisory body has been recognized throughout ACUS' history. A Republican President, Dwight Eisenhower, established the first Administrative Conference on a temporary basis in 1953. A Democratic President, John Kennedy, created a second temporary Conference in 1961. Apart from their numerous proposals for specific improvements in agency procedures, both temporary groups strongly endorsed the need for a permanent institution. Congress agreed, and created what was designed to be a permanent institution in 1964 with passage of the Administrative Conference Act.

A separate, independent institution serves to maintain both objectivity and the appearance of objectivity. From its earliest days, ACUS had a bylaw providing that each member participated "according to his own views and not necessarily as a representative of any agency or other group or organization." It is doubtful, for example, that federal judges would have, or could have, participated in an institution that was not genuinely independent of an incumbent political administration. So ACUS would have lost the valuable insights of numerous federal judges, such as Justice Breyer, if it were seen as closely allied to the President, irrespective of which party was in power. Although the ACUS Chairman and staff were careful not to lock horns unnecessarily with an incumbent administration, ACUS' recommendations at times parted company with the official view of the President or particular departments or agencies of government. I think that committees of Congress especially appreciated that when ACUS provided its advice, it was not doing so simply as a spokesperson for a current administration.

As part of its independence, Congress needs to ensure that ACUS has some funds for independent research. Over the years, ACUS affected major alterations in the

federal administrative process. It recognized the need to develop fundamental changes in the process of the entire government. But it also examined the need for improvements in the organization and procedures of individual agencies. Its studies almost always focused on empirical inquiry, although they did not ignore doctrinal elements. During the period when I served as ACUS' General Counsel, from 1987 to 1995, agency-specific studies were conducted at the request of several agencies, often with the financial support of the requesting agency. Congress encouraged this approach in an effort to make ACUS more self-sustaining. Although ACUS was always receptive to conducting studies on behalf of agencies interested in self-examination, a number of us were concerned about excessive reliance on funds from other agencies to sponsor projects. I would emphasize that no agency was ever able to influence ACUS' recommendations despite having requested or underwritten a study. Still, I believe that excessive reliance on agency funds can undermine public confidence in the objectivity of ACUS' research. Equally important, too much reliance on agency funding introduces instability in the research program because areas that need examination may not get it for lack of outside funding and a constant flow of funds from other agencies can never be assured. In my judgment, some independent research budget is essential.

STRUCTURE AND MISSION FOR A REAUTHORIZED ACUS

Any revitalized ACUS should remain essentially advisory. From time to time during ACUS' history, elements within ACUS or its supporters urged that it be given authority to compel, rather than merely recommend, action by agencies. In my view, that's a bad idea. Such expansion of its authority will compromise ACUS' ability to achieve actual reform. Much of its success stemmed from its ability to enlist an agency's support even when that agency was the subject of study. Numerous agencies actively solicited ACUS' help. And, in most cases, agencies adopted ACUS' recommendations. Any change from advisory to mandatory powers would alter ACUS' relationship with its member agencies from that of an impartial adviser to that of a policeman or potential adversary and compromise its ultimate ability to effect change. Nonetheless, I do believe that ACUS should undertake to bring to the attention of Congress or the President whether, and to what extent, its recommendations have been adopted. Providing Congress and the President with impartial advice, including a status report on agency implementation of ACUS recommendations, is not inconsistent with ACUS' advisory mission.

Given the changing complexion of regulatory problems, and the recognized public dissatisfaction with government regulation, but the apparent lack of consensus on how to reform it, I think a revitalized ACUS should examine whether there are institutional elements that bear on regulatory failure. During my tenure, ACUS had economists among its members, such as OMB Director James Miller, and I think a revitalized ACUS would benefit from a membership that also included public administrators.

A revived ACUS can be smaller than the 101-member Assembly. Such a large group provided broad representation of interests but, at times, frustrated efficient operation. As with any organization, not all members were equally active. Senior political officials from the government, in particular, often had schedule conflicts that compromised their participation. These scheduling conflicts also intermittently led to quorum problems. So the work typically fell to a smaller group of active members. As long as the balance between government and private interests is retained, and all cabinet departments and a fair representation of other agencies are included, fewer than 101 individuals could accomplish ACUS' statutory mission.

Reform of entrenched administrative practices and attacking bureaucratic inertia takes time and perseverance. One of ACUS' strengths was its ability to see its ideas through from concept, to design, to implementation. So, in reauthorizing ACUS, Congress needs to ensure an ongoing role for a permanent, career staff.

However, the permanent staff might be a bit smaller than the 24 employees that made up the Office of the Chairman during the high water mark of ACUS' activities. While a small corps of permanent employees is essential, there is no reason why employees temporarily assigned from other agencies could not supplement the permanent staff. The existing statute permits this arrangement and, over the years, ACUS had an active "visiting executive" program that allowed a number of highly talented government employees to join the ACUS staff for temporary periods while remaining on their home agency's payroll. A new ACUS could also augment its operations without an additional outlay of funds through an affiliation with a law school or school of public administration, whose students and faculty could assist in, or supplement, the conduct of research, the coordination of peer review for oversight of projects, and the drafting and implementation of recommendations.

ACUS' budget was tiny by governmental standards—only \$1.8 million when it was eliminated in 1995. Even ACUS' critics acknowledged that its abolition had no meaningful effect on the overall federal budget. Perhaps more importantly, ACUS' budget was also small relative to its mission—it was the only agency with exclusive responsibility for improving administrative justice in federal programs that, at the time, affected about \$500 billion of the gross domestic product and involved government departments and agencies that adjudicated more cases than the federal courts. Indeed, the amount of money saved by both the government and the private sector from ACUS' seminal work in the area of alternative dispute resolution, standing alone, far exceeded its annual budget. Given inflation since 1995, I think that ACUS could operate successfully at the outset on a modest budget in the \$2–3 million range.

In summary, though, I think that the precise size and organizational structure of a new ACUS is much less significant than the political recognition that some entity needs to be available to police the inner recesses of the administrative process, and that ACUS is the best available option. It provides, as Justice Scalia pointed out, “a unique combination of scholarship and practical know-how, of private-sector insights and career-government expertise.” Its essential purpose today would be the same as when it was originally created—to identify the causes of government inefficiency, ineffectiveness, delay and unfairness, recommend ways to change things, and pursue those recommendations to fruition.

EMOLUMENTS CLAUSE ISSUE

As part of the reauthorization process, I urge the committee to clarify the uncertainty that exists over a rather technical issue, namely the applicability of the Emoluments Clause of the U.S. Constitution to non-government members of ACUS. The uncertainty arises because of a 1993 opinion by the Office of Legal Counsel, Department of Justice (OLC), and ACUS' inability to have the matter resolved before it went out of business in 1995. Congress should make clear that, in its view, ACUS' members from outside the federal government who serve part-time, are unpaid for their services, and are explicitly required by the statute to be chosen for their expertise do not, simply because of such service, hold an “Office of Profit or Trust” within the meaning of the Emoluments Clause. Rather, they should be treated like members of any other federal advisory committee. Absent resolution of the issue by Congress, the status of ACUS' non-government members will remain in doubt and the ability of a revitalized ACUS to attract the most distinguished individuals from the private sector will be seriously compromised.

As you may know, the Emoluments Clause provides that “no Person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept . . . any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” U.S. Const., art. I § 9 cl. 8. The Constitutional Convention included the Clause in order to shield foreign ministers and other officers of the United States government from undue influence and corruption by foreign governments. However, in a 1991 opinion, OLC substantially expanded the historic understanding of the Clause when it concluded that even “[f]ederal advisory committee members hold offices of profit or trust within the meaning of the Emoluments Clause.” *Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65 (1991). The 1991 opinion, although presumably affecting a thousand or more advisory committees at scores of federal agencies, went essentially unnoticed at the time.

On October 28, 1993, OLC issued a further opinion addressing two rather esoteric Emoluments Clause questions specifically affecting ACUS members. First, it concluded that ACUS' academic members, such as law professors, are prohibited by the Emoluments Clause from serving on ACUS if, absent Congress' consent, they accept any payment from a commercial entity owned or controlled by a foreign government, including universities or law schools. That ruling had the effect of preventing any academic from serving as an ACUS member if he or she at any time undertook any employment relationship with a foreign government-owned academic institution—even a one-semester visiting professorship or a single compensated lecture. Second, OLC determined that an “Emolument” within the meaning of the Clause included any distribution of partnership shares that includes some proportionate share of the revenues generated from the firm's foreign government clients even though the ACUS members themselves did not personally represent any foreign clients and had no dealings with them. *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114 (1993). What we discovered at the time was that, at most law firms, it is impossible to segregate partnership earnings to exclude from one partner's share some amount—often miniscule—associated with another

partner's foreign government clients. So, absent Congress' consent, lawyers in large law firms whose partners had foreign clients could no longer serve on any advisory committee. Importantly, in reaching its decision, OLC did not reconsider its fundamental 1991 view that advisory committee members, such as non-government ACUS members, occupy an "Office of . . . Trust" within the meaning of the Emoluments Clause. Some of ACUS' members resigned in light of OLC's decision.

The matter has been partially—but, unfortunately, not fully—resolved in the years since 1993 because OLC has retreated from its original determination. Immediately on the heels of its October, 1993 ACUS opinion, OLC, at the behest of the Department of State, reconsidered and revised its underlying view regarding the applicability of the Emoluments Clause to unpaid members of advisory committees. On March 1, 1994, in an unpublished letter to State Department Legal Adviser Conrad Harper from OLC Assistant Attorney General Walter Dellinger, subsequently cited in *Applicability of 18 U.S.C. §219 to Representative Members of Federal Advisory Committees*, 1999 OLC LEXIS 11 (1999), OLC determined that "not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the [Emoluments] Clause." Later in 1994, OLC modified its view regarding advisory committee members from the academic community. It determined that while foreign public institutions, such as universities, were presumptively instrumentalities of a foreign state for Emoluments Clause purposes, individuals did not come within the Emoluments Clause if the foreign academic institutions with which they had a relationship are independent of the foreign government when making employment decisions. See *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13 (1994). In 1996, OLC publicly rejected what it now characterized as its previous "sweeping and unqualified view" that federal advisory committee members hold offices of profit or trust and were thereby subject to the Emoluments Clause. It went on to conclude that members of the State Department's Advisory Committee on International Economic Policy do not occupy an "Office of Profit or Trust" within the meaning of the Emoluments Clause. See *Letter Opinion for the Deputy Legal Advisor, Department of State, The Advisory Committee on International Economic Policy*, 1996 OLC LEXIS 63 (1996).

Unfortunately, the 1994 unpublished letter to Conrad Harper at the Department of State has not, to my knowledge at least, been made public. When I learned of its existence, long after ACUS had been abolished, I requested from OLC and the Department of State both a copy of the letter and any underlying documents from the State Department to OLC that might help illuminate OLC's new rationale. Because I was now a member of the academic community, I had to make my request pursuant to the Freedom of Information Act. My FOIA requests were denied by both agencies. So the bases for OLC's 1994 change of heart, and the factors that influenced it, are, as best I can tell, still not publicly known.

OLC did issue a brief, two paragraph, published opinion on the subject in 1996. However, in that opinion OLC simply pointed to various factors that took members of the State Department's Advisory Committee on International Economic Policy out from under the Emoluments Clause. OLC pointed out that the members of that advisory committee met only occasionally, served without compensation, took no oath, and did not have access to classified information. OLC further indicated that the State Department committee was purely advisory, was not a creature of statute, and discharged no substantive statutory responsibilities. Beyond noting these factors, however, OLC failed to set out in any principled way which of these seemingly key characteristics, or combination of them, would render other advisory committee members subject to, or not subject to, the Emoluments Clause. For example, is the mere fact that Congress created the advisory committee by statute sufficient, by itself, to render advisory committee members subject to the Clause? If so, why is that so, and are the other factors thus either irrelevant or surplusage insofar as OLC's analysis is concerned? In the circumstances, OLC's view on the applicability of the Emoluments Clause to prospective ACUS members cannot be determined. Nonetheless, if rigidly or individually applied, the fact that the Conference is created by statute, that the membership as a whole is technically responsible for the Conference's activities, and that, through its Chairman and permanent career staff, it performs statutory duties other than making recommendations, could be seen to subject the non-government members to the Emoluments Clause. So Congress needs to declare its intent that ACUS' non-government members be treated in the same way as members of other advisory committees and indicate that it is aware of the OLC opinion but does not believe that the Emoluments Clause should be a barrier to service by ACUS' academic members or individuals in large law firms as long as the non-government members do not, themselves, represent foreign governments. This is plainly within Congress' constitutional capacity to do.

I would point out that, apart from ACUS' statutory creation, none of the other factors noted as relevant in OLC's 1996 opinion apply to non-government ACUS members. Non-government members meet only occasionally, serve without compensation, do not have access to classified information, and are not required to take an oath. They perform purely an advisory role akin to that performed by advisory committee members throughout government. The job of the Assembly of the Conference, made up of its entire membership, is to study issues of administrative procedure and adopt recommendations for improvement. See 5 U.S.C. § 595(a), setting out the Assembly's statutory responsibilities. Although the Assembly technically "has ultimate authority over all activities of the Conference," its functions are necessarily confined by the specific administrative and executive powers conferred expressly on the Chairman and the Council in 5 U.S.C. § 595(b) and (c). And, as a practical matter, during my term of office at least, the Assembly and its non-government members (apart from the 5 non-government members of the Council) did not perform any functions that were not related to their advisory responsibilities. In short, the Assembly, meeting twice a year in Plenary Session, and through its committees on an irregular basis at other times, was entirely a recommending or advisory body.

ACUS' statutory footing or its other statutory responsibilities do not alter the advisory role of its non-government members. Although ACUS is both a statutorily created federal agency and an advisory committee, its non-government members participate only in its advisory functions. The statute created the position of Conference Chairman as its chief executive. He or she is a full-time federal employee who, along with the professional staff, conducts ACUS' day-to-day activities. The Chairman and staff ensure implementation of ACUS recommendations and the accomplishment of any statutory assignments given to ACUS by Congress. They serve as a clearinghouse for government agencies on administrative process issues. In other words, to the extent that ACUS as an agency performs tasks that might be considered to be non-advisory, these tasks fall within the purview of the Chairman and staff, who, as federal officials, are clearly subject to the Emoluments Clause.

ACUS' 40-year history testifies to the fact that Congress has always known about—and, indeed, has endorsed and statutorily required—the appointment of distinguished law professors, lawyers in private practice, and other experts as non-government members. There were two temporary Conferences, neither of which was established by statute—the first created by President Eisenhower in 1953, the second established by President Kennedy in 1961. They were made up of law professors, lawyers in private practice, and other experts, with a federal judge as chairman. Those Temporary Conferences were explicitly the model for the statutorily established Conference created by Congress in the Administrative Conference Act of 1964, P.L. 88-499. Indeed, in section 593(b)(6) of Title 5 Congress expressly required that non-government members shall be chosen to "provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure." Establishment of ACUS by statute worked no change in the basic advisory role of its non-government members. An Administrative Conference rooted in a statute, as recommended by both temporary Conferences, was intended solely to give the advisory body permanent status. In my opinion, if anything, ACUS' statutory underpinning, and Congress' express articulation of membership qualifications, manifests *de facto* congressional consent to any Emoluments Clause issue that a statutory foundation, standing alone, might be seen to pose.

But I recognize that the 1993 OLC opinion will complicate and compromise ACUS' ability to attract the most distinguished individuals from the private sector. So Congress should eliminate any ambiguity by amending the statute as part of the reauthorization process. There is no drawback in doing so. The Assembly, and its committees, have always operated, and must continue to operate, pursuant to the openness requirements of the Federal Advisory Committee Act, 5 U.S.C. Appendix, as do other federal advisory committees. Non-government members must comply with pertinent Office of Government Ethics disclosure requirements. So I recommend that Congress make two statutory modifications. First, it should delete the second sentence of section 595 that confers on the Assembly "ultimate authority over all activities of the Conference." This will eliminate any technical argument that the Assembly plays a role in the administrative operation of the agency. Second, it should add a final sentence to section 593(c) to provide explicitly that "Members of the Conference from outside the Federal Government do not, by virtue of their appointment, hold an "Office of Profit or Trust" within the meaning of Article I, § 9, cl. 8 of the U.S. Constitution." At a minimum, Congress should make clear in the

legislative history that, in reauthorizing ACUS, it fully anticipates, and consents to, membership by individuals who are members of the practicing Bar, scholars in the field of administrative law or government, or other experts in federal administrative procedure irrespective of any highly attenuated relationship with a foreign entity of the type OLC found to implicate the Emoluments Clause.

I appreciate the opportunity to participate in the subcommittee's hearings and I sincerely hope that they are the beginning of a process that leads to the reauthorization, re-creation, and funding of the Administrative Conference.

Mr. CANNON. Thank you, Professor.

Ms. Payton, would you—we have only one microphone but it works, which is nice.

STATEMENT OF PROFESSOR SALLYANNE PAYTON, WILLIAM W. COOK PROFESSOR OF LAW, THE UNIVERSITY OF MICHIGAN LAW SCHOOL, ON BEHALF OF NATIONAL ACADEMY OF PUBLIC ADMINISTRATION

Ms. PAYTON. I will try not to say anything too startling.

Mr. Chairman, Members of the Committee, thank you for inviting me to testify on the reauthorization of the Administrative Conference of the United States. I am the Cook Professor of Law at the University of Michigan Law School. As you know, I served on the Administrative Conference continuously for five presidential administrations. I am a past Chair of the Administrative Law Section of the American Association of Law Schools, and since 1998 I have been a Fellow of the National Academy of Public Administration and a member of the Standing Panel on Executive Organization and Management, which I will refer to as EOM panel.

I currently serve as the Director of the Academy. The Academy itself does not take positions on pending legislation. That function is located in the standing panels, such as the EOM panel, and I am here on behalf of the EOM panel. I am expressing today the management view, if you will, of the Administrative Conference. I have coordinated my testimony with Sally Katzen, who has contributed a statement for the record, and I concur in her views. Since she cannot be here in person today she has authorized me to speak to any questions regarding her statement.

My testimony reflects also the strong views of the EOM panel, which recently met and after deliberation voted to express its strong support of restoring the Administrative Conference. The EOM panel includes many present and former senior managers of the Government. I must say that this is the first time I have ever known my colleagues on the EOM panel to express enthusiasm for lawyers, and so the position of the panel should be taken as a measure of this wide esteem in which ACUS is held.

You have my written statement. In these oral remarks the principal point I want to make is that good administrative process and procedure are part of the critical infrastructure of Government. Like other infrastructure, they are likely to be taken for granted and neglected until problems build into crises or something major goes wrong. In the Government of the United States, only ACUS ever had the mission of engaging in constant correction and improvement of the procedure and process infrastructure.

ACUS was what we call a community of practice. It was a community of practice of administrative law professionals. Its members spanned all the agencies, administrations and different political

parties. It included both academicians and practitioners which fused public and private. ACUS was led from the top. The roster of its public members and consultants was a virtual Who's Who of administrative law.

Moreover, these luminaries worked hard. ACUS projects for the most part were difficult, technical and esoteric, some would say boring, the ordinary work of tending after the administrative process.

Now many of the lawyers who are supporting restoration of ACUS have spoken warmly of the bipartisan and collegiality of the Conference. From a management perspective, the attractiveness of ACUS to the professional community meant that prominent and distinguished people were willing for the sake of that collegiality to focus on operational issues that would otherwise never have claimed their attention. The Government benefited enormously by assembling and hosting ACUS. It stimulated the members of the Conference to do the work of the Government.

Now, I don't mean that ACUS was perfect, only that it was, as we now know, irreplaceable. The EOM panel therefore encourages restoring it with its virtues intact.

Now, our analysis of the relationship between ACUS's structure and performance leads us to urge caution with respect to changing in any significant respect its role and responsibilities. We recognize that the world has changed since 1994 and so have the concerns of administrative lawyers, as Professor Edles just pointed out. We have moved off the old agenda on to a new agenda, but it is still the agenda of administrative law. We believe that the task of deciding how to retain the old virtues of ACUS, while meeting new challenges, can safely and appropriately be entrusted to the administrative law community, itself operating under its original and quite flexible ACUS charter.

The EOM panel therefore supports restoration of ACUS under its original charter. I thank the Subcommittee for reexamining this issue. You are doing a great service.

[The prepared statement of Ms. Payton follows:]

PREPARED STATEMENT OF SALLYANNE PAYTON

Mr. Chairman and Members of the Subcommittee:

I greatly appreciate your invitation to testify in favor of the reauthorization of the Administrative Conference of the United States, known as ACUS or "the Conference." I am the William W. Cook Professor of Law at the University of Michigan Law School. I served on the Conference continuously through five presidential administrations as a Public Member and then a Senior Fellow, beginning in 1978 and ending in 1995 when the Conference was disbanded. In 2001-2002 I was Chair of the American Association of Law Schools Section on Administrative Law. Since 1998 I have been a Fellow of the National Academy of Public Administration and a member of its Standing Panel on Executive Organization and Management (EOM Standing Panel). I currently serve as a Director of the Academy.

My testimony today has been coordinated with that of Sally Katzen, and I concur in her views. Since she cannot be here in person today she has authorized me to speak to any questions regarding her testimony. My testimony also reflects the views of the EOM Standing Panel, which recently met and deliberated on the question of restoring the Administrative Conference. The panel voted to express its strong view in support of reauthorization. I will focus these remarks on the reasons for this solid endorsement.

One of the challenges of managing a government as diverse in mission and organization as is the Government of the United States is to locate responsibility for common functions where they can be performed most effectively at the appropriate

scale. Administrative processes and procedures are ubiquitous in government, but being matters of technique rather than substance they tend to claim a smaller share of the attention of agencies and the Congress than do more concrete and pressing concerns.¹ They are not for that reason unimportant. It is through administrative processes and procedures that most people interact with government. These processes and procedures are part of the essential infrastructure of government, and continuous attention must be paid to them. The ability of government to conduct itself appropriately, and to monitor and improve its procedures and processes, is therefore a critical piece of organizational competence. It is true that the judiciary has power to review agency action at the behest of an appropriate party with a legally-protected interest, but judicial review is available for only the thinnest sliver of the work of government, and in any event the mission of the courts is to decide disputes and to focus on larger-scale institutional relationships, not to improve administrative systems.

There is thus a void, which the Administrative Conference was created to fill. The Conference was a remarkable institution. In the current argot of organizational theory, it would be called a “community of practice.” In her 1994 testimony in support of the reauthorization of ACUS, Sally Katzen described the Conference as it then existed:

By statutory design, a majority of the Administrative Conference’s members represent government departments and agencies. All major departments and agencies are represented and each department or agency chooses its own representative. The caliber of the individuals who represent these agencies attests to the importance that the agencies, as well as the Administration, assign to the Administrative Conference’s functions. . . . The government officials join forces with distinguished private citizens, called “public members”—law professors, public interest lawyers, private practitioners, economists, public administrators—who volunteer their time and talent because they share the view that this unique public-private partnership significantly improves the way government regulates its citizens or delivers services to them. The Administrative Conference Act requires that the Administrative Conference chairman select members from the private sector who are “members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to federal administrative procedure.” . . . The Administrative Conference ha[d]s a long-standing tradition of private sector membership that crosses party and philosophical lines . . .²

I am sure that all of the witnesses before this Committee who have been on the private side of this public-private partnership would attest that serving as a Public Member of the Conference was challenging, the work being frequently complicated, esoteric and technical. Nonetheless, Public Members of startlingly distinguished professional standing viewed participation in the Conference as a high calling and worked their way devotedly, largely at their own personal expense, through procedural and process issues of which no notice was likely to be taken outside of the circle of administrative lawyers, and for which they would receive no credit.

This willingness on the part of the leaders of the administrative law community to contribute personally to the work of ACUS was an expression of their commitment to improving the important below-the-radar processes that are critical to the

¹This observation was a principal motivation for the creation of ACUS as a permanent body. Here is what Judge E. Barrett Prettyman wrote to President Kennedy after having led two committees studying the possibility of creating the Conference:

The heavy pressures on Government to discharge immediate responsibilities may at times rob administrators of the time needed for consideration of procedures. Imperfections in method . . . may acquire the protective coloration of familiarity; and the demands of the daily job may lessen the will to achieve change. . . . The committees of Congress, suitably concerned as they are with matters of substantive policy, can only sporadically occupy themselves with the details of methodological and organizational problems . . . Nor do we think that hope of major accomplishment lies in occasional studies by groups external to the Government. . . . *The current need is for continuous attention to somewhat technical problems*, rather than for public enlightenment concerning a few dark areas that cry for dramatic reforms. A discontinuous commission . . . is unlikely to have great impact upon the day-to-day functioning of the Federal agencies. *Letter from Judge E. Barrett Prettyman to President John F. Kennedy* (Dec. 17, 1962) (urging establishment of permanent Administrative Conference) (on file with ACUS), cited in *Testimony of Sally Katzen before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States, April 21, 1994*, reprinted in 8 ADMIN. L.J. AM. U. 649, 653 (1994) (emphasis supplied).

²*Id.* at 652.

well-being of those who have to depend on or do business with government. I think, for example, of the work that ACUS did on the process for designating “representative payees” for Social Security recipients who cannot care for themselves but who have not been declared legally incompetent.³ What was unique about the Conference was that highly-compensated lawyers, leading academicians who specialized in constitutional theory, and sitting federal judges who turned out to be future Supreme Court Justices, among others, believed that making sure that processes of this sort were tailored correctly was worth their time, because these processes mattered to the public.

Even partisan competition was subordinated to the members’ determination to achieve good administrative principle and practice. The Conference’s bipartisanship was so pervasive that it functioned as nonpartisanship, in the tradition of “good government.”

Like any organized community of practice, the Conference maintained an informal institutional memory and a repository of useful information that was made available to those who sought its advice, whether or not they were located in the Executive Branch. It is worth remembering in this context that at any given time a substantial fraction of the people who have responsibility for designing, conducting or reforming administrative processes and procedures are new to their jobs, or have never had occasion to think about the type of issues confronting them. There are new Hill staffers and new independent agency commissioners, who need a source of trustworthy information and advice. Turnover among agency officials produces a constant inflow of people who need to be informed about their responsibilities. Best practices need to be identified and information about them disseminated. No individual agency is in a position to maintain a comprehensive information base on federal administrative process and procedure; nor can any administrative or other operating agency always take on the role of thinking conceptually about its own work in the context of general principles of administrative process. Responsibility for these functions must be centralized; it must be prestigious; and it must be impartial. The Conference was all of these things. Some of the greatest praise for ACUS has come from Members of Congress who had occasion to call on it for information and advice. Many members of the EOM Standing Panel have had similar experiences, and view ACUS as having been a highly useful organization.

The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique—and, as we have observed during the years since its demise, irreplaceable—function. Much has changed during the past ten years, however, and we understand that among those who favor placing ACUS back in service there might be some sentiment for modifying its charter to give the organization a broader role and responsibility, and an instruction to take on matters of greater salience. On this point the members of the EOM Standing Panel were unable to agree among ourselves, and we urge the Committee to be cautious. It is not intrinsically difficult to attract high-level attention to high-visibility issues; it is much more difficult to attract high-level attention to low-visibility issues. The genius of ACUS was that although its charter was (and still is) flexible enough to encompass virtually any subject that can plausibly be characterized as a matter of “agency organization, procedure, or management”⁴, as distinct from pure substance, its broadly representative structure drove it away from issues that might have provoked partisan strife and toward addressing a continuous stream of low-salience problems that were important to people who actually had to deal with the government. As we have learned during the years of its absence, if ACUS does not do this work, no one will. We urge the Committee to reauthorize ACUS using the existing language of its charter, to put ACUS back together

³ Administrative Conference of the United States, Recommendation 91-3: The Social Security Representative Payee Program, 1991 ACUS 17.

⁴ 5 U.S.C. § 594 provides:

To carry out the purpose of this subchapter, the Administrative Conference of the United States may (1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs. . . .

5 U.S.C. § 592 (3) defines “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.

as nearly as possible just as it was, and to allow ACUS to find its own way in its new environment.

I thank the Subcommittee for reexamining this issue and for considering the restoration of the Administrative Conference.

Mr. CANNON. Thank you. We appreciate your comments.

Mr. CHABOT. Mr. Chairman.

Mr. CANNON. Yes.

Mr. CHABOT. If I could speak out of order for just a moment.

Mr. CANNON. Absolutely. Do you have other commitments?

Mr. CHABOT. Yes, I have a hearing that I have to attend on Iran nuclear proliferation. I have heard the other three testify. Professor Harter, I have yours in my hand. I assure you I will read it this afternoon. So I apologize.

Mr. CANNON. Thank you. More time for questions for us. Professor Harter.

STATEMENT OF PROFESSOR PHILIP J. HARTER, EARL F. NELSON PROFESSOR OF LAW, CENTER FOR THE STUDY OF DISPUTE RESOLUTION, UNIVERSITY OF MISSOURI LAW SCHOOL

Mr. HARTER. Well, this is the part of the schizophrenia of this issue.

Mr. CANNON. We would hope that the structure that we come up with for ACUS is simple and flexible enough to accommodate the problems that we have in daily life, like getting our light system to work.

Mr. HARTER. Let me begin by saying that after a—my title of Earl F. Nelson Professor of Law is very much of a newbie. I have spent 35 years here in Washington working with agencies, among them, and in that I have observed them in action, and I do want to point out that that is two words. And I am here to wholeheartedly support the resurrection of the Administrative Conference, and I want to do it really on two grounds. One is that I think that the reestablishment would not only save the Government significant sums of money. Clearly I think we need it as an investment, but also that it would enhance democratic or, if you want to be nonpartisan about it, civic republican values in America, of just how the people participate in the Government.

You look back, since the APA was enacted in 1946, significant changes have taken place in the management structure of the Federal Government. There are new forms, major new forms of public-private interaction, reliance on the private sector with oversight by Government, new developments and relationships between Federal and State governments, new perceptions of how the Government should and should not function when making important decisions in relationship with individuals in the private sector. If you think about it, agencies in each individual agency, entity, each individual subagencies, hundreds of them, must confront each of those demands daily, each time they take action, and so similar choices must be made over and over and over again in Washington. Agencies lack the way of finding out what works and what doesn't work.

Let me go over some specifics as to some of the needs. I was recently—gave a little pep talk to an agency on how negotiated rule-making works and whatever, and a couple of representatives from other agencies heard that I was going to do it and asked if they

could attend, and the answer was no. Bizarre. It was a lack of sharing experiences across agencies to support insights.

One of the major provisions of the Administrative Resolution Act is its confidentiality provision. It was one of the leading early provisions. It had some ambiguity, some interpretation. How do you dovetail mandatory confidentiality at agencies with inspector generals, how various parts work.

What do we have? Federal Government set up a committee to talk about guidance for confidentiality and dispute resolution proceedings. The American Bar Association set up a committee to talk about confidentiality in administrative dispute resolution proceedings. Now, even though these parties are going to be in the same proceeding, those two committees don't talk to each other. They come up with different advice. There is no way to share the insights or to come up with a common set of goals on how to implement. The communication has broken down.

Second, if you go through and look at an awful lot of the recent legislation, that because there is no ACUS, Congress is ad hocking it. It will require agencies—well, go talk to the National Research Council. There is no continuity. There is no standing membership. There is no particular insight into the broad perception, so let's just go out and find out individual aspects.

One that I found interesting was American University held a major conference on electronic rulemaking earlier in January. One of the major reasons given for expanding e-rulemaking, and certainly it has major aspects in e-data acquisition and management but another aspect is the accessibility of the American public, an ability to participate in rulemaking via the Internet. And I will tell you when they were talking about what they were going to do it just sent shivers down my spine. If implemented without care, it will just basically disenfranchise individuals because what they are talking about is establishing a dialogue for rulemaking, basically an ad hoc, negotiated rulemaking. What individual has the time to be there? Only the organized interests are going to be on the other end of that communication. It will be in fact ex parte communication in broad daylight.

We broke down into work groups and in my work group that I chaired, and it was really a bizarre, you know, which turned out to be a broadly representative group—was strongly of the view that the Government needed to establish an advisory committee of public and private people to advise on public participation. After all, the whole name of it is how the private people participate in Government. Wouldn't it be nice if the Government asked the private people how it ought to work? And so based on that, I sent a petition, or a letter I guess actually, to three of the leaders of the e-rulemaking effort suggesting that an establishment of an advisory committee could be a good idea, to which I got a resounding nothing. Not an answer. I was told by somebody who was at the meeting that my answer said all they want to do is take a hold and take it away. It was some kind of pejorative answer. All of those issues would be addressed by an Administrative Conference wishing to have a dialogue among the parties, desperately.

So what has happened is the private sector is talking to themselves, the Government is talking to themselves without bridging,

and we have got to get over that. That is what we are talking about in the e-rulemaking—I mean in the EU process.

I think as to the membership, I would—although I think that the statute is fine, I would urge a much broader membership of—I mean if you listen to the four of us the words “administrative law” creep in a lot. It isn’t just administrative law. It is administration. It is the Administrative Conference, not the Administrative Law Conference. I think you need experts in management. You need economists. You need public administrators. You need all levels of Government. You need political agencies, senior service, and you need the staff. After all, it is the staff that is going to implement all of that and I think the staff has been woefully underrepresented in the Conference.

So I would hope that in its new incarnation that it be really broadly represented of diverse interests that would be affected by it.

Lastly, the question of appropriations. I would admit to a mistake, an error in my prepared testimony that I sort of abstracted, which I think the current value of the original appropriation would be \$10 million, and I was wrong as to what the original appropriation is. But I still think that is a good figure, because I think that you really do require resources to go out and do the sophisticated stuff, to answer a lot of the questions that have been raised by you and by the other panelists, and again I think that will be an investment well made. Urge your action and I am excited that you are undertaking this.

[The prepared statement of Mr. Harter follows:]

PREPARED STATEMENT OF PHILIP J. HARTER

My name is Philip J. Harter. I am the Earl F. Nelson Professor of Law at the Center for the Study of Dispute Resolution at the University of Missouri—Columbia School of Law. I whole heartedly support the resurrection of the Administrative Conference: Its re-establishment would not only save the government significant sums of money, it would also enhance democratic—or, to be non-partisan about it, civic republican—government.

BACKGROUND AND PERSPECTIVE

I would like to provide a bit of my background since it forms the perspective for the observations that follow. To a very real extent, the Administrative Conference has determined the course of my professional life. Thirty five years ago right now I was a research assistant to Professor Roger Cramton at the University of Michigan Law School. The project we were working on ultimately became ACUS Recommendation 2, and Professor Cramton became Chair of ACUS. I later became Senior Staff Attorney at the Conference and developed a program on regulatory reform. After I entered private practice, I was subsequently a consultant to the ABA’s Coordinating Committee on Regulatory Reform that played such a crucial role in the debates of the late 70s and early 80s. In the mid-90s I chaired that committee, and in that capacity I had the honor to work closely with this Committee.

I have been a consultant to the Conference on several occasions. Probably most notably, I developed negotiated rulemaking as a consultant to ACUS and wrote a series of articles on the use of dispute resolution techniques by the Federal Government. Those articles resulted in the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. Through its recommendations, oversight, and consultations, the Conference played a pivotal role in improving the way government agencies make decisions affecting the public.

THE DESPERATE NEED FOR ACUS

The processes government agencies use to make decisions are complex, difficult, and continually evolving. The flexible, scant procedures outlined in the Administrative Procedure Act have been supplemented by numerous Executive Orders, judicial

decisions, and ad hoc statutory requirements. Moreover, since the APA was enacted in 1946 significant changes have taken place in the management structure of the Federal government, and there are new forms of public-private interaction, new developments in the relationship between Federal and State governments, and new perceptions as to how the government should function when making important decisions. Officials in each agency must confront all of these demands each time they take action. As a result, similar choices must be made over and over again in the halls of Washington about *how* to make decisions.

Oftentimes officials have little information as to how well a program implemented by another agency works or little guidance as to how the duties could be successfully discharged or major pitfalls avoided. Those who deal regularly with multiple agencies have witnessed the dire need for some means by which agencies can share insights and experiences and to gain expert advice as to the best ways to go about the public's business. Without it, agencies necessarily incur high transaction costs by repeatedly reinventing similar procedures; the lack also means the best ideas are not recognized, strengthened, and used more widely nor the worst improved or discarded.

Further, advice would be helpful both to Congress and the agencies as to the potential structure of new ways to achieve public goals and to respond to public inquiries and criticisms about how individual agencies have functioned. And, Congress and the agencies alike could benefit from the insights and advice of those who are directly affected by the administrative process and from those who study it from a variety of perspectives.

Since the demise of ACUS, we lack the means to refine how we do the public's business: no office or organization regularly convenes a broadly representative group of experts to deliberate about how to improve the quality of the administrative process. A permanent entity such as renewed ACUS is needed that can be devoted to solving the problems of excess costs, delays, and burdens that are imposed upon the agencies and upon the public by inadequate, inefficient, and duplicative government processes.

Individual agencies, while they have the ability to review their own performance, lack the capacity to make cross-cutting agency reforms and comparisons. Furthermore, agencies acting alone cannot make the necessary procedural reforms for the improvement of administrative process as a whole. And, agencies usually do not have the incentive, will, or resources to conduct a thorough self-examination to see if they could do things better.

A forum for collegial self-critique and development of effective administrative practices is eminently desirable. Moreover, one is needed that can bring a sense of unity to administrative agencies and promote an appropriate degree of uniformity in their procedures. Congress should, therefore, establish such an institution that will systematically seek to promote improvements in the administrative process: The Administrative Conference is just such an agency.

The primary purpose of revitalized ACUS would be to care for the improvement of the administrative process. In doing so, it would examine government procedures and practices, with the goal being to search for new ways of helping governmental agencies function more fairly, efficiently, and effectively. The organization could play a leading role in the development of domestic administrative law doctrines. One of its foremost functions would be to review and evaluate whether the basic law governing administrative procedure, the Administrative Procedure Act ("APA"), as well as other procedural requirements should be revised and updated. It could also arrange for the interchange among administrative agencies of information potentially useful in improving administrative procedures. Another role it could discharge would be the preparation of resource documents, bibliographies, and advice and recommendations on various topics confronted by agencies. Although now aging, ACUS handbooks are on the desks of many of the leaders in the administrative process on both sides of the great public-private divide.

The new ACUS could also focus on the more minute details of the administrative process as well. Specifically, it could study and adopt recommendations concerning better rule-making procedures, or ways to avoid legal technicalities, controversies, and delays through agency use of alternative means of dispute resolution. For example, the exploding use of the internet and other forms of electronic communication present wonderful opportunities for increasing the information available to our citizens and their participation in our affairs. But, tapping these resources and making sure they work effectively and efficiently is itself a daunting task. A recent conference on e-rulemaking held at American University pointed out many potential problems that could arise if the procedures used for e-rulemaking were not carefully developed; the public at large could effectively be disenfranchised. Moreover, a strong recommendation was made that since much of the work on e-rulemaking is

being done in the name of enhancing public participation, it would help if those in the government actually consulted with interested parties in the private sector. Yet, multiple requests to leaders of the e-rulemaking effort for the establishment of an advisory committee that could provide such advice and make recommendations to protect against abuse went unanswered. That experience alone points to the dire need for an oversight body.

Another focus would be to collect information and statistics from administrative agencies and to publish reports that could be useful for evaluating and improving administrative procedure. It could also evaluate the judicial review of agency actions and make recommendations for its improvement. A major issue confronting the administrative process that has emerged forcibly in the past few years is the delicate balance of open government in a time of concern over national security and the means by which requirements are imposed on our citizens and businesses to protect our homeland.

Another purpose for renewing ACUS could be to serve as a regulatory ombuds. It could in appropriate circumstances investigate and respond to individual complaints and undertake a systematic performance review of various government agencies, especially of those agencies with serious operational and programmatic problems. Individual agencies themselves often resist any critical self-evaluation in response to public complaints due to burdensome workloads or a failure to admit the flaws in one's own prior decisions. An independent, objective entity, unfettered by internal agency politics and its own inertia, can offer meaningful recommendations to improve the operational structure of administrative agencies.

We also lack a repository on administrative processes that the various state governments could call upon for high quality administrative procedural advice. ACUS could consider ways to improve federal, state, and local relations in different areas, including those in which state and local agencies administer federal programs. The organization could attempt to promote cooperation and coordination on interstate administrative procedural matters to foster a responsible and efficient administrative process among the several states. The entity would be equipped to advise state agencies and their staffs of significant legal developments and emerging trends occurring in the area of administrative procedure.

Another major issue in administrative procedure comes from the international harmonization of laws and regulations. As a result of harmonization, many domestic regulations will need to be changed to bring them into conformity with the international requirements. Just how that is to be done is a complex, controversial issue that needs to be addressed.

ACUS was structured to develop objective, non-partisan analysis and advice. It had sufficient independence from particular policy-based responsibilities, and hence its recommendations were given credence and were seen as a detached analysis. The structural makeup could bring together an inter-disciplinary collection of experts in the administrative process. Membership would preferably include: committed senior management agency officials, professional agency staff, representatives of diverse perspectives the private sector who deal frequently with agencies, leaders of public interest organizations, highly regarded scholars from a variety of disciplines, and respected jurists. The problems that ACUS should address include management as well as legal issues. Thus, its panel of experts should be comprised of members with both legal backgrounds and those who may not have legal training, such as management, public administration, political science, dispute resolution, and law and economics. State interests should also be included in the entity's membership by sending representatives from certain state agencies or state organizations.

One final point should be made: Although it is currently politically unfashionable to suggest that funding should be increased, that is clearly the case here. Throughout its life, ACUS was a huge bargain for the United States. But towards the end, inflation had taken a huge toll on its stationary authorization, and it was not able to function to the full extent of its potential. I suggest strongly that in the process of re-establishing the Conference, the appropriate level of funding is the amount of the original statute updated to reflect inflation. My own, back of the envelope calculation is that that figure would be about \$10 million. From 35 years of observing the Federal government in action (note that's two words), I firmly believe that such an amount should be viewed as an investment that would be paid back many times over. Even if it were not, the improved quality of the decision making process would be more than worth it. For example, what number would anyone put on the costs to our society if the procedures that are bursting upon us from the electronic age and globalization are not implemented appropriately? This is a tiny price.

The new ACUS will help significantly in ensuring that our public decisions are made effectively, efficiently, and fairly. That is clearly a major undertaking, but one ACUS is structured to discharge for the benefit of us all.

Mr. CANNON. Thank you, Professor. We only have two Members here but we are going to strictly abide by the 5-minute rule and I will—you poke me, because I think we are going to have several rounds and then I would probably do better if we go back and forth in that fashion.

Now, you know, I have a brother who actually served on the ACUS twice and you know him, Professor Harter.

Mr. HARTER. Can I tell a wonderful story?

Mr. CANNON. Yeah, you can, but let me ask a question first. You worked on neg reg a lot, and he keeps telling me that he is solely responsible. Can you clarify the record on his role?

Mr. HARTER. Well, it is certainly true. We were on a panel together and it really resulted in one of those lines that I absolutely love. And I can't remember how the line came up, but we reached a disagreement. He said, well, wait a minute, I have the authority to issue that rule. Why should I work with this committee? And I turned to him—this is all off the record—and I said you have the authority but you lack the power. And that is when he became really very much of a proponent of the whole idea of working it out with the political constituents.

Mr. CANNON. That was between times, I think, on the ACUS. Thanks. Let me just ask a question that I would like you to respond to and then Ms. Payton, because Ms. Payton is saying no changes and you are suggesting a substantial broadening to bring in professionals from other scientific areas.

I take it you are actually thinking in terms of an increased appropriation to have more staff because you talked about staff in particular, and then going to all levels of Government. Do you want to flesh that out a little bit and then, Ms. Payton, I would like to get your view on that.

Mr. HARTER. I think that the structure at the Conference both in terms of numbers and everything is probably okay. I would just again in the appointment process, would look for more diversity of professional and diversity in general and I mean, I think some of the serious management expertise, which I think would—really a little more economic ideas, a little more, again, different levels of Government, State representatives, maybe a NAAG or State Governors. I think it would because of the public-private. And I think that on the staff level, having a different perspective, and I think some of the issues that both—the committee and here have talked about, we are facing huge scientific issues. So I think having some degree of a technical ability would also help as well. So I don't think it needs to be major, and I think the structure still works.

Mr. CANNON. Is that consistent with what you are thinking, Ms. Payton?

Ms. PAYTON. Well, the way I read the charter, I thought that there was authority to appoint those kinds people as public members anyway.

Mr. HARTER. Oh, absolutely.

Ms. PAYTON. And I also think that ACUS has the authority to appoint to its committees people who are not public members of ACUS. I believe we have done that. We can. They can.

Mr. CANNON. So you believe that when you talk about the group could regulate itself, you believe that there is plenty of latitude in the current charter to do the kinds of things?

Ms. PAYTON. That is the way I see it. Now Gary may have more.

Mr. EDLES. I think that is absolutely right. I mean it does, the statute does indicate that there are to be private citizens, members of the private bar, but also other experts in the administrative process. And historically ACUS did have economists. We often had members, I remember—I believe David Piddle, who was then a Consumer Products Safety Commissioner, who was basically an engineer, who participated actively in ACUS activities. So we did have representation even in the old days of people who were not lawyers, although I must say it was fundamentally, I think, a lawyers organization.

Mr. CANNON. Mr. Gray.

Mr. GRAY. I think in terms of the studies that were commissioned, they could be studies by economists or scientists. There was no limit. It wasn't only study by lawyers. So there was plenty of access to expertise outside the law.

Mr. CANNON. Good. Maybe in this context can we talk about funding, because when you go outside, I mean what you had in ACUS was all these incredibly brilliant people who came together and participated with relatively small budgets. But when you did study on the outside you commissioned those funds for those and that cost money. I suspect what we will do is include in our report language the idea that we should be looking at these broad groups of people to be representative. But do we need more money than what we are talking about so we can do these kinds of studies, and maybe, Mr. Gray, you can take that question.

Mr. GRAY. I really would like to get Gary's perspective on this, but I think it would be very useful to have more funding because our outreach would be much broader. I have taken as an example, what I suggested, which may not be workable, but this EU comparative project I think would be ultimately better done by an impartial entity like ACUS rather than a private entity with questions about its funding. It is going to cost a hundred thousand dollars to do that.

Mr. CANNON. I am sorry. How much?

Mr. GRAY. A couple of \$100,000 and that is not the kind of thing the private sector can come up with without raising questions about where it came from, and yet it is not that much, it seems to me, for it be funded out of something like that because it is not a backbreaking, seems to me, figure. All I know is there are all kinds of budget constraints.

Mr. CANNON. I would like to pursue this topic a little bit more so we can get some clarity on the record, but my 5 minutes has expired and we will come back to that.

Mr. Watt, would you like to take 5 minutes?

Mr. WATT. Thank you, Mr. Chairman. Let me just play devil's advocate here for a little bit, because we have now heard from six witnesses, all of whom have been vigorously in support of reauthorizing, and while I certainly share that view, one of our obligations, I think, and in the process that I described and referred to in my opening statement works best, we get both sides of an issue and

there has not been any witness yet who has said this would be a terrible idea.

Let me be further provocative to—and probably counterintuitive to assume that there was a rational basis for terminating the Administrative Conference of United States. When I look back and realize that that happened in 1995, I kind of have to step back from that because there was a lot of stuff happening in 1995 that was not based on any rational evaluation. So I have got an opportunity here to put all of this together because I have got people, I think, who understand the history of how we got here.

What was the rationale, if there was a rationale, for terminating this agency?

Mr. EDLES. I can tell you what the House Appropriations Committee report said, which is simply that ACUS had completed its mission as of 1995. As to whether there were other rationales, I can only say what the public report said.

Mr. WATT. Were there any kind of hearings to document the completion of that mission or any discussion to build a record in support of that conclusion?

Mr. EDLES. There was a hearing—there were hearings, I think, before this Committee which fundamentally came out supporting the Administrative Conference. We did have our usual, you know, hour and a half or 2 hours before the Subcommittee on Appropriations. That was the oversight provided for us insofar as our annual appropriation was concerned and it was presumably on the strength of that, you know, hour and a half meeting and information we had submitted in which the Subcommittee came to the conclusion that we should be—we should no longer be funded. But I think it was an era, quite frankly, in which there was a looking around to see if there could be widespread Government retrenchment.

Mr. WATT. This was reform.

Mr. EDLES. And our little agency, I think, is what came up in that time.

Mr. WATT. Mr. Harter, you look like you are just chomping at the bit—

Mr. HARTER. No, I am not sure I am chomping.

Mr. WATT.—to respond to this question.

Mr. HARTER. I will add a little bit to the discussion, and in my view I think it was time that the Conference needed to be revitalized. I mean I think that it needed to be energized and what not. I am not sure that I would take the boot heel that was taken to it, I mean to this kind of the ultimate one. But I think it needed resparking along the lines that I think a lot of us have been talking about here, and I think in part my view is that it lacked as much of the energetic and enthusiastic support at that time that you are seeing now for the reconstruction of it.

I mean, I think that a lot of issues have emerged that are not getting addressed, and so it might be that this had become slightly torpid in that way.

Mr. WATT. Mr. Gray, you were—you said you testified at a hearing where this was evaluated. Were there compelling reasons advanced on the opposite side of where you were? You were in favor of reauthorizing, according to your testimony. Were there other

people on the other side who were making some compelling arguments to terminate?

Mr. GRAY. Well, I have to be candid since I am testifying. There were interests, private interests, if you will, that were opposed to the reauthorization. But they never really surfaced publicly with their arguments. I think what was public was the testimony rather to the contrary that it should be reauthorized.

Mr. WATT. Okay.

Mr. CANNON. We will come back for another round. Did you want to add something to that, Ms. Payton?

Ms. PAYTON. Well, I think that everyone here at the witness table is being reluctant to say what we all know. May I suggest that—

Mr. WATT. I am prone to go to meddling in stuff that makes people have to come to grips with that.

Ms. PAYTON. Right. Well, I think you might find it useful to read at least some excerpts of a law review article by Toni Fine, which appeared in the U.S. Law Review¹ a little while ago, that really goes to the legislative issues of the demise of ACUS. You would find that very useful in its meticulous detail.

Mr. CANNON. Ms. Payton, could you make that article available for our review or at least give us the citation so we would like to have that be part of the record?

Ms. PAYTON. Certainly.

Mr. CANNON. Thank you. Just for the record you should be aware that the Administrative Law Subcommittee had a hearing on ACUS and reported out that language to reauthorize it when the Appropriations Committee decided not to. I have actually talked to people who were engaged in that process, both Democrat and Republicans, and they don't remember it. I think this is just—I would love to suggest the point of all that is that ACUS's work was not widely understood beyond the people that were involved, and I would hope that one of the agenda items, one of the things that the ACUS would do would be to have staff to make sure that Congress understands what they are doing.

I don't think we have any real serious opposition to reestablishing ACUS short of that. We were talking about funding a bit ago, and in my opening statement we talked about a couple of other projects that ACUS did over a 28-year period of time and we are talking about this study.

Mr. Gray, do you think it would cost \$100,000—I think it would be at least that—to do that kind of depth that we want to do? How many studies—given the kind of workload of 28 years, you are looking at 10 or fewer series of projects—how many studies should we be looking at? One per year, one every other year, five per year? Do you have any sense of how much ACUS can do and how much?

Mr. GRAY. Well, I think because it has not been around for nearly 10 years there is a backlog of things that need to be looked at. I mentioned just three of them, including in addition to the European Union project that come to my mind, and in dealing with the quality of purity, which are related topics. So perversely it might

¹The correct reference to the article cited by Professor Payton in her testimony is as follows: Toni M. Fine, A Legislative Analysis of the Demise of the Administrative Conference of the United States, 30 Ariz. St. L. J. 19 (1998).

take more to get it underway and make the backlog through of things that need to be looked at, and it might then drop afterwards.

Again I look to Gary. I think he ran this. I was on the council, but I wasn't involved in daily administration, and I think you had a better answer.

Mr. CANNON. Let me just say here that I agree with your analysis. You may have a big need that may trail off, and so my sense is that when we are talking \$3 million you might need to pick it up a little bit so that we authorize enough to actually do what needs to be done?

Mr. EDLES. Yeah. Over my period, 1987 to 1995, I think we probably tackled a dozen fundamental, major projects each year. I think a couple points on the value here. One is that we—all the private sector members who participated did so pro bono. I mean, people like Boyden Gray did not get their hourly rate when they did work for the agency. They did all of that as volunteers and did a lot of hard work as volunteers. Secondly, the law professors by and large, although some of them were not law professors who served as consultants to ACUS, never really got market rates for what they were doing. There was first of all, their desire to have entree to Government agencies, which they got through the Administrative Conference, which they could not have gotten if they were just a law professor doing a study of some agency. They would not have gotten a hospitable relationship of the type that they got because of ACUS. So they were eager to do their projects through the Administrative Conference, and the Administrative Conference on the other side was quite willing to have them publish their studies in an independent law environment. So through that sort of symbiotic relationship we managed to get them at well below market rates.

And I think our projects, we used to fund them in the range of \$10,000. I mean, things of that nature. I think some probably as little as \$5 or \$6,000. Maybe some were a little more pricey if they had to be done fast or if there was more than one consultant that needed to be used. But, you know, we were not talking in the hundreds of thousands of dollars for individual consulting projects the way the Government does normally.

[3:30 p.m.]

Mr. CANNON. Thank you.

Professor Harter, I resonated with your personal comments about the Internet. I would like to go to you.

You talked about the Internet rulemaking and what essentially becomes ex parte communications in the open. In the last 4 days, I have had four opinion pieces or opinion page articles in the Washington Journal about me and what I am doing on immigration; and that is sort of cool, except there are at least a dozen and probably 100 Web sites out there that are saying horrible things about me. And I looked a little bit, or attempted to look, but there is no way on the face of the Earth that I could respond to all that is said by people who don't like what I stand for and do on immigration.

How do you deal in a world of information with people who want to see things—how do you deal with that? Nobody has the resources except the fanatic or the corporation that has the money

to do it. So I am impressed by your thinking about that, and I have been thinking about that.

We have had issues on the Forest Service where we had 2 million comment, because they are organized. They are in environmental groups. And the other side, maybe you had 50,000 barbers who inarticulately got online and said I don't like what they are suggesting. And so you weigh those which we don't do but we do do and you come up with skewed decisions.

You obviously have thought about this a little bit. Would you mind commenting about what we do with the Internet?

And secondly, both of you, Ms. Payton, is the structure—the current structure of ACUS sufficient to deal with these kinds of challenges?

Mr. HARTER. I am not sure I can address the technical aspects of the Internet. There is a lot of thinking going on about it; and, in fact, the Forest Service rule is one that is commonly used in talking about, well, let us have the computer screen the rule. The computers will read the 2 million rules and tell you what the various comments were.

I think what my point is, is that what really—and NSF has a program that is looking at it. American University has a program that is looking at it. There is one inside the Government that is sponsored by the White House and EPA that is looking at it. But these groups need to talk to each other, and the public at large needs to participate in some of the discussions.

I mean, I gather, from talking to people who have been deeply involved in it, this whole issue of the response, the *ex parte* in the open is really not looking at it. They are looking at the technology, as opposed to what is happening with—the average person can't keep up with it. So I don't have an answer to it.

Those of us who do what I do often quip: I don't do substance, I do procedure. And what is really needed, I think, is an advisory committee to talk about it and come up with guidelines on it that will take these issues into account. It strikes me that is the perfect vehicle to do it. It is built that way and comes up with the recommendations that are broadly representative, so it is the perfect vehicle to do that. When I raised the prospect of an advisory committee, I didn't get the courtesy of a response.

Mr. CANNON. You think ACUS, the way it was set up, could handle it?

Mr. HARTER. Absolutely. They may need a new committee, but that is easy, and that takes 4 minutes.

Ms. PAYTON. Let me muse a little in a way that I don't ordinarily do on the record.

The revised ACUS needs to have both the range of interests represented that allows it to be a kind of very high-status, diverse group. On the other hand, it needs to be nimble and flexible and needs to be able to do something about all these problems; and it needs to be able to respond in a shorter time frame than having recommendations deliberated at a plenary session.

I guess the one thing I would suggest is that recommendations be allowed to be promulgated—to be made by groups that are smaller than the plenary session. Now that is how the National

Academy of Sciences does it, and that is how the National Academy of Public Administration does it.

I am not taking a position on behalf of NAPA as a whole. The organization that is authorized to comment is the EOM panel, which is a subunit of NAPA; and this is the way in which we compromise between our interests in having a diverse general membership and then subject matter panels that are expert but that themselves are fairly diverse and they can respond to these things.

I think the work of ACUS would be enormously improved if all recommendations didn't have to go through that plenary and if people who were not public members of the conference as a whole could sit on committees, and then you would have something that looked a lot more like the National Academy of Sciences.

I would say that when you start expanding that mandate—and I am speaking as an advocate—when you start expanding that mandate, I am afraid that you draw the attention of ACUS away from the small. Now, ironically, it is the small that can't get any attention paid to it unless ACUS pays attention to it. So what I would say, if you want to expand that mandate, you have to give ACUS some sort of incentive to make sure that it keeps tending after these fairly minor issues. It has to have a division that does that or something of the sort.

Mr. CANNON. Thank you. I have gone over my time, and I apologize. Mr. Watt.

Mr. WATT. I just wanted to get an appreciation of what the prior budget was before the termination and if we extrapolate out with some reasonable cost of living adjustment what that would result in.

Mr. EDLES. The budget when ACUS was abolished was \$1.8 million, and it had a staff of 18 employees at that time. At the high water mark of ACUS, I think it had a budget of \$2.3 million. That was the highest ever, and that supported a staff of 24 employees.

Mr. WATT. And if you were thinking about the ideal—taking into account the backlog of things that has not been attended to since ACUS has not been in existence, first of all, for how long—how long do you think it would take to get that backlog taken care of and to what extent would the budget be ramped up for that period of time and for what period of time?

Mr. EDLES. I don't think I can answer either of them, how long it would take or how much it would cost.

I can tell you that when President Eisenhower set up the first temporary conference, he did that in 1951. That conference lasted for 2 years. So it was over, I guess, in 1955. By 1961, President Kennedy had to set up another temporary conference, which means that over a period of 4, 5 years there was again a need for additional work.

The first temporary conference came up with about 30 recommendations, as I recall reading, and the second temporary conference also with something on the order of 30 recommendations. I don't really have a real strong feeling as to, you know, how many various projects there are out there. I suspect there are scores of them that could be usefully done at this stage. And I think \$10 million would probably be a wonderful figure. I think, quite candidly,

something in the neighborhood of 2 to 3 million would probably be more politically acceptable.

Mr. WATT. At least for a start. At least to start.

I am just trying to create a record here with expert input, which I think, even if you are guessing, if it is an educated guess, is better than having an appropriator pull a figure out of the sky, I guess is the point I am making. So I want—let me just encourage each of you to do some creative thinking about this, whether you do it today or whether you submit it to us to supplement the record subsequent to today's hearing. I think you all are in a better position to evaluate this than either the Chairman or I would be and certainly in a better position than some appropriator pulling a figure out of the sky would be. So if you don't have a good feel for it today, I would just hope that you would give it some thought, give us your input and the basis on which you make that input.

Mr. CANNON. Without objection, I suggest we leave the rest of the record open for 7 days so you all could submit your thoughts on funding to us.

Mr. WATT. There are some responses that they may be prepared to make today.

Mr. CANNON. Without objection, so ordered, on leaving the record open.

Ms. PAYTON. I am so nervous about the prospect of diluting the main focus of ACUS. One of the reasons why you are getting such a bipartisan, enthusiastic response is exactly that ACUS did something that was enormously important and irreplaceable, something that only ACUS could do and no one else will.

When you start expanding the role of ACUS, you may wind up in terrain that other people think they already occupy; and it is almost possible that this measure that at the moment is going forward so smoothly may encounter some rocky places.

Mr. WATT. I guess my response to that is I think it is part of our responsibility to forward some parameters with this, not just to say we reauthorize ACUS, but we reauthorize it up to a figure of x amount per year. Now whether the appropriators buy that figure or not, I think may be—if this process works as it should work, it will be in direct proportion to the—our having justified it and built a record in support of it. And I think that is much—a much better way, even if you come up with different figures, with different visions. As long as we understand what your assumptions are, we have built a record and can take that into account in our Subcommittee and full Committee's evaluation on the authorizing side, which is what our responsibility is in this process.

Mr. HARTER. When I discovered my error in the testimony, I actually gave considerable thought—although, obviously, a lot of it is guess. Let me just sort of give food for that. And I share the concern one wants to keep it closely cabined or corralled, focused on the administrative process. My definition may be broader, but when it gets beyond that, it will encounter opposition that will be adverse.

On the other hand, I think there are a number of different parts of what the conference does that we need to be focused on. I think there are a whole series of large processes that Boyden has been

talking about that would need to be undertaken, especially given the hiatus. There are a whole series of smaller ones.

In individual research areas, you get professors to do things on the cheek so long as there is not a lot of research, but research is expensive to get it done. And it strikes me in the latter days of the conference that it was having trouble coupling together enough resources to do good projects. It was getting money from other agencies. It was soliciting from the people it was going to study. It makes me a little nervous, and I think it diminished its nimbleness.

I certainly echo the idea of having the broader committees. So, from my view, I would be concerned if it really were constrained only \$2 million or \$2.5 million. I don't think it can really function effectively at that rate to get it done. My own view, a minimum of \$5 million is necessary; and, frankly, I would go with the \$10 million, with the urging that 5 is probably the minimum. If it is too scant, the quality of the studies just aren't as thorough and as good; and part of its real advantage was thorough studies and a bipartisan support of the recommendation.

Mr. WATT. Can I ask one more question, Mr. Chairman, just a corollary to that? For a 5 or \$10 million investment, what would you project the savings were that resulted from just the—what was the major initiative?

Mr. HARTER. Let me give a figure you can't put a number on. I just completed 2 years ago a negotiated rulemaking for OSHA on building steel buildings. The subpart R of OSHA's rules that had been on OSHA's docket for 20 years, they had tried multiple times to revise the rule, each time unsuccessfully. The negotiated rule worked it through. Unanimous recommendation. OSHA implemented it. The fatalities in steel erection are currently about a third of what they were then. We are talking about probably 20 deaths a year. What is the number? The regular rulemaking didn't work for 20 years.

Mr. WATT. There is method to my madness here, because this is the record building stage. Because I think it is our obligation to document the best we can the cost benefit of this reauthorization, and so I am being a little bit more meticulous than I would normally be because of that. I think we need to anticipate some of these issues, and if you all can submit something to us having thought about it in some more detail—I am not looking for you to be uniform. There is benefit I think in not being uniform. We are not asking you to get together as a group and come up with a group figure or a group vision or a group benefit, cost-benefit analysis, but this is the kind of information that I think would be helpful to have in the record to document not only the cost and what the reasonable costs should be to accomplish whatever the vision is that could differ from panelist to panelist but to document also the benefit of that cost; and that is, I think, what we don't do nearly enough of in this body.

I will yield back.

Mr. CANNON. I would like to go through some notes and make some statements; and if you want to take notes, I will leave it open for you to comment on that.

I appreciate, Mr. Gray, very much your statements. I think it extraordinarily important that we do this so that we stay ahead of the rest of the world. For me, that is very, very important. We have a world in which we can be transparent instead of opaque. We may be more transparent than Europe, but we want to be more transparent. I am a big fan of John Graham, and I appreciate your comments on him. This Subcommittee is actually focusing on helping out there.

Mr. Edles, you talked about—you made a great record. I really appreciate that. And you talked about the institutional memory. I just think that is remarkably important. We can put this back together with many people who are now and were in the prime of their lives that know what happened and know what we can do. And one of the things I hope we can do here is go from taking the negotiated regulation or rulemaking model to a negotiated permitting model.

We are in a position where we have had massive forest fires, and we can't deal with that in Congress. We fiddled around for 2 or 3 years now on the Healthy Forest Initiative, and we still can't get a consensus out of this body. We will never get a consensus out of this body. And we are not going to cut trees until we come up with a process that a rulemaking agency can do, and that is in part rulemaking but I think in larger part it is going to be a negotiated process for permitting—permitting the cutting of trees, permitting of drilling the wells and things like that so we that can come up with a process that actually works.

The problem with it, of course—and, Ms. Payton, you talked about these things don't work until something major goes wrong. And we have some major problems. In the case of forests, for instance, you have a forest fire because we didn't tend to the forests because we could issue permits for cutting trees in a way that everybody agrees. There is a way to make sense. It is just that no agency is going to come up with a permit that doesn't allow for litigation to stop the cutting of trees; and if it is not a healthy forest, we end up with massive forest fires. We lose the trees, lose the watershed, lose the endangered species. We are letting extreme conditions drive major issues that, when you get settled into a discussion with reasonable people, you come to conclusions.

But it is not the reasonable people that bring the lawsuits. It is the people that have an agenda that is outside and choose their judge and all that because we abdicated. That is, America got rid of acres and acres. So negotiating the permitting I think is one of the incredibly important things that we are doing.

Many things have been said today, and we appreciate your comments. Are there any comments on what I have said or—

Well, then I will yield back the time I have. Mr. Flake, do you have any questions?

Mr. FLAKE. No questions.

Mr. CANNON. Thank you for your attendance here. Your being here I think has created a record that is remarkable. More importantly, it will draw attention to people who need to understand how important this is and give us a boost in moving this legislation through and getting not only the reauthorization but funding from

the appropriators. We appreciate your presence here today and thank you.

The hearing is adjourned.

[Whereupon, at 3:55 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD
RESPONSE TO POST-HEARING QUESTIONS FROM C. BOYDEN GRAY

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July 12, 2004

C. Boyden Gray, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
2445 M Street, NW
Washington, DC 20037

Dear Mr. Gray:

Thank you for appearing before the Subcommittee on Commercial and Administrative Law at the oversight hearing on the "Administrative Conference of the U.S. - Part II: Why Is There a Need To Reauthorize the Conference?" on June 24, 2004. Your testimony, and the efforts you made to present it, are deeply appreciated and will help guide us in whatever action we take on this matter.

Pursuant to the unanimous consent request agreed upon at the hearing, Subcommittee Members were given the opportunity to submit written questions to the witnesses. These questions are annexed. Your response will help inform subsequent legislative action on this important topic. Please submit your written response to these questions by Friday, July 30, 2004, to: Susan Jensen, Counsel, Subcommittee on Commercial and Administrative Law, B353 Rayburn House Office Building, Washington, DC 20515. Your responses may also be submitted by e-mail to: susan.jensen@mail.house.gov

We have also enclosed for your review a copy of the official transcript of this hearing. The transcript is substantially a verbatim account of remarks actually made during the hearing. Accordingly, please only make corrections addressing technical, grammatical, or typographical errors. No substantive changes are permitted. Please return any corrections you have to Ms. Jensen by Friday, July 30, 2004.

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Mr. C. Boyden Gray
July 12, 2004
Page Two

If you have any questions, please feel free to contact Ms. Jensen at (202) 225-2825.

Thank you for your continued assistance.

Sincerely,



CHRIS CANNON
Chairman
Subcommittee on Commercial and Administrative Law

Enclosure
CC/sj

c: The Honorable Mel Watt

**QUESTIONS FROM THE HONORABLE CHRIS CANNON
FOR MR. C. BOYDEN GRAY**

- 1) It has been nearly nine years since the Administrative Conference of the United States (ACUS or Conference) was terminated. What, if any, problems have arisen in administrative law and practice that could have been addressed by the Conference if it was in existence over this period?
- 2) If ACUS were reconstituted, what, if anything, would you recommend be changed about the Conference?
- 3) How important is it to preserve the bi-partisan, non-political nature of ACUS?
- 4) Should ACUS be reconstituted as part of another agency, such as the Justice Department or the General Services Administration?
Should it be privatized?
- 5) What should be the priorities for a reauthorized ACUS?
- 6) What, if anything, should be done to ensure that the Conference's membership is representative?
- 7) Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?
- 8) Should ACUS be given any administrative responsibilities (e.g., vis à vis ADR implementation, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?

**QUESTIONS FROM THE HONORABLE MEL WATT
FOR MR. C. BOYDEN GRAY**

- 1) What level of funding would be necessary to fund the ACUS you envision being reauthorized?
- 2) Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

-----Original Message-----

From:

Sent: Tuesday, August 17, 2004 4:07 PM

To:

Subject: Replies from C. Boyden Gray

Importance: High

Re: C. Boyden Gray's testimony before the Subcommittee on Commercial and Administrative Law at the ACUS oversight hearing on June 24, 2004, here are Mr. Gray's replies to the questions posed by Chairman Cannon:

- 1) Issues relating to Peer Review and Data Quality (and these two issues are themselves related) are the two domestic issues that most quickly come to mind. The Ad Law and Administrative Practice Section of the ABA made useful comments to OMB on some of these questions and can continue to do so in the future, but ACUS would have the staff and time to work through the potential problems more intensively. On the international front, as I testified, attention need to be paid to the diverging procedures employed by the EU and US to address the same problem -- bearing in mind that at some point, procedural rules will determine the substantive outcome. As I testified, the Ad Law Section is conducting a thorough comparison of EU and US administrative law, but ACUS would have been (and possibly could still be) the better forum, if for no other reason that it would presumably be federally funded and thus not subject to criticism because of the source of its private funding.
- 2) I wouldn't recommend any major changes, because it worked before and worked well.
- 3) It would be very important to preserve the non-political and non-partisan nature of ACUS. In large part because of ACUS (with some credit to the Ad Law Section of the ABA), administrative law has not been politicized even as some of the substantive laws themselves have been so tarnished -- i.e., the Clean Air Act, the Food, Drug and Cosmetic Act, the Medicare statutes, to name a few.
- 4) ACUS should be independent but not privatized because of inevitable questions about the influence of the private money that would have to be raised to support it. The Ad Law Section is, in any event, a private entity.
- 5) Peer Review and Data Quality issues, along with an evaluation of OMB's so-called "prompt letter" process, whereby OMB suggests implementing rather than eliminating regulations. The EU-US Ad Law comparison project is worthy of notice as well, as

10/4/2004

indicated above.

6) The membership process worked before to provide a membership that was never criticized, to my knowledge, for being unrepresentative.

7) I do not see how it could be given more authority than it had (which was considerable, even if more "moral" than legal) and still remain independent -- because it would raise questions of Presidential Authority and be opposed by the White House.

8) For the reasons given in the answer to #7, I would not give it any substantive responsibilities.

Re: Questions from The Honorable Mel Watt to Mr. Gray:

1) I would double what it had before.

2) The reasons for ACUS' earlier demise related to problems which should be dealt with separately from ACUS, if in fact they require any legislation at all.

RESPONSE TO POST-HEARING QUESTIONS FROM GARY J. EDLES



AMERICAN UNIVERSITY
WASHINGTON, D.C.

PROGRAM ON LAW AND GOVERNMENT

July 27, 2004

Hon. Chris Cannon, Chairman
Subcommittee on Commercial and Administrative Law
House Committee on the Judiciary
B-353 Rayburn House Office Building
WASHINGTON, DC 20515-6221

Attention: Susan Jensen, Esq.
Counsel

Dear Mr. Chairman:

Let me, again, express my appreciation for the opportunity to testify in support of the re-establishment of the Administrative Conference of the United States. I genuinely believe that, on an objective cost-benefit balance, ACUS represents good value for taxpayer money. I enclosed an edited copy of the transcript of my testimony and am pleased to respond as best I can to the written questions that you and Ranking Member Watt have put forth.

Questions from Chairman Cannon

1. Given the fact that the recommendations of the Administrative Conference of the United States (ACUS or Conference) were only advisory in nature, how were the agencies encouraged to adopt them?

Some agencies recognized that they had a problem but were unable to fashion an appropriate solution. That was often the case because potential solutions were opposed by various interest groups. However, when ACUS was able to craft a consensus solution, the agencies could point to that as support for adopting a needed change. In other instances, the ACUS Chairman actively lobbied the agency to implement a recommendation, often meeting personally with agency political appointees or senior career staff. Knowledge that ACUS recommendations represented a consensus position of government and private sector members, including, importantly, members from the White House and the Office of Management and Budget, also created peer

pressure. Oversight committees in Congress were also told of the ACUS recommendation and agencies at times found it preferable to implement a recommendation than explain to Congress why it had declined to do so.

2. What were some of the Conference's most significant accomplishments?

Over the years, ACUS affected major alterations in the federal administrative process. It recognized the need to develop fundamental changes in the processes of the entire government as well as promote improvements in the procedures of individual agencies.

During its early days as a permanent agency, ACUS adopted three of its most influential government-wide recommendations. Recommendations 68-7, 69-1, and 70-1 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 where the injury resulted from adverse action by a federal department or agency. A dollar threshold had long been a statutory jurisdictional requirement before federal courts could entertain cases arising under the Constitution or certain federal statutes. The requirement was plainly anomalous in cases where a genuine deprivation was alleged but the aggrieved party could not put a monetary value on the adverse effect of governmental action, or where the monetary value was small. The second proposal urged abolition of the doctrine of sovereign immunity that deprived the federal courts of jurisdiction to entertain citizen suits in the absence of an express abrogation of the doctrine by Congress. The doctrine had already been abandoned for actions to recover in tort or contract from the United States. ACUS argued that the doctrine should not block the right of citizens to challenge in court the acts of government administrators. Finally, the third recommendation 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. ACUS campaigned for the reforms against the opposition of the Department of Justice. The Department of Justice reversed its position, however, when former ACUS Chairman Antonin Scalia became Assistant Attorney General in charge of the Office of Legal Counsel. Congress implemented all three proposals in 1976 when it passed Public Law 94-574.

ACUS adopted its first major rulemaking recommendation 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.

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 current Bush Administration has carried over the Clinton Executive Order in substantial measure.

In the mid-1970s, ACUS undertook its most exhaustive study of the procedures of a single agency -- a review of the practices and procedures of the Internal Revenue Service (IRS). ACUS produced seventy-two separate proposals in six principal areas of IRS activity, including the confidentiality of taxpayer information, the IRS' settlement procedures, the handling of citizen complaints, methods to ensure fair and consistent treatment in selecting returns for audit, and the availability of information to the public. The IRS adopted fifty-eight of the recommendations entirely, endorsed another five partially, and disagreed with only nine. In commenting on the ACUS study, IRS Commissioner Donald Alexander observed:

The fact that we endorse the vast majority of the proposals is, I believe, a good measure of the collaborative nature of the effort. Further, the fact that the Service has already put a number of the proposed changes into effect, or is about to do so, reflects the very practical orientation of the Administrative Conference study. . . . It is clear to me that the Administrative Conference Report on the Internal Revenue Service will have substantial, long-term beneficial effects upon the IRS. Even in those relatively few instances where the Service disagrees with the Conference's recommendation, the public will still be served as a result of the sound research and thoughtful presentation of issues reflected throughout the Report. Letter of Commissioner Donald C. Alexander, Internal Revenue Service, to the Administrative Conference, June 15, 1975, Administrative Conference Implementation Binder 75-7 (on file, Washington College of Law, American University).

In 1982, then-Chairman Smith created the Council of Independent Regulatory Agencies, consisting of the chairmen of fourteen major multi-member, independent regulatory agencies, to provide the first-of-its-kind forum for the exchange of ideas on issues of mutual concern. President Reagan hosted the Council's first meeting at the White House. In 1987, then-Chairman Breger inaugurated a popular series of annual seminars on the administrative process for members of congressional staffs that continued until ACUS' abolition.

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.

A commitment to both the efficiency and fairness of the administrative process led ACUS, in the decade starting in the early 1980s and running through its abolition in 1995, to assign a high priority to formulating recommendations to stem the growing tide of expensive administrative litigation. It encouraged agency use of less costly consensual alternatives to conventional courtroom-style procedures ordinarily involving the use of a neutral third party mediator, known as alternative dispute resolution, or "ADR." ACUS undertook seminal research into the litigation crisis within the federal government, producing more than a dozen separate recommendations. Its first ADR recommendation, for example, urged increased use of mediation under federal grant programs. See *Recommendation 82-2, Resolving Disputes Under Federal Grant Programs*, 47 Fed. Reg. 30,701 (1982). ACUS' principal recommendation was issued in 1986. See *Recommendation 86-3, Agencies' Use of Alternative Means of Dispute Resolution* 51 Fed. Reg. 25,641 (1986). ACUS then worked closely with the American Bar Association (ABA) in an effort that led to enactment of the Administrative Dispute Resolution Act in 1990 that established a statutory framework for the use of ADR.

The Administrative Dispute Resolution Act, Public Law 101-552, and the Negotiated Rulemaking Act, Public Law 101-648, were enacted in 1990, with strong support and assistance from the Conference. Both statutes included major oversight and coordination roles for the Conference. Neither statute mandates the use of ADR or Negotiated Rulemaking in any particular case or category of cases. But the ADR Act does obligate each department and agency to adopt a policy for using ADR, and requires each department and agency to designate a senior official to be the dispute resolution specialist to oversee the implementation of ADR activities. In furtherance of its government-wide coordinating responsibility, ACUS assisted agencies in implementing their ADR policies, and provided support for interagency working groups to help ensure uniform compliance with the statute throughout government and address problems that were beyond the capability of a single department or agency. In the years before its abolition, ADR activities occupied about half of ACUS' staff time. However, it was worth it. As noted in response to question 7, ACUS' commitment to ADR has brought about a thorough integration of ADR into agency programs government-wide and continues to result in significant cost savings to both the government and the private sector.

3. How was the Conference able to attract such high caliber members, staff, and fellows?

Because it was a genuinely independent, bipartisan, non-ideological agency, and not wedded to the agenda of any Administration, ACUS was held in very high regard by members of both parties in Congress, officials of the executive departments and agencies, and in the private sector, especially among members of the private bar and the academic community. It could attract senior level government officials and federal judges (judges would have been precluded from an association with an agency tied to an incumbent Administration). In my judgment, the ability to participate in an interaction among senior government officials, judges, leading academics, and other notable members from the private sector, encouraged individuals to serve as ACUS members. Most found it rewarding to be engaged in genuinely nonpartisan "public interest" activity.

ACUS staff members were given a considerable degree of freedom to suggest projects and work on assignments in which they had a keen interest. As a small agency, there was very little bureaucratic interference with individual initiative that one might find in larger institutions. Staff members also had an opportunity to work personally with senior government officials, judges, distinguished members of the private Bar, and well-known academics. These factors encouraged career civil servants to join ACUS' staff and remain for long periods.

ACUS was also able to attract a mixture of distinguished administrative law experts and up-and-coming academics as consultants. Because they worked for a prestigious and independent agency, scholars were not concerned that their research would be perceived as being influenced by any sponsoring agency. Moreover, researchers knew that, working under the auspices of the Administrative Conference, they would receive unprecedented access to government documents and officials. An ACUS committee composed of knowledgeable academic authorities, private lawyers, judges and government officials would also subject their work to an interactive peer review process. Furthermore, ACUS not only allowed consultants to publish their final products in academic journals, but encouraged them to do so. So their research work furthered their careers. Finally, ACUS' research consultants knew that formal ACUS recommendations, based on their work would be pursued by the permanent staff, and that these recommendations stood a reasonable chance of adoption by the President, Congress, or the affected departments or agencies. The ACUS staff has estimated that, over the agency's twenty-eight year history, over two-thirds of its recommendations were adopted, at least in part. In short, ACUS members, staff and consultants knew that ACUS studies and recommendations did not merely collect dust on the shelf but that recommendations were highly likely to be adopted.

4. What were the principal reasons why ACUS was defunded?

The House Appropriations Committee provided simply a one-sentence explanation that ACUS had "fully accomplished its mission." See, for example, H. Rep. No. 103-127 (1993) at p. 76. Obviously, the issue was a bit more complicated than that. I agree with Professor Payton that the most thoroughgoing analysis of the reasons for ACUS' abolition is contained in Professor Toni Fine's 1998 article, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 *Ariz. St. L. J.* 19 (1998). Professor Fine had no association with ACUS and her article is considered to be the most authoritative and impartial scholarly source of information on ACUS' rise and fall. She points out, correctly in my judgment, that a

confluence of events led to ACUS' abolition. But a key trigger was a behind-the-scenes effort by a small group of the government's administrative law judges following what they believed was an unfavorable ACUS report and set of recommendations that proposed changes in the method of selection and supervision of ALJs. This effort tapped into a prevailing mood in Congress following the election of 1994, consistent with the "Contract with America," looking toward the elimination of government agencies and programs. In my view, ACUS was simply swept up in the tide. Professor Fine observes:

While no singular answer appears, it can safely be said that the lack of a political constituency to support the Conference, coupled with the strenuous and vocal disapproval of ACUS by a small, yet spirited, group of administrative law judges, was the impetus for the defunding of the Administrative Conference. Under pressure from this group, and with no public constituency to posit any opposition, Congress was presented with an opportune occasion to eliminate an agency. In doing so, Congress was able to prove to the American public that agencies were not necessarily perpetual. Nevertheless, ACUS by all accounts was doing its job exceedingly well at a budget so modest it defies any reasonable likelihood that the agency's significant contributions did not amply justify its existence. . . . Fine Article at p. 23 (footnotes omitted).

Although the ALJs' opposition to ACUS was not at all unanimous, complaints by some ALJs that the agency ought to be eliminated apparently caught the ear of leaders on the House Appropriations Subcommittee responsible for funding ACUS - it was just after the ALJ debacle that the House voted to eliminate the Conference. . . . Fine Article at p. 96 (footnotes omitted).

It thus appears that certain disenchanted administrative law judges set in motion a critical evaluation of ACUS by Congress. While this appraisal could hardly be seen as establishing any justification by which to defund the agency, the evaluation prompted by the administrative law judges did present Congress with a politically expedient opportunity to move toward its budget reduction goals (albeit ever so slightly) and, above all, to appeal to the public by having eliminated a federal agency. Fine Article at pp. 23-24 (footnotes omitted).

5. Are any of the forces that led to the defunding of ACUS back in 1995 present today?

Some administrative law judges may oppose ACUS' reauthorization. But they have other concerns that probably reflect their higher priorities, e.g., the effort to retain pay parity with the Senior Executive Service that they have lost over the past 9 years, and the initiative, endorsed in 2000 by the American Bar Association, to turn every future administrative hearing into a formal APA hearing at which only ALJs could preside. I cannot predict whether, individually, or through any of their associations, ALJs would now devote significant energy or political capital to preventing ACUS' re-emergence. However, in light of the substantial independent recognition of ACUS' value in improving the administrative process, it is unlikely that members of House or Senate committees are going to be swayed simply by objections from ALJs stemming from a specific ACUS recommendation.

6. If you were testifying today before the appropriations subcommittee with jurisdiction over entities such as ACUS, what would be your most compelling arguments about why – in this fiscally sensitive environment – our taxpayers' dollars should be expended to fund a reauthorized ACUS?

First, ACUS represents a minimum outlay of taxpayer funds. Yet it leveraged this small expenditure by attracting as members individuals from the private sector who, if paid, would command substantial fees. It could also attract consultants prepared to work for well below "market rates." Second, ACUS saved the government and the private sector far more than its annual budget. Finally, if reauthorized, ACUS can be a vital ally in Congress' effort to "get the government off the back" of its citizens while protecting citizen rights. Betty Jo Christian, the distinguished Washington lawyer and Supreme Court litigator, summarized this fundamental argument in a 1998 law journal article. She wrote:

[T]he decision not to provide funding for ACUS . . . was essentially a byproduct of a broad effort to reduce government expenditures, to eliminate unnecessary government programs, to reduce regulation, and to make government more efficient. It was in pursuit of these goals that Congress decided not to appropriate the approximately \$1.5 million required for ACUS' continued existence Rather than abolish ACUS, those members of Congress seriously interested in reducing the burden of regulation and eliminating unnecessary agency functions should have embraced ACUS as their best – and most cost-effective – ally in achieving that goal. Indeed, had ACUS continued to function, I think it is fair to say that it could have rendered an enormous service to the cause of streamlined, down-sized government [O]ne of the last recommendations issued by ACUS, shortly before its demise, concerned the need for a review of existing agency regulations. That recommendation urged that all agencies develop processes for systematic review of existing regulations to determine whether to retain, modify or revoke those regulations. ACUS proposed

standards for setting priorities in the review process, including whether the regulatory function could be accomplished by the private sector or another level of government more effectively and at a lower cost . . . This is precisely the sort of guidance needed to eliminate outmoded regulatory activities and to lift unnecessary burdens from the public. Betty Jo Christian, *Penny-Wise and Pound-Foolish: The Demise of the Administrative Conference*, 30 *Ariz. St. L.J.* 11-12 (1998) (footnotes omitted)

7. Is there any way to estimate the savings in taxpayer dollars that resulted from the Conference's recommendations?

Regrettably, ACUS did not keep detailed or agency-by-agency records of the amount of money saved by the federal government or the private sector as a result of its efforts. Most data are anecdotal. Some tangible savings can nonetheless be estimated and others have been documented.

Among the recommendations adopted in 1980 was Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*. An eight-year implementation campaign led to enactment of Public Law 100-236 in 1988, implementing the recommendation. Hundreds of thousands of dollars in needless litigation costs have been saved by both the government and private parties through implementation of this recommendation.

ACUS' most notable cost-saving contribution was in the area of encouraging what is popularly known as "alternative means of dispute resolution," or ADR. This initiative, begun in the 1980s in response to the growing litigation crisis, produced 15 separate recommendations between 1982 and 1990. Toward the end of its lifespan, ACUS was devoting about half its time to the practical implementation of these recommendations. I attach a list of cost savings and benefits associated with ACUS' ADR efforts. It was compiled in a February 1995 ACUS Report entitled *Toward Improved Agency Dispute Resolution: Implementing the ADR Act*. Moreover, former Acting Chair Sally Katzen's April 21, 1994 testimony before this subcommittee quoted from the President of the American Arbitration Association, who pointed to "the importance of the Administrative Conference of the United States in our national effort to encourage the use of alternative dispute resolution by Federal government agencies, thereby saving millions of dollars that would otherwise be frittered away in litigation costs."

A disarmingly simple ADR recommendation in 1988 urged agencies to use so-called "settlement judges." Recommendation 88-5, *Agency Use of Settlement Judges*. Such judges, who are members of an agency's corps of administrative law judges, work with parties to explore possibilities for consensual resolution in cases over which the settlement judge is not presiding. Two agencies – the Federal Energy Regulatory Commission and the Occupational Safety and Health Review Commission – had used settlement judges but their use elsewhere in government was virtually non-existent. ACUS' contribution was to study the FERC and OSHRC experience, develop a design and set of criteria that could be replicated at other agencies, and promote the new initiative across government. In 1995, for example, the National Labor Relations Board adopted the technique. According to former NLRB Chairman William Gould, in the first two

years employing the new technique, the Board increased its settlement rate by about 25 percent, thus eliminating the need for full-blown administrative hearings in many cases. Chairman Gould estimates that each litigated case cost the government about \$35,000 and private parties spent at least as much. According to Gould's calculation, taxpayer savings over the initial period were in excess of about \$2.3 million. Private litigants probably saved as much, if not more. See William B. Gould IV, *Labor Relations, Law, Politics, and the NLRB - A Memoir* (The MIT Press 2000), pp. 80-81. And such savings, of course, now continue indefinitely into the future at numerous agencies across government.

8. I note that you spend part of the academic year overseas teaching administrative law. Do other countries have counterparts to ACUS?

The principal common law countries with significant administrative systems have some form of advisory body akin to ACUS. Britain has the Council of Tribunals that continuously monitors the work of that country's approximately 70 administrative tribunals and makes recommendations for procedural improvement. Like ACUS, the Council on Tribunals has a salaried chairman and other part-time members. Much like ACUS, its detailed work is its greatest strength. The Council's Chairman has observed: "The functions of the Council were envisaged as ranging from general reflection to a focus on detail. . . . It is at the level of specific recommendation that our most valuable contributions are likely to be made." See the Franks Committee Report, *quoted in Preface of Lord Archer of Sandwell, Council on Tribunals, Annual Report 1992/93*, at vii. The Australian Administrative Review Council has responsibility for giving advice on the workings of the administrative review system in that country. Canada has a Law Commission. It employs the same general methodology as ACUS - systematic review and oversight of Canadian legal matters and the submission of recommendations for improvement to Parliament and the agencies and departments of government. The Commission is smaller than ACUS but its jurisdiction is broader, extending to "the statutes and other laws comprising the laws of Canada." So it advises the Canadian Parliament on how to improve and modernize all of Canadian law, not simply administrative law. As occurred in the U.S., a new Canadian government in the 1990s introduced a budget plan designed to reduce both the federal budget and the deficit. It proposed abolition, privatization or consolidation of 46 separate agencies or programs, and the Law Commission of Canada was one of the agencies abolished. However, the government quickly recognized that abolishing the Commission had been a mistake and the Canadian Parliament re-established the Commission, in a somewhat modified form, only 4 years later. Finally, in a civil law jurisdiction, the Section of Reports and Studies of the French Conseil d'Etat operates as the prestigious "think tank" of the Counsel, with responsibility for anticipating problems of the administrative system and proposing solutions.

Questions from Ranking Member Watt1. What level of funding would be necessary to fund the ACUS you envision being reauthorized?

ACUS' actual appropriation reached \$2.3 million in fiscal year 1992. During the reauthorization cycle immediately preceding ACUS' abolition, the Office of Management and Budget authorized ACUS to request a ceiling amount on appropriations that would have reached \$2.928 million in FY 1998. My testimony indicated that, in my judgment, an authorization of \$2-3 million would likely be sufficient to get ACUS up and running. Traditionally, ACUS had a 4-year authorization of appropriations. Given the large backlog of items that have accumulated over the past decade since ACUS' abolition, I think an initial authorization of appropriations should reflect the \$3 million figure. But I remain convinced that ACUS can fulfill its mission on a limited budget. In the circumstances, I believe that ACUS can begin operations successfully at \$3 million in its first year, and that its authorization should grow modestly each year to accommodate inflationary or unanticipated cost increases, to \$3.2 million in the second year, \$3.4 million in the third year, and \$3.6 million in the fourth year.

2. Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

I doubt that there are statutory changes that would absolutely eliminate the factors that led to ACUS' abolition because they were part of a broader effort in the mid 1990s to reduce the overall size of government. Nonetheless, as long as the balance between government and private interests is retained, all cabinet departments are included, and there is a fair representation of independent agencies and sub-cabinet agencies, I believe that a smaller ACUS, with fewer than 101 members could accomplish ACUS' statutory mission. Before 1986, ACUS had a statutory ceiling of 91 members.

One Further Matter: The Emoluments Clause Issue

In my prepared statement to the subcommittee, I recommended that Congress remove any ambiguity occasioned by the Office of Legal Counsel's restrictive construction of the Emoluments Clause that would constrain a revitalized ACUS' ability to obtain the most highly qualified members from the private sector. In my view, ACUS' non-government members should be treated like those at the approximately 1000 advisory committees throughout the government, including 20 such committees at the Department of State that, like ACUS, have distinguished law professors and members of the nation's largest law firms among its members.

I noted that ACUS' non-government members perform functions akin to those at other advisory committees and that, when ACUS was established by statute in 1964, Congress did not intend to change the advisory function of ACUS' non-government members from that performed by members of the two earlier, temporary, non-statutory conferences. ACUS' statutory footing, in other words, did not alter the traditional understanding by Congress that ACUS' members from the private sector undertake their functions as citizen-advisors and not as government officials.

In now reviewing former Acting Chair Katzen's 1994 testimony before this subcommittee regarding ACUS' reauthorization, I have discovered that she made the same point. She urged Congress to add a sentence to section 593(b)(6) of ACUS' enabling statute that would read: "The members shall participate in the activities of the Administrative Conference solely as private individuals without official responsibility on behalf of the Government of the United States and, therefore, shall not be considered to hold an office of profit or trust for purposes of Article 1, Section 9, Clause 8 of the U.S. Constitution." Frankly, I think her suggested change in section 593 is better than mine. Significantly, the initial phrase is identical to that contained in President Kennedy's Executive Order establishing the Temporary Administrative Conference in 1961. Please see Section 3 of Executive Order 10934, issued by President Kennedy on April 13, 1961, which I include. The language is also similar to that included in early versions of legislation to establish the permanent Administrative Conference. The language noted by Ms. Katzen was ultimately removed by the House Judiciary Committee, but the committee explained:

The Committee was concerned lest this requirement be thought to prohibit agency personnel or, for that matter, non-Government personnel from recognizing problems encountered by their own agency or outside organizations. While the committee expects conference members to exercise intellectual independence, it believes it best to omit from the bill any instruction on this point.

However, as explained in a contemporaneous analysis, by removing this provision the House implicitly recognized that the members would naturally tend to represent the preconceptions and practices of their own backgrounds. In the circumstances, I recommend that Congress add to section 593 the sentence from Section 3 of E.O. 10934 of 1961 that reads as follows:

Members of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States.

This language would set forth the traditional and contemporaneous understanding regarding the role that ACUS' members from the private sector have always played and will continue to play. To reinforce this role, I continue to believe that Congress might usefully delete the second sentence of section 595 that confers on the Assembly "ultimate authority over all activities of the Conference." Ms. Katzen's testimony, which develops her ideas in greater detail, is reprinted as *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Government Relations in Support of Reauthorization of the Administrative Conference of the United States*, 8 Admin. L.J. Am. U. 649, 669-672 (1994).

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If I can be of further assistance to the subcommittee, please do not hesitate to call upon me. Because I return to England on August 17, I can best be reached through my U.S. voice mail at (202) 274-4186, which I access twice a week, or my e-mail at G.J.Edles@hull.ac.uk, which I access every other day or so.

Sincerely,



Professor Gary J. Edles

ADR Savings*

Cost Savings and Benefits of ADR

To date, there has been no comprehensive study of cost savings and benefits associated with ADR use in the federal sector. Evaluations of several pilot programs and anecdotal evidence, however, indicate that use of ADR in the federal sector has produced significant savings. Here are some examples (all from agencies' reports to ACUS unless otherwise noted).

Federal Deposit Insurance Corporation: Use of ADR rather than litigation in liquidation and litigation matters produced estimated cost savings in legal fees and expenses of \$325,000, \$4,200,000, and \$9,300,000 in 1991, 1992, and 1993, respectively. The FDIC's ADR creditor claims pilot project resulted in cost savings of \$410,475.

Resolution Trust Corporation: Use of ADR from 1991 through 1994 led to estimated agency savings of \$115,497,232 in legal costs. (Annual Comparison of ADR in the RTC, February 15, 1995 fax to ACUS).

Department of Labor: A regional mediation pilot program for enforcement cases produced savings of 7-19% and case-processing time savings of 18-84% (depending on the statistical method chosen). (US DOL, *A Cost Analysis of the Department of Labor's Philadelphia ADR Pilot Project*, August 1993, at 15).

U.S. Air Force: Using mediation in over 100 EEO complaints, the Air Force saves an estimated 50% of its average \$80,000 processing cost per complaint, resulting in an estimated \$4 million savings.

Defense Mapping Agency: An ADR program to reduce the backlog of performance rating appeals saved an estimated 4200 personnel hours and over \$135,000 in 33 appeals.

U.S. Air Force: Through partnering among the Army Corps of Engineers, prime contractors and subcontractors, the Air Force completed a \$226 million Large Rocket Test Facility \$12 million under budget and 114 days ahead of schedule (McDade, *An Overview of Selected Public and Private-Sector Alternative Dispute Resolution Initiatives* (US Air Force, January 1995 Draft), at 12-13).

U.S. Information Agency: USIA used ADR to settle the largest contract claim in its history -- saving over \$1 million in interest charges alone.

U.S. Mint: Using ADR on 220 cases in the EEO and grievance areas saved an estimated \$3 million.

Federal Election Commission: During seven months of 1994, the FEC realized a possible savings of \$640,000 by using ADR in EEO disputes.

U.S. Army Corps of Engineers: Using partnering, the Corps lowered the number of contract appeals in which it is involved from 779 in 1987 to 307 active appeals at the end of FY 1994 (January 17, 1995 FAX to ACUS from U.S. Army Corps of Engineers, at 3).

These initial results from federal programs are consistent with private sector studies. Some illustrations:

The **CPR Institute for Dispute Resolution** resolved business disputes involving 440 companies and \$6.7 billion in controversy using ADR between 1990-1993, resulting in estimated legal cost savings in excess of \$187 million, or an average of \$425,000 per company (Cronin-Harris, *ADR Cost Savings & Benefits Studies*, (CPR, 1995), at 26). A 1994 survey of corporate law departments by **Price Waterhouse** produced similar findings: Forty-five percent of participants reported cost savings of over \$100,000 through use of ADR, and 10% of those saved over \$1 million. (*ADR Cost Savings* at 31).

Deloitte & Touche surveyed law firm attorneys and corporate general counsels about their experience with ADR. Sixty-seven percent of those who had used ADR and 78% of extensive users said it saved money, typically 11-50% of the cost of litigation (*Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels* at 14).

Participants in an empirical study of 13 environmental enforcement mediations conducted by the **Florida Department of Environmental Regulation** from 1990 to 1992 reported average direct savings per case of \$325,000 compared to litigation (*ADR Cost Savings* at 56).

* From *Toward Improved Agency Dispute Resolution: Implementing the ADR Act* (ACUS 2/95) at p. 37.

Executive Order 10934

Executive Order 10934

**ESTABLISHING THE ADMINISTRATIVE
CONFERENCE OF THE UNITED STATES**

WHEREAS the performance of regulatory functions and related responsibilities for the determination of private rights, privileges, and obligations by executive departments and administrative agencies of the United States Government substantially affects large numbers of private individuals and many areas of economic and business activity and

WHEREAS it is essential to the protection of private and public interests and to the sustained development of the national economy that Federal administrative procedures ensure maximum efficiency and fairness in the performance of these governmental functions; and

WHEREAS the steady expansion of the Federal administrative process during the past several years has been attended by increasing concern over the efficiency and adequacy of department and agency procedures, and

WHEREAS the experience of the several groups which have examined Federal administrative procedures in recent years demonstrates that substantial progress in improving department and agency procedures can result from cooperative effort by the departments and agencies, working together with members of the practicing bar, and other interested persons:

SECTION 1. *Establishment of the Conference.* There is hereby established a conference to be known as the Administrative Conference of the United States which shall consist of a Council of eleven members named by the President, one of whom he shall designate to be Chairman of the Conference, and a general membership from Federal executive departments and administrative agencies the practicing bar, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures.

SEC. 2. *Purpose.* The purpose of the Conference shall be to assist the President, the Congress and the administrative agencies and executive departments in improving existing administrative procedures. To this end the Conference shall conduct studies of the efficiency, adequacy and fairness of procedures by which Federal executive departments and administrative agencies protect the public interest and determine the rights, privileges and obligations of

Executive Order 10934

private persons. The Conference shall from time to time report to the President any conclusions reached by its members based on such studies, together with suggestions for appropriate measures to improve the administrative process. The Conference shall make a Final Report to the President no later than December 31, 1962, summarizing its activities, evaluating the need for further studies of administrative procedures, and suggesting appropriate means to be employed for this purpose in the future.

SEC. 3. *Membership.* The composition of the general membership of the Conference shall be determined by the Council, provided that the total membership shall be not less than fifty persons, and at least a majority of the total membership shall be from Federal executive departments and administrative agencies, so distributed as to effect an appropriate representation among the several departments and agencies. General members from Government service shall be designated by the heads of their respective departments and agencies. Other general members shall be named by the Chairman with the approval of the Council from the practicing bar, scholars in the fields of administrative law and government, and other persons specially informed by knowledge and experience with respect to Federal administrative procedures. Members of the Conference who are not in Government service shall participate in the activities of the Conference solely as private individuals without official responsibility on behalf of the Government of the United States.

SEC. 4. *Staff.* The Attorney General of the United States is hereby authorized and directed to furnish to the Conference research and staff assistance from the Office of Administrative Procedure in the Department of Justice, through the Director of that Office and the Chairman of the Conference, and the Director of the Office of Administrative Procedure shall act as Executive Secretary of the Conference.

SEC. 5. *Operation of the Conference.* The Conference shall have authority to adopt bylaws and regulations not inconsistent with the provisions of this order for the conduct of its functions. Every member of the Conference will be expected to participate in all respects according to his own views, and not necessarily as a representative of any department or agency or other group from which he may have been chosen.

SEC. 6. *Committees.* Committees of the Conference shall be appointed by the Chairman, with the approval of the Council. Committees shall have authority to designate subcommittees from their own membership for the purposes of

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conducting studies and making reports to the full committees.

SEC. 7. *Functions of the Council.* The Council is hereby authorized to perform the following functions:

- (a) To meet under the chairmanship and upon the call of the Chairman of the Conference.
- (b) To determine the composition of the general membership of the Conference as provided in section 3 above.
- (c) To make appropriate arrangements with the President of the Senate and the Speaker of the House of Representatives for participation in the activities of the Conference by interested committees of the Congress. Representatives of the Congress shall have the privilege of the floor of the Conference.
- (d) To determine the time and place of plenary sessions of the Conference.
- (e) To propose bylaws and regulations, including rules of procedure and committee organization, for adoption by the Conference.
- (f) To propose to the Conference the matters concerning which the Conference and its committees shall conduct investigations and studies.
- (g) To receive and consider reports of committees of the Conference and proposals adopted by the Conference, and to transmit them to the President together with the views of the Council concerning such matters.

SEC. 8. *Cooperation of Federal agencies.* All executive departments and administrative agencies of the Federal Government are authorized and directed to cooperate with the Conference and to furnish such information and assistance not inconsistent with law as may reasonably be required in the performance of its functions.

SEC. 9. *Expenditures of the Conference.* Each executive department and administrative agency which is represented by one or more members of the Conference named or designated as provided in section 3 of this order shall, as may be necessary for the purpose of effectuating the provisions of this order, furnish assistance to the Conference in accordance with section 214 of the act of May 3, 1945, 59 Stat. 134 (31 U.S.C. 691). Such assistance may include detailing employees to the Conference to perform such functions consistent with the

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purposes of this order as the Conference may assign to them.

JOHN F. KENNEDY

THE WHITE HOUSE,
April 13, 1961.

RESPONSE TO POST-HEARING QUESTIONS FROM SALLYANNE PAYTON

UNIVERSITY OF MICHIGAN LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

Sallyanne Payton
William W. Cook
Professor of Law

30 July 2004

The Hon. Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives
Congress of the United States
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Cannon:

This is in response to your letter of July 12, 2004, transmitting questions submitted by members of the Subcommittee regarding the ACUS reauthorization. Thank you for giving me the opportunity to respond. These views expressed in this letter are my own; they do not necessarily reflect the views of the Standing Panel on Executive Management and Organization of the National Academy of Public Administration or of Sally Katzen. The questions and the responses are set forth below.

Questions from the Honorable Chris Cannon

1) You served as a Member of the Administrative Conference of the United States (ACUS or Conference) for many years. What, if anything, would you recommend be done to ensure the Conference's membership is representative?

"Representation" has many dimensions. The one most frequently discussed in the context of ACUS is substantive: the Conference has been careful to create itself as a bipartisan group that includes diverse experiences and attitudes with respect to the administrative process. A revived ACUS can be expected to continue this tradition, since the legitimacy of the Conference depends on its maintaining this kind of diversity. I want to associate myself with the views of Phil Harter on the importance of bringing a broader range of people into the Conference. He speaks of representatives of neighboring disciplines such as economics. I want particularly to urge attention to the management dimension. I also agree that the Conference ought to include representatives of state and local government and the nonprofit sector. The importance of enlisting this kind of

diversity is one reason why I argue for having the Conference operate through project panels, as discussed below.

I take it that the question invites me to comment on the fact that as of the time when the Conference was disbanded nearly all of its members of the Conference were white and the great majority were men. This was noticeable, but it was largely an age cohort effect. Members of the Conference are on average relatively senior: it is rare for a person to be an agency general counsel or be appointed a public member of ACUS in her youth. The pool of persons eligible to serve in these positions generally therefore will reflect the demographic of the law school classes that graduated at least 10 to 15 years earlier. The public members will be older on average than the agency counsels, since they tend to reflect past administrations. The government members will reflect the combined effects of the age cohort demographic and the hiring practices of the incumbent administration.

Since there were not significant numbers of minorities and women in law schools prior to the mid-1970s, it would have been unrealistic to have expected the emergence of large numbers of minority or women administrative lawyers into relatively senior positions until the late 1980s. At about that time we did experience a growth in the number of minority and women lawyers in the administrative law community, as was observed in both the ABA Administrative Law Section and the AALS (Association of American Law Schools) Section on Administrative Law. Unfortunately, ACUS was abolished during the period when these lawyers would have been moving into senior positions. It is reasonable to speculate that had ACUS continued in existence it would have acquired more minority and women members, although it must be said that minority lawyers are underrepresented in regulatory practice, which is the traditional background for a career in administrative law. None of the senior professional staff of the Conference was minority. The last Chair of the Conference, Thomasina Rogers, a Clinton appointee, was an African American woman.

If the Conference extends its activity to issues of the type outlined by Boyden Gray in his testimony before the Subcommittee, the work of the administrative law community may become more attractive to a wide range of lawyers involved in public policy, including minorities.

2) You testified at the Subcommittee's June 24th hearing on behalf of the Executive Organization and Management Standing Panel of the National Academy of Public Administration. Please explain why this entity supports the Conference's reauthorization.

My written testimony in its entirety reflects the views of the EOM Panel, and is posted on the Academy's website at <http://www.napawash.org/resources/testimony/Pavton1%20testimony--6%2024%2004.pdf>. To summarize that document, the EOM Panel supports the reauthorization of ACUS for the following reasons:

- ACUS was the central repository of knowledge about administrative processes, which are part of the essential infrastructure of government and require continuous attention from an expert body.
- ACUS brought high quality to its work by virtue of its distinguished membership and scholarly excellence.
- ACUS paid attention to the ordinary administrative processes of government through which government affects those who must deal with it or depend on it.

- ACUS was disinterested and bipartisan.

One sentence sums up the FOM position:

“The case for restoring ACUS thus seems overwhelming to my colleagues on the EOM Standing Panel, because we have great respect for its unique – and, as we have observed during the years since its demise, irreplaceable – function.”

3) *Do you have any recommendations as to how ACUS could be given more authority/leverage to achieve implementation of its recommendations?*

Generally speaking, the authority of the Conference should be the authority of influence. ACUS should be a resource more than an enforcer, particularly if it aspires to have the agencies as part of its clientele. There may be times when a Congressional committee may commission an ACUS study and involve itself in monitoring implementation.

4) *Should ACUS be given any administrative responsibilities (e.g., vis a vis ADR implementation, Government in the Sunshine Act, Unified Agenda of Federal Regulations, Equal Access to Justice Act)?*

It would be beneficial for ACUS to be an active, useful agency with routine functions and therefore an ongoing role in the work of the government. Any such administrative functions should emerge out of the work of the Conference itself, as ADR did, and thus command government-wide support and bipartisan esteem. It would be important not to assign to ACUS any function that makes it part of the policy apparatus of the incumbent administration. See my answer to question 7 below, arguing for making ACUS the organizer of communities of practice.

5) *Some say that many in Congress failed to recognize the contributions of ACUS and therefore did not strongly oppose its elimination in 1995. Whether for substantive or public relations purposes, would you recommend that Congress play a more active role in a reconstituted ACUS?*

Even the most enthusiastic supporters of ACUS agree that its work was not sufficiently visible to the Congress. To some degree this is a structural fact of life: ACUS exists to *save* the Congress from being burdened by the business of ordinary procedural reform, and arguably does that job most perfectly when the doing of it requires no congressional attention. On the other hand, as ACUS was originally intended to be an organization on which the Congress might call for expertise, a closer bond might be forged if the Congress were to use ACUS more intensively. ACUS ought to have the same type of relationship to problems of administrative process that the National Academy of Sciences has to scientific questions, or the National Academy of Public Administration has to problems of executive management and organization – that is, to be a repository of institutional memory and expertise and a source of trusted analysis and advice. The other witnesses before the Subcommittee had long lists of issues in which ACUS needs to become engaged, and I concur in those lists.

I would also urge the Congress to use a reauthorized ACUS as its vehicle for becoming more involved in the process questions that are sprouting everywhere as the government moves from being an administrative hierarchy of full-time employees to being an organization that mainly manages its relationships with other organizations. Less and less of the work of the federal government is performed by the agencies themselves; more and increasingly more is performed by

the government's non-governmental or non-federal partners. Performance and relationships are managed through grants, contracts, intergovernmental agreements, participating provider agreements, loan guarantees, statutorily-mandated federalism arrangements, and other legally enforceable arrangements. Deregulation, devolution and contracting out have created unexamined legal and governance relationships. Regulatory process issues swirl in the legal and policy communities, but the federal government has disabled its institutional capacity for thinking about these matters, that capacity having been located in ACUS. If a reauthorized ACUS were to take on the administrative procedure issues arising out of the transformation of government, its work would not be obscure.

6) *What were some of the Conference's most significant accomplishments?*

I would associate myself with the list supplied by Gary Edles in his testimony before the Subcommittee, and with the list in Sally Katzen's 1994 testimony on reauthorization. I think that the Conference's championing of ADR, in particular, has had a positive impact.

7) *If ACUS were reauthorized, what, if anything, would you recommend be changed about the Conference?*

ACUS needs some modest changes in its structure and some important changes in its operations. With respect to the structure, I suggest that:

- (1) the government membership be expanded to include, in addition to general counsels, all departmental assistant general counsels and chief counsels at the bureau level; and that
- (2) the limit on the number of public members be eliminated from the statute, leaving the number of public members to the judgment of ACUS in consultation with its congressional committees.

With respect to operations, I suggest that:

- (1) Consistent with the practice of other distinguished advisory organizations such as the National Academy of Sciences and the National Academy of Public Administration, ACUS should produce its reports and recommendations through project panels rather than requiring them to be adopted by the full Conference in plenary session; and
- (2) ACUS should assume responsibility for organizing government-wide communities of practice among agency lawyers with similar responsibilities.

Explanation:

1. *Government members.* In principle, ACUS should function, as was intended, as a community of practice for agency counsels who have responsibility for managing administrative processes. The theory was that problems could be brought to the Conference and be worked on by a community of experienced professionals. In practice, however, there is a mismatch between ACUS membership and the actual distribution of work among agency counsel: while only the department-level general counsel is seated on ACUS as a government member, much of the actual experience and expertise that ACUS needs to have available for the conduct of its work resides at the levels below the general counsel. During my time on ACUS, lawyers at the second level, who frequently have responsibilities at least as extensive as those of department general counsels, were typically involved in the work of the Conference only when their own function was the subject of an ACUS report. They therefore did not participate in and did not benefit from the broad

exposure to administrative law issues that ACUS provides; nor could ACUS call on them freely, having no official relationship with them. ACUS as an institution needs to know what they know. This can be fixed by bringing them in as government members. The effect of such a change on the size of the plenary session is discussed in the section on project panels, below.

2. *Public members.* The presence of Public members in ACUS gives the organization the professional distinction and bipartisanship that accounts for the enthusiasm of those who urge reauthorization. Given the enhanced range of subjects now properly embraced by the term "administrative procedure," it is not clear that the rather low statutory ceiling on the number of public members serves any longer a useful purpose. It seems to have been placed in the original legislation in order to make the government members the heart of the Conference and to ensure the control of the incumbent administration over Conference activities. However, actual experience in operating the Conference has revealed that much of the energy of the Conference comes from the public members, for whom ACUS functions as the administrative lawyers' equivalent of a national academy. In light of the intellectually ambitious work that a reauthorized ACUS would be likely to undertake, it would be well to expand that capacity by either setting the statutory ceiling substantially or eliminating it altogether. Greater numbers of public member positions would also be necessary if the Conference were to add any substantial number of non-lawyer experts, as authorized by statute and urged by the witnesses before the Committee. There is no reason to fear dilution of the quality of the body of public members simply by virtue of an increase in numbers: the national academies all operate with much larger memberships. An increase in numbers would, however, entail a shift from having recommendations processed by the entire plenary session to having them be identified as the work of panels or committees, as suggested in the next section.

3. *Project panels.* ACUS was persistently hampered by its adherence to a rigid format of assigning work to standing committees that commissioned studies and constructed recommendations that were deliberated upon by the entire Conference in plenary session. What was gained by the demonstration of consensus across the extremely diverse membership was arguably outweighed by the cumbersome nature of the process itself, which prevented ACUS from responding flexibly and in a timely manner to problems and opportunities. ACUS should be instructed by the Committee to reconsider its practices of developing recommendations through standing committees and of adopting all of its recommendations in plenary session. Both the National Academy of Sciences and the National Academy of Public Administration have found it effective to assemble focused expertise in project panels as well as its standing panels, and to allow those panels to be the entities that make recommendations. The panel format also allows the organization to involve on particular matters persons who are not members of the organization. This works well for NAS and NAPA, is regarded by those organizations as contributing to the quality of their work, and does not appear to be forbidden by anything in the ACUS statute. Working through panels brings also the advantages of transparency and accountability: the members of panels are known individuals who take personal responsibility for their work and bring their professional authority to it. If there are lapses in bipartisanship and disinterestedness, those will be apparent.

4. *Communities of practice.* In order to fulfill its mission of developing and making available useful knowledge about administrative processes, ACUS should be directed by the Committee to

The Hon. Chris Cannon
30 July 2004 page 6 of 7

organize government-wide communities of practice to deal with common substantive and managerial problems of administrative procedure. Using communities of practice is now a standard technique of private sector knowledge management.¹ An example of a community of practice within the federal government is the Regulatory Working Group authorized by President Clinton's Executive Order 12866. Some communities of practice organize themselves in the bar associations, most notably now the ABA Section on Administrative Law and Regulatory Practice, which has stepped into some of the void left by the demise of ACUS. The government needs to take responsibility, however, for the quality of its own operations. Using modern management techniques to improve efficiency is particularly important when the government is reducing its personnel. Some communities of practice may include non-government persons, consistent with ACUS' own status as a public-private body.

8) *How important is it to preserve the bi-partisan, non-political nature of ACUS?*

It is absolutely critical. The stature of the organization is a function of the professional distinction of the individual members and the bipartisan nature of the whole body.

Questions from the Honorable Mel Watt

1) *What level of funding would be necessary to fund the ACUS you envision being reauthorized?*

On budget estimates I defer to my colleagues who testified at the hearing before the Subcommittee. I think it important not simply to extrapolate from the previous experience of operating ACUS, because the program projected at the hearing is more ambitious. ACUS needs the stability of an appropriation that will allow it to maintain itself institutionally and engage simultaneously in four or five major projects and six to eight smaller ones, all of which it might undertake on its own initiative out of its own resources. Stable funding for this core of activity would allow it to pursue other work, funded by agencies or foundations, without needing to compromise its integrity.

2) *Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?*

Short of changing the nature of ACUS entirely, as by tucking it under one of the cabinet-level departments, I cannot think of any legislative change that would make a decisive difference. I have suggested in my reply to No. 7 of Rep. Cannon's questions, above, that ACUS should expand its membership and take on higher-profile issues, which ought to generate a wider constituency and more enthusiasm. Its status as an independent agency will always, however, make ACUS problematic. From long experience with independent agencies, we know that the greatest risk to their satisfactory performance over time is that their need for high-quality personnel is not always consistent with the interests of those who hold the appointment power. We also know that

¹ For an overview of the current literature on communities of practice, see E. L. Lesser & J. Storck, "Communities of Practice and Organizational Performance," *40 IBM Systems Journal* No. 4, 2001, available online at <http://www.research.ibm.com/journal/sj/40/4/lesser.html>.

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congressional interest in the independent agencies varies with the type of work they do and their relationship to constituents. Independent agencies that lose the attention of the executive branch and the Congress generally become vulnerable to capture by special interests that influence and protect them. ACUS experienced the first two effects of being an independent agency but not the third: it did not retain over time the interest of the White House or the Congress, but neither was it captured by special interests. The consequence was that by the early 1990s it was orphaned. ACUS was never intimidated by its vulnerability, which it appeared not to have appreciated; instead, it was murdered.

If ACUS is going to continue as an independent agency, therefore, it will be necessary to compensate for the intrinsic, and desirable, weakness in its ability to attract powerful patrons. I think the best strategy is for it to take on projects of greater visibility and salience to the Congress and the agencies. It should also be authorized to seek private funding, as to which it will have to exercise discretion.

I hope this response is useful. Thank you for giving me the opportunity to contribute.

Sincerely yours,

/s/

Sallyanne Payton

RESPONSE TO POST-HEARING QUESTIONS FROM PHILIP J. HARTER

**QUESTIONS FROM THE HONORABLE CHRIS CANNON
FOR PROFESSOR PHILIP HARTER**

- 1) Since the demise of ACUS, what are some of the most critical areas that a reauthorized Conference should consider?

Answer: There are so many that I'm hesitant to mention a few lest that be taken to exclude others that are also important. But, high on my list would be:

- We need an intense joint public-private effort to address the issues surrounding electronic rulemaking – how to make dockets easily accessible on line; the proper procedures for using interactive communications during rulemaking (without care, many citizens could be severely hurt); how agencies can cope with a million electronic comments (without care this could degenerate into a plebiscite instead of a quest for information and rational decisions making) ; how the web can be used to generate responsible information. While much of this work is being done, there is very little collaboration, and it is desperately needed.
- I think we need to look hard at smoothing the way for public-private collaboration. Agencies hate using the Federal Advisory Committee Act because of its extraordinarily burdensome and bureaucratic structure, so it should be streamlined to accomplish its basic goals while getting rid of its difficult, unproductive requirements. Moreover, as more functions that were previously the exclusive province the government are taken over by the private sector with sometimes minimal oversight, we as a society need to think through just what that relationship should be and where liability should reside. There is currently a broad distrust between the public and private spheres, with each tending to resist discussions and joint problem solving with the other. ACUS was a spectacularly successful vehicle for providing that dialogue.
- The world is increasingly linked together so that domestic decisions that were once clearly final are now subject to a type of review in the international community through important treaties such as the World Trade Organization. Moreover, companies that operate domestically also operate internationally and it is potentially highly burdensome for them to have to comply with competing and sometimes inconsistent sets of regulations. Further, how much credence should we place on a regulatory decision made by a foreign country; do we need to start from scratch, or could we simply adopt a rule that was crafted abroad if the circumstances met certain criteria; what criteria should be used? In short, many issues over the "harmonization" of US decisions with international institutions is vitally important.

- I also think it would be productive to step back and ask ourselves just what sort of information and analysis agencies need to make policy decisions, whether in rules, guidelines, or in adjudication. A whole series of executive orders and internal directives require agencies to undertake analyzes that only consume time and resources without adding significantly to the quality of the decision. We should weed these out and develop a common view as to what is appropriate; doing so will be difficult and controversial, but again it cannot really be done without a productive dialogue and we currently have no forum in which it can take place.
- 2) Can an agency that already exists – such as the Office of Management and Budget or the General Services Administration – perform the responsibilities of the Conference?

Answer: Either OMB or GSA, or possibly Justice, could theoretically perform the role served by ACUS. To get the benefit of the public-private deliberation they would have to empanel an advisory committee and staff the enterprise on an on-going basis. That might work. But, there are major downsides. The first is cultural: none of have done it even though doing so might well be within their existing jurisdiction; this is not something they envision as being part of their mission. And each has a conflict. OMB sets budgets and legislative priorities and reviews rules; agencies could well and reasonably be reluctant to participate in an open, honest way were OMB to undertake this task. The independence of the Administrative Conference has been seen historically as a major benefit that frees it to focus on the substance of procedure. So, while the other agencies could take over the functions, the result would very likely not be as good.

- 3) In your written statement, you note that there have been significant changes in the management structure of the Federal government among other important developments since the enactment of the Administrative Procedure in 1946.
- a) Do you think there is a need to update the APA?

Answer: As one who headed the Regulatory Reform Committee of the American Bar Association, I certainly believe that there are beneficial changes that could be made to the APA and have testified before Congress many times concerning them. As I indicated above, some of those changes might address the delegation of formerly government functions to the private sector; some might streamline the process; others might try to make the administrative process more responsive to needs perceived in the private sector. But, that said, I also think that the basic structure of the APA is quite sound and hence I do not think any sort of “wholesale” change is merited.

- b) If the APA was “updated,” would this vitiate the need for ACUS?

Answer: Absolutely not! Much of what needs to be done is to provide forum in which agencies can exchange information and views as to what works and what does not work in administering a program, as well as providing a forum

between the government and the private sector as to how to improve the operation of government (not surprisingly, sometimes a government agency might think it is discharging its duties in a spectacularly skillful manner when the private sector has quite a different view). For example, in my own experience, I believe that major recommendations as to how to implement both the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act would be helpful. Thus, the passage of new legislation addresses only part of the problem: it still must be implemented. And that was ACUS's speciality. Even if a revised and updated APA were quite comprehensive, a whole multitude of issues lies beyond it that are the stuff of a revitalized ACUS.

- 4) What issues would you recommend be the priorities for a reauthorized ACUS?

Answer: I think the issues described in Paragraph 1 are certainly priorities; I would probably add a good, hard-headed look at the APA as well. But, overall, I think the major priority should be in re-establishing the dialogue on an on-going basis.

- 5) According to your curriculum vitae, you rendered various services to the Conference over its period of existence.

- a) Were any of those services rendered on a volunteered basis?

Answer: Yes. I served as a consultant to ACUS for a number of projects, at least some of which were on a volunteer basis and a couple of which were compensated but at far below market price.

- b) Why were so many individuals willing to provide their services to ACUS free-of-charge?

Answer: ACUS provided a rare opportunity to "do good" by making sophisticated recommendations as to how to improve the functioning of government and improving our society. My experience both with ACUS and when mediating negotiated rulemakings, many people are very willing to go to extraordinary levels to provide that sort of help.

That said, it is also important to differentiate the different roles of people who are engaged with ACUS. While a short "think piece" or one with only a small amount of data underlying it might be done on a volunteer or reduced-cost basis, major studies need to be adequately funded. I am convinced, for example, that ACUS's negotiated rulemaking recommendation would not have been as solid and significant without the adequate funding that it provided (which, I also hasten to add, amounted to about half-price of the then market value of the research). Thus, it would be a mistake to try to get too much research done on a volunteer basis. Members attending plenary sessions and working in committees are perfect volunteers; but it is not reasonable to ask someone to engage in a substantial amount of their professional time without adequate compensation.

**QUESTIONS FROM THE HONORABLE MEL WATT
FOR PROFESSOR PHILIP HARTER**

- 1) What level of funding would be necessary to fund the ACUS you envision being reauthorized?

Answer: It strikes me that it would be a mistake of the highest order to re-establish ACUS but not give it sufficient funds to discharge its duty. It would be "re-born" crippled. It was my impression that at the end of its life ACUS lacked those funds, and hence it was forced into a position of begging for resources from the very agencies it wanted to study. That, it seemed to me, fundamentally converted it from a neutral observer to more of a consultant – not the function envisioned for the agency.

Having thought about it considerably after the hearing, I believe that a minimum of \$5 million would be necessary and that \$7.5 million would be a more reasonable figure on an on-going basis. It might even be higher, perhaps as high as \$10 million, for a year or two given the start up costs and the back log of projects that have arisen since ACUS's demise.

- 2) Are there any legislative changes that would prevent the types of criticisms and/or concerns that led to the demise of ACUS in 1995?

Answer: My own view is that ACUS must maintain a strong political vitality, and that means that it needs to work closely with Congress and the Administration. It needs to preserve its independence and neutrality, to be sure, but it also needs to service its constituency of both parties and political orientations. Thus, in my view, what is needed more than any legislative change could provide would be an on-going dialogue between ACUS and the relevant Congressional committees and the relevant offices within the administration. Annual oversight hearings might be appropriate to show the interest and concern of the committee and to provide a means by which the committee could make suggestions for important projects and issues that need to be addressed.

LETTER FROM MICHAEL HERZ AND DAVID RUDENSTINE

CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

THE FLOERSHEIMER CENTER FOR CONSTITUTIONAL DEMOCRACY
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June 22, 2004

The Honorable Chris Cannon
Chairman
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Re: Reauthorization of the Administrative Conference

Dear Mr. Chairman,

As co-directors of the Floersheimer Center for Constitutional Democracy, we are writing to express our enthusiastic support for the reauthorization and refunding of the Administrative Conference of the United States. We ask that this letter be included in the official record of the June 24 hearing.

The Floersheimer Center pursues and promotes research, scholarship, and action aimed at understanding and improving democratic governance. The grand aspirations of constitutional democracy can seem far removed from the tedious, day-to-day functioning of administrative agencies. But in fact the two could not be more closely related. For most citizens and firms, "the government" is not Congress, or the President, or the courts, with which they have no personal contact. Rather, it consists of the agencies, whose operations and decisions have direct effects on their lives and businesses. Therefore, the smooth, fair, effective functioning of government agencies is an essential aspect of a successful constitutional democracy.

From 1968-1996, the Administrative Conference made enormously valuable contributions to improving the functioning of the administrative state. ACUS brought together academics, private lawyers, agency staff, and agency heads – people with different professional backgrounds and political viewpoints who were united in having a strong understanding of administrative law and a desire to improve the functioning of the bureaucracy. After rigorous background study, inclusive debate, and careful consideration, it produced scores of useful recommendations for improving the administrative process. Not every study turned into a recommendation, and not every

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recommendation was adopted by Congress or individual agencies. If that were so, it would have meant that ACUS was producing uncontroversial pabulum and not doing its job. But even the studies and proposals that were not acted upon contributed importantly to our understanding of the administrative process. And time and again ACUS reports and recommendations did lead to identifiable and meaningful improvements in the operation of the federal bureaucracy.

The demise of the Administrative Conference may reflect a truth about constitutional democracy, at least our particular version of pluralist democracy, in which so much policy is made through the conflict of interest groups. Precisely because it was nonpartisan, operated behind the scenes, and did not pursue particular *substantive* goals, ACUS lacked a constituency. No group fed at its trough, and no special interest existed to fight for it in 1996. However, this does not mean that ACUS was not useful; it is a sign of just how unusual a government program it was, and what made it politically vulnerable is also what made it practically valuable.

The strongest case for the Administrative Conference was made by the two extraordinary witnesses at your May 20th hearing. Not just by what they said – though what they said was compelling and we would endorse it – but by their joint appearance and their agreement. Justice Scalia and Justice Breyer see the world very differently in many respects. But they were both professors of administrative law before going on the bench; they were both closely involved with ACUS (Justice Scalia even having chaired the conference for two years); they are both deeply knowledgeable about the challenges of effective administrative governance; and they have no personal stake in the matter. They are in the perfect position to judge ACUS's value, and it is hard to quarrel with their joint conclusion that ACUS merits reauthorization.

You are to be congratulated for holding these hearings and pursuing the resurrection of the Administrative Conference. We hope that this small but important step toward fair, efficient, and effective administrative governance can be achieved.

Thank you for considering our views.

Sincerely,


Michael Herz
Professor of Law &
Co-director, Floersheimer Center


David Rudenstine
Dean & Co-director,
Floersheimer Center

cc: Hon. Melvin L. Watt

**DEFENSE OF PRIVACY ACT AND PRIVACY IN
THE HANDS OF THE GOVERNMENT**

JOINT HEARING
BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
AND THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 338

JULY 22, 2003

Serial No. 45

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**DEFENSE OF PRIVACY ACT AND PRIVACY IN
THE HANDS OF THE GOVERNMENT**

TUESDAY, JULY 22, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,

AND

SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittees met, pursuant to call, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. Chris Cannon [Chairman of the Subcommittee on Commercial and Administrative Law] presiding.

Mr. CANNON. We are waiting because we would like to introduce Ms. Murphy appropriately, and we are waiting for a faxed resume to come in. But while we're waiting, if you wouldn't mind, Steve, I thought we could swear the witnesses. So if Mr. Barr, Mr. Dempsey and Ms. Murphy, if you would stand and raise your right hand and take an oath, I would appreciate that.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that everyone said yes. And we will wait just, if you don't mind, another moment or two before we get started.

[Recess.]

Mr. CANNON. The Subcommittees will come to order. On behalf of the Commercial and Administrative Law Subcommittee, I want to express our sincere appreciation to our colleague and friend, the esteemed Chair of the Constitution Subcommittee, and its Members for participating today with us in this joint hearing on H.R. 338, the "Defense of Privacy Act."

The fact that this is a joint hearing underscores the broad-ranging ramifications of the subject matter.

The Government's collection, use, dissemination and protection of personally identifiable information presents far-reaching regulatory as well as constitutional issues, especially in these days when there is an increasingly critical need to balance law enforcement initiatives designed to preemptively detect and deter terrorist attacks and other crimes, with the need to protect the privacy of innocent Americans from abusive and potentially destructive Government intrusion. H.R. 338, I believe, strikes that important balance, and I thank my co-chair for taking the initiative to reintroduce this bill in the 108th Congress.

H.R. 338 imposes a modest, though meaningful, requirement that a Federal agency prepare a privacy impact analysis for proposed and final rules noticed for public comment. H.R. 338 is intended to ensure that individual privacy rights are safeguarded by requiring Federal agencies to consider the privacy implications presented by the collection, use, and dissemination of personally identifiable information.

On the other hand, H.R. 338 will not overly burden the work of these agencies. In fact, its analysis requirement is similar to other analyses that agencies currently conduct, such as those required by the Regulatory Flexibility Act and the E-Government Act of 2002. And the Congressional Budget Office has concluded with respect to H.R. 338's identical predecessor in the 107th Congress that implementation of this measure would not entail significant costs.

As technological developments increasingly facilitate the collection and dissemination of personally identifiable information, the potential for misuse of such information grows. The General Accounting Office has warned that our Nation's increasing ability to accumulate, store, retrieve, cross-reference, analyze and link vast numbers of electronic records brings substantial Federal information benefits as well as increasing responsibilities and concerns.

The misuse—and I suspect some of the Members of the panel will think that was an understatement, and that's what we're actually looking to explore—the misuse of personally identifiable information by the Federal Government presents two major concerns. One is the potential for fraud presented by unrestricted access to such information by unscrupulous individuals, such as identity thieves. According to the Federal Trade Commission, identity theft has become one of the most widely reported consumer crimes in recent years. In fact, the Identity Theft Resource Center reports an estimated 700,000 Americans have been victims of this devastating form of fraud.

The other concern relates to the privacy ramifications and to issues presented when the Government relies on inaccurate personally identifiable information. This concern is perhaps best illustrated by certain data-mining activities being undertaken by various Federal agencies. Data mining apparently involves a complex system that utilizes sophisticated data analysis tools to scan large databases for purposes of identifying valid patterns and relationships. For example, data mining is currently being used by the Justice Department to assess crime patterns and adjust resource allotments, and by the Veterans Administration to predict demographic changes for budgetary purposes. The Defense Department as well as the Transportation Security Administration are also exploring data mining's terrorism-detection capabilities.

Nevertheless, privacy advocates as well as the Congressional Research Service have identified certain concerns relating to the accuracy and privacy implications of data mining. The Congressional Research Service, for instance, noted that if a database contains inaccurate information, innocent people could be branded security risks on the basis of flawed data and without any meaningful way to challenge the Government's determination. In addition, House Judiciary Committee Chairman Jim Sensenbrenner has also warned that the Defense Department's Terrorism Information

Awareness Data Mining Project warrants careful scrutiny because of its implications to civil liberties, mainly the presumption of innocence and the right to be free from intrusive Government surveillance absent particularized suspicion of criminal wrongdoing.

At least in response to the regulatory aspects of privacy in the hands of the Government, H.R. 338 offers a simple noncontroversial solution that requires Federal agencies to consider the privacy ramifications with respect to proposed and final rules. As some of you may recall, bipartisan legislation similar to H.R. 338 was introduced by Mr. Chabot in the 106th Congress, and a bill virtually identical to H.R. 338 was introduced by Mr. Barr in the 107th Congress. In the last Congress the Commercial and Administrative Law Subcommittee, of which Mr. Barr was Chairman, held a hearing on this measure's predecessor at which a broad political spectrum of witnesses testified in support of the legislation. The bill was ordered favorably reported by our Subcommittee as well as by the full Committee without amendment by voice vote. Thereafter, the House under suspension of rules passed the bill without amendment by voice vote in October of last year. Unfortunately the Senate did not consider the bill prior to the conclusion of the 107th Congress.

It is against this substantial background that we will consider H.R. 338.

[The prepared statement of Mr. Cannon follows:]

PREPARED STATEMENT OF THE HONORABLE CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

On behalf of the Commercial and Administrative Law Subcommittee, I want to express our sincere appreciation to our colleague and friend, the esteemed Chair of the Constitution Subcommittee and its Members for participating today with us in this joint hearing on H.R. 338, the "Defense of Privacy Act."

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It is against this substantial background, that we will today consider H.R. 338.

Mr. CANNON. I now turn to my colleagues in the minority. Would anyone like to make an opening statement?

Thank you, Mr. Nadler.

The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I'm pleased to join you and to join this joint hearing of the two Subcommittees in this bipartisan effort to protect the privacy of the American people from unjustified encroachment by the Government. Whether for the protection of personally identifiable information from identity theft or other misuse, or the protection of the individual from unwarranted intrusions by the peering eyes of Government, the protection of privacy is of the utmost important. There are legitimate reasons the Government may need to gather personal information and, consistent with the protections of the fourth amendment, intrude into the zone of privacy. But every such intrusion and the justification for gathering and use of all such information must necessarily be scrutinized with care.

The legislation I have introduced with my colleague, the distinguished Chairman of the Constitution Subcommittee, the Defense of Privacy Act, and which was drafted with Mr. Barr, who is one of our witnesses today, would require precisely this form of careful

scrutiny. I think that requiring such deliberation in advance will minimize such intrusions and require that they be justified.

That this legislation is bipartisan and indeed has the support of both the Chair and Ranking Member of the Subcommittee sends an important message to every agency and to the American people. It makes clear that the right to privacy is a fundamental American right, and whether or not the courts have so found in any particular instance, it is one that as a matter of policy and principle should be protected scrupulously.

I am pleased to welcome back to the Committee two distinguished alumni: our former colleague, Representative Bob Barr, with whom I initially worked on this legislation, and Jim Dempsey, who served our Subcommittee ably as counsel under the chairmanship of Don Edwards. Although they come from very different political perspectives, their agreement on this particular issue demonstrates that individual privacy, or to put it more precisely, individual autonomy, is a fundamental American value.

Welcome home to you both.

I have a number of concerns that I hope we can examine today. First, what are the sources of the information gathered by the Government? Are they reliable? We have been told by the Department of Justice that among other commercially available sources, credit reporting agencies and private companies such as ChoicePoint provide data to Government agencies. I find this deeply troubling. No one familiar with these sources can have confidence in the information they provide. Credit reporting agencies are notorious for providing and failing to correct inaccurate information.

This Congress has grappled with the problems people have had getting credit on appropriate terms because of these inaccuracies. Our Committee recently reported legislation introduced by the Chairman of the full Committee dealing with the problem of fraudulent involuntary bankruptcies, which, although dismissed, remain on the targeted individual's credit report even after they are dismissed.

ChoicePoint people, you will remember, came under scrutiny following the 2000 election when it became known that its inaccurate lists illegally disenfranchised a large number of Florida voters, possibly altering the outcome of the Presidential election. If national security or law enforcement agencies are using information from these sources, we should be deeply concerned.

Second, is the Government properly protecting personal identifiable—personally identifiable information? In those cases where the Government has a legitimate need to collect such information, it's vulnerability to improper use either by another agency not entitled to use it or by private individuals who want to use that information for their own often illegal purposes would be intolerable. In some cases that information is required to be made public by law. Section 107 of the Bankruptcy Code, for example, places every aspect of a debtor's life on the Internet, making these most vulnerable of Americans even more vulnerable to the unscrupulous.

Third, does the Government have the right or a legitimate need for the information? High-tech dragnets such as the Total Information Awareness, now renamed the Terrorism Information Awareness program, would enable the Government to pore through the

personal information of millions of Americans guilty of nothing more than using a credit card, buying an airplane ticket, or taking a book out of the library without any reason to suspect that person of so much as jaywalking. Whatever name they may come up for it, we should be deeply concerned with this initiative. Moreover to the extent that this information might be shared with law enforcement agencies that would otherwise require a warrant to obtain it, the program threatens the whole underpinning of our rights under the fourth amendment.

So I welcome our witnesses and the opportunity to assess these important issues, and I look forward to a productive and informative discussion. I thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. CANNON. I thank you, Mr. Nadler.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF THE HONORABLE JERROLD NADLER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW YORK

Thank you, Mr. Chairman. I am pleased to join you in this bipartisan effort to protect the privacy of the American people from unjustified, encroachments by the government. Whether for the protection of personally identifiable information from identity theft or other misuse, or the protection of the individual from unwarranted intrusions by the peering eyes of government, the protection of privacy is of the utmost importance.

There are legitimate reasons why the government would need to gather personal information and, consistent with the protections of the Fourth Amendment, intrude into the zone of privacy, but every such intrusion, and the justification for gathering, and use of, all such information, must necessarily be scrutinized with care.

The legislation I have introduced with my colleague, the Distinguished Chairman of the Constitution Subcommittee, the "Defense of Privacy Act," would require precisely this form of careful scrutiny. I think that requiring such deliberation in advance will minimize such intrusions and require that they be justified.

That this legislation is bipartisan, indeed it has the support of the Chair and Ranking Member of our Subcommittee, sends an important message to every agency and to the American people. It makes clear that the right to privacy is a fundamental American right and, whether or not the courts have so found in any particular instance, it is one that as a matter of policy and principle should be protected scrupulously.

I am pleased to welcome back to the Committee two distinguished alumni: our former colleague, Representative Bob Barr, with whom I initially worked on this legislative endeavor, and Jim Dempsey, who served our Subcommittee ably as Counsel under the Chairmanship of Don Edwards. Although they come from very different political perspectives, their agreement on this particular issue demonstrates that individual privacy—or to put it more precisely, individual autonomy—is a fundamental American value. Welcome home to you both.

I have a number of concerns that I hope we can examine today.

First, what are the sources of the information gathered by the government? Are they reliable? We have been told by the Department of Justice that, among other commercially available sources, credit reporting agencies and private companies such as ChoicePoint, are providing data to government agencies. I find this deeply troubling.

No one familiar with these sources can have confidence in the information they provide. Credit reporting agencies are notorious for providing, and failing to correct, inaccurate information. This Congress has grappled with the problems people have had getting credit on appropriate terms because of these inaccuracies. Our Committee recently reported legislation, introduced by the Chairman of the Full Committee, dealing with the problem of fraudulent involuntary bankruptcies which, although dismissed, remain on the targeted individual's credit report. ChoicePoint, people will remember, came under scrutiny following the 2000 election when it became known that its inaccurate lists illegally disenfranchised large numbers of Florida voters, possibly altering the outcome of the Presidential election. If national security or law enforcement agencies are using this information, we should be deeply concerned.

Second, is the government properly protecting personally identifiable information? In those cases where the government has a legitimate need to collect such information, its vulnerability to improper use, either by another agency not entitled to use it, or by private individuals who want to use that information for their own, often illegal, purposes, is intolerable. In some cases, that information is required to be made public by law. Section 107 of the Bankruptcy Code, for example places every aspect of a debtor's life on the Internet, making these most vulnerable of Americans even more vulnerable to the unscrupulous.

Third, does the government have the right, or a legitimate need, for the information? High-tech dragnets, such as the Total Information Awareness—now renamed the Terrorism Information Awareness program—would enable the government to pour through the personal information of millions of Americans guilty of nothing other than using a credit card, buying an airplane ticket, or taking a book out of the library, without any reason to suspect that individual of so much as jaywalking. Whatever name they come up for it, we should be deeply concerned about this initiative. Moreover, to the extent that this information might be shared with law enforcement agencies that would otherwise require a warrant to obtain it, the program threatens the whole underpinning of our rights under the Fourth Amendment.

So I welcome our witnesses, and the opportunity to assess these important issues, and I look forward to a productive and informative discussion.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. CANNON. Mr. Chabot, do you have an opening statement?

Mr. CHABOT. I do. Thank you very much.

Mr. CANNON. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you.

First I want to thank you, Mr. Chairman, for your leadership and your willingness to hold this joint hearing on the Defense of Privacy Act, and as has been done previously, we want to welcome back our colleague Mr. Barr, who served with great distinction on this Committee on the Judiciary Committee for four terms. And we sat next to each other and often had an opportunity during Committee meetings to discuss the issues that were going on, and he was one of the more active Members. And we really do miss you here, Bob, and hope that at some point that you'll be back and join us again.

I want to also thank my Ranking Member Mr. Nadler for cosponsoring this legislation. It's fair to say that many of the judiciary Committees philosophically have a tendency to have us at odds on various issues even though we get along very well personally. But this is one piece of legislation—

Mr. NADLER. A few issues, Mr. Chairman.

Mr. CHABOT. A few. But we're pleased that this one we're able to cosponsor together and believe that it's important that we do protect the privacy rights of the American people.

Today's hearing is necessary because Federal agencies too often promulgate rules and dictate policy without consideration for the ultimate ramifications on the privacy of the American people. Privacy should not be a partisan issue. Privacy is a value that's important to all citizens whether they be Republicans or Democrats, whether they are liberal or conservative. It's really an intrinsic American value. The right of Americans to live free of excessive Government intrusion is a long-established principle in our Nation's history. Many have interpreted personal privacy as one of the blessings of liberty, secured in the Preamble of our Constitution. Certainly the Bill of Rights established important privacy protections.

Throughout our Nation's history, the Supreme Court has placed a high value on these rights as well. In 1886, Justice Clark opined

for the Court in *Boyd v. United States* that the doctrines of the fourth and fifth amendments, quote, “apply to all invasions on the part of the Government and its employees of the sanctity of a man’s home and the privacies of life,” unquote. More importantly, in his concurring opinion, in *Katz v. United States*, Justice Harlan succinctly stated that the fourth amendment provided citizens, quote, “a reasonable expectation of privacy,” unquote.

When I first introduced the Defense of Privacy Act back in the 106th Congress, I did so because of an increasing concern that this reasonable expectation is too often an afterthought in the regulatory process. We have seen attempt after attempt by Federal agencies to implement ominous regulations that allow the Government to invade the privacy of American citizens. From financial information to medical records, the Federal Government has sought access to highly sensitive information without regard to the privacy implications.

The Defense of Privacy Act provides a straightforward solution to this problem. The legislation would, for the first time, require Federal agencies to assess the privacy implications of their proposed rules or regulations. Through this process, we would shine a light on the potentially negative impact of Government regulations on personal privacy, at the same time encouraging Federal agencies to more fully consider the merits of each proposal and review less intrusive alternatives.

This legislation is particularly relevant today. Significant technological advancements have prompted a flurry of Government proposals to employ new tools to effectively fight crime or combat terrorism. While some of these programs may ultimately prove useful and provide legitimate information to the Government, Congress and the Administration must also work to protect the privacy rights of law-abiding Americans, especially where the collection and dissemination of personally identifiable information is concerned.

In recent years we have heard a steady stream of reports about programs or policies in both the public and private sector that raise privacy concerns, from reports of drastic increases in identity theft to Government proposals like the FDIC’s so-called “Know Your Customer” regulations, or, as some of us refer to it, the “Spy on Your Customer” regulations, and data-mining systems like the FBI’s Carnivore that I know Mr. Barr had spoken and acted very actively when he was on this Committee. So we recognize that this is not an easy task we have before us today, and it will not get any easier in the future. Yet passing this common-sense legislation is a good first step. Requiring all Federal agencies to assess privacy implications of proposed rules and regulations will elevate the issue of privacy protection and generate important debate, thus strengthening the rights of every American.

I look forward to hearing the testimony from our distinguished witnesses here today, and I yield back the balance of my time.

Mr. CANNON. I thank you, Mr. Chabot.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF OHIO

First, I want to thank you, Chairman Cannon, for your tremendous leadership and willingness to hold this joint hearing on the *Defense of Privacy Act*. Today's hearing is necessary because federal agencies too often promulgate rules and dictate policy without consideration for the ultimate ramifications on the privacy of the American people.

Privacy is not a partisan issue. Privacy is a value important to ALL citizens—Republican or Democrat, liberal or conservative. It is an intrinsic American value.

The right of Americans to live free of excessive government intrusion is a long-established principle in our nation's history. Many have interpreted personal privacy as one of the "Blessings of Liberty" secured in the Preamble to our Constitution. Certainly, the Bill of Rights established important privacy protections.

Throughout our nation's history, the Supreme Court has placed a high value on these rights as well. In 1886, Justice Clark opined for the Court in *Boyd v. the United States* that the doctrines of the Fourth and Fifth Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."

More recently, in his concurring opinion in *Katz v. United States*, Justice Harlan succinctly stated that the Fourth Amendment provided citizens a "reasonable expectation of privacy."

When I first introduced the *Defense of Privacy Act* in the 106th Congress, I did so because of an increasing concern that this "reasonable expectation" is, too often, an afterthought in the regulatory process. We have seen attempt after attempt by federal agencies to implement ominous regulations that allow the government to invade the privacy of American citizens. From financial information to medical records, the federal government has sought access to highly sensitive information without regard to the privacy implications.

The *Defense of Privacy Act* provides a straight-forward solution to this problem. The legislation would, for the first time, require federal agencies to assess the privacy implications of the proposed rules or regulations. Through this process, we would shine a light on the potentially negative impact of government regulations on personal privacy—at the same time, encouraging federal agencies to more fully consider the merits of each proposal and review less intrusive alternatives.

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I look forward to hearing the testimony from our distinguished witnesses today.

Mr. CANNON. We'd like to also recognize Mrs. Blackburn from Tennessee and Mr. Scott from Virginia.

Without objection, all Members may place their opening statements in the record at this point. Is there objection? Hearing none, so ordered.

Without objection, the Chair will be authorized to declare recesses of the Subcommittee today at any point. Hearing none, so ordered.

On unanimous consent I ask that Members have 5 legislative days to submit written statements for inclusion in today's hearing record.

I'm now going to introduce our witnesses. We expect Senator Grassley to join us. He's apparently in a hearing, and so we will come back and introduce him when he arrives.

Joining Senator Grassley, or maybe we should say after we hope Senator Grassley joins the rest of us, we'll hear from our esteemed colleague and probably hear first from you, unless Senator Grassley comes in soon, Bob Barr. Bob, as you know, chaired this Subcommittee, which I am honored to succeed him in this position, during the 107th Congress, and, in fact, he authored the H.R. 338's predecessor in the last Congress.

It's a great pleasure to welcome you back, Bob.

Over the course of his four terms in Congress, representing Georgia's Seventh District, Mr. Barr served on the Financial Services and Government Reform Committees in addition to the Judiciary Committee. As one of the Nation's leading privacy hawks, it's particularly appropriate for him to share his thoughts on this legislation. He appears today as the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union.

Our next witness is Jim Dempsey, another Judiciary Committee alum, whom we also welcome back. Mr. Dempsey is currently the executive director of the Center on Democracy and Technology. That's got to be one of the coolest jobs on the face of the Earth, by the way.

Mr. DEMPSEY. Yes, sir, it is.

Mr. CANNON. If you need some bipartisan—I'd love to do something with you guys—where he specializes in privacy and electronic surveillance issues.

Before joining the center, Mr. Dempsey was the deputy director of the Center for National Security Studies and also served as special counsel to the National Security Archive, a nongovernmental organization that uses the Freedom of Information Act to gain the declassification of documents pertaining to U.S. foreign policy.

From 1985 to 1994, Mr. Dempsey was assistant counsel to the House Judiciary Subcommittee on Civil and Constitutional Rights, the precursor to the Subcommittee on the Constitution, which is jointly holding this hearing with us today.

Mr. Dempsey obtained his undergraduate degree from Yale College and his law degree from Harvard Law School.

Our final witness is Laura Murphy. Laura is the director of the Washington office of the American Civil Liberties Union, the Nation's oldest and largest civil liberties organization. As Washington office director, she directs the national legislative and executive branch priorities on behalf of the 250,000-member organization.

The first woman and first African American to hold the position of Washington office director, Ms. Murphy had previously worked for the ACLU as a lobbyist for more than 3 years during which she was instrumental in the passage of the Voting Rights Act extension of 1982.

She was a development director in the southern California ACLU affiliate and has worked for five elected officials in the State; State, municipal and Federal levels. And I have worked with her in particular, along with Mr. Barr, on the Patriot 1. Interesting, we now call it Patriot 1 because we have a Patriot 2 coming maybe, or at least there'll be an attempt. I suspect the Patriot 2 will be a—just

some minor technical corrections and not some of the major changes that some want.

But it was a pleasure working with you, and I welcome you here today, Ms. Murphy.

Ms. MURPHY. Thank you.

Mr. CANNON. I extend to each witness my warm regards and appreciation for your willingness to be at today's hearing. In light of the fact that your written statements will be included in the hearing record, I request that each of you limit your oral remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note, and I think you all have had experience, there is a little device that has a green and then a yellow and a red light. The yellow means you have 1 minute remaining. To be consistent I will tap when the red light goes on. That doesn't mean stop. It means wrap up, if you will. During questioning I try to be very careful to remind people when time is up on an even-handed basis. Again, if you're answering the question, a tap just means that if you'd finish your answer, we would appreciate it.

Senator Grassley, welcome. Would you like to join us at the table, Senator? We would all love to have the obscurity which you enjoy, which is national fame and recognition. I have not introduced you, so, Mr. Grassley, if you would allow me.

I'm honored to introduce today particularly our senior Senator from Iowa, Senator Chuck Grassley. In addition to having the distinction of being the only working family farmer in the United States Senate, Senator Grassley currently chairs the Senate Finance Committee and plays an active role on the Senate Judiciary Committee.

We understand that he has just returned from a Senate judicial confirmation hearing. We hope that was successful. So we're especially appreciative that he was able to adjust his busy schedule in order to participate in today's hearing.

And with that, Senator, if you would like to go ahead and speak, we would appreciate hearing from you.

**STATEMENT OF THE HONORABLE CHARLES E. GRASSLEY,
A UNITED STATES SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. Thank you very much, Mr. Chairman. Congressman King, my fellow Congressman from Iowa. First of all, I appreciate very much the introduction. If my son Robin heard that, he'd say, Dad, why don't you tell them I do all the work? So Robin Grassley does most of the work on the family farm.

Mr. Chairman and Members of the Subcommittee, I thank you for this opportunity to testify on a very important topic of privacy. In this post-September 11 world, the Government must do everything within its power and within the law to protect our citizens and country, but more and more, this stepped-up protection involves intrusion of private lives. Some of them are just plain inconveniences, but some of them approach violation of fundamental rights.

Justice Brandeis noted in 1928, quote, the right to be left alone is the right that Americans cherish most, or at least more than most of any right, is what he said. It's my belief that one of the

most important jobs we as legislators and overseers of the executive process do is vigorously guard and protect the right to be left alone. I'd like to focus my remarks on this important oversight aspect of our job and specifically on the Terrorist Information Awareness program, or TIA, that the Defense Department is presently researching.

Power can be abused if put in the wrong hands. That's why checks on power are critical for privacy. A prosecutor can go too far in pressing a case, harassing and embarrassing a private person. So judges and defense counsel are a critical check on prosecutorial power. Likewise, an overzealous investigator can dig too deeply into private lives. So the courts, under authority of the Constitution, are there to restrain undue probing. Even intelligence officials' powers are checked by the Foreign Intelligence Surveillance Act and the secret court that enforces that act. Without these checks, even a good-meaning public official can overreach and exploit our deeply cherished privacy.

But in some instances, there aren't systemic checks in place. A public official working deep within the bowels of a Government agency may be able to burrow into private information of people with little or no oversight. So H.R. 338 appears to focus on some of these situations where new administrative rules could create opportunities for unwarranted intrusion into privacy. The bill's impact statement requirement would force careful consideration of appropriate safeguards to protect civil liberties. It is important that this process doesn't become too cumbersome, create new bureaucracies or cause unnecessary delays. We need a careful, but nimble Government to fight terrorism. I look forward to listening to the debate on the bill in the coming weeks.

It is in these situations where there's no obvious safeguard that the Congress must provide rigorous oversight of the executive branch and do that to protect the public, and also the public's cherished right to privacy, and do that against unwarranted Government intrusions. I describe one such incident where I've been involved in heavy oversight to protect civil liberties.

Many of you may know about the Defense Department's TIA program that's designed to test technologies that collect information from private and public databases and try in turn to find trends that could signal threats against our country. This program's being run under DARPA, the DOD's unit that created the Internet. Like many people, I have been concerned that TIA would be used to invade the privacy of Americans by snooping around our bank accounts, personal Internet computers, phone records, and a lot of other things you can think of. In November of last year, I asked the Department of Defense inspector general to look into the reasons for TIA and to make sure that there are controls in place to ensure that it's used only for foreign intelligence purposes and for that purpose, to protect us against terrorism and foreign threats. The inspector general's investigation is proceeding, and a formal audit of TIA should be finished by the fall.

In January of this year, Democratic Senator Ron Wyden and I were able to get an amendment attached to the Department of Defense appropriation bill that limited funding for TIA research and required congressional reporting and oversight. In a recent report

the Department of Defense seems to have embraced its role in restricting the intrusion TIA will have into people's lives and has confirmed that it will not, and has confirmed that it cannot, meddle into private information that it's not otherwise allowed access to under existing law.

After 9/11, all of us in Congress were questioning why Government failed to connect the dots and recognize terrorist activities that were interrelated. Well, it's my understanding that TIA is being researched as a tool that could potentially help connect some dots. But we have to be careful about on the one hand demanding that the Administration connect the dots and, on the other hand, putting a stop to their efforts to connect the dots. I have learned that the Department of Defense appropriation bill that's currently being debated would cut off all research funding. We need to proceed with caution. But one thing's for certain: Oversight is critical.

It is a delicate balance that Congress must strike between protecting people from terrorism and protecting people from unwarranted Government intrusion into their private lives, and in the mix must be rigorous and effective congressional oversight. You can expect that I will continue to carry the oversight torch, and I hope that each of you will as well.

I thank you for your time and focusing on a very important subject, Mr. Chairman.

Mr. CANNON. Thank you, Mr. Grassley.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF THE HONORABLE CHUCK GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA

Chairman Cannon, Chairman Chabot, Members of the Subcommittees, thank you for the opportunity to testify on the important topic of privacy. In this post-September 11 world, the government must do everything within its powers, and within the law, to protect our citizens and country. But more and more this stepped-up protection involves intrusions into our private lives. Some of them are just inconveniences; but some of them approach violations of fundamental rights. The "right to be let alone," as Justice Brandeis noted in 1928, is the right that Americans cherish more than most any right.

It is my belief that one of the most important jobs we as legislators and overseers of the executive process do is vigorously guard and protect the right to be let alone. I'd like to focus my remarks on this important oversight aspect of our job and, specifically, on the Terrorist Information Awareness program—T-I-A—that the Defense Department is researching.

Power can be abused if put in the wrong hands. That's why checks on power are critical for our privacy. A prosecutor can go too far in pressing a case, harassing and embarrassing a private person. So judges and defense counsel are a critical check on prosecutorial power. Likewise, an overzealous investigator can dig too deep into private lives. So the courts—under the authority of the Constitution—are there to restrain undue probing. Even intelligence officials' powers are checked by the Foreign Intelligence Surveillance Act and the secret court that enforces that act. Without these checks, even a good-meaning public official can overreach, and exploit our deeply cherished privacy.

But in some instances, there aren't systemic checks in place. A public official working deep within the bowels of a government agency may be able to burrow into the private information of people with little or no oversight. H.R. 338 appears to focus on some of those situations where new administrative rules could create opportunities for unwarranted intrusions into privacy. The bill's impact statement requirement would force careful consideration of appropriate safeguards to protect civil liberties. It is important that this process doesn't become too cumbersome, create new bureaucracies, or cause unnecessary delays. We need a careful but nimble government to fight terrorism. I look forward to listening to the debate on this bill today and in the coming weeks.

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It's a delicate balance that Congress must strike between protecting people from terrorism, and protecting people from unwarranted government intrusions into their private lives. In the mix must be rigorous and effective congressional oversight. You can expect that I will continue to carry the oversight torch, and I hope that each of you will too.

I thank you for your time, and for focusing on this important topic.

Mr. CANNON. We recognize your schedule is busy. If you need to leave, you certainly don't need to ask. But have you got a little bit of time to do questions with us?

Senator GRASSLEY. I'll try, yes.

Mr. CANNON. Okay. No compulsion here, but we really appreciate your insights into that situation.

Senator GRASSLEY. I really need to go back to Judiciary.

Mr. CANNON. Would you please get something done over there? I'm not sure how you're going to do that, but you have our support, maybe even our prayers.

Mr. GRASSLEY. If we had your Rules Committee, we could do a lot.

Mr. CANNON. Thank you, Senator Grassley.

Mr. Barr.

STATEMENT OF THE HONORABLE BOB BARR, 21ST CENTURY LIBERTIES CHAIR FOR FREEDOM AND PRIVACY, AMERICAN CONSERVATIVE UNION

Mr. BARR. Thank you very much, Mr. Chairman and Mr. Chairman Chabot. It's a tremendous honor to be here today with you and distinguished Ranking Member and good friend Mr. Nadler, whom—with whom I've had the pleasure in months since I left the Congress to share some podiums to discuss these very issues. It is a tremendous honor to be before you and Mr. Scott, with whom I worked very closely. It was an honor. I look up to him as a mentor,

coming as he does from Harvard and being very well versed in so much of what went on in the Judiciary Committee, and I enjoyed working with him very closely on many of the pieces of legislation. Colonel, so wonderful to see you today. Mr. Coble, my good friend and colleague; and Mr. Flake, from the great State of Arizona.

It's wonderful to be with you all today and to think as we proceed with this hearing of the many issues on which we worked together constructively, Democrat, Republican, those from a more liberal persuasion and a more conservative one. And that really is, as Mr. Chabot indicated, Mr. Cannon indicated, Mr. Nadler indicated in their opening remarks, is really the hallmark of this legislation.

It is an honor to be back before the Subcommittee, and I will submit my written remarks for inclusion, as the Chairman indicated, in their entirety in the record, and appreciate that courtesy being extended.

Let me speak to just a couple of points and then listen to Mr. Dempsey, for whom I have the highest regard on these matters of privacy and Government power, and I have had the pleasure of working with him on many occasions, and after him, to Ms. Murphy, who has really been a stalwart not only here in Washington, D.C., but across the country in working on these tremendously important privacy and other civil liberties matters. And it is an honor to appear today with them, as it was with my good friend from my native State of Iowa, Senator Grassley.

Mr. Chairman, while the world of George Orwell's 1984 face crime and thought crime and the world of Minority Report's precrime detention and arrest are not fully upon us, their specter is so close that it casts a shadow over our Nation, and we need to do everything within our power to ensure that the mechanisms that we read about in those novels and in those movies do not become the reality of TIA gone wild or CAPS II gone astray, or any of the other myriad programs such as Project Carnivore that I think Mr. Chabot indicated we worked on years ago do not obtain the hold on our society that some, perhaps in the minority, but some in our society would like them to do. If we allow that to happen, then indeed we will look back on these days of vast Government power as the good old days when there was at least some freedom and some privacy left, and I know none of us here in this room today want to see that happen.

This piece of legislation, carefully crafted as I know it is, very well thought out as it obviously is, is a very, very modest piece of legislation. Some might ask on the outside why bother with such a modest piece of legislation, foregoing as it does a direct attack, so to speak, on some of the mechanisms that we're all familiar with? I think it's important to make this small, but significant step, as Chairman Chabot described it, as a good first step because we do want to tread carefully.

None of us have a desire to thwart the Government's legitimate and paramount interest in fighting the war against terrorism and other criminal activity. We certainly want to make sure that what we do to ensure that privacy is protected, and in those instances where it has been threatened or curtailed, it is made whole again, we certainly want to make sure that those do not come at the expense of legitimate law enforcement, legitimate antiterrorism ef-

forts or legitimate foreign intelligence-gathering, analysis, coordination and dissemination efforts.

And that is why I think this first step is a very, very appropriate one. It will send a very important message not just to the American people, but to the courts and to the executive branch that we in the Congress, that you in the Congress, care deeply about privacy, and that you are taking steps, concrete steps, through this legislation to begin the process of ensuring that privacy is fully recognized and protected as one of the foundational principles underlying our Bill of Rights.

The legislation does in many respects, if not precisely, mirror legislation that Mr. Chabot, as was indicated, introduced in the 106th Congress and as I introduced with the support of many on these two panels in the 107th Congress. I stand ready to assist in any way possible with this legislation not just today, but in the months ahead and would be glad to answer any questions or engage in any colloquies or discussions today as we look at specific aspects of the legislation. Thank you, Mr. Chairman.

Mr. CANNON. Thank you, Mr. Barr.

[The prepared statement of Mr. Barr follows:]

PREPARED STATEMENT OF THE HONORABLE BOB BARR

I am pleased to offer my views today on behalf of the American Conservative Union at this joint hearing of the Subcommittee on Commercial and Administrative Law and Subcommittee on the Constitution to examine the Defense of Privacy Act, H.R. 338, introduced by Representative Chabot, the distinguished Chairman of the Subcommittee on the Constitution, and Representative Nadler, its ranking member. This legislation also enjoys the support of my good friend Representative Cannon, the distinguished Chairman of the Subcommittee on Commercial and Administrative Law, who I am very pleased to see has so ably taken up the gavel that I was once honored to hold.

I am particularly pleased that you have taken up this issue, Chairman Cannon, as bipartisan work on this issue—and on this important legislation—were, as you know, among the issues most dear to my heart when I sat where you are sitting now. I now appear before you to represent the American Conservative Union, the nation's oldest conservative lobbying organization, which expresses its strong endorsement of this legislation. I hope we can, together, speedily send this good government initiative on its way through the House and ultimately to the President's desk.

It is clear that those of us who support this legislation, both in and out of Congress, do not agree on every issue. In fact, however, many observers have been particularly impressed by the political diversity of the bill's supporters, and I am pleased to be part of a distinguished panel which also spans the conventional ideological spectrum.

Supporters of this legislation share a commitment to protecting the privacy cherished by American citizens—a value increasingly imperiled in an information age in which personal information has become a commodity that is captured and compiled, manipulated and misused, bought and sold in ways not even imaginable just a few years ago. The sphere of privacy, which Justice Brandeis eloquently described as the “right to be let alone,” is not only rapidly diminishing, it is increasingly penetrable. Special care is necessary to ensure that personal information remains personal, absent a sound reason to treat it otherwise. This value is neither Republican or Democratic; liberal or conservative, it is truly an *American* value; one that remains a heart of our way of life and of our Bill of Rights.

H.R. 338 takes the first—necessary—step toward protecting the privacy of information collected by the federal government. While some have decried the loss of personal privacy by private companies, (and this is indeed a matter of grave concern), it must be emphasized that government alone has the *authority* to *compel* the disclosure of personal information; and unlike a private commercial gatherer of personal data, the government can put you in jail based on what it uncovers. For this reason, the government has an obligation to exercise great *responsibility* when enacting policies that undermine privacy rights.

The Defense of Privacy Act requires that rules noticed for public comment by federal agencies be accompanied by an assessment of the rule's impact on personal privacy interests, including the extent to which the proposed rule provides notice of the collection of personally identifiable information, what information will be obtained, and how it is to be collected, maintained, used and disclosed. The measure further provides that *final* rules be accompanied by a *final* privacy impact analysis, which indicates how the issuing agency considered and responded to privacy concerns raised by the public, and explains whether the agency could have taken an approach less burdensome to personal privacy.

Unlike existing laws that protect against the disclosure of information *already* obtained by the federal government, the Federal Agency Protection of Privacy Act provides *prospective* notice of a proposed rule's affect on privacy *before* it becomes a binding regulation. Together with a wide and diverse array of co-sponsors, I introduced an earlier version of this measure last Congress—H.R. 4561, the Federal Agency Protection of Privacy Act, which passed the full House by a voice vote under suspension of the rules. Unfortunately, the Senate did not take up the measure with the rush of business at the end of a busy 107th Congress, but I am confident that with such broad support we will get the job completed this year.

Like that earlier measure, H.R. 338 specifically articulates the principles that should guide agency action when rules that impact privacy are promulgated: 1) the public should have notice that a rule provides for the collection of personally identifiable information and how the agency will collect, maintain, use and disclose that information; 2) individuals should have access to information that pertains to them and an opportunity to correct inaccuracies; 3) agencies should take steps to prevent information collected for one purpose from being used for another purpose; and 4) agencies should take steps to provide *security* for such information.

Importantly, H.R. 338 permits individuals who are adversely affected by an agency's failure to follow its provisions to seek judicial review pursuant to the provisions of the Administrative Procedure Act. In this respect, the bill tracks the administrative innovations of 1996 amendments to the Regulatory Flexibility Act, which provided for the judicial review of rules issued without regard to their impact on small businesses. I can say, without hesitation, that privacy is no less important to American citizens than regulatory burdens are to American businesses, and this measure helps address these concerns.

Finally, I want to emphasize that H.R. 338 will *not* unduly burden regulators *nor* will it hinder law enforcement or foreign intelligence gathering. The Defense of Privacy Act will apply the best antiseptic—*sunshine*—to the federal rulemaking process by securing the *public's right to know* about how rules will affect their personal privacy while ensuring that citizens have the opportunity not only to critique the substance of a rule, but to do so with an understanding of the reasoning and justification upon which the rule was predicated.

On behalf of the American Conservative Union, I thank the Committee for this opportunity to express our strong support for this important legislation.

Mr. CANNON. Mr. Dempsey, you are recognized for 5 minutes.

**STATEMENT OF JAMES X. DEMPSEY, EXECUTIVE DIRECTOR,
CENTER FOR DEMOCRACY & TECHNOLOGY**

Mr. DEMPSEY. Thank you, Mr. Chairman and Chairman Chabot and Mr. Nadler, Members of the two Committees. It is a privilege to be here today, especially to share the witness table with Senator Grassley and Mr. Barr and Ms. Murphy, three of the leading advocates and supporters of privacy in this country.

The Center for Democracy and Technology is here today in strong support of H.R. 338. The legislation has in it a concept; the core of it is the privacy impact assessment, and this is clearly a concept whose time has come. Even though this legislation was not enacted in the 106th Congress or last year, the principle is being implemented already in Government agencies, is being adopted by the Congress. In the E-Government Act, which was adopted last year, that legislation included a requirement for privacy impact assessments when the Government was procuring new computer systems. And when Congress also last year adopted the Homeland Se-

curity Act, it took the privacy impact assessment concept and it included it in the Homeland Security Act and gave that responsibility to the privacy officer in that agency.

So H.R. 338 would fully deploy, so to speak, this concept across the Government. We've seen the idea being picked up already, and it's now time to apply it across the board to Federal agency rulemaking.

Now, the concern might be raised that this would be an encumbrance to the Federal bureaucracy, or that it would impose unnecessary costs. I want to stress a point that Chairman Cannon made in his opening statement, which was that last year the Congressional Budget Office studied this legislation and in its estimate concluded that it would not impose any significant cost or require any significant expenditure, and pointed out that only a small percentage of the Federal regulations would actually require a full privacy impact assessment.

And I would like to stress that I think that in many ways, this legislation can end up saving money and actually streamlining the realization of Government programs and the achievement of legitimate Government interests, and that's because the legislation forces agencies to focus on the privacy concerns at the point when it can make the most difference; that is, at the design phase, at the initial phase when the Government is deciding to initiate through regulation a new collection of information. That's the time to surface problems and to correct them. It could end up saving money and avoiding litigation.

I know just one example. Last year a Government contractor lost or suffered a security breach. Five hundred thousand records of military personal and retired Active Duty and retired military personal and their families were stolen by computer because of poor computer security practices from computer systems run by a contractor. The Government and the contractor are now having to spend hundreds of thousands, if not millions, of dollars notifying those people and trying to rectify that damage. And if the security issues associated with that information had been surfaced at the outset, that could have been avoided.

The legislation creates a public input mechanism so that groups like the American Conservative Union and the ACLU and CDT can comment on rulemaking and put suggestions; making suggestions, for example, to use an identifier other than the Social Security number, which we know has gotten out of hand, and is the key to identity theft, and maybe a system could be designed to avoid that so we can build privacy into the design of data collection.

Now, I would just point out that there is one issue which Senator Grassley alluded to, the Chairman in his opening statement alluded to, that I think is actually not covered by this legislation, which desperately needs being addressed, and that is the increasing use by the Government of commercial databases where the Government buys the information or subscribes to it from the private sector, doesn't mandate the disclosure by rulemaking, doesn't take the information into its own database, so it never really becomes subject to the Privacy Act. The FBI has reported that its use of these commercial databases has grown by 9,600 percent since 1992. Congress needs to figure out what's going on there. They

need to require the agencies to disclose how they are using this data and to walk through many of the questions that are in this legislation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dempsey follows:]

PREPARED STATEMENT OF JAMES X. DEMPSEY

Chairman Cannon, Chairman Chabot, Members of these two Subcommittees, thank you for the opportunity to testify today on H.R. 338, the Defense of Privacy Act. We commend you for your attention to the important privacy issues surrounding the government's collection and use of personal information. We offer here today our strong support for the Defense of Privacy Act. In addition, we suggest some further steps Congress should take to ensure fairness in the government's collection or use of personal information, particularly with regard to government access to commercial databases and the possible use of "data mining" techniques. We look forward to ongoing work with you on these issues.

I. SUMMARY

The federal government has many legitimate needs for personal information, ranging from administration of benefits programs to tax collection to winning the war on terrorism. Especially in light of the digital revolution, this government demand for information brings with it heightened risk to privacy and the associated values of Fair Information Practices. The Defense of Privacy Act would put in place an important process to protect Americans' privacy against unnecessary or unwise government intrusions. The Act requires government agencies to closely examine the privacy impact of their rules and regulations and to consider alternative ways to accomplish their objectives while minimizing any adverse privacy impact. The Act focuses on the point when careful consideration of privacy could do the most good: at the beginning of the regulatory process.

The Defense of Privacy Act serves as a sound complement to Section 208 of the E-Government Act of 2002, which requires that federal agencies conduct privacy impact assessments whenever they purchase a new information technology or initiate a new collection of personally identifiable information. However, we note with dismay that the Office of Management and Budget (OMB) has failed to issue guidance to agencies on performing the privacy impact assessments under the E-Gov Act. We urge the Subcommittees to send a strong message to OMB that it should promptly issue guidance to the agencies on the E-Gov Act privacy impact assessment process.

While adoption of the Defense of Privacy Act and full implementation of the E-Gov Act would be important steps, further congressional action is needed to address a new problem: the growing use by federal law enforcement and intelligence agencies of sensitive, personal data about Americans held by the private sector or collected by government agencies for purposes other than law enforcement or intelligence. With growing frequency, the government does not compel disclosure of private sector data but rather purchases access to it. Since this information is not collected under a regulation, it would not be subject to the Defense of Privacy Act. Agencies are developing new "data mining" technologies that would seek evidence of possible terrorist preparations by scanning billions of everyday transactions, potentially including a vast array of information about Americans' personal lives, such as medical information, travel records, credit card and financial data, and government data initially collected for non-law enforcement purposes. Contrary to some reports, research on data mining continues under the auspices of the Total (now Terrorism) Information Awareness (TIA) project at the Pentagon's Defense Advanced Research Projects Agency. And even if TIA funding were zeroed out, the development of data mining would go on commercially or at other agencies. Government implementations of this uniquely intrusive technology should not go forward without explicit congressional authorization based on (i) a finding of effectiveness, (ii) guidance for implementation, and (iii) oversight. CDT urges the Congress to develop, first, a structure or criteria for evaluating the effectiveness of particular uses of data analytics technology and then, for specific situations where the use of such techniques are found to be effective, guidelines and an oversight process for protecting privacy and due process. CDT offers its assistance in that process.

II. THE DEFENSE OF PRIVACY ACT AND PRIVACY IMPACT ASSESSMENTS

A. The Defense of Privacy Act

CDT strongly supports enactment of H.R. 338, the Defense of Privacy Act, introduced this Congress by Chairman Chabot and cosponsored by Representatives Boucher and Nadler. The bill would require agencies to conduct privacy impact analyses for both new and existing agency rules and regulations. Importantly, it would provide a judicial review mechanism to ensure enforcement. For the same reasons that we supported former Representative Barr's Federal Agency Protection of Privacy Act, which passed the House of Representatives in the last Congress but was never taken up by the Senate, we believe that H.R. 338 provides a sound approach for enhancing privacy protections for the federal government's collection and use of personally identifiable information.

The privacy impact analyses required by the Defense of Privacy Act will greatly improve the regulatory process. They will force agencies to consider issues they have often overlooked in issuing regulations, namely the privacy implications. Agencies would have to consider ways to reduce the privacy impact of regulations. And they would have to systematically justify their decisions to collect personally identifiable information.

Specifically, the bill requires agencies to address up front some of the basic "Fair Information Practices" that are reflected in the federal Privacy Act of 1974, such as notice to individuals of the collection of personally identifiable information, the right of individuals to access information about themselves, the opportunity to correct information, limits on use and disclosure of data for purposes other than those for which the data was collected in the first place, and appropriate security measures to protect the information against abuse or unauthorized disclosure.

These "Fair Information Practices" form part of the foundation of the Privacy Act, which was enacted in response to the creation of government computer databanks filled with personally identifiable information. (As will be discussed below, the Privacy Act has a number of exemptions and loopholes that render it less effective today than intended.) Other Fair Information Practices, which are also reflected in the Privacy Act, include limitations on the retention of data, a requirement to ensure the accuracy, completeness and timeliness of information, and the establishment of redress mechanisms for individuals wrongly and adversely affected by the use of personally identifiable information. We recommend that those additional principles be included in the Defense of Privacy Act's list of considerations that agencies must review when issuing regulations, so that the Defense of Privacy Act fully tracks the Privacy Act of 1974.

A key element of the Defense of Privacy Act is that it would require policy makers to identify and address privacy issues at the initial stages of a new project or policy—at the conceptual or design stage, before regulations are promulgated. This represents a vast improvement over current practice. It also means that the Act should not adversely interfere with agency operations. Instead, it will reduce the likelihood that any given regulatory scheme will be found to have a negative impact on privacy after it has been implemented, when it may be difficult to mitigate the impact without substantial expense, delay in the program or even litigation. The requirement that agencies periodically review existing regulations that have serious privacy implications could also benefit agency operations by identifying information collection practices that have become outdated or unnecessary and that can be dispensed with altogether.

The privacy impact analyses will not force agencies to adopt any one privacy standard. Indeed, different standards may well be appropriate for different programs dealing with information of varying sensitivity. However, having to work through a privacy impact analysis should guide an agency in acting more responsibly, and as a result this bill should lead to better regulations and fewer unnecessary privacy intrusions.

B. Failure to Fully Implement the E-Government Act

Enactment of H.R. 338 would not be the first time that Congress has directed federal agencies to analyze the privacy impact of their programs. Just last year, the E-Government Act of 2002 included a provision, Section 208, requiring federal government agencies to conduct privacy impact assessments before developing or procuring information technology or initiating any new collections of personally identifiable information. Under that legislation, a privacy impact assessment must address what information is to be collected, why it is being collected, the intended uses of the information, with whom the information will be shared, what notice would be provided to individuals, and how the information will be secured. The privacy impact assessments required under the Defense of Privacy Act complement the re-

quirements under the E-Gov Act. We urge the Subcommittees to ensure that the two Acts are congruent. Our initial thoughts are that this should be done by making the list of factors to be considered the same in both, and by making it clear that when a new collection of information is initiated by rule, the notice and comment provisions of the Defense of Privacy Act apply to the privacy impact assessment process.

The privacy impact assessments under the E-Gov Act should bring greater transparency to the IT development and procurement process, allowing Congress, citizens and advocacy groups to better scrutinize the privacy decisions of the government. And using the massive purchasing power of the U.S. government, the assessments could help to increase the marketplace for technologies that incorporate privacy “by design.”

Unfortunately, privacy impact assessments for information technology procurements have only been implemented by a few agencies, despite the fact that the E-Government Act set an April 2003 deadline for implementation. The Director of OMB was supposed to issue guidelines in April for agencies on how to draft the assessments, but has failed to do so. As a result, the implementation of this important new privacy protection has been significantly pushed back. CDT is very concerned about this delay. These Subcommittees should encourage the Executive Branch to get on with implementation of the E-Gov Act. Guidance issued for privacy impact assessments under the E-Gov Act could also help agencies perform similar assessments of regulatory actions under the Defense of Privacy Act.

It is worth noting that privacy impact assessment requirements like those in the Defense of Privacy Act and the E-Government Act are not a new or uniquely American concept. Privacy impact assessments already are used in several other countries. Indeed, privacy commissioners in Canada and New Zealand have issued excellent guides or handbooks on conducting privacy impact assessments, which may assist OMB in issuing its guidance. For more information about the international experience, see *Privacy and E-Government: Privacy Impact Assessments and Privacy Commissioners—Two Mechanisms for Protecting Privacy to Promote Citizen Trust Online*, a report of the Global Internet Policy Initiative, which can be found at <http://www.gipiproject.org/practices/030501pia.pdf>.

C. Privacy Officers

We briefly mention one other important privacy protection mechanism, the Privacy Officer, now being implemented at the Department of Homeland Security. In Section 222 of the Homeland Security Act of 2002, Congress established a Privacy Officer for the Department. The Privacy Officer’s statutory responsibilities include “evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government” and “conducting a privacy impact assessment of proposed rules of the Department . . . including the type of personal information collected and the number of people affected.” CDT believes that every federal agency should have a statutory Privacy Officer with authorities similar to those provided under the Homeland Security Act. This officer would have the stature and expertise to effectively conduct privacy impact assessments of the kind required under the Defense of Privacy Act, and the Defense of Privacy Act would give these officers specific requirements and an enforcement mechanism to draw on in fulfilling their duties. Attempts by the Clinton Administration to create privacy officers by Executive memorandum were unsuccessful. The position needs and deserves statutory footing.

III. THE NEED FOR FURTHER CONGRESSIONAL ACTION REGARDING THE PRIVACY IMPLICATIONS OF DATA MINING AND OTHER GOVERNMENT USES OF COMMERCIAL INFORMATION

The E-Government Act’s requirement that agencies issue privacy impact assessments each time they procure new information technology systems was a vital step toward making privacy a significant part of government decision-making processes. The Defense of Privacy Act addresses another major concern by requiring agencies to consider the privacy implications of their proposed and existing regulations. But there is a third set of issues not necessarily addressed by either of those provisions: “data mining” and other law enforcement and intelligence uses of commercial data and other information that was not initially collected for law enforcement and intelligence purposes. Law enforcement and intelligence agencies are increasingly buying commercial data or developing new uses of government data originally collected for non-law enforcement or intelligence purposes. A new theory of pattern-based analysis is being developed that claims the ability to review the ocean of data we generate in everyday life, potentially including a vast array of information about Americans’ personal lives such as medical information, travel records and credit card and

financial data. Such techniques turn the presumption of innocence upside down. They seem to assume government access to personal information about everyone from any source. Yet this is an area where few laws, regulations or guidelines constrain the government or provide any meaningful oversight or accountability. CDT urges Congress to address this significant gap in privacy protection.

Before going into further detail, let me be clear on one point: The threat terrorism poses to our nation is imminent and grave. Our nation critically needs a more effective intelligence effort to thwart terrorism, and this effort must include new technologies for collecting and analyzing information from public and private sources. But advanced information technology, by its power to search decentralized databases, has new, grave privacy implications. Such technology must be used only if effective; it must be subject to checks and balances; it must be implemented with a focus on actual suspects, guided by the particularized suspicion principle of the Fourth Amendment; and it must be subject to executive, legislative and judicial controls. At this time, those checks and balances do not exist.

A. Access to Information Initially Collected for Purposes Other Than Law Enforcement and Intelligence

Increasingly, U.S. law enforcement and intelligence agencies are seeking access to commercial data and other personally identifiable information that was not initially collected for law enforcement and intelligence purposes. Agencies can obtain this information via subscription, through voluntary disclosures, or under new Patriot Act authorities that authorize access under very weak standards. The Constitution as currently interpreted provides no limits on government collection of this information because courts in the pre-Internet era—not envisioning a technology that could link vast public and private databases to present a composite image of any individual—held that individuals do not have Fourth Amendment rights in personal information disclosed to third parties like banks and credit card companies in the course of business transactions.

The result is that the government faces few constraints on its ability to obtain and use this information. For years the FBI has had contracts with major companies that aggregate commercial data about individuals. According to an undated FBI presentation obtained by the Electronic Privacy Information Center, the FBI's use of "public source" information (including those proprietary commercial databases) has grown 9,600% since 1992. Other entities that collect commercial information have voluntarily provided the FBI with their databases, from grocery store frequent-shopper records to scuba diving certification records. But it is entirely unclear what, if any, guidelines apply to the FBI's use of this information.

Ironically, when private companies wish to use and share consumer information to assess an individual's credit, decide whether to extend a job offer, or evaluate whether to issue an insurance policy, they must comply with fairly strict rules. For example, under the Fair Credit Reporting Act, private companies cannot use consumer information to deny an individual a job, credit or insurance unless that person has the opportunity to review and correct that information.

Yet the government is subject to none of those rules when it uses that same information to identify possible terrorists, even though the consequences of mistake or abuse can be very serious. The Privacy Act was supposed to subject government agencies that collect personally identifiable information to the Fair Information Practices, but the Act's protections only apply to federal "systems of records," so the government can bypass the Privacy Act simply by accessing existing private sector databases rather than collecting the information itself. Thus, although the Privacy Act requires notice to and consent from individuals when the government collects and shares information about them, gives citizens the right to see whatever information the government has about them, and holds government databases to certain accuracy standards, none of those rules applies when the government accesses commercial information without pulling that data into a government database. Currently, the government need not ensure (or even evaluate) the accuracy of the data; it need not provide individuals with the ability to review and correct the data; and there are no limits on how the government might interpret or characterize the data. Meanwhile, plans are being discussed to promote broader sharing of data with state and local authorities, and the line between domestic intelligence and foreign intelligence has blurred.

CDT recognizes that commercial information can and should play a key role in law enforcement investigations. But agencies relying on that data should have clear guidelines for its use—guidelines that both protect individual rights and ensure the information is useful for investigative purposes.

The accuracy of the information, for example, is essential both to the effectiveness of counter-terrorism efforts and to individuals to ensure they are not mistakenly

caught up in an investigation. Marketing data and other information collected for commercial purposes are often inaccurate. Rampant identity theft threatens to pollute credit reports and other commercial databases with false information. Accordingly, a way needs to be found to build data quality standards into government uses of consumer data. Another problem is security. It is important to protect against abuse by rogue agents within law enforcement agencies. There have been recurrent news accounts of police officers using access to police computers to obtain information about celebrities or to track their ex-girlfriends; agencies should establish auditing mechanisms and other safeguards to protect against that type of unauthorized access when agencies query commercial databases. Redress is a third issue: what will be the rights of an individual if adverse action is incorrectly taken on the basis of erroneous or misinterpreted commercial data?

B. Data Mining Technology

A related but even more complicated set of issues concerns so-called “data mining” or “pattern analysis” technology. This set of techniques purports to be able to find evidence of possible terrorist preparations by scanning billions of everyday transactions, potentially including a vast array of information about Americans’ personal lives. This type of “pattern-based” analysis is to be distinguished from more traditional “suspect-based” searches, where a law enforcement agency has identified a suspect and is attempting to locate additional information about the suspect (or his associate) through the use of commercial databases. Pattern-based searches heighten civil liberties concerns because they require government access to everyone’s information, not just that of individuals already under suspicion as a result of traditional investigative means. For that reason, our concerns about the use of private sector information (and government data originally collected for non-law enforcement or intelligence purposes) grow exponentially when the government seeks to use that information as part of a data mining program.

Congress has put a temporary hold on domestic deployment of data mining technology originating from the Pentagon’s “Total Information Awareness” (recently renamed “Terrorism Information Awareness”) program, and it appears likely that the hold will continue through FY2004. This is a positive step, but data mining of Americans’ bank, credit, medical, commercial and other records can continue unhampered at the FBI, CIA, the Terrorist Threat Integration Center (TTIC), and the various components of the Department of Homeland Security. Yet there is a host of unanswered questions regarding this technology that should be answered before it goes forward.

These questions fall into two categories. First, is the technique likely to be effective? If not, there is no reason to pursue it, particularly when we have limited resources for counter-terrorism. No government agency has yet demonstrated that this type of technology will work, and there are serious questions about whether it will generate so much information—including false positives—that it will be impossible to investigate all of the leads. Our intelligence agencies are already overloaded with information they do not have the resources to analyze; adding to that load will serve no purpose.

Second, if data mining is shown to be effective, what should be the rules governing it? Who should approve the patterns that are the basis for scans of private databases and under what standard? What should be the rules limiting disclosure to the government of the identity of those whose data fits a pattern? When the government draws conclusions based on pattern analysis, how should those conclusions be interpreted? How should they be disseminated and when can they be acted upon?

Adapting the Privacy Act and other Fair Information Practices to government uses of commercial databases is one way to look at setting guidelines for data mining. But some of those principles seem inapplicable to the intelligence context, while others need to be further augmented. Perhaps one of the most important elements of guidelines for data mining would be rules on the interpretation and dissemination of hits and on how information generated by computerized scans can be used. Can it be used to conduct a more intensive search of someone seeking to board an airplane, to keep a person off an airplane, to deny a person access to a government building, to deny a person a job? What due process rights should be afforded when adverse actions are taken against individuals based on some pattern identified by a computer program? Can ongoing audits and evaluation mechanisms assess the effectiveness of particular applications of the technology and prevent abuse?

All of these questions must be answered before moving forward with implementation. Meanwhile, Congress should insist on a full reporting from all agencies as to their uses of commercial databases. The privacy impact assessment concept in the Defense of Privacy Act may be an excellent framework for this kind of reporting. Then Congress should limit the implementation of data mining until effectiveness

has been shown and guidelines on collection, use, disclosure and retention have been adopted following appropriate consultation and comment. It is time for Congress to create this framework, working with the intelligence agencies, privacy experts, and the industries that hold this data and build the technology to analyze it.

IV. CONCLUSION

CDT commends the Subcommittees for holding this important hearing. Enactment of the Defense of Privacy Act is an important step toward ensuring that federal agencies consider and address the privacy implications of their programs. Further steps must be taken, however, to ensure that our law enforcement and intelligence agencies operate under a set of privacy-protective policies and guidelines when they access commercial information and seek to “mine” it in search of terrorists. Such guidelines would not merely to protect individual rights; they would focus government activity and make it more effective.

Mr. CANNON. I didn't mean stop. I was really interested in what you were saying, Mr. Dempsey, but we'll give you a chance to continue in a moment.

Mr. DEMPSEY. Yes, sir.

Mr. CANNON. I just thought I'd point out here that many of the things you talked about that we've done historically were actually done under the leadership of Mr. Barr when he had this chairmanship, and I hope that I can fulfill the shoes or the mantle that he's left behind.

We'd also like to recognize the presence of—let's see, Mrs. Blackburn from Tennessee, Mr. King from Iowa, and Mr. Coble from North Carolina, and Mr. Flake from Arizona.

And with that, Ms. Murphy, we'd like to yield you 5 minutes.

STATEMENT OF LAURA W. MURPHY, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON NATIONAL OFFICE

Ms. MURPHY. Thank you, Chairman Cannon, Chairman Chabot, and Ranking Member Nadler and the Members of the Subcommittee. I'm pleased to testify in favor of the Defense of Privacy Act on behalf of the ACLU, and I'm also pleased to substitute for my dear colleague Gregory T. Nojeim, who could not be here because of a family emergency.

Ours is a nationwide nonprofit organization with over 400,000 members, not 250—I have to update my bio—dedicated to protecting the principles of freedom set forth in the Constitution and in our Nation's civil rights laws. We join many Members of the Subcommittee on both sides of the aisle in nongovernmental organizations from across the political spectrum in support of this legislation.

Americans right to privacy is in peril. Individuals' personal information, including medical and financial records, is being collected on computer networks that can be linked, transferred, shared and sold, often without consent or knowledge of the person to whom the information pertains, and as Jim says, this information is increasingly being used by the Federal Government. Increasingly, this information is obtained by the Government, and because of this, legislation such as H.R. 338, the “Defense of Privacy Act,” is essential to force the Government to even consider protecting the privacy of and limiting access to the information that it collects.

The legislation that you are considering today is simple, yet very powerful; modest, yet effective. It would require Federal agencies

to issue privacy impact statements with the regulations they propose. It would encourage agencies to develop a systematic means for reviewing how a particular regulation would affect individual privacy.

One need only to look at the application of this law, of this bill, had it been law when the Government introduced the Total Information Awareness program and the Computer-Assisted Passenger Profiling System. We could have used this law in the current debate that's taking place over this last session of Congress. The TSA, the agency that is advocating CAPS, wants to collect data on every individual who flies on an airplane in the U.S. To determine who is rooted in the community so that unusual behavior of less rooted individuals would help to single out terrorists. The Department of Defense wants to collect information on everyone in our country so that it can be compiled in a central database. Using algorithms they would single out aberrant behavior to help determine terrorism activities. These agencies, if they issued regulations on these programs, would be forced to consider what data it would gather on individuals and whether it could collect less data and achieve the same security outcome that it could get by collecting less data.

This legislation introduces long-accepted principles of fair information practices into the rulemaking process. It is modeled after the Regulatory Flexibility Act, and it places an important check on agencies' use and disclosure of personal information.

People care about privacy, and that's why so many people in the last year alone have joined the ACLU. Under this bill, they would have a better opportunity to be heard when their privacy is threatened.

I agree with Mr. Barr: This bill is modest because what it does not do is as important as what it does do. The bill does not create new substantive legal standards for the use and disclosure of individually identifiable personal information, information maintained by Government agencies. The Privacy Act and other Federal statutes already do that.

The bill does not give the individual power to force an agency to adopt a particular privacy policy alternative, including those that would be less intrusive of privacy. It merely requires agencies to consider less intrusive alternatives and to explain why they selected that alternative over the others.

The bill is not overly burdensome, and it would not hinder efficient functioning of Federal agencies.

The legislation applies only to rulemaking. It does not cover other, more numerous administrative actions that fall outside the formal rulemaking process. These are things like adjudications and informal agency actions. In particular, law enforcement agencies would continue to be able to investigate crimes and track down criminals just as they do under current law. The bill includes necessary exceptions that already appear in current law.

And I think I'll conclude here. But I just would like to say that we would like to work very closely with both sides of the aisle to get this legislation into law, and I think it is very important that we had Chairman Grassley to testify over here because we don't have as many conservative privacy advocates on the Senate side as

we do on the House side. And I thank all the Members of this panel for holding a hearing today and pushing this most important legislation.

Mr. CANNON. Thank you, Ms. Murphy.
[The prepared statement of Ms. Murphy follows:]

PREPARED STATEMENT OF LAURA W. MURPHY

Chairmen Chabot and Cannon, and Ranking Members Watt and Nadler:

I am pleased to testify today on behalf of the American Civil Liberties Union in favor of the Defense of Privacy Act, H.R. 338. The ACLU is a nationwide, non-partisan organization of nearly 400,000 members dedicated to protecting the principles of liberty, freedom, and equality set forth in the Bill of Rights to the United States Constitution and in our nation's civil rights laws. For almost 80 years, the ACLU has sought to preserve and strengthen privacy in many aspects of American life.

Americans' right to privacy is in peril. Individuals' personal information, including medical and financial records, is being collected through an ever expanding number of computer networks and being stored in formats that allow the data to be linked, transferred, shared and sold, often without consent or knowledge.

The same technological advances that have brought this country enormous benefit also make people more vulnerable to unwanted snooping and accidental disclosure of personal information. The federal government's increased reliance on computerized records increases efficiency but also poses significant challenges to privacy.

H.R. 338, the "Defense of Privacy Act," would require federal agencies to issue privacy impact statements with the rules or regulations they propose. By requiring privacy impact statements, the bill would encourage agencies to develop a systematic means for reviewing how a particular regulation would affect individual privacy. In addition, such statements would put the public on notice about the choices federal agencies are making about the use and disclosure of individually identifiable information and give the public a carefully limited chance to participate in those decisions.

The Defense of Privacy Act would provide an important check and balance on federal agencies' use and disclosure of personal information inside and outside the government. The passage of this legislation would be an important step in the effort to protect privacy, particularly as the federal government relies more and more on powerful information technology.

THE HISTORY AND LESSONS OF THE "KNOW YOUR CUSTOMER" BANKING REGULATION

The history of the "Know Your Customer" ("KYC") regulations provides important background on the need for privacy issues to be considered before a regulation is adopted.

In 1998, pursuant to the Bank Secrecy Act and other federal law, each of the bank regulatory agencies published parallel "Know Your Customer" regulations to facilitate the filing of suspicious activity reports, an element of the agency's broader anti-money laundering initiative. Although most banking institutions already had adopted KYC programs voluntarily, the proposed regulation established uniform standards across the banking industry. Banks were required to identify customers and their normal and expected transactions, to determine the customer's sources of funds for transactions involving the bank, and to monitor daily transactions and identify those that appear suspicious. The impact of the regulation, however, would have been to require banks to track innocent individuals in their day to day financial transactions and collect and track an enormous amount of personal financial information through federal databases.

In 1999, the Treasury Department was overwhelmed by almost 300,000 comments on the proposed "Know Your Customer" regulations because the agency failed to consider the privacy implications of tracking customers' routine banking activities and reporting personal financial information to the government before proposing the rule. As a result, the agency was forced to retreat and withdraw the proposed rule.

The KYC experience provides two clear lessons. First, Americans care about the privacy of personal information. Out of the almost 300,000 comments submitted on the proposed KYC regulations, only a small fraction were in favor of the regulation. Second, federal agencies must consider privacy up front. As demonstrated by the proposed KYC regulations, because bank regulators failed to consider privacy, the proposed regulation unraveled, forcing regulators back to the drawing board and wasting federal resources.

REQUIREMENTS OF THE DEFENSE OF PRIVACY ACT

Although federal laws regulate the use and disclosure of personal information within the government, privacy continues to be an afterthought in the development of federal policy. In addition, the public has little opportunity to comment on—or even understand—the choices administrators are making about the use and disclosure of individually identifiable information.

The Defense of Privacy Act would establish basic checks and balances on federal agencies' decisions to use and disclose personal information. The legislation's "privacy impact statement" builds the principles of Fair Information Practices into the rulemaking process and would enhance individuals' control over personal information stored in government databases.

The bill would require agencies to engage in a systematic review of privacy before federal regulations are adopted and irreversible privacy violations occur. In addition, it would enhance federal agencies' public accountability for decisions about the use and disclosure of personal information.

This legislation is modeled after the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 seq. For over twenty years, it has required agencies to consider the needs and concerns of small business whenever they engage in rulemaking subject to the notice and comment requirements of the Administrative Procedure Act ("APA") or other federal law. This bill adopts requirements almost identical to those found in the RFA. Instead of assessing the impact on small business, however, the agency analyses would assess the impact of a regulation on individual privacy.

WHAT THE BILL WOULD DO:

Require a systematic review of privacy issues before a regulation is adopted.

Sections 2(a) and (b) would require federal agencies to issue initial and final privacy impact analyses whenever the agency is required under the APA or other federal law to publish a general notice of proposed rulemaking, including interpretative rules involving tax laws.

The "initial privacy impact analysis" would be published with the agency's proposed rulemaking and the public would have an opportunity to comment on the privacy impact statement and the underlying regulation. The contents of the impact analysis would include an assessment of the extent to which the proposed rule will impact individual privacy interests including: 1) what personally identifiable information is to be collected, and how it is to be collected, maintained and used; 2) whether and how individuals can access the personal information that pertains to them; 3) how the agency prevents the information collected for one purpose from being used for another purpose; and 4) what security safeguards are in place to prevent unauthorized disclosure of personal information. Most importantly, the agency must describe alternatives to the proposed rule which accomplish the policy objective but minimize impact on individual privacy.

A "final privacy impact analysis" would be issued with the final rule or regulation. This final privacy impact statement would include the same categories of information as the initial impact statement. In addition, the agency would have to explain the steps it has taken to minimize the "significant" privacy impact on individuals, including the factual, policy and legal reasons for selecting the alternative adopted in the final rule and why the other alternatives were rejected. The final privacy impact statement would also summarize the significant issues raised in the public comments.

Enhance public participation and agency accountability for individual privacy interests.

Section 2(d) would require the federal agency proposing a rulemaking that would have a "significant privacy impact on individuals, or a privacy impact on a substantial number of individuals" to ensure individuals have been given an opportunity to participate. Agencies could do this by taking steps such as announcing the rulemaking's potential privacy impact in publications with a national circulation, holding public hearings and conferences, and directly notifying interested individuals.

Section 2(f) would provide individuals who are "adversely affected or aggrieved" by final agency action to obtain judicial review of compliance with the procedures for final privacy impact statements.

Section 2(e) would require a periodic review of rules that have a "significant privacy impact on individuals, or a privacy impact on a substantial number of individuals" to determine whether a rule can be amended or rescinded to minimize an adverse privacy impact. Such review is required to take place within ten years of the date of enactment of the regulation. Agencies are also required to publish plans for

these reviews in the Federal Register and invite public comment on whether the rule should be rescinded or amended.

WHAT THE BILL WOULD NOT DO:

The Defense of Privacy Act would take important steps to protect privacy. Equally important, however, the legislation would not undermine government rulemaking process or inhibit important government policy goals.

First, the bill does not create new substantive legal standards for the use and disclosure of individually identifiable personal information within the federal government. The Privacy Act and other federal statutes continue to regulate the use and disclosure of personal information held by federal agencies. Sections 2(a) and (b) of the bill simply offer criteria that would be used to measure the privacy impact of any particular regulation.

Second, the bill does not give an individual the power to force an agency to adopt a particular policy alternative. The final privacy impact analysis requires agencies to articulate the available policy options and state why one alternative was selected over the others. But, the bill does not require the agency to adopt the alternative that is least intrusive on privacy.

Third, the bill is not overly burdensome and would not hinder the efficiency or functioning of federal agencies. The legislation only applies to rulemaking, not to the vast amount of administrative action that falls outside the formal rulemaking process, including adjudication, informal action, and guidance. Law enforcement agencies would continue to be able to investigate crimes and track down criminals just as they do under current law. In addition, a privacy impact analysis would only be required if a rulemaking is required in the first place. The APA includes exceptions that exempt certain agency functions from the rulemaking process altogether, including when rulemaking procedures are "impracticable, unnecessary, or contrary to the public interest." In addition, privacy impact statements could actually increase efficiency by cutting down on privacy debacles like the proposed KYC regulation. Lots of government resources were wasted on that proposed rule because there was little to no consideration of privacy in the development of the proposed regulations.

Fourth, the bill would not result in an overwhelming amount of litigation. Judicial review is limited to review of agency compliance with the procedures related to the final privacy impact statement. It does not provide individuals a right to sue over substantive decisions the agency makes in the final regulation. In 1996, the Small Business Regulatory Enforcement Fairness Act established the same judicial review provisions in the RFA as are included in this legislation. Pub.L. 104-121.

Finally, the legislation includes the same waivers available under the RFA. Privacy impact statements would not be required when emergencies make compliance "impracticable."

CONCLUSION

The ACLU strongly commends Chairman Chabot (R-OH) for introducing this important bill. We urge other Members to join them in support of a good government measure that would enhance individuals' privacy.

Mr. CANNON. I think that we have probably helped the ACLU here with the PATRIOT Act. I think that was probably the cause of the spike of—

Ms. MURPHY. It's sad, though, that things like that have to help the membership of the ACLU.

Mr. CANNON. It is, I suppose. But let me just say that it's really nice to know there are 400,000 people out there that care enough to sign up and pay their dues. So we appreciate that.

I'll yield to myself 5 minutes, and then we'll—oh. I think we want to acknowledge the presence of our Ranking Member on the Commercial and Administrative Law Subcommittee Mr. Watt.

Mr. WATT. Good morning.

Mr. CANNON. May I just ask, Ms. Murphy, you know, you talked about CAPS. My understanding of CAPS is that it's really a private database that the Government is adopting. Is that true?

Ms. MURPHY. Well, it is a database, but I don't know how you can call it private when the Government adopts it.

Mr. CANNON. Right. But it comes from—it was created by the—by one or more of the airlines and used, as I understand, in a primitive form to identify many of the terrorists on 9/11 and has now become more central to the Government activity.

Ms. MURPHY. Right. Well, the genesis of CAPS has come from the airline industry—the fact that the Government is now going to be responsible for administering this program, in my view, makes it something completely within the purview of the Government, and the troublesome part of CAPS is that they did not issue regulations in advance of the program. So this bill would not necessarily capture CAPS-related regulations, and we need to look at ways to find—to force and compel the agencies to issue regulations and come to Congress before they institute such invasive programs.

Mr. CANNON. Thank you.

One of the things I'm concerned about is there are a lot of private databases out there. There are databases, huge databases, that are being manipulated by private companies. Much of their information comes from public records, but it seems to me that this is a critical interface between what is private and what people can do with private databases, which I think is quite scary also, and the governmental interface.

Let me ask you a question that I would like each of you to respond to. You know, I was concerned, and when I watched and I forced all my kids and all my staff to watch *Enemy of the State*, because that's an interesting movie, what you have there—a couple of things that are really intriguing as it relates here. One of them, obviously the movie is about an innocent citizen who is the victim of a bent bureaucrat with lots of power. And that's scary to everyone. But just as scary is the fact that you have a—well, I get—it's actually a nice thing. You have a Congressman who's represented as being a man of principle. Since he couldn't be bought or bribed or black-mailed, he was killed. I suppose—that may be a more rare circumstance than reality. The nice thing is that you actually had someone who was portrayed as being honest and having integrity. The unfortunate thing is that you have to get rid of him.

But I worry there aren't a lot of us that would be in that circumstance. But there are a lot of us who are mortal and who can be pushed around by data. And so there are two sorts of things. I'm really trying to grapple with what this transition in our society where we have so much computing power, so much ability to manipulate, so much ability to sort in comparison to the available data that it seems to me that we have a couple of problems, and I'd like your insight on those problems, what other problems we have to go along with that.

In the first place, you have the problem of public officials who are subject to extortion because of facts that can be observed through these databases, and, therefore, you get a distorted decision-making process. And then the second concern that I have is, you know, if someone wants an outcome from Congress, like the person did in *Enemy of the State*, he can get it by extortion. But on the other hand, I worry about the lower agent who has a potential son-in-law that he doesn't like and he wants to dissuade him

from marrying his daughter, and therefore goes in the database and finds information.

It seems to me that when you get into that position, you're not much different from some of the States in the world where they use thuggery or bribery or some other form of persuasion other than law to regulate society, and it occurs to me that those two things seem to be critical issues that we ought to be dealing with, that they go well beyond this issue. But I'm wondering, as you've looked at the big questions, are those the big questions, or are there other things out there that we need to be concerned about?

We can start with Mr. Barr.

Mr. BARR. You've raised some very important and fundamentally critical issues, Mr. Chairman, as you always do. And I think those are certainly concerns. A generation ago or so when I was in college, back in the 1960's, we had some scandals back then with regard to the Government, certain Government agencies collecting evidence and compiling dossiers on certain citizens in the civil rights movement and the student movement and the antiwar movement, and that was bad enough. Think what the problem would have been had they had today's technology in those times.

You are right. The availability of the technology, the extent to which technology can be used to collect, analyze, sort, disseminate vast amounts of data, undreamed of just a few years ago, really puts us in an entirely different arena than we were a generation ago, and that influences why we are here today, and it influences what Government can do. The Department of Defense coming forward and saying, you know, hey, it's okay, guys, we're only going to limit the collection of information that goes into TIA to that information which Government can accumulate lawfully, doesn't make me feel any better whatsoever.

The problem here is, and the question here is, do we want Government to be doing this in the first place regardless of where it gets the data. Whether it gets it from a private database as a way to avoid the strictures of the Privacy Act or FOIA, for example, or whether it gets it from somewhere else, the fundamental question is do we want Government gathering data, analyzing it and compiling electronic dossiers on law-abiding citizens with no reasonable suspicion that they have done anything wrong? That is why this debate is so very, very important and why the answer to your question is yes, those are very, very real concerns today, and if we don't address them today, we'll not have an opportunity to in a few years. It will be a fait accompli.

Mr. DEMPSEY. Mr. Chairman, I think you have put your finger on it exactly in terms of asking what is the next set of issues that we need to worry about. I think H.R. 338 should be enacted, address the regulatory process and the collection in the regulatory process. Get that done and in place, but at the same time, begin to move on to the kinds of questions that you're now raising. And one of those is this blurring of the line between commercial databases and Government databases and the increasing reliance of the Government on the commercial data.

The Government—the day of the centralized database of the Big Brother Government computer is beyond us.

Technology has moved in a different direction. The technology has become decentralized. The technology has become privatized. And now the Government no longer has to collect the information into a central database. The Government can reach out to these commercial databases. And currently, those are beyond the reach of the Privacy Act. They would be beyond the reach of H.R. 338 as it currently exists.

I think the first step is to find out what commercial databases is the Government purchasing or using or subscribing to, what is the accuracy of that data? How is it being used? If you are in the database and you are in there wrongly, how can you A, find out, B, correct it? What is that being used for? If it's brought into the criminal justice system, you get the full panoply of constitutional rights in a trial, but if it's used in an employment context or some kind of screening context or voting or if it's used in any of these noncriminal justice contexts, it's not clear to me what the limitations are.

As Mr. Barr correctly pointed out, the privacy laws just are not attuned to this current environment, and this is where I urge this Committee—these Committees to direct their attention. Let's get H.R. 338 out of the way. Hopefully, we can find a Senate cosponsor and move it forward. It's earlier in the Congress this year. Let's get this enacted, but begin to use this as the way to think about the kinds of issues you're raising.

Mr. CANNON. Thank you, Mr. Dempsey. I am well over my time.

Mr. Nadler, would you like to—the Chair yields 5 minutes to Mr. Nadler, the gentleman from New York.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Dempsey, could you elaborate a little bit on the issue of the misuse of information once it's obtained, for example, inappropriate sharing and identity theft, and how we might deal with that?

Mr. DEMPSEY. Well, as we all know, identity theft is one of the fastest growing—probably the fastest growing crime in the United States. If you are the victim of it, it can ruin your life as you try to recover from it, not only the initial monetary loss, but then in the process of trying to clean up your records.

It is also interesting to think that the process of identity theft is continually polluting these databases and introducing false data into them. The State of California alone has a terrible problem through its Department of Motor Vehicles issuing driver's licenses which have biometrics in them. They have the ID. I think they have a fingerprint on them, and they're issuing them to the wrong people. So you are walking around with a Government-issued ID that's not reflecting your real background and your real identity. And then you begin creating a whole new database of information, again, perhaps under somebody else's name.

Part of the basis for this is the Social Security number. The Social Security number clearly was designed to administer the Social Security system to collect and account for the payments. It was originally supposed to be used only for that purpose. Our society, our Government has violated one of the fundamental privacy principles, which is that the information collected for one purpose or a record collected for one purpose should not be used for another pur-

pose. We now see that number everywhere, and it has become the key to identity theft.

I think, perhaps, we can get that cat actually back in the bag as we develop new information systems and new information collection and begin using identifiers other than the Social Security number and sticking to the principle that you should have different identifiers for different systems if feasible. But identity theft is at the core. I think both of the questions of security and of some of the other issues, that H.R. 338 would force Government agencies to pay more attention to.

Mr. NADLER. Thank you.

Ms. Murphy, Senator Grassley commented on the case for effective checks in the executive branch, especially in this area. The bill before us provides for judicial review. Do you have any concerns about the Administration's position on judicial oversight of national security agencies?

Ms. MURPHY. Yes. We have substantial concerns, because I think one of the problems with the PATRIOT Act is it wrote out significant judicial review in areas that have to do with personal privacy. So when it comes to business records, academic records, library records, the standard for judicial review is not strong enough so that the Government is forced to justify a need nor that information. And when you look at section 215 of the PATRIOT Act—

Mr. NADLER. You are saying it is not strong enough to make the Government justify—

Ms. MURPHY. That's right. And when you look at section 215 of the PATRIOT Act in particular, the Government only needs to assert to a court that the information its seeking is relevant to a terrorism investigation. So increasingly, through antiterrorism laws that are morphing into crime fighting laws, as we have seen with the use of the PATRIOT Act and whether it is sneak and peek warrants in other areas of the laws, increasingly the ability of the Government to seize information without our knowledge is—the need for that power is being claimed by the Government in order to fight terrorism when, in fact, we know that what happens to these laws and other laws that allow the Government to get our data, mission creep occurs and what's sought for one purpose, is used for another purpose. And that's a constant problem in the context of privacy.

Mr. NADLER. And this, of course, leads right into the question that Mr. Dempsey talked about information being collected for one purpose and being used for another purpose. Can you comment Mr. Dempsey or perhaps Mr. Barr, either one, on how the PATRIOT Act leads to or should we put more restrictions on it with respect to the use and the promotion of information being collected for one purpose and being used for another?

Mr. DEMPSEY. Well, the PATRIOT Act appropriately addressed the question of the sharing of information between the law enforcement and the intelligence communities and eliminated some of the legal barriers to the sharing of that information from the law enforcement side to the intelligence side. There never were any legal barriers preventing intelligence agencies from sharing their information with law enforcement. The fact they didn't do that well had nothing to do with privacy legislation or statutory burden. That was purely a question of turf and institutional issues, which I still

don't think are addressed by the way. But the PATRIOT Act said that information collected for law enforcement purposes under the Grand Jury Authority, under the Title III Wiretap Authority, could henceforth be shared with the intelligence agencies.

Now, when Congress created the Department of Homeland Security and gave it the intelligence, fusion and analysis function of taking all of this information from the law enforcement side and from the intelligence side and putting it together, trying to connect the dots, Congress set up an Officer for Civil Rights for the Department of Homeland Security and a Privacy Officer and gave those officials explicit authority to address the privacy concerns.

Now, what has happened? The President has taken that intelligence fusion and analysis function away from the Department of Homeland Security and given it to an agency, the so-called TTIC under the CIA, where there is no Privacy Officer that anybody knows of, where there is no Civil Rights or Civil Liberties Officer, and where there is not the congressional oversight. Actually, the full Judiciary Committee, along with the full Homeland Security Committee, are holding a hearing this afternoon on this very issue where this will be raised. But that's an example of where I think Congress to some extent in the Homeland Security Act may be recognizing that the PATRIOT Act had gone overboard in some respects and didn't have the adequate checks and balances. I think Congress was trying to create some oversight in the Homeland Security Department, and now we are seeing all of that analysis and sharing and accumulation of information occurring outside of that oversight process.

Mr. NADLER. Can I ask one more question with the indulgence of the Chair?

Mr. CANNON. Without objection.

Mr. NADLER. You said that the PATRIOT Act—that was never a bar—no aspersions—there was never a bar for sharing of information gathered by intelligence agencies for law enforcement purposes and that what the PATRIOT Act did was to enable the sharing of information gathered for law enforcement purposes for intelligence. I thought it was the other way around. And I would think that since we established in the FISA act of 1979 I think it was, a lower bar for gathering—for invading privacy and gathering information, for suspected foreign intelligence agents, that under the 4th amendment, in other words, you don't need the same evidence and the same probable cause to get a search warrant and so forth for foreign intelligence, that since you now are invading peoples' privacy if you are suspected of being a foreign intelligence agent in a way you wouldn't do if you suspected them of being thieves or murderers, that the point is, if they are not foreign intelligence agents, you have to protect against that information coming into the domestic criminal side, because otherwise you are undermining the 4th amendment, and it's not the other side that is the other problem because you have a higher standard before you can collect the information on the other side.

Mr. DEMPSEY. Congressman, you are talking about what is called the Primary Purpose Test. Under the Primary Purpose Test, which was used in the Foreign Intelligence Surveillance Act, the primary purpose of the surveillance had to be the collection of foreign intel-

ligence or counterterrorism information because of the lower standard. That was the purpose. But once that information was collected—

Mr. NADLER. If you met that purpose.

Mr. DEMPSEY. If you met that purpose, under FISA from 1978, it was always permissible to share that information with the law enforcement authorities, and there were 50 or 60 or 70 cases where that was done, obviously espionage cases which start out as counterintelligence cases turn into criminal espionage prosecutions, that could always occur.

The problem that I saw, and others saw, with the PATRIOT Act was starting out with the purpose, the going in for the purpose of collecting criminal evidence under that lower standard. Now, the Justice Department and the FBI really got their knickers in a twist with the FISA court misinterpreting that whole—

Mr. NADLER. They misinterpreted or the court misinterpreted?

Mr. DEMPSEY. It was unfortunately done in secret, even the interpretations of law. They all were just flat out misinterpreting that legislation in a way that did not really even protect privacy, and they had this almost perverted interpretation of that law saying that they had to create this complicated law and went in swearing, the FBI and Justice Department, that there was no criminal interest in people where there clearly was a criminal interest. The whole thing got completely perverted in a way that did no good for privacy and no good for national security.

I am not sure that the solution Congress picked was the right solution. I think that merits revisiting. But it's a classic case of where you take the interpretation of law and put it into a secret box. It's all ex parte. It's only the Government talking to the Government, and it did not well serve either privacy or national security.

Mr. NADLER. Thank you, and I thank the Chair for his indulgence.

Mr. CANNON. This is really quite an interesting hearing. I feel badly having gone way beyond my time. Maybe we can go to a second round if there are more questions.

Mr. Chabot?

Mr. CHABOT. Obviously, I think we would all agree we want to do whatever we can to make sure that our country is protected from terrorism and that we're safe as we possibly can be. But as the Government discussed this program, such as the Defense Department's Total Information Awareness Program as you had mentioned, Ms. Murphy, and the Transportation Security Administration's Computer-Assisted Passenger Prescreening System, I think what you addressed as well, does it seem that either the Defense Department or the TSA took sufficient time, looked closely enough at privacy implications on law-abiding citizens, and how do you think considering personal privacy rights during the regulatory process could have enhanced or improved these particular regulations?

And I'd ask each of the members if they would like to address that. Mr. Barr, I go to you first.

Mr. BARR. Of course, Mr. Chairman, a fundamental problem is no matter what mechanism you have in place, if you don't have

people who care about it and whose mission it is to abide by the law, the system is not going to work. One of the reasons that I suspect, for example, that we see more and more Federal agency use of outside databases, that is private databases, is for the very reason that Mr. Dempsey indicated, and Mr. Nadler expressed concern about, in his opening statement, and that is to avoid the strictures of the Privacy Act or in some cases FOIA. If, in fact, the agency can tell an aggrieved person, who believes they are aggrieved, they don't know it, perhaps, but they believe they are an aggrieved party because the Government has misinformation on them or is misusing information on them, they can avoid having to answer any questions or disclose the information by saying it is not our information, it is not a Government file. That is an increasing problem. And it's one reason why I do think that an additional matter that the Congress needs to look into is the Privacy Act itself and Freedom of Information Act. These laws were put together for very laudable purposes a generation ago, but now the technology that's now available both to private industry and to the Government is light-years ahead of where it was when these laws were crafted. So I think that's a very real concern. Whether or not some of the problems that we're now seeing would have come to light with regard to the Total Information Awareness or whatever they are calling TIA nowadays or CAPPs II, could have been avoided by a more timely and a more public, you know, exposure to this and discussion of this, I think clearly, yes. But the problem is that the development of TIA is not something that Congress mandated in the first place. It wasn't that the Defense Department said—had this forced upon it. It was an idea that they took some general language, and I think it was in the Department of Homeland Security Bill, and said, hey, this means we've been given this general charge to try to come up with ways to better identify terrorists, and they take that ball and ran with it in all sorts of different directions.

The one point that Senator Grassley made before he had to leave is a very, very important one and that is no substitute for true oversight, not just occasional oversight, not just superficial oversight but to ask some fundamental questions about some of these programs that are being developed because they do not reflect congressional intent.

Mr. CHABOT. Let me just mention something that you mentioned, Bob, about the oversight. If we're successful in passing this legislation, and I think, ultimately, we will be, I think we have to be very vigilant that it doesn't become "check this form" or this is a "thing done by the agency" and no one takes it seriously. So I think we have to have considerable oversight to make sure that every department goes through every regulation and rule to ensure that Americans' privacy rights are protected.

Mr. Dempsey?

Mr. DEMPSEY. Mr. Chairman, that certainly is an excellent point you just made. In terms of the CAPPs II Program, the Air Passengers Screening Program of the Transportation Security Administration, I will say that that agency is now seriously considering the privacy issues. They have now a Statutory Privacy Officer, Nuala O'Connor Kelly,

Who I think was an excellent choice for that job and is really trying to bring attention to the issues.

The Agency, before she came on board, issued a Privacy Act Notice which was completely unintelligible. You couldn't even tell what they were talking about and they were basically saying, well, we can do anything and collect anything and keep it for as long as we want. They are now in the process of drafting a new Privacy Act Notice. They are also in the process of doing a Privacy Impact Assessment, because, as I said, the Homeland Security Act does provide for Privacy impact assessments, unlike other Government agencies. I'm afraid that the—I'm still not sure how that's going to come out. I'm still worried about mission creep, terribly worried that some in the Agency are going to try to take an air passenger screening system and turn it into a general law enforcement system, which I think would be a disaster for both privacy and air safety.

In terms of TIA, I spent, personally, a fair amount of time now with Dr. Poph, the Deputy Head of that and the person in charge of TIA. They are trying to understand the privacy issues. They had to be brought to it by Congress, by the Grassley amendment and forced to issue a report. The report still doesn't come close to answering the questions, as Mr. Barr alluded to. They say in the report, we will only use in TIA, the information to which we are lawfully entitled. Well, we've gone through the various privacy laws and shown that again and again in those laws, there are major loopholes for national security or for intelligence, et cetera. Now obviously, we have a serious terrorist threat that we face, and absolutely we need to use information and information technology as one of our strongest weapons in that fight. But to say that there will be a blanket exception, I think, undercuts both the security goals as well as the privacy values. And we need to build those checks and balances back in. I think on the TIA, we're not close to there yet. Particularly, when we think about how that will be deployed outside the Department of Defense, and how, perhaps even not under TIA, agencies are developing data-mining capabilities already, which needs to be looked at.

Mr. CANNON. Thank you, Mr. Dempsey.

If I might just point out, you have touched on the whole array of issues that we need to be concerned about. I want to thank Mr. Barr for his foresight when he was Chairman of the Commercial and Administrative Law Committee in identifying these privacy issues, establishing an oversight or an approach to them. And on the Judiciary Committee, we need to figure out where we are going to do this and continue to do it so that we have an oversight function that is effective. I just don't think we have it anywhere else in Congress. So I thank you very much for that.

Mr. Scott, would you like to ask questions?

Mr. SCOTT. Sure.

Mr. CANNON. The gentleman is yielded 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman, and I thank you for calling the hearing. I would like to thank all of our witnesses. Mr. Barr, many others, worked on the PATRIOT Act, and I think made significant improvements in that Act as to some real constitutional problems and appreciated working with him on that and other bills

where privacy was an issue. Mr. Dempsey and Ms. Murphy have been outspoken critics of many things that this Committee has done, and I think we have benefited from that criticism.

Mr. Dempsey, I share the same concerns as the gentleman from New York pointed out with getting information under the—under FISA, where there is virtually no limit to what you can get. Bona fide curiosity is about the only standard you need to get information under FISA. And when you can start using that in criminal investigations, I think you have gotten into real problems, particularly when all these people are working together, FBI agents and TIA agents working on the same task force, you have the incentive for one to say, you can get it and don't have to worry about probable cause, and if you find anything, let us know, offers real problems.

So I just want to indicate that I share the same concerns that he did. One of the questions on the legislation, I think, we see what the problem is. The question is how this bill would actually help. What information would no longer be available if this bill had been in force?

Mr. DEMPSEY. I think that we would have seen a more careful design of information collection. I think in the Committee report last year on this legislation, it pointed out, for example, the kind of information that is being collected under some of the Federal health care systems where just a huge amount of information is being collected, stored under the Social Security number, and I think that if this bill had been in place, the question would have been forced, do you really need to collect all of this information? Do you need to store it under a Social Security number, where it's most vulnerable to theft and misuse? Do you need to keep it forever, or shouldn't you establish some limits on how long it can be kept?

I think if you're looking at the Veterans' Administration computer systems, if you are looking at the Health and Human Services new-hires database, I think there are a host of regulatory databases that were created over the past five or 10 years which never got the kind of scrutiny. Congress may have put—as Mr. Barr suggested—may have put one sentence into legislation, but then the Agency uses as the justification for a huge data collection effort. And the purpose of H.R. 338 is to say, sort of, stop, look and listen. Pause before you go into this data collection. Solicit comments. Listen to them. Take them into account. Then the Agency can go ahead under this legislation with the data collection.

This is not telling the Government to stop doing anything. If the need is there, if the justification is there, H.R. 338 allows it to go forward. But it focuses the attention of the Agency up front in the design phase. So that they can build in audit trails, for example, to protect against abuse. Far easier to do that when you're building the system than after the fact.

Mr. SCOTT. Before my time expires, as you've indicated, does nothing check the power of a bureaucrat to get information and misusing it? Would this bill create any hardship on an agency? Is there any compliance problem with an agency complying with this?

Mr. DEMPSEY. Well, I think that they are subject to judicial oversight on this. But the CBO found last year that the legislation would not impose any significant cost on the agencies.

Mr. SCOTT. Have any crimes been discovered using all of this information that's floating around, all of this private information? Has invasion of privacy done any good?

Mr. DEMPSEY. Well, in individual investigations, this information can be very useful. When you're dealing with the question of data mining, I think there's no evidence that it's useful yet. It may be there.

Mr. Chairman, if I could just point out one example, the FINCIN, the Financial Crimes Information Network, which collects, by regulation, millions and millions of reports on banking transactions, supposedly to spot money laundering. I think reviews of that system have found that it has had very, very little, if any utility in spotting money laundering, just based upon the flows of money transactions. And yet, that continues to suck in more and more of these currency transaction reports year after year after year. I think that's an example of where this attempt to scan large databases does not produce the kinds of results. The focused, particularized suspicion of the 4th amendment does produce results, and I think that's where we need to focus.

Mr. CANNON. Thank you, Mr. Dempsey.

I think we have two more people who would like to ask some questions, and there's a vote that is coming up. And so if we keep fairly short on the answers.

Go to Mr. Coble and Mr. Watt. Mr. Coble you are recognized.

Mr. COBLE. Mr. Chairman, thank you for calling the hearing, and thank you all for being with us.

Most Americans guard their privacy very jealously, as do I. And until these murderers came calling on 9/11, many Americans and probably most Americans, regarded domestic terrorism sort of indifferently. You know, it will never happen here. I don't mean that they're uncaring about, but it will never come to our shores. Well, it came to our shores. And those who regard our privacy jealously—I don't mean that we need to compromise our privacy, but we need to be a little more flexible than we were.

Good to have you back on the Hill, Mr. Barr. How do you respond, folks, to those who say that society's interest in protecting privacy must take second place to the prevention of terrorism? Must the former inevitably fall victim to the latter, A? And B, some of the Government's most aggressive surveillance technologies, I am told, are described as being intended for overseas use. What safeguards are in place to ensure that they are not deployed domestically?

And let me start with you, Mr. Barr.

Mr. BARR. As always, Colonel, you have put your finger on two extremely important issues. The answer to the last one is, there's nothing in place. And this was a paradigm in a recent discussion played out in the newspapers with regard to something called CTS, combat zones at sea, and this is a program again being developed at DARPA, supposedly, for use in urban environments overseas by our military to marry up an array of surveillance cameras with digitized computer and facial recognition to track cars and people

over time and record and store all of that data from those cameras. As soon as word got out on this, then there have been and this is reported in the paper, police chiefs and law enforcement officials across America they're saying this would be a good tool to use in urban environment for law enforcement purposes in this country.

This is the problem—one of the problems with getting the Defense Department involved in data collection and developing techniques to gather, manipulate, store and use and possibly abuse data on citizens. There's no checks or balances on it, and that's something that Congress really needs to look at in the context of all of these different programs. And I'll leave it to perhaps, Mr. Dempsey, and I have already forgotten—

Mr. COBLE. First question.

Ms. MURPHY. I think the question is a valid one because we are asking the public to give up its privacy protections in the name of assuring national security. And I think the question we have to answer is what went wrong with the terrorism attacks that we have experienced in the United States? And I think Members of Congress should be in a position to fix the things that went wrong, rather than giving the agencies cart blanche to gather information on people who are not convicted of any criminal activity or not suspected of any criminal activity, rather than allowing those agencies to collect that data like TIA would or like CAPPs would. I think the Congress must insist that it fix the problems that will provide real solutions to our national security. And it's interesting, the ACLU is polled on these questions on about whether or not there should be these trade-offs.

And increasingly, the further out we get from 9/11, the more citizens are less willing to give up their privacy. And conservatives and focus groups, in particular, have been angered by what they see in terms of encroachments on their privacy, and they think about what would happen if Attorney General Hillary Clinton had these powers, and who would she investigate, and then people begin to step back and say look, we need to have a standard for protecting our privacy and not react in the haste of the moment. And I think most American people are reasonable. But if you asked them a month after September 11, they'll say I don't have anything to hide. Take my private information. But I think people are being much more reasonable and are questioning and challenging the Government more from all sides of the political spectrum.

Mr. COBLE. Mr. Chairman, in the interest of time, I yield back.

Mr. CANNON. I thank the gentleman. And Mr. Watt, you are recognized for 5 minutes or as much time as you may consume before we have to leave to catch this vote.

Mr. WATT. I thank the gentleman for yielding time.

And let me do two or three things. First of all, I want to join my colleague from North Carolina in welcoming our former colleague back, we missed you. We especially miss you in areas like this where individual liberties are at risk, because we need and needed that balance from both sides emphasizing these issues, and I haven't heard that as aggressively since you have been gone.

Second, thanks to the Chairman for calling the hearing. It's an absolutely necessary and important hearing.

Third, I said in a press conference when the bill was introduced originally, a couple of years ago, whenever it was, that I supported the bill. I still support it. I think it's not revolutionary. And we need to get some control over this area.

Fourth, I'm not sure that I am as optimistic as Mr. Chabot is about the prospect for moving this bill and getting it passed and signed into law. I'm a little more cynical, I think, in my views about this, because I've seen the agencies—the bureaucrats, the bureaucracy that would be potentially impacted by a bill such as this work behind the scenes, underground, undercover to sabotage the passage of a bill such as this. I don't know why it didn't move in the last term of Congress. Perhaps it was the lateness of moving it, but this bill should have moved. I've seen those agencies take the PATRIOT Act and turn it from something that was a strongly bipartisan bill in the Judiciary Committee, that we thought had the support of the Administration, to a bill on the floor that many of us could not support because the bill got rewritten between the Judiciary Committee and the floor of the House by people, most of whom weren't even lawyers and didn't understand the privacy or personal liberties consequences of what was being done.

Mr. CHABOT. Would the gentleman yield? It did pass in the House. It was in the Senate.

Mr. WATT. I know it did pass in the House, didn't pass in the Senate. I'm aware of that. Finally, I'll ask a question now that I have gotten all those things off my chest. I'm wondering if anybody can distinguish for me what the difference is between the Defense Department's Total Information Awareness Program, which is what the original name was, and the Defense Department's Terrorism Information Awareness Program? Is there substantively, in your experience, any difference between what they're doing just by changing the name from one thing to another?

Mr. BARR. Unfortunately, I don't think so, Mr. Watt. It's a trick that we've seen over and over again. You change the name of something and hope that attention will thereby be deflected at the same time. It's the same program, only by a different name.

Mr. DEMPSEY. I agree with Mr. Barr, there is no difference.

Mr. WATT. So we should be concerned?

Ms. MURPHY. I agree, too. And the fact that they have changed their Website several times and changed their name once, is an indication that they are sensitive to public criticism about their mission. So I would suggest that even though it is now called Terrorism Information Awareness, it still is vulnerable to congressional oversight and public criticism as it started out to be.

Mr. WATT. I'll say one final word. I think it's important for us to continue our vigilance in this area without bringing you all back after the votes because this Committee, the only way we can data mine into what they're data mining into is by doing effective oversight, and we need to get into all of these sources and programs and figure out what our Government is doing and in some cases what private enterprise is doing. And I strongly support that and I yield back.

Mr. CANNON. I thank the Ranking Member—and let me just point out what he calls cynicism, I view as duty. There is a duty in this body to be cynical of what the executive branch does wheth-

er they are of the same or different party. And we intend to continue this.

I want to thank our panelists—we are very short on time. You are welcome to leave here. I will just wrap here and state that I really appreciate your comments. I wish we had more time. I think it is best for you that we end this now because you would have to wait for awhile. But a number of things you said have suggested ideas for new hearings. I hope you'll work with staff and help us flesh some of those ideas out.

Along with Mr. Watt, I feel—Mr. Chabot, I feel a keen urgency about exploring these issues, about using legislation and oversight to contain the administrative and executive functions that are moving forward at a very rapid rate. So I thank you for your time and this hearing is now adjourned.

[Whereupon, at 11:47 a.m., the Subcommittee was adjourned.]



A P P E N D I X : S T U D Y

**Outside Participation in the
Development of Proposed Rules**

*Exploratory Research of Rule Proposal
Development in Government Agencies*

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As the exercise of delegated legislative authority, rulemaking is the most important way in which the bureaucracy creates policy. Agencies issue several thousand legally binding rules each year, often pursuant to broad statutory directives that require administrators to balance competing interests and conflicting social values.

Because of its importance, all three constitutional branches of government have sought to control rulemaking through direct oversight and through various procedural constraints designed to promote desired qualities in the process. The most significant of these controls is the requirement that agencies publish a notice of proposed rulemaking (NPRM) in the *Federal Register* and that they solicit public comments on the merits of their proposal. Yet the effects of notice and comment are also limited by the fact that some of the most critical decisions in rulemaking are often made *before* a proposal appears in the *Federal Register*. NPRMs are almost always specific and thoroughly justified, and they often take years to develop. Most other formal constraints on rulemaking come to bear at a late stage in the process as well.

Very little attention has been given on how agencies develop proposed rules. As an initial effort to redress this neglect, the following study seeks to provide an overview of the process. In so doing, it also identifies and discusses some of the key considerations that Congress might consider in evaluating proposal development. These include issues of openness and inclusiveness as well as issues of effective management.

Introduction: Framing Our Study

The Administrative Procedure Act defines a rule as a “statement of general or particular applicability and future effect.” In fact, the words “or particular” have long been a source of confusion and can be ignored for the purposes here. What are often termed “substantive” or “legislative” (as opposed to “procedural” or “interpretive”) rules have the force of law and can only be issued pursuant to explicit delegations of authority from Congress. It is these that provide the focus for our study. Substantive rulemaking is often viewed as an alternative to reliance on case-by-case discretion in implementing policy.

Congress’s delegation of rulemaking authority is necessary if American government is to discharge its responsibilities effectively. As the exercise of (often-broad) legislative authority by non-elected officials, however, rulemaking also poses important issues of legitimacy and control for our political system. As a result, Congress and the other two constitutional branches have imposed various institutional constraints on rulemaking in an effort to promote certain, desired qualities in the process.

Chief among these constraints are notice-and-comment requirements, which are designed to ensure that rulemaking is open and responsive to a broad range of affected interests. Yet although a growing literature suggests that notice-and-comment helps to shape rulemaking, this requirement is also limited by the fact that it comes to bear at a relatively late stage in the decision making process. Little is known about the qualities of the processes that precede it.

Origins and Definition of Rulemaking

The governing powers delineated in the Constitution were granted to the three major branches of government. Despite this, the “fourth branch of government,” the bureaucracy, has become increasingly important as a locus of policy-making authority. This has occurred in large measure through the growth of rulemaking as a tool to carry out legislative mandates. The delegation of rulemaking power to the bureaucracy has been a natural consequence of the public’s ever-increasing demand on government to implement the numerous initiatives affecting their daily lives (Kerwin 2003).

Although rulemaking has existed since the first days of the Republic, its use was relatively limited until the 1930s. The tremendous expansion of federal programs that occurred during the New Deal was necessarily accompanied by a similar expansion in the size and power of the bureaucracy. The latter development was, in turn, facilitated by the Supreme Court’s abandonment of non-delegation doctrine as a basis for declaring statutes unconstitutional. Since the late 1930s, Congress has been free to give agencies broad and even open-ended discretionary powers for the purpose of carrying out its objectives in regulatory and other areas (Shapiro 1986).

If the New Deal was an important milestone in the evolution of rulemaking, it was still common for scholars in the 1960s to complain that agencies did not use their rulemaking authority as extensively as they should. In contrast, scholars have sometimes referred to the

decade of the 1970's as the "era of rulemaking" or the "rulemaking revolution." Although there was a cutback in rulemaking after the 1970s, it was modest in relation to the overall expansion that occurred.

To some extent, the proliferation of rulemaking activity during this period may have been an agency response to the arguments of authorities such as Kenneth Davis (1969) who felt that rulemaking was not used frequently enough in the interest of fair and effective administration. In any case, it also resulted in substantial measure from new regulatory programs to protect workers, consumers, and the environment. Unlike most of the old "economic" regulatory statutes, which gave agencies the option to choose between rulemaking and *ad hoc* strategies of implementation, the new "social" regulation typically required agencies to issue rules-- often within a particular time period. Such requirements reflected the assumption that rulemaking was a forceful way of achieving regulatory results. Among the criticisms that had been leveled against the case-by-case approach was its manifestation of agencies' unwillingness to regulate aggressively.

Institutional Constraints

If the increased use of rulemaking has been desirable in terms of promoting effectiveness and avoiding arbitrariness and capriciousness in administration, it has also been problematic in some respects. Some have argued that, notwithstanding the courts' abandonment of the non-delegation doctrine as a practical necessity, the exercise of legislative authority by non-elected officials power still presents important issues of legitimacy for American government. Others have noted that rulemaking poses important problems of control for elected officials. Perhaps for both of these reasons (to the extent that they can even be disentangled), the expanded use of rulemaking has been accompanied by a variety of requirements intended to make it more accountable.

The Administrative Procedure Act of 1946 is the starting point for any discussion of rulemaking procedures. Enacted in the wake of the New Deal, the APA divides the administrative process into types of actions that have direct and legally binding effects on society: rulemaking and adjudication. The latter is the judicial function of resolving a dispute between a government agency and an individual (whether someone must cease and desist from an allegedly deceptive practice under the Federal Trade Commission Act, for example, or whether someone is eligible for a benefit under the Social Security Act). The APA requires that individuals affected by adjudication are entitled to formal due process as a last resort-- at least in cases where Congress has determined that important interests are at stake. Triggered by statutory language requiring that decisions be based "on the record after an opportunity for an agency hearing," the Act's adjudicatory procedures are much like the procedures that courts use in trying a case.

The APA outlines much less formal requirements for rulemaking. With certain broad exceptions, agencies are required to publish a notice of proposed rulemaking in the Federal Register and to solicit written comments concerning the merits of their proposal. Unlike the APA's strict standard of judicial review for adjudication, which requires that decisions be based on "substantial evidence in a record," its rulemaking procedures require that decisions not be

“arbitrary or capricious.” Although the operational definition of this standard was not clearly articulated, it was generally understood to require only that there be some reasonable basis for the agency’s decision (and not that the agency prove the correctness of its empirical and legal premises). Most authorities feel that this relatively lax standard reflected an unwillingness to interfere with bureaucratic judgment in areas of policy making. The framers of the APA felt that, as a legislative process, rulemaking should be informed by the views of affected interests but that it should not be unduly constrained by procedural requirements. This was consistent with the sanguine view of bureaucracy that was popular among many New Deal intellectuals ((Administrative Procedure Act: A Legislative History 1946).

As rulemaking expanded in the late 1960s and 1970s, however, so did efforts to constrain rulemaking decisions. One important change was the incorporation of more rigorous due process into notice and comment, itself. This occurred in part through enabling statutes that required agencies to base rules on evidence in a record. In some cases, these statutes also required agencies to hold hearings and to afford participants certain procedural rights such as cross-examination and rebuttal. So-called “hybrid procedures” (because they represented a middle ground between the APA’s requirements for rulemaking and adjudication) were especially prevalent in the new social regulation (Driver 1981).

The courts followed much the same path in the 1970s. The rise of the “hard look doctrine” essentially involved a reinterpretation of the APA to require that agencies justify their rules on a record as a basis for meaningful judicial review. In some cases, reviewing courts also required adversary procedures as a way of testing those records. Although Several Supreme Court decisions in the late 1970s and the 1980s criticized lower courts (primarily the D.C. Circuit) for going beyond the APA, most notably in regards to the proscription *ex parte* communications within the Executive Branch, precedent has not been consistent and has not returned to anything approaching the lax expectations that existed before 1970 (West 1995).

Several factors explain these changes in the character of notice-and-comment. Legislative requirements were, to some extent, a concession to constituents who wished to impede the implementation of new programs. Yet both Congress and the courts were also motivated to improve the quality of rulemaking, per se, by making it more open and accountable and by ensuring that agencies would consider all relevant comments. These goals were underscored by allegations, popular at the time, that agencies were often subservient to narrow clientele interests.

Congress and the executive have imposed a variety of other constraints on rulemaking as well. A number of analytical requirements seek to ensure that agencies take a comprehensive look at the environmental, social, and economic effects of their policies. These often require the preparation of reports, such as cost-benefit analyses and environmental impact statements. The two political branches have also sought to strengthen their own abilities to oversee rulemaking. For example, the Congressional Review Act of 1996 requires all final rules to be submitted to Congress, and it stipulates that the legislature shall have sixty days to consider significant rules before they go into effect.

Regulatory review has been an especially significant development in rulemaking. Created by executive orders and existing in one form or another since the 1970s, this program has required some or all rules to be justified on the basis of cost-benefit analysis and allows agents of the president in the Executive Office to screen rules before they go into effect. Review authority has been vested in OMB's Office of Information and Regulatory Affairs (OIRA) since 1981. Although President Reagan required all rules to be cleared through OIRA in that year, oversight has been confined to "significant regulations" since the Clinton Administration. These are rules that have a projected economic impact in excess of \$100 million per year, that satisfy one of several other criteria, or that are otherwise considered to be significant by OIRA or the agency. Regulatory review does not give OMB formal, legal authority to block or change rules. Still, most authorities conclude that OMB enjoys substantial influence under its provisions (Friedman 1995).

Limitations of Institutional Constraints: The Importance of Proposal Development

The constraints on rulemaking described above undoubtedly have important effects—both in terms of the values they are designed to promote and in terms of their side effects on competing values such as administrative efficiency and effectiveness. As a matter of perspective, however, it is also important to realize that most controls on rulemaking come to bear at a relatively late stage in the process, after agencies have defined and prioritized problems and after they have identified, evaluated, and eliminated competing solutions to those problems. That is to say, most controls on rulemaking are designed to evaluate or test a particular policy alternative embodied in a proposed rule.

Several observations are important here. One is that proposed rules are usually very specific. Although NPRMs are occasionally open-ended, this is not common. Thus, agencies strongly prefer detailed proposals as a way of focusing public comment and of providing due process to affected interests (who might otherwise complain that they were not given adequate opportunity to address what agencies intended to do). Proposed rules also frequently take a long time to develop. Although the length of the process is difficult to measure (the determination of when an agency begins working on a rule can be somewhat arbitrary, for example) and although it varies greatly from case to case, the formulation of an NPRM often takes years. One recent study of 44 rules found that it lasted for more than 5 years on the average (West 2004). A final and closely related observation is that proposed rules tend to be thoroughly justified as well as reflect a good deal of research and analysis. Important proposals are often accompanied by book-length reports.

In brief, then, proposed rules usually represent a series of important decisions and a substantial investment of time and effort. Are agencies willing to change their proposals in response to public comment? Although several recent studies have answered this question in the affirmative, some have added that the changes do not tend to be of a fundamental nature for at least two reasons. Perhaps the more obvious has to do with the sunk costs in organizational resources and psychological commitments. In addition, agencies may feel compelled to invite a second round of public comment on important changes in the interest of due process. This can be an unattractive option, especially given that rulemaking is already often a protracted process and given that agencies are often under pressure from Congress or the courts to issue rules in a

timely fashion. One might add that the difficulty of changing proposals also increases the incentive to develop proposals that will not need to be changed, thus reinforcing sunk costs in proposal development. Whether or not-- or how often or the degree to which-- agencies are inclined to make "important" changes in proposed rules is an open question, the answer to which is ultimately in the eye of the beholder to a great extent. Suffice to say for the present that many important decisions are made during proposal development. It is there that problems are identified and defined, and that most alternative solutions to those problems are eliminated.

Despite its importance, proposal development has received very little attention. As an effort to redress this neglect, our study provides a broad overview of the process that is guided by the following, broad questions:

- *Where do the initiatives for proposed rules originate and how are they placed on agencies' policy-making agendas?*
- *Who participates in proposal development and how open and inclusive is the process?*
- *How is proposal development managed as an organizational process?*

Our examination of these issues is based primarily on survey data, elite interviews, and agency standard operating procedures that we have collected. It also incorporates our analysis of a very limited body of existing research in these areas.

Hardly any of the questions posed in this study have neat answers. A striking if largely anticipated finding is that the process of developing NPRMs defies generalization with regard to most of its important dimensions. This, in itself, is an important finding. If the primary intent of the APA was to standardize agency policy making across the federal bureaucracy (or at least the regulatory bureaucracy), it only succeeded in standardizing the last and perhaps the least important stage of the process.

The questions we pose also make explicit the various goals that provide a basis for evaluating rulemaking (and bureaucratic performance generally). These include the democratic values of inclusiveness, responsiveness, and transparency that inform the notice-and-comment requirements of the APA as well as managerial values such as objectivity, efficiency, effectiveness, and coordination. The issues surrounding proposal development and its possible reform can be framed largely in terms of the tension among these often-competing considerations.

Methodology

Our study relies primarily on two kinds of data. First, an electronic questionnaire sought to solicit quantitative information on the rulemaking process in federal agencies concerning specific rules that were promulgated in 2004. Second, elite interviews sought to solicit qualitative information from upper and top management personnel concerning specific agencies' general rulemaking processes. This two-pronged approach allows the quantitative analyses to provide specific insights into patterns and trends while the qualitative analyses helps to provide general explanations for the results.

Electronic Questionnaire

The electronic questionnaire used for this study consisted of 25 questions that were divided into four general areas: 1) the decision to regulate, 2) development of the proposed rule, 3) internal/external review of the proposed rule, and 4) effects of the comment period on the proposed rule (See Appendix B for complete questionnaire). Questions were of a mixed format including Likert scaling, open-ended, and check-all-that-apply. Respondents were given the option on each question to provide additional information in order to minimize the constraining effect of the questions' designs. They were also allowed to skip questions if they wished not to answer.

The questionnaire was administered through a secure electronic link that enabled respondents to save their progress and submit their results at a later time. The link and invitation to participate in the study was e-mailed to each of the identified contact persons for each of the rules that the study chose to analyze (See Appendix A for a detailed explanation of the rule and subject selection process).

Respondents

Respondents to the electronic questionnaire were a sample of individuals that participated directly in the development of a predetermined rule. Respondents' selection was based on their inclusion in the Federal Register as the contact persons for these specific rules. The number of respondents was 37 out of 409 total persons solicited to participate (9.05%).

The respondents consisted of a wide range of job titles and hierarchical levels including technical analysts, attorneys, program directors, deputy general counsels, and many more. The average length of time they had served with their particular agencies was 16.26 years and had been in their current positions for an average of 7.86 years.

Measurement and Analysis

The survey questionnaire sample was drawn out of a population using a random sampling method. Based on statistical calculations, we are 95% sure that our data is statistically accurate with actual results varying no more than 16% of those values reported. Although the limited sample size has resulted in a lower confidence interval, sound statistical inferences and credible

information regarding the patterns of the federal rulemaking process can be extracted from the survey analysis. In order to achieve accurate analysis results, we used STATA, a survey analysis module. In contrast to other statistical programs, commands within STATA take survey sampling information into consideration which enhances our results.

Elite Telephone Interviews

The elite interviews used for this study were conducted as a teleconference in which a principal interviewer asked the questions and recorded responses while one to three other researchers simultaneously recorded responses and formulated an analysis of those responses. A set of open-ended questions on general rulemaking practices were used to help guide each of the interviews (See Appendix D for complete question set). However, each respondent was encouraged to provide additional information that they felt was relevant to better understanding their agencies' practices. As such, the interviews took on a conversational tone that facilitated the extraction of information that would have otherwise been missed. Typically, the calls lasted from 30 to 60 minutes.

Respondents

Respondents to the elite interviews were a sample of individuals who had previously worked or were currently working in a federal agency or department as a top manager in their organization's rules and regulations section. Their selection was based on their job position within the agency and level of knowledge on their agency's rulemaking practices. There were 16 respondents that participated in the elite phone interviews.

Measurement and Analysis

Based on the interview transcripts, themes were identified by analyzing all of the responses together as a single block of data. Themes were then compared to the questionnaire results to assess similarities and differences between the different agencies. The method used for identifying and analyzing these themes was having three research members each derive conclusions based on the data and then cross-reference their findings with one another. This method allowed for the identification of major themes which were identified by each of the researchers, and less obvious themes that were identified by only one or two researchers. The less obvious themes were discussed until all three members accepted the finding as being credible or was dropped from the study due to lack of convincing evidence.

Limitations

The most obvious limitation of the electronic questionnaire is the low response rate. Extant research on the administration of electronic questionnaires indicates that response rates typically hover around 10%. This particular questionnaire proved to be no exception in that only 37 subjects responded out of a potential 409. According to accepted statistical analysis procedures, a minimum of 35 responses are needed in order to conduct a statistically significant analysis. Although it was hoped that comparisons across agencies and policy areas could be made, the small survey sample prohibits this. As such, an analysis of the study's electronic

questionnaire is only able to produce very general results on the rulemaking process across the various federal agencies.

Limitations that are common to both the electronic questionnaire and elite telephone interviews are that subjects are asked for their impressions about past and current circumstances, and that these can be affected by subjective factors such as lapses in memory, self-censorship, and personal biases. Also, the answers of those who chose not to respond could possibly differ than those who did, especially among subjects that were prohibited by their agencies from answering. If differences do exist, this may possibly skew the results or allow a significant factor in the rulemaking process to go unnoticed. In addition, the ability to generalize the results of the questionnaire and interviews may be limited by the time period of the rules analyzed and the time period in which the interviews were conducted. This study cannot claim with confidence that the 2004 questionnaire results and the 2006 interviews would be similar in consecutive years, during different presidential administrations, or under different combinations of party control in Congress and the White House.

How are rules initiated?

Issues of problem definition and agenda setting are no less important in the rulemaking process than in the legislative process. Where do ideas for rules come from and why do agencies decide to pursue some of those ideas and not others? In fact, rules come from various sources in almost all agencies. Some are generated internally and some are suggested or mandated by various actors in the agency's environment. In many cases, the exchange of information and ideas is so fluid and seamless that it is difficult for even those most intimately involved in a rule's development, to recall precisely where it originated.

Although rules have diverse origins, and although the processes for initiating the development of proposals vary greatly among organizations, perhaps the most important generalization from our study concerns the overall importance of Congress in setting many agencies' agendas. Several of the officials we interviewed spoke to the tension between so-called discretionary and non-discretionary rulemaking and to the challenges this posed for the management of agency resources.

Discretionary Rulemaking

All substantive rulemaking must be authorized by statutory law. Beyond this, however, several of the senior officials interviewed for our study stressed the distinction between discretionary and non-discretionary rulemaking. The former is where an agency decides which issues to deal with through rulemaking pursuant to a general delegation of authority (often broad). For example, most rulemaking by the Occupational Safety and Health Administration (OSHA) is discretionary under its mandate to prevent "unreasonable" health and safety risks in the workplace. The officials that we interviewed indicated that, although it was often difficult to sort them out, ideas for discretionary rules came from various sources.

Agency Initiatives: Not surprisingly, many rulemaking initiatives are generated internally. Sometimes they come from enforcement or other line officials who identify problems with existing policies. In some agencies, research by staff also plays a significant, proactive role in identifying the need for new rules. For example, the National Highway Traffic Safety Administration conducts vehicle tests and visits accident sites in identifying the need for new regulations, and its National Center for Statistics and Analysis also analyzes accident data from various sources. As another illustration, some OSHA rules result from site visits by agency staff.

Affected interests: Stakeholders such as industry and public-interest groups are also frequently influential in setting the rulemaking agenda. This may occur through informal communications with rulemaking staff or enforcement officials. In many regulatory agencies, for example, input from industry concerning the need to revise existing rules is a primary source of new initiatives. Groups may also seek to initiate rulemaking through formal petitions. Advisory committees can play an important role in the rulemaking process as well. For example, most of the rules issued by the National Fisheries Service (within the National Oceanic and Atmospheric Administration) are generated by eight Regional Advisory Councils that are composed primarily of various stakeholder representatives.

Although such a study would be worthwhile, our data do not allow an examination of the relative importance or frequency of different sources of discretionary rules. It is something that undoubtedly varies a good deal from agency to agency. It is also an issue that may be brought into sharper focus by identifying different kinds of discretionary rules. For example, several of the officials we interviewed distinguished between significant new rulemaking initiatives on the one hand and “maintenance” or “grass-cutting” rules on the other. As revisions to existing standards, typically in response to technological changes, the latter are frequently suggested by industry in agencies such as OSHA, NHTSA, and EPA. In contrast, the former are more likely to be suggested by the intended beneficiaries of regulatory programs such as environmentalists, consumer advocates, and health and safety groups (and organized labor in the case of OSHA).

Partly because their agencies issued different kinds of rules and partly because of the difficulty of disentangling the effects of various influences, most of the experienced officials we interviewed were hard pressed to identify a particular, dominant source of rulemaking initiatives by their agencies. Instead, a recurring observation was that rules came from many places. One exception to this may be agencies whose primary rulemaking mission is to serve a well-defined constituency or set of interests. As indicated above, for example, the agenda-setting process for the Fisheries Service is largely dominated by the fishing industry. Similarly, interviews conducted for an earlier study suggest that most of the rules developed by the Agricultural Marketing Service are brought to it by producer groups (West 2004).

Non-Discretionary Rulemaking: The Important Role of Congress

Although they may be influenced by external factors, agencies ultimately decide when and when not to develop discretionary rules. In the case of formal petitions, for example, the courts have typically given administrators wide latitude in allocating policy-making resources as they see fit. In contrast, a non-discretionary rule is where Congress enacts legislation telling an agency to issue a policy dealing with a particular issue – often within a prescribed time period. The courts may also play a role in non-discretionary rulemaking by issuing injunctions that enforce legislative mandates. One should hasten to add that agencies may be required to make broad policy judgments within the context of a non-discretionary rule. As alternative means of agenda-setting, moreover, the distinction between discretionary and non-discretionary rulemaking is sometimes a matter of degree rather than an absolute one. Yet the distinction is important nonetheless.

Several of the officials we interviewed observed that their agencies’ agendas were dominated by non-discretionary rulemaking. For example, most the current rulemaking activity by the Department of Energy is mandated by the Energy Policy Act of 2005. Even though their agencies have the statutory authority to issue discretionary rules as well, these have been effectively crowded out by legislative mandates to address particular issues (which must obviously take precedence over agency initiatives). Even some officials whose agencies issued many discretionary rules nonetheless stressed the importance of this dynamic. Although most National Highway Traffic Safety Administration rules are discretionary, for example, congressional requirements tend to focus on especially important and controversial issues that consume disproportionate resources.

The importance that our interviewees attributed to statutory requirements reinforces and clarifies the findings of Marissa Golden (1998) who has undertaken perhaps the only systematic effort to examine agenda setting in the rulemaking process. Although Golden's interviews with several agency officials identify Congress as the most important source of initiatives, they do not distinguish between legislation and less formal congressional influences. The interviews conducted for this study suggest that it is the former that are of primary importance.

That specific statutory requirements are an important source of rulemaking initiatives may not be surprising to most experienced practitioners. This observation does, however, contradict the view, at least implicit in much of the academic literature, that agencies operate with blank checks in the rulemaking process. Even though many of them do have blank checks, the ability of some to draw on their accounts is frequently constrained to one degree or another by competing legislative demands on available resources. As discussed shortly, this can have important implications for the management of agency resources.

Presidential Influence

In a sense, actions that result from presidential influence fall in between discretionary and non-discretionary rulemaking. Presidents cannot legally order agencies to issue rules if Congress has delegated that authority to the head of an agency or department (as is normally the case). The political appointees who usually occupy those positions serve at the president's pleasure, however, and the White House does sometimes seek to influence agencies' rulemaking agendas. One way presidents have done that is by periodically requiring agencies to review existing rules to determine which ones might be obsolete or in need of revision. One senior official in the Department of Labor indicated that his agency had been required to comply with such requirements every 5-7 years.

The White House also sometimes encourages agencies to issue rules dealing with particular issues. Although this accounts for a small percentage of all rulemaking (much smaller than rules required by Congress), such initiatives tend to be important ones. There is also reason to believe that this practice has become more common. Elena Kagan (2001) suggests that, although all modern presidents have sought to shape policy through rulemaking to some extent, the Clinton Administration went well beyond any of its predecessors in its use of this strategy. This occurred in an *ad hoc* fashion as policy advisors in the White House identified particular opportunities for promoting the president's policy and political objectives through rulemaking.

The Executive Office may influence agencies' rulemaking agendas as well. In this regard, developments under George W. Bush reinforce speculation that presidents may increasingly attempt to shape policy proactively through the administrative process. Although its influence over rulemaking has been primarily reactive, OMB's Office of Information and Regulatory Affairs added "prompt letters" to its portfolio under its recently departed director, George Graham. These are suggestions from OIRA that an agency consider issuing a rule in a particular area.

Managing the Rulemaking Agenda

Most of the people we interviewed indicated that their agencies had limited resources and that they were presented with many more ideas for rules than they could accommodate. Typically, agenda setting begins with a preliminary report prepared by staff addressing the feasibility and importance of rulemaking to deal with a particular issue. This report must usually be circulated among different offices with an interest in rulemaking and then approved by management.

Beyond these general outlines, the formal agenda-setting process varies from one agency to the next. For example, our interviews suggest that the review and approval of rulemaking initiatives is more highly centralized in some executive departments than in others. In the Department of Labor, for example, permission to work on an NPRM must be granted by a Policy Planning Board comprised of the various agency heads from DOL. The purpose of PPB review is to ensure that agencies' rules are consistent with one another and with DOL policy, and that they otherwise reflect a rational allocation of resources. (For example, the PPB has reportedly reigned in OSHA on several occasions when it felt that the agency's rulemaking agenda outstripped its resources.) In contrast, the formal approval of rulemaking initiatives is usually delegated to the agency level within the Department of Transportation (although common sense often dictates that agencies typically bring potentially controversial to the Department's attention). How agencies establish their priorities in rulemaking and how this process varies are important topics that have received little attention.

The tension between discretionary and non-discretionary rulemaking can have especially important implications for the management of agency resources. Thus, several of the officials we interviewed noted that legislative requirements interfered with their ability to plan and to follow coherent agendas. One noted that, although Congress obviously had the right to conduct oversight and enact action-forcing legislation, it sometimes did so based on an incomplete understanding of the issues at stake (or on "part of the story," as he put it). In any case, both legislative and presidential requirements tend to reflect *ad hoc* policy and political considerations as opposed to a more comprehensive view of implementation in a particular area. As such, they have the potential to disrupt discretionary agendas that might reflect a rational prioritization of limited agency resources. They also have the potential to disrupt the execution of those agendas. For example, an earlier study identified the need to put ongoing activities aside in the interest of congressional and presidential requirements (and changes in presidential administrations) as a significant source of the delay in rulemaking (West 2004).

The obvious counter to these observations is that, because of the legislative character of rulemaking, other values may trump considerations of rational planning and execution. Indeed, the issues of legitimacy associated with rulemaking discussed earlier may be less severe to the extent that agencies receive their marching orders from Congress or the president. Influences from elected officials may also render rulemaking more responsive to what the public wants or needs. Yet while conceding the appropriateness of legislative directives, the head of a rulemaking office in a prominent regulatory agency nevertheless stressed the need to make Congress better aware of the costs imposed by non-discretionary rulemaking in terms of other

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worthwhile policy initiatives. The desire to educate legislators was a primary motivation behind another agency's recent institution of a five-year rulemaking agenda.

Who gets involved, how, and when?

Once an agency has begun developing a rule, what influences its decision making? An especially important question concerns external influences. Outside participation is common in the proposal-development process and it often involves different kinds of actors. Its importance is underscored by the legislative character of rulemaking and by the intent of the APA and other legislative requirements that the process be open and inclusive. As a prelude to the next section's evaluation of proposal development in terms of these criteria, this section provides an overview of participation in the process. If it is common, its character also varies a great deal from one agency and indeed one rule to the next.

Participants in Proposal Development

Who participates in proposal development varies a great deal from one case to the next. In fact, to state that no two rules involve the same configuration of participants may only be a slight exaggeration. With this caveat, our survey, our interviews, and our review of standard operating procedures reveal that agencies often communicate with the following actors as they are formulating NPRMs:

Other agencies: Agencies frequently communicate with other agencies in the proposal-development process. This may occur through the formal clearance requirements that have been instituted by some organizations or it may occur through informal contacts at the staff or management level. Our data suggest that communications with other agencies may focus on jurisdictional or other legal issues. Communications are also sometimes motivated by the concerns of other agencies' constituents. For example, the Commerce Department or the Small Business Administration may seek to ensure that business interests are not slighted in policy making by OSHA or EPA. A related but more common motive for communications with other agencies is simply to coordinate policy across different parts of the bureaucracy with overlapping or potentially conflicting responsibilities.

This latter observation is especially significant in light of the common view that bureaucrats operate within isolated "stovepipes." Without minimizing the problems of coordination that no doubt exist within the federal executive, both our survey and our interviews suggest that there are frequent communications about rulemaking across organizational boundaries. These communications can occur at all organizational levels from the staff who actually develop rules to the political executives at the agency and departmental levels who must sign off on NPRMs. As discussed later, perhaps especially notable in this regard is the network of senior careerists in general counsels' offices at the departmental level.

Affected interests: One of our elite interviewees indicated that his agency sought to minimize communications with people outside of government, especially after work had begun on a specific proposal. In general, however, our data suggest that such communications are common during the development of NPRMs and that they can focus on the full range of relevant considerations in rulemaking, from legal and procedural issues to empirical issues concerning the probable effects of policy alternatives to the simple expression of preferences. Some of the

officials we interviewed indicated that contacts with affected interests were essential to sound decision making. In many cases, they were the only way in which regulatory agencies could collect information on how various policy options would affect business and other interests. Although a few agency officials were understandably reluctant to frame rulemaking in such terms, several indicated that communications with affected interests were also necessary as a way of predicting the nature and strength of political reactions that would result from different policy alternatives (and that might conceivably derail a rulemaking initiative in the latter stages of its development).

Participation by non-governmental actors in proposal development is largely the province of organized groups. This is hardly surprising given the considerable resources required to monitor and influence agency activities, and it is consistent with much of what we know about participation in the legislative and administrative processes generally. Nor is it surprising that both our survey and our elite interviewees who were willing to offer a comparison indicated that business groups tended to participate more frequently and more effectively than so-called public interest groups such as environmentalists and consumer advocates. Again, this is consistent with much of the literature on interest groups generally and with several recent analyses of participation in the comment phase of rulemaking. One reason for this may be that, at least in many regulatory contexts, business groups are an essential source of information. In any case, they are typically better-organized, better-funded, and more intensely committed than other groups, and there is no reason to believe that these advantages are less important in proposal development than elsewhere.

At the same time, it would be highly misleading to imply that public-interest groups are ciphers in proposal-development, for they can be very active and influential. As indicated earlier, for example, they have often been influential in prodding agencies to initiate rulemaking proceedings. It would also be misleading to imply that participants in proposal development always fall neatly into two camps. Reality can be much more complex or polycentric, and can even involve coalitions that shift from one provision of a proposal to another. For example, EPA's recent consideration of whether to tighten the air quality standard for particulate matter was influenced by the views of medical doctors, public health researchers from major medical universities, environmental group representatives, and officials from the electric power industry, among others (See Appendix H).

The Office of Management and Budget: Several of our elite interviewees indicated that OMB's Office of Information and Regulatory Affairs (OIRA) is an especially important participant in rulemaking by virtue of the powers it enjoys under regulatory review. Established by executive orders and relatively stable in its essential structure since the Reagan administration, this program allows OIRA to screen rules before they go into effect. Since the Clinton Administration, it has been confined to "significant" rules having a projected economic impact in excess of \$100 million/year or satisfying one of various other criteria.

Although regulatory review does not formally come to bear until agencies have completed fully developed proposals, it sometimes provides the basis for communications and influence of a less formal nature during proposal development. Always an element of the review process, early communications have been encouraged by Presidents Clinton and Bush as a way

of intercepting problematic agency initiatives at an early stage in their evolution, before they have acquired sunk costs that discourage change. (Although OMB has substantial power by virtue of its position within the Executive Branch, it does not have the legal authority under regulatory review to block or change regulations.) For their part, agencies may also be motivated to consult with OMB during proposal development in order to avoid “late hits.”

Our data are inconsistent concerning the frequency and impact of OIRA involvement in the development of proposed rules. Thus, while one senior careerist characterized OMB as the “800-pound gorilla,” others indicated that it seldom became involved until their agencies had completed a proposed rule. Still others observed that it rarely became involved at any stage of the rulemaking process. These differing perceptions may be attributable to several factors. One is that, as a relatively small organization, OIRA naturally has to focus limited resources on areas of high priority. These tend to be agencies, such as EPA and NHTSA, which develop large numbers of significant rules which are politically salient. Another explanation is that, although practices vary as good deal, in many cases OMB communications go through departmental headquarters (usually the general counsel’s office) rather than directly to the staff responsible for developing a proposal. This plausibly helps to explain why our elite interviewees generally rated OMB as a more important participant in rule development than did the staffers who responded to our survey. The timing and the character of regulatory review also depend to some extent on the personal preferences of OIRA analysts (“desk officers”) that are assigned to different areas and to the relationships between these individuals and their agency counterparts.

In any case, it is clear that, if its presence is sporadic and varies from agency to agency, OMB can be a significant participant in the proposal-development process. Interviews with two OIRA officials confirm this assessment and suggest that its oversight can be motivated by several factors. Perhaps the most apparent is OIRA’s responsibility for ensuring that proposed rules are justified on the basis of sound cost-benefit analysis (which regulatory review also requires agencies to conduct). A fact worth noting here is that most OIRA staff are trained in policy analysis and that a belief in its value is central to the agency’s culture. OIRA also seeks to ensure that agency rules do not duplicate or conflict with other agencies’ activities, and that they are consistent with the president’s policy agenda. The latter criterion is obviously a broad one, but ample evidence suggests that it sometimes encompasses a concern with the preferences and well-being of constituent groups. In fact, it has often been alleged that OIRA has, on occasion, acted as a conduit for regulated interests.

Congress: In contrast to OMB, Congress reportedly plays a limited role in the development of proposed rules. As discussed earlier, statutory requirements are a very important source of rulemaking initiatives. Yet both our survey and our elite interviews indicate that, although it occurs occasionally, legislative involvement tends to be minimal once an agency has begun work on a rule. The probable explanation that our interviewees offered for this is simply that the legislature lacks the necessary resources—the time, the manpower, and the subject-matter expertise—to monitor and to be a viable participant in administrative policy making. At least two senior careerists at the departmental level added that it was their agencies’ policy to discourage efforts by legislators and legislative staff to influence the development of proposed rules. This was explained in terms of a separation-of-powers argument that views

communications within a “unified” Executive Branch as being appropriate and desirable and legislative communications as being inappropriate.

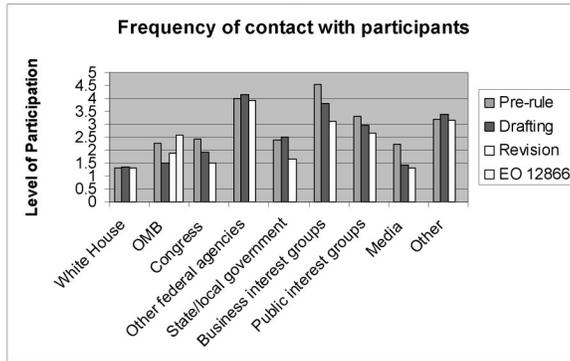
Congress’s relatively limited involvement in proposal development is an interesting finding of our study, for it is inconsistent with an academic literature arguing that the oversight process has become an increasingly important vehicle through which the legislature seeks to influence policy. A few of our interviewees did indicate that legislative involvement in rulemaking was much more common during the comment phase than beforehand. If this is true, it may support the theory that an important function of notice-and-comment is to serve as a “fire alarm” for alerting legislators to politically salient rules that have important implications for their constituents (McCubbins, Noll, and Weingast 1987).

Timing and Influence of Participants

Participation may also vary according to the stage of the process at which it occurs. For example, advanced notices are used at a relatively early stage as a way of framing issues, defining possible problems, and identifying and exploring possible alternatives. Our data indicate that outside participation on the full range of issues relevant to a rule can and does occur throughout proposal development in many agencies. At the same time, several of the people we interviewed suggested that contacts with private interests (as opposed to other entities within the Executive Branch) became more limited or were even eliminated during the latter stages of the process. The reason given for this was that, while gathering information from stakeholders was often indispensable early on, it could present the appearance of impropriety or bias after the agency had begun to develop a specific policy.

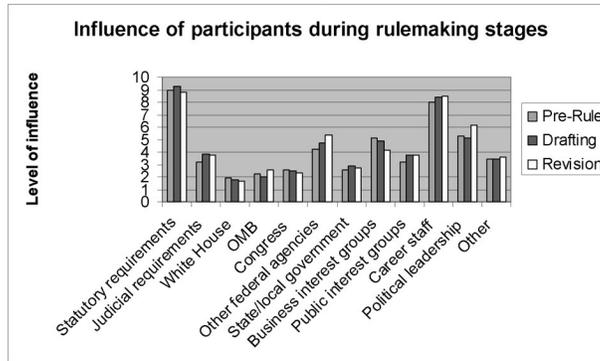
Our survey results for the frequency of contact that participants had with agency officials and how influential these contacts were in the development of proposed rules are depicted in Graph 1. As this graph shows, other federal agencies, business interest groups, public interest groups, and other were the groups with which communication occurred most frequently. These groups scored above a 3 on a scale of 10, showing a moderate level of contact. Business interest groups scored the highest during the pre-rule stage, and other federal agencies scored the highest during the drafting and revision stages. By contrast, the White House, OMB, Congress, state and local governments, and the media all scored low (under 3) in each of the stages of rulemaking.

Graph 1



As illustrated in Graph 2, the influence of participants during the pre-rule, revision, and drafting stages of rulemaking vary slightly from those with the most frequent contact.

Graph 2



Not surprisingly, our survey finds that statutory requirements and career staff had the highest level of influence during all three stages of the rulemaking process. Judicial requirements, other federal agencies, business interest groups, public interest groups, political leadership, and other all exerted moderate influence with a score between 3 and 7 during each of the stages. The White House, OMB, Congress, and state and local governments were all scored as having low influence during proposal development.

The Means of Participation

The nature of outside participation in proposal development varies along a number of dimensions. Sometimes it is initiated by agencies as they collect factual information or as they seek to anticipate the reactions of affected interests or other governmental actors to specific policy proposals. In other cases, outside parties contact agencies. They may learn about proposals that are being considered or developed from the semi-annual regulatory agendas that agencies are required to publish. They may also learn about important rulemaking initiatives through word of mouth or from trade publications and other media outlets. It is important to add some agencies communicate with industry groups and other external actors on such a routine basis that it is often difficult to ascertain who originally certain issues relating to rules.

The mechanisms through which communications occur also vary a great deal. Our interviews and survey data suggest that informal conversations (both in person and over the phone) and e-mails are the most frequent forms. In addition, communications may take place through letters, through public hearings (sometimes held in multiple locations), at trade conferences, and through advanced notices of proposed rulemaking and similar devices. Some agencies have even used focus groups in the proposal-development process. In some cases, outside participation may be structured to a degree by formal procedures. For example, EPA and several other agencies require that drafts of actual or contemplated proposals be circulated among other organizations within the Executive Branch. By and large, however, the character of participation is determined on an *ad hoc* basis. Even within particular agencies, it tends to vary a good deal from one rule to the next.

Advisory committees can be another important mechanism for participation in the development of proposed rules. These bodies are typically constituted to be representative of all the important stakeholders in the administration of a program. Beyond this, however, they vary substantially in their size, their structure, how they are appointed, and the role they play. Some are created by statute and some are created at the discretion of the agency. In some cases, agencies are required to consult with advisory committees and in other instances the use of advisory committees is optional. In most agencies, advisory committees are confined to the provision of advice but in a few they play a more determinative role in rulemaking. In the case of the National Marine Fisheries Service (within NOAA and the Department of Commerce), for example, eight Regional Advisory Councils composed primarily of group representatives (various commercial interests and environmentalists) actually identify the need for and develop proposed rules. There is a presumption that the Fisheries Service will issue these proposals NPRMs if they are reasonable and satisfy the various procedural requirements described earlier.

In general, the nature and role of advisory committees in the rulemaking process is a topic that deserves a good deal more attention than it has received. In one of the few efforts to examine this subject, Nicholas Ashford (1984) classifies advisory committees into three types: *permanent* committees are constituted by statute, *quasi-permanent* committees are created administratively, and *ad hoc* are established by statute or administratively for a specific issue. Nicholas also observes that some of these bodies offer strictly technical advice, such as scientific analysis and opinions concerning the effects of toxic substances, while others are constituted to represent the interests of various stakeholders. What literature does exist on the subject supports the findings of our elite interviews – the structure, function, and purpose of advisory committees varies from one agency to the next.

Democratic values: inclusiveness and transparency in proposal development

Several values can be applied in assessing rulemaking. As discussed in a later section, many of the agency officials we interviewed as well as some prominent academic authorities are concerned with its efficiency as an organizational process. In addition, various institutional constraints imposed by Congress, the president, and the courts are designed to promote substantive rationality in rulemaking. That is, they are intended to ensure that agencies take into account all of the probable consequences of their decisions and that agencies justify their actions objectively through sound constructions of legislative intent, sound reasoning, and sound empirical premises. Although these various expectations can conflict with one another, they might loosely be placed under the heading of *administrative* values.

A second set of values that are at least of equal relevance in evaluating rulemaking might be labeled *democratic*. Foremost among these are openness and balanced responsiveness to stakeholders. Again, the notice-and-comment requirements of the APA, which are based on the assumption that rulemaking is a legislative function, are clearly designed to promote these qualities. The evolution of notice-and-comment requirements since the 1970s can further be explained in large part as an effort to reinforce openness and responsiveness. Thus, the requirement that agencies justify their rules on the basis of a record has been designed both to promote transparency and to ensure that agencies will not ignore relevant comments.

As discussed, however, notice-and-comment requirements do not come to bear until a relatively late stage in decision making. In light of this, it is important to examine inclusiveness and transparency in the proposal-development process. To the extent that proposal development falls short in terms of these criteria, it is also important to ask how inclusiveness and transparency during the comment phase of rulemaking may or may not redress these deficiencies.

Inclusiveness

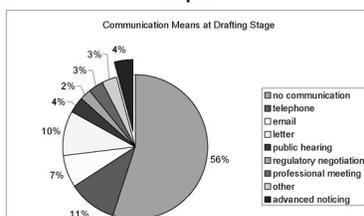
Not surprisingly, practically all of the agency officials we interviewed indicated that, to the extent they communicated with outside parties, they made assiduous efforts to gather input from all relevant interests. We have no reason to doubt this claim, and indeed it is consistent with the diversity of participatory mechanisms described in the preceding section. As a very rough generalization, it seems that the larger, the more pluralistic, the more complex, and the

more fluid the agency's rulemaking environment, the more likely it is to employ creative outreach techniques. This is what one would expect, both in terms of agencies' desire to be fair and their incentive to avoid surprises and policy reversals at later stages in the rulemaking process. Agencies that operate in simpler and more predictable environments may be able to satisfy these imperatives by relying more exclusively on informal contacts with the "usual suspects."

With this said, an important qualification is that stakeholder participation in proposal development usually occurs either at the invitation of the agency or at the initiative of the participant. In the latter instance, it is obviously conditioned by the participant's ability to learn about rulemaking initiatives and gain access to relevant agency officials. The primary alternative to this system is for an agency to issue an advanced notice of proposed rulemaking. The purpose of an ANPRM is to alert the interested public that an agency is considering issuing a rule to deal with a particular issue and to solicit broad input concerning the nature and severity of problems and the merits and demerits of alternative solutions at an early stage of decision making. Yet although all of the senior officials we interviewed said that their agencies sometimes issued ANPRMs, especially when the rulemaking issues were important, complex, or novel, they indicated that this was clearly the exception rather than the norm.

Our interviewees' observation that ANPRMs were not used very often is reinforced by an earlier study which found that, of 200 rules involving notice and comment that were issued in May and November of 1997, only three used advanced notices (West 2004). Similarly, our survey results showed that only 4% of our respondents mentioned the use of ANPRMs when developing an initial draft of the rule. Graph 3 shows these results below.

Graph 3



The senior agency officials we interviewed offered several explanations for their agencies' reluctance to use ANPRMs more often. The most important was that it further delayed an already-protracted process. An important observation here is that, although agency officials undoubtedly care about the value of inclusiveness in rulemaking, this competes with other values such as administrative efficiency. The importance of efficiency is often underscored, not only by the imperatives of internal management, but by pressures from Congress, the courts, and constituent groups to issue rules in a timely manner.

Two officials also felt that the information obtained by their agencies via advanced notices tended to be of limited value because the input was so unfocused. Without specific proposals to structure participation, that is, much of the input had little relevance in terms of the policy options the agencies ultimately chose to develop. A third explanation by one interviewee was that an ANPRM could precipitate OMB involvement at an earlier stage of the process. Because of this, his agency occasionally used alternative techniques for attempting gather broad input on policy issues that did not necessarily imply the recourse to rulemaking. Finally, one senior official also noted that one effect of an ANPRM was to create an expectation that the agency would issue a rule. This, in turn, could have important political or public relations implications if the agency chose not to issue the rule or if its proceeding was even delayed for one reason or another.

How inclusive, then, is participation in the proposal-development process? If there is obviously not a simple answer to this question, one relevant observation is that public notice and comment would seem to have little more than symbolic value if prior participation were completely inclusive. In fact, however, agency officials typically attest that they pay close attention to and sometimes learn from public comment. Their claims are supported by several recent academic studies which conclude that agencies do often change proposed rules as the result of comment (or at least in a direction that is consistent with comment). This suggests on its face that participation in proposal development is less than perfectly inclusive.

In turn, the converse of this observation is the question of how effective notice and comment is as a check on participatory oversights during proposal development. One issue is whether public comment, itself, is a vehicle for balanced input. Many have alleged in this regard that, because of the resources it requires, effective comment in rulemaking is almost exclusively the domain of organized interests and that it is frequently dominated by business groups.

Assuming that public comment can at least broaden the information that is brought to bear in rulemaking, a more pertinent question for the purposes here has to do with its potential to correct the effects of participatory deficiencies during proposal development. If there is an emerging consensus that agencies change proposed rules, there is much less agreement concerning the importance of those changes. To revisit our earlier discussion of this issue, suffice to say that the most fundamental decisions in identifying problems and identifying solutions to those problems are usually made before an NPRM appears in the Federal Register.

Suffice to say as well that fundamental changes in proposed rules are difficult to make. This is not only because of sunk organizational costs; it is also because of the demands of due process. Two of our interviewees noted in this regard that major changes in proposed rules often necessitated either a second round of public comments or a new NPRM in order to provide ample opportunity for stakeholders to respond to newly contemplated agency actions.

Transparency

Although transparency is an important criterion for assessing much of what government does, it is arguably especially critical in the exercise of delegated authority by non-elected officials (Foreign/Trade Terms, 2006). In the context of rulemaking, the most important

mechanism for achieving this goal is docketing, or the creation of a public record that lays out the rationales for an agency's decision. Interestingly, the APA says nothing about a rulemaking record, and it was not common for agencies to compile one in any formal sense during the first quarter century following the Act's passage. This changed in the 1970's, however, as some enabling statutes required agencies to base their decisions on substantial evidence and as courts became increasingly willing to take a "hard look" at rules under the terms of the APA. Although several court decisions have since approved of certain kinds of *ex parte* communications under the APA, the expectation that rules be accompanied by and reviewed primarily on a record remains an important part of the rulemaking process.

Yet when do agencies begin building a record and what goes into it? As with other dimensions of rulemaking, there are not simple answers to these questions. Rather, our elite phone interviews, our survey of rule makers, and our examination of several agencies' standard operating procedures indicate that docketing practices cover almost the complete spectrum of possibilities.

When docketing begins: Two of our interviewees indicated that their agencies docketed all communications with outside parties from the earliest stages of proposal development. Others indicated that they began docketing all communications at some intermediate stage of proposal development, and others indicated that they were more likely to docket at least some kinds of communications as the process progressed. The most commonly mentioned transition point was when the agency stopped collecting general information about the problem in question and about the implications of various solutions and began either to formulate or draft a specific policy. Almost all of the officials we spoke with indicated that their agencies docketed all outside communications after the publication of an NPRM. The exception was a senior careerist who indicated that his agency sometimes entertained off-the-record communications during the comment phase in a process that relied on open-ended proposals and that seemed to resemble negotiated rulemaking in its essential dynamics.

What is docketed: The definition of "outside parties" is critical to the issue of docketing. A key observation is that most agencies do not feel the need to record communications that occur within the Executive Branch. These include contacts with other agencies and with the White House (and White House staff), OMB, and other entities within the Executive Office. They do not, however, include contacts with legislators or their staffs, which are often treated in the same way as communications with non-governmental actors.

The practical and legal justification for not docketing communications with other agencies and entities within the White House and Executive Office is the notion of a so-called "unified executive." Under this influential theory, the entire federal bureaucracy (with the exception of the independent boards and commissions) is viewed as one organization that is directly accountable to the president. Several important court decisions have endorsed a unified executive in recent years, not only in terms of constitutional intent, but as a way of promoting accountability and rational coordination in the administrative process.

A few of the officials with whom we spoke also indicated that their agencies docketed some but not all communications with non-governmental actors and Congress (at least at some

stage of proposal development). The general distinction in this regard was between communications that either were or were not "material." One individual observed that information which directly influenced the content of a proposal would have to be included with the publication of an NPRM and would eventually have to be placed in the record accompanying a final rule. The determination of materiality was usually made at the discretion of the agency official who acquired the information.

Again, perhaps the only confident generalization that one can make about docketing practices in proposal development is that they defy generalization. It is probably fair to say that docketing is not a major concern for a majority of federal agencies and that it often does not occur. Yet docketing is taken very seriously by some agencies. To the extent that it occurs, moreover, specific practices vary a good deal from one case to the next.

Explaining variation: Several factors may help explain this variation. The most obvious is a lack of clear legal guidance from Congress and the courts. Again, although some enabling statutes require agencies to base rules on a record, APA's generic requirements do not mention the subject. And while the Supreme Court has seemingly chastised lower courts for imposing procedural requirements that go beyond the terms of the APA, judicial review of rulemaking remains much more demanding than it was before the 1970s. The courts' mixed signals concerning the sanctity of a record have probably created some confusion or disagreement among agency officials charged with formulating policy on docketing. One high-level attorney noted in this regard that, although his department did not feel a need to record outside participation as NPRMs were being formulated, some of his colleagues in other agencies were "still living in the pre-Vermont Yankee world of the 1970s."

Although our data do not allow us to address the issue in a systematic way, docketing practices may also be influenced by the legal and political environments within which agencies operate. One suspects that the more complex and contentious the environment of rulemaking, the more likely agencies are to record communications during the proposal-development phase. It is probably instructive that officials from EPA, FDA, and DOT indicated that their agencies had relatively strict docketing policies.)

Variation in docketing practices is also partly attributable to agency history and culture, as well as to the idiosyncratic preferences of individuals responsible for setting policy at the agency and departmental levels. It is clear in the latter regard that intelligent and experienced officials can strike different balances among the advantages and disadvantages of docketing. One senior agency attorney, who had presumably had a good deal of influence over his department's policy on the subject, noted that, although he did not feel a legal obligation to record communications during the pre-notice phase, it was nonetheless a sound practice in the interest of transparency. He observed that, because most communications with non-governmental actors occur at the agency's invitation, the appearance of fairness required that they be placed on the public record. His personal view on this subject probably does much to explain why his department's docketing practices are among the most strict in the federal government.

Framing the issues: A rejoinder to this official's argument for docketing is the one, alluded to above, that any evidence or arguments directly supporting a rule must eventually be made a part of the public record. Assuming that this is true, however, a record so defined may still not reveal how agencies obtain evidence and are persuaded by some arguments as opposed to others. Moreover, recording the premises that sustain a particular policy option may not always elucidate the bases for earlier and more fundamental decisions as problems are being defined and alternative solutions to those problems evaluated and eliminated. Again, these earlier processes largely define the importance of proposal development.

As with mechanisms to promote inclusiveness, the use of docketing to promote transparency can be evaluated in terms of competing criteria. Several of the officials we spoke with felt that docketing inhibited the collection of information about stakeholder preferences and the probable effects of policy options that they needed in order to fashion sound proposals. Although many civil servants are understandably reluctant to characterize rulemaking in overtly political terms of accommodating the reconciling interests, one official also noted that docketing requirements would have a chilling effect on the bargaining and compromise needed to fashion consensus among contending groups. This observation is supported by several interviews conducted for an earlier study of rulemaking (West 2004). The strength of the case for docketing is largely contingent on the importance one assigns to transparency and administrative accountability as values that compete with these considerations.

The evaluation of docketing must also obviously take separation of powers into account. One issue here concerns special exemption that is often accorded to communications within the Executive Branch. Although several interviewees strongly endorsed the view that requiring these to be recorded would undermine effective management, there is also abundant evidence suggesting that communications from OMB and other agencies frequently transmit the preferences of non-governmental actors. This obviously has important implications for the transparency of the administrative process. More generally, any limitations on transparency in proposal development must also be evaluated partly in terms of their implications for the accountability of rulemaking to the legislature and the judiciary.

The Management of Proposal Development

The preceding sections have focused on participation by external actors in the development of proposed rules and on its implications for the democratic criteria of inclusiveness and transparency. Although these are important considerations, managerial considerations are important as well. This section briefly identifies several important dimensions of variation in the management of proposal development. It also discusses the qualities of internal efficiency and external coordination as bases for evaluating the process.

Internal Structure and Processes

Our elite interviews and our examination of agency SOPs reveal wide variation in how agencies develop NPRMs. For example, the “production process” is more decentralized in some agencies than in others. For instance, Food and Drug Administration rules are developed by its five produce centers, whereas NHTSA rules are a separate division under the direction of an associate administrator for rulemaking. Similarly, some departments are much more closely involved in their agencies’ rulemaking than others. This is the case with agenda setting decisions, as discussed earlier, and it is also true of departmental clearance at later stages of proposal development.

Variation in the formality and standardization of proposal development is particularly striking. Some agencies have highly detailed SOPs that structure most of the key elements of proposal development, including the initiation of the process, the assignment of responsibilities, and the designation of internal and external actors who must review and sign off on proposals at various stages of their development. EPA is one such example. In contrast, some agencies such as the Federal Communications Commission have few, if any, guidelines. One official justified his agency’s lack of SOPs by observing that “rulemaking is not something you can go to school and learn.” In a similar vein, a senior attorney noted that no one read the detailed set of procedures he developed for his department in the mid-1990s. He added that SOPs were impossible to keep current in light of the constantly changing nature of procedural constraints on rulemaking, and that the idiosyncratic nature of the process made them difficult to follow in any case.

What explains the degree to which agencies seek to formalize or standardize the rulemaking process? Although our study does not permit a systematic examination of this question, the literature on organizations suggests some plausible hypotheses that seem to be consistent with our observations. The larger the organization, the more rules it issues, and the more complex, unpredictable, and contentious its environment, the more likely it is to have detailed guidelines. EPA ranks high along most of these dimensions, for example. As an official from another agency noted, “EPA develops so many rules that it would be impossible to do them on an *ad hoc* basis.” In contrast, smaller agencies with more limited and stable sets of stakeholders are more likely to operate informally. This is true of the FCC and the Federal Railroad Administration, for example. As an official from the latter organization observed, “We only have about 100 people in our headquarters. Anybody can talk to anybody if they want to.”

The internal management of proposal development is a topic that deserves a good deal of attention. Ultimately, the questions that we ask in assessing this process should be informed in large measure by a consideration of the managerial values internal efficiency and external coordination. A consideration of these same values may help, not only to understand the process, but to identify possible areas for reform.

Internal Efficiency

Our interviews suggest that two related "internal" tasks are especially important in formulating NPRMs. One is the need to comply with the various procedural requirements alluded to in the introduction. These might include the Paperwork Reduction Act, the National Environmental Policy Act, the Small Business Regulatory Enforcement Fairness Act, the Congressional Review Act, the cost-benefit provisions of regulatory review, and information quality requirements, among other constraints. (For example, the Fisheries Service must also comply with the Coastal Zone Protection Act, the endangered Species Act, and the Marine Mammal Protection Act in many of its proceedings.) Consistent with the concerns expressed by Thomas McGarity (1992) and others about the "ossification" of rulemaking, most of the agency officials we spoke with alluded to the issues these requirements posed for efficiency.

One senior official in the general counsel's office of an executive department observed that the various constraints affecting rule development were like the layers of an archaeological site. Although they had all been added for reasons that were understandable at the time of their creation, they had accumulated in a piecemeal fashion with little thought to how they fit together or to what their overall effects would be on the administrative process. In light of this, he felt that it was past time to consolidate all of the general requirements affecting rulemaking in one place-- the APA. At the least, he felt that this would improve communications and avoid confusion by allowing agencies to engage in "one stop shopping." At best, it might encourage a more comprehensive evaluation of controls on rulemaking.

Partly because of the need to comply with analytical requirements and other controls, rulemaking has also become more highly differentiated as an organizational process in recent decades. Agencies are often viewed as monoliths. In reality, however, administrative decision making typically combines different perspectives. Although these perspectives are grounded to some extent in personal predilections, they also frequently reflect differences in professional training and functional responsibilities. The need to reconcile the latter tends to be especially important in rulemaking. Among the types of agency actors that might play significant roles in the rulemaking are subject matter experts with appropriate technical expertise, policy analysts, lawyers, and political appointees. Each of these tends to bring a somewhat different set of concerns to policy making (West 1989).

Several of those we interviewed spoke to the importance of inter-office and inter-professional differences in proposal development, and all viewed this tension as something that was healthy if managed properly. To the latter end, they tended to favor a team approach that brought together different specialists at an early stage in the process. Much as McGarity (1991) has prescribed, they felt that this facilitated the resolution of differences much more effectively than a sequential approach in which proposals were first developed and then circulated among

various specialists. Although our data do not permit a systematic examination of the issue, one senses from our interviews that sequential policy development has become the exception in the federal bureaucracy. That would certainly stand to reason given its potential to produce organizational strife and inefficiency.

External Coordination

Another important management issue in rulemaking has to do with the coordination of policy output across federal agencies. A NHTSA standard affecting fuel efficiency might be of interest to the Department of Energy or EPA, for example, just as some Federal Trade Commission regulations might be relevant to the concerns of the Consumer Products Safety Commission or the Food and Drug Administration. One could offer many such illustrations. Many and perhaps most of the important rules present issues of inter-agency coordination.

As mentioned earlier, a common perception among academics and among critics of bureaucracy is that agencies operate within stovepipes, unmindful of what other agencies are doing. Our study does not support this stereotype. Although we cannot speak to its effectiveness, our interviews indicate that coordination is an important concern among agency officials. This finding is reinforced by our survey data which indicate that other agencies are among the most important participants in the proposal-development process. Coordination is promoted by experienced managers at the agency level who typically have a good sense for how certain rules might impinge on the activities of other agencies. It is also promoted at the departmental level. Especially important here are the general counsel's offices which often serve as clearing houses for the proposals developed within their organizations. Senior careerists in general counsel's offices communicate with one another about rulemaking and other issues of mutual interest through an informal network that they have maintained at their own initiative.

Coordination is also reinforced by the regulatory review process. Thus, one of the considerations that may precipitate OIRA's involvement in rulemaking is if an agency's proposal duplicates or conflicts with the implementation of another agency's program. This is facilitated by the fact that most of the OIRA desk officers who review regulations focus on broad policy areas rather than particular organizations. Several of the agency officials with whom we spoke indicated that, aside from the intrinsic benefits of coordination, the specter of OMB involvement for that purpose served as a motive for them to communicate with other agencies.

The inter-agency communication that occurs in rulemaking is obviously salutary. This is not to say, however, that it eliminates all problems of redundancy and conflict. Nor should one confuse it with the kind of proactive coordination often associated with "management." Whether it involves OMB or is confined to lateral interactions, coordination tends to be a reactive process involving the resolution of issues on an *ad hoc* basis. There is little if any evidence suggesting that systematic, top-down planning and coordination of rulemaking takes place across the federal bureaucracy through OMB review or any other institutional mechanism (West 2006).

Discussion

Our purpose has been to provide an overview of how agencies develop proposed rules. In so doing, our study has been guided by three broad questions: Where do ideas for rules originate and how are they placed on agencies' policy-making agendas? Who participates in the development of proposed rules and how open and inclusive is that participation? How do agencies manage the proposal-development process?

We have found that practices vary considerably with regard to most dimensions of agenda setting and proposal development. This observation reinforces our belief that case studies of a few rules from one or a few agencies are of limited value in gaining a general understanding of the rulemaking process. Although we had hoped to identify patterns of variation across agencies and policy areas through our electronic survey, a low response rate precluded such an analysis. Collecting rule-specific data for large number of NPRMs remains an important challenge confronting future efforts to describe and understand how bureaucracy develops policy. Appendix A discusses some of the obstacles that we encountered and that such an effort must overcome.

If we cannot describe cross-agency variation in pre-notice rulemaking in a rigorous way, our study is nonetheless useful as an exploratory effort to identify some of the important dimensions of that variation. As such, it obviously points the way to further empirical research to gain a better understanding of how bureaucracy develops policy from both a political perspective (who participates in and influences the process?) and a management perspective (how is the process organized?). The literatures on policy environments (Lowi 1972; Wilson 1980) and on the relationship between organizational structure and organizational tasks may be useful in addressing these respective topics.

Our study also suggests several issues of institutional policy that may be worthy of further consideration. Evaluative or prescriptive analysis must be informed, not only by an examination of agency practices and their effects, but by a consideration of the qualities that we want to promote in rulemaking. The latter task is complicated by the fact that these qualities often compete with one another. Thus, the internal values of organizational efficiency and effectiveness in producing rules may compete with external requirements designed to ensure desired qualities in those rules. In turn, the latter may conflict with one another as well. For instance, efforts to promote substantive rationality in rulemaking can be at odds with efforts to ensure that rulemaking is politically responsive (Stewart 1975).

Just what qualities should be assigned the greatest importance in evaluating the rulemaking process can depend on one's position or role. Not surprisingly, the agency officials with whom we spoke attached high importance to the managerial goals of efficiency and effectiveness. In this regard, several noted the implications of non-discretionary rulemaking for their agencies' ability to plan and execute coherent agendas. Without denying the legitimacy of congressional oversight and instruction, some felt that this function could be performed with more attention to the implications it poses for the effective allocation of agency resources. An

examination of the possible tension between non-discretionary rulemaking and the effective management of agency resources might be an interesting area for further research.

Of course, it may not be realistic or desirable to expect Congress to adapt to agencies' rulemaking agendas. Perhaps a more viable suggestion is for Congress to review how institutional constraints on rulemaking have evolved. Most of our interviewees emphasized the difficulty of complying with the various procedural and analytical constraints on rulemaking that have accumulated in a more-or-less ad hoc fashion in recent decades. This helps to explain the fact that it often takes years to develop NPRMs. Again, although many if not all of these requirements have been imposed for sound reasons, little effort has been made to consider their goals and their effects in a comprehensive way. This might be an appropriate undertaking on the 60th anniversary of the Administrative Procedure Act.

The primary focus of our study has been on outside participation in the development of proposed rules. As noted in the introduction, the APA sought to impose uniform, minimum standards of due process on rulemaking (and adjudication) across the federal bureaucracy. As such, it was a response to agency practices that had evolved haphazardly. Implicitly, the purpose of the notice-and-comment requirements was to promote responsiveness, inclusiveness, and transparency. Whether everyone has the practical wherewithal to participate effectively under its requirements is doubtful. At the very least, however, the APA afforded all stakeholders the means to inform themselves about proposed rules and to offer comments concerning the effects and desirability of those proposals. The more recent expectation that agencies base their rules on a record has obviously reinforced the APA's goal of openness. It has also sought to promote inclusiveness by ensuring that agencies take all relevant comments seriously. As also noted, however, the APA's provisions do not come to bear until a late stage of rulemaking, after many of the key policy decisions have at least tentatively been made. In light of this, one might ask whether institutional constraints designed to promote inclusiveness and transparency should begin with the publication of an NPRM.

An examination of this question should be informed by a consideration of administrative practices that have received almost no attention. Three, general findings of our study are particularly relevant here. One is simply that agencies often communicate with stakeholders and with other governmental actors as they are developing proposed rules. A second is that, although such participation takes place through diverse mechanisms, it usually does not occur pursuant to general invitation. Rather, it occurs by specific agency invitation or at the initiative of the participant. A third is that, although practices again vary a great deal, pre-notice participation is usually not placed in a public record. Assuming that these observations are problematic in terms of inclusiveness and transparency, the obvious solution would be to require advanced notices for all or at least some classes of rulemaking and to require agencies to docket all or at least some types of pre-notice communications.

Whether or not these reforms would be desirable is a function, not only of their likely effects, but also of the severity of the problems they would address. In turn, this determination requires an assessment of the proposal-development process as well as the notice-and-comment process. To what extent do agencies fail to consider important viewpoints in proposal development, for example? And to the extent that they fall short of inclusiveness, to what extent

does notice-and-comment help to correct this failure? Conversely, is stakeholder participation pursuant to NPRMs essentially delineated by the same practical constraints (organizational and financial resources) that define informal participation in proposal development. These are complex questions that obviously do not have simple answers.

Yet, whatever benefits these reforms might have in promoting democratic values must also be weighed against their costs in terms of administrative efficiency and effectiveness. Senior agency officials were particularly adamant in their opposition to advanced notices as a general requirement for all or even certain kinds of rulemaking. Among the reasons discussed earlier, the most important objections focused on the delay it would impose and on the lack of corresponding benefits in terms of providing meaningful additional input. All of the people with whom we spoke felt that the usefulness of advanced notice was limited to certain rulemaking contexts that could only be identified by agencies, themselves, on a case-by-case basis.

Perhaps a stronger case can be made for standard docketing requirements. Most officials were against this as well, primarily because they viewed it as an impediment to their effectiveness in gathering information. Still, the fact that some agencies do docket all or certain kinds of communications suggests that it may not be a prohibitively onerous requirement. One should hasten to add, however, that a consideration of docketing requirements during proposal development subsumes a number of issues:

- Should docketing be required for all or only for some of the latter stages of proposal development?
- In the latter regard, how does one distinguish among different stages of the process?
- Should docketing be required for all communications or just for those communications that have a material influence on agency decision making?
- In the latter regard, how does one define a material influence?
- Should docketing be required only for communications with extra-governmental actors or should it also be required for communications within the Executive Branch?
- Would it be legal to require docketing for communications within the Executive Branch?

If the answer to either of the last two questions is “no,” then exempting the White House, the Executive Office, and other agencies from docketing requirements might significantly undermine any gains in transparency associated with placing communications from non-governmental participants on the public record. A substantial body of evidence thus suggests that these executive-branch actors can serve as conduits for private interests in the rulemaking process.

Ironically, the potential problems associated with a lack of inclusiveness and transparency during proposal development may be exacerbated by the very constraints that are designed to ensure these qualities in rulemaking. The requirement that agencies base their rules on a record induces them to develop detailed NPRMs in order to provide focus for public comment. Due process requirements also make it difficult to change NPRMs in substantial ways without soliciting additional comments. Thus, several of the senior officials interviewed for this study stressed the incentive for their agencies to develop proposed rules that would not require substantial changes. One might speculate in these regards that a return to the APA’s original

conception of public comment as an aid that agencies could use as they see fit could promote inclusiveness by rendering the comment phase more meaningful.

Yet such a reversion to the APA's original intent would also give more discretion to the bureaucracy than some might find acceptable. It is at least partly because of the perception that administrative organizations can be biased in terms of their own missions or clientele that constraints on rulemaking have become numerous and demanding. This is to say that there may be no easy answers to questions of institutional reform. Stating that the issues are complex, however, does not mean that they should be ignored.

Appendices

APPENDIX A: Methodology of Survey Database

Rule Selection

The survey portion of the study was designed to solicit information on the rulemaking process of federal rules developed in 2004. Focusing on 2004 provided a clear time period in which to conduct the study and it was the most recent and complete annual list of rules at the launch of the study in October 2005.

The Government Accountability Office (GAO) possessed the most complete searchable database that allowed rules to be filtered according to various search criteria (<http://www.gao.gov/fedrules.html>). For the purpose of this study all rules classified as significant/substantive in the GAO database were used while all other rules possessing a lower classification were excluded. The focus on significant/substantive rules is due to these rules having the greatest impact on the groups that they affect. The result was the selection of 1011 rules that would be targeted for statistical analysis based upon the study's electronic survey. Once these rules were constructed into the study's research database, it was discovered that 38 of the rules were duplicates and 19 possessed a classification lower than significant/substantive. This reduced GAO's list of rules that were applicable to the study to 954. The 954 rules represented all 15 federal departments and 24 independent agencies.

Subject Selection

After building the database of the 954 rules that were to be analyzed, persons that had played a leading role in developing each of the rules had to be identified. To do this, each rule was researched in the Federal Register through the U.S. Government Printing Office's (GPO) electronic website (<http://www.gpoaccess.gov/fr/index.html>). Each rule listed contact information, usually a single individual within the agency, to whom questions about the rule could be directed. The name, e-mail address, mailing address, and phone number of the person listed were all collected when provided. A few rules listed more than one contact name in which the highest ranking individual was typically listed first, so names listed first were selected as potential research subjects. Using this methodology 897 of the original 954 rules were paired with at least one contact name. The remaining 57 rules could not be located within GPO's on-line Federal Register database.

There were several rules that had listed the same contact person as other rules in database. For these rules, the rule with the highest rule identification number (RIN) was used while the remaining rules were disregarded for the study. That higher RIN represented the more recent rule and would conceivably be easier for the contact person to recall. This further reduced the 897 rules that were found in the GPO Federal Register database by 383, bringing the total number of usable rules to 514.

At this point 514 contact persons had been paired with 514 rules creating the database of potential research subjects that would be targeted for participating in the electronic survey portion of the study. The next step was to contact these potential research subjects to solicit their cooperation.

Contacting/Notifying Subjects

The primary process for contacting subjects to inform them of the study and request their cooperation involved mailing a pre-notification letter followed by an e-mail containing an invitation to participate and an electronic link to the survey. Subjects were given a set time in which to complete the survey, from two to six weeks, before a reminder was sent to them via e-mail or telephone, or both. The entire process was divided into three rounds. The second and third rounds consisted of subjects that took longer to find contact information for.

Round 1

The first round began with sending a letter to 336 of the subjects for whom complete contact information could be found. The letters provided a notice to each subject indicating that they had been selected to participate in the study, and information that explained who was conducting the study, what it was about, why it was being done, and how the information that it generated would be used. The letters were used to help provide credibility and generate interest so that the e-mails containing the survey would not simply be ignored when they were received.

The letters were then followed up a week later with an e-mail. The e-mail contained another letter that provided a more in-depth explanation of the study and an invitation to participate via a secure electronic link to the survey. Subjects in the first round were given six weeks to respond before being sent a reminder e-mail. By the time the e-mail reminders were sent out, only 18 persons had completed the electronic survey.

Because the response rate was so low, each of the 336 subjects were called to confirm that they had received the e-mail and to answer any questions they had about completing the survey. It was discovered that almost all e-mails had in fact been received, but many expressed their lack of time to participate and others expressed concern over divulging what they considered "sensitive" information. No further contact was made with the first round of subjects except in a very few cases that required follow up in order to rectify some technical problems that were experienced with accessing the survey. Seven subjects had requested that a hardcopy of the survey be mailed to them. Out of these seven, one subject completed and returned the survey for a total of 19 completed surveys.

Round 2

The second round included 89 subjects who were mailed a slightly revised pre-notification letter that would clarify some questions, which were made evident in the first round, in hopes of producing a higher response rate. As in the first round, the letters were followed one week later with the e-mail containing the survey link. Subjects in the second round were asked to complete the survey within four weeks. By the time the third round was started, the total

number of survey completed had reached 34. No follow-up e-mails or telephone calls were made due to several negative comments that were received in the first round concerning the excessive amount of correspondence.

Round 3

After having conducted the second round, a total of 425 subjects had been sent a notification and solicited for their participation in the study. As for the remaining 89 subjects of the original 514 selected subjects, no e-mail addresses could be located for them. Their telephone numbers, however, were found. In the interest of reducing turnaround time, no letters were sent to these 89 subjects. Instead, the subjects were called to notify them of the study and to request an e-mail address to which the survey link could be sent. This resulted in 34 of the 89 subjects agreeing to provide their addresses to which the survey link was sent and given two weeks to complete. The remaining 55 subjects were not included in the study. At the completion deadline for round three, 39 electronic and hardcopy surveys had been completed.

APPENDIX B: Electronic Survey for Rulemaking Officials



The East West Research Group
 The Bush School of Government &
 Public Service
 Survey of Rulemaking Officials

The following survey is part of a study that seeks to describe and analyze the policy-making process that results in the publication of a proposed rule in the Federal Register. It asks for your recollections concerning a specific rule that you helped to develop. Most of the survey is divided into three sections that focus on the following three stages of the proposal-development process:

- 1) the decision to regulate;
- 2) the preparation of an initial draft of the proposed rule; and
- 3) the review and revision of the initial draft of the proposed rule.

The same five questions are repeated for each stage. Please answer them to the best of your ability.

Identifiers:

What is your job title?

How long have you served in this agency? ____ Years

How long have you served in your current position? ____ Years

Stage I. Deciding to Regulate

1. During the early period of deciding whether to regulate in this area, to what extent did each of these possible external participants communicate with the agency about that decision?

<i>Participants</i>	No Communication 0	1	2	3	4	5	6	7	8	9	High Level of Communication 10
The White House											
OMB											
Members of Congress/ congressional staffs											

Other federal agencies																				
State/local governments/representatives																				
Business interest groups																				
Public interest groups																				
Media																				
Other (specify)																				

Other

(Note: if there was no communication with external participants during this phase, skip to Q6)

2. For each external participant with whom there was communication during this period, please indicate the nature of the communication that occurred between the agency and the external participant. Please select all that apply.

<i>Participants</i>	No communication	Telephone	E-mails	Letters	Public hearings	Professional conferences	Advanced Notice of Proposed Rule Making	Other (specify)
The White House								
OMB								
Members of Congress/congressional staffs								
Other federal agencies								
State/local governments/representatives								
Business interest groups								
Public interest groups								
Media								
Other (specify)								

Other

3. For each external participant with whom there was communication during this period, please indicate who initiated the communication.

<i>Participants</i>	No communication	External participant	Agency	Both
The White House				
OMB				
Members of Congress/congressional staffs				
Other federal agencies				
State/local governments/representatives				
Business interest groups				
Public interest groups				

Media				
Other (specify)				

Other

4. For each external participant with whom there was communication during this period, please indicate the subject(s) of the communication. Please select all that apply.

<i>Participants</i>	No communication	Legal issues (e.g., consistency with statute)	Preferences of affected parties	Need for the rule	Comments on effects of the rule (cost/benefit)	Alternatives that should be considered	Other
The White House							
OMB							
Members of Congress/ congressional staffs							
Other federal agencies							
State/local governments/ representatives							
Business interest groups							
Public interest groups							
Media							
Other (specify)							

Other

5. For each external participant with whom there was communication during this period, please indicate when, if ever, those communications were docketed/placed in the public record.

<i>Participants</i>	No communication	Communications not docketed	Docketed shortly after the communication occurred	Not docketed until rule published	Other
The White House					
OMB					
Members of Congress/ congressional staffs					
Other federal agencies					
State/local governments/ representatives					
Business interest groups					

Public interest groups					
Media					
Other (specify)					
Other					

6. How influential were the following factors/participants in deciding whether to regulate in this area?

<i>Participants</i>	No influence 0	1	2	3	4	5	6	7	8	9	High influence 10
Statutory requirements											
Judicial requirements											
The White House											
OMB											
Members of Congress/congressional staff											
Other federal agencies											
State/local governments/representatives											
Business interest groups											
Public interest groups											
Career staff within your agency											
Political leadership within your agency											
Other (specify)											
Other											

II. Development of the Initial Draft of the Rule

7. After the decision was made to regulate in this area, to what extent did each of these possible external participants communicate with the agency during the development of an initial draft of the proposed rule?

<i>Participants</i>	No communication 0	1	2	3	4	5	6	7	8	9	High level of communication 10
The White House											
OMB											
Members of Congress/congressional staffs											
Other federal											

agencies																				
State/local governments/ representatives																				
Business interest groups																				
Public interest groups																				
Media																				
Other (specify)																				

Other

(Note: if there was no communication with external participants during this phase, skip to Q12)

8. For each external participant with whom there was communication during this period, please indicate the nature of the communication that occurred between the agency and the external participant. Please select all that apply.

<i>Participants</i>	No communication	Telephone	E-mails	Letters	Public hearings	ANPRMs	Regulatory Negotiations	Professional conferences	Advanced Notice of Proposed Rule Making	Other (specify)
The White House										
OMB										
Members of Congress/ congressional staffs										
Other federal agencies										
State/local governments/ representatives										
Business interest groups										
Public interest groups										
Media										
Other (specify)										

Other

9. For each external participant with whom there was communication during this period, please indicate who initiated the communication.

<i>Participants</i>	No communication	External participant	Agency	Both
The White House				

OMB				
Members of Congress/ congressional staffs				
Other federal agencies				
State/local governments/ representatives				
Business interest groups				
Public interest groups				
Media				
Other (specify)				
Other				

10. For each external participant with whom there was communication during this period, please indicate the subject(s) of the communication. Please select all that apply.

<i>Participants</i>	No communication	Legal issues (e.g., consistency with statute)	Preferences of affected parties	Need for the rule	Comments on effects of the rule (cost/benefit)	Alternatives that should be considered	Other
The White House							
OMB							
Members of Congress/ congressional staffs							
Other federal agencies							
State/local governments/ representatives							
Business interest groups							
Public interest groups							
Media							
Other (specify)							
Other							

11. For each external participant with whom there was communication during this period, please indicate when, if ever, those communications were docketed/placed in the public record.

<i>Participants</i>	No communication	Communications not docketed	Docketed shortly after the communication occurred	Not docketed until rule published	Other
The White House					
OMB					
Members of Congress/ congressional staffs					
Other federal agencies					
State/local governments/ representatives					
Business interest groups					
Public interest groups					
Media					
Other (specify)					

Other

12. How influential were the following factors/participants during the development of the initial draft of this rule?

<i>Participants</i>	No influence 0	1	2	3	4	5	6	7	8	9	High influence 10
Statutory requirements											
Judicial requirements											
The White House											
OMB											
Members of Congress/congressional staff											
Other federal agencies											
State/local governments/ representatives											
Business interest groups											
Public interest groups											
Career staff within your agency											
Political leadership within your agency											
Other (specify)											

Other

III. Internal/External Review of the Rule (from initial development to publication)

13. After the development of the initial draft of the rule, to what extent did each of these possible external participants communicate with the agency as the draft was being reviewed and revised for publication in the Federal Register as a notice of proposed rulemaking?

<i>Participants</i>	No communication 0	1	2	3	4	5	6	7	8	9	High level of communication 10
The White House											
OMB—review before the formal submission											
OMB—formal review under EO12866											
Members of Congress/congressional staffs											
Other federal agencies											
State/local governments/representatives											
Business interest groups											
Public interest groups											
Media											
Other (specify)											
Other	<input type="text"/>										

(Note: if there was no communication with external participants during this phase, skip to Q18)

14. For each external participant with whom there was communication during this period, please indicate the nature of the communication that occurred between the agency and the external participant. Please select all that apply.

<i>Participants</i>	No communication	Telephone	E-mails	Letters	Public hearings	Professional conferences	Other (specify)
The White House							
OMB							
Members of Congress/congressional staffs							
Other federal agencies							
State/local governments/representatives							
Business interest groups							
Public interest groups							
Media							

Other (specify)							
Other							

15. For each external participant with whom there was communication during this period, please indicate who initiated the communication.

<i>Participants</i>	No communication	External participant	Agency	Both
The White House				
OMB				
Members of Congress/ congressional staffs				
Other federal agencies				
State/local governments/ representatives				
Business interest groups				
Public interest groups				
Media				
Other (specify)				

Other

--

16. For each external participant with whom there was communication during this period, please indicate the subject(s) of the communication. Please select all that apply.

<i>Participants</i>	No communication	Legal issues (e.g., consistency with statute)	Preferences of affected parties	Need for the rule	Comments on effects of the rule (cost/benefit)	Alternatives that should be considered	Other
The White House							
OMB							
Members of Congress/ congressional staffs							
Other federal agencies							
State/local governments/ representatives							
Business interest groups							
Public interest groups							
Media							
Other (specify)							

Other

17. For each external participant with whom there was communication during this period, please indicate when, if ever, those communications were docketed/placed in the public record.

<i>Participants</i>	No communication	Communications not docketed	Docketed shortly after the communication occurred	Not docketed until rule published	Other
The White House					
OMB					
Members of Congress/ congressional staffs					
Other federal agencies					
State/local governments/ representatives					
Business interest groups					
Public interest groups					
Media					
Other (specify)					

Other

18. How influential were the following factors/participants as the initial draft of this rule was being reviewed and revised for publication in the Federal Register?

<i>Participants</i>	No influence 0	1	2	3	4	5	6	7	8	9	High influence 10
Statutory requirements											
Judicial requirements											
The White House											
OMB											
Members of Congress/congressional staff											
Other federal agencies											
State/local governments/ representatives											
Business interest groups											
Public interest groups											
Career staff within your agency											
Political leadership within your agency											
Other (specify)											

Other

IV. General Questions About Proposal Development

19. Please indicate the basis of possible disagreements between lead agency staff and other participants that might have occurred at any of the three stages of the rule-development process.

<i>Participants</i>	No disagreement	Legal issues (e.g., consistency with statute)	Preferences of affected parties	Need for the rule	Alternatives that should be considered	Effects of the rule (e.g., costs/benefits)	Other
Political leadership within your agency							
Other career staff within your agency (specify)							
The White House							
OMB							
Members of Congress/ congressional staffs							
Other federal agencies							
State/local governments/ representatives							
Business interest groups							
Public interest groups							
Media							
Other (specify)							

Other career staff within agency:

Other

20. About how long did it take to develop the proposed rule from the starting point (when it was clear that the agency would develop a rule) to the ending point (when the rule was

published in the Federal Register)?

V. The Relationship Between Rule Development and the Comment Phase

21. Did your agency solicit comments on this rule (either through a notice of proposed rulemaking or in some other form)?

- Yes
 No (if no, skip to end of survey)

22. Describe the nature of any significant information that you might have received from external participants during the comment phase of the rulemaking process that you were unaware of as you were developing a notice of proposed rulemaking.

<i>Participants</i>	No communication	Legal issues (e.g., consistency with statute)	Preferences of affected parties	Need for the rule	Comments on effects of the rule (cost/benefit)	Alternatives that should be considered	Other
The White House							
OMB							
Members of Congress/ congressional staffs							
Other federal agencies							
State/local governments/ representatives							
Business interest groups							
Public interest groups							
Media							
Other (specify)							

Other

23. Were important changes made to the rule?

If yes, specify below:

If no, skip to end.

24. To what extent did the following factors influence any important changes that might have been made in the proposed rule during the comment phase?

	No influence 0	1	2	3	4	5	6	7	8	9	High influence 10
Legal issues (e.g., consistency with statute)											
Preferences of affected parties											
Need for the rule											
Comments on effects of the rule (cost/benefit)											
Alternatives that should be considered											
No Communication											
Other (specify)											

Other

25. Please provide the name and contact information for someone with additional knowledge regarding this rule or another rule published in 2004.

APPENDIX C: Electronic Questionnaire Response Statistics

In total there were 459 subjects/rules for which an attempt had been made to include in the study. The following table provides a breakdown of the responses that were received during the three rounds for the 459 subjects/rules.

Completed Survey (survey was completed and submitted either electronically or by mail)	39
No Response (Subject received invitation to participate but did not submit a completed survey or explicitly decline to participate)	257
Invalid Subject (retired, passed away, no longer with agency)	16
Invalid E-mail (e-mail was returned and no correct address could be verified)	34
Declined by Department/Agency (department/agency explicitly prohibited Subject from participating)	97
Declined by Subject (Subject explicitly declined to participate)	16
Total	459

There were 409 subjects/rules in all that had been identified as being qualified and capable of participation in this study. Thirty-nine chose to do so for a response rate of 9.54%

*APPENDIX D: Elite Phone Interview Question Template**Standard Operating Procedures*

1. Are there standard operating procedures that govern rulemaking in your department? If so, could we obtain a copy?
2. Do individual agencies within your department have their own SOPs? If so, how could we obtain these?
3. Are SOPs generally followed in the rulemaking process?

Centralization

4. Does the department secretary have to sign off on rules promulgated by agencies in your department? How are agencies' proposed rules reviewed?
5. At what stages of the development of proposed rules are agency initiatives reviewed at the departmental level?
6. Who at the departmental level is most closely involved in rule development?
7. How often do officials at the departmental level become involved in rule development in more than a cursory way and what precipitates their involvement?

Agenda Setting

8. Where do ideas for rules come from?
9. If ideas for rules come from different sources, what are your impressions concerning the relative frequency of these sources in different agencies within your department?
10. What determines whether an idea for a policy is placed on the rulemaking agenda?

Outside Participation

11. At what stages of proposal development are there participation by governmental and non-governmental actors from outside your department?
12. At what stages of proposal development are communications with external participants docketed?
13. Are docketing requirements different for different kinds of external participants?

14. Which external participants have the most influence on the development of proposed rules and how does this vary among agencies within your department?

15. In general (and if possible), rate the influence of the following external participants on a scale of 1-10:

- business groups
- public interest groups
- OMB (OIRA)
- White House staff
- congressional committees
- other agencies

Disagreements During Proposal Development

16. What are the major sources of disagreement within your department during the development of proposed rules?

17. How are internal disagreements resolved?

18. How are disagreements between agencies and external actors resolved?

APPENDIX E: Survey Cover Letter

Title: Outside Participation in the Development of Proposed Rules

Dear XXXX,

I invite you to participate in a study of how federal agencies develop proposed rules. Conducted under the auspices of the Congressional Research Service, the purpose of this project is to describe the influences that shape administrative policy making before a notice of proposed rulemaking appears in the Federal Register. As you know, the Administrative Procedure Act's notice-and-comment requirements are intended to ensure that rulemaking is open, accountable, and broadly responsive to affected interests. As you probably also know, however, proposed rules are often very specific and may reflect substantial investments of agency time and resources. The processes through which proposals are developed are potentially very important but have received remarkably little systematic attention.

You have been identified as someone who is knowledgeable about a specific rule that was promulgated in 2004. Within the next week, you will receive an electronic questionnaire identifying that rule and asking a number of questions about its development. Most of these questions will elicit factual information and your impressions concerning your agency's formulation of a notice of proposed rulemaking. The survey should take about twenty minutes to complete. The results of the study will be used to describe commonalities and variation in proposal development across the federal bureaucracy. They will be useful to agencies as well as to Congress as it considers possible reforms of the administrative process.

You have my complete assurance that your participation in this project will be strictly confidential. This study involves a large number of rules, and neither you nor the specific regulation with which you are associated will be identified. If you do not feel comfortable completing your survey on-line, you may opt to have it mailed to you. To do so, simply send a blank e-mail to cmiller@bushschool.tamu.edu with 'MAIL' in the subject line. If you have any questions or concerns about completing the questionnaire, you may contact me by phone (979-862-8825), or e-mail (wwest@bushschool.tamu.edu). This project has been approved by the Institutional Review Board at Texas A&M University.

Sincerely,

William F. West,
Professor
The George Bush School of Government and Public Service
Texas A&M University
College Station, Texas

APPENDIX F: Database Statistics

	2/14/2006	2/22/2006	2/28/2006	4/26/2006
Ready to send E-mail	30	30	0	0
Resend Email	2	2	0	0
Total Waiting Action	32	32	0	0
Waiting Response / Mailed (12/02/05)	164	164	164	164
Waiting Response / Mailed (1/26/06)	79	77	75	75
Waiting Response / Mailed (2/28/06)			34	34
Waiting Response / Resent E-mail	11	11	10	10
Waiting Response / Hardcopy Mailed	7	6	6	6
Waiting Response / Forwarded	1	1	1	1
Total Waiting Response	262	259	290	290
Suspended by duplicate contact	337	337	335	335
Suspended by incomplete information	55	55	55	55
Suspended by invalid contact	44	44	44	44
Suspended by duplicate RIN	44	44	44	44
Suspended by invalid E-mail	32	32	32	32
Suspended by low priority	19	19	19	19
Suspended by invalid rule	1	1	1	1
Total Suspended	532	532	530	530
Declined by department	96	96	97	97
Declined by person	20	20	20	20
Total Declined	116	116	117	117
Confirmed Completed	26	35	37	37
Confirmed Completed - Hard Copy		1	1	1
Claimed to have Completed	7			
Total Completed/Claimed	33	36	38	38
No Contact Information	57		57	57
Total	1032	1032	1032	1032

APPENDIX G: Obstacles Encountered**Use of Case Studies in Rulemaking Research**

It is obvious that the proposal development, like other portions of the rulemaking process is very idiosyncratic. However, much of the research done previously has focused on a specific agency's practices and used case studies of rules as the basis of analysis. While the intention is not to discredit these studies, it is important to note the limited application of their findings. Attention of further research should not be around case studies, but aim to collect a large sample of data, much larger than what was collected in this study, so that whatever trends do exist may be distilled. Case studies definitely have their place in the research of rulemaking, we included many in ours, but they were supporting evidence, not driving our research.

Rule Database

One of the greatest challenges faced in this study was compiling a complete list of 2004 rules that was easy to manipulate for our research. Our desired fields were:

- RIN#
- Rule Title
- Agency/Sub-Agency
- Priority
- Contact Name
- Contact Information (phone, email, mailing address)

We started with the GAO website, but that did not provide the RIN#, specific priority level, contact name or information. After eliminating duplicates from the database generated by the GAO, we went to the Federal Register where we had to look up each of the 1011 rules individually and were then able to gather the RIN#, specific priority, contact name, and a phone number. From there we had to call each individual to get their email address and/or mailing address. Once the information was collected and initial emails and letters sent to individuals we found not only was a lot of the information incorrect, but in many cases the individual listed as a contact for the office had no knowledge of the rule and forwarded us on to someone else to start the process over again. If we were individuals trying to get information about a rule to comment on it, it would have taken a lot of persistence not to give up. It would be beneficial to create a more user friendly website than the Federal Register's current site to gather information, and most likely aid to increase participation during the rulemaking process.

Accessibility of Standard Operating Procedures

For our study we set out to collect the standard operating procedures from all agencies that created economically significant, significant, or substantive rules in 2004. Initially we thought it would be easy, but ran into several problems. The number of standard operating procedures we were able to collect was quite limited because agencies either did not have

material to send us, it was not accessible on the website, or they were unwilling to provide the information to us because they guarded them as confidential internal documents. Our interactions with agencies just in an attempt to obtain standard operating procedures told us a lot about the agency before even looking at the content of the material.

APPENDIX H: Case Study Summaries

National Research Council Fluoride Study Could Lead to New Standards, Report Says
EPA
Thursday March 2, 2006

An upcoming National Research Council assessment on the health effects of fluoride in drinking water could lead to revised federal standards for the substance. Even if the assessment confirms the EPA's earlier findings on fluoride's toxicity, EPA could still revise its standards.

EPA spokesman Dale Kemery told BNA that the agency asked the research council to examine the current contribution of drinking water to total fluoride exposure as one part of its review.

"We expect that this issue will be addressed in their report to us," he said. "Until we receive the report, it is premature to speculate how their findings will influence agency decisions about the fluoride standards".

In 2005, local chapters of four unions asked Congress to impose a nationwide moratorium on the programs. The chapters also asked the agency to issue an advance notice of proposed rulemaking that would inform the public and local health authorities of the new research.

However, Congress does play a key role in the EPA regulation of contaminants in drinking water. The findings of the National Research Council and "the appropriateness" of EPA's fluoride standards could generate new congressional oversight and legislative attention.

Background on Rule:

In 1986, EPA set an enforceable fluoride standard of 4 milligrams per liter to protect against adverse effects to bone structure. At the same time, the agency set a secondary, nonenforceable standard of 2 mg/L, to protect infants and young children from dental fluorosis.

Fluoride addition is strongly supported by most public health organizations, and EPA's standards have been deemed safe by the National Research Council. At the same time, fluoridation has long drawn strong criticism from some over possible adverse health effects.

Significance for this Study:

It reveals that EPA often relies on the information provided by external professional organizations with specific expertise as an important guidance for the agency's rulemaking. Interest parties and the public could get involved in the agency's rulemaking by asking for an issuance of an advance notice of proposed rule.

EPA to Propose New Emissions Rules For Hospital Medical Waste Incinerators
EPA
Monday February 13, 2006

The Environmental Protection Agency has agreed to propose new emissions limits for hospital, medical, and infectious waste incinerators within a year, under an agreement to resolve a lawsuit filed by an environmental group.

Under the agreement, EPA said it would propose the new standards one year after the settlement is finalized. EPA agreed to finalize the standards after two years. The settlement is still a proposed agreement and is subject to a 30-day comment period.

The D.C. Circuit in its ruling said EPA failed to adequately explain and justify the process it used to set the emission limits.

EPA is taking comment on the proposed settlement until March 13. Comments should be labeled with Docket ID number EPA-HQ- OGC-2006-0104, and may be submitted online at <http://www.regulations.gov> (EPA's preferred method); or by e-mail to oei.docket@epa.gov. Comments also may be mailed to EPA Docket Center, Environmental Protection Agency.

Background on Rule:

The agreement is intended to settle a complaint by the Sierra Club, which challenged the original emissions limits issued in 1997 and won an order two years later from a federal appeals court directing EPA to revise the standards.

The agency failed to comply with the 1999 ruling by the U.S. Court of Appeals for the District of Columbia Circuit, and the Sierra Club went back to court.

Significance for this Study:

This case shows that EPA might schedule its rulemaking process according to particular agreements with certain external actors.

It implies that EPA actually does have a comment period before a rule is finalized and that it collects public comments from the public through the website, email or mail. It also docket comments by ID number.

Some Assumptions in Statutes Inappropriate For Nanomaterials Regulations, Report Says
EPA
Thursday January 12, 2006

Statutes that may be used to regulate nanomaterials contain assumptions that cannot be applied to those materials, a former assistant administrator of the Environmental Protection Agency said Jan. 11, suggesting the new laws are necessary. The report describes statutory and regulatory language in TSCA and the Food, Drug, and Cosmetic Act (FDCA) that Davies said would impede the laws' ability to manage nanomaterials.

Agencies such as EPA, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission are under-funded and understaffed and as such will find it difficult to add regulation of nanomaterials to their existing regulatory responsibilities, the report said.

Given all of these challenges, Davies recommended that Congress develop new legislation specifically for nanomaterials.

Background on Rule:

The properties of materials designed with nanotechnologies "are often not predictable from the laws of classical physics and chemistry".

The toxicity of materials made with nanotechnologies are more likely related to their surface area than to their weight. nanoparticles have vastly larger surface areas, proportionately, than larger chemicals do. The more surface area a chemical has, the more it may react with other things.

Cosmetics already use nanoscale ingredients, yet "for all practical purposes, cosmetics aren't regulated in this country".

Significance for this Study:

It indicates that when the existing regulation could not be effectively applied and that the regulatory agencies are unable to add regulation to their existing responsibilities due to the lack of fund and staff, agencies might end up recommending the Congress to develop new legislation.

EPA will initiate the communication with other agencies if they find their rules inappropriate.

Other Important Information:

If a legislative program is too strict on technologies, it might stifle innovation and lead to the diffusion of our country's best minds to countries that support research, at great jeopardy to our national sustained economic growth. Rulemaking agencies should be aware of it.

A voluntary code of conduct developed by firms working with nanotechnology may be effective.

EPA Proposes Fuel Economy Measurements More Reflective of Driving Conditions
EPA
Wednesday January 11, 2006

The Environmental Protection Agency proposed new methods to measure vehicle fuel economy Jan. 10 that the agency said would better reflect "real-world" driving conditions.

EPA first announced its intention to revise the estimates for vehicle fuel economy in November 2005 (224 DER A-28, 11/22/05).

A group called the Blue Water Network petitioned EPA in 2003 to revise fuel economy ratings, saying the EPA ratings are often higher than the fuel economy experienced by consumers.

Background on Rule:

EPA Administrator Stephen Johnson said the change "gives consumers better information and bridges the gap between what the sticker says and what the consumer experiences."

For years, consumers have complained that their actual fuel economy has been lower than that listed on the vehicle sticker.

The new standards are designed to reflect real-world driver habits, Johnson said, by accounting for higher road speeds, rapid acceleration, the use of air conditioning, and operating vehicles in cold temperatures.

Significance for this Study:

This case shows that researches and studies lead to legislation, which might then leads to new regulations.

When the existing regulation could not be effectively applied and that the regulatory agencies are unable to add regulation to their existing responsibilities due to the lack of fund and staff, those agencies might end up recommending the Congress to develop new legislation.

Coalition Sues EPA for Failure to Issue Regulations Addressing Lead, Remodeling
EPA
Wednesday December 21, 2005

A coalition of public health and community organizations filed a lawsuit Dec. 20 asking a federal district court to compel the U.S. Environmental Protection Agency to issue regulations to reduce lead-based paint hazards in renovation and remodeling activities.

Public Employees for Environmental Responsibility (PEER) noted that under the Toxic Substances Control Act, EPA was supposed to publish regulations for renovation or remodeling activities by Oct. 28, 1996.

PEER Executive Director Jeff Ruch told BNA Dec. 20 that filing the lawsuit serves notice to EPA that the agency will have to explain to a judge why it has failed to regulate lead from renovation and remodeling, he said.

Background on Rule:

EPA Deputy Administrator Marcus Peacock said the agency would issue a proposed rule by the end of 2005.

EPA is on target to have its proposal signed by the end of 2005, Charles Auer, the director of EPA's Office of Pollution Prevention and Toxics told BNA. The agency expects to promulgate the rule in 2007.

Significance for this Study:

This case shows that the communication between the rulemaking agencies and other agencies is not only about the content of the rules but also about the timing of the rulemaking. Other interest parties are not just waiting passively for the publication of the regulation. If the rulemaking process lags behind the original schedule too much, other parties involved in the rules might take actions to compel the rulemaking agency to issue relevant regulations.

The rulemaking agencies might need to explain their failures to issue new regulations if they are sued by other parties.

Other Important Information:

Rulemaking agencies sometimes will work in several other areas not necessarily directly related to the regulations proposed. These efforts, however, will complement agency regulations. The problem is that these activities might need extra time and sometimes delay the original issuance time of the regulations.

Groups Seeking to Sway EPA Decision On Changes to Fine Particle Standard
EPA
Wednesday December 14, 2005

Environmental and public health groups and the electric power industry are seeking to sway the Environmental Protection Agency in its decision due Dec. 20 on whether to propose tightening the air quality standard for particulate matter.

EPA released a staff paper July 1 recommending that the standard for fine particles be tightened. In addition, agency staff recommended creation of a new category for coarse particles.

The scientists' letter said, "We believe that the standards should be set at--or below--the low end of the ranges recommended in the final EPA Staff Paper."

Background on Rule:

Under a legal agreement with the American Lung Association, EPA is required to issue a proposal regarding the particulate matter standards by Dec. 20 and to issue a final rule by Sept. 27, 2006.

The letter from the doctors and researchers said the evidence has become stronger since the standard was last revised that exposure to particulate matter, especially fine particles, causes illness and death. The scientists urged EPA to set the standard at the low end of the levels recommended by agency staff in July.

EPA's own risk assessment found that 4,700 deaths would occur each year in nine cities even after the cities come into attainment of the current fine particle standard, the letter said.

Significance for this Study:

This case shows that external agencies and organizations involved in particular regulations might request the rulemaking agencies to change the details of the existing regulations if they found the regulations or parts of the regulations are not appropriate any more and need medications.

The communication between rulemaking agencies and external interest group could be initiated by different organizations at the same time for the same reason. This could actually create a greater pressure on the rulemaking agencies' decision-making.

Large Bank Insurance Determinations Target of Advance Notice for Board Meeting
The Federal Deposit Insurance Corporation Board of Directors
Wednesday November 30, 2005

The Federal Deposit Insurance Corporation Board of Directors Dec. 5 will consider an advance notice of proposed rulemaking that could set the stage for modernizing deposit insurance determinations for large bank failures, the agency said Nov. 29.

The advance notice, if approved for issuance by the board, would examine various approaches the FDIC could take when making insurance determinations for very large bank failures, agency spokesman David Barr told BNA Nov. 29.

Background on Rule:

The agency has not changed the way it handles insurance determinations for 10 years, a period in which the banking landscape has changed tremendously.

The agency has a history of turning bank failures around quickly, giving people access to funds the next business day. This could be harder to do with larger institutions and a proposal could consider how to make it easier.

Significance for this Study:

This case indicates that advance notice is frequently used by rulemaking agencies as an official opportunity to involve the public in the rulemaking process and collect their comments on proposed regulations.

Other Important Information:

Typically, an advance notice of proposed rulemaking seeks comment on three or four scenarios, Barr said. Based on input from the public, the agency can decide whether to put an actual proposal out for comment, he added.

Commerce Department Preparing Rule On Technology Transfer to Foreign Nationals
The Commerce Department
Monday November 28, 2005

The Commerce Department will publish "in the coming weeks" a proposed rule regarding the transfer of technology and technology information from companies and universities to foreign nationals, a government source said Nov. 25.

A U.S. government source told BNA that the proposed rule will be published "in the coming weeks." Then, after a period of public comment, a final rule will be issued.

He said the rule is still being developed as BIS officials have been reviewing thousands of public comments in response to the OIG recommendations. Further, he said BIS may or may not incorporate the recommendations into a rule.

The Association of American Medical Colleges said the recommendations, if adopted, would significantly damage the health of the U.S. academic research community and, in so doing, damage the economic and scientific vitality of the country as well as its national security.

Background on Rule:

BIS began the study after the department's Office of Inspector General released a report in March 2004 concluding that existing "deemed" export controls may not stop the transfer of sensitive technology to foreign nationals in the United States. The "deemed export" controls treat domestic sales of sensitive technology to foreign nationals as though they were exports.

BIS is considering OIG's recommendations to base the requirement for a deemed export license on a foreign national's country of birth, to modify the definition of "use" in the EAR, and to modify regulatory guidance on licensing of technology to foreign nationals working with government-sponsored research and research conducted in universities.

Significance for this Study:

This case confirms the rulemaking process we've outlined in our paper: before the publication of the regulation, there should be a period of public comment. After that, a final rule could be issued.

It also implies that a department report may have been the impetus. However, even though the rulemaking agencies will collect all the comments made by the public and recommendations from other agencies, they may or may not incorporate this information into the rules.

EPA Says Data Indicate Need to Regulate New Offshore Cooling Water Intake Systems
EPA
Monday November 28, 2005

The data collected from offshore operators and the National Oceanic and Atmospheric Administration are "significant" enough to suggest regulations are needed to minimize entrapment and injury, EPA said.

"EPA believes these data indicate the potential for entrainment and impingement from cooling water intake structures at oil and gas facilities operating in the offshore regions," the notice of data availability published Nov. 25 said.

EPA also said it is seeking comment on revised engineering cost estimates for technology that existing manufacturing and new offshore oil and gas facilities would have to install under the proposed cooling water intake rule.

Background on Rule:

New data compiled by both industry and government show that cooling water intake towers of new offshore oil and gas facilities could trap and injure fish and aquatic life, the Environmental Protection Agency said in a notice published Nov. 25.

The data supplements previously known information relating to a rule proposed in 2004 to regulate Clean Water Act requirements for cooling water intakes at existing manufacturing facilities as well as new offshore oil and gas facilities.

Significance for this Study:

This case shows how a rulemaking agency initiates rulemaking process. They might firstly collect data and identify a potential problem. The data could either come from previous studies conducted by the experts of the agency itself or from other agencies or organization.

A rulemaking agency might not only seek public comments on the proposed rules, they might also collect comments on certain approaches they are using for the studies of particular issues.

Sierra Club Asks Court to Set Deadline For EPA to Issue 'Area' Source Toxic Limits
EPA
Wednesday November 23, 2005

The EPA should be forced to finish issuing air toxics emissions limits for 55 categories of "area" sources of hazardous air pollutants by 2008, a Sierra Club lawyer told a federal district court.

Pew said the court needs to set a tight deadline as to give the agency a sense of urgency in completing the standards and to show the agency it cannot ignore statutory deadlines.

The agency needs seven years to complete the standards to ensure the emissions limits satisfy congressional intent, are scientifically justifiable, legally defensible, and serve the public interest.

Background on Rule:

James Pew, an Earth justice attorney representing the Sierra Club, told the U.S. District Court for the District of Columbia Circuit that EPA already has missed the deadline for completing the standards by five years, adding that the agency should not be given another seven years as it is requesting.

EPA was required by the Clean Air Act to issue the standards for area sources by Nov. 15, 2000. The agency was required to issue the volatile organic compound standards for consumer products by March 23, 2001.

The rules would impose emissions control requirements that could apply to hundreds of thousands of individual sources.

Significance for this Study:

The case again demonstrates that interest groups do not only have requirements on the content of the rules but also on the timing of the rule's issuance. If the rulemaking agency failed to publish rules on the scheduled date, other organizations relevant might take action to place pressure on the agency to speed up their rulemaking process.

This case is particularly popular among the rulemaking of those regulations that are highly related to the public health and safety.

Other Important Information:

EPA has too many competing mandatory regulatory requirements at the same time. Sometimes it is rather difficult for it to devote the resources needed to complete action right on time.

NRC Withdraws Proposal to Regulate Radionuclides Disposal in Wastewater
EPA
Tuesday November 15, 2005

The Nuclear Regulatory Commission withdrew an advance notice of proposed rulemaking Nov. 10 that would have amended existing rules for radionuclide disposal into the nation's sanitary sewer systems (70 Fed. Reg. 68,350).

NRC said the action follows a decade of surveys and studies which concluded that existing regulations are "adequate" and "sufficient" to protect public health and safety.

"The purpose of the [Advance Notice of Proposed Rulemaking] was not initiated to propose specific changes in regulations, but rather to solicit stakeholder opinions," A. Christianne Ridge, of NRC's office of nuclear material, safety and safeguards, told BNA Nov. 14.

NRC asked for comment on the need to regulate excreta of patients who were undergoing chemotherapy as well as the form of radionuclides that should be subject to regulation.

Background on Rule:

The action brings closure to an issue that has been the subject of debate and studies since 1994, when the agency first released its advance notice of proposed rulemaking to ascertain the need to tighten existing rules for disposing radionuclides in sanitary sewer systems.

Current NRC regulations require that any licensed material discharged into a sanitary sewer system be water soluble and "readily dispersible biological material." The agency does not allow facilities licensed to use nuclear materials to discharge radionuclides, which are insoluble and non-biological in nature, into the sewer systems.

Significance for this Study:

Sometimes rulemaking agencies publish the advance notice of proposed rulemaking is not to initiate to propose new regulations or specific changes in the rules. The real purpose underlying is to solicit the comments and perspectives from the public and interest groups. Therefore, it is very possible that a rulemaking agency would withdraw proposal to changes in regulations if they find the existing regulations are appropriate and efficient to achieve the policy goals so that new regulations are not necessary.

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APPENDIX: SYMPOSIA AND
CONFERENCES

E-Rulemaking in the 21st Century:
Issues and Themes from a Congressional Symposium

Sponsored by
The Committee on the Judiciary
U.S. House of Representatives

in cooperation with

The Congressional Research Service and
The Regulatory Policy Program at Harvard University

December 5, 2005

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E-Rulemaking in the 21st Century: Issues and Themes from a Congressional Symposium

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Administrative rulemaking has entered the information age. In recent years, the federal government has launched a regulatory portal called Regulations.Gov and has developed an on-line Federal Docket Management System (FDMS). These on-line initiatives aim to help the public find information about and comment on the thousands of new rulemaking proceedings initiated each year by hundreds of regulatory agencies across the federal government. The advent of new information technology brings with it potential opportunities for agencies not only to expand public access to the rulemaking process but also to improve regulatory decisions.

To examine the potential for the use of information technology in improving the rulemaking process, the United States House of Representatives' Committee on the Judiciary sponsored a major symposium on E-Rulemaking in the 21st Century, held in December 2005. This symposium brought together legislative staff, administration officials, and academic researchers to explore the implications of e-rulemaking for administrative law and procedure, as well as to identify future research and policy issues implicated by new applications of information technology to rulemaking.

This report summarizes and synthesizes the major issues raised by participants in the Congressional symposium. It begins by tracing the progress made by the federal government in applying information technology to the regulatory process. It then elucidates some of the key goals or metrics for the success of e-rulemaking, before next discussing the principal research findings to date on e-rulemaking's effects on public participation. In its final part, this report considers the future of e-rulemaking, raising matters of both technological innovation and institutional design that deserve continued dialogue and analysis by researchers, public managers, and policy makers.

This report summarizes and synthesizes the major perspectives and issues expressed at the December 5, 2005 symposium, E-Rulemaking in the 21st Century, sponsored by the United States House of Representatives' Committee on the Judiciary, in cooperation with the Congressional Research Service and the Regulatory Policy Program at Harvard University's John F. Kennedy School of Government. The views expressed in this report do not necessarily reflect those of its author or the academic institutions to which he is affiliated, or those of the House Judiciary Committee, its Members or staff, or the Congressional Research Service. Furthermore, although this report summarizes the symposium discussions, it does not purport to attribute views to specific participants nor to represent the views of all the participants, nor should this report be construed as a consensus statement or shared set of findings among all participants.

A Progress Report on E-Rulemaking

The Congressional symposium began by tracing the progress made to date on applying information technology to the rulemaking process. As with many other modern technological applications in the Internet age, e-rulemaking first began to emerge in the early 1990s. Among the earliest efforts to encourage e-rulemaking were two studies commissioned by the Administrative Conference of the United States (ACUS) that focused on the electronic acquisition and management of agency information, one released in 1988 and the other in 1990. By the mid-1990s, key regulatory publications like the *Federal Register* or the *Code of Federal Regulations* became available on-line. Furthermore, in 1993, the Clinton Administration's National Performance Review issued several recommendations designed to encourage regulatory agencies to use information technology to improve public access to and participation in the governmental process.

Around this same time, administrative agencies began experimenting with computer systems for storing and managing public records, and in individual rulemakings several agencies started to allow members of the public to submit comments via email. In 1995, ACUS released a third major report on e-rulemaking, this one analyzing key impediments to the creation of on-line regulatory dockets and providing guidance to those agencies that sought to use the Internet to make their work more accessible to the public. Three years later, the U.S. Department of Transportation (DOT) became the first regulatory agency to establish a comprehensive, agency-wide docket management system.

By the turn of the new century, a few other agencies had followed with docket systems of their own. However, most regulatory agencies continued to rely solely on paper-based (or microfiche-based) records storage systems. Some still would not even allow members of the public to submit comments by email. In 2002, Congress adopted the E-Government Act in order to require all federal agencies to accept electronic public comments and to begin to publish their regulatory docket information on-line. At about the same time, the Bush Administration began to pursue e-rulemaking as part of its major President's Management Agenda, seeking a more transparent and participatory regulatory process through the deployment of new information technology.

The Administration developed two major information technology projects related to rulemaking, both implemented by an interagency cooperative group led by the U.S. Environmental Protection Agency (EPA). The first project was the creation of a one-stop rulemaking portal, Regulations.Gov. Launched in January 2003, Regulations.Gov provides a single place for the public to find *Federal Register* notices for all the rules proposed by any federal agency. It also enables the public to submit comments on proposed rules by easily clicking a link found at that same location. Comments submitted via the Regulations.Gov portal are electronically routed to the appropriate individual agencies. The Administration reports that from 2003 to 2005, Regulations.Gov received 11.5 million hits and downloaded some 8.9 million pages and

files for the public to view. During this same period, visitors used Regulations.Gov to submit nearly 13,500 comments on proposed rules.

In September 2005, the Administration launched an on-line federal docket management system (FDMS) and added it to the existing structure of Regulations.Gov. FDMS stores and provides public access via the Internet to all the background materials on proposed rules that previously had been available in agency docket rooms. These materials include *Federal Register* notices associated with each rulemaking, supporting studies and analyses, and all the public comments filed on the proposed rule. FDMS also includes a web-based form for comment submission and a simple keyword search engine. Supporting documents from approximately two-dozen agencies can now be found on-line via FDMS. The Administration plans eventually to see that most, if not all, federal agencies make their regulatory docket materials fully available through the FDMS.

Metrics for Assessing E-Rulemaking

As progress in implementing e-rulemaking proceeds, it is useful to pause to consider the purposes served by using information technology in the regulatory process. In other words, by what terms should the success of e-rulemaking be gauged?

Both Congress and the Administration have provided answers to this question. The preamble to the E-Government Act of 2002 articulates several goals, including:

- “To ... provide citizen-centric Government information and services.”
- “To reduce costs and burdens for businesses and other Government entities.”
- “To promote better informed decisionmaking by policy makers.”
- “To make the Federal Government more transparent and accountable.”

The Administration has expressed a series of similar goals for e-rulemaking. In broadest terms, the Administration’s objective has been to make it more likely that “[c]itizens can easily access and participate in a high quality, efficient, and open rulemaking process.” The initiative’s further goals are to:

- “Expand public understanding of the rulemaking process”
- “Improve the quality of federal rulemaking decisions”
- “Increase the amount, breadth, and ease of citizen and intergovernmental access and participation in rulemaking”

Both the Congressional and Presidential goals evince a desire to improve the quality of government regulation as well as its legitimacy. Many participants at the Congressional symposium expressed support for these goals as well. Some argued that increasing public comment would itself help improve both the legitimacy and quality of government regulation. In addition to providing agency decision makers with a potentially broader set of information, public comments can alert agencies to problems they may encounter with implementing a new rule. In addition, some participants suggested that e-rulemaking could help cure some of the problems often attributed to regulatory decision making, whether tunnel vision, incomplete information, regulatory capture, or delays in decision making. Others touted e-rulemaking's potential for enhancing interagency coordination and improving academic research.

Despite broad support for expanding participation and improving substantive decisions, some participants questioned the compatibility of these twin goals. Even if some level of public participation is valuable, this does not necessarily mean that more is better. At some point, additional comments may yield only diminishing returns – if not even stark tradeoffs between increased participation and technically sound decision making. Agency officials have traditionally claimed to use public comments only as a source of substantive or technical input into the design of a proposed rule. An excessive emphasis on public comments, some suggested, might make agencies more inclined to treat rulemaking as a plebiscite, rather than as a process of using expert judgment to advance statutory mandates and the overall public interest.

Others questioned whether increasing the number of comments – and increasing their influence on decision making – would necessarily enhance the legitimacy of rulemaking. Even with the benefit of information technology, those individuals with the time to file comments may not be fully representative of the overall public. For example, one participant noted that in other contexts, such as FOIA requests, a disproportionate share of public input appears to come from retired individuals and convicted felons, whose views may not always reflect those of the entire public. Others expressed concern that interest groups of various types will increasingly use mobilization campaigns to inundate agencies with pre-formulated messages, skewing the representativeness of the comments received.

Participants raised a series of other unintended consequences that could arise from efforts to expand significantly the number of comments on proposed rules. A dramatic increase in comment volume could tax the capacity of many agencies to read and process comments in a timely, effective manner. Interest groups could strategically flood agencies with comments in an effort to stop or delay a rulemaking. Greater participation might only serve to accentuate the controversy already surrounding many rulemaking proceedings. This might directly contribute to greater delays in rulemaking, or indirectly contribute if a greater number of comments also increased the probability of subsequent judicial challenges. For those concerned about Presidential involvement in the rulemaking process, it was suggested that e-rulemaking may well enhance the White House's ability to oversee and influence regulatory agencies.

Even if agencies could somehow manage well in the face of a large influx of comments, agency officials might disparage having to do so. The result, according to some participants, could be that mass email campaigns would undermine the value agencies place on public comments. Agency officials could come to discount the value of comments altogether, viewing them more as a nuisance than as an aid to decision making. Another possible effect could be to create in practice a two-tiered rulemaking process, with agencies discounting the expressed views of the mass public but giving credence to the views of those with the resources to file lengthy and sophisticated comments.

Although symposium participants did not come to any final agreement on the proper goals for e-rulemaking, their discussion helped clarify the need for precision in defining these goals. Is the goal to increase comments from (a) those who are affected by a proposed rule, (b) those who are organized and interested, (c) those possessing relevant information, or (d) those who can affect the implementation of and compliance with any resulting rule – or some combination of these categories? Similarly, if the goal is to improve the quality of rulemaking, how should quality be defined and measured? Criteria for judging rulemaking quality can include effectiveness, cost-effectiveness, efficiency, equity, political acceptability, ease of administration and enforcement, and degree of actual implementation and compliance – or again, a combination of these criteria. In going forward, both policy decision makers and researchers will benefit from precise metrics that can be used to assess e-rulemaking's performance and to take steps to improve information technology applications over time.

Evaluating E-Rulemaking

A body of evidence on the impacts of e-rulemaking has begun to emerge. Some of this evidence corresponds directly to the overarching goals of e-rulemaking, while some of it does not. An example of the latter would be a recent U.S. Government Accountability Office (GAO) report on the overall management of the Administration's e-rulemaking effort. Comparing lead-agency EPA's actual management practices against thirty key project management practices, GAO found that EPA had implemented most of these best practices and that partner e-rulemaking agencies appeared to be satisfied with EPA's collaboration and responsiveness.

Administrative cost-savings have also been used as a metric for evaluating e-rulemaking. A few agencies have reported cost-savings in moving from paper-based dockets to electronic docket systems. For example, the EPA has reported savings of \$400,000, while DOT reports saving over \$1 million annually in records management costs.

While management practices and costs are important to study, they do not speak to the goals of improving regulatory decisions or expanding public access and participation. One way to begin to assess the impact of e-rulemaking on public access

and participation would be to examine the “useability” of Regulations.Gov and the FDMS. It is possible to compare the FDMS’s search engine, user interface, and report generation functions to those in similar information storage and retrieval systems in commercial or library use. Although no comprehensive useability study was reported at the symposium, several participants did share assessments based on their use of a variety of information systems. These sophisticated users reported that even though FDMS makes regulatory documents available without needing to travel to Washington, D.C., finding these documents proves to be exceedingly difficult. They reported that FDMS fails to provide the public with the kind of full text searching capability now commonly available elsewhere in commercial and library settings -- and apparently also available to agency users of FDMS. One participant requested that the public have access to more fields for searching, an ability to search across multiple fields, and an ability to use Google to search the FDMS.

Of course, even without search capabilities on par with Google, the FDMS may still lead to a demonstrable improvement in public access compared with the previous paper-based dockets. At the symposium, one participant reported that about 3,000 people a year accessed DOT regulatory dockets before the department established its on-line docket in 1998, whereas afterwards it received 2.5 million hits by about 350,000 distinct users. Another participant reported that the DOT garnered 4,341 comments on 137 rules in 1998, but in 2000 it received 62,944 comments across 99 rules.

It is not self-evident that DOT’s e-docket actually caused this dramatic increase in comments in 2000. Perhaps DOT rules issued in 2000 were just much more controversial or significant than the ones issued in 1998. Determining the causal impact of e-rulemaking requires examining more than just two single years, since even one unusual rulemaking in a given year could explain a dramatic difference in the number of comments. At the Congressional symposium, political scientist Steven Balla presented findings from a systematic study of the impact of DOT’s on-line docket on public commenting. Examining the number of comments filed on more than four hundred and fifty DOT rules, about half issued before the docket system and half afterwards, Balla and his co-author found that the levels and patterns of commenting were basically the same across both sets of rules. In 2001–2003, the median rulemaking received nearly the same number of comments as the median rulemaking in 1995–1997. The averages were different, but only because of two highly unusual rulemakings that were issued in the latter period. Strikingly, the distribution of comments across all rulemakings in both periods was nearly identical.

Another paper presented at the Congressional symposium by political scientist Stuart Shulman considered the possibility that, even if information technology does not expand the number of comments, it can enhance the quality of public deliberation over proposed rules. Shulman and his coauthors surveyed over 1,500 individuals who filed comments in three rulemakings, about half who filed hard copies of their comments and half who filed their comments electronically. They assessed the quality of deliberation by whether commentators (a) sought out information in drafting their comments, (b) reviewed comments filed by others, (c) believed they learned something from others’

comments, and (c) actually changed their views after reading others' comments. Interestingly, on nearly all of their tests, Shulman and his collaborators failed to find a significant difference between the electronic versus the paper filers. One difference they did find was that paper filers were more likely to make reference to others' arguments, and in that sense they were actually more deliberative than their electronic counterparts.

The Shulman and Balla papers represent some of the most systematic efforts to date to evaluate the impact of e-rulemaking; however, they certainly do not indicate that additional research is no longer needed to evaluate e-rulemaking. The fact that the results of these early studies have run counter to prior expectations only suggests how much can be learned from systematic empirical efforts. Future research efforts, including collaborations between government and the research community, can help assess the impact of technology and inform decisions about future information technology investments and refinements to existing applications.

The Future of E-Rulemaking

Even if the basic finding from the early research holds over time, namely that existing attempts at e-rulemaking yield no discernible impact on public participation, this may stem only from limitations on the current uses to which information technology has been put. As one symposium participant described, e-rulemaking so far has mainly just automated the existing rulemaking process. Participants at the Congressional symposium shared ideas for new uses of information technology, ideas that may find their way into e-rulemaking's future and enable it eventually to live up to the promise of making discernible improvements in public participation and governmental decision making.

One set of ideas focused on new ways to inform and involve the public in regulatory decision making. Since the public needs information about rulemaking in order to participate thoughtfully and actively in it, the federal government could create a website that explained the regulatory process to the public, perhaps using animation or other visual means. Websites could provide clear and comprehensive links to the background statutes, related regulations, and other explanatory materials. One participant even suggested providing links to outside groups expressing different positions on a proposed rule.

Another way to enhance participation and foster improved deliberation would be to deploy more consultative information technologies. Interactive software that allows users to comment on prior users' comments – the on-line collaborative tool “Slashdot” being one example – may better promote deliberation. Or open-source tools like the popular Wikipedia, a website that allows any user to edit its contents, may create new avenues for public dialogue over regulatory decisions.

New information technologies may also help lessen some of the challenges to governmental capacity that could come from heightened levels of participation. To

address the need for agencies to sort through hundreds of thousands of public comments in particularly controversial rulemakings, for example, researchers are beginning to experiment with the use of natural language processing and other text analysis software to filter comments automatically by issue and position. Others are testing detection tools that can spot form letters and separate them from the comments that present new information and arguments.

In the future, information technology may also be used more extensively after agencies finish making rules, in order to assist regulated individuals and businesses to come into compliance. Those targeted by government regulations need to know about how the rules apply to their operations and what they need to do to comply with them. Compliance assistance technologies can be designed to help explain complex rules in plain English (or other languages). Interactive software can also be designed so that users can be prompted by a series of questions about their activities and then the computer can respond by displaying the rules that apply to those activities.

At some point, new technologies may also make it much easier and cheaper to achieve another goal expressed by some conference participants: archiving historical government materials electronically. While some individual agencies are scanning old regulatory dockets for retention purposes, there is currently no government-wide push to do so. The Administration's initiative through Regulations.Gov and FDMS is principally focused on digitizing ongoing and future rulemakings, but some participants favored adding the mission of scanning and capturing records from past rulemakings.

As much as e-rulemaking's future will depend on innovations in information technology, it will also depend on making appropriate institutional choices. In particular, two types of choices that innovators have already confronted will likely remain relevant. The first is the choice between centralization and decentralization of information systems. In developing the FDMS, the present Administration has tended toward centralization, which may bring with it the advantages of economies of scale and better security. Others contend, however, that the varied needs across different regulatory agencies should dictate flexibility and that decentralization can better foster innovation that may then diffuse to the benefit of others. This tension between decentralization and centralization is not likely to disappear any time soon.

The second institutional choice – namely funding e-rulemaking – will also not disappear. Participants noted that the current Administration's e-rulemaking initiative lacks adequate and secure funding. Even if the initiative were adequately funded, there is still the risk that once FDMS is fully operational for all regulatory agencies, managers and appropriators will view the project as finished and neglect funding continual upgrades and enhancements. With computer technology changing rapidly, participants believed that the FDMS and similar systems will need stable, long-term funding if e-rulemaking is to be able to meet important goals like those established by Congress and the Administration.

Conclusion

Information technology has brought change to many aspects of everyday life, and it also promises corresponding changes to how government completes its crucial task of rulemaking. In an effort to increase public participation and help regulatory officials craft better rules, the federal government has made substantial progress in applying information technology to the regulatory process. Large agencies such as the DOT have operated on-line regulatory dockets for many years now. More recent projects such as Regulations.Gov and FDMS have put at least part of the rulemaking process on-line for all federal regulatory agencies.

Contrary to expectations, the empirical evidence to date fails to discern any major transformations in public participation occurring due to the e-rulemaking projects established at DOT or across the federal government. However, new, more interactive technologies may well be deployed in the future to a much greater effect. As with current projects, future e-rulemaking projects will raise both technological and institutional challenges (such as adequate funding) to ensure successful implementation.

In an effort to meet these challenges, events such as the Congressional symposium summarized in this report help bring academic experts into productive dialogue and collaboration with governmental officials. Participants recommended expanding and institutionalizing such opportunities for collaboration. Much work remains in terms of refining appropriate metrics for e-rulemaking, evaluating the impact of e-rulemaking in terms of these metrics, and then improving existing applications of information technology or creating new ones altogether.

**Appendix 1:
Symposium on E-Rulemaking in the 21st Century**

Agenda

Opening Remarks

- Ray Smietanka, Chief Counsel, Committee on the Judiciary Subcommittee on Commercial and Administrative Law
- Stephanie Moore, Minority Counsel, Committee on the Judiciary Subcommittee on Commercial and Administrative Law

Welcome and Introductions

- Cary Coglianese, Chair, Regulatory Policy Program, Harvard University

Opening Speaker

- Karen Evans, Administrator for Electronic Government and Information Technology, Office of Management and Budget (OMB)

Session 1: Current Progress on E-Rulemaking

- Don Arbuckle, Deputy Administrator, Office of Information and Regulatory Affairs, OMB
- Oscar Morales, Director, eRulemaking Initiative, U.S. Environmental Protection Agency
- Rick Otis, Deputy Associate Administrator, U.S. Environmental Protection Agency

Commentary

- Barbara Brandon, University of Miami
- Orice Williams, U.S. Government Accountability Office

Session 2: Current and Future Research on E-Rulemaking

- Steven J. Balla, George Washington University
- Stuart Shulman, University of Pittsburgh

Commentary:

- Cornelius M. Kerwin, Acting President, American University
- Jeff Lubbers, Former Research Director, Administrative Conference of the United States

Closing Speaker

- Sally Katzen, Former Administrator of the Office of Information and Regulatory Affairs, OMB

**Appendix 2:
Speaker and Commentator Biographies**

Donald R. Arbuckle is the Deputy Administrator in the Office of Information and Regulatory Affairs, in the White House Office of Management and Budget. Don has worked at OIRA nearly from its inception. He joined OIRA in 1981 and over the next several years served as a Desk Officer and then as Deputy Branch Chief for the Commerce and Lands Branch, covering a variety of agencies including DOT, EPA, DOI, USDA, SBA, and DOC.

He worked closely with OIRA's Administrators and Deputy Administrators during the Reagan, Bush, and Clinton Administrations on broad regulatory and information issues, including the many controversies surrounding regulatory review. Don became OIRA's Deputy Administrator in 1996, serving as Acting Administrator for 18 months in 1998 and 1999 and during the transition between the Clinton and Bush Administrations. He is now the Deputy for OIRA Administrator John Graham.

Prior to joining OMB, Don worked at the National Transportation Safety Board. Before that, in what turned out to be a singularly ill-timed career move, he was a professor at a university in Iran, setting up an American Studies program in 1977 and 1978. Don has a BA from Harvard and a Ph.D. from the University of Pennsylvania. He lives in Alexandria with his wife and son; his two older children live in Cambridge, Massachusetts and Norman, Oklahoma.

Steven J. Balla is an Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs at George Washington University. His primary research interest is the extent and efficacy of public involvement in executive branch policymaking.

He has examined participation in notice and comment rulemaking, the federal advisory committee system, negotiated rulemaking, and other avenues through which agencies make and implement public policy. He has published articles in journals such as the *American Political Science Review*; *American Journal of Political Science*; *Journal of Law, Economics, and Organization*; and *Journal of Public Administration Research and Theory*. He is the author (with William T. Gormley, Jr.) of *Bureaucracy and Democracy: Accountability and Performance* (CQ Press). He has his Ph.D. from Duke University.

Barbara H. Brandon is the Faculty Services Librarian at the University of Miami Law School. She is a graduate of the University of Pittsburgh Law & Library Schools and she has an LLM from Harvard. She has defended EPA rulemakings at the Department of Justice.

In addition, she has challenged rules from the other side, while working at a large law firm with a national environmental practice and for the Commonwealth of Pennsylvania. She has taught environmental law at the University of Kentucky College of Law and the University of Pittsburgh School of Law.

Cary Coglianese is the Edward B. Shils Professor of Law at the University of Pennsylvania Law School, where he is also a Professor of Political Science and the Director of the Penn Program on Regulation. His interdisciplinary research focuses on issues of regulation and administrative law, with a particular emphasis on the empirical evaluation of alternative and innovative regulatory strategies and the role of disputing and negotiation in regulatory policy making. His work has appeared in, among other journals, the *Administrative Law Review*, *Duke Law Journal*, *Law & Society Review*, *Michigan Law Review*, *University of Pennsylvania Law Review*, and *Stanford Law Review*.

Previously he served on the faculty for twelve years at Harvard University's John F. Kennedy School of Government, where he founded and chaired the School's Regulatory Policy Program. He remains a Senior Research Fellow at the Kennedy School's Mossavar-Rahmani Center for Business and Government. He has also served as a visiting professor of law at Stanford Law School and the Vanderbilt University Law School.

Coglianese is a co-editor of the international, peer-reviewed journal *Regulation & Governance*, and is the founder and co-chair of the Law & Society Association's international Collaborative Research Network on Regulatory Governance. He also serves as vice-chair of the e-rulemaking committee of the American Bar Association's Administrative and Regulatory Practice Section, as well as vice-chair of the Committee on Innovation, Management Systems, and Trading of the American Bar Association's Section of Environment, Energy, and Resources. At the University of Pennsylvania, Coglianese teaches environmental law and policy, administrative law, and regulatory policy. He is a Fellow of the American Bar Foundation, a recipient of two Resources for the Future fellowships in regulatory implementation, and a recipient the American Political Science Association's Edward S. Corwin Award for his research on environmental litigation.

He received his J.D., M.P.P., and Ph.D. from the University of Michigan and is a member of the bar of the State of Michigan and the United States Supreme Court.

Karen S. Evans is the Administrator of the Office of Electronic Government and Information Technology (IT) at the Office of Management and Budget. In this role, she oversees implementation of IT throughout the Federal government including advising the Director on the performance of IT investments, overseeing the development of enterprise architectures within and across agencies, directing the activities of the Chief Information Officer (CIO) Council, and overseeing the usage of the E-Government Fund to support

interagency partnerships and innovation. She also has responsibilities in the areas of capital planning and investment control, information security, privacy, accessibility of IT for persons with disabilities, and access to, dissemination of, and preservation of government information.

Prior to becoming Administrator, Ms. Evans was the Chief Information Officer for the Department of Energy. There she was responsible for the design, implementation, and continuing successful operation of Information Technology (IT) programs and initiatives throughout the Department and its offices. During this time, Ms. Evans was also the Vice-Chairman of the Federal Chief Information Officers Council. Elected to this post in December 2002, she coordinated the Council's efforts in developing federal IT programs and improving agency information resource practices.

Before joining Energy, she was Director, Information Resources Management Division, Office of Justice Programs (OJP), U.S. Department of Justice, Washington, D.C., where she was responsible for the management and successful operation of the Information Technology program. OJP's bureaus and offices provide funding opportunities for initiatives such as Safe Schools, Safe Start Program, Community Prosecution, Native American Tribal Courts, and other programs of high local, state, and national interest. Key accomplishments included the implementation of an on-line grants management system to process grants from discretionary, formula and large block grants programs, to streamlining capabilities to ensure for the expeditious processing of claims benefits to families of public safety officers after the September 11th attacks.

She is a 20 year veteran of Government service with responsibilities ranging from GS-2 to SES, working with several agencies, including the National Park Services, the Office of Personnel Management, and the Farmers Home Administration (FmHA) of the Department of Agriculture.

Prior to joining OJP, she served as the Assistant Director for Information Services at DOJ headquarters, where she successfully managed Internet resources for the Department, including electronic mail services and security. While at FmHA, she served as the acting Deputy Assistant Administrator for Management Information Systems, Deputy Director for the Applications Management Division and the Chief of Emerging Technology, where she managed the implementation on a nationwide basis, from inception to continuing operations, of several critical automation systems.

She holds a Bachelor's degree in Chemistry and a Master of Business Administration degree from West Virginia University.

Sally Katzen served almost eight years in the Clinton Administration, first as the Administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget, then as Deputy Assistant to the President for Economic Policy and Deputy Director of the National Economic Council in the White House, and then as the Deputy Director for Management at OMB.

Before joining the Clinton Administration, Ms. Katzen was a partner in the Washington DC law firm of Wilmer, Cutler & Pickering, specializing in regulatory and legislative matters. While in private practice, Ms. Katzen was an adjunct Professor at the Georgetown Law Center (Administrative Law), served in various leadership roles in the American Bar Association, including Chair of the Section on Administrative Law and Regulatory Practice and two terms as DC Delegate to the House of Delegates of the ABA, served as President of the Federal Communications Bar Association, and was President of the Women's Legal Defense Fund.

Since leaving government service in January 2001, Ms. Katzen has taught at the George Mason University Law School, Johns Hopkins University, the University of Michigan Law School, and Smith College.

She graduated magna cum laude from Smith College and magna cum laude from the University of Michigan Law School, where she was Editor in Chief of the Law Review. Following graduation from law school, she clerked for Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit. She also served in the Carter Administration for two years as the General Counsel of the Council on Wage and Price Stability in the Executive Office of the President.

Cornelius M. Kerwin is the Interim President of American University, appointed on November 11, 2005 after serving as acting president since August 24, 2005. Dr. Kerwin is a long-standing member of the American University faculty. He previously served as provost for seven years and as acting provost for one year, in that capacity leading approximately 475 full-time teaching faculty in AU's six schools and colleges (College of Arts and Sciences, Kogod School of Business, School of Communication School of International Service, School of Public Affairs, and Washington College of Law). He also served as Dean of the School of Public Affairs from 1989 to 1997.

Dr. Kerwin, a professor of public administration in the School of Public Affairs, is a nationally recognized specialist in public policy, with emphasis on the regulatory process. He is actively engaged in teaching and research and teaches courses in administrative process, policy implementation, and American government. He is the author of *Rulemaking: How Government Agencies Write Law and Make Policy* (3rd ed., 2003, Congressional Quarterly Press) and the coauthor of *How Washington Works: The Executives Guide to Government* (3rd ed., 1996). Dr. Kerwin's scholarly articles have appeared in *Public Administration Review*, *Journal of Politics*, *Policy Studies Review*, *Journal of Public Administration Research and Theory*, *Judicature*, *Justice System Journal*, and *Harvard Journal on Legislation*. He is also the author of numerous monographs, chapters in edited books, anthologies, and articles in professional and popular publications.

Under Dr. Kerwin's leadership, the university established the Center for the Study of Rulemaking in July 2004. As part of its mission to better understand and improve the

processes and techniques used by government agencies to develop regulations, the Center organizes conferences, symposia, and workshops, which bring together scholars, public and private sector personnel, and the larger academic community.

Dr. Kerwin's experience in the public sector includes work with the Office of Personnel Management, the Environmental Protection Agency, the Administrative Conference of the United States, the Federal Energy Regulatory Commission, the Department of Agriculture, the Nuclear Regulatory Commission, and the Public Health Service. In the private sector, he has served as a consultant to IBM Corporation and General Electric.

Dr. Kerwin is active in a number of professional associations and societies. He was elected as a Fellow of the National Academy of Public Administration (NAPA) in 1996. He was president of the National Association of Schools of Public Affairs and Administration (NASPAA) in 1998 and was the founding chair of the Section on Public Law and Administration of the American Society for Public Administration (ASPA). He is a member of Pi Sigma Alpha and Pi Alpha Alpha national honor societies for the fields of political science and public administration, respectively.

He received a BA from American University in 1971, followed by an MA in political science from the University of Rhode Island in 1973 and a PhD in political science from Johns Hopkins University in 1978.

Jeffrey S. Lubbers is a Fellow in Law and Government at American University's Washington College of Law. He teaches courses in Administrative Law, Environmental Law, Federal Legal Institutions, and ADR. He has also taught at the University of Miami School of Law, Washington and Lee University School of Law, the Georgetown University Law Center, Melbourne University, Ritsumeikan University Law School in Japan, and the University of Ottawa. He has an A.B. degree from Cornell University and a J.D. from the University of Chicago Law School and is a member of the bars of the State of Maryland and the District of Columbia.

Prior to joining American University, he served in various positions with the Administrative Conference of the United States (ACUS), the U.S. Government's "permanent" advisory agency on procedural improvements in federal programs until its closure by the 104th Congress in 1995. From 1982-1995 he was ACUS' Research Director—a position in the Senior Executive Service. In this position, he developed ideas for new studies, hired outside consultants (mostly law professors) to conduct the studies, reviewed reports, supervised staff attorneys and assisted ACUS committees in developing recommendations from the studies on a wide variety of administrative law subjects. He worked with Congressional committees and agencies to seek implementation of ACUS recommendations, and served as Team Leader for Vice President Gore's National Performance Review team on Improving Regulatory Systems in 1993. He co-authored ACUS' major 1992 study, *The Federal Administrative Judiciary* and was a contributing author of the first edition of the *Guide to Federal Agency Rulemaking*. He has authored an updated third edition of the latter Guide, published by the American Bar Association

in 1998. A fourth edition is forthcoming in 2006. He has also co-authored the Administrative Procedure Sourcebook (3d. ed, 2000), and serves as the editor for the American Bar Association's Developments in Administrative Law and Regulatory Practice (volumes from 1998-2005).

He has published numerous articles on the administrative process, participated frequently in training programs for government officials in the US and overseas, and has won several prestigious honors for his work in administrative law including a Presidential Rank of Meritorious Executive, the "Mary C. Lawton Award for Outstanding Government Service" from the American Bar Association, and the "Walter Gellhorn Award" from the Federal Bar Association.

In addition to his teaching, he has served as a consultant to various federal agencies, the ABA, the World Bank (on administrative law reform in Latvia), the USAID (on administrative reform in Georgia), and the Office of Economic Cooperation and Development (OECD) (on administrative simplification and regulatory burden reduction).

Oscar Morales has over twenty five years experience at the U.S. Environmental Protection Agency. Currently, Mr. Morales manages the Agency's FOIA, Privacy Act, Paperwork Reduction Act and the National Records Management Program as well as oversees the EPA's electronic docket system and the e-Rulemaking Initiative.

As part of the State-EPA Exchange Network, he is responsible for the maintenance of the Systems of Registries and Repositories which are also used extensively in the Agency's Portal System. He is constructing the first-ever civilian Enterprise Content Management System and runs the State-EPA and International environmental data standards processes.

As the director of the eRulemaking Initiative, he is overseeing the construction and maintenance of a federal-wide electronic rulemaking and docket system to be used by over 200 federal agencies. The initiative is a groundbreaking achievement in the creation of a citizen-centered eDemocracy with a front and back end process that will revolutionize the way the entire federal government writes rules and solicits comments from the public.

Mr. Morales has an M.B.A from Wharton and a Masters in Political Science from Texas Tech University. He completed four years of doctoral work in Statistics, Political Science and Policy at the University of Michigan at Ann Arbor. Oscar is a member of the American Council for Technology, Industry Advisory Council (ACT, IAC), the E-Gov Institute Board, the Association for Federal Information Resources Management (AFFIRM) and was selected as one of the 100 IT Senior Government or Industry Managers for 2003 by Government Executive Magazine.

Richard D. Otis, Jr. currently serves as the Deputy Associate Administrator for the Office of Policy, Economics, and Innovation with responsibility for assisting in managing the agency's policy and regulatory development processes, economics analysis program, and efforts to establish innovative approaches for accelerating environmental performance.

He began his public policy career in 1980 as a Presidential Management Intern in the Office of Federal Activities at the Environmental Protection Agency (EPA). He moved on to become a regulatory Desk Officer in the Office of Management and Budget during the mid-1980s after which he returned to EPA where he worked as a policy advisor to the Assistant Administrator of the Office of Solid Waste and Emergency Response.

In subsequent years, he became a Legislative Fellow for Congressman Fred Upton where he handled the Congressman's activities on the House Energy and Commerce Subcommittee on Oversight and Investigation. He has worked for a government affairs consulting firm focusing primarily on environmental regulatory issues, managed the federal and international government affairs activities of an industry trade association, and operated his own consulting firm focused on environmental policy and communications issues.

Prior to his current position, Rick managed the Bush Administration's transition team at EPA in 2001, served as Deputy Assistant Administrator for EPA's Office of Environmental Information where he had principal responsibility for managing the Environmental Protection Agency's e-Government activities under the President's Management Agenda, and served on a special assignment to reinvigorate the agency's enterprise-wide public liaison and outreach functions.

Over this twenty five-year period, Rick has developed an extensive understanding of the mechanisms used by federal agencies, Congress, the Executive Office of the President, and interest groups to establish and implement national environmental policy. His experience with these mechanisms, existing environmental laws, the federal regulatory process, and the transformational value of information technology has fostered his interest in the logical evolution of federal environmental programs. This includes a sound grasp of the political, institutional, procedural, public opinion, and communications challenges associated with successfully achieving innovative change.

He received an MBA from Cornell University in 1980 and a BA from Ithaca College in 1976.

Stuart W. Shulman is an Assistant Professor with a joint appointment in the School of Information Sciences and the Graduate School of Public and International Affairs at the University of Pittsburgh. He is a Senior Research Associate in the University of Pittsburgh's Center for Social and Urban Research (UCSUR) and in the Université de Genève-, European University Institute-, and Oxford Internet Institute-based E-

Democracy Centre. He is the founder and director of UCSUR's new Qualitative Data Analysis Program (QDAP).

Dr. Shulman is the Principal Investigator and Project Director on related National Science Foundation-funded research projects focusing on electronic rulemaking, language technologies, digital citizenship, and service-learning efforts in the United States. He has been the organizer and chair for federal agency-level electronic rulemaking workshops held at the Council for Excellence in Government (2001), the National Defense University (2002), the National Science Foundation (2003), and The George Washington University (2004).

For the last three years, Dr. Shulman has served on the Program Committee for the NSF's National Conference on Digital Government Research (dg.o). He is the dg.o 2006 Workshop and Tutorial Chair. Dr. Shulman has also reviewed individual NSF proposals from multiple cross-cutting divisions and sat on a NSF proposal review panel. Dr. Shulman is the Senior Contributing Editor for the international Journal of E-Government, an Editorial Board Member for the International Journal of Electronic Democracy, and he was the 2004-2005 President of the American Political Science Association's organized section on Information Technology & Politics. He is a former Oregon Tilth certified organic farmer who teaches courses on American national government, environmental policy, sprawl, digital citizenship and governance, service-learning, and film and politics.

Orice M. Williams is a Director at the U.S. Government Accountability Office (GAO). In this capacity, Ms. Williams has been responsible for directing a wide variety of engagements, including those related to regulatory issues that have implications across federal agencies. Most recently, Ms. Williams has led GAO's work on unfunded mandates and the Unfunded Mandates Reform Act of 1995 and e-Rulemaking. Prior to joining GAO's Strategic Issues Team, she was an Assistant Director in the Financial Markets and Community Investment Team. There she was responsible for cross-cutting financial services issues and specialized in issues involving accounting oversight and the Securities and Exchange Commission (SEC).

Over the past decade, she has produced dozens of reports and led a wide variety of efforts on accounting, securities, insurance and banking issues involving tax-exempt bonds, government-sponsored enterprises, derivatives, hedge funds, day trading, investor protection, human capital management practices, financial-regulatory coordination, the Securities Investor Protection Corporation and the Public Company Accounting Oversight Board.

Ms. Williams received an M.B.A. with a concentration in finance from Virginia Tech in 1990 and a B.S. degree in business and finance from Virginia Commonwealth University in 1988.

**Appendix 3:
List of Participants**

Don Arbuckle Office of Management and Budget	Cynthia Farina Cornell Law School
Steven J. Balla George Washington University	Brenda Hankins U.S. House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law
Stuart Benjamin Duke University School of Law	Michael Herz New York University Law School Cardozo Law School
Barbara Brandon University of Miami	Susan Jensen-Conklin U.S. House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law
Larry Brandt National Science Foundation	Sally Katzen George Mason University; Office of Information and Regulatory Affairs, 1993- 1998
Tom Bruce Cornell Law School	Neil Kerwin American University
Claire Cardie Cornell University	Phil Kiko U.S. House Committee on the Judiciary
Bob Carlitz Information Renaissance	Kincho Law Stanford University
Bill Cline Federal Communications Commission	Jeff Lubbers American University; Administrative Conference of the United States, 1982- 1995
Cary Coglianesse University of Pennsylvania Law School	Randy May Progress & Freedom Foundation
Dan Cohen U.S. Department of Commerce	
Curtis Copeland Congressional Research Service	
Neil Eisner U.S. Department of Transportation	
Karen Evans Office of Management and Budget	

Stephanie Moore
U.S. House Committee on the Judiciary,
Subcommittee on Commercial and
Administrative Law

Oscar Morales
U.S. Environmental Protection Agency

Rick Otis
U.S. Environmental Protection Agency

Richard Parker
University of Connecticut Law School

Kerli Philippe
U.S. House Committee on the Judiciary,
Subcommittee on Commercial and
Administrative Law

Morton Rosenberg
Congressional Research Service

David Rosenbloom
American University School of Public
Affairs

Robert Shull
OMB Watch

Stuart Shulman
University of Pittsburgh

Ray Smietanka
U.S. House Committee on the Judiciary,
Subcommittee on Commercial and
Administrative Law

J. Woody Stanley
U.S. Department of Transportation

Rena Steinzor
University of Maryland School of Law

Jessica Taylor
U.S. House Committee on the Judiciary,
Subcommittee on Commercial and
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U.S. Government Accountability Office

ADMINISTRATIVE LAW REVIEW

E-Rulemaking: Information Technology and the Regulatory Process

Cary Coglianese

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E-RULEMAKING: INFORMATION TECHNOLOGY AND THE REGULATORY PROCESS

CARY COGLIANESE*

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* Irvine Visiting Professor of Law, Stanford Law School; Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University. The Digital Government Research Program at the National Science Foundation made this project possible under award number EIA-0226053, and the Program's staff—Larry Brandt, Valerie Gregg, and Sue Stendebach—offered helpful guidance and encouragement at every point along the way. This Article benefited from the contributions offered by the researchers and practitioners who participated in e-rulemaking workshops organized by the Regulatory Policy Program, the insights shared by workshop executive committee members, and the many helpful comments and suggestions on earlier drafts provided by Steve Balla, Bob Carlitz, Claire Cardie, Jeremy de Roxas, Ed Hovy, Roger Hurwitz, Neil Kerwin, Kincho Law, Liz Liddy, Jeff Lubbers, Beth Novack, Rick Otis, Jarrett Perlow, Ed Schwalenberg, Peter Shane, Stuart Shulman, Geoff Steele, Sue Stendebach, Peter Strauss, Chris Weare, and Gio Wiederhold. In addition, Bernie Cahill, Amy Christopher, Kate Dodson, Eric Lockwood, Jennifer Nash, Todd Olmstead, and Camiliakumari Wankaner, all of the Center for Business and Government, contributed in many ways to organizing the workshops. Allan Friedman, Todd Olmstead, Sabine Schaffer, Özlem Uzuner, and Sarah Wilford took helpful notes of the discussions, and Sam Walsh provided excellent research assistance in the preparation of this article. This Article summarizes and synthesizes the perspectives that emerged at the Regulatory Policy Program's workshops, so the views expressed here do not necessarily reflect those of the author, the Regulatory Policy Program, the Kennedy School of Government, Harvard University, or the National Science Foundation. Moreover, while this Article summarizes workshop discussion, it does not necessarily represent the views of all the participants nor should it be construed to represent any consensus statement or shared set of findings or recommendations.

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INTRODUCTION

Over 100 federal regulatory agencies and sub-agencies collectively issue more than 4,500 new regulations every year.¹ These rules govern virtually every major aspect of contemporary life. Efficient and productive markets depend on appropriate regulation of key sectors such as banking, securities, communications, energy, and transportation. Government regulation also helps secure vital public benefits by delivering food safety, environmental quality, and investor and consumer protection. When taken together, the federal government's health, safety, and environmental regulations yield up to an estimated \$250 billion to \$1 trillion in benefits to the public each year.²

Crafting government regulations imposes significant information demands on regulatory agencies, from completing scientific, engineering, and economic analyses to processing and responding to extensive public comments. Information is vital for understanding complex problems, identifying the need for regulation, and analyzing alternative regulatory

1. See John D. Graham, Presidential Management of the Regulatory State, Remarks Prepared for Delivery to the National Economists Club (Mar. 7, 2002), available at <http://www.whitehouse.gov/omb/legislative/testimony/graham030702.html> (last visited May 14, 2004).

2. See, e.g., OFFICE OF MANAGEMENT AND BUDGET (OMB), MAKING SENSE OF REGULATION: 2001 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 3 (2001), available at <http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf> (finding that "the cost of social regulation . . . ranged from approximately \$150 billion to \$230 billion per year" and benefits "ranged from \$250 billion per year to more than \$1 trillion"); see also OMB, INFORMING REGULATORY DECISIONS: 2003 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL AND TRIBAL ENTITIES 3 (2003), available at http://www.whitehouse.gov/omb/inforeg/2003_costben_final_rpt.pdf [hereinafter INFORMING REGULATORY DECISIONS] (reviewing 107 major regulations promulgated between 1992 and 2002 and estimating annual benefits from \$146 billion to \$230 billion and annual costs from \$36 billion to \$42 billion); OMB, STIMULATING SMARTER REGULATION: 2002 REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 39 (2002), available at <http://www.whitehouse.gov/omb/inforeg/2002reporttocong ress.pdf> (estimating that annual costs for regulations promulgated between April 1, 1995 and September 30, 2001 are between \$50 billion and \$53 billion and annual benefits are between \$48 billion and \$102 billion); Robert W. Hahn & Erin M. Layburn, *Tracking the Value of Regulation*, 26 REG. MAG. 16, 16 (2003) (estimating the total annual cost of rules issued between April 1995 and September 2001 at between \$50 billion and \$53 billion and the benefits at between \$48 billion and \$102 billion).

designs. Electronic rulemaking, or e-rulemaking, offers the potential to overcome some of the informational challenges associated with developing regulations. E-rulemaking refers to the use of digital technologies in the development and implementation of regulations. The use of these technologies may help streamline and improve regulatory management, such as by helping agency staff retrieve and analyze vast quantities of information from diverse sources. By taking better advantage of advances in digital technologies, agencies may also increase the public's access to and involvement in rulemaking.³

In recent years, agencies have constructed websites containing rulemaking documents and have allowed the public to submit electronic comments on proposed rules, thus making it easier for members of the public to learn about and participate in the rulemaking process.⁴ The Clinton Administration's National Performance Review encouraged government agencies to explore new applications of information technology (IT),⁵ and e-rulemaking has formed a major part of the Bush Administration's e-government initiative.⁶ In 2003, the Bush Administration launched a web portal designed to facilitate electronic filing of public comments on proposed regulations (<http://www.regulations.gov>), an accomplishment that represented the first phase of the Administration's e-rulemaking strategy.⁷ In addition, the Office of Management and Budget (OMB) has recently incorporated e-rulemaking into its own regulatory review process, making all of its studies and decisions accessible via the Internet.⁸ Efforts such as these will almost certainly persist beyond the

3. See Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1422 (2002); see also Stephen Zavestoski & Stuart W. Shulman, *The Internet and Environmental Decision Making: An Introduction*, 15 ORG. & ENV'T 323, 326 (2002); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 282 (1998).

4. Brandon & Carlitz, *supra* note 3, at 1422 (describing "electronic docket rooms" and "online policy dialogues" as two ways to increase public involvement in the policymaking process).

5. See, e.g., NATIONAL PERFORMANCE REVIEW, IT03: DEVELOP INTEGRATED ELECTRONIC ACCESS TO GOVERNMENT INFORMATION AND SERVICES, at <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (last visited Apr. 4, 2004) [hereinafter IT03] (urging agencies to put rulemaking dockets online).

6. See OMB, IMPLEMENTING THE PRESIDENT'S MANAGEMENT AGENDA FOR E-GOVERNMENT 9, 26 (2003), available at <http://www.whitehouse.gov/omb/egov/2003egovstrat.pdf>.

7. See Cindy Skrzycki, *U.S. Opens Online Portal to Rulemaking: Web Site Invites Wider Participation in the Regulatory Process*, WASH. POST, Jan. 23, 2003, at E1.

8. See generally OMB, REGULATORY MATTERS, available at <http://www.whitehouse.gov/omb/inforeg/regpol.html> (last visited Apr. 23, 2004) (providing links to rules currently under review with the Office and notations of ex parte meetings); see also Memorandum from John D. Graham, OIRA Administrator, to OIRA Staff (Oct. 18, 2001), available at <http://www.whitehouse.gov/omb/inforeg/oiradislosurememo-b.html> (last visited Feb. 14, 2004).

current administration, if for no reason other than the enactment of the E-Government Act of 2002, which calls for federal agencies to use information technologies in adjudicatory and rulemaking proceedings.⁹

In order to ensure that the growing interest in e-rulemaking leads to effective and meaningful innovations, computer technologies will need to be appropriately integrated into the institutional design of the federal regulatory process.¹⁰ Decisions about the design and implementation of new technologies will therefore need to take into account the legal, political, and managerial dimensions of the rulemaking process. In addition, to take full advantage of new technologies, existing institutional structures and rulemaking practices may themselves need to be reconfigured. For these reasons, effective deployment of information to assist with government rulemaking will require an integration of both technological and institutional analysis.

In cooperation with the National Science Foundation's Digital Government Program, the Regulatory Policy Program at Harvard University initiated two major dialogues on the future direction for research on e-rulemaking: one in Washington, D.C. in March, 2002, the other at Harvard in January, 2003.¹¹ These workshops brought together specialists from the information sciences, law, social sciences, and public management, as well as key regulatory officials from more than ten different government agencies. The aim was to forge a forward-looking research agenda needed to improve the rulemaking process through the development and deployment of information technologies.

The workshop sessions elicited broad recognition from participants about the significance of e-rulemaking as a new arena for research and policy development. These sessions also helped build linkages across research communities and connect researchers who are already beginning to pursue new, interdisciplinary research on the role of IT in the rulemaking process. This article summarizes the discussions that took place at the Regulatory Policy Program's workshops and seeks to expand further the community of researchers and policy analysts who can contribute to this new area.

Part I of this Article details the rulemaking process, outlining the procedures agencies must currently follow in developing new regulations

9. See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915-16 (2002) (codified at 44 U.S.C. § 3501 note) (requiring agencies to accept submissions electronically, to the extent feasible, and to make electronic dockets available online).

10. See generally JANE E. FOUNTAIN, BUILDING THE VIRTUAL STATE: INFORMATION TECHNOLOGY AND INSTITUTIONAL CHANGE 31-43 (2001).

11. See Regulatory Policy Program, E-Rulemaking Resource Website, at <http://www.e-rulemaking.org> (last visited Feb. 14, 2004) (providing information regarding e-rulemaking workshops, including presentations and related materials).

and highlighting some of the problems generally associated with rulemaking. Part II considers ways that IT may be able to improve the rulemaking process, as well as discusses some of the chief goals, choices, and challenges associated with e-rulemaking. Part III presents a cross-disciplinary agenda for research intended to contribute to e-rulemaking's long term potential for improving government regulation and enhancing the management and legitimacy of the rulemaking process.

I. THE EMERGENCE OF E-RULEMAKING

Until about the middle of the twentieth century, regulatory agencies in the United States frequently established regulatory policy by following court-like procedures and deciding individual cases involving particular regulated parties.¹² By adjudicating cases involving individual firms, regulatory agencies would effectively establish new "rules," but they would do so by creating precedents to guide other firms in the same industrial sectors.¹³ With the adoption in 1946 of the Administrative Procedure Act (APA), however, Congress specifically authorized agencies to issue general rules outside the context of individual case adjudication and even without adhering to formal court-like procedures.¹⁴ Although the APA still allowed agencies to engage in adjudication and use formal processes, it also permitted agencies to use an informal rulemaking process, which required little more than providing notice of proposed new rules and giving the public an opportunity to comment on them.¹⁵ This meant that regulatory

12. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 163 (2000) (explaining that most regulation during the 1950s and 1960s was created through adjudicatory processes); see also KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.6 (3d ed. 1994) (noting that by the 1970s, agencies were increasingly making policy through rulemaking rather than adjudication).

13. See Rakoff, *supra* note 12.

14. See Administrative Procedure Act, 5 U.S.C. § 553 (2000) (outlining the rulemaking process including notice and comment procedure).

15. In order to issue a rule, a regulatory agency must simply: (1) publish a "[g]eneral notice of proposed rule making . . . in the Federal Register;" (2) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments;" and (3) "[a]fter consideration of the relevant matter presented, . . . incorporate in the rules adopted a concise general statement of their basis and purpose." *Id.* These three basic steps provide the procedural contours of what has aptly become known as "notice-and-comment" or informal rulemaking. Under notice-and-comment rulemaking, the agency first informs the public of its intentions by publishing a notice of proposed rulemaking (NPRM) in the *Federal Register* and specifying in that notice a time period for the public to submit comments on the proposed rule. After reviewing all the comments received, the agency makes any revisions to the proposed rule and publishes its final rule in the *Federal Register*. In the main body of the *Federal Register* announcement—a section referred to as the *preamble*—the agency provides a written justification for the rule in its final form and an explanation of the policy choices it represents. The APA gives those who will be affected by a new rule an opportunity to challenge that rule in the courts. 5 U.S.C. § 702 (2000). Other statutes and executive orders provide additional procedures that agencies must follow. See *infra* notes 25-27 and accompanying text.

agencies no longer had to search for a suitable individual case before setting general policy and that the agency could follow simpler procedures in creating new rules.

By the 1960s and 1970s, a period during which Congress established a number of new regulatory agencies and statutes, informal rulemaking had become one of the most significant methods for establishing regulatory policy in the United States.¹⁶ Kenneth Culp Davis declared informal rulemaking to be “one of the greatest inventions of modern government.”¹⁷ Through informal rulemaking, regulatory agencies have issued rules governing the quality of drinking water, the safe operation of airlines, and the installation of air bags in automobiles, among many other significant policy issues. In fact, over the past several decades, regulatory agencies have adopted more than ten times more rules than Congress has passed laws, even though both have the same binding legal effect on regulated entities.¹⁸

If informal rulemaking was one of the greatest inventions in modern government, IT now offers the potential to improve on this invention. The basic characteristics of rulemaking—its complexity and information dependence—make it reasonable to expect that agencies could benefit from more extensive use of IT. This Part develops those characteristics and chronicles the emergence and potential of e-rulemaking.

A. Key Characteristics of Rulemaking

The three steps in the informal rulemaking process—notice, comment, and final rule—apply across nearly all federal regulatory agencies. Yet in reality, the practice of rulemaking is both procedurally and institutionally more complicated and varied than the rulemaking procedures outlined in the APA suggest.¹⁹ For one thing, the APA procedures only cover a part of the chronology of rulemaking, beginning with the notice of proposed rulemaking (NPRM) and ending with the publication of the final rule. Much, if not most, of the work takes place prior to the publication of the NPRM.²⁰ Furthermore, “the rulemaking process often does not come to an

16. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 13-16 (3d ed. 2003).

17. See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15, at 283 (Supp. 1970).

18. See *INFORMING REGULATORY DECISIONS*, *supra* note 2, at 6 (reporting that from October 1, 2001 to September 30, 2002, the federal government published 4,153 new rules). Over the same period, Congress enacted 245 statutes. See Pub. L. No. 107-45, 115 Stat. 258 (Oct. 1, 2001); see also Pub. L. No. 107-229, 116 Stat. 1456 (Sept. 30, 2002); Bill Walsh, *Unelected Make the Laws: Agencies' Rules Far Outnumber Congress*, *TIMES-PICAYUNE*, Aug. 7, 2003, at 10 (noting that Congress enacted 269 new laws and government agencies created over 4,000 new rules and regulations in 2002).

19. See KERWIN, *supra* note 16, at 71.

20. See *id.* at 182-91 (discussing pre-NPRM steps in the rulemaking process); see also

end once an agency issues its final rule” in the *Federal Register*.²¹ Organizations with objections to the rule can and do file legal challenges, and courts can and do send rules back to agencies if they find the rules conflict with legal standards.²² In response, agencies will revise their rules even after they have been made “final” in the *Federal Register*.²³ Moreover, as agencies implement and apply new rules, they often learn of ways that the rule needs to be modified and therefore start a new rulemaking proceeding to amend the existing rule.²⁴ In this way, the rulemaking process is iterative and ongoing.

In addition to starting earlier and extending longer than the APA would suggest, rulemaking has become more complicated than the APA’s notice-and-comment framework because Congress, the President, and the courts have imposed a number of additional rulemaking requirements on agencies.²⁵ For example, since 1981, agencies have been required by

Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57, 71-90 (1991) (discussing pre-NPRM steps in the rulemaking process at the Environmental Protection Agency). Decisions need to be made about whether to develop a rule and what priority it should be given on the agency’s agenda. Twice each year, agencies publish a “regulatory flexibility agenda” in the *Federal Register*, which lists brief information about all the rules each agency is contemplating or in the process of developing. See Regulatory Flexibility Act, 5 U.S.C. § 602 (2000) (stating specifically that during “October and April of each year, each agency shall publish a regulatory flexibility agenda”); see also, e.g., Agency for International Development: Federal Regulations; USAID Regulatory Agenda Semiannual Summary, 68 Fed. Reg. 30,920, 30,920 (May 27, 2003) (providing an example of the U.S. Agency for International Development’s published agenda). The semiannual regulatory agenda usually provides the first public notification that the agency is developing a proposed rule. In some cases, agencies issue an Advance Notice of Proposed Rulemaking, providing more detailed information than in the regulatory agenda and encouraging the public to provide early comment prior to the issuance of the proposed rule. As they develop their proposals, agencies need to gather information and conduct analysis of the underlying problem and possible regulatory solutions—a process that can be time consuming. During this time, agency staff members frequently engage in consultations with regulated firms and their representatives, as well as with other interested parties and other executive or legislative branch staff.

21. Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Phillip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 410 (2001).

22. See 5 U.S.C. § 702 (2000) (outlining the scope of judicial review of any agency action); see also 5 U.S.C. § 706 (defining the scope of judicial review of agency action).

23. See Coglianese, *supra* note 21, at 410-11 (providing examples of rulemaking that did not end with publication in the *Federal Register*). Of course, subsequent revisions to rules must also follow the notice-and-comment procedures and appear in the *Federal Register*.

24. See *id.*

25. Additional procedural requirements or arrangements can be found in, among other sources. See National Environmental Policy Act, 42 U.S.C. § 4332 (2000) (requiring agencies to prepare environmental impact statements for major actions affecting the environment); see also Paperwork Reduction Act, 44 U.S.C. §§ 3501-521 (2000) (requiring OMB approval for agency information collection efforts); Freedom of Information Act, 5 U.S.C. § 552 (2000) (mandating that agencies make their records available to the public); Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-16 (2000) (stipulating open procedures for agency use of advisory committees); Negotiated Rulemaking Act, 5 U.S.C. §§ 561-70a (2000) (allowing agencies to establish a negotiated rulemaking committees); Government in the Sunshine Act, 5 U.S.C. § 552b (2000) (requiring open meetings for

executive orders issued by the President to conduct economic analysis of major or significant proposed regulations and to have their analyses reviewed by the OMB.²⁶ These executive order requirements have been effectively codified by the Unfunded Mandates Reform Act, passed by Congress in 1995, which also requires agencies to analyze the costs and benefits of any proposed regulation that would impose annual costs of more than \$100 million on the economy.²⁷ As a result, OMB's Office of Information and Regulatory Affairs (OIRA) plays a key role in reviewing, and sometimes asking for revisions of, significant proposed and final rules before agencies publish them in the *Federal Register*.²⁸

Taken together, the various requirements from statutes, executive orders, and court decisions make the rulemaking process much more complex than the terms "informal" or "notice-and-comment" rulemaking might otherwise imply.²⁹ The complexity of rulemaking holds at least two important implications for the use of IT in this governmental process. First, the complexity of rulemaking creates institutional and decision making challenges that IT may help regulatory agencies overcome. Second, designing information systems that will be used effectively by regulatory agencies requires a clear understanding of the complex institutional environment within which rulemaking takes place. In other words, the development of effective e-rulemaking demands institutional analysis as well as technological research. To ensure the design of effective e-rulemaking initiatives, it will therefore help to keep in mind the salient characteristics of rulemaking and the problems often associated with rulemaking that IT might help address.

One of the most notable characteristics of rulemaking is its information

agencies headed by multi-member commissions or boards); Congressional Review Act, 5 U.S.C. §§ 801-08 (2003) (providing fast-track procedures for Congress to use to review agency regulations). It is widely believed that the cumulative effect of these myriad procedures has been to "ossify" or slow down the rulemaking process. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1398-1407 (1992) (arguing that the rulemaking process has become "ossified"); JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 109-11 (1990) (arguing that the National Highway Traffic Safety Administration has retreated from rulemaking in the face of judicial review).

26. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 17, 1981) (requiring agencies, by order of President Reagan, to conduct economic analysis and seek OMB review of rules imposing annual costs of more than \$100 million); see also Exec. Order No. 12,886, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993) (mandating agencies, by order of President Clinton, to conduct economic analysis and seek OMB review of rules imposing annual costs of more than \$100 million).

27. See Unfunded Mandates Reform Act, 2 U.S.C. § 1532 (2000).

28. Cf. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1516 (2002) (urging reforms to improve the role of economic analysis in regulatory decision making).

29. See generally McGarity, *supra* note 25, at 1400-07.

intensity. Rulemaking presents government decision makers with some of society's most pressing issues that demand extensive information collection and analysis.³⁰ In addition, government agencies address many routine issues through rulemaking, and, while each of these routine rules may demand little in the way of new information, in the aggregate these more routine rules can place significant processing demands on regulatory agencies. Rulemaking is not only information-rich, but it is particularly rich in language-based information. After all, rules themselves are text, as are public comments and other communications with the various governmental and nongovernmental participants in the rulemaking process. Although the APA requires only "a concise general statement" of the basis of the rule,³¹ preambles for the most significant rules can take up many more pages in the *Federal Register* than the rules themselves, occasionally even taking up 100 pages or more for a single new rule.³² The volume of both text-based and data-based background information associated with even a single rulemaking can be vast and varied in format, but must nevertheless be maintained in an accessible way in an agency docket.

Information used in rulemaking is varied because many different types of individuals and institutions are involved in the process. Developing rules requires cooperation across different offices and staffs within a regulatory agency, each with their own needs and professional expertise. The development and implementation of a new rule is usually an interdisciplinary effort, with different types of analysts—legal, economic, and scientific—contributing to the process. Furthermore, actors from outside the agency—various governmental oversight bodies, such as the OMB, Congress, and the courts—provide relevant information to agency decision makers. Interest groups, business firms, and the press also factor into deliberation and decision making.³³ Moreover, the process of developing a new rule is supposed to be transparent to those outside the government, which creates a demand for communicating information effectively. Finally, the end product of the process—the rule itself—must also be communicated to hundreds of thousands of users, both inside and outside of government.

In one form or another, the tasks of gathering, processing, analyzing, and communicating information make up most of the administrative costs associated with rulemaking. For many government agencies, information

30. See generally Rakoff, *supra* note 12, at 165.

31. 5 U.S.C. § 553(c).

32. For an example of a rule with a lengthy preamble, see Environmental Protection Agency, Disposal Restrictions for Third Scheduled Wastes, 55 Fed. Reg. 22,520 (June 1, 1990).

33. See generally KERWIN, *supra* note 16, at 182-84.

management can be a significant burden.³⁴ Early input from interested parties often depends on in-person meetings which can be costly and time-consuming to organize. As a result, these kinds of consultations may not be held as frequently as might be optimal. When members of the public offer formal comments on rules, they have been expected, until recently, to file their comments in hard copy format (sometimes in triplicate) and deliver them by hand or by mail.³⁵ As with public comments, communication of key analyses and drafts between government officials, such as between agency staff and the OMB, also often takes place by exchanging hard copies, often delivered by couriers. Furthermore, regulatory agencies' dockets consist literally of large rooms of file cabinets, sometimes with documents later archived on microfiche also filed in cabinets. These docket rooms have tended to be cumbersome to access by those outside of the agency, especially those living outside Washington, D.C. At least until recently, agencies' proposed and final rules themselves were relatively inaccessible to the general public, with access limited to hard copies of the *Federal Register* and *Code of Federal Regulations*, which were available only at certain public or law libraries.³⁶

Perhaps in part due to information management burdens, government regulation has come in for substantial criticism over the past few decades. For some observers, the expanding sweep of government regulation has become unacceptably incoherent and inefficient.³⁷ Problems of poor data quality and inconsistent reporting are sometimes said to increase problems of regulatory incoherence.³⁸ Still others have argued that the rulemaking process has become ossified, pointing out that rulemaking has become more burdensome and time-consuming than the informal, notice-and-comment framework of the APA suggests, especially for agencies with shrinking budgets.³⁹ In addition, in the face of resource constraints,

34. See generally *id.* at 143-46 (discussing the burdens of managing regulatory information).

35. For an example of a regulation that at the time required comments to be submitted in triplicate, see Environmental Protection Agency, Hazardous Waste Management System; Testing and Monitoring Activities, 55 Fed. Reg. 4440 (Feb. 8, 1990). With the introduction of EPA's new "e-docket," such requirements have been phased out.

36. See GPO Access, About the Federal Depository Library, at <http://www.gpoaccess.gov/fdrip.html> (last visited Feb. 14, 2004) (listing Federal Depository Libraries where individuals can find hard copies of the *Federal Register* and the *Code of Federal Regulations*).

37. See, e.g., STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 16-19 (1992) (discussing several areas where the regulations have become incoherent); see also John F. Morrall III, *A Review of the Record*, 10 REG. MAG. 25 (1986) (reporting significant variation in the costs per lives saved of various federal regulations).

38. See generally Cary Coglianese, *Bounded Evaluation: Cognition, Incoherence, and Regulatory Policy*, 54 STAN. L. REV. 1217, 1235-36 (2002) (discussing how incoherence in regulatory policy can arise due to differences in data methods).

39. See, e.g., Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An*

extensive engagement with the public has not always been regulators' top priority. Yet some have argued that regulatory policy—made by unelected government officials—suffers from a democratic deficit.⁴⁰ With more extensive and effective public participation, agencies may gain insights needed to craft better regulatory policy as well as to enhance the perceived legitimacy of government regulation.⁴¹ Given the controversial and significant policy choices embedded in regulatory policy, any information technologies that can improve agency management and enhance public participation seem likely to help in addressing the criticisms of rulemaking and promoting more effective, efficient, and legitimate regulatory policy.

B. The Rise of E-Rulemaking

Attention to the use of information technologies in government rulemaking dates back only about a decade. Beginning in the late 1980s, the now-defunct Administrative Conference of the United States started commissioning reports prepared by administrative law scholar Henry Perritt on the application of IT to different aspects of government record-keeping and rulemaking.⁴² The Clinton Administration's National Performance Review issued reports in the early 1990s calling upon federal agencies to increase their use of IT in developing and implementing regulations.⁴³ In 1994, the Office of the Federal Register made the *Federal Register* available free to the public via the Internet, with the *Code of Federal Regulations* going online shortly thereafter.⁴⁴ By the mid-1990s, Congress also began to take action, adopting amendments to the Paperwork Reduction Act and the Freedom of Information Act that aimed to increase the availability of government agency information via the internet.⁴⁵

During this same period, regulatory agencies began to take advantage of

Essay on Management, Games, and Accountability, 57 LAW & CONTEMP. PROBS. 185 (1994); McGarity, *supra* note 25.

40. See generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2d ed. 1979).

41. See KERWIN, *supra* note 16, at 158-59.

42. See HENRY H. PERRITT, JR., REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL AGENCY ELECTRONIC RECORDS MANAGEMENT AND ARCHIVES (1990), reprinted as Henry H. Perritt, Jr., *Electronic Records Management and Archives*, 53 U. PITTS. L. REV. 963 (1992); HENRY H. PERRITT, JR., REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ELECTRONIC DOCKETS: THE USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION (1995), available at http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm.

43. See IT03, *supra* note 5.

44. See Government Printing Office Website, at <http://www.gpoaccess.gov/nara/index.html> (last visited Feb. 13, 2004).

45. See 1995 Paperwork Reduction Act, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. §§ 3501-521 (2000)); see also Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1996) (codified at 5 U.S.C. § 552 note (2000)).

advances in information technologies.⁴⁶ Many agencies, for example, began to use e-mail to send and edit documents internally when designing new rules. Some agencies developed electronic word processing “templates” to encourage more standardized reporting of information in rulemaking documents.⁴⁷ Agencies also began to use the internet to enhance transparency and public participation in rulemaking. Some began posting key studies and other rulemaking documents on their websites. Others used IT to analyze public comments submitted on proposed rules. For example, the Bureau of Land Management used scanning technologies to process more than 30,000 public comments on a proposed rangelands rule.⁴⁸ Still other agencies began to allow the public to submit comments via e-mail. For example, the Food and Drug Administration used electronic scanning of documents in its 1996 tobacco marketing rulemaking.⁴⁹ E-mail comments played a role in the Federal Aviation Administration’s rulemaking on small-scale rockets⁵⁰ and the Department of Agriculture’s rulemaking on the labeling of organic foods.⁵¹ Other early adopters of electronic commenting included the Nuclear Regulatory Commission and the Federal Communications Commission.⁵²

In 1998, the Department of Transportation (DOT) became the first regulatory agency to make available an online, department-wide regulatory docket, providing full access to all studies, comments, and other documents contained in the agency’s rulemaking records.⁵³ The DOT system also allows the public to submit electronic comments on all rules proposed by the department. A few years later, the Environmental Protection Agency

46. See generally Brandon & Carlitz, *supra* note 3 (discussing recent agency use of information technologies in rulemaking).

47. Neil Eisner, E-Rulemaking, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking (Jan. 21, 2003), available at <http://www.ksg.harvard.edu/cbg/Conferences/rpprulemaking/EisnerPresentation.pdf> (noting early use of electronic “NPRM templates” by the Department of Transportation).

48. See KERWIN, *supra* note 16, at 194.

49. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, 60 Fed. Reg. 41,314 (Aug. 11, 1995).

50. See Press Release, Federal Aviation Administration, FAA First-Ever-On-Line Public Forum Proves Successful in Gaining Rulemaking Input (Mar. 30, 2000), available at <http://www1.faa.gov/apa/pr/pr.cfm?id=1009> (last visited Feb. 19, 2004).

51. National Organic Program, 62 Fed. Reg. 65,859 (Dec. 16, 1997); see Stuart W. Shulman, *An Experiment in Digital Government at the United States National Organic Program*, 20 AGRIC. & HUM. VALUES 253, 255 (2003).

52. See Michele Ferenz & Colin Ruic, *RULENET: An Experiment in Online Consensus Building*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 879-98 (Lawrence Susskind et al. eds., 1999); see also JoAnne Holman & Michael A. McGregor, “Thank You for Taking the Time to Read This:” *Public Participation via New Communication Technologies at the FCC*, 2 JOURNALISM & COMM. MONOGRAPHS 158 (2001).

53. See CHRISTINE S. MEERS, DEPARTMENT OF TRANSPORTATION’S DOCKET MANAGEMENT SYSTEM, at <http://www.dig.gov.org/archive/library/dgo2001/DGOMAC/MEDIA/MEERS.PDF> (last visited Mar. 28, 2004).

(EPA) also adopted an agency-wide system (EDOCKET).⁵⁴

These early e-rulemaking efforts have captured the attention of academic researchers as well as policymakers. In 1998, the *Administrative Law Review* published an article by law professor Stephen Johnson who predicted that the Internet would “change everything” when it came to public participation in federal rulemaking.⁵⁵ A few years later, the National Science Foundation’s Digital Government Program, together with Drake University and the Council for Excellence in Government, helped launch the first gathering of academics and agency managers to discuss long-term research needs on IT and rulemaking.⁵⁶

In a major effort to expand IT capabilities across the federal government, the Bush Administration launched an e-government initiative as part of the President’s Management Agenda.⁵⁷ Coordinated through the OMB, the Administration’s e-government initiative consists of approximately two-dozen projects, one of which is e-rulemaking.⁵⁸ A key goal for the Administration’s e-rulemaking project is to make it easier for the public to access information about government regulations and participate in the rulemaking process.⁵⁹ In addition, Administration officials believe that better use of IT will improve regulatory decisions and increase the quality of government rules.⁶⁰

The OMB selected the EPA to be the interagency team leader on the Administration’s e-rulemaking project, with a core group of other agencies playing key roles as well. The project consists of three stages. The first stage, which was completed in January 2003, involved the creation of a search-and-comment portal located at <http://www.regulations.gov>.⁶¹ The Regulations.gov portal relies on the Office of Federal Register’s listings of notices of proposed rules and enables users to search all proposed rules that

54. See EPA Website, at <http://cascade.epa.gov/RightSite/dkpublichome.htm> (last modified Mar. 28, 2004).

55. Johnson, *supra* note 3.

56. See Drake University Website, at <http://www.drake.edu/artsci/faculty/sshulman/DC2001> (last visited Mar. 28, 2004).

57. See OMB, THE PRESIDENT’S MANAGEMENT AGENDA, FISCAL YEAR 2002, available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf> (last visited Mar. 28, 2004); see also OMB, *supra* note 6. Like other aspects of the President’s Management Agenda, implementation of the e-government initiative is scored by OMB on a ‘traffic light’ system. See Stephen Barr, *In Midyear Score-Card Assessment, Some Agencies Miss the Mark*, WASH. POST, July 29, 2002, at B2.

58. See OMB, THE PRESIDENT’S MANAGEMENT AGENDA, FISCAL YEAR 2002, available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf> (last visited Mar. 28, 2004).

59. See OMB, *supra* note 6, at 26.

60. Rick Otis, E-Rulemaking, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking (Jan. 21, 2003), at http://www.ksg.harvard.edu/cbg/Conference/s/rpp_rulemaking/OtisPresentation.pdf (Jan. 21, 2003) (discussing the Administration’s goals for its e-rulemaking project).

61. See Skrzycki, *supra* note 7 (describing a new web portal that aims to open the rule-making process up to people who live outside of Washington, D.C.).

are open for public comment. Building on software originally developed by the Food and Drug Administration, the EPA hosts a comment processing system that enables members of the public to comment on any proposed rule issued by any government agency, all from a single location on the Internet.⁶² Comments submitted electronically at Regulations.gov are then distributed to the relevant agencies.

The second stage of the Bush Administration's e-rulemaking project will expand on the first stage efforts to create a government-wide e-docket system. The administration's current plan is to enhance the EPA's EDOCKET system to take into account the docketing requirements of other agencies and eventually to create a comprehensive on-line docket that will enable the public to access all documents related to every new regulation across the government.⁶³ Administration officials expect that the development of a government-wide e-docket will be followed by a third stage involving the development of an "electronic desktop" for regulators. Plans for this third stage have yet to be fully developed, but this final stage reflects the administration's long-term goal of creating a suite of knowledge management tools to aid with regulatory analysis and decision making.⁶⁴

The current administration's efforts in e-rulemaking seem likely to be continued in future years due to the passage of the E-Government Act in 2002.⁶⁵ This law aims to promote the use of information technologies throughout the government in order to increase opportunities for public participation, improve government decision making, and enhance the ability of government agencies to achieve their programmatic and policy goals.⁶⁶ The Act specifically directs regulatory agencies to accept electronically submitted comments and to establish comprehensive electronic dockets for all rulemakings.⁶⁷ The Act also creates a new office of electronic government within the OMB, which requires that office to produce guidelines for all agency websites, and generally calls upon agencies to adopt innovative uses of information technologies.⁶⁸

C. E-Rulemaking's Potential

Despite all the recent governmental efforts to promote the use of e-

62. See Otis, *supra* note 60; see also Oscar Morales, eRulemaking Initiative: Trials and Tribulations of a Frustrated Bureaucrat or the Proof is in the Details, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking, at http://www.ksg.harvard.edu/chg/Conferences/rpp_rulemaking/Morales_presentation.pdf (Jan. 21, 2003).

63. See Otis, *supra* note 60; Morales *supra* note 62.

64. See Otis, *supra* note 60; Morales *supra* note 62.

65. E-Government Act of 2002, Pub. L. No. 107-347, 166 Stat. 2899 (2002).

66. *Id.*

67. *Id.*

68. *Id.*

rulemaking, these early steps toward e-rulemaking only scratch the surface of what IT makes possible. To begin with, the advances reflected in the e-docketing systems, installed by agencies such as the DOT or the EPA, are by no means found across the federal government. Only a small fraction of agencies have developed automated docketing systems and, even among the ones that have, some agencies have used such dockets only for a select number of rules.⁶⁹ Furthermore, even though Regulations.gov now permits the public to file electronic comments on any new proposed rule, in some agencies any comments submitted through Regulations.gov must still be printed out by government staff and stored in hard copy in normal file cabinets.⁷⁰

More significantly, even the most advanced applications of IT in government rulemaking, such as the DOT's or the EPA's docket systems, only capture a small part of the potential uses for IT in the regulatory process. As a participant in an e-rulemaking workshop organized by Harvard University's Regulatory Policy Program noted, e-rulemaking can be much more than just a "bunch of websites." Advances in IT make it possible to retrieve, categorize, extract, and analyze information in markedly more sophisticated ways that may help dramatically improve government rulemaking.⁷¹

As noted earlier, developing a regulation requires agency analysts and rule writers to review a large volume of studies, public comments, and other relevant documents. To manage this information more effectively, agency analysts might rely more extensively on ad hoc information retrieval (IR) systems to identify relevant information.⁷² IR systems (one of the most well-known is Google) search documents based on a query input by the information user and return matching documents.⁷³ If some of

69. See Brandon & Carlitz, *supra* note 3, at 1433-35 (noting existing electronic docket rooms in government agencies).

70. See GAO, ELECTRONIC RULEMAKING: EFFORTS TO FACILITATE PUBLIC PARTICIPATION CAN BE IMPROVED, REPORT TO THE COMMITTEE ON GOVERNMENTAL AFFAIRS, U.S. SENATE, available at <http://www.gao.gov/new.items/d03901.pdf> (Sept. 17, 2003).

71. See Eduard Hovy, e-Rulemaking: Research Problems for IT, Presentation to the National Conference on Digital Government Research, at http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/HovyPresentation.pdf (last visited Mar. 28, 2004) (discussing potential applications of information technology to rulemaking); see also Elizabeth D. Liddy, Applications of NLP-based Information Technology, Presentation to the National Conference on Digital Government Research (May 20, 2003), at http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/LiddyPresentationRecap.pdf (Jan. 2003) (discussing numerous applications of information technology to the rulemaking process).

72. See Claire Cardie, Natural Language Technologies for E-Rulemaking, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking (Jan. 21, 2003), at http://www.ksg.harvard.edu/cbg/Conferences/rpp_rulemaking/Cardie_Presentation.pdf (last visited Mar. 28, 2004) (describing the use of ad-hoc information retrieval, text categorization, information extraction, summarization, and question answering).

73. See RICARDO BAEZA-YATES & BERTHIER RIBEIRO-NETO, MODERN INFORMATION RETRIEVAL 381 (1999) (explaining the ranking algorithm used by Google).

the documents are in a foreign language, machine translation technology could be used to help translate the gist of these documents into the language of the user.⁷⁴

Once information is retrieved through an IR system, it needs to be organized, a process that can also be automated. For example, text categorization systems could sort public comments according to the different issues presented in a rulemaking. In other contexts, state of the art text categorization systems can organize documents into dozens of categories with upwards of about 85% accuracy.⁷⁵

For many purposes, the relevant information contained within a given rulemaking document will often consist of only a small fraction of the entire document. To gather only the most pertinent information from each relevant document, agencies could rely on information extraction systems to pull out these key parts. These key parts can themselves be used as metadata which can be used to organize the documents still further in ways that may be useful to the rule writer.⁷⁶ In this way, computer systems could enable users to retrieve focused and relevant information from all the comments, background documents, and studies relevant to each sub-provision of a new rule, as well as to provide summarization and analysis of this information.

In addition to systems that retrieve, categorize, and extract information, other natural language processing systems could be of value to government regulators.⁷⁷ For example, some information systems allow users to submit questions and receive the answers (in addition to documents that contain the answers). Still other technologies are beginning to be able to produce summaries of large documents, condensing a high volume of information into a form that can make them more useable for busy decision makers.

Greater use of these natural language processing systems will also facilitate increased development of digital libraries.⁷⁸ Digital libraries

74. See Bonnie J. Dorr & Douglas W. Oard, *Evaluating Resources for Query Translation in Cross-Language Information Retrieval*, Proceedings of the First International Conference on Language Resources and Evaluation 759-63 (1998), available at <http://ftp.umi.acs.umd.edu/pub/bonnie/granadaps-a.pdf> (last visited Mar. 28, 2004) (evaluating the use of lexical conceptual structures in cross-language information retrieval).

75. See Cardie, *supra* note 72 (comparing the Reuters Collection, WebKB Collection, and Ohsumed McSH).

76. See INTRODUCTION TO METADATA: PATHWAYS TO DIGITAL INFORMATION (Murtha Baca ed., 1998) [hereinafter BACA].

77. See Boris Katz et al., *Better Public Policy Through Natural Language Information Access*, MIT Artificial Intelligence Laboratory, at <http://www.ksg.harvard.edu/cbg/Conferences/rprulemaking/HurwitzLanguageInfoAccess.pdf> (last visited Mar. 28, 2004) (discussing annotated natural language search engines).

78. See Edward A. Fox, *Digital Libraries for e-Rulemaking: Integrating the Information Fields (Hypertext, Information Retrieval, Multimedia, etc.)*, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking, at <http://www.ksg.harvard.edu/cbg/Conferences/rprulemaking/FoxPresentation.pdf> (Jan. 21-22, 2003).

contain information in multiple media formats and have the flexibility needed to make the information available to a large number of users.⁷⁹ The use of digital libraries and advanced information retrieval systems may help regulatory agencies more effectively share common information across different program offices or even across different rulemakings.

Overall, many possibilities exist for applying information technologies in new ways to government rulemaking. Throughout the Harvard workshops, participants identified a number of innovations in rulemaking practice that could be developed either with new or existing technologies. Some of these ideas included:

- *Improved data mining capabilities.* Many agencies keep compliance or incident data, but the staff who write rules often have to go out to regional offices to get this information. Data mining technologies, which range from simple web search engines to more sophisticated multi-database search and integration systems could enable rule writers to learn from the various data sources available throughout their agencies.⁸⁰
- *Conflict identification tools.* IT could help rule drafters identify certain obvious conflicts in rules and help to ensure consistency both within, and across, rules. Also, expert systems and software that creates representations and inferences from texts could spot differences between proposed and final rules to help agencies ensure that they have provided adequate notice of any changes before promulgating the final version.⁸¹
- *Plain language tools.* To help make rules clearer, automatic "plain English" (or other language) translators could be developed that aid agency staff in drafting rule language. Current natural language technology is still limited in its translation ability, but highly specified applications appear possible in the near term.⁸² Additionally, such tools could eventually be used to assist with regulatory compliance.

79. See SOURCEBOOK ON DIGITAL LIBRARIES (Edward A. Fox ed., 1993), at <http://fox.cs.vt.edu/DL.SB.html> (last visited Feb. 20, 2004) [hereinafter Fox].

80. For an overview of data mining, see DAVID J. HAJD, HEIKKI MANNILA, PADHRAIC SMYTH, PRINCIPLES OF DATA MINING (2001); see also Marti A. Hearst, *Text Data Mining*, in THE OXFORD HANDBOOK OF COMPUTATIONAL LINGUISTICS 616 (Ruslan Mitkov ed., 2003).

81. Conflict identification can also be used in compliance assistance. For a description of systems that can identify conflicts between rules and users' performance, see Shawn Kerrigan, Charles Heenan & Kincho H. Law, *Regnet: An Infrastructure for Regulatory Information Management and Compliance Assistance*, Proceedings of the National Conference on Digital Government Research 377-82 (May 20, 2002), available at http://cil.stanford.edu/publications/shawn_kerrigan/DGO2002_FinalPaper_Kerrigan_HeenanLaw.pdf.

82. See generally Ehud Reiter and Robert Dale, *Building Applied Natural Language Generation Systems*, 1 J. NAT. LANG. ENGIN. 1, § 2.2 (1997), available at <http://www.ics.mq.edu.au/~rdale/publications/papers/1997/jnle97.pdf>.

- *Integrating rules with other laws.* IT could link all the traces of a rule's history, both back to the statute as well as to past or related rules.⁸³ Recent advances in topic detection and tracking have made it possible to automate this cross-linking function to a limited extent.⁸⁴
- *Customizable, automatic alerts.* Long before an agency issues a notice of proposed rulemaking, it announces its intentions in the semiannual regulatory agenda.⁸⁵ Interested users could sign up for e-mail alerts of rules added to an agency's regulatory agenda. In addition, when a user visits a website for a particular rule, agency systems could inform the user about other rules that those visiting the same website have visited (much like what Amazon.com[®] does for books).⁸⁶
- *Online regulatory negotiations or juries.* Digital technology might be used to replicate the kind of deliberation that traditionally takes place in juries. Regulatory officials could enlist randomly selected panels of citizens with the task of advising on core policy issues to be decided in a rulemaking.⁸⁷
- *Digital public hearings.* One participant spoke of a rulemaking that affected various Native-American tribes in Alaska and recounted the difficulties the agency and the tribes experienced in their consultations. Technologies such as bulletin boards or user profiling systems could facilitate communication in such situations or any time a rule affects a dispersed portion of the public, such as small businesses.
- *Sharing data and models online.* Using something akin to a SimCity[®] game, regulatory agencies could provide the public with digital access to simulation software that reflects the agency's modeling of its regulatory problem.⁸⁸
- *"TurboTax[®]" rules.* IT could lead to a reconceptualization of the form in which rules are promulgated by transforming rules

83. See JEFFREY S. LUBBERS, THE FUTURE OF ELECTRONIC RULEMAKING: A RESEARCH AGENDA (Regulatory Policy Program, Working Paper RPP-[2002-04], 2002), at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf>.

84. For a good overview of topic detection and tracking, see Charles L. Wayne, Topic Detection and Tracking (TDT): Overview and Perspective, presented at the DARPA Broadcast News Transcription and Understanding Workshop, at <http://www.nist.gov/speech/publications/darpa98/pdf/ttd10.pdf> (last visited Mar. 28, 2004).

85. See Regulatory Flexibility Act, 5 U.S.C. § 602 (2000).

86. See Liddy, *supra* note 71.

87. See CARY COGLIANESE, THE INTERNET AND PUBLIC PARTICIPATION IN RULEMAKING (Regulatory Policy Program Working Paper RPP-[2003-05], 2003), at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2003-05.pdf> (discussing the potential use of electronically linked "regulatory juries" modeled after traditional juries used by courts).

88. See Keith B. Belton, *What If Everyone Were a Policy Analyst*, 23 REG. 8, 8-9 (2000) (describing the application of regulatory analysis calculator to estimate the effects of proposed regulation).

from text contained in the *Code of Federal Regulations* to software packages akin to the popular TurboTax[®] or other commercially available compliance software. Researchers at Stanford University have demonstrated how wheelchair accessibility standards could be defined using software that simulates in-use performance rather than by text-based rules.⁸⁹

- *IT and non-rule policies.* Agencies issue many policy statements and guidance documents that are not binding rules; however, these non-rule policies may sometimes be nearly as important in practice as rules.⁹⁰ Automated text summarization technology could be used to improve the accessibility, transparency, and management of these policies just as with rules.⁹¹

As these examples of potential innovations suggest, current e-rulemaking efforts are but first steps toward the full exploitation of IT. Making regulatory dockets available on-line and allowing citizens to submit electronic comments can certainly make it easier for the public to follow government rulemaking and agencies to manage their information. But, these early steps have only begun to tap the full potential for existing and new forms of IT in the rulemaking process.

II. E-RULEMAKING: PROSPECTS AND CHALLENGES

Although advances in IT raise many possibilities for changes in rulemaking practice, deciding whether to pursue any of these alternatives raises the question of what e-rulemaking should seek to accomplish. As already noted, e-rulemaking is generally thought to hold the potential to help improve the management and legitimacy of the rulemaking process.⁹² It may also help to overcome some of the problems commonly attributed to the rulemaking process, such as those related to incoherence, sluggishness, or lack of transparency.⁹³ Future applications of IT to the rulemaking

89. Charles S. Han et al., *A Performance Based Approach to Wheelchair Accessible Route Analysis*, 16 ADVANCED ENGINEERING INFORMATICS 53 (2002).

90. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like - Should Federal Agencies Use Them To Bind The Public?*, 41 DUKE L.J. 1311, 1332-33 (1992) (providing examples of agency use of policy statements and guidance documents); see also *United States v. Mead Corp.*, 533 U.S. 215 (2001) (discussing, and ultimately rejecting, application of *Chevron* deference for agency policy statements, guidance documents, and ruling letters); Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996) (pointing to agency use of policy statements to achieve regulatory goals).

91. See Eduard Hovy, *Text Summarization*, in THE OXFORD HANDBOOK OF COMPUTATIONAL LINGUISTICS 583 (Ruslan Mitkov ed., 2003) (discussing advancements in text summarization research and development).

92. See *supra* Part I.B.

93. See *supra* notes 37-40 and accompanying text.

process will benefit from explicit consideration of what agencies hope to gain from using this technology. This Part clarifies the most significant goals for e-rulemaking, as well as the central issues surrounding the design of new technologies for rulemaking and the key institutional constraints facing the future development of e-rulemaking.

A. Goals for E-Rulemaking

Addressing some of rulemaking's various challenges, participants at the Regulatory Policy Program's e-rulemaking workshops identified several goals for e-rulemaking: increasing democratic legitimacy, improving policy decisions, reducing administrative costs, and increasing regulatory compliance. Participants recognized that to assess new applications of IT researchers and agency managers will need to compare e-rulemaking against obtainable results in the absence of the IT. By making such a comparison based on the core goals, as well as specific metrics for measuring progress toward these goals, analysts will be able to determine whether specific applications of e-rulemaking make a meaningful and positive difference.

Goal 1: Increase Democratic Legitimacy. Even though rulemaking has significant effects on society and the economy, the officials making rulemaking decisions are themselves neither elected nor otherwise immediately accountable to the larger public.⁹⁴ Indeed, career professionals conduct the major analysis and drafting, even though the political appointees heading the agencies play a role in reviewing and approving key decisions. Yet from the standpoint of democratic legitimacy, the very significance of rulemaking combined with its distance from public scrutiny make it all the more important that regulatory officials engage the public in the process. In-person public hearings or advisory committee meetings, as well as the conventional comment period, provide the traditional means for public input into the rulemaking process. IT may broaden public outreach both by fostering greater public awareness of rulemaking as well as by simplifying the process by which citizens can add their voices to the decision making process.⁹⁵

Of course, without more, the goal of increasing democratic legitimacy will seem almost too general to assist information systems designers or regulatory officials. Workshop participants characterized this goal in more specific ways which should prove helpful to decision makers and designers. Some of those goals include: (1) increasing public understanding of rulemaking; (2) increasing both the quality and quantity of public comment

94. See Cary Coglianese, *Administrative Law*, in PAUL B. BALTES & NEIL J. SMELSER, EDS., INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES 1:85-88 (2001).
95. See generally Johnson, *supra* note 3.

on rulemaking; (3) making the public comment process more interactive and deliberative; and (4) enhancing the ability of more democratically accountable institutions, such as Congress or the President, to oversee the rulemaking process.

At present, the public has relatively little understanding of both the rules that specific agencies are developing and the process by which agencies promulgate their rules.⁹⁶ Yet such knowledge of the issues and the process are essential precursors to participating effectively in government rulemaking. IT may provide better ways of communicating the steps of the rulemaking process to the public, notifying them of rules that may affect their work or their lives, and facilitating access to information that will enable members of the public to comprehend the policy choices embedded in rulemaking.

With greater understanding of the issues, the quality of public comments may improve.⁹⁷ For example, instead of comments filed simply to express support of or in opposition to a rule, a better-informed public may be able to explain why they support or oppose the rule.⁹⁸ In contemplating a governmental goal of improving the quality of public comments, though, at least one workshop participant expressed concern that such a goal seemed patronizing.

Even without affecting the *quality* of public comment, IT could increase the *quantity* of comments.⁹⁹ Many participants were convinced that IT would lead to a dramatic increase in the number of comments submitted on agency rules. In addition to bringing about an overall increase in public comments, e-rulemaking could also affect the types of commentators by increasing the proportion of previously underrepresented voices in the rulemaking process,¹⁰⁰ providing another way that IT could improve the democratic legitimacy of rulemaking.

96. See KERWIN, *supra* note 16. Moreover, media coverage of regulatory policy is limited. See generally Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INT'L J. OF PRESS/POL. 39 (1998); Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 213 (1990).

97. See Stuart W. Shulman et al., *Electronic Rulemaking: New Frontiers in Public Participation*, 21 SOC. SCI. COMPUTER REV. 162 (2002).

98. For evidence of the lack of sophistication of some comments submitted by ordinary citizens, see Mariano-Florentino Cuellar, *Rethinking Public Engagement in the Administrative State* (2004) (unpublished manuscript), at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=485063> (last visited May 14, 2004).

99. See Schulman, *supra* note 97.

100. The current level of participation by citizens in the rulemaking process is quite limited. In one study of comments submitted in twenty-five EPA rulemakings, comments by individual citizens made up only about 6% of all the comments filed with the agency. See Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* (1994) (unpublished Ph.D. dissertation University of Michigan) (on file with author); see also KERWIN, *supra* note 16, at 182-84; Marissa Golden, *Interest Groups in the Rulemaking Process*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998).

IT could also change the manner in which members of the public share comments on rules, thereby shifting the mode of communication from a relatively unidirectional one to a more deliberative and interactive process. Citizens and government officials could interact with each other in dialogues facilitated through electronic communication technologies. In addition, members of the public could begin to comment on each other's comments as well.¹⁰¹

Finally, IT could enable other institutions and actors to monitor what agencies are doing and seek to influence the direction of regulatory policy. Not only could information make it easier for political appointees within agencies to follow and manage the work of civil service professionals, but it could also facilitate monitoring by congressional committees, White House staff, outside interest groups, and independent analysts.¹⁰²

Given these different ways of characterizing the goal of increased democratic legitimacy, some of the specific metrics that might be used to operationalize legitimacy include:

- Public knowledge about rulemaking process or substantive regulatory issues;
- Number of comments submitted;
- Distribution of viewpoints or sectors reflected in comments;
- Number and type of issues raised in comments;
- Frequency of litigation challenging agency rules;
- Frequency or type of intervention by Congress or other oversight bodies; and
- Public support for government regulation.

Goal 2: Improve Policy Decisions. If information technologies make it easier for rule writers to retrieve and process information needed to develop sound regulatory policy, then e-rulemaking should presumably lead to better decisions. After all, good regulatory decisionmaking generally requires extensive information about the underlying problem, its causes, and the predicted effects of different possible solutions.¹⁰³ IT could make

101. See THOMAS C. BEIERLE, *DISCUSSING THE RULES: ELECTRONIC RULEMAKING AND DEMOCRATIC DELIBERATION* (2003), available at <http://www.rff.org/Documents/RFF-DP-03-2.pdf>, see also Brandon & Carlitz, *supra* note 3; Johnson, *supra* note 3.

102. For example, Robert Hahn and Robert Litan have proposed that agencies provide consistent reporting of regulatory analysis results for this reason. See Robert W. Hahn & Robert E. Litan, *Recommendations for Improving Regulatory Accountability and Transparency*, Testimony before the Subcomm. on Energy Policy, Natural Res. & Regulatory Affairs of the House Gov't Reform Comm., 10 at <http://aeibrookings.org/admin/pdf/files/phpk0.pdf>.

103. See generally DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* (2d ed. 1992); AARON WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* (1979).

it easier for regulatory officials to analyze large volumes of data drawn from multiple sources.

With a better understanding of the underlying behavioral and technical conditions that affect regulatory problems and their solutions, regulators would be better positioned to draft rules that are more effective, as well as perhaps more cost-effective or efficient. While IT provides regulatory decision makers with better information, introducing such technology is only worthwhile if regulators make decisions that draw upon and are consistent with the additional information they acquire.¹⁰⁴ The goal for regulators should be to make decisions that are superior to those that they would have made without the benefit of IT. If a regulatory agency writes rules similar to those it would have otherwise written before the introduction of some new type of IT, then e-rulemaking will not have met the goal of improving policy decisions.¹⁰⁵

Like the goal of democratic legitimacy, the goal of improving policy decisions can be characterized more concretely. In particular, designers and decision makers can distinguish among three main ways of improving regulatory policy. The first way is to consider the impact of the regulation on solving the regulatory problem.¹⁰⁶ The regulatory problem might be, for example, either health risks from air pollution or fatalities from automobile accidents. If the goal is merely to increase the impact—or benefit—of a rule, then e-rulemaking would meet this goal by enabling agencies to craft regulations that decrease air pollution risks or reduce the number of crash-related fatalities, at least relative to rules crafted without the benefit of the relevant IT.

A second way to improve regulatory policy is to improve its cost-effectiveness.¹⁰⁷ In order to achieve benefits such as reduced air pollution or greater automobile safety, regulated firms need to incur costs, such as installing safety or pollution control devices. These costs can be taken into account, in addition to the benefits, when assessing the quality of a rule. If Rule A achieves the same level of benefits as Rule B, but the economic costs associated with complying with Rule A are less than the costs associated with Rule B, then Rule A is more cost-effective than Rule B. If

104. Cf. Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1122-23 (2002) (noting that economic analysis requirements improve regulatory policy only if the information generated in response to these requirements is used by agencies to make better decisions than they would have made in the absence of this information).

105. *See id.*

106. *See generally* LAWRENCE B. MOHR, *IMPACT ANALYSIS FOR PROGRAM EVALUATION* (2d ed. 1995) (providing in-depth treatment of the methods for assessing the impact of public policy).

107. For the distinction between efficiency and cost-effectiveness, see Robert W. Hahn et al., *Environmental Regulation in the 1990s: A Retrospective Analysis*, 27 HARV. ENVTL. L. REV. 377, 377 n.1 (2003).

IT better enables the regulator to analyze information about costs as well as benefits (assuming access to costs is even available to government), then e-rulemaking might lead agencies to develop more cost-effective rules.

In the same manner, IT might help regulators improve the efficiency of their rules, the third way policy improvement can be understood.¹⁰⁸ Like the cost-effectiveness criterion, efficiency takes both benefits and costs into account. But unlike cost-effectiveness, which concerns achieving a given level of benefits for the lowest cost possible, efficiency asks whether the benefits outweigh the costs.¹⁰⁹ In other words, even the most cost-effective regulation might, in some situations, impose costs that exceed the value of the benefits to be gained. In contrast, efficient policies will maximize positive net benefits, defined as total benefits minus total costs.¹¹⁰

Other criteria, such as the distribution of costs and benefits of regulation across society, could also be used to measure the quality of rulemaking.¹¹¹ Overall, the goal of improving regulatory policy through e-rulemaking could be expressed in metrics that include:

- Benefits to society, such as reductions in risks or other regulatory problems;
- Costs to society, in terms of the compliance and opportunity costs associated with achieving the required regulatory benefits;
- Comparisons of costs and benefits, either in terms of cost-effectiveness or efficiency; and
- Equity considerations related to the distribution of costs and benefits.

Goal 3: Decrease Administrative Costs. Managing the rulemaking process can also be costly and at times burdensome to regulatory agencies. A third goal for e-rulemaking would be to decrease the administrative costs associated with rulemaking, that is, to lower the costs that government incurs in developing new rules. IT may allow agencies to carry out existing rulemaking responsibilities in less costly ways. For example, the DOT has reported saving more than a million dollars in storage costs each year from its investment in an online docket system.¹¹²

IT may also help agency managers better coordinate rulemaking staff

108. Efficiency can be conceived as either Pareto efficiency, which is achieved if no person is made worse and at least one person is made better, or as Kaldor-Hicks efficiency, which occurs if those who gain from a decision gain more in the aggregate than the losers lose. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 12-13 (6th ed. 2003).

109. See generally COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES (Matthew D. Adler & Eric A. Posner eds., 2000); EDWARD M. GRAMLICH, *BENEFIT-COST ANALYSIS OF GOVERNMENT PROGRAMS* (1981).

110. *Id.*

111. Cf. ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975).

112. See Eisner, *supra* note 47.

and other resources. For example, a docketing system that tracks each rule may provide information to managers about common procedural bottlenecks, perhaps suggesting areas where staffing levels should be adjusted in order to reduce delays.¹¹³ Information systems may also be used to evaluate the performance of rulemaking staff, improve communication across the agency and with the OMB, and allow enforcement offices to monitor new rules proactively and plan compliance strategies accordingly.

Finally, IT may help administrators with reviewing and responding to public comments. At present, agencies sometimes will delegate the task of analyzing public comments in major rulemakings to private contractors, some of whom will physically cut and paste hard copies of the comments in order to sort them into manageable categories. IT may provide superior and less costly methods of analyzing comments, identifying different issues and opinions expressed in them, and even perhaps providing automatic summaries of them.¹¹⁴

Possible metrics that reflect the broader goal of reducing administrative costs could include:

- Amount of time it takes to develop a rule, from initial consideration to final rule;
- Number of staff members (or full-time equivalents) used; and
- Budgetary costs related to rulemaking.

Goal 4: Increase Regulatory Compliance. A final goal of e-rulemaking could be to increase compliance with the rules agencies promulgate. Regulation is designed to achieve social goals by bringing the behavior of businesses and individuals into alignment with the law. To the extent that IT can help increase compliance with rules, it can help in achieving the underlying social goals that the rules are intended to serve.

Of course, if those targeted by regulation do not know about or understand the rules that apply to them, compliance will be at best something that is hit or miss. Perhaps some actors will comply for reasons unrelated to the rules, but many undoubtedly will not. So the first step in increasing compliance will be to increase awareness and understanding of regulations.¹¹⁵ Compliance assistance systems may make it easier for businesses to identify rules that apply to them. For example, even though a small print shop may be unable to afford to hire an attorney, the owner or

113. *See id.*

114. *See* Brandon & Carlitz, *supra* note 3, at 1452.

115. *See generally* DOROTHY THORNTON ET AL., CTR. FOR THE STUDY OF LAW AND SOC. JURISPRUDENCE & SOC. POLICY PROGRAM, GENERAL DETERRENCE AND CORPORATE ENVIRONMENTAL BEHAVIOR, at <http://repositories.cdlib.org/csls/fwp/16>.

shop manager could more easily use a software package that asks a series of questions about the shop's operations and then provides information about what health and safety rules apply to the facility.¹¹⁶

In addition to knowing which rules apply, regulated entities also need to understand exactly what to do in order to comply with the rules. Unfortunately, the rules in the *Code of Federal Regulations* do not always provide clarity and simplicity for non-legal professionals to follow. The same kind of compliance assistance system that could help the small business identify rules to follow could also translate those rules into plain English (or another language) and provide easy-to-follow information about what the facility needs to do to comply with the applicable regulations.¹¹⁷

The possible metrics for the goal of increasing compliance include:

- Level of knowledge of rule and what it requires with the regulated sector, or
- Extent of compliance with rule

Relationships and Tradeoffs Among Goals. Any consideration of the goals for e-rulemaking should first take into account whose goals they are. Different users will have different goals. For e-rulemaking, the users will be a highly diverse lot, including those who work within various agency offices, Congress, the White House, regulated firms and trade associations, nongovernmental organizations, citizens, academic researchers, and professional organizations. Goals are likely to vary depending on who are the primary users of any new technology in the rulemaking process. Moreover, the users may have goals and priorities different from those held by the funders of these new technologies or others who otherwise oversee the users.

Designers and decision makers also need to recognize that some information technologies will be better suited for some goals rather than for others. E-rulemaking is not a single strategy, but a general term that encompasses many different types of tools and procedures that rely upon IT. Some tools will be better suited for achieving certain goals than others. For example, issuing rules in software format rather than as conventional

116. On compliance assistance and regulation generally, see Shawn Kerrigan & Kincho H. Law, *Logic-Based Regulation Compliance Assistance*, Int'l Conference on Artificial Intelligence & Law (Edinburgh, UK June 24-28, 2003), at <http://171.64.55.25/publications/shawnkerrigan/ICAIL2003-kerrigan.pdf> (discussing proposed REGNET regulation assistance system that offers user-friendly technology for determining whether compliance requirements are met). The system provides web links to regulations that are referenced in the compliance check. Integrated within the system is a mechanism that allows a number of possible permutations of scenarios for users. Further, the system affords users the provision of logs to maintain accurate records of compliance checks. *See id.*

117. *See id.*

text—the so-called TurboTax[®] approach to rulemaking—might help with compliance, but it probably would not by itself directly improve the substance of the rules.

That said, many e-rulemaking efforts would likely have impacts on more than one goal, sometimes even posing tradeoffs across different goals. For instance, a TurboTax[®]-type rule might help with compliance, but it could be more costly for the agency to produce. It might also raise concerns about legitimacy because, as one workshop participant noted, a software package may be less transparent and harder for the public or courts to scrutinize than a traditional text-based rule.

Another example of a tradeoff might be when information technologies increase the number of comments (a possible indicator of increased democratic legitimacy), but in doing so they also increase the administrative costs associated with rulemaking.¹¹⁸ More comments may correspond to more viewpoints, more concerns, and more conflicts or issues that need resolution, thus potentially making the rulemaking process take longer to complete.¹¹⁹ Even if IT makes it easier to process the information contained in a larger volume of comments, this information could potentially make the decision calculus for the agency more complex or uncertain, especially if the information submitted is internally inconsistent.¹²⁰ Quite plausibly a tradeoff exists between the amount of time needed to issue a rule and the rule's quality (or the level of satisfaction with the rule, which may not necessarily equate with quality).¹²¹

Of course, the ideal situation would be to find information technologies that resolved tradeoffs or minimized them. Recognizing that such tradeoffs exist, though, will be the first step toward finding ways to overcome them. Nevertheless, in many cases such tradeoffs will likely be irresolvable (at least in the near term), so systems designers and agency decision makers

118. For a related argument on how high-volume participation can compromise deliberation, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 241-43 (1997). Direct citizen participation in decision-making effectuates tangential issues of how particular bodies are to be treated in terms of authority. See *id.* Further, to achieve "deliberative democracy" limitations must be placed on public participation. See *id.*

119. See Beierle, *supra* note 101, at 14-15 (suggesting that increased public participation may increase staff workload and create further delay). But see Brandon & Carlitz, *supra* note 3, at 1452 (dismissing the idea that greater public participation in the rulemaking process will "overwhelm agencies with citizen input" by pointing out the greater efficiency provided by information technology).

120. See James K. Hammit, *Can More Information Increase Uncertainty?*, CHANCE, Summer 1995, at 15, 36 (concluding that in certain situations additional information may actually complicate the decision making process by increasing, rather than decreasing, a decision maker's uncertainty).

121. See Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policy Making*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 69, 73-75, 82 (Rosemary O'Leary & Lisa B. Bingham eds., 2003) (explaining why "satisfaction does not equate with" the quality of a regulatory decision).

will need to make choices about priorities among the various goals for e-rulemaking.

B. Technology Design Choices

Key choices about IT should be made in ways that advance e-rulemaking's main goals. Participants at the Regulatory Policy Program's e-rulemaking workshops highlighted a variety of design choices, such as those about flexibility, accuracy, security, and other characteristics or dimensions of IT systems. Making choices about these various dimensions will depend on the desired goals of e-rulemaking and the needs and capabilities of system users. Some of the design choices noted during the workshop included:

1. *Degree of Uniformity.* The performance of IT systems can be greatly enhanced when they rely on uniform lexicons, data structures, and training materials. If uniformity is not imposed on these systems, then they need to be designed in ways that allow them to adapt to differences in terminology and needs across different rulemaking proceedings or different agencies. Some participants argued that uniformity across government is crucial, especially to help public users who work with multiple agencies. Also, uniform systems may better exploit economies of scale, though perhaps with the negative effect of decreasing the innovation that decentralized systems would foster. Others argued that non-uniform (adaptable) systems will be more quickly developed and more easily configured to new circumstances if they are designed to accommodate different user and agency needs, particularly the distinct uses of technical language found across different regulatory areas. Advocates of smaller, more modular packages suggested that systems could eventually "learn on their own" by adapting system ontologies or lexicons based on the texts that they process.

2. *Degree of Complexity.* Systems can be structured in complex ways that mirror the complexity of regulatory issues and processes, or they can be built on more simple models. In addition, the system interface can be either complex or simple for users to interact with and understand.

3. *Use of Metadata.* Metadata are descriptions of data. Systems can be designed to search the data themselves or to search by metadata instead (or sometimes to search by both).

4. *Structure Definition.* Who should define how systems are structured? Systems can be structured in a manner determined by the agency's upper management, or they can be structured by the users themselves and hence customized to different uses and needs.

5. *Scalability.* Systems can be designed for different numbers of users or different volumes of data. At what scale should e-rulemaking systems be designed? Or should systems be designed so that their scale can vary

depending on users' needs?

6. *Privacy.* Privacy issues arise in a number of contexts. One involves the protection of confidential business information as it pertains to rulemaking, a matter related to security issues. Another privacy concern involves the treatment of public comments in on-line dockets. The DOT currently creates an on-line list of commentators by name, while the EPA does not.¹²² Should the identities of individuals or organizations filing comments be easily searchable in agency dockets?¹²³

7. *Security.* Security typically is assured through access control, restricting who gains access to information contained on agency systems. But security could also be obtained through release control—or filtering information as it leaves a system. One participant noted that release control will be more effective than access control but is probably also more costly.

8. *Accuracy.* Especially with respect to information retrieval and text summarization systems, accuracy will be a key issue. How accurate do such systems need to be? Do systems need to be 100% accurate, or just as accurate as an average human, or accurate to some other degree? Also, will it be more important to avoid false positives or false negatives? No matter how these questions are resolved, it will help increase trust in information systems if they are designed to report their results together with an indication of the confidence in them.

9. *Human-Computer Interface.* When designing IT systems to support government rulemaking, numerous design choices will arise about how to communicate information to users. This is a vast and complex issue, as there is a large variety of input devices and output displays. If rulemaking documents are to be accessible to the broadest possible audience, including those with disabilities, users with older technologies, or just the average person trying to wade through dense technical information, e-rulemaking will pose significant challenges in terms of human-computer interface and graphical design.¹²⁴

10. *Public Outreach.* Agencies can obtain comments from self-selected commentators who take the time to contact the agency or they can seek out comments from the public, such as through randomly selected surveys.¹²⁵

122. Barbara H. Brandon, *An Update on the E-Government Act and Electronic Rulemaking*, 29 ADMIN. & REG. L. NEWS 7, 8 (2003).

123. See Brandon & Carlitz, *supra* note 3, at 1440; LUBBERS, *supra* note 83.

124. See generally HCI MODELS, THEORIES, AND FRAMEWORKS: TOWARD A MULTIDISCIPLINARY SCIENCE (John M. Carroll ed., 2003).

125. See Peter M. Shane, *Online Deliberation Tools and Electronic Rulemaking*, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking (May 20, 2003), at <http://www.ksg.harvard.edu/cbg/Conferences/rpprulemaking/ShaneDeliberationTools.pdf> (describing efforts to seek out public deliberation and comment by randomly selecting participants for policy forums). For a discussion of possible administrative law constraints on e-rulemaking, see LUBBERS, *supra* note 83.

The current practice of opening up proposed rules for comment is reactive: the agency issues a notice and waits for the public to submit comments. The other approach, which may be made easier by IT, would be for the agency to be proactive and reach out by contacting individuals and soliciting their input. Furthermore, comments could be designed at varying levels of interaction between government and other commentators—ranging from the typical one-shot submission of comments to on-line deliberations between commentators. Such deliberations could be either moderated or unmoderated.¹²⁶

11. *Structure of Public Input.* A related choice is between open-ended versus structured comments from the public. An agency could structure input by providing a list of key issues from which commentators can check specific boxes reflecting their preferences. Garnering structured comments would probably make it easier to categorize and analyze them, which may make them more helpful to agency, but open-ended comments may fit better with the goal of democratic legitimacy. Of course, even if an agency did seek structured comments, the system could also be designed to allow commentators to override the structure and offer open-ended responses instead of, or in addition to, structured responses.¹²⁷

12. *System Costs.* Different design choices will have different costs associated with them and agencies will need to make decisions about how much they would like to spend on the design and operation of IT. Although this point may seem obvious, recognition of the financial implications of design choices raises the more general point that e-rulemaking must confront institutional challenges and constraints in addition to technological ones.

C. Institutional Challenges and Constraints

Undoubtedly e-rulemaking will present significant and interesting technological challenges in terms of semantic representation, human-computer interface, privacy and security, and the adaptability of systems. But workshop participants also recognized that to be successful, e-rulemaking must also take into account a series of no less significant institutional challenges. Systems that agencies cannot afford, or that do not fit well with the needs or practices of agency officials, will likely prove to be ineffective, no matter how technologically innovative they may be. Successful e-rulemaking efforts will therefore need to integrate both

126. See Beierle, *supra* note 101, at 8, 16 (enumerating the possible formats of electronic dialogues, including different styles of format, structure, levels of moderation, and interface design).

127. See, IT & Management of Rulemaking, Presentation to John F. Kennedy School of Government Workshop on E-Rulemaking (Jan. 21, 2003), at <http://www.ksg.harvard.edu/cbg/Conferences/rprulemaking/LiddyRapporteur.pdf>.

technological and institutional analysis, taking organizational needs and constraints explicitly into account in designing information systems.

Workshop participants noted at least three specific institutional constraints or challenges that will likely influence the incorporation of information technologies into the rulemaking process. The first major institutional challenge that workshop participants highlighted was the need for cooperation both within and across government agencies. Particularly with efforts to build uniform or government-wide platforms, coordination across agencies will be important but challenging.¹²⁸ Getting different staffs, offices, and agencies to work together in designing a system generates transaction costs and may reveal that participants have different, perhaps even sometimes incompatible, preferences about the design and performance of systems. This kind of cooperation is often not easy to accomplish, even within the same agency. As a result, the implementation of e-rulemaking may take longer if all systems need to be uniform and not merely compatible. Seeking uniformity may also affect the quality of IT if cooperation is achieved by designing systems to the lowest common denominator.

The second institutional consideration participants noted was organizational inertia. E-rulemaking may necessitate what some participants called a cultural change within government agencies. Many agency personnel have been doing what they are doing for quite some time, without innovative forms of IT. As a result, many of them may fail to see the advantages of e-rulemaking. Not only will training be essential when new systems are introduced, but so will be ongoing technical support and a management commitment to new technology. Participants predicted resistance to new systems and a risk of atrophy over time. For example, agency staff will have little incentive to favor systems that facilitate the submission of additional comments, since this will mean additional work for them and raise fears that opponents of a rulemaking could flood the agency with comments. Similarly, agency staff can be expected to oppose new docket management systems that allow agency managers to monitor staff performance more closely. Ultimately, leadership from the top will be important to the long-term sustainability of e-rulemaking, especially in order to keep information systems up to date.¹²⁹ But even leadership will be a challenge since the appointees who head agencies turn over frequently and thus typically have a short-term focus.

128. See generally EUGENE BARDACH, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP* (1998) (analyzing the challenges associated with inter-agency cooperation).

129. See Sheila Burke, *Some Cautionary Notes on the "Virtual State"*, in *DEMOCRACY.COM?: GOVERNANCE IN A NETWORKED WORLD* 163, 164 (Elaine Ciulla Kamarck & Joseph S. Nye, Jr. eds., 1999).

Workshop participants pointed to administrative law and existing rulemaking procedures as a final institutional constraint.¹³⁰ At a minimum, information systems will need to be designed so that they comport with proper legal procedures. For example, security practices must be designed to meet existing legal standards for protecting confidential business information.¹³¹ This may require that software be designed to allow agency staff to redact portions of documents electronically before placing them in agency dockets. In addition, information systems will need to adapt to changes in legal procedures. If new procedural requirements are added to the rulemaking process, such as adding steps or requiring new analysis, then information systems will need to be able to accommodate these changes.

Still more challenging is the question of whether law itself should change in light of the capabilities of new information technologies.¹³² For example, at the present time, many agencies document so-called ex parte conversations, i.e., conversations with outside interests, by drafting memoranda summarizing these conversations and submitting them to the rulemaking docket. Digital technologies would make it increasingly easy to record such ex parte communications digitally and then upload the audio file to the on-line docket.¹³³ We are living in an era where such "ultra-transparency" to the governmental process is now possible. Is it also desirable?

A further question about the role of agency expertise can be raised by the ease with which agencies will be able to solicit public comment. Much of administrative law is still based on deference to agency expertise, and agencies are charged with carrying out their congressional mandates in ways that comport with their expert judgments about what best serves the public interest. But when IT now makes it possible for hundreds of

130. For a discussion of possible administrative law constraints on e-rulemaking, see LUBBERS, *supra* note 83.

131. For examples of a few regulations applicable to the handling of confidential business information, see Department of Agriculture, Handling Information from a Private Business, 7 C.F.R. § 1.12 (2003) (instructing USDA staff on whether to release information submitted by a private business); Environmental Protection Agency, Confidentiality of Business Information, 40 C.F.R. subpt. B (2003) (establishing procedures the EPA must follow when disclosing confidential business information); National Highway Traffic Safety Administration, Confidential Business Information, 49 C.F.R. § 512.1-10 (2003) (detailing rules for NHTSA officials to apply when deciding whether information qualifies as confidential).

132. See, e.g., James T. O'Reilly, *Let's Abandon Regulatory Creationism: The Case for Access to Draft Agency Rules*, 28 ADMIN. & REG. L. NEWS 4, 4 (2003) (proposing additional transparency in rulemaking through the disclosure of agency rulemaking drafts - documents that are currently confidential and exempt from the Freedom of Information Act).

133. See Coglianese, *supra* note 87, at 9-10 (envisioning the possibility of requiring agencies to record digitally all ex parte communications and make them available on-line so members of the public will be able to click on an audio file to hear the conversations that transpired).

thousands of citizens to submit comments on a proposed rule, undoubtedly some observers of the rulemaking process will wonder if it is time to reexamine the role of democratic responsiveness in rulemaking.¹³⁴ Perhaps courts will come to view legislative policy making by agencies as more like legislative policy making by the Congress. If nothing else, perhaps judges will expect agencies to give stronger justifications for decisions that run contrary to overwhelming expressions of public preferences.

E-rulemaking raises important questions about the future of administrative law. Moving forward to craft effective e-rulemaking will require careful consideration of these and other institutional issues, in addition to addressing important issues of technological design. Although choices about system design should be guided by decision makers' goals for e-rulemaking, achieving these goals will also require that designers and decision makers work within or overcome a series of constraints. Some of these constraints will undoubtedly be technological ones, but participants suggested that the technological constraints may prove easier to overcome than the institutional ones. As a result, effective change in this area will be enhanced by a robust agenda for research on both technology and institutions, as well as on the relationships between the two.

III. DIRECTIONS FOR FUTURE RESEARCH

In the short-term, agencies have available to them a variety of technologies that stand ready to use in rulemaking, as soon as institutional barriers to their widespread adoption can be overcome. These near-term technologies will build upon the existing rulemaking process, providing greater access and transparency to the work of regulatory agencies. But in the medium to longer terms, e-rulemaking has the potential to go well beyond just digitizing the current process. With the appropriate institutional adoption of innovations in technology, some aspects of the rulemaking process could be improved significantly, if not redesigned altogether. Some workshop participants predicted revolutionary changes over the long term with the development of new technologies.¹³⁵

In order to tap e-rulemaking's fullest possible potential, research will be needed from across a variety of disciplines, including computer sciences, law, economics, political science, and organizational theory. This final Part offers guidance for cross-disciplinary research aimed at making

134. *But see* Randolph J. May, *Under Pressure?: Campaign-style Tactics Are the Wrong Way to Influence Agency Decisions*, LEGAL TIMES, July 7, 2003, at 44-45 (arguing in favor of agency expertise over an expanded emphasis on public participation).

135. One administrative law scholar has even predicted that information technology will "change everything" when it comes to administrative rulemaking. *See* Johnson, *supra* note 3, at 320 (suggesting that "[t]he Internet could be used to revolutionize each step of the process that agencies must follow").

medium- and long-term impacts on e-rulemaking. It presents a policy analytic framework for organizing future research, highlights the different functional aspects of rulemaking deserving of research, and outlines a series of research questions raised by workshop participants. With coordinated input from both informational and institutional disciplines, researchers will be able to contribute to the development of more effective technological solutions and better assess the impact that digital tools have on agency rulemaking.

A. Policy Analysis Framework

The ultimate test for e-rulemaking will be whether it improves either the substance or process of rulemaking (or both). Since IT offers potential solutions to problems with rulemaking, research will be needed to determine the extent to which IT actually mitigates these problems or advances the goals of those who implement it. Previous sections of this article have highlighted some of the problems with rulemaking and have articulated different goals for e-rulemaking.¹³⁶ In this section, rulemaking problems and e-rulemaking solutions are organized within the framework of policy analysis or evaluation. This framework is intended to illuminate the different roles for institutional and informational research in finding ways to improve government rulemaking.

The conventional approach to policy analysis begins by specifying and studying problems.¹³⁷ With respect to rulemaking, as noted in Part I of this article, observers have variously defined the problems as ones of inefficiency, delays, lack of democratic responsiveness, or incomplete compliance.¹³⁸ Merely stating that a problem exists, however, is but the first step in policy analysis. The researcher next defines the problem as precisely as possible, measures the extent of the problem, and identifies trends in the problem.¹³⁹ Is the problem getting worse or better? Most importantly, the researcher examines the causes of the problem because knowing the underlying causes will help in identifying solutions.

By understanding the problem better, the policy analyst is able to specify criteria by which alternative solutions to the problem can be assessed.¹⁴⁰

136. See *supra* Part II.A.

137. See EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 3 (1978) (approaching policy analysis by first identifying goals); DAVID L. WEIMER & AIDAN R. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 258 (3d ed. 1999) (noting that policy analysis begins with "problem analysis").

138. See *supra* notes 37-39 and accompanying text (reviewing different critiques of rulemaking).

139. See STOKEY & ZECKHAUSER, *supra* note 137, at 5-6; WEIMER & VINING, *supra* note 137, at 264; EUGENE BARDACH, A PRACTICAL GUIDE FOR POLICY ANALYSIS: THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING 1-4 (2000).

140. See generally STOKEY & ZECKHAUSER, *supra* note 137, at 22-27; WEIMER &

Some of these criteria will relate directly to the problem, such as by selecting metrics to determine how well a particular solution reduces the problem.¹⁴¹ Other criteria will relate to constraints on decision makers or organizations.¹⁴² In the rulemaking context, for example, solutions that might improve regulatory compliance will also impose administrative costs on agencies. Decision makers need to reduce the problem of noncompliance (or any other problem) within their financial constraints. Analysts should therefore assess alternative solutions along a number of dimensions, such as the impact on the problem as well as on factors such as administrative costs or legal feasibility. In selecting criteria, e-rulemaking researchers will be able to draw on goals and metrics such as those discussed earlier in this article.

After analyzing the problem and selecting criteria, the next step is to identify alternative solutions.¹⁴³ Policy analysis compares alternatives, of which at least two always exist: (1) the status quo, and (2) something that would change the status quo.¹⁴⁴ No matter how many alternative solutions are considered, the status quo (or the "do nothing" option) is always included as the benchmark against which the alternatives are compared. Often there will be several alternative ways of changing the status quo that the researcher will want to consider. E-rulemaking encompasses a broad range of applications of IT, each of which can have different design choices embedded within them.¹⁴⁵ Each relevant type and design of IT can be considered as a separate solution.

The analysis of the solutions consists of assessing each of the alternative solutions against all of the relevant criteria. How well do each of them solve the problem and avoid the constraints? If solutions have yet to be implemented, this analysis becomes prospective and must be based on forecasts or inferences drawn from other comparable settings. If solutions have been implemented, then the analysis can consist of empirical study of their effects, comparing each of these results with the status quo or with the effects of other alternatives.¹⁴⁶

On the basis of the analysis, a recommendation or decision can be made whether to implement or continue implementing the solution. In many cases, there will be tradeoffs to be made across criteria. In other words,

VINING, *supra* note 137, at 276-78; BARDACH, *supra* note 139, at 12-13, 19-27.

141. *See supra* Part II.A.

142. *See* STOKEY & ZECKHAUSER, *supra* note 137, at 178 (acknowledging that constraints must not be ignored when contemplating solutions to a complex problem).

143. *See id.* at 22-23; WEIMER & VINING, *supra* note 137, at 278-82; BARDACH, *supra* note 139, at 12-17.

144. *See* Coglianese, *supra* note 104, at 1116.

145. *See supra* Part II.B.

146. *See* Coglianese, *supra* note 104, at 1115-17 (explaining basic methods for conducting empirical analysis of public policy or process design).

some solutions may solve one problem well, but create new problems of their own, or may cost more than other solutions. Choices will still need to be made, but they will be choices informed by a clearer understanding of the impacts of different options among the relevant criteria.¹⁴⁷

The purpose of this overview of policy analysis is not to suggest that all research on e-rulemaking ought to be approached as policy analytic research. Rather, it is to provide an overarching framework for integrating the contributions of various disciplines—computer sciences, social sciences, and the law—in the advancement of e-rulemaking. Research from each discipline contributes in different ways to different parts of the policy analysis framework.

Social scientists seek to understand organizational and individual behavior in the rulemaking context.¹⁴⁸ Their research on the rulemaking process provides a better basis for understanding problems and their causes. It also provides a baseline understanding of the status quo.

In contrast, the information sciences are particularly useful in identifying possible solutions. The innovative technologies developed by information scientists make up the alternative solutions that merit assessment for effectiveness.

Both types of research will be needed to support future decision making on e-rulemaking. Social science research, for example, will help inform the work of information scientists by identifying and explaining the underlying structure of information and decision making in the rulemaking process. By uncovering the causes of slow or inefficient decision making, social scientists also contribute insights that will enable information scientists to design systems that can address these causes and better meet users' needs.

In addition to the contributions made by the social and computer sciences, legal research will contribute to a better understanding of the constraints under which new technologies must operate. Administrative law scholars can also identify legal innovations and procedural changes that may complement or facilitate the application of innovations in IT.¹⁴⁹ These legal changes will themselves constitute alternative solutions meriting their own evaluation.

Finally, all disciplines can contribute to and benefit from research on the impacts of new technologies on the rulemaking process. Research that

147. See STOKEY & ZECKHAUSER, *supra* note 137, at 136; WEIMER & VINING, *supra* note 137, at 283-84, 286; BARDACH, *supra* note 139, at 27-28.

148. See, e.g., Scott R. Furlong, *Interest Group Influence on Rule Making*, 29 ADMIN. & SOC'Y 325 (1997) (studying interest group influence on rulemaking); MARISSA MARTINO GOLDEK, *WHAT MOTIVATES BUREAUCRATS? POLITICS AND ADMINISTRATION DURING THE REAGAN YEARS* (2000) (examining the behavior and decisions of bureaucrats).

149. See LUBBERS, *supra* note 83.

measures the effects of e-rulemaking will be relevant not only to decision makers but also to researchers from across the disciplines. Information scientists will want to know if their solutions have been effective and will benefit from evaluation results in order to refine technologies or search for new solutions. Social scientists and administrative law scholars will learn how IT affects behaviors and outcomes in the rulemaking process.

Research from all disciplines will help in putting together the pieces of the policy analytic puzzle. Should new technologies be applied to rulemaking? Which ones? How should they be designed? What are the appropriate criteria or metrics for evaluating the impact of e-rulemaking?

B. Functional Aspects of Rulemaking

E-rulemaking research can benefit not only from an analytic framework for interdisciplinary research but also from a functional perspective on rulemaking. Such a perspective considers the tasks that agency staff and other users undertake in developing and implementing rules.

A functional perspective differs in some ways from the perspective that social scientists and administrative law scholars typically offer of the rulemaking process. The typical perspective portrays rulemaking in a procedural manner, as a series of legal steps or hurdles that must be cleared.¹⁵⁰ While e-rulemaking researchers do need to appreciate the procedural steps of rulemaking, this is not the only way to conceptualize the rulemaking process. A functional account of rulemaking emphasizes tasks instead of procedures or steps. These tasks are ones that agency staff and other users must perform at a particular stage or at several stages of the rulemaking process. Many workshop participants characterized future research needs around different functional aspects of rulemaking.

Some of these functional aspects are closely related to a particular procedural stage in rulemaking, while others cut across more than one stage. The tasks that workshop participants highlighted and thought were most likely to benefit from advanced IT include the following:

- *Gathering information.* To understand the extent of regulatory problems and analyze different solutions, agency staff must gather large quantities of information in the form of internal or external studies and analyses of available data. Relevant technologies include information retrieval, data and text mining, information extraction, summarization, and semantic analysis.
- *Securing public input.* Public input is another major source of information for regulatory decision makers, so agencies need to capture and analyze this input. Information technologies that

150. See *supra* notes 15, 25-27 and accompanying text (providing examples of procedural steps in rulemaking).

facilitate digital deliberation will be relevant, as will text classification and summarization technologies.

- *Drafting rules.* The process of writing a rule can be laborious, especially if it contains many parts or addresses complex problems. In addition, writing a rule often involves input from a number of staff members from different professional backgrounds (e.g., lawyers, engineers, economists, and enforcement staff). Style-checking software, templates, and collaborative drafting tools are among the IT tools relevant to this task.
- *Sharing information.* An important part of rulemaking is sharing information with the public and with others in different parts of the government. Digital libraries, information retrieval, and question and answering systems are possible tools for sharing information.
- *Securing compliance.* One of the major tasks of any regulatory agency is ensuring that regulated actors come into compliance. Regulatory enforcement has traditionally served this role, but IT may be able to help too. Relevant technologies could include regulatory conformance software or remote sensing technologies.
- *Managing rulemaking.* Managers within regulatory agencies need to make strategic choices about which rules to develop and how to allocate agency resources toward rulemaking. Relevant technologies could include systems that track the development of rules from inception through enforcement, as well as systems that can be used to set priorities and make budgetary decisions.

For the most part, the functional aspects of rulemaking have remained understudied. More research will therefore be useful for uncovering the specific challenges regulatory officials face in addressing each of these tasks. Another important area for research will be to determine whether variation exists in these tasks. It seems likely that the functional tasks of rulemaking will differ for different types of rules or agencies. If nothing more, the relative difficulty of these tasks seems likely to vary from rule to rule. Assuming this variation correlates with other identifiable features of rulemaking, it should be possible to design systems that offer different features designed to take such differences in tasks into account.

From the standpoint of evaluation, each different task can be viewed as a type of a problem, for each is a problem that the staff responsible for dealing with the task must solve. Correspondingly, the different types or designs of relevant IT can be considered alternative solutions to these problems. Research organized around the functional aspects of rulemaking can assess how well different technological solutions impact the completion of the relevant task along various criteria, such as timeliness,

expense, and effectiveness.

C. Research Directions in E-Rulemaking

Having recognized that research should assess the actual impacts of e-rulemaking on problems and functions, participants in the Regulatory Policy Program's workshops articulated a broad range of specific questions that they believed future research should address.¹⁵¹ The workshop dialogues covered a wide-ranging but interconnected set of research issues. For purposes of presentation, through, the resulting ideas for future research can be organized into four main categories: (1) developments in IT; (2) agency management of rulemaking; (3) public involvement in the rulemaking process; and (4) regulatory compliance.

1. *Developments in IT.* E-rulemaking raises a series of challenges for research in the information sciences.¹⁵² The long-term potential for e-rulemaking will depend on adapting existing technologies to the rulemaking process as well as on making more fundamental progress in areas such as modeling, natural language processing, and human-computer interface. Some specific research questions directed at developing new IT applications include:

- How can general simulation and modeling packages—such as ones designed to assist with economic analysis—be constructed so they are useful to different regulatory agencies or for a variety of regulatory issues?
- How can software be designed to perform automated checking of rule documents for internal and external consistency?
- Can IT tools be designed to perform automated cross-indexing and linking to related rules, docket records, and other relevant documents?
- How can rulemaking systems be designed to be clear and easy-to-use for a variety of users, from agency specialists to ordinary citizens?
- What structures and system designs will best facilitate clear and effective communication of the complex policy and procedural issues that characterize rulemaking?

151. Many of the research questions reported here also appear in Cary Coglianese, *Information Technology and Regulatory Policy: New Directions for Digital Government Research*, 22 SOC. SCI. COMPUTER REV. 85 (2004) (summarizing the discussion and research agenda from the Regulatory Policy Program's e-rulemaking workshops).

152. See generally Hovy, *supra* note 71 (summarizing technological challenges posed by rulemaking); Liddy, *supra* note 71 (listing thirty specific applications of technology that may be able to improve the future of rulemaking). For a discussion of the possible impacts of e-rulemaking on the public and governmental officials, see Coglianese, *supra* note 87, at 13-16.

- How can agencies structure technologies for public input that will encourage more members of the public to participate more meaningfully in the rulemaking process?
- What technologies can best support interactive dialogue between the public and agency staff?
- How can IT tools be designed to help agency staff process and analyze commentary and dialogue from the public? Can systems be designed to categorize and summarize comments and generate responses to them?
- What kinds of technologies can be used for question-and-answer exchanges with the public? Can the technologies used by large companies to answer on-line user questions help agencies provide focused assistance to members of the public?

2. *Agency Management of Rulemaking.* IT can help in overcoming certain management challenges associated with rulemaking, but it may also create new management challenges of its own.¹⁵³ The application of new information technologies to the rulemaking process generates a series of research questions for those interested in public management.

- What effects do information technologies have on agencies' ability to gather more or better information required for writing the rule? Does it enable rule-writers to conduct analyses or perform functions more quickly or with greater quality?
- What degree of flexibility is needed in IT systems that support rulemaking? Will structured systems help streamline the production process for new rules or will it create more work to adapt structured systems to meet contingencies related to each rule?
- How do agency staff members perceive the benefits and costs of information technologies in the rulemaking process?
- How does IT affect the decision making within regulatory agencies? Does it change the relative influence that various professional staffs have inside an agency? For example, could lawyers lose influence over technical staff if IT systems made it easier for non-lawyers to draft rules?
- What kinds of changes, if any, does e-rulemaking bring to the relationships between regulatory agencies and other governmental actors, such as staff in Congress or the OMB?
- What aspects of the organizational culture within agencies are

153. See generally JANE E. FOUNTAIN, BUILDING THE VIRTUAL STATE: INFORMATION TECHNOLOGY AND INSTITUTIONAL CHANGE (2001) (discussing general, management challenges that arise with the introduction of new information technology in government agencies).

relevant to e-rulemaking? How can agencies make the organizational changes that might be needed in order to secure the full benefits of e-rulemaking?

3. *Public Involvement with Rulemaking.* E-rulemaking can affect both the internal management of regulatory agencies and the interaction between agencies and the public. Indeed, the management of public input is itself an important part of the strategic management of regulatory agencies, if for no reason other than that the rulemaking process is generally transparent to the public and involves extensive participation by outside organizations.¹⁵⁴ Research on how IT affects public participation will be of interest to those who study both public management and democratic politics. Some of the more important questions for research will include:

- Does public awareness of the rulemaking process increase after the introduction of new IT tools? Is this awareness increased more for some segments of the public than others?
- Does IT increase the number of comments submitted on proposed rules? Does it change who comments? Does it change the nature of the discourse?
- How does the public respond to different types of communication and deliberative technologies? How do different means of obtaining public input—email, videoconferencing, chatroom—perform according to different metrics?
- What does greater access of information do to media coverage? Does it make it less or more relevant? Does it increase coverage of regulatory issues? Does IT change the role for other information brokers (e.g., lawyers, trade associations) in the rulemaking process?
- Do comments have a different impact on agency decision making when agencies use information retrieval software to analyze comments than when they use staff or consultants to analyze them?
- How do people “feel” after participating via these different means? Do they feel differently about email than a written comment, or about a videoconference than an in-person hearing?
- Does e-rulemaking affect the public’s sense of legitimacy of regulations? Does it reduce conflict or decrease the incidence of litigation?

154. See generally MARK H. MOORE, *CREATING PUBLIC VALUE: STRATEGIC MANAGEMENT IN GOVERNMENT* (1995) (discussing strategies for managing public input, responding to public concerns, and maintaining government accountability).

4. *Regulatory Compliance.* The final set of research questions that participants raised concerns the role of IT in promoting regulatory compliance. The point of making rules, after all, is to have them change the behavior of those they regulate. Research can be directed toward finding ways for IT to promote regulatory compliance as well as determining what impacts information technologies have on the behavior of government enforcement staff and regulated firms.¹⁵⁵ Some of the pertinent research questions include:

- How well can compliance assistance systems process users' descriptions of their situations and then identify all the relevant rules for users? Can effective systems be designed to help firms identify their own compliance and non-compliance with rules?
- What are the most effective ways to communicate regulatory requirements in compliance assistance software?
- How can systems best display or explain compliance to users, especially with respect to regulatory issues that possess so-called "gray areas"?
- How should compliance systems take enforcement discretion into account?
- What role can IT play in improving evaluations of regulations? Can remote sensing technologies, for example, be used to link changes in underlying conditions with regulatory changes?
- How can systems be designed to process data on regulatory compliance in ways that will prove helpful for agency staff when revising old rules or creating new ones?

CONCLUSION

Through the rulemaking process, government agencies set standards that affect every major aspect of economic and social life in the United States. The volume and impact of government regulations have grown significantly over the past half-century, making rulemaking one of the most important vehicles for government policymaking today.¹⁵⁶ As a result, any proposal that promises to improve the rulemaking process by making it more efficient, less burdensome, or more accountable merits careful attention by both regulatory officials and policy researchers. E-rulemaking is one such proposal.

155. See, e.g., Kerrigan & Law, *supra* note 116 (creating a regulatory compliance assistance system that would facilitate greater understanding of and compliance with complicated regulations).

156. See *supra* notes 1-2 and accompanying text (referring to the large number of regulations promulgated every year); see also KFRWIN, *supra* note 16, at xi (underscoring the pervasiveness and impact of rulemaking on society).

The term e-rulemaking actually encompasses a broad range of applications of IT to the rulemaking process. While some agencies are beginning to make rulemaking documents available on the Internet, IT could play a still more significant role. As participants in the Regulatory Policy Program's e-rulemaking workshops suggested, application of IT in the rulemaking process have considerable potential. Agencies may be able to use new technologies to communicate more effectively with the public, conduct more informed regulatory analyses, and implement rules more quickly and efficiently.

Not only may digital technologies offer better ways for agencies to complete existing tasks, but they also may lead to a significant redefinition of the existing tasks and processes of rulemaking. For example, IT may make it possible for agencies to be much more systematic about generating widespread public deliberation over proposed rules, perhaps leading rulemaking in the future to be driven more by public preferences than by expert judgments.¹⁵⁷ Whatever the merits of this or any other institutional change, it is clear that maximizing e-rulemaking's potential will depend on creating a good fit between information technologies and regulatory institutions.

Research from across the information and social sciences will therefore have much to offer to the development of e-rulemaking. Researchers working across disciplines can help design information systems that better meet the institutional routines and requirements of the rulemaking process. They can also evaluate the impacts of IT on regulatory outcomes and behaviors.¹⁵⁸ The effective use of IT promises to advance important goals, such as improving regulatory decisions, enhancing democratic legitimacy, decreasing administrative burdens, and increasing regulatory compliance. But careful research will be needed in order to assess whether specific applications of technology actually advance these goals.

This article has identified numerous ways that IT can be used to try to solve some of the problems associated with rulemaking. It has also highlighted key avenues for future research on e-rulemaking. Through coordinated efforts over the next decade, researchers should be able to answer many of the significant questions posed in this article and help bring about the development of more effective IT applications for rulemaking. The e-rulemaking efforts made so far by the OMB and a core group of leading regulatory agencies represent important first steps,¹⁵⁹ but

157. See *supra* notes 90-97 and accompanying text (discussing the goal of greater democratic legitimacy for rulemaking).

158. For a discussion of the possible impacts of e-rulemaking on the public and on government officials, see Coglianese, *supra* note 87, at 13-16.

159. See *supra* notes 43-68 and accompanying text (surveying the initial steps taken by agencies to make greater use of the internet in rulemaking and agency procedures).

sustained cooperation between these regulatory agencies and the research community will be essential to take e-rulemaking into its next generation.

APPENDIX A
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 CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE
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APPENDIX B

E-RULEMAKING:

NEW DIRECTIONS FOR TECHNOLOGY AND REGULATION

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HARVARD UNIVERSITY—JANUARY 21-22, 2003

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EMPIRICAL ANALYSIS AND ADMINISTRATIVE LAW

Cary Coglianese*

Empirical research has been used to study many areas of law, including administrative law. In this article Professor Coglianese discusses the current and future role of empirical research in understanding and improving administrative rulemaking. Criticism of government regulation and calls for regulatory reform have grown in the last few decades. Empirical research is a valuable tool for designing reforms that will truly improve the effectiveness, efficiency, and legitimacy of regulatory governance. Specifically, Professor Coglianese discusses three areas of administrative law that have benefited from empirical research—economic review of new regulations, judicial review of agency rulemaking, and negotiated rulemaking.

Agencies are now required to perform a cost-benefit analysis of all major regulations. Those analyses themselves are empirical in nature, and further empirical research has been conducted to examine what effect these analyses have on the rulemaking process. Judicial review has also benefited from empirical research, and would benefit from still further such research. Scholars debate whether judicial review improves governance or ossifies agencies due to fear of potential judicial challenges. Despite the widespread belief that agencies are retreating from rulemaking, the empirical evidence is actually more mixed, with few agency rules ever reversed due to judicial review. Finally, negotiated rulemaking is meant to avoid litigation and speed up the rulemaking process, yet the empirical research to date shows that negotiated rules take as long to develop as nonnegotiated rules, and are challenged more often than nonnegotiated rules. Overall, empirical research on how procedures affect administrative agencies is vital to improving administrative law in ways that will contribute to more effective and legitimate governance.

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INTRODUCTION

Even though politicians may sometimes proclaim that the era of big government is over, government regulation has established a firm foothold in the United States over the past century. Each year, federal regulations impose hundreds of billions of dollars in costs on the economy and provide significant benefits to society in terms of improved safety, health, and environmental conditions.¹ Despite the permanence of government regulation, in recent decades the public has grown increasingly distrustful of government, and regulatory policy has found itself subject to controversy and criticism from virtually all quarters.² According to some, government regulatory agencies have grown unresponsive and “ossified,” failing to achieve the public goals that they were established to serve.³ To others, regulatory policy has become afflicted with “tunnel vision,” with government devoting large amounts of resources to addressing relatively minor problems.⁴ Still others claim that the regulatory process suffers from the “pathologies of adversarial legalism” which inhibit the ability of government to develop more coherent and effective regulatory strategies.⁵

Criticism of government regulation has sometimes resulted in changes to the substance of regulatory policy, such as has occurred with the deregulation of the airline and telecommunications sectors.⁶ For at least the past twenty years, however, some of the most prominent and persistent calls for regulatory reform have tended to be procedural ones, including proposals to make agency decision-making procedures more transparent, politically responsive, and analytically rigorous.⁷ These reform proposals have sought not so much to restructure the substance of regulatory policy, but instead to restructure the institutional environment of regulatory policymaking. They have sought, in short, to change administrative law.

Recent regulatory reform proposals reveal how much administrative law is centrally concerned with promoting more legitimate and effec-

1. See OFFICE OF MGMT. & BUDGET, MAKING SENSE OF REGULATION 3 (2001), available at <http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf> (reporting estimated costs of social regulation ranging from about \$150 billion to \$250 billion annually, and estimated aggregate benefits of \$250 billion to more than \$1 trillion annually).

2. For analyses of recent criticisms of government in the United States, see DEREK BOK, THE TROUBLE WITH GOVERNMENT 43–55 (2001); WHY PEOPLE DON'T TRUST GOVERNMENT (Joseph S. Nye et al. eds., 1997).

3. See Thomas O. McGarity, *Some Thoughts on Deossifying the Rulemaking Process*, 41 DUKE L.J. 1385, 1387–96 (1992).

4. See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE 11–19 (1993).

5. See Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. PUB. POL. ANAL. & MGMT. 369, 384 (1991).

6. See MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 238–46 (1985).

7. See generally Sheila Jasanoff, *Negotiation or Cost-Benefit Analysis: A Middle Road for U.S. Policy?*, 2 ENVTL. F., July 1983, at 37.

tive governance.⁸ Administrative law is constructed and reconstructed on the basis of assumptions about how particular procedural arrangements will affect the behavior and performance of government officials and organizations. As a result, the insights and methods of other disciplines, such as political science, economics, and organizational behavior have contributed greatly to the development of administrative law scholarship.⁹ Indeed, interest in interdisciplinary work in administrative law appears to be growing. For example, much political economy analysis has focused on how legislatures and executives try to use administrative procedures to exercise control over the policy decisions of unelected bureaucrats.¹⁰ Other recent research has analyzed judges' voting records in administrative law cases to test the extent to which judicial decision making correlates with political ideology.¹¹

Empirical research can contribute to a clearer understanding of the role that administrative law can play in democratic governance. It can also give us a better idea of how reforms to regulatory institutions and processes can improve the effectiveness, efficiency, and legitimacy of regulatory governance. Just as substantive changes to regulatory policy should be judged by their impact on society, so too should changes to the regulatory process be assessed by their outcomes.¹² Given the steady interest in reforming the regulatory process, empirical analysis can profitably extend itself further and in new directions. Scholars and policymakers have much more to learn from the careful and systematic empirical study of administrative law.

In this article, I argue for increased use of empirical analysis to evaluate how well institutional procedures and designs achieve public goals. Social science research strategies provide an important basis for evaluating the effects of various kinds of procedures on administrative rulemaking. After introducing some basic concepts and issues in empirical research on administrative law, I proceed to illustrate the value of empirical analysis by focusing on three salient aspects of regulatory pro-

8. See Cary Coglianese, *Administrative Law*, in 1 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 87-88 (Neil J. Smelser & Paul B. Baltes eds., 2001).

9. See PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 3 (1994) (noting that much of administrative law scholarship "is a product of disciplines other than law relying on methodologies other than case analysis [and] embraces the positive and the normative, the empirical and theoretical, the doctrinal and behavioral").

10. For examples of the growing public choice literature on administrative procedure, see *infra* note 16.

11. See William S. Jordan III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45, 47-48 (2001); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1100-05 (2001); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1717-21 (1997). For an example of the still broader literature on judicial behavior, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

12. See Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 409 (1990) (arguing that "evaluation of regulatory controls and legal doctrine must depend in large part on their effects in the world").

cedure: (i) economic analysis of new agency rules; (ii) judicial review of agency rules; and (iii) negotiated rulemaking. In these and other areas, empirical analysis provides decision makers and scholars with the means for making more informed choices about how to design effective and legitimate governing institutions.

I. ADMINISTRATIVE LAW AND EMPIRICAL INQUIRY

Administrative law seeks to guide the use of government authority in ways that promote values such as democracy, fairness, effectiveness, and efficiency. Legal scholars have long recognized the discretion held by agency officials who are not directly accountable to the public, viewing this discretion both as a reality of legislative delegation as well as a problem to be solved.¹³ The aim in much of the literature has been to identify procedures that encourage administrators to exercise their discretion in socially desirable ways. For example, by making administrative decision making transparent through requirements for public comment and open meetings, administrative procedures give citizens and organized interests the ability to represent their views in the administrative process.¹⁴ Open procedures are thought to foster pluralist politics that protect against regulatory capture, the danger that an industry will come to control an agency's decision making to secure private benefits.¹⁵

More recently, researchers have studied administrative procedures as efforts by legislators to try to hardwire agency policymaking.¹⁶ From the standpoint of the legislator, administrative discretion creates the potential for bureaucratic drift. This occurs when the agency makes choices other than those the enacting legislative coalition would have preferred. Legislators themselves are not able to monitor directly all of the activities of the regulatory agencies they create.¹⁷ Consequently, administra-

13. For empirically oriented treatments of agency discretion, see MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13–28 (1980); THE USES OF DISCRETION 47–88 (Keith Hawkins ed., 1992).

14. See Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667 (1975).

15. For one of the classic discussions of regulatory capture, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971).

16. See Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62 (1995); David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information and Agency Discretion*, 38 AM. J. POL. SCI. 697 (1994); John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990); Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413 (1999); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997).

17. See Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 271, 271–72 (John E. Chubb & Paul E. Peterson eds., 1989).

tive procedures provide a potential solution to the problem of bureaucratic drift as they may facilitate monitoring by interest groups or otherwise help entrench the policy preferences of the original legislative coalition.¹⁸

Positive political economy has made an important contribution by revealing how administrative procedures can be policy instruments themselves. When legislators or executive branch officials impose procedural requirements on administrative agencies, they purportedly do so in order to achieve some instrumental goals, including improving the efficiency or cost-effectiveness of regulations, preventing capture, reducing conflict, or changing the pace of the rulemaking process. These goals may not always be, or perhaps even are seldom likely to be, fully consistent with the broader public interest, but the reforms are nevertheless intended to have some consequences. A key question is whether different procedural arrangements actually achieve the goals that they are intended to achieve or that others might want them to serve.

Reform proposals are based, either explicitly or implicitly, on a set of claims about how some outcome in the world would be different (usually for the better) if the reforms were adopted. Through empirical analysis, the researcher is able to assess the impact of these reforms, or any other policy intervention, on those intended outcomes. Such analysis provides a basis for understanding how changes in the behavior and outcomes of regulatory agencies arise due to changes in the standards and procedures that govern these agencies. In short, empirical analysis shows whether administrative law makes a difference.

From the standpoint of those interested in institutional design and regulatory policy, empirical analysis is essential to determining how institutions and procedures affect regulatory decision making. For example, in deciding whether to impose or keep in place requirements that agencies conduct cost-benefit analysis before issuing new rules, the key question is whether regulatory decisions improve with respect to intended and measurable criteria when these requirements are imposed. Do the requirements lead to regulatory decisions that are themselves more efficient? This necessitates empirical analysis to determine the costs and benefits of regulatory decisions made in the absence of these requirements, and to compare them with the costs and benefits of regulations made under conditions where economic analysis requirements are imposed. Also, it will be relevant to investigate whether such requirements lead to other changes in regulatory decisions. For instance, do they delay the imposition of new regulations that might otherwise be net beneficial? To decide whether the benefits of additional economic analysis outweigh the costs of conducting the analysis, it is necessary to evaluate the impact

18. See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 24-27 (1999) (discussing administrative procedures as a solution to the problem of bureaucratic drift).

analytical requirements have in terms of relevant outcomes of interest, such as efficiency or rulemaking time.

The purpose of empirical analysis, at its core, is to explain variation and support causal inferences. Empirical analysts of administrative law seek to determine whether measured outcomes vary depending on which procedure is used. The aim is to identify how much of what is observed can be attributed to a particular procedure as opposed to other factors that might affect the outcomes of concern. This is accomplished by comparing the observed outcomes with estimates of the counterfactual, or what would have happened in the absence of the regulatory procedure being tested.¹⁹

Researchers can never observe the counterfactual because it calls for them to consider what would have happened rather than what did happen.²⁰ However, empirical analysts can frequently make reasonably valid estimates of what would have happened for purposes of comparison. They do this by measuring a set of outcomes that arise under a new procedure with the outcomes that arise in a similar context where the new procedure does not exist.

There are three basic ways to conduct empirical research.²¹ The first of these, a controlled experiment, is the ideal model for empirical research. In a controlled experiment, researchers control conditions in a laboratory environment, varying one factor at a time so that any change in outcome can be attributed to the factor that was varied. If all the other potential contributing factors to the outcome are held constant, the counterfactual can be estimated quite clearly. It is evidenced by the outcome prior to the change made in the factor manipulated by the researcher. With this approach, researchers can have an extremely high degree of confidence that any resulting changes were due to the treatment manipulated by the researcher. Of course, empirical analysis of administrative law cannot proceed via the kind of laboratory experiments that are used in the physical sciences, but the controlled experiment does provide an important model for other research strategies.

The second way empirical research can be structured is to use a randomized experiment, which is the next best strategy to a controlled experiment. A randomized experiment requires that the outcomes in a group of treated entities (the treatment group) be compared with the outcomes in a group of untreated entities (the control group). The control group provides the basis upon which the researcher can infer the

19. LAWRENCE B. MOHR, *IMPACT ANALYSIS FOR PROGRAM EVALUATION* 2-3 (2d ed. 1995) ("The crux of the impact analysis of the efficacy of a treatment program . . . is a comparison of what did happen after implementing the program with what would have appeared had the program not been implemented.") (emphasis omitted); see also Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 37 (2002) (discussing counter-factual inference).

20. See MOHR, *supra* note 19, at 2-3.

21. For a thorough discussion of research design strategies, see DONALD T. CAMPBELL & JULIAN C. STANLEY, *EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH* (1963).

counterfactual. Of course, it is always possible that factors other than the treatment could explain any observed differences in outcome between two groups. This potential for confounding factors is addressed by randomly assigning the treatment so that, on average, changes in any confounding factors will cancel each other out across both the control and treatment groups, leaving any observed difference in outcomes attributed with confidence to the treatment. By definition, the randomized experiment requires random assignment of the treatment, and this may seldom be feasible in the realm of administrative law or other settings where norms of equal treatment prevail.

The third way to design empirical research is through an observational study, which is available whenever laboratory controls and randomized treatment are not feasible. There are two basic types of observational studies: longitudinal and cross-sectional. A longitudinal design compares outcomes over time. The outcomes before the adoption of a reform are compared with outcomes after its adoption. A cross-sectional design compares outcomes in the same time period between one group operating under the procedure and one that does not. In other words, the researcher can compare the outcomes in jurisdictions or individual cases that operate under one set of procedures with jurisdictions or cases operating under another procedure. If all things other than the existence of the procedure are equal, then the researcher can make a strong inference that observable differences in the outcomes between the two groups over time or across domains resulted from the procedure. This is referred to as the procedure's impact.

Of course, other things are not always equal in an observational study because the treatment and comparison groups have not been randomly selected. As a result, the researcher needs to take into account factors other than the procedure that might be affecting the outcome.²² Sometimes, for example, procedural changes occur in conjunction with other changes, making it more difficult to untangle the precise effect of the procedure versus other factors. For example, consider how a researcher might assess the impact of President Reagan's 1981 executive order requiring agencies to conduct economic analysis for all major rules. If a researcher simply compared regulations prior to 1981 with those issued later, it might be difficult to determine how much of any observed difference is due to the executive order versus how much is due to the fact that Reagan political appointees, possessing different policy ideologies than their predecessors, took charge of the various federal regulatory agencies at about the same time. A way around this potential problem might be to shift from a longitudinal design to a cross-sectional one, comparing regulatory decisions at the state level. Researchers might compare similar kinds of regulatory decisions between states with eco-

22. See Epstein & King, *supra* note 19, at 78.

conomic analysis requirements and states without such requirements, all the while controlling for other factors that might affect the outcome such as party control of the state's legislature or governor's office.

A related problem may arise when agencies can voluntarily choose to adopt a procedure. For example, imagine that agencies were not required to conduct economic analysis but could voluntarily choose to do so. Researchers comparing outcomes in those rulemakings where the agency chose to conduct an analysis with those where it did not would confront a significant possibility of selection bias.²³ The rules voluntarily selected for economic analysis may well not be a representative subset of all agency rules. One might speculate that agencies would be more likely to employ benefit-cost analysis voluntarily for those rules that the agency believes have positive net benefits. Alternatively, agencies might voluntarily use economic analysis for those rules which have the largest costs associated with them, which could mean that from the start these would be rules that are less likely to have positive net benefits. An empirical researcher would therefore need to consider whether selection bias might partly explain any differences found between the treatment and comparison groups.²⁴

If the samples being compared are large and randomly selected, and assignments to the treatment group are also made randomly, then researchers can have considerable confidence in inferences about the procedure's impact, as other factors should be distributed about the same in both samples.²⁵ Large random samples, however desirable, are not necessary in order to draw reasonable inferences, and random assignment is often not available in empirical research on administrative law.²⁶ In the absence of random assignment and large samples, empirical researchers who undertake longitudinal or cross-sectional observational studies still must seek to control for other possible factors and assess the degree of confidence they can properly have in their inferences. Analysis can and does proceed even in the absence of large samples, but researchers must select an appropriate research design and take care to consider possible threats to the validity of their inferences.²⁷ Only through such careful and systematic empirical research will scholars be able to learn how ef-

23. See GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 128-38 (1994) (discussing the general problem of selection bias in empirical research).

24. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1312-21 (1997) (investigating the potential for selection bias in a cross-sectional study of the impact of negotiated rulemaking).

25. KING ET AL., *supra* note 23, at 94 (discussing the value of random selection and large samples).

26. *Id.* at 94-95 (noting that inferences can be made even without large, random samples).

27. See MOHR, *supra* note 19, at 55-92 (discussing potential threats to "the validity of an inference or conclusion about a program impact based on a certain design"); Epstein & King, *supra* note 19, at 112-14 (discussing strategies for research based on small samples).

fective different procedural reforms turn out to be in improving government regulation.

II. ECONOMIC REVIEW OF NEW REGULATIONS

Perhaps the most significant and persistent complaint about government regulation has been that it imposes excessive costs on the economy. For decades, reformers have argued for more cost-effective and efficient forms of regulation than currently exist.²⁸ It is widely accepted that the costs of different health, safety, and environmental regulations vary markedly, with some regulations costing only tens of thousands of dollars for each life saved while others cost billions of dollars per life saved.²⁹ This variation in cost-effectiveness suggests that government could save more lives for an equivalent investment of social resources by reallocating its priorities toward those regulatory efforts that are most cost-effective.³⁰

Reforms to improve the cost-effectiveness of federal regulation date back at least to the Ford administration.³¹ In 1981, President Reagan issued an executive order requiring agencies to conduct economic analysis of proposed regulations and to have their analyses reviewed by the Office of Management and Budget, an approach that has been followed by each subsequent administration.³² In the mid-1990s, Congress proposed legislation that would have required agencies not only to conduct economic analysis, but to have new regulations effectively pass a benefit-cost test.³³ While some of the more sweeping proposals introduced at the

28. For some of the early economic analysis of less costly regulatory strategies, see JOHN DALES, *POLLUTION, PROPERTY, PRICES* (1968); A. C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

29. See BREYER, *supra* note 4, at 24-27; Robert W. Hahn, *Regulatory Reform: What Do the Government's Numbers Tell Us?*, in *RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION* 208, 230-31 (Robert W. Hahn ed., 1996); John F. Morrall III, *A Review of the Record*, 10 *REGULATION* 25 (1986); Tammy O. Tengs et al., *Five-Hundred Life-Saving Interventions and Their Cost-Effectiveness*, 15 *RISK ANALYSIS* 369, 371 (1995); W. Kip Viscusi, *Regulating the Regulators*, 63 *U. CHI. L. REV.* 1423 (1996); SHEILA M. CAVANAGH ET AL., *NATIONAL ENVIRONMENTAL POLICY DURING THE CLINTON YEARS* (John F. Kennedy School of Government Harvard University Faculty Research Working Paper No. RWP01-027, June 2001).

30. See Tammy O. Tengs & John D. Graham, *The Opportunity Costs of Haphazard Social Investments in Life-Saving*, in *RISKS, COSTS, AND LIVES SAVED: GETTING BETTER RESULTS FROM REGULATION*, *supra* note 29, at 167, 177 (suggesting that as many as 60,000 additional lives could have been saved each year if society reallocated its investments more cost-effectively across nearly 200 life-saving strategies).

31. For a review of the history of rulemaking reform, see Murray Weidenbaum, *Regulatory Process Reform: From Ford to Clinton*, 20 *REGULATION* 20 (1997). Similar kinds of reforms have occurred at the state level. See ROBERT W. HAHN, *State and Federal Regulatory Reform: A Comparative Analysis*, in *COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES* 37 (Matthew D. Adler & Eric A. Posner eds., 2001).

32. See, e.g., Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 19, 1981) (issued by President Reagan and affirmed by President George H.W. Bush); Exec. Order No. 12,886, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (issued by President Clinton and so far retained by President George W. Bush).

33. See, e.g., Regulatory Reform Act of 1995, S. 291, 104th Cong. (1995) (proposing to require agencies, prior to issuing a new rule, to make "a reasonable determination . . . that the benefits of the

time were never adopted, Congress did pass the Unfunded Mandates Reform Act,³⁴ which essentially codified existing executive branch requirements for agencies to perform economic analysis.³⁵ Agencies are now required by both executive order and statutory prescription to perform an assessment of the costs and benefits of any proposed regulation that would impose annual costs of more than \$100 million on the economy.³⁶

These changes to the administrative process aim to increase the cost-effectiveness and efficiency of federal regulation by compelling agencies to assess benefits and costs and to search for the lowest cost strategies. Executive Order 12,866 adopts the principle that agencies should “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating,” and “in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits.”³⁷ By conducting the required economic analyses, agencies are confronted with the need to define problems, articulate alternative solutions, and consider which solution will best solve the problem using the least amount of resources.

The way that economic analysis is supposed to lead to improved efficiency can be specified in three basic steps. First, by conducting economic analysis, an agency is supposed to arrive at reasonably accurate estimates of the benefits and costs of different policy options. Second, the agency is supposed to make decisions that are consistent with the results of this economic analysis, that is, by choosing the options that impose the lowest costs for a given level of benefits or that achieve the greatest net benefits. Finally, the decisions that agencies make on the basis of economic analysis should be different from—that is, more efficient than—the ones that they would make in the absence of the analysis. If an agency would still have adopted the least cost or greatest net benefit approach in the absence of the economic analysis requirement, then the requirement would be superfluous. In short, economic analysis requirements need to have an independent effect on what an agency does, making its decisions more efficient than they otherwise would be.

How well has the process of requiring economic analysis improved the efficiency of regulatory outcomes? Even though intuitively it may seem that such a requirement would make a difference, the question is ultimately an empirical one. Rather than simply assuming that an economic analysis requirement will lead to more cost-effective or efficient decisions, empirical analysis can be used to determine whether and how

rule justify the costs of the rule, and that the rule will substantially achieve the rulemaking objectives in a more cost-effective manner”).

34. 2 U.S.C. § 1501 (1997).

35. For a discussion of the proposed regulatory reform legislation in the 1990s, see CAVANAGH ET AL., *supra* note 29, at 10–13, 44–47.

36. 2 U.S.C. § 1532(a)(2); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

37. Exec. Order No. 12,866, *supra* note 32, § 1.

the procedural requirement for economic analysis changes regulatory outcomes.

A growing body of empirical research has recently emerged that examines the impact of economic analysis requirements. With respect to the accuracy of economic analysis, several studies have raised questions about the quality of economic analyses that agencies have performed in response to the requirements of the executive orders. For one thing, many agencies apparently do not manage to collect the kind of information that is required of them and that would be necessary to determine the net benefits of different regulatory alternatives.

Robert Hahn and a team of researchers have examined the economic analyses agencies produced in nearly fifty major health, safety, and environmental rulemaking proceedings, and have assessed the extent to which the analyses met the requirements stated in Executive Order 12,866, as well as in guidelines issued by the OMB.³⁸ Although agencies are directed to compare different regulatory options, and wherever possible to choose the one that maximizes net benefits, Hahn and his team found that in only about a quarter of the rules they examined did agencies even quantify the costs and benefits of different regulatory options.³⁹ Furthermore, for a substantial percentage of the rules they examined, the agencies did not monetize all the costs and benefits they quantified.⁴⁰ Hahn's team also found that agencies sometimes used inconsistent discount rates in converting future costs and benefits into present value terms.⁴¹ They concluded that "most economic analyses do not meet the expectations set forth in the Executive Order and the OMB guidelines, and a significant percentage clearly violate them."⁴²

When agencies do monetize costs and benefits before issuing a new regulation, the accuracy of these estimates is open to empirical scrutiny after the regulation has been implemented. Recent studies have attempted to assess how well the cost and benefit predictions made by regulatory agencies accurately reflect the costs and benefits that are incurred after a regulation is adopted. For example, James Hammitt compared the pre-adoption predictions of regulatory costs associated with reducing CFC consumption in the United States with post-adoption data.⁴³ He found that some of the pre-adoption predictions substantially overestimated the control costs associated with the CFC-phasedown, in

38. Robert W. Hahn et al., *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000). For the OMB guidelines, see OFFICE OF MGMT. & BUDGET, GUIDELINES TO STANDARDIZE MEASURES OF COSTS AND BENEFITS AND THE FORMAT OF ACCOUNTING STATEMENTS (2000).

39. Hahn et al., *supra* note 38, at 874.

40. *Id.* at 866-70 (reporting that only about sixty percent of the analyses monetized all the costs identified by agencies, while only about thirty percent monetized all the identified benefits).

41. *Id.*

42. *Id.* at 865.

43. James K. Hammitt, *Are the Costs of Proposed Environmental Regulations Overestimated? Evidence from the CFC Phaseout*, 16 ENVTL. & RESOURCE ECON. 281 (2000).

part due to the unanticipated development of lower cost substitutes for CFCs.⁴⁴ In another study, researchers at Resources for the Future compared the *ex ante* cost predictions made by agencies in twenty-five rule-makings with *ex post* findings made by independent experts.⁴⁵ In nearly half the cases, costs were overestimated *ex ante*, while in a quarter they were underestimated.⁴⁶ The *ex ante* estimates were deemed “accurate”—by being, *ex post*, within the estimated range or within a range of no more than twenty-five percent above or below any point estimates—in only a quarter of the cases.⁴⁷

On the basis of findings such as these, some researchers have suggested that economic analyses may tend to exhibit “some upward bias of *ex ante* cost estimates relative to actual [costs] because neither firms nor regulators can predict accurately the cost-saving innovations that will likely occur once a real effort is made to comply with the rules.”⁴⁸ Of course, it is also possible that agencies underestimate the costs, as well as over or underestimate the benefits, of new regulations.⁴⁹

Even assuming that economic analyses conducted by agencies were always thorough and accurate, it would remain to be determined whether they had an impact on the types of decisions made by regulatory agencies. Based on the government’s own numbers, it would seem that agencies have not followed the results of their analyses. After all, most of the research purporting to show the inefficiency of existing regulation has been based on the very economic analyses that agencies have been required to produce.⁵⁰ Among those rules for which agencies monetized regulatory impacts (which is only a fraction of all rules), about a quarter of them fail a benefit-cost test.⁵¹ More than forty percent of all environmental regulations with monetized impacts reportedly fail to yield positive net benefits.⁵² Perhaps the most pessimistic interpretation of these findings might be that economic analysis has had its greatest impact in documenting the inefficiency of government regulation, not in reducing it.⁵³

44. *Id.* at 296–97.

45. Winston Harrington et al., *On the Accuracy of Regulatory Cost Estimates* (Jan. 1999) (Resources for the Future Discussion Paper No. 99-18) (on file with the University of Illinois Law Review).

46. *Id.*

47. *Id.*

48. Richard D. Morgenstern & Marc K. Landy, *Economic Analysis: Benefits, Costs, Implications*, in *ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT* 455, 468 (Richard D. Morgenstern ed., 1997).

49. Hahn, *supra* note 29, at 228.

50. See sources cited *supra* notes 38, 43, and 45.

51. ROBERT W. HAHN, *REVIVING REGULATORY REFORM* 57 (2001), available at <http://www.aei.org/publications/books/rrr.pdf>.

52. *Id.*

53. Cf. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002) (suggesting that government’s commitment to benefit-cost analysis has often been “symbolic rather than real”).

The mere fact that inefficient regulations continue to be issued, however, does not necessarily mean that economic analysis requirements have had no impact on regulatory decision making. The appropriate empirical test is whether decisions made under a requirement for economic analysis turn out to be less inefficient overall than decisions made without such a requirement. Some researchers have suggested that, at the very least, the regime for economic review has resulted in eliminating or preventing regulations that were extremely inefficient outliers.⁵⁴ However, recent statistical analyses have failed to show that economic analysis and OMB review have significant effects on the cost-effectiveness of government regulations.⁵⁵

A series of a dozen case studies of EPA rulemakings collected in a volume by Richard Morgenstern does indicate that economic studies can help improve regulatory decisions by providing regulators with information needed to adopt more cost-effective policies.⁵⁶ Yet Morgenstern also acknowledges that it is not clear whether these improvements came about “solely because of the economic analysis . . . [nor whether] the same or similar changes might not have occurred for other reasons.”⁵⁷ Researchers have yet to identify a clear counterfactual to use in assessing the extent to which these requirements affect regulatory outcomes. Because relatively few economic analyses were produced (and still fewer were required) prior to 1981 when Reagan’s executive order was issued, it is difficult to compare regulatory outcomes before and after the imposition of economic analysis requirements. Yet the impact of analytical requirements can only be assessed with confidence by comparing regulatory decisions made under a regime of analytical requirements with decisions about similar issues made in the absence of such requirements. One possible avenue for future empirical research would therefore be to compare regulations on similar issues across states with different requirements for analysis.⁵⁸

54. See Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981 (1998) (arguing that agencies never adopted some of their least cost-effective proposals); Viscusi, *supra* note 29, at 1436 (noting that “OMB has succeeded in eliminating only extremely ineffective regulations”).

55. See HAHN, *supra* note 51, at 52 (finding that “OIRA review does not significantly affect cost-effectiveness estimates”); Scott Farrow, *Improving Regulatory Performance: Does Executive Office Oversight Matter?* (July 26, 2000) (unpublished manuscript, available at <http://www.aei.brookings.org/publications/related/oversight.pdf>) (indicating that overall “Executive Office review does not seem to improve (reduce) the cost-per-life-saved of regulation”); see also Hahn & Sunstein, *supra* note 53, at 1540 (noting that although economic analysis has often helped lead to improvements, “the system for OIRA review has not succeeded in fundamentally redirecting regulation toward areas where it would do the most good”); Eric Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137 (2001) (developing a model of economic review that yields the prediction that greater inefficiencies will result).

56. ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT (Richard D. Morgenstern ed., 1997).

57. Morgenstern & Landy, *supra* note 48, at 457.

58. An initial step in this direction can be found in Robert Hahn’s study of different states’ regulatory review requirements. See HAHN, *supra* note 31. Although we know that different states have different regulatory review requirements, we know much less about what kind of impact these differ-

Another avenue for future research might be to study more systematically why economic analysis requirements have apparently not had more of an impact on agency decision making. A variety of possible explanations have been offered, some of which may apply more to different agencies or with respect to different rulemakings. Agency officials, like others, may simply be boundedly rational, with a tendency to “satisfice” by not quantifying impacts or otherwise producing thorough analysis even when required to do so.⁵⁹ Alternatively, agency officials may be ideologically resistant to the quantification or monetization of different kinds of social benefits and costs.⁶⁰ Even if they are willing to quantify costs and benefits, agency officials may sometimes seek to promote other values that are not easily captured by economic analysis.⁶¹ They may respond, due to interest group pressures or other factors, to the distributional effects of policies (that is, to how the costs and benefits are distributed) more than to the aggregate net social benefits which have typically been the focus of economic analyses. Finally, they may simply be constrained by statutes that preclude the agency from considering benefit-cost analysis in setting regulatory standards.⁶²

The effectiveness of any new or modified economic analysis requirements will vary depending on which of these explanations accounts for inefficient regulation. If agency officials are constrained by statutes or are ideologically resistant to benefit-cost analysis, then requiring its use may not do much to make agency decisions more efficient. On the other hand, if agencies tend not to perform sound analyses because they tend simply to satisfice, regulatory requirements might prove to be more effective if they are accompanied by adequate incentives for agencies to undertake and rely upon serious, careful review. Recent proposals have emphasized strengthening OMB review of agency analysis and even providing opportunities for judicial review of an agency’s economic analysis.⁶³ Of course, these proposals, if enacted, will merit their own empirical evaluation as well.

The broader point is that, in order to develop institutional strategies to reduce the inefficiencies in government regulation, it will be beneficial

ent requirements have in terms of achieving efficiency gains. One recent study has examined the impact of state regulatory review requirements in terms of the timeliness and frequency of regulatory change, finding that they do not appear to slow down the regulatory process significantly. Stuart Orin Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change* (1998) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

59. See JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 140–41 (1958); see also Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059 (2000).

60. See generally STEVEN KELMAN, *WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT* (1981).

61. See generally ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993).

62. See, e.g., *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001) (holding that the Clean Air Act precludes the agency from taking costs into account when setting national ambient air quality standards).

63. See Iahn & Sunstein, *supra* note 53.

to understand better why they arise. The available empirical research indicates that simply mandating analysis does not eliminate inefficiency, and it may not even significantly reduce it. This is not to suggest that economic analysis requirements have had no important effects or should be abandoned. It is instead to say that these effects have been neither as straightforward nor substantial as those who imposed these requirements probably hoped they would be. To achieve greater regulatory coherence and efficiency, decision makers will require further empirical research, as they will need to know whether and how to strengthen existing requirements, improve the quality of regulatory analyses, and realign incentives so that agencies will act to achieve greater net benefits for society.

III. JUDICIAL REVIEW OF AGENCY RULEMAKING

Although compliance with economic analysis requirements is not currently enforceable through judicial review,⁶⁴ the courts do have the authority to enforce nearly all other legal requirements imposed on agencies. Much administrative law scholarship is based on the premise that judicial review of administrative action, if employed properly, can improve governance.⁶⁵ An analysis of what should be the proper role and standards for judicial review therefore depends on empirical claims about the effects courts have on the behavior of administrative agencies.⁶⁶ These effects may include making agencies more observant of legislative mandates, increasing the analytic quality of agency decision making, and promoting agency responsiveness to a wide range of interests.⁶⁷ Administrators who know that their actions may be subjected to judicial review may exercise greater overall care, making better, fairer, and more responsive decisions than administrators who are insulated from judicial oversight.

Notwithstanding these potential benefits, legal scholars have increasingly emphasized courts' potentially debilitating effects on agency rulemaking. In the early 1970s, rulemaking was considered to be, in Kenneth Culp Davis's terms, "one of the greatest inventions of modern government."⁶⁸ Yet it is now widely accepted that the rulemaking process has become "ossified," as agencies are thought to take years to issue

64. 2 U.S.C. § 1571 (2000); Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,744 (Oct. 4, 1993).

65. See, e.g., CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

66. Peter H. Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 987 (describing the belief that courts control the behavior of agencies as "one of the *raison d'être* of most of administrative law").

67. See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 537 (suggesting that "judicial review has, in many settings, increased the incidence of legality, prevented arbitrariness, ensured against undesirable regulation, and brought about regulatory controls that have saved lives or otherwise accomplished considerable good").

68. KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15, at 283 (1970 & Supp. 1971).

new regulations and in some cases have allegedly retreated altogether from issuing new rules.⁶⁹ Legal scholars agree that one of the principal reasons administrative rulemaking has become ossified is the threat of judicial review. Government agencies are thought to face a high probability that their actions will be subject to litigation.⁷⁰ This threat of judicial review, combined with the uncertainty over what a reviewing court will find to be “arbitrary and capricious,” has been viewed as creating significant delays for agencies seeking to develop regulations.⁷¹ The looming possibility of judicial review, Thomas McGarity has argued, means that “agencies are constantly ‘looking over their shoulders’ at the reviewing courts in preparing supporting documents, in writing preambles, in responding to public comments, and in assembling the rulemaking ‘record.’”⁷²

In some cases, agencies have allegedly retreated altogether from efforts to establish new regulations. The U.S. National Highway Traffic Safety Administration (NHTSA) is often viewed as the poster child of ossification. A prominent study by Jerry Mashaw and David Harfst is premised on the claim that NHTSA has shifted away from developing new auto safety standards in order to avoid judicial reversal.⁷³ Mashaw and Harfst claim that “devastating” losses in rulemaking litigation in the early 1970s led NHTSA to retreat from rulemaking.⁷⁴ They claim that most of NHTSA’s safety standards were put into place before 1974 and none have been issued since 1976.⁷⁵ They also argue that, instead of issuing new rules, NHTSA shifted its efforts toward increasing the number of recalls of defective vehicles, an approach which they argue leaves NHTSA less susceptible to judicial reversal.⁷⁶ Administrative law scholars appear almost universally to accept that pre-enforcement judicial re-

69. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992). The first use of the metaphor of “ossification” in this context is usually attributed to Donald Elliott. *Id.* at 1385–86.

70. See, e.g., CARNEGIE COMM’N ON SCI., TECH. & GOV’T, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 109 (1993) (“In some agencies, 80 percent of major rules are appealed.”).

71. See R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION (1988); Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991).

72. McGarity, *supra* note 69, at 1412.

73. JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

74. *Id.* at 87–88.

75. *Id.* at 12.

76. *Id.*; see also Jerry L. Mashaw & David L. Harfst, *Inside the National Highway Traffic Safety Administration: Legal Determinants of Bureaucratic Organization and Performance*, 57 U. CHI. L. REV. 443, 443 (1990) (noting that “the judiciary reacted . . . favorably to NHTSA’s recall efforts”).

view of regulations at NHTSA, as well as at other agencies, has led to a decline in new regulations.⁷⁷

The view that judicial review has ossified the rulemaking process has important implications for regulatory reform debates. Judicial review has not only been advocated as a means of promoting compliance with economic analysis requirements, it has also been opposed because of concerns about the paralysis of the regulatory process.⁷⁸ What is needed is empirical evidence to inform decision making about whether to expand or contract opportunities for judicial review. Yet administrative law scholars have failed generally to produce systematic empirical analysis of the effects of judicial review.⁷⁹ Empirical analysis can help to determine the extent to which administrative rulemaking has declined as well as how heightened judicial review may have affected the level of rulemaking output by agencies.

The empirical evidence for a retreat from rulemaking in the face of stringent judicial review is not nearly as clear as has been generally supposed. As Figure 1 shows, the number of pages in the Code of Federal Regulations (CFR) has grown consistently over the years, even in the face of the courts' hard look review in the 1970s. Moreover, the volume of regulations issued by specific agencies has experienced a similar growth. From 1976–1996, the overall volume of regulations in the CFR slightly less than doubled.⁸⁰ NHTSA, the agency that has been widely perceived to have abandoned rulemaking, slightly more than doubled its

77. See, e.g., JERRY L. MASHAW, GRIED, CHAOS, AND GOVERNANCE (1997) (arguing that “[t]he past decade’s case study literature on the performance of America’s administrative agencies details an agency-by-agency retreat from rulemaking.”); Robert Glicksman & Christopher H. Schroeder, *FPA and the Courts: Twenty Years of Law and Politics*, 54 LAW & CONTEMP. PROBS. 249, 249 n2 (1991) (indicating that the effects of ossification should apply to the FPA because it “is the largest and most active of the environment, health, and safety regulatory agencies [and] over 80% of EPA’s regulations are challenged in court”); McGarity, *supra* note 69, at 1412 (“[S]tringent judicial review is largely responsible for [NHTSA’s] virtual abandonment of rulemaking in favor of case-by-case recalls.”); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 311 (“NHTSA has abandoned almost completely its efforts to establish policy through rulemaking.”).

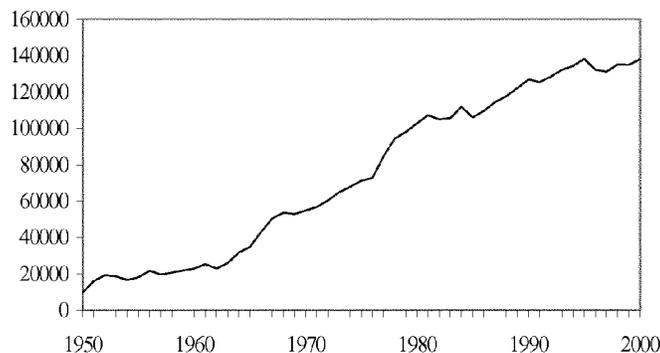
78. Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1014, 1020–27 (2000) (arguing against judicial review because it creates undesirable consequences, including ossifying “the rulemaking process, making administrators slow and timid to address their responsibilities.”); see also McGarity, *supra* note 67, at 1454 (urging courts to reduce the stringency of their review of rulemaking); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) (advocating changes to judicial doctrine and remedies to reduce the ossification of rulemaking). But see Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997) (suggesting that changes to the standards for judicial review are premature and will not significantly reduce regulatory ossification).

79. See Mashaw & Harfst, *supra* note 71, at 275 (noting that “the normative expectations of administrative lawyers have seldom been subjected to empirical verification of a more than anecdotal sort”); Schuck & Elliott, *supra* note 66, at 985 (observing that “we still know little about what is perhaps the central question in [the] field [of administrative law]: How does judicial review actually affect agency decisionmaking?”).

80. In 1976, the CFR spanned 72,740 pages. By 1996, it had grown to 132,112 pages (or 1.8 times more pages).

CFR pages during the same period (a period subsequent to the early judicial defeats that purportedly sent NHTSA into rulemaking retreat).⁸¹ It seems clear that regulatory agencies have not abandoned their use of rulemaking.

FIGURE 1
CUMULATIVE PAGES IN THE CODE OF FEDERAL REGULATIONS,
1950–2000



The impact of rulemaking has also grown, as indicated by the costs that regulations impose on the economy. For example, the annual costs associated with environmental regulations have risen in constant dollars from \$33 billion in 1972 to \$141 billion in 1992.⁸² Even though NHTSA has been thought to have retreated from rulemaking since the mid-1970s, the agency continues to impose significant regulatory costs on the automobile industry. Prior to NHTSA's judicial defeats in 1972, complying with the agency's safety standards added no more than about \$200 to the cost of the average car, but by 1984 the agency's safety regulations had imposed costs of nearly \$900 per car.⁸³ These costs appear only to have risen further since the 1980s.⁸⁴

Available data on the volume and costs of regulation do not appear to support the prevailing view that agencies have retreated from rule-

81. NHTSA's auto safety regulations took up 218 pages in the CFR in 1976 and 484 pages in 1996 (or 2.2 times more pages).

82. Adam B. Jaffe et al., *Environmental Regulation and the Competitiveness of U.S. Manufacturing: What Does the Evidence Tell Us?*, 33 J. ECON. LITERATURE 132, 140 (1995).

83. ROBERT W. CRANDALL ET AL., *REGULATING THE AUTOMOBILE* 37 tbl.3-4 (1986). Even assuming a five percent rate of decline in costs due to a learning curve, Crandall et al. estimate that compliance costs would have increased nearly three times from 1972 to 1984. *Id.*

84. See CHARLES H. FINE ET AL., *THE U.S. AUTOMOBILE MANUFACTURING INDUSTRY* 77 (1996), available at <http://www.ta.doc.gov/Reports/autos/auto.pdf> (noting that "safety regulations have added about \$1,000 to the average selling price of passenger cars since 1980").

making. However, these data may not seem quite as surprising in light of recent empirical research on the frequency of judicial reversals of agency rulemaking. While many observers have previously thought that judicial review is virtually assured for most agencies following issuance of a new rule, the probability of judicial scrutiny is something that can be empirically determined.⁸⁵ It turns out, when the data are collected, that only a fraction of agency rules are ever subject to petitions for review.⁸⁶ Moreover, only a fraction of the challenges reach a judicial panel for decision; only a fraction of judicial decisions result in rules being remanded to the agency; and only a fraction of remands actually result in blocking the agency's decision.

For example, even though it is widely believed that most EPA rules, or at least most significant EPA rules, are challenged in court,⁸⁷ data reveal that the actual rate is only about 26%, and that even the most significant rules are subject to petitions for review only about 35% the time.⁸⁸ After petitions for review are filed challenging EPA rules, only about 29% of them ever result in a decision of an appellate panel.⁸⁹ Voluntary settlement, it turns out, is a common means of disposing of judicial review litigation.⁹⁰ Moreover, in those cases that do result in judges' decisions on the merits, in at least half of the cases the agency decision is upheld entirely.⁹¹ Of those rules that are remanded to the agency by a court, in only about 14% of the cases does the remand appear to present a serious obstacle to the agency in achieving its original objectives.⁹²

Some of these data come from different samples, so care is needed in extrapolating across the different studies. Nevertheless, it is illustrative to note that when these data are combined it appears that judicial review blocks the EPA from taking action in only about 0.5% of all its rulemakings. Rather than indicating that judicial review has devastating

85. Schuck & Elliott, *supra* note 66, at 988–89.

86. Since 1981, about 300 reported judicial decisions based on the arbitrary and capricious standard have appeared reviewing the actions of five federal regulatory agencies combined (NHTSA, EPA, Occupational Safety and Health Administration, Food and Drug Administration, and the Consumer Product Safety Commission). Yet over this same period, these five agencies have together promulgated more than 15,000 new regulations. The number of judicial decisions (not all of which involved reversals) therefore represents only about two percent of the overall output of these regulatory agencies.

87. For an extensive list of sources claiming that litigants challenge eighty percent of the rules that EPA issues, see Coglianese, *supra* note 24, at app. D.

88. *Id.* at 1298–1300 (reporting data on the incidence of litigation filed against EPA's significant rules under the Clean Air Act and RCRA).

89. *Id.* at 1308 n.247.

90. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 756 (1996).

91. See Coglianese, *supra* note 24, at 1308–09 n.249; Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?*, 67 S. CAL. L. REV. 621, 636–39 (1994).

92. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 440 (2000) (“[A]gencies have successfully implemented their policies in approximately 80% of the instances in which courts have originally remanded rules as arbitrary and capricious.”).

impacts on agencies, these data appear instead to support Martin Shapiro's observation that "the courts generally let the agencies do what they want."⁹³ Of course, this does not mean that there are never any important legal decisions reversing agency rulemakings, just that as a percentage of rulemakings such obstructive judicial decisions are quite a rare occurrence.⁹⁴

The fact that judicial review occurs much less frequently than thought also does not necessarily mean that judicial review has had no effects on agency behavior. Perhaps in some subset of the most significant rulemakings judicial review does make agencies more careful, hesitant, or both. Indeed, it is possible that agencies have prevailed so often because they refrain from taking action that would expose them to litigation risks.⁹⁵ This, of course, would generally be consistent with the ossification hypothesis, which supposes that agencies have to work harder to produce rules that will withstand judicial scrutiny. Yet if a rulemaking retreat is truly occurring, which several case study authors have claimed, this retreat is not reflected in the growth in CFR pages and the increasing costs associated with environmental and safety regulations. The growth in regulations and regulatory costs would appear to be more consistent with the evidence that shows that the probability of judicial reversal is quite low.

Admittedly, there are challenges in assessing the impact of judicial review or any other purportedly "ossifying" requirement on federal agencies. Since such requirements tend to apply across all federal agencies, it is often difficult to find appropriate cross-sectional comparisons between different agencies. Analysis of agency rulemaking over time may be complicated if changes in judicial doctrines or other regulatory oversight procedures have occurred at about the same time as changes in other plausible factors affecting rulemaking, such as the party affiliation of the executive branch.

In a recent study, Stuart Shapiro sought to overcome these challenges by examining the ossification of rulemaking at the state level. To ensure variation across states, he chose to study day care regulation, an area that has remained largely unencumbered by preemptive federal regulatory standards.⁹⁶ Relying on a series of carefully selected matched case studies, Shapiro found that day care regulators in states with seemingly cumbersome rulemaking procedures were generally not deterred

93. MARTIN SHAPIRO, *THE SUPREME COURT AND ADMINISTRATIVE AGENCIES* 270-71 (1968); see also Christine B. Harrington, *Regulatory Reform: Creating Gaps and Making Markets*, 10 *LAW & POLY* 293, 305 (1988) (observing that "[t]he pace of regulatory litigation has not increased sharply in the last fifteen years nor has judicial support for agency rules weakened").

94. These data appear generally consistent with the general deference courts give to agencies. Peter Schuck and Donald Elliott's study of published appellate decisions found a high level of judicial affirmances of agency decisions of all types. Schuck & Elliott, *supra* note 66, at 1011 (noting that "in administrative law . . . the agency wins almost 90% of the time").

95. *Id.* at 1010-11.

96. Shapiro, *supra* note 58.

from issuing new regulations. Even though positive political theory would suggest that enacting coalitions control agencies by adopting procedures for rulemaking review,⁹⁷ Shapiro found that the key determinant of regulatory activity in the states was the existing political climate. When the existing coalition was supportive of regulatory change, change tended to occur, notwithstanding the presence of procedural hurdles put in place by earlier coalitions.⁹⁸

Recent and emerging empirical research on both rulemaking trends and the frequency of judicial review raises questions about the extent to which judicial review has ossified the regulatory process. As these empirical findings run counter to the prevailing understanding among administrative law scholars, it should be clear that empirical analysis has become highly relevant to central issues in administrative law. Additional empirical research would help illuminate these issues and provide still further avenues for assessing claims that judicial review hampers agency rulemaking.

IV. NEGOTIATION AS REGULATORY REFORM

Although the effects of judicial review merit further empirical inquiry, many administrative law scholars and policy makers have advocated agency efforts designed to stave off the filing of litigation in the first place.⁹⁹ Specifically, they have encouraged agencies to employ formal negotiation with affected interests over the terms of new regulations in an effort to avoid litigation and speed up the rulemaking process.

Negotiated rulemaking is a procedure by which government regulations are negotiated by representatives from government, the private sector, and nongovernmental organizations prior to the agency's decision to issue a proposal for a new regulation.¹⁰⁰ A negotiated rulemaking committee comprising the affected interests and agency staff meets in an effort to reach unanimous agreement on a proposed rule.¹⁰¹ If the commit-

97. See *supra* note 16.

98. Shapiro, *supra* note 58.

99. See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 18 (1982) (urging use of negotiated rulemaking as a cure for a "bitterly adversarial" regulatory process). Although the literature overall tends to stress the potential benefits of negotiated rulemaking, some scholars have recently expressed concerns about such a technique. See, e.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1356 (1997) (arguing that "the principles, theory, and practice of negotiated rulemaking subtly subvert the basic, underlying concepts of American administrative law"); Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, 34 VAL. U. L. REV. 423 (2000) (suggesting that "[t]urning over the power of government to collaboratives is misguided and a departure from democratic ideals"); Susan Rose-Ackerman, *Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation*, 43 DUKE L.J. 1206, 1212 (1994) (observing that the claims of benefits from negotiated rulemaking "are mostly speculative").

100. 5 U.S.C. §§ 584–585 (2000).

101. By statute, "consensus" is defined as unanimous concurrence or any lesser concurrence if agreed to unanimously by the committee. 5 U.S.C. § 562(2) (2002).

tee reaches such an agreement, the agency then uses it as a basis for its rule, which it then promulgates according to normal notice-and-comment procedures.¹⁰²

Because negotiated rulemaking is intended to encourage affected parties to reach agreement, rather than stake out protracted adversarial positions, its proponents have argued that it will decrease the amount of time it takes to develop regulations¹⁰³ and reduce subsequent judicial challenges.¹⁰⁴ In 1982, the Administrative Conference of the United States (ACUS) first recommended that agencies use negotiated rulemaking procedures. According to the then-chairman of ACUS, the “whole purpose of negotiated rulemaking was to keep things out of the courts.”¹⁰⁵ In addition, ACUS hoped that negotiated rulemaking could reduce the long delays that were thought to characterize the rulemaking process.¹⁰⁶

The Federal Aviation Administration initiated the first negotiated rulemaking in 1983, using the procedure to develop rules governing the frequency of flying time for airline personnel.¹⁰⁷ Since that time, about fifteen federal agencies have used negotiated rulemaking to develop more than thirty regulations.¹⁰⁸ In 1990, Congress formally authorized the practice by enacting the Negotiated Rulemaking Act of 1990.¹⁰⁹ Congress has also adopted more than two dozen other statutes requiring or

102. The Administrative Procedure Act requires agencies to publish a notice of proposed rulemaking, provide an opportunity for interested persons to comment on the rule, and when issuing the final rule provide a statement of the basis and purpose of the final decision. 5 U.S.C. § 553 (2000).

103. See, e.g., ADMIN. CONFERENCE OF THE U.S., BUILDING CONSENSUS IN AGENCY RULEMAKING: IMPLEMENTING THE NEGOTIATED RULEMAKING ACT 1 (1995) (“reg-neg can improve the . . . timeliness of regulations”); Harter, *supra* note 99, at 30 (negotiated rulemaking “can reduce the time and cost of developing regulations”).

104. See, e.g., NAT’L RESEARCH COUNCIL, UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 202 (Paul C. Stern & Harvey V. Fineberg eds., 1996) (“The purpose of regulatory negotiation is to reduce legal challenges to new rules by involving would-be adversaries directly in the rule-making process and by producing a draft rule that meets legal requirements and is acceptable to a wide array of interested and affected parties.”); Harter, *supra* note 99, at 102 (advocating negotiated rulemaking because it “may reduce judicial challenges to a rule because those parties most directly affected, who are also the most likely to bring suits, actually would participate in its development”); Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 18 (1985) (noting that advocates of negotiated rulemaking claim this procedure will “soften the adversary posture that animates the current comment process and reduce the inevitability of legal challenges to adopted rules”).

105. Colloquium, *The Fifth Annual Robert C. Byrd Conference on the Administrative Process: The First Year of Clinton/Gore: Reinventing Government or Refining Reagan/Bush Initiatives?*, 8 ADMIN. L.J. AM. U. 23, 62 (1994) (statement of Judge Loren Smith, chairman of ACUS at the time of its first recommendation on negotiated rulemaking).

106. Admin. Conference of the U.S., Recommendation 82-4, Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-4 (1983) (noting that traditional forms of rulemaking had resulted in “[l]ong periods of delay” and had become “needlessly expensive”).

107. See Flight Time, Duty Time & Rest Requirements for Flight Crewmembers Utilized by Air Carriers, 48 Fed. Reg. 21,339 (proposed May 12, 1983).

108. Coglianese, *supra* note 24, at 1273-75.

109. 5 U.S.C. §§ 561-570 (2000).

encouraging agencies to use negotiated rulemaking or similar consensus-based procedures.¹¹⁰

Although negotiated rulemaking has captured the attention of policymakers who view it as an attractive alternative to traditional rulemaking, empirical inquiry is needed to establish how successful it is in practice. Empirical analysis provides the appropriate basis for assessing the impact negotiation has had on the rulemaking process and how well it has achieved its goals of saving time and reducing litigation.¹¹¹

Over the years, administrative law scholars have published a series of case studies of individual negotiated rules, but these case studies provide an insufficient basis for determining the impact and value of negotiated rulemaking. First, many of these case studies have focused on what their authors perceive to be successful examples of negotiated rulemaking, rather than providing a representative sample of negotiations, both of failures as well as successes.¹¹² Second, these case studies have frequently been written by the very practitioners who were involved in the negotiations, rather than by independent observers.¹¹³ Finally, case studies that focus purely on negotiated rules—with no comparison with similar cases of nonnegotiated rules—do not permit any inferences to be made about what would have happened in the absence of negotiation.¹¹⁴

As with any evaluation of a regulatory innovation, it is necessary in evaluating negotiated rulemaking to compare rules that were negotiated against a counterfactual. In the case of negotiated rulemaking, this counterfactual is properly thought of as what would have likely happened in

110. Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 93 n.2 (Eric W. Orts & Kurt Deketelaere eds., 2001).

111. See, e.g., Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 142 (1985) (noting that the benefits of negotiated rulemaking need to be demonstrated).

112. For a discussion of the importance of including failures as well as successes in program evaluations, see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386, 395 (2001).

113. See Barry G. Rabe, *The Politics of Environmental Dispute Resolution*, 16 POL'Y STUD. J. 585, 591 (1988) (indicating that most of what we know about consensus building comes from practitioners and advocates of alternative dispute resolution). For a careful case study that is an exception to this trend, see Christine B. Harrington, *Howard Bellman: Using "Bundles of Input" to Negotiate an Environmental Dispute*, in WHEN TALK WORKS 105 (Deborah M. Kolb et al. eds., 1994) (providing an account of a regulatory negotiation at the Nuclear Regulatory Commission).

114. There have only been a few efforts to make explicit comparisons between negotiated rulemaking and traditional rulemaking. For example, I have compared the performance of negotiated and traditional rulemaking in terms of the time it takes to develop the rule and any resulting litigation. See generally Coglianese, *supra* note 24; Coglianese, *supra* note 112. Steven Balla and John Wright have compared rules developed through collaborative processes and those developed through conventional means. Steven J. Balla & John R. Wright, *Consensual Rulemaking and the Time It Takes to Develop Rules* (1999) (unpublished paper presented at the Fifth National Public Management Research Conference, Dec. 3–4, 1999) (on file with the University of Illinois Law Review). In addition, Laura Langbein and Neil Kerwin have published findings comparing the views of participants in negotiated rulemakings with the views of individuals who filed comments in traditional rulemakings. See generally Laura Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000).

the absence of an agency's decision to use a negotiated rulemaking procedure. For example, does the process of negotiation allow agencies to promulgate rules in less time than would otherwise be required? Does negotiation reduce the amount of litigation that otherwise would have occurred?

An empirical study I conducted compared all of the negotiated rulemakings that the EPA had completed with the population of significant rulemakings EPA had developed through conventional means.¹¹⁵ The EPA was selected for examination because its conventional rulemaking process, including its time demands, had already been extensively studied.¹¹⁶ Moreover, the EPA was the agency that had completed the most negotiated rulemakings at the time of my study. The total number of negotiated rules promulgated across all agencies has actually been quite small, only about thirty-five rules—or less than one-tenth of one percent of all agency rules.¹¹⁷ EPA has completed twelve negotiated rules, or about one-third of the total rules that have been negotiated by more than a dozen different federal agencies.¹¹⁸

It turns out that the average and median negotiated rule at the EPA takes about the same amount of time to develop as the average and median nonnegotiated rule.¹¹⁹ As Table 1 shows, whether negotiated or not, significant EPA rules take on average about three years to develop.¹²⁰ Subsequent research by political scientists Steven Balla and John Wright has tended to confirm that regulatory negotiation does not shorten the regulatory process.¹²¹ In addition, these findings are consistent with the well-accepted view that negotiated rulemakings are intensive and time consuming for all who participate in them.¹²² According to another study, participants in negotiated rulemakings are more than three times as likely as participants in conventional rulemakings to complain that the rulemaking process takes too long.¹²³

When it comes to reducing litigation, the empirical evidence again fails to indicate that negotiated rulemaking has achieved its goal. The rate at which EPA rules generally are challenged in court is, as noted

115. See Coglianese, *supra* note 24.

116. See Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992) (examining the duration of EPA rulemakings).

117. Coglianese, *supra* note 24, at 1277 tbl.2.

118. *Id.* at 1274.

119. *Id.* at 1280–84.

120. For an elaboration of my methods and results, see Coglianese, *supra* note 112, at 406–14.

121. Balla & Wright, *supra* note 114 (finding that “rules to which regulatory negotiation was applied took longer to issue than those developed through conventional proceedings, despite the fact that agencies were more likely to conduct regulatory negotiations in situations that were amenable to relatively rapid resolution”).

122. See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 457 (2000) (noting that “all commentators agree that negotiated rulemaking is an intensive process” that demands “a concentrated devotion of resources by the agency and private negotiation participants”).

123. Langbein & Kerwin, *supra* note 114, at 620.

earlier, about twenty-five percent.¹²⁴ Surprisingly, EPA's negotiated rules have fared still worse when it comes to prompting legal challenges. As shown in Table 1, six of EPA's twelve negotiated rules have been subject to petitions for judicial review filed in federal court, or a litigation rate of fifty percent.¹²⁵ Moreover, these challenges to the negotiated rules do not appear to be any different than the challenges to conventional rules in terms of their contentiousness. The average number of petitioners in these challenges is about the same (actually slightly higher) for negotiated rules as for EPA rulemaking overall.¹²⁶ The percentage of legal challenges that result in a decision by judges is about the same for both groups, as is the percentage of challenges that are at least partially vindicated by the judges.¹²⁷

TABLE 1
NEGOTIATED RULEMAKING VS. CONVENTIONAL RULEMAKING

	Average Rule- making Dura- tion	Rules Challenged	Average Petitions per Challenge	Challenges Decided by Court	Challenges that Succeeded
EPA Negotiated Rules	2.8	50%	3.7	33%	50%
Significant EPA Rules	3.0	35%	3.0	29%	51%

The underlying sample of negotiated rules is admittedly small because the EPA, like other agencies, has simply not utilized the procedure very frequently. It is natural to wonder about the possibility of selection bias. For example, have agencies simply selected the more challenging or contentious rules for negotiation? While selection bias is always a potential concern, in this case the selection bias appears to be in the opposite direction.¹²⁸ Agencies have by no means selected trivial rules for negotiation, but generally speaking the rules they have selected have been the ones that have been easier to negotiate, not harder.¹²⁹ In fact, the Negotiated Rulemaking Act and agency guidelines instruct government officials to select rules for negotiation only if they have a prior likelihood

124. See *supra* note 89 and accompanying text.

125. See Coglianese, *supra* note 24, at 1290-93, 1301-07.

126. See *id.* at 1310 n.252.

127. *Id.*; see also Coglianese, *supra* note 112, at 426-27 & tbl.2 (noting that "[t]he typical challenge filed against an EPA negotiated rule does not differ in any discernible way from the typical challenge filed against a conventional rule").

128. See Coglianese, *supra* note 24, at 1320-21 (concluding that the rules selected for negotiation have tended to be ones that are more likely at the outset to be resolved without excessive delay or litigation).

129. See, e.g., Balla & Wright, *supra* note 114 (noting that agencies are more likely to use negotiation for those rules that are more amenable to quicker resolution); Jeffrey P. Cohn, *Clearing the Air*, GOVT EXECUTIVE, Sept. 1, 1997, at 45, 50 (noting that "most negotiated rule-making involves relatively narrow issues").

of successful and prompt resolution.¹³⁰ The EPA has avoided using negotiated rulemaking for its most contentious and significant rulemakings.¹³¹ Instead, it has tended to utilize the procedure for what one EPA report characterized as “second-tier” rules.¹³² In short, the deck has been stacked in favor of finding that negotiated rules take less time and result in less litigation, making the resulting findings even stronger.

In the face of the empirical evidence showing that negotiated rulemaking at EPA has not achieved its major goals of saving the agency time and reducing legal contestation, some have argued that negotiation might achieve still other goals, such as improving the quality of rules.¹³³ However, no empirical analysis has yet demonstrated that negotiated rules achieve these other goals,¹³⁴ and other recent work actually suggests that negotiation can create new problems for policymaking, such as the lowest common denominator problem.¹³⁵ While there is room for further empirical analysis of the effects of negotiated rulemaking, the empirical research that has been conducted to date provides a basis for making more informed decisions about how to structure the rulemaking process. The empirical record indicates that further efforts to promote consensus building will not likely reduce litigation or save time and suggests that such efforts are also unwarranted on other grounds. Rather than simply accepting the enthusiastic promises that mediators and other advocates have made for negotiated rulemaking, policymakers can now rely on empirical findings to make better judgments in designing the rulemaking process.

130. See, e.g., 5 U.S.C. § 563(a)(4) (2000) (directing agencies to select rules for negotiation for which there is a “likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time”). For an extended discussion of statutory and other guidelines for selecting rules for negotiation, see Coglianese, *supra* note 24, at 1319–20.

131. Coglianese, *supra* note 24, at 1318.

132. Program Evaluation Div., U.S. Envtl. Protection Agency, *An Assessment of EPA's Negotiated Rulemaking Activities*, in NEGOTIATED RULEMAKING SOURCEBOOK 34, 34 (1990).

133. See Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 54 (2000).

134. The Laura Langbein and Neil Kerwin study, *supra* note 114, has been said to suggest that negotiated rulemaking results in better quality rules. Harter, *supra* note 133, at 56 (arguing that the Langbein and Kerwin study provides “powerful” support for the claim that negotiation improves rulemaking quality); see also CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 182 (2d ed. 1999) (arguing that his study with Langbein represents “the most compelling evidence to date . . . that negotiated rulemaking . . . produces results superior to conventional rulemaking”). However, the Langbein and Kerwin study actually never investigated the outcomes of negotiated rulemaking, but instead compared the perceptions of participants in negotiated rulemaking with those of individuals who filed comments in conventional rulemakings. See Langbein & Kerwin, *supra* note 114, at 601. Consequently, it does not provide a sound basis for drawing inferences about the relative quality of negotiated rules. For an extended discussion of the limitations of the Langbein and Kerwin study, see Coglianese, *supra* note 112, at 430–38.

135. See Charles C. Caldart & Nicholas Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 201 (1999) (concluding that negotiated rulemaking can undermine the potential of regulation to encourage technological innovation); Coglianese, *supra* note 110 (discussing the pathologies of consensus); McCloskey, *supra* note 99, at 434 (arguing that consensus building is a “cumbersome process that is plagued by disadvantages that outweigh its perceived advantages”).

CONCLUSION

Each of the arenas for procedural reform that I have considered here have benefited from careful empirical research. Given the level of interest in reforming the regulatory process, still further empirical research will make a contribution to ongoing policy debates at the same time that it furthers scholarly understanding of law as a social instrument. I have raised each of the examples here to illustrate issues common to empirical analysis of law in a variety of areas of regulatory reform, not to suggest that these examples are exhaustive. Important empirical work remains to be done in other areas of administrative law, such as on the impacts of procedures on the outcomes of administrative law judges or the impact that varying standards of review may have on judicial decision making.

In order to understand how law can influence governing institutions within society, it is vital to examine how procedures actually affect the behavior of administrative agencies and to learn more about the conditions under which different procedural arrangements might yield better policy outcomes. Empirical analysis should therefore go hand in hand with the implementation of any regulatory reform. By choosing appropriate research strategies and attending with care to issues of empirical validity, researchers will be able to explain better how administrative law affects the behavior and outcomes of government agencies. Empirical research on administrative law has the potential for evaluating and ultimately improving prescriptive efforts to design administrative procedures in ways that contribute to more effective and legitimate governance.

CITIZEN PARTICIPATION IN RULEMAKING: PAST, PRESENT, AND FUTURE

CARY COGLIANESE[†]

ABSTRACT

Administrative law scholars and governmental reformers argue that advances in information technology will greatly expand public participation in regulatory policymaking. They claim that e-rulemaking, or the application of new technology to administrative rulemaking, promises to transform a previously insulated process into one in which ordinary citizens regularly provide input. With the federal government having implemented several e-rulemaking initiatives in recent years, we can now begin to assess whether such a transformation is in the works—or even on the horizon. This paper compares empirical observations on citizen participation in the past, before e-rulemaking, with more recent data on citizen participation after the introduction of various types of technological innovations. Contrary to prevailing predictions, empirical research shows that e-rulemaking makes little difference: citizen input remains typically sparse, notwithstanding the relative ease with which individuals can now learn about and comment on regulatory proposals. These findings indicate that the more significant barriers to citizen participation are cognitive and motivational. Even with e-rulemaking, it takes a high level of technical sophistication to understand and comment on regulatory proceedings. Moreover, even though information technology lowers the absolute cost of submitting comments to regulatory agencies, it also dramatically decreases the

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costs of a wide variety of entertainment and commercial activities that are much more appealing to most citizens. Given persistent opportunity costs and other barriers to citizen participation, even future e-rulemaking efforts appear unlikely to lead to a participatory revolution, but instead can be expected generally to deliver much the same level of citizen involvement in the regulatory process.

E-rulemaking seems to be the next “best thing” capturing the attention of administrative law scholars. For a time, negotiated rulemaking had been the reigning “best thing,” promising to cure the ills thought to afflict a time-consuming and conflict-ridden regulatory process.¹ But even after Congress passed a statute encouraging the use of negotiated rulemaking² and a number of agencies tried to use the procedure,³ interest generally faded as empirical research showed that formal negotiation of rules makes little difference, or certainly fails to accomplish anything like what proponents had promised.⁴

1. The seminal article advocating the use of negotiated rulemaking is Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982).

2. Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570 (2000).

3. For case discussions of specific negotiated rulemakings, see, for example, Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 HARV. ENVTL. L. REV. 141, 149 (1999) (analyzing and assessing the potential of negotiation in the formulation and implementation of environmental and health and safety policy); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1627–29 (1986) (reviewing negotiations over rules at the Occupational Safety and Health Administration, the Federal Aviation Administration, and the Environmental Protection Agency).

4. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1259–61 (1997) [hereinafter Coglianese, *Assessing Consensus*] (reporting empirical results showing the failure of negotiated rulemaking to achieve its major goals of reducing rulemaking time and decreasing judicial challenges); Steven J. Balla & John R. Wright, *Consensual Rule Making and the Time It Takes to Develop Rules*, in POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 187, 203–05 (George A. Krause & Kenneth J. Meier eds., 2003) (reporting empirical results that negotiated rulemaking does not shorten the time to develop rules). One empirical study reports that negotiated rules appear to be rated better by participants than conventionally developed rules. Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599, 600 (2000). The Langbein and Kerwin study, however, suffers from substantial conceptual and methodological shortcomings. See Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION 69, 78 (Rosmary O’Leary & Lisa Bingham eds., 2003) [hereinafter Coglianese, *Is Satisfaction Success?*] (discussing limitations of the Langbein and Kerwin study and others that rely on satisfaction as basis for evaluation); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 386, 430–38 (2001)

Experience with other regulatory reforms has exhibited a similar pattern of initial high hopes followed by a failure to deliver on reformers' expectations.⁵

Is e-rulemaking headed down the same path? At the very least, it is starting out in much the same place. Reformers promise great things from the application of new information technology to the regulatory process—chief among them being the ability to expand public participation in rulemaking. Prior to the advent of modern information technology, unelected regulatory officials made significant policy decisions through a process largely insulated from the general public.⁶ Information technology is now supposed to make it easier for ordinary citizens to learn about, participate in, and influence governmental decisionmaking about new regulations.⁷

The Clinton administration first trumpeted e-rulemaking as a means of enhancing citizen participation,⁸ and the Bush

[hereinafter Coglianese, *Assessing Advocacy*] (discussing problems and limitations of the Langbein and Kerwin study). For discussion of further concerns with negotiated rulemaking, see Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy?*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 93–94 (Eric Orts & Kurt Dektelaere eds., 2001) [hereinafter Coglianese, *Consensus*].

5. See, e.g., Cary Coglianese & Laurie K. Allen, *Building Sector-Based Consensus: A Review of the US EPA's Common Sense Initiative*, in INDUSTRIAL TRANSFORMATION 65, 65 (Theo J.N.M. de Bruijn & Vicki Norberg-Bohm eds., 2005) (finding that a major EPA effort to reform environmental regulation produced nothing of consequence); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111, 1119–25 (2002) (noting the persistence of inefficient regulation even following procedural reforms designed to improve the efficiency of government rulemaking).

6. Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 372 (2004).

7. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 438 (2004) (“Regulatory agencies are increasingly harnessing the power of digital technologies to . . . expand public involvement in policymaking.”).

8. See, e.g., OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: IMPROVING REGULATORY SYSTEMS 39 (1993), available at <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (recommending that agencies “[i]ncrease [their] use of information technology,” as this would, among other things, “give the public easier and more meaningful access to rulemaking and policy guidance documents”); OFFICE OF THE VICE PRESIDENT, ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: REENGINEERING THROUGH INFORMATION TECHNOLOGY 25, 28 (1993), available at <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (recommending the use of information technology “to reduce the complexities that citizens face” and improve “[c]itizen access to government information and services”); HENRY H. PERRITT, JR., ELECTRONIC DOCKETS: USE OF INFORMATION

administration has picked up the tune with still greater gusto.⁹ Making e-rulemaking one of its governmental reform priorities, the Bush administration moved swiftly to implement a one-stop Web portal, Regulations.gov, that allows citizens to comment more easily on any proposed rule issued by any federal agency.¹⁰ The Bush administration has also created an online docket system intended eventually to house all rulemaking records across the entire federal government.¹¹ Commenting on the launch of Regulations.gov in 2003, the director of the Office of Management and Budget (OMB) said, “[E-rulemaking] will democratize an often closed process and enable every interested citizen to participate in shaping the rules which affect us all.”¹² With similar optimism, the managers implementing the

TECHNOLOGY IN RULEMAKING AND ADJUDICATION, REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (1995), available at http://www.kentlaw.edu/classes/rstaudt/internetlaw/casebook/electronic_dockets.htm (discussing technical and legal issues related to improving public access to the regulatory process through e-rulemaking).

9. See, e.g., Press Release, Executive Office of the President, Office of Mgmt. & Budget, OMB Accelerates Effort to Open Fed. Regulatory Process to Citizens and Small Businesses (May 6, 2002), available at <http://www.whitehouse.gov/omb/pubpress/2002-27.pdf> (explaining the Bush administration’s effort to make the “regulatory process more open to the public” through online rulemaking).

10. For an overview of the Bush administration’s e-rulemaking initiative, including descriptions of the federal docket management system and progress with Regulations.gov, see Michael Herz, *Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE, 2002–2003, at 129, 145–51 (Jeffrey S. Jabbers ed., 2004).

11. For commentary on the new federal docket management system (FDMS), including recommendations of ways to enhance access to information for research, see Cary Coglianese et al., *Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System*, 57 ADMIN. L. REV. 621, 622 (2005). The Bush administration’s program to create a government-wide docket system has met with bumps along the way, including funding conflicts with congressional appropriators. See Cindy Skrzycki, *Funds for E-Docket Filed Under ‘No.’*, WASH. POST, Jan. 10, 2006, at D1 (reporting that the House Appropriations subcommittee refused to allow the Office of Management and Budget (OMB) to require agency contributions for the development of the FDMS until the OMB submitted a detailed funding plan). The administration, however, continues to promise that the “FDMS will ultimately replace the 20 existing individual agency electronic regulatory systems and over 150 paper-based docket systems.” EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE BENEFITS OF THE PRESIDENT’S E-GOVERNMENT INITIATIVES 3 (2006), available at http://www.whitehouse.gov/omb/inforeg/e-gov/e-gov_benefits_report_2006.pdf [hereinafter E-GOVERNMENT BENEFITS].

12. Press Release, Executive Office of the President, Office of Mgmt. & Budget, Regulations.gov to Transform U.S. Rulemaking Process and Save Nearly \$100 Million (Jan. 23, 2003), available at <http://www.whitehouse.gov/omb/pubpress/2003-03.pdf>. Three years later, the Bush administration continued to proclaim that “Regulations.gov and the Federal FDMS effectively promote a key principle of E-Democracy—using information technology to enable all citizens to more effectively participate in their government.” E-GOVERNMENT BENEFITS, *supra* note 11, at 3.

administration's e-rulemaking initiative have declared the project to be "a groundbreaking achievement on the road toward citizen-centered government."¹³

Administrative law scholars similarly predict grand effects from e-rulemaking. One of the earliest administrative law articles on e-rulemaking claims that the Internet will "change[] everything," helping to ensure that "[c]itizens can . . . play a more central role in the development of new agency policies and rules."¹⁴ Another legal scholar suggests that the federal e-rulemaking initiative holds the potential to "enlarge significantly a genuine public sphere in which individual citizens participate directly to help . . . make government decisions."¹⁵ Still another describes the Bush administration's e-rulemaking effort as "perhaps the most far-reaching and important such governmental transformation ever effected."¹⁶ In this vein, a

13. Oscar Morales & John Moses, *eRulemaking's Federal Docket Management System*, in *ERULEMAKING AT THE CROSSROADS* (Stuart Shulman ed., May 4, 2006), available at <http://erulemaking.ucsur.pitt.edu/doc/Crossroads.pdf>. The members of an awards committee at the John F. Kennedy School of Government's Innovations in American Government program apparently agreed, naming the Bush administration's e-rulemaking initiative as an award finalist in 2005 and again as one of the top fifty most innovative government programs in the United States in 2006. U.S. Environmental Protection Agency, *Celebrating Our Success: Office of Environmental Information FY 2005 Accomplishments 20* (Nov. 30, 2005), available at http://www.epa.gov/oei/pdf/2005_oei_accomp_rep_final.pdf; Harvard University, John F. Kennedy School of Government, and The Council for Excellence in Government, *The Innovations in American Government Awards: 2006 Top 50 Programs 2* (Mar. 22, 2006), available at <http://www.innovations.harvard.edu/redir.html?url=http%3A%2F%2Fwww.ashinstitute.harvard.edu%2Fash%2F2006IAGtop50.pdf>. In announcing its 2006 decision, the innovations award program declared that the administration's e-rulemaking initiative "promotes e-democracy and opens the door to the Federal rulemaking process by placing hundreds of regulations and supporting documents that impact daily life at the American public's fingertips." *Id.*

14. Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 277, 303 (1998).

15. Peter M. Shane, *Turning GOLD into EPG: Lessons from Low-Tech Democratic Experimentalism for Electronic Rulemaking and Other Ventures in Cyberdemocracy*, 1 I/S 147, 148 (2005), available at <http://www.is-journal.org/V01I01/I-S,%20V01-I01-P147,%20Shane.pdf>; see also Coglianese, *supra* note 6, at 373 (reporting on an e-rulemaking workshop at which "[m]any participants were convinced that [information technology] would lead to a dramatic increase in the number of comments submitted on agency rules"); Lobel, *supra* note 7, at 440 ("The new portals for notice and comment help make the public comment process more interactive and deliberative. This . . . increases public participation and democratic legitimacy.") (footnote omitted).

16. Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 434 (2004) [hereinafter Noveck, *Electronic Revolution*]. But see Beth Simone Noveck, *Public Participation in Electronic Rulemaking: Electronic Democracy or Notice-and-Span?*, ADMIN. &

number of authors claim that e-rulemaking portends a fundamental transformation, even a revolution, in the regulatory process.¹⁷

Is a revolution really in the works? To assess e-rulemaking's impact and its potential, I begin this Article by reviewing what researchers have discovered about citizen participation in rulemaking in the past, before the introduction of e-rulemaking. Then I consider the empirical research on whether and how citizen participation has changed since the introduction of e-rulemaking.¹⁸ Fortunately, an interdisciplinary network of researchers has been producing a rapidly expanding body of research that speaks directly to the question of e-rulemaking's impact.¹⁹ After examining what the research community

REG. L. NEWS, Fall 2004, at 7 [hereinafter Noveck, *Notice-and-Spam*] ("The current plan for e-rulemaking is nothing short of a disaster.").

17. See, e.g., Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 170 (2004) (noting that "[a]dministrative law . . . stands to be transformed by trends toward increased openness" fostered by information technology); Noveck, *Electronic Revolution*, *supra* note 16, at 433 ("Informal rulemaking, 'one of the greatest inventions of modern government,' is about to be transformed by the silent revolution of e-government." (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 65 (1969))); Noveck, *Notice-And-Spam*, *supra* note 16, at 7-8 ("E-rulemaking is potentially revolutionary because it will demand nothing short of a rethinking of bureaucracy itself and the role of citizens in it."); Michael Tonsing, *Two Arms! Two Arms! E-Government Is Coming!*, FED. LAW., July 2004, at 19 ("The Electronic Rulemaking Initiative . . . has dramatically transformed the federal rulemaking process by enhancing the public's ability to participate in regulatory agency decision-making."). Claims about technology's revolutionary or transformative potential also abound in the broader literature on the Internet and policymaking. See, e.g., Council for Excellence in Government, *E-Government: The Next American Revolution* 20 (2001), available at <http://www.excelgov.org/admin/FormManager/filesuploading/bpnt4c.pdf> ("The digital revolution already is changing the way that government does business at the federal, state, and local levels."). Cf. REED E. HUNDT, *YOU SAY YOU WANT A REVOLUTION: A STORY OF INFORMATION AGE POLITICS* (2000) (describing contemporary politics surrounding the Federal Communications Commission's policymaking as novel and revolutionary). For a brief overview of some of the claims of "digital democrats," who "argue that web-based participation could be the answer to the decline in social capital and . . . interest in citizenship," see Stuart W. Shulman et al., *Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences*, 21 SOC. SCI. COMPUTER REV. 162, 164 (2003). Consistent with the revolutionary fervor found throughout the literature, Jeffrey Lubbers has raised a question that is now currently (and quite seriously) on the minds of a number of administrative law scholars: "Should the Administrative Procedure Act be amended to reflect the electronic age?" Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda* 9 (Regulatory Policy Program, Working Paper RPP-2002-04, 2002), available at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf>.

18. In this Article, I use "e-rulemaking" broadly to mean the use of the Internet and digital technologies in soliciting public input about rulemaking. The introduction of e-rulemaking is marked by the increased adoption by federal agencies of the option to submit rulemaking comments by e-mail in the late 1990s.

19. In 2002, the National Science Foundation (NSF) asked me to convene a series of workshops aiming, among other things, to build a network of scholars interested in e-

has learned about the impact of current e-rulemaking efforts, I finally consider how citizen participation might possibly expand in the future with new applications of information technology and whether e-rulemaking might eventually create a true revolution in public participation in the regulatory process.

Will e-rulemaking actually increase thoughtful citizen participation in regulatory policymaking? The answer appears to be, after a careful consideration of the available evidence, decidedly “no.” Based on the experience to date with several different types of e-rulemaking projects, no signs of a revolution appear on the horizon.

I. PAST

Back in the “old days,” which really were not that long ago, anyone submitting public comments to a regulatory agency needed to read the *Federal Register* to learn if an agency had issued a proposed rule and then had to send in comments by mailing a letter before the close of the comment period. Regulations.gov did not exist, and the *Federal Register* was not even available online, so it was not easy for most people to learn that an agency had proposed a rule that might be of interest to them.²⁰ Some public libraries across the country carried the *Federal Register*, but by the time many libraries received each issue, catalogued it, and placed it on the library shelves, the public comment periods for the proposed rules in that issue were well underway, if not lapsed altogether. Of course, if interested parties could hire a Washington lawyer or lobbying firm to monitor an agency’s activities, or if they belonged to a trade association or other organized interest group, they would be in a much better position to know when a new rule was in the works. On occasion, the public

rulemaking from across the fields of the information sciences, social sciences, and law. The NSF project resulted in a report synthesizing the views of workshop participants. Coglianesse, *supra* note 6. It also resulted in a Web site, www.e-rulemaking.org, which catalogs and compiles a broad range of research studies, government reports, and conference proceedings on e-rulemaking. This Article draws directly on the growing volume of research focused specifically on information technology and rulemaking. For other work considering the role of information technology in politics and policymaking more broadly, see generally BRUCE BIMBER & RICHARD DAVIS, *CAMPAIGNING ONLINE: THE INTERNET IN U.S. ELECTIONS* (2003); RICHARD DAVIS, *THE WEB OF POLITICS: THE INTERNET’S IMPACT ON THE AMERICAN POLITICAL SYSTEM* (1999); GOVERNANCE.COM: *DEMOCRACY IN THE INFORMATION AGE* (Elaine Ciulla Kamarck & Joseph S. Nye eds., 2002); *DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET* (Peter M. Shane ed., 2004); CASS R. SUNSTEIN, *REPUBLIC.COM* (2001).

20. Coglianesse, *supra* note 6, at 362–63.

might happen to learn of a proposed rule in a media report, but coverage of a new regulation was (and still is) relatively rare.²¹ Even when the media do cover a rule, seldom do their reports provide enough detail to enable a citizen to know how to submit a public comment.

Not surprisingly, most rulemakings did not elicit many comments. For example, in 1989, the U.S. Environmental Protection Agency (EPA) issued a total of seventy-two hazardous waste rules under the Resource Conservation and Recovery Act (RCRA), nine of which the agency considered significant enough to list in its semiannual regulatory agenda.²² For these significant rules, the agency received an average of twenty-five comments per rule, whereas the other, less significant rules averaged only six comments per rule.²³ Researchers have found similar comment levels in studies of other rules and other agencies. Political scientist Marissa Golden examined comments submitted on eleven randomly selected regulations proposed between 1992 and 1994 by the EPA, the National Highway Traffic Safety Administration (NHTSA), and the Department of Housing and Urban Development (HUD).²⁴ The number of comments submitted on these rules ranged from one to 268, with a median of twelve comments submitted per rule.²⁵ In another study, political scientist William West examined comments on forty-two rules completed by fourteen different agencies in 1996.²⁶ The number of comments ranged from zero to 2,250, with the median rule garnering only thirty-three comments.²⁷

21. On the paucity of media coverage of regulations, see Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INT'L J. OF PRESS/POL. 39, 40-41 (1998); John Gravois & Walt Potter, *How the Press Misses the Beat: Reporting on Regulatory Agencies Is a Vast Wasteland*, WASH. JOURNALISM REV., Jan./Feb. 1982, at 29; Jules Witcover, *Washington's Uncovered Power Centers*, COLUM. JOURNALISM REV., Mar./Apr. 1972, at 14-19.

22. Cary Coglianese, *Challenging the Rules: Litigation and Bargaining in the Administrative Process* 67 (1994) (unpublished Ph.D. dissertation, University of Michigan) (on file with the *Duke Law Journal*).

23. *Id.*

24. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 250-64 (1998).

25. *Id.* at 252.

26. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 68 (2004).

27. *Id.* at 79.

Few of these comments ever came from ordinary citizens. A study of all the significant EPA hazardous waste rules from 1989 to 1991 found that industry filed nearly 60 percent of all the comments submitted in these proceedings, whereas individual citizens submitted only about 6 percent.²⁸ Only about 40 percent of the rulemaking proceedings received at least one comment from an individual citizen, whereas 96 percent of them contained at least one comment from a business firm and 80 percent had at least one comment from a trade association.²⁹ Of those comments submitted by citizens, most were only the briefest of letters. Often they were handwritten notes; sometimes they expressed flippant, derogatory remarks toward the agency; and sometimes they were obviously cribbed from a grassroots group's form letter. Business submissions were consistently longer and more sophisticated, at times running into the hundreds of pages.³⁰

Other studies have found a similar paucity of participation by ordinary citizens in agency rulemakings.³¹ For example, in ten out of the eleven rules in Professor Golden's study, not a single ordinary citizen filed a comment.³² The one exception, in which citizens submitted 9 percent of the comments, was a HUD rule on housing for the elderly and disabled.³³ In the three HUD rulemakings that

28. Coglianese, *supra* note 22, at 48.

29. Coglianese, *supra* note 22.

30. For a similar observation, see WESLEY A. MAGAT ET AL., RULES IN THE MAKING: A STATISTICAL ANALYSIS OF REGULATORY AGENCY BEHAVIOR 39 n.17 (1986), which recounts a rulemaking in which "the Utility Water Act Group submitted four bound volumes of comments totaling more than 500 pages on the powerplant industry rules." *Id.*

31. See JEFFREY M. BERRY, THE INTEREST GROUP SOCIETY 134 (3d ed. 1997) ("Many of those who write to agencies are representatives of interest groups since the technical jargon in regulations makes them incomprehensible to anyone not expert on the subject."); MAGAT ET AL., *supra* note 30, at 39 ("Most of the comments came from individual firms and trade associations."); Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 135 (2006) ("[B]usiness interests typically submit the majority of comments to a given rule."). As political scientist E.F. Schattschneider observed nearly fifty years ago, the policymaking process is dominated by organized interests, and even among organized groups there are many more corporations and trade associations involved in policymaking than groups representing individual citizens. E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960). Mancur Olson's theoretical development of collective action showed the difficulties that ordinary citizens face in mobilizing to pursue common interests in the policy process. MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965); see also JAMES Q. WILSON, POLITICAL ORGANIZATIONS (1973) (elaborating on the implications of collective action problems for interest group politics).

32. Golden, *supra* note 24, at 253-55.

33. *Id.* at 255.

Golden studied, governmental entities tended to dominate among the commentators, contributing 75 percent of all the comments submitted.³⁴ Businesses dominated at the EPA and NHTSA, filing 77 percent of all comments.³⁵ On the basis of data like these, it is difficult to argue with Golden's conclusion that "at least in the regulatory arena, there is a striking absence of citizen representation."³⁶

II. PRESENT

In an article published in 2005, administrative law scholar Mariano-Florentino Cuéllar suggests that patterns of participation may have started to change.³⁷ On the basis of his examination of comments in three rulemaking proceedings, he concludes that, "contrary to conventional wisdom, comments from the lay public make up the vast majority of total comments about some regulations."³⁸ Professor Cuéllar is certainly correct that *some* rules—like those in his study—do garner a large proportion of comments from ordinary citizens. Yet that has always been the case. An especially salient rulemaking would, from time to time, become the

34. *Id.*

35. *Id.* at 253–54. Golden did not find, however, that many of the same businesses participated across the different rulemakings, even for those issued by the same agency. *See id.* at 257 ("[E]ach [rulemaking] results in a strikingly different set of participants."); *see also* Coghianese, *supra* note 22, at 51 (noting that "[b]y far, most groups and individuals participated infrequently" and that "[o]f the 1,607 participants examined, 87 percent participated in only one [rule]").

36. Golden, *supra* note 24, at 255. Woody Stanley, an official with the Department of Transportation, has suggested that at least some of the NHTSA rules in Golden's study may have in fact garnered citizen comments that were not included in the public docket because most of them were form letters and postcards that provided the agency with no relevant information. E-mail from Woody Stanley, Office of Legislative and Government Affairs, Federal Highway Administration, to Cary Coghianese, Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, (Mar. 16, 2006 13:03 EST).

37. Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005).

38. *Id.* at 414. The first of these rules was proposed by the Treasury Department in 2002 to address law enforcement use of private data kept by financial institutions. It garnered a total of 172 comments, 124 (72 percent) of which individual citizens submitted. *Id.* at 442–43. The second rule, proposed and finalized in 2003 by the Federal Elections Commission, governed the financing of political campaigns and party conventions. *Id.* at 447. About fifteen law firms, political organizations, and legislators submitted comments on the proposed rule, whereas about 1,100 individual citizens submitted comments. *Id.* at 448–49. The third rule was proposed by the Nuclear Regulatory Commission (NRC) in 2001 to change the procedures for licensing nuclear power plants. *Id.* at 456. The NRC received over 1,400 comments, 98 percent of which came from individual citizens. *Id.*

subject of a grassroots mass mail campaign, with a large volume of form letter submissions targeted at an agency.³⁹ This appears to be what happened in the three rules in Cuéllar's study. As with other highly salient rules in the past, most of the comments in two of his rulemakings were "simple form letters,"⁴⁰ and citizen comments in the other rulemaking were, in Cuéllar's words, "tremendously unsophisticated."⁴¹

The fact that all three rules in Professor Cuéllar's study were proposed within the last five years—after e-mail communication had become commonplace—does at least raise the question of whether the Internet might be leading to a general increase in citizen commentary. The agencies in Cuéllar's study, after all, accepted e-mail comments on the specific rules he studied.⁴² About 98 percent of

39. See Fred Emery & Andrew Emery, *A Modest Proposal: Improve E-Rulemaking by Improving Comments*, 31 ADMIN. & REG. L. NEWS 8, 8 (Fall 2005) ("Many agencies were besieged by comments long before the coining of the phrase e-rulemaking."); Ioana Munteanu & J. Woody Stanley, *Participation in E-Rulemaking: Evidence from an Agency Electronic Docket 20–21* (Nov. 1, 2004) (unpublished manuscript, on file with the author) ("[T]he DOT received a large volume of comments by mail, including post cards and form letters, for . . . controversial rulemakings prior to the introduction of the [electronic docket management system]."); see also David C. Nixon et al., *With Friends Like These: Rule-Making Comment Submissions to the Securities and Exchange Commission*, 12 J. PUB. ADMIN. RES. & THEORY 59, 64 (2002) (reporting that the twenty-one final rules the Securities and Exchange Commission promulgated in 1998 elicited over six thousand comments, with "the vast majority of those comments . . . submitted [by individual investors] in reference to two particular rules"). Although the U.S. Department of Agriculture allowed email submission of comments on its proposed organics food labeling rule in the late 1990s, the vast majority of the more than a quarter million comments came in as postcards, paper letters, or faxes—not e-mails. Stuart W. Shulman, *Democracy and E-Rulemaking: Comparing Traditional vs. Electronic Comment from a Discursive Democratic Framework C-7* (unpublished manuscript, Jan. 27, 2003); Stuart W. Shulman, *An Experiment in Digital Government at the United States National Organics Program*, 20 AGRIC. & HUM. VALUES 253, 255 (2003).

40. Cuéllar, *supra* note 37, at 449, 457.

41. *Id.* at 443. The lack of sophistication to citizen comments is relevant because, based on standard principles of administrative law, comments are supposed to provide the agency with information relevant to making rational policy decisions, not serve as a measure of public opinion. In contrast with legislators, agency officials are neither supposed to nor generally do use comments to count preferences. Professor Cuéllar's observations about the sophistication of the comments in the rules he studied are based on an index of ordinal rankings of each comment on five qualities, such as the extent to which the comment addressed the underlying statute or the extent to which it contained well-developed background information. *Id.*

42. E-mail from Mariano-Florentino Cuéllar, Associate Professor of Law and Deane F. Johnson Faculty Scholar, Stanford Law School, to Cary Coglianese, Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, (Nov. 11, 2005 07:17 EST) (on file with author).

the comments submitted on one rulemaking and about 80 percent on another came in electronically.⁴³

Other recent rulemakings have reportedly generated large numbers of citizen comments. Over the past few years, revisions to the Federal Communications Commission's (FCC) rules on the concentration of media ownership,⁴⁴ an EPA rulemaking on mercury emissions,⁴⁵ and the U.S. Forest Service's rulemaking imposing bans on road construction in wilderness areas⁴⁶ have each drawn hundreds of thousands of comments, most of them submitted electronically. If rules like these, that garner tens or even hundreds of thousands of comments, have become more than just a rare event, then perhaps this is because of e-mail communication and other e-rulemaking efforts such as the creation of Regulations.gov.

The evidence so far suggests that Regulations.gov has not had any substantial impact on public participation in rulemaking. In September 2003, the Government Accountability Office (GAO) reported that, at most, a couple hundred comments came in through Regulations.gov during its first five months of operation.⁴⁷ According to the GAO report, only about eight of the 300,000 total comments submitted to the EPA during this same period, and twenty-one of the 18,000 total comments submitted to the Department of Transportation (DOT), came in through the Regulations.gov portal.⁴⁸ By October 2004, however, an EPA official reported that Regulations.gov had channeled 9,800 comments to various federal

43. See *id.* (noting that 98 percent of the comments on the FEC rule and 80 percent on the Treasury rule were submitted electronically). Professor Cuéllar notes that the percentage of comments submitted electronically to the NRC was "somewhat lower." *Id.*

44. John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969, 979-80 (2006); JoAnne Holman, *Strength in Numbers? Public Participation in the Media Ownership Proceeding at the Federal Communication Commission 3* (Aug. 31, 2005) (unpublished manuscript), available at <http://web.si.umich.edu/tprc/papers/2005/426/TPRC%206049.pdf>.

45. David Schlosberg et al., 'To Submit a Form or Not to Submit a Form, That Is the (Real) Question': Deliberation and Mass Participation in U.S. Regulatory Rulemaking 11 (May 5, 2005) (unpublished paper, on file with the *Duke Law Journal*).

46. Stuart W. Shulman et al., *Electronic Rulemaking: A Public Participation Research Agenda for the Social Sciences*, 21 SOC. SCI. COMP. REV. 1, 2-3 (2003); Seth Borenstein, *Bush Officials Lift Development Ban on Millions of Acres*, PHILA. INQUIRER, May 6, 2005, at A15.

47. U.S. GENERAL ACCOUNTING OFFICE, ELECTRONIC RULEMAKING: EFFORTS TO FACILITATE PUBLIC PARTICIPATION CAN BE IMPROVED 23 (Sept. 17, 2003), available at <http://www.gao.gov/new.items/d03901.pdf>. The name of the U.S. General Accounting Office was changed in 2004 to the U.S. Government Accountability Office.

48. *Id.* at 23-24; Herz, *supra* note 10, at 147.

regulatory agencies.⁴⁹ Although 9,800 comments is clearly a more substantial response, it is not immediately obvious how to interpret this number. Considering that the federal government proposed about 4,900 rules during this same period,⁵⁰ total comments submitted through Regulations.gov amounted to an average of only about two comments per rule. Moreover, it is indiscernible how many of the comments submitted through Regulations.gov would have reached agencies through other channels anyway. On the other hand, it is also possible that Regulations.gov led more users to find out about rules open for comment and then to e-mail comments directly to the agencies, rather than submitting comments through Regulations.gov's Web interface.⁵¹ More study is needed to determine Regulations.gov's impact over the long term; however, the early returns suggest that this impact has not been anything dramatic.

Even if Regulations.gov has not increased the level of citizen comments, has the simple ability of citizens to use e-mail contributed to an increase in public participation in rulemaking? According to one report, comments filed on DOT rulemakings "soared when electronic submission became routine."⁵² In 1998, the first full year the DOT placed its regulatory dockets on the Internet, the department reportedly promulgated 137 rules that garnered a total of 4,341 comments.⁵³ Two years later, in 2000, the DOT reportedly

49. Rick Otis, Federal eRulemaking Initiative, Presentation at the Meeting of the American Bar Association Section of Administrative Law & Regulatory Practice 13 (Oct. 21, 2004), available at http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/Otis_cRule_ABA_v3_final_10_21_04.pdf.

50. A search in Westlaw's database for the *Federal Register* yielded a result of 4,945 proposed rules published between January 1, 2003 and September 30, 2004.

51. Based on a recent study I conducted, it does appear that Regulations.gov makes it somewhat easier for users to find materials on proposed regulations available on regulatory agencies' Web sites. Cary Coglianese, How Accessible are Online Regulatory Dockets?, Presentation to the American Bar Association Section on Administrative Law & Regulatory Practice 10-11, 13 (Oct. 21, 2004), available at http://www.ksg.harvard.edu/cbg/rpp/erulemaking/papers_reports/Coglianese%20ABA%20Presentation.pdf. Whether any increased accessibility provided by Regulations.gov also leads to an increase in the number of comments submitted directly to agencies has not been examined.

52. Cindy Skrzycki, *U.S. Opens Online Portal to Rulemaking: Web Site Invites Wider Participation in the Regulatory Process*, WASH. POST, Jan. 23, 2003, at E1.

53. Christine S. Meers, Department of Transportation's Docket Management System, <http://www.dig.gov.org/library/library/dgo2001/DGOMAC/MEDIA/MEERS.pdf> (last visited Mar. 4, 2006).

received 62,944 comments across 99 rules.⁵⁴ On average, this is nearly a twentyfold increase in the number of comments per rule.

Despite this dramatic increase, one needs to know more to conclude that information technology *caused* this increase. Rulemakings were not randomly assigned to an “e-mail group” and a “non-e-mail group,” so it is possible that DOT’s rulemakings in 2000 were simply more controversial or otherwise more “comment-prone” than the rules it promulgated in 1998.⁵⁵ After all, regardless of the availability of e-mail, rules that are highly salient or that affect an easily activated professional group will be more likely to generate a larger quantity of public comments. Of course, such rules also tend to be relatively rare, and for some agencies they might not even be issued every year. This means that the existence of even one or two of these outlier rulemakings in a single year could easily account for a dramatic increase in total or average participation compared with any other specific year.⁵⁶

Several recent studies confirm that most proposed rules still continue to generate relatively few comments, even after the introduction of e-mail submissions. Government analysts Ioana Munteanu and J. Woody Stanley recently studied comments filed in seventeen randomly selected DOT rulemakings, finding that 83 percent of the total comments came from just a single proceeding, a rule that affected the mandatory retirement age for commercial airline pilots.⁵⁷ Munteanu and Stanley find that “most DOT rulemaking dockets established after [the introduction of DOT’s online system in] 1998 continued to receive only a few submissions during the notice-and-comment period.”⁵⁸ Professor John de Figueiredo, in a study published in this symposium issue, analyzes comments and other filings in FCC proceedings since 1992 and finds that “in 99 percent of dockets, the e-filing option does not seem to

54. *Id.*; see also Skrzycki, *supra* note 52, at E1 (“In 1997, the [DOT] got 3,102 public comments on 155 rules; in 2000, there were 62,944 public comments on 119 rules.”).

55. For background on research designs that permit valid causal inferences, see Coglianese, *supra* note 5, at 1116–18. In addition to controlling for the degree of controversy or significance of rules, one would want to control for any differences in the length of the comment period, for presumably rules with longer comment periods will garner more comments.

56. When a small number of extreme outliers exist in a sample, the median is usually the better measure of central tendency than the mean or average, as averages can vary markedly, especially if there is an extreme outlier. See Coglianese, *Assessing Advocacy*, *supra* note 4, at 413 (discussing the properties of averages and their sensitivity to outlying data).

57. Munteanu & Stanley, *supra* note 39, at 14.

58. *Id.* at 20.

cause an increase in individual or interest group participation.”⁵⁹ That said, the FCC’s rulemaking on the concentration in ownership of media outlets did receive a dramatic spike in comments amounting to “over twenty times the average number of . . . comments the FCC had ever received in any single month.”⁶⁰

In an especially informative study, political scientists Steven Balla and Benjamin Daniels have conducted research specifically designed to test whether e-rulemaking has caused an increase in public comments.⁶¹ Their sample consists of over four hundred and fifty DOT rules, roughly half issued between 1995 and 1997 (before the introduction of the DOT’s online rulemaking system). The other half consists of rules promulgated afterwards, between 2001 and 2003. By explicitly comparing comments before and after the establishment of DOT’s online system, Balla and Daniels’ analysis better overcomes the vagaries of small samples and the comparison of just two single years. They find, perhaps surprisingly, that the levels and patterns of commenting were basically the same across both sets of rules.⁶² The median rulemaking in the 2001–03 period had almost the same number of comments as the median rulemaking during 1995–97 (thirteen versus twelve, respectively).⁶³ The averages were different (628 during 2001–03 versus 162 during 1995–97), but only because of two outlier rulemakings in the 2001–03 period.⁶⁴ These outliers, as

59. de Figueiredo, *supra* note 44, at 987.

60. *Id.* at 980.

61. Steven J. Balla & Benjamin Daniels, Information Technology and Public Commenting on Agency Regulations 12 (Mar. 14, 2006) (unpublished paper, on file with the *Duke Law Journal*).

62. *Id.* at 11. Balla and Daniels relied principally on the *Federal Register* preambles for data on the number of comments filed. *Id.* at 7.

63. *Id.* at 10.

64. *Id.* at 17 (table 2). The two outlier rules each garnered more than 50,000 comments, whereas the largest number of comments in any single rulemaking in the earlier period was only about 14,000. *Id.* at 10–11. Without these two outlier rules in the sample, the average number of comments within the later time period would drop from 628 to 64, well below the 162 average for the pre-electronic period. E-mail from Steven J. Balla, Associate Professor of Political Science, Public Policy and Public Administration, and International Affairs, George Washington University, to Cary Coglianese, Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, (May 4, 2006 16:13 EST) (on file with author). Even dropping the two rules having the most comments in the earlier period—one with about 14,000 comments, the other with about 5,000—the average number of comments in the earlier period (about 85) is still greater than the average in the later period sans outliers. *Id.*

Balla and Daniels correctly note, “characterize rulemaking as it is practiced only on the rarest of occasions.”⁶⁵

Balla and Daniels did not analyze the number of comments filed by individual citizens. However, the results of two other studies shed some light on citizen participation after agencies allowed e-mail submissions. In a study of nine of the most active DOT rulemakings in late 1999 and early 2000, researcher Thomas Beierle reports that in seven of these rules very few individuals filed comments.⁶⁶ Almost all the comments in these seven rulemakings came from “the ‘usual suspects’ of law firms, industry, trade associations, and consulting firms.”⁶⁷ Munteanu and Stanley report that the rules in their study that garnered the largest citizen input were, as would be expected, those that received the highest amount of overall comments.⁶⁸ Given that such highly salient rules tend to be rare, rules that garner a high level of citizen input presumably also remain rare.

At present, then, neither agencies’ acceptance of comments by e-mail nor the development of the Regulations.gov portal have led to any dramatic changes in the general level or quality of public participation in the rulemaking process. Most rules still garner relatively few overall comments and even fewer comments from individual citizens. As in the past, the occasional rulemaking does continue to attract a large number of citizen comments, but most of these comments remain quite unsophisticated, if not duplicative.⁶⁹

65. Steven J. Balla & Benjamin Daniels, Information Technology and Public Commenting on Agency Regulations 12 (Apr. 7, 2005) (unpublished paper presented at the Midwest Political Science Association, on file with the *Duke Law Journal*). Even for these two outliers, the overwhelming majority of the comments appear to have been submitted by means other than e-mail. Balla & Daniels, *supra* note 61, at 13.

66. Thomas C. Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation* 10 (Resources for the Future, Discussion Paper No. 03-22, 2003) [hereinafter *Discussing the Rules*], available at <http://www.rff.org/Documents/RFF-DP-03-22.pdf>. Beierle examined just the rules with the most comments filed. E-mail from Thomas C. Beierle, Fellow, Resources for the Future, to Cary Coglianese, Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University (Nov. 25, 2005 16:17 EST) (on file with the *Duke Law Journal*).

67. Beierle, *Discussing the Rules*, *supra* note 66, at 11.

68. See Munteanu & Stanley, *supra* note 39, at 26 (“[I]ndividuals were also the predominant type of commenter to most of the dockets with high public response.”).

69. See Cuéllar, *supra* note 37, at 443, 449, 457 (commenting on the lack of sophistication exhibited by most comments filed by individuals); J. Woody Stanley & Christopher Weare, *The Effects of Internet Use on Political Participation: Evidence from an Agency Online Discussion*

According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of these comments reportedly had anything original to say.⁷⁰

III. FUTURE

Maybe more revolutionary change will come in the future. In the wake of early reports about the low number of comment submissions through Regulations.gov, the director of the Bush administration's eRulemaking Initiative drew an analogy to online tax filings. He predicted that citizen use of Regulations.gov will increase over time, noting that the Internal Revenue Service (IRS) had remarkably few users of its online filing system in its first several years of operation,⁷¹ even though the system now brings in 65 percent of all tax filings each year.⁷²

Perhaps use of Regulations.gov will increase with time, but the analogy to online tax filings is clearly inapt. Citizens already were filing taxes before the introduction of the IRS's online system, and they continue to have a strong reason to do so (given that filing is mandatory). The IRS's e-filing system simply makes it easier for tax filers to do something they would otherwise do. In addition, many people rely on tax preparers to assist them with their taxes, so the shift to online filing reflects, in part, the choices of these professionals rather than a complete groundswell from citizens themselves. None of these considerations apply to Regulations.gov, which only promises to

Forum, 36 ADMIN. & SOC. 503, 517 (2004) (noting that "the large number of comments [in some rulemakings] is deceptive" because most submissions are form letters).

70. See Schlosberg et al., *supra* note 45, at 11, 35 n.35 (noting that the EPA's major regulation aimed at addressing mercury levels in the air received only about 4,500 original comments out of over 490,000 submitted); see also U.S. Env'tl. Prot. Agency, Controlling Power Plant Emissions: Public Comments, http://www.epa.gov/mercury/control_emissions/comment.htm (last visited Jan. 20, 2006) (reporting that "[t]here were approximately 4,500 unique comments submitted" on the mercury rulemaking).

71. Gail Repsher Emery, *Government Defends E-Rulemaking*, WASH. TECH., Mar. 22, 2004, at 16 (quoting Oscar Morales, Director of the eRulemaking Initiative, as observing that "[n]ot many folks participated in the first couple of years [of online tax filing], so I'm not really surprised to see our numbers are low. Use will increase over time.>").

72. See Press Release, Internal Revenue Serv., E-File 7 Percent Ahead of Last Year, IR-2005-42 (Apr. 7, 2005), available at <http://www.irs.gov/newsroom/article/0,,id=137689,00.html> (reporting that at least fifty-two million filings were submitted online in 2005 and that "[o]verall, 65 percent of all returns were e-filed—up from 60 percent for the same period last year"); Press Release, Internal Revenue Serv., E-Filing Continues Surge with 10 Percent Jump, IR-2004-32 (Mar. 10, 2004), available at <http://www.irs.gov/newsroom/article/0,,id=121067,00.html> (reporting that at least 37 million filings were submitted online in 2004).

help those citizens who take it upon themselves to express their opinion on a proposed regulation. No one should expect Regulations.gov's usage to increase at anything near the rate of usage for the IRS's system.

Of course, even if Regulations.gov fails to generate a dramatic change in public participation, it is possible that the government will begin using altogether new online tools.⁷³ For example, some scholars have urged agencies to establish interactive, online regulatory dialogues that would involve the public through chat rooms or discussion boards.⁷⁴ Existing software already allows citizens to interact online with each other and with government officials, as well as to focus their comments on topics defined by the agencies or the users.⁷⁵ Professor Peter Shane has suggested that agencies should establish a series of "deliberative groups around the country with access to software for conducting online deliberations" and then invite these groups, among other things, "to develop deliberative recommendations concerning issues on the agency's agenda."⁷⁶ Although Shane indicates that agencies are unlikely to implement his suggestions fully,⁷⁷ in fact a few agencies have taken steps to use online dialogues, at least in limited circumstances.⁷⁸ Their experience

73. See Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 899–901 (2006) (discussing the applicability of online collaboration and peer rating tools, such as those found at Wikipedia.org and Amazon.com, to e-rulemaking).

74. See, e.g., Cuéllar, *supra* note 37, at 491–92 (contemplating that agencies would use "sophisticated online surveys" to help them get a sense of public opinion); Lobel, *supra* note 7, at 440 ("[D]igital technology can further be used to create deliberative forums. Government agencies could create panels of citizens, like traditional juries, that would advise about rulemaking."); Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 I/S 1, 20–21 (2005), available at <http://www.is-journal.org/V01I01/I-S,%20V01-I01-P001,%20Noveck.pdf> ("[M]oving rulemaking into cyberspace presents an opportunity to experiment with . . . new methods of dialogue and decision-making . . . that may now be practicable with information technology."); see also Coglianese, *supra* note 6, at 370 (reporting innovative ideas that arose at a scholarly workshop, including proposals for digital deliberations and online hearings); A. Michael Froomkin, *Technologies for Democracy*, in DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET, *supra* note 19, at 3, 9 (discussing alternative technologies for facilitating citizen participation in policymaking).

75. See Noveck, *Electronic Revolution*, *supra* note 16, at 502–04 (describing the usefulness of Unchat, H2O Rotisserie, and software developed by AmericaSpeaks, as well as urging the development of other software that could potentially be used for deliberation over rulemaking).

76. Shane, *supra* note 15, at 159. For a similar, non-electronic proposal for deliberation over rulemaking, see David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81 (2005).

77. Shane, *supra* note 15, at 159–60.

78. See *infra* notes 79–97 and accompanying text.

offers a glimpse of what the future might hold if agencies go further down the path urged by proponents of online dialogues.

In 2001, the EPA established a ten-day national online public dialogue on potential revisions to its longstanding internal policy document on public involvement in rulemaking, permitting, and other regulatory processes.⁷⁹ To help EPA officials determine what kind of revisions to make, the agency used the Internet to try to engage the public in the revision process. For each day of the dialogue session, the EPA posted a new thread on the dialogue Web site and assigned several participants to serve as discussion leaders.⁸⁰ In a review of the dialogue, researcher Thomas Beierle declared it to be a “highly successful” experiment.⁸¹

Although the EPA’s experiment showed that a regulatory agency could set up and use an online dialogue system to generate discussion among people from around the country, it is harder to say whether the dialogue session resulted in much, if any, improvement to the normal comment process. The level of participation was rather modest, certainly relative to the number of people affected by the EPA’s policies. About 1,200 people signed up to get access to the dialogue, 39 percent of whom turned out to be government officials.⁸² Of those who signed up, 320 participated by posting at least one message.⁸³ Over the ten-day period, participants contributed a total of about 1,200 messages to the site—although a third of these messages

79. One may visit the dialogue’s Web site at <http://www.network-democracy.org/epa-pip/welcome.shtml>.

80. THOMAS C. BEIERLE, *DEMOCRACY ON-LINE: AN EVALUATION OF THE NATIONAL DIALOGUE ON PUBLIC INVOLVEMENT IN EPA DECISIONS 17* (2002), available at <http://www.rff.org/rff/Documents/RI1-RPT-demonline.pdf> [hereinafter *EVALUATION OF THE NATIONAL DIALOGUE*]; see also Thomas C. Beierle, *Digital Deliberation: Engaging the Public Through Online Policy Dialogues*, in *DEMOCRACY ONLINE*, *supra* note 19, at 155, 162 (discussing the quality of the dialogue).

81. BEIERLE, *EVALUATION OF THE NATIONAL DIALOGUE*, *supra* note 80, at 11. Beierle did temper his assessment somewhat, noting that “[t]o say that the Dialogue was a success is not to say that there is no room for improvement.” *Id.* at 51.

82. *Id.* at 21. This is not to suggest that there is anything wrong with government officials participating in such a dialogue, but rather simply to note that not all participants were truly from the “public.” Even fewer were individual citizens. Among the nongovernmental participants, a significant portion came from industry and educational institutions. Out of the 320 active participants, “[r]oughly 18% were affiliated with an environmental or community group or identified themselves as individual citizens.” *Id.*

83. Overall, about sixty percent of the 320 participants contributed only one or two messages during the entire dialogue, “many of which were introductions posted during the first two days.” *Id.* at 28. About half of all the comments were contributed by slightly more than 10 percent of the participants. *Id.* at 26.

came from those who had been specifically recruited to keep the dialogue going.⁸⁴ Only about eighty messages a day came from users participating on their own initiative, relatively few of whom were ordinary citizens.⁸⁵

A year before the EPA ran its online dialogue, the DOT's Federal Motor Carrier Safety Administration (FMCSA) created an interactive discussion about the development of an agency strategic plan. From August 2000 through May 2001, the FMCSA allowed members of the public to submit comments via both a Web-based discussion forum and its traditional, official docket.⁸⁶ Neither venue garnered an enormous number of comments, but the discussion forum did see greater use: 451 messages appeared in the forum, compared with 102 comments submitted to the docket.⁸⁷ Of course, participants in the online forum tended to submit more than just a single message. The 116 identifiable participants in the discussion forum contributed 339 messages (the remaining messages were submitted anonymously), compared with 100 individuals and organizations submitting 102 comments to the docket.⁸⁸ There were virtually no overlaps in the participants between the two venues,⁸⁹ so by establishing the discussion forum the FMCSA plausibly increased the level of public involvement in its planning process. One cannot be

84. *Id.* at 23–29.

85. Although it is difficult to know how to gauge this level of participation, eighty messages a day for ten days hardly seems like a lot. In one recent year, Congress received an estimated ninety-four million e-mail messages. *Communicating with Capitol Hill: How Technology Is Changing Information Processes in Congressional Offices*, INSIDER'S BULL. (Cong. Mgmt. Found., Wash., D.C.), Nov. 2003, at 1, available at <http://capitoladvantage.com/capwiz/pdf/InsidersBulletin1.pdf>. Closer to home, the EPA received an average of about two thousand formal comments a day on proposed regulations in the first five months of 2003. See U.S. GENERAL ACCOUNTING OFFICE, *supra* note 47, at 23–24 (identifying the “more than 300,000 comments received through the agency’s own e-rulemaking Web site and traditional methods”). On the other hand, as Tom Beierle has noted, eighty comments a day for ten days could be more than might be received at a typical public meeting. E-mail from Tom Beierle, Ross & Associates Environmental Consulting, Ltd., to Cary Coglianese, Associate Professor of Public Policy and Chair of the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, (Mar. 17, 2006 11:26 EST) (on file with author).

86. Stanley & Weare, *supra* note 69, at 511. The Web site containing the discussion forum also included a link for submitting an online comment to the docket. *Id.* at 510.

87. *Id.* at 511.

88. *Id.*

89. *Id.* at 513. Stanley and Weare reported that only six individuals both participated in the discussion forum and submitted comments in the docket, and in five of these cases “the participant simply posted the same comments submitted in the docket to the Web site discussion.” *Id.*

confident, though, how large any such increase might have been. Because the same FMCSA Web site contained links both to the discussion forum and the online docket submission form, participants could simply select one versus the other. Had the FMCSA provided only the docket option, it seems likely that at least some visitors who selected the forum would have submitted a comment to the docket instead.⁹⁰

The types of participants who selected the FMCSA's discussion forum did vary from those who selected the docket. Traditional docket comments tended to be filed by the usual suspects, such as government officials (37 percent), trade associations (27 percent), and businesses (14 percent).⁹¹ In contrast, the bulk of the comments in the Web discussion forum came from either commercial truck drivers (20 percent) or other individuals (including anonymous posters) (57 percent).⁹² In addition, most of the docket participants tended to be repeat players with the agency (85 percent), whereas very few participants in the discussion forum could be considered as such (4 percent).⁹³ Along with these differences in participants came differences in the types of issues they raised in the two venues.⁹⁴ For example, issues of regulatory enforcement arose more frequently in the discussion forum, but the docket comments gave more attention to issues related to safety research and analysis.⁹⁵

90. Stanley, Weare, and Musso claim that "[m]any of these individuals would not ordinarily participate in FMCSA-sponsored policy-making discussions." J. Woody Stanley et al., *Participation, Deliberative Democracy, and the Internet: Lessons from a National Forum on Commercial Vehicle Safety*, in *DEMOCRACY ONLINE: THE PROSPECTS FOR POLITICAL RENEWAL THROUGH THE INTERNET*, *supra* note 19, at 167, 176. Although this seems true enough if the comparison is to FMCSA rulemakings in general, it is not clear whether it applies in these specific proceedings, because the link to submit comments was located on the same Web page as the link to the online discussion. Even if the discussion forum had not been available, presumably some number of drivers motivated enough to find that Web page would have clicked the box to send in a comment, however terse it might have been.

91. Stanley & Weare, *supra* note 69, at 512.

92. *Id.*

93. *Id.* at 513-14. The dominant participation in the docket by repeat players, and presumably by better-financed industry groups, could have been due to the fact that they were more familiar with the normal comment process. It may also have been that these players understood that "the Web-based discussion did not have the same legal authority as submissions to the official docket." *Id.* at 511.

94. *Id.* at 514-15. Of course, that there were differences does not mean that the existence of the discussion board caused them. It is not possible to be sure that these issues would not have been otherwise raised in the docket, had that been the only participation option available.

95. *Id.* at 514.

If these results at the FMCSA provide any indication of what might lie ahead, the adoption of new tools might well generate participation from a small number of citizens who would otherwise not participate in the normal commenting process, and by extension might bring somewhat different issues or insights to the attention of agency officials.⁹⁶ Even if online discussion forums are used more frequently, however, it does not seem likely that they will bring about a major transformation in citizen participation in rulemaking. The scale of public involvement in these digital dialogues has been quite modest, and the quality or sophistication of the contributions made by most citizen participants is also unlikely to increase a great deal, even with more widespread application of these new tools.⁹⁷

CONCLUSION

Even after introducing various forms of e-rulemaking, regulatory agencies continue to garner only the most modest, if not trivial, level of involvement by ordinary citizens.⁹⁸ Information technology may lower the cost of finding out about proposed rules and communicating with regulatory officials, but the reduction of these barriers alone is insufficient to induce a substantial fraction of the citizenry to contribute substantive comments on agencies' proposed rules. Even with more sustained efforts to create user-friendly tools or new efforts to use the Internet to educate citizens about regulation, there will remain substantial motivational, cognitive, and informational barriers to citizen participation, making continuity

96. See *supra* notes 91–95 and accompanying text; see also Cuéllar, *supra* note 37, at 472–73 (arguing that citizen participants can tend to emphasize subtly different issues than policy insiders).

97. For discussion of the lack of quality of citizen comments, see STUART W. SHULMAN, *THE INTERNET STILL MIGHT (BUT PROBABLY WON'T) CHANGE EVERYTHING: STAKEHOLDER VIEWS ON THE FUTURE OF ELECTRONIC RULEMAKING* 32–33 (2004), available at http://erulemaking.ucsur.pitt.edu/doc/reports/e-rulemaking_final.pdf. Some have questioned whether greater participation produces better information. See, e.g., SUNSTEIN, *supra* note 19, at 99–102; Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 224–28 (1997).

98. See Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, 1 I/S 33, 52–54 (2005), available at <http://www.is-journal.org/V01I01/I-S,%20V01-I01-P033,%20Coglianese.pdf> (“[E]ven after both Regulations.gov and the new government-wide docketing system are fully on-line, the core obstacles that keep citizens from participating in rulemaking will still remain.”).

rather than change the expected result, at least for most rulemakings.⁹⁹

The chief barriers to citizen participation in rulemakings are not technological ones.¹⁰⁰ Participating in a rulemaking requires, at a minimum, understanding that regulatory agencies make important decisions affecting citizens' interests, as well as knowing about specific agencies and the new rules they propose. Yet regulatory agencies receive little attention in civics education at nearly every level, and the media generally neglect regulatory policymaking.¹⁰¹ As a result, the average citizen, who already shows declining involvement in politics,¹⁰² simply does not know a great deal about regulatory agencies or the policy issues underlying specific rulemakings. Indeed, it is almost a given that most citizens will not possess a good understanding of regulatory policy issues. If Congress delegates rulemaking authority at least partly because certain issues are so complex or technical that they require agency expertise, then the policy issues in rulemakings will tend systematically to be ones that are harder, rather than easier, for citizens to understand.

Even locating regulatory information on the Internet requires a degree of sophistication. In the fall of 2004, about two dozen students at Harvard's Kennedy School of Government participated in a study to see how easy it would be for reasonably knowledgeable citizens to find information about rules proposed by federal agencies.¹⁰³ I gave

99. Continuity may not be such a bad thing. As history demonstrates, revolutions do not always turn out for the best. With respect to rulemaking, a real revolution in public participation might have only generated new problems for the regulatory process. *Id.* at 55–57 (discussing potential drawbacks to increased public participation in the regulatory process).

100. *Engaging Citizens Online for Better Policy-Making*, OECD POLICY BRIEF (Org. for Econ. Co-operation & Dev., Wash., D.C.), Mar. 2003, at 1, available at <http://europa.eu.int/idabc/servlets/Doc?id=23278> (“The barriers to greater online citizen engagement in policymaking are cultural, organisational and constitutional not technological.”); see also JANE E. FOUNTAIN, *BUILDING THE VIRTUAL STATE: INFORMATION TECHNOLOGY AND INSTITUTIONAL CHANGE 196–98* (2001) (arguing that the major barriers to e-government arise from organizational and political factors, not technological limitations).

101. See *supra* note 21 and accompanying text.

102. See Coglianese, *supra* note 98, at 52 (“Engagement in elections . . . has declined since 1960. In 2000, only slightly more than half of the voting age public cast ballots in the presidential election.”) (footnotes omitted). See generally THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* (2002) (examining causes of declining electoral participation).

103. For further discussion of this study, see Cary Coglianese, *Weak Democracy, Strong Information: The Role for Information Technology in the Rulemaking Process*, in *FROM ELECTRONIC GOVERNMENT TO INFORMATION GOVERNMENT: GOVERNING IN THE 21ST*

these students information about four rules proposed by the DOT and the EPA and asked them to find a specific numbered document in the docket for each rulemaking, thereby simulating the challenge a typical user might face who wanted to find out more about a proposed rule.¹⁰⁴ Surprisingly, even these graduate students, who were interested in regulation and adept at using the Internet, had a difficult time locating the right dockets within the time allotted.¹⁰⁵ On average, the Kennedy School students could find only half of the dockets they were instructed to locate.¹⁰⁶

Motivational barriers are also intertwined with knowledge-based barriers. If relatively few citizens know about rulemakings or know how the policy issues addressed in these proceedings can affect their lives, this will constrain their motivation to get involved in the rulemaking process. But even when citizens do know about an upcoming rulemaking and how it might affect their interests, choosing to participate requires that they overcome the well-known problem of collective action.¹⁰⁷ The Internet notwithstanding, it will remain costly for a citizen to take the time to learn about a rulemaking proceeding and submit a comment, at least one with any meaningful substance. The costs of participation should not be thought of in absolute terms, but rather as opportunity costs. Even though the Internet can decrease the cost of submitting a comment to a regulatory agency, it also dramatically decreases the costs of communicating with friends, tracking sports results, keeping up with celebrity gossip, or playing video games. For most people, the entertainment, business, and recreational opportunities made possible by the Internet will be more appealing than the opportunity to send in a comment on a proposed federal regulation. Moreover, even citizens concerned about regulatory policy could reasonably decide not to participate because their one comment would be unlikely to make much of a difference—

CENTURY (Viktor Mayer-Schoenberger & David Lazer eds., forthcoming) (manuscript at 22, on file with the *Duke Law Journal*).

104. *Id.*

105. *Id.*

106. *Id.*

107. See *supra* note 31 and accompanying text. Political scientist James Q. Wilson argues that the problem of collective action shapes the political environment of regulatory agencies, and that the distribution of the costs and benefits of regulatory policies explains patterns of public involvement in the regulatory process. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1982). If these motivational factors are what matter most, then the political patterns Wilson calls attention to will likely persist, even in the wake of e-rulemaking.

and in many cases, they can simply free ride on the comments submitted by organized interest groups.¹⁰⁸

It is hard to imagine how information technology could ever overcome the deep motivational, cognitive, and knowledge-based chasms that stand in the way of citizen participation in the regulatory process. The results to date from various applications of e-rulemaking suggest that these non-technological barriers are real and that probably the most that can be expected from e-rulemaking in the future will be incremental changes to the levels and quality of public participation in rulemaking.¹⁰⁹

One of these incremental changes could be marginally increased participation among groups or individuals who are already highly motivated and reasonably sophisticated. Participation by members of professional groups affected by proposed rules may increase, such as with pilots or flight attendants participating in FAA proceedings.¹¹⁰ A

108. The extant political science literature suggests that comments do not generally lead agencies to make changes in their proposed rules, which supports an assumption that a single citizen's comment is not likely to make much of a difference. Golden, *supra* note 24, at 262; West, *supra* note 26, at 71; *see* Nixon et al., *supra* note 39 at 64 n.3 (observing that, for SEC Release 33-7513, the rules never cite an individual's comments, although 88 percent of comment letters were sent by individuals). If it is true that most of the influence occurs at the proposal stage, as many interest group representatives seem to believe, then the entire effort to use information technology to provide public input on proposed rules may be more symbolic than real. *See* CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 79-80 (3d ed. 2003) (describing how the important action in rulemaking generally takes place before a rule is proposed); Scott R. Furlong, *Interest Group Influence on Rulemaking*, 29 *ADMIN. & SOC.* 325, 335 (1997) (reporting results from an interest group survey showing that informal contacts prior to rule proposal are viewed as one of the most effective means of influencing agencies).

109. Similar conclusions find support in the more general literature on information technology and political participation. *See, e.g.*, Bruce Bimber, *Information and Political Engagement in America: The Search for Effects of Information Technology at the Individual Level*, 54 *POL. RES. Q.* 53 (2001) (failing to find that the Internet contributed to any widespread increase in political engagement); Alice Robbin et al., *ICT's and Political Life*, 38 *ANN. REV. INFO. SCI. & TECH.* 410, 461-64 (2002) (failing to find support for more than "small and incremental" changes in political participation based on a review of empirical studies of the effects of information communication technology); Dietram A. Scheufele & Matthew C. Nisbet, *Being a Citizen Online: New Opportunities and Dead Ends*, 7 *PRESS/POL.* 55, 69 (2002) (finding "that—at this stage of its development—the role of the Internet in promoting active and informed citizenship is minimal"). *But see* Lori M. Weber et al., *Who Participates and Why? An Analysis of Citizens on the Internet and the Mass Public*, 21 *SOC. SCI. COMP. REV.* 26, 38 (2003) (reporting survey findings that suggest "there may be something about Internet participation that mobilizes citizens into political life," but noting that "it may also be possible that those engaged in politics are more likely to use the Internet").

110. The large number of commercial drivers who submitted electronic comments to the FMCSA is another example. *See* Stanley & Weare, *supra* note 69, at 512, 517 (showing tables of

second incremental change may be an amplification of the comment “bounce” long observed with an especially salient or controversial rulemaking. Instead of seeing occasional rules receive hundreds or thousands of comments as in the past, exceptionally salient rules may more consistently receive tens of thousands or hundreds of thousands of comments.¹¹¹ The rare, outlier rule will likely lie somewhere farther out on the extreme.

For all other agency rules, it appears the future will be little different from the past and present. Rather than a revolution in citizen participation, the end result from even ambitious attempts at e-rulemaking seems likely to turn out much less interesting than the high hopes many now seem to harbor.¹¹² As we enter what many have called the information age, decisionmakers should take empirical research information—not just hopeful thinking—into consideration. A more evidence-based assessment of e-rulemaking’s prospects can help policy makers and designers of administrative procedures make better, more realistic decisions about whether and how to use information technology in the regulatory process, or whether and how to change rulemaking procedures in light of new technologies.

the percentage and numbers of comments submitted by different groups, including commercial drivers). From the standpoint of egalitarianism, perhaps scholars and policymakers should be concerned if individual professionals—rather than a representative cross section of all individual citizens—start to make up most of the participants in certain rulemakings. At least such a possible outcome raises concerns similar to those animating discussion about the so-called digital divide, or the disparities that exist across different socioeconomic groups in their access to the Internet.

111. This prediction seems to be borne out to some degree by the Balla and Daniels results. See *supra* notes 61–65 and accompanying text.

112. See *supra* notes 8–17 and accompanying text; see also Robbin et al., *supra* note 109, at 461 (noting that much of the early literature on information technology and politics has been “normative, prescriptive, aspirational, stereotypical, and hyperbolic”).

**Democracy and E-Rulemaking:
Web-based Technologies, Deliberation, and
Environmental Campaigns ***

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Government agencies are increasingly turning to information technologies to streamline and enhance government-citizen interactions. Regulatory agencies have adopted a range of Internet-based tools (e.g., web forms and emails, online consultations) to facilitate such public participation. At the same time, deliberative democratic theorists have become increasingly interested in institutionalized forms of discourse, including those facilitated by information technology. Within all of this theory and practice, however, there have been very few empirical studies of the claims that the Internet will make public participation more broad and deliberative. We report the results of a survey of 1,556 citizen participants in regulatory public comment processes in the US. Our analysis focuses on the differences in deliberative indicators between those who used newly available electronic tools and those who mailed or faxed letters on paper. We also examine differences between those who submitted an original letter and those who

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submitted a version of a mass-mailed form letter. Overall, the data found modest evidence of the presence of deliberative practices, though it failed to reveal evidence of deliberative differences between electronic and paper commenters. More interestingly, we discovered some fundamental attitudinal differences between citizens who submit original comments and those who submit form letters. Such form letters are a widespread practice advocated by interest groups, yet form submitters are less inclined to deliberative behavior than the writers of original comments, who report personal practices that embody many of the characteristics of deliberative democracy. We discuss the implications of these findings as they relate to the use of information technology in government-citizen interactions more broadly.

Introduction

Public participation and citizen deliberation are hallmarks of democratic theory. Over the past two decades, there has been a renewed and expanded interest in public participation and deliberation as crucial aspects of democratic practice; the role of discussion, reasoning, and engagement across lines of difference has become a central focus of democratic theorists. As Dryzek (2000, 1) notes, “the essence of democracy itself is now widely taken to be deliberation.” Some deliberative democrats make the argument that deliberation already occurs in current liberal democratic governments, legislatures, and/or courts (see, for example, Bessette 1994; Rawls 1996). Most in the field, however, call for expanding public participation and deliberation on policy issues in various ways, from citizen juries, to a national expansion of town hall-style meetings, to transnational discourse in civil society (Barber 1984; Bohman 1996; Dryzek 2000; Habermas 1996; Young 2000).

Given this call for an extension of participatory and deliberative opportunities, a number of democratic theorists and practitioners have moved beyond the theoretical examinations of deliberation, and into questions of the implementation of such democratic engagement and deliberation. One area ripe with potential to increase citizen participation is the use of the Internet (Grossman 1995; Hill and Hughes 1998). Web-based participation,

discourse, and deliberation could range from online consultations with MPs in the UK (Coleman 2004), to online policy dialogues and deliberative polling at the national and international levels (Beierle 2004, Janssen and Kies 2004, Fishkin 2000), to coordinated web-based networking among groups in civil society (Dryzek 2000). Some authors have gone so far as to argue that these types of web-based participation could be the answer to the decline in social capital and the general interest in citizenship (Blumler and Coleman 2001; Coleman and Gotze 2001; numerous essays in Shane 2004). Others, however, see the Internet as a place that limits democratic engagement, by fostering the practice of communicating only with like-minded citizens (Sunstein 2001, 2002). It seems there is agreement on only one thing – the web has potential; whether that potential is for improving or diminishing deliberation is an open question.

As a result of these trends, and the open question of the potential of online democratic engagement, a growing research community is looking closely at electronic rulemaking and the more general possibilities for online political deliberation. A range of scholarly activities – spanning elaborate conceptual specifications for deliberation (Berkman Center 2005), to research centers and interdisciplinary conferences¹, and online deliberative polls²—now dot the intellectual landscape. This new scholarship begins to more systematically articulate and test theories about the role of deliberation (Beierle 2004; Schlosberg & Dryzek 2002; Sunstein 2001), information (Bimber 2000, 2003), communications technology (Coleman and Götze 2001; Froomkin 2003), architecture (Lessig 1999), design (Noveck 2004), as well as a host of other factors linked to theories of democratic governance (Zavestoski & Shulman 2002). The fledgling interdisciplinary research community is generally long on theory, hopes, and predictions, however, while too often short on empirical data (Schlosberg, et al. 2005; Shulman, et al. 2003).

Responding to the interest in online deliberation, and the lack of data in online deliberative studies, we examined just how deliberative one form of institutionalized discourse actually is. Contrary to much research and development in this field, we did not seek to develop new forms of online interaction that optimize deliberative behavior; rather, we set out to evaluate the deliberative nature of one new, and growing, form of electronic citizen

participation in the US—that of participation in online, or electronic, rulemaking. Our goal here is to examine the longstanding, yet unsubstantiated, optimistic claim so often made in the literature on online participation, that the convenience of use, non-hierarchical nature, egalitarian potential, and two-way character of the Internet could lead to richer and deeper communication. Our central aim in this project is to evaluate the move to web-based public participation in rulemaking against various criteria established by theorists of deliberative democracy. The key question is whether or not an online forum produces higher indicators of deliberation than more traditional forums of public input on rulemaking.

E-Rulemaking and Participation in the US

Why study e-rulemaking? There is a growing literature focusing on the importance of public participation in public administration (Bingham, Nabatchi, and O’Leary 2005; Goodsell 2006; Roberts 2004; Thomas and Strieb 2003; Yang 2005), as well as in rulemaking in particular (Furlong 2004; Golden 1998; Langbein and Freeman 2000; Lubbers 2006; Shulman 2005; West 2005). Issues of inclusion, deliberation, trust, and interest group influence are central to these studies. Langbein and Freeman (2000), for example, find that participation in regulatory negotiation generates more learning of the positions of others and higher participant satisfaction as compared to conventional rulemaking. The idea in this literature is that enhanced participation can improve the process of governance; as Goodsell (2006: 627) posits: “can citizen participation help democratize administration? The answer is yes, but only under the right circumstances.” Still, as Kerwin (2003) notes, there is a dearth of empirical studies focused on the public comment process. And only a small subset of the existing literature examines the potential of information technology in expanding or improving public participation.

Scholars who have begun to research the potential of the Internet in citizen-government relations generally, and e-rulemaking in particular (Coglianese 2004; Lubbers 2002; Noveck 2004; Shulman 2003, 2004a, 2004b; Zavestoski, Shulman, and Schlosberg 2006), are fundamentally concerned with the aspects and quality of public participation, as well as its impact on the process and outcomes. As Lubbers (2006: 221) observes, the “main touted

benefits from e-rulemaking, of course, are increased opportunity for information dissemination, public participation, and governmental transparency, along with better outcomes and greater trust in government.” Such claims, however, have very little empirical support. Our focus is specifically on the potential of electronic avenues for comment to expand the experience of deliberation and participation in the traditional rulemaking setting. In addition to contributing to the discussions of the potential of the Internet in expanding democratic deliberation generally, this study’s survey of actual citizen participants in the e-rulemaking process offers an empirical contribution to these discussions of citizen participation in governmental decisions.

Our case begins with the fact that the United States federal government is, by design, facilitating the electronic submission of citizen comments during federal regulatory rulemaking comment periods.³ Rules are available for viewing on the web, and agency docket systems have been designed so citizens can search for topics broadly or rules specifically, and then simply type a comment that goes directly into the rulemaking comment docket. In response, citizens of many stripes are taking advantage of newly developed web-based tools and services for generating large numbers of public comments. The confluence of these two trends—the pull of an increasingly accessible and searchable federal system for collecting public comments and the push of advocacy coalitions and their electronic tools—has altered the rulemaking environment. As Lubbers (2006: 218) notes, the “age of e-rulemaking is upon us.” This type of Internet-enabled participation will likely be the dominant form of mass political communication between average citizens and decision-makers in controversial rulemakings.

E-rulemaking is a unique addition to the participatory and deliberative realm, and so of interest to us for this study for a variety of additional reasons. First, the development of new rulemaking technology has embodied a democratic direction (Carlitz and Gunn, 2002). Many agencies now use open electronic dockets, which allow citizens to see and comment on the rules proposed by agencies, supporting documentation, and the comments of other citizens. Second, electronic rulemaking systems are highly structured, hence quite different from other web-based discourse that is one-way, isolated, or homogenous. Sunstein (2001, 2002) argues that the web enables people to pay attention to other, like-minded

people, and ignore those who are unlike them or disagree with their positions on issues. The web, then, diminishes exposure to heterogeneity and is far from the ideal of a real public forum. Yet the argument here is that the structure of e-rulemaking, in particular the open docket system, may enable and indeed encourage citizens to engage the positions of others, including those with whom they disagree. The open docket architecture of e-rulemaking may mitigate some of the anti-deliberative dangers lurking elsewhere on the web.

Third, rulemaking goes somewhere; simply put, the process frequently leads to actual changes of agency-enforced rules. Here, a focus on rulemaking differs from other examinations of web-based discourse – such as online deliberative polling, cyberjuries, or web-based policy discussions. Rulemaking requires agencies to respond to, and incorporate, substantive public comments. It may be the only form of online deliberation that regularly ends in some form of actual implementation by the state. Finally, the design of the Administrative Procedure Act in the first place was to increase the gathering of substantive information; it is a ripe area of study for deliberative, rather than aggregative democratic practice. Or so we thought.

Overview

In this paper we offer baseline data on indicators of deliberation in e-rulemaking collected through a survey of 1,556 participants in regulatory public comment processes. Our analysis focuses on the differences between those who used newly available electronic tools and those who mailed or faxed letters on paper. We also examine differences between those who submitted an original letter and those who submitted a version of a mass-mailed form letter.⁴ The point of examining the type of submission was to get not only at the *use* of electronic comment, but at the *way* that citizens used this technology. Only with such a thorough examination could we begin to explore the potential for the technology to improve democratic deliberation.

In what follows, we first discuss why we focus on environmental rules, introduce the particular rulemakings from which our sample of survey respondents was drawn, and lay out our approach to measuring deliberative indicators. After describing the

survey methodology, we focus on three findings: 1) the presence of unexpectedly high levels of deliberative engagement across all survey respondents, 2) the absence of a significant difference in self-reported practices between electronic and paper commenters, and 3) the significant differences between respondents who submitted original comments and those who submitted form letters. Finally, we conclude with the implications of our findings for those interested in public participation in rulemaking, citizen deliberation, and the potential of the web for increasing both.

Why Environmental Rulemakings?

The choice to focus the study not just on large comment-receiving regulatory actions, but ones focused on environmental issues, was based on several factors (Zavestoski et al 2006). First, much of the environmental politics literature claims high levels of democratic involvement in environmental policy-making. “One of the most distinctive features of modern U.S. environmental protection policy,” writes Andrews (1999, 240), is the “broad right of access to the regulatory process, which extends not only to affected businesses but to citizens advocating environmental protection.” Paehlke (1989) argues that the environmental arena has led all others in the scope and extent of innovations in public participation, including public inquiries, right-to-know legislation, alternative dispute resolution, advisory committees, and policy dialogues. Bingham, et al. (2005: 552, 554) argue that what they call “new governance practices” such as “deliberative democracy, e-democracy, public conversations, participatory budgeting, citizen juries, study circles, collaborative policy making, and other forms of deliberation and dialogue” “have taken a particularly strong hold ... in environmental policy.” Hence a leading edge of democratic public participation in the US is in the environmental field; this seems to have continued into web-based participation processes.

Second, environmental rules, especially over the last few years, have been highly controversial, attracting large numbers of comments.⁵ In one of the first major instances of online participation in rulemaking—the USDA’s National Organic Standard—regulators received 300,000+ comments in two rounds in the late 1990s (Shulman 2003), of which, over 20,000 came via a web-based form. The EPA’s mercury rulemaking, which we will

discuss, attracted nearly 500,000 public comments. More comments potentially could mean more discourse and increasingly diverse participants. We also sought to ensure a chance for deliberation, which meant restricting ourselves to rules in which the lead agency posted citizen comments to its website so that visitors could see the comments of others. Both the EPA and DOT implemented such “open docket” systems.

One of the central challenges for research in this field is that most cases are exceptional (Golden 1998; Yackee 2005). The business practices of an agency and/or the dimensions of a rulemaking vary widely within and across agencies. Furthermore, the architecture of electronic interfaces used over the last decade are often novel, experimental, or entirely idiosyncratic. We understand the limitations of the case-based approach; however, given the history of public participation in environmental policy, and the recent public interest in environmental rulemakings, we selected three regulatory actions where we predicted deliberation by citizens should be more likely to occur. We look only at those environmentally-driven cases where the architecture of the online notice and comment process permitted commenters to view other comments before writing their own comments, and where the total number of public comments received numbered in the tens or hundreds of thousands. Our survey respondents are therefore consciously and strategically drawn from exceptional rather than ordinary rulemakings.⁶ If the predictions of the more optimistic cyber-deliberationists are to be borne out anywhere, we expected that this would have been more likely around controversial environmental policy issues with open dockets. That we did not find evidence of greater deliberation by web participants in the online comment process is more striking in light of this case selection bias.

Given our interest in controversial environmental regulations that elicited large numbers of public comments, we settled on the three following cases. First was the EPA’s advanced notice of proposed rulemaking (ANPR) on the Clean Water Act regulatory definition of the “Waters of the United States” (Waters).⁷ The central question was whether or not the EPA would issue a new rule changing the extent of the federal jurisdiction over so-called “isolated wetlands. Whereas development lobbies saw the prospect of a Bush administration rulemaking as an opportunity to free up

considerable chunks of land that had been protected for 30 years, environmentalists feared the potential rollback of federal regulatory powers would undermine core principles articulated in the landmark 1972 Clean Water Act. The second rule selected was the EPA's proposed National Emissions Standards for Hazardous Air Pollutants (Mercury).⁸ While an EPA press release claimed the proposed actions represented "the largest air pollution reductions of any kind not specifically mandated by Congress,"⁹ environmental and public interest groups countered that the rule would only undermine the intentions of the Clean Air Act and increase mercury in the environment. Finally, we chose to examine a Department of Transportation (DOT) ANPR on the Corporate Average Fuel Economy Standards (CAFE).¹⁰ This proposal sought public comments on revising the CAFE program's structure to address continuing criticisms of the program related to energy security, traffic safety, economic practicability, and the definition of the separate category for light trucks. We classify this activity as an environmental regulatory activity due to the strong interest of environmental groups in the CAFE standards over many years, and the fact that this rulemaking was the object of a campaign by numerous groups.

Surveying for E-Deliberation

A central challenge in research on deliberation is the search for valid inferences about the impact of deliberation on an individual's decision process, and, in this case, observable indicators of deliberative behavior in cyberspace. Developing widely agreed upon metrics poses stiff conceptual and operational challenges (Janssen and Kies 2004). Many in this field identify deliberative attributes (such as autonomy from power, reflexivity, heterogeneity, inclusion, equality, etc.) as conducive to better decisions and democratic legitimacy (Dahlberg 2001; Froomkin 2004; Witschge 2004). Yet major differences exist across such theories of deliberation and discursive democracy, making a thorough focus on deliberative attributes rather difficult (see Dryzek 2000). Research ranges from the specific aspects of speech to the larger effect of deliberative processes on the public sphere.

In this study, we focus on a few key attributes of deliberation noted across the spectrum of deliberative democratic theory. For

example, one of the basic concepts in the field is that deliberation is reflective rather than simply reactive. We assume reflection is based on collecting diverse information and forming an understanding of various positions on an issue. A second central concept in deliberative theory is that such engagement with other positions will bring recognition of others in the process. Participants in democratic deliberation ideally listen to others, treat them with respect, and make an effort to understand them. Third, deliberative theory examines the relation between discourse and the transformation of individual preferences. The ideal of deliberation is that of communication that actually changes the preferences of participants as they engage the positions of others. The perceived authenticity of the process, and citizen efficacy, are also central to deliberative democracy, as deliberation is offered as a more authentic form of political participation. Our questionnaire included items intended to measure each of these dimensions of deliberation. While we do not claim to cover the full range of concerns of every deliberative theorist, our measures capture a key subset of the concepts central to recent developments in democratic theory, and will give a reasonable indication of the level of deliberative activity present in the rulemaking process.

We posit that one straightforward way to measure the optimistic expectations of cyber-democrats is to compare the practices of those that participate in a traditional manner, through paper or fax submission of comments, and those that participate using web-based opportunities. Examining the potential of the technology a bit further, we also posited that those who take the time and effort to write original comments using the web display higher indicators of deliberation than those who send mass emails with little or no original contributions; the point here is to acknowledge and explore claims that the potential of e-communication and mass submission of comments can either enhance or decrease deliberation.

Sampling Frame Construction

Having selected our cases and approach, we constructed a sampling frame that would be used to complete the telephone survey portion of the study. Submitted comments become part of the public record, so we were able to rely on relatively open access to the

comment sets on each rule. Our challenge was to find commenters who left a phone number, or at least a full name and address so that we could locate their phone numbers using a reverse phone-number look-up.

Because our research design did not require comparisons across the cases, we did not attempt to sample proportionally from the three cases. Instead, we were interested in making two types of comparisons. First, we wanted to compare attitudes of people who submitted electronically as opposed to on paper. Second, we were interested in comparisons between those who submitted original letters as opposed to form letters. The goal was to complete 375 surveys for each of the following four types of commenters: 1) electronic submission of form letters; 2) electronic submission of originals; 3) paper submission of form letters; and 4) paper submission of originals. Table 1 lists the number of completed surveys for each of the four types of commenters in the three different rules. Table 2 describes the total number of comments on each rule, the number of comments to which we had access, the limitations with respect to the way in which the accessible comments had been selected by the agencies, and the approach we took to sampling for each rule.

Table 1. Summary of Completed Surveys

<i>Electronic Submissions</i>				
	<u>Waters</u>	<u>Mercury</u>	<u>CAFE</u>	Total
<i>Form</i>	32	125	220	377
<i>Original</i>	131	125	126	382
<i>Paper Submissions</i>				
<i>Form</i>	8	5	409	422
<i>Original</i>	151	148	76	375
Total	322	403	831	1556

As Table 2 illustrates, we had to employ a number of different approaches to reach our sample size goals.¹¹ In each case, graduate research assistants trained as sample collectors located the comments on the Federal agency web-based docket systems (EPA's "EDOCKET" or DOT's "Docket Management System").¹² Comments were available from these websites as either Adobe Acrobat (.pdf) or text (.txt) files. In the case of the mercury rule, EPA also provided us with a large number of .txt files containing just over 536,000 e-mailed comments.¹³ Determination of submission type was based on the content and/or appearance of the submitted comment. Paper submissions are stamped with receipt dates by the agencies before they are scanned into the docket; electronic submissions often have telltale information headers, and lack such a date stamp. Form letters include identical content and were submitted by multiple participants who filled in their contact information. Determination of an original comment was based on whether the letter contained text that differed from identified form letters or petitions. Once the main form letter variations were identified and coders became familiar with their rhetoric, original letters were easily identified. Occasionally a form letter had been modified enough by a commenter so that it blurred the difference between original and form. In these instances, we used as a standard (developed and implemented by many agencies) the inclusion of at least one substantive argument or viewpoint not found in the baseline version of the form letter.

As sampling progressed, it became apparent that we lacked access to a sufficient number of form comments on the EPA rules to ensure a balance of comment types across all three rules. This was due to the EPA's practice of putting one example of each form letter, rather than every single submission, into the EDOCKET system. As noted above, comparing across rules was not integral to the research design, so we relied on access to a greater number of form submissions in the CAFE set of comments to complete the sample.

Table 2. Case Characteristics and Data Access

	Waters	Mercury	CAFE
Estimated total number of comments	~135,000	~495,000	66,786
Comments in sampling frame	3,223	4,264; +~490,000 emails	66,786
Access to comments	EPA's "eDocket" web-based docket management system	EPA's "eDocket" web-based docket management system; EPA also supplied .txt files containing ~490,000 emails	DOT's web-based "Docket Management System" (DMS)
Limitations	EPA places only unique original comments in the eDocket system, plus one example of each type of form letter received, therefore our ability to include submitters of form letters on this rule was limited; EPA reports having deleted over 125,000 emails	Access to limited form letters in the eDocket system was off-set by .txt files containing all ~490,000 emails submitted, the vast majority of which were form submissions	DOT did not enumerate all 66,786 comments in the DMS, but rather created "records" of form comments containing anywhere from 2 to 25,432 versions of a form letter
Sampling approach	We collected contact info from every single electronic and paper form letter that existed in eDocket (therefore no sampling actually took place); for original letters, we collected info from eDocket using systematic random sampling until the sampling targets were reached	Original commenters were selected using the same procedure as with the "waters" data. Form commenters were selected using a word-processing text search tool to search text files containing the email form letter comments for text formatted as a phone number. Systematic random sampling was used to hit the sampling targets	Systematic random sampling was used to select records from DMS; when a record contained no contact info, the next record was selected; when a record contained multiple versions of a form letter, systematic random sampling was used within the batch of form letters

Since potential respondents were to be contacted by telephone, we obtained telephone numbers either from the actual comment or by looking them up using a web-based phone number database.¹⁴ The use of a systematic random sampling method meant that when we could not locate a phone number, we moved to the next “*n*th” comment. Due to the range of difficulties faced—from agencies failing to provide access to the entire set of submitted comments to obtaining phone numbers for individuals—the results of the survey are not generalizable to the whole population of citizen commenters on these regulatory actions. While these issues should be addressed in any future survey of citizen commenters and the management by agencies of future public comment datasets, the data that follow represent the only major survey of the practices of citizen commenters that we have seen, and offer important insights on the ways that citizens participate in the rulemaking process.¹⁵

The Survey

A telephone survey instrument was administered using a computer-assisted telephone interviewing (CATI) system. Thirty trained interviewers completed the telephone surveys. The interviews took an average of 14 minutes to complete. Respondents qualified to complete the interview if they recalled submitting a comment to a Federal public agency and if they were 18 years of age or older. The survey was completed by 1556 respondents between the dates of August 30 and November 24, 2004. This represented a cooperation rate of 48 percent, with a margin of error of plus or minus 2.5 percent.¹⁶

The survey asked questions regarding the respondents’ general commenting practices such as the number of times that they had commented, how much information they obtained before commenting, how they typically submit a comment, whether they refer to other citizens’ comments and, if so, the effect this has on their comments, and the reasons that they commented. Respondents were also asked questions pertaining to the results of the regulatory activity, such as whether they thought their comments were reviewed by a government employee, whether they heard about the final agency decision, and if so, whether they were satisfied with the final decision. Respondents were also asked questions about Federal agency websites, including the frequency of the visits, the

type of information they accessed, whether they used these websites to submit a comment, their general perceptions of the effect Federal agency websites have on commenting, and if they would be likely to submit a comment on an agency rule in the future.

Finally, respondents were asked if they believe submitting comments, individually or as a group, has the ability to change the outcome of the final rule. Demographic information collected include age, gender, education, income, political ideology, voting behavior, race, ethnicity and weekly Internet use (in hours); we note differences along demographic lines below only when statistically significant.¹⁷

Survey Findings

We organize the discussion of our findings around three important discoveries. First, we observed greater levels of self-reported deliberative activity across all types of commenters than expected. A surprisingly large number of respondents reported that they read other individuals' comments, acquire increased understanding of other people's positions as a result, and even occasionally change their own positions. Yet, second, we found that electronic commenters do not appear to be any more deliberatively engaged than paper commenters. In fact, we observed and discuss below a significant difference on only two measures. Third, rather than significant differences between electronic and paper commenters, the main differences we found were between individuals who submitted original comments and those who posted form letters.

The Prevalence of Deliberative Indicators

There are indicators that all types of commenters practice, or benefit from, certain types of deliberative activity. In this section we report on four indicators of such deliberative discourse: the frequency with which commenters seek out a variety of information, the tendency to review other citizen's comments, gaining an understanding of the positions of others, and changing one's own position after being exposed to the arguments of others. The findings are summarized in Tables 3 and 4.

Commenters are Information-Seekers. The use of information in developing a public comment is quite high. Overall, commenters, regardless of medium, are information-seekers. When asked how much information they receive on rules before submitting a comment, 45.2 percent said they get a lot of information, and a full 90 percent say they get a lot or some information. Those that write original paper comments claim the most; nearly 51 percent say they get a lot of information before submitting a comment. Over 71 percent of those surveyed said that they referred to the arguments, studies, statements or positions of agencies or independent organizations before submitting a comment; men were slightly more likely than women to refer to outside arguments when preparing their comments. Again, those that submitted original paper comments were at the top with 76.7 percent. Agency websites are important sources of information for commenters; a full 50 percent surveyed said they used these sites in developing their comment. Women, along with those with lower incomes and people 60 and over, were significantly less likely to get information on a proposed rule from a federal agency's website. Overall, a large majority of commenters claim they are seeking out information, even those who submit form letters. Few commenters, at least from what they report, simply submit comments without trying to understand the issue.

Commenters Review Others' Comments. Surprisingly, 70.6 percent of those surveyed said that they had read the comments of others at some point.¹⁸ As these comments are only available either in person in the agency docket rooms in DC or on the newly developed agency websites, it may be that all types of commenters are using the agency websites to examine the docket, when such comments are available.¹⁹ Demographic differences are insignificant on this point. For those that specifically reported using the agency websites, 69.4 percent said that the site helped them review other citizens' comments. Here, men, those with higher incomes (over \$70K/yr), and people under 60 were significantly more likely to use agency websites than women, those with incomes under \$70K, and people over 60.²⁰ Counter to our original hypotheses, such access to information was reported highest (75.5 percent) by those who ultimately submitted original paper comments. Still, overall reporting of the review of others' comments is high regardless of

submission type or demographic, illustrating attention to the positions of others in the rulemaking process.

Commenters Gain an Understanding of Other Positions. Reading of other citizens' comments is not just for information; commenters report that they gain an *understanding* of the positions of others as well. Overall, nearly three-quarters (73.2 percent) say they get a better understanding of the positions of other citizens by reading their comments; the only demographic difference is that people with higher incomes are more likely to report better understanding than those with lower incomes. In addition, a total of 73.2 percent of the respondents who reported reading others' comments say that they gain a greater understanding of the positions or arguments of other citizens by reading their comments, and 41.5 report that they have found other citizens' comments to be persuasive. As the difference across types of commenters is insignificant, these findings suggest that commenters in general are gaining an understanding of the positions of other citizens commenting on a rule. Agency websites seem to have added to this particular indicator of democratic deliberation.

Commenters Change Their Own Positions. Finally, over one-third (36.3 percent) of those surveyed report that their position on an issue actually changed after reading others' comments. That is less than the 47 percent who report no change in their position, but the percentage that acknowledges such change is significant and suggests that the limited discourse made possible by access to others' comments is having an impact on the reasoning of citizen commenters. However, this is a question that needs further research. It may be that people are not changing their positions from "opposed" to "for" or vice versa, but instead changing one or more reasons for being opposed, or for, the proposed rule. Commenters might change their reasons due to information or arguments learned from commenters with whom they agree.

Differences Between Paper and Electronic Commenters

One main goal of the survey was to look for differences between those who submitted comments on paper, either through postal mail or fax, and those who used agency web-based forms, int-

Table 3. Summary of Paper vs. Electronic Deliberation Measures

		Paper %/(N)	Electronic %/(N)	Total %/(N)	Chi-Squared Significance
<i>Information-Seeking</i>					
In general, how much information do you receive on rules before submitting a comment?	A lot	46.9/(372)	43.4/(328)	45.2/(700)	.33 (df=4)
	Some	44.2/(351)	45.8/(346)	45.0/(697)	
	A little	6.5/(52)	8.7/(66)	7.6/(118)	
	None at all	1.5/(12)	1.1/(8)	1.3/(20)	
	Don't Know	0.9/(7)	1.0/(7)	.9/(14)	
	Total (N)	784	755	100 (1549)	
When preparing your comments, do you refer to arguments, studies, statements or positions made by agencies or independent organizations?	YES	74.6/(592)	67.1/(507)	70.9/(1099)	.002 (df=2)
	NO	9.3/(74)	14.4/(109)	11.8/(183)	
	OTHER	16.1/(128)	18.5/(140)	17.3/(268)	
	Total (N)	794	756	1550	
Have you ever used a federal agency's website to read information on a proposed rule?	YES	48.1/(367)	51.9/(396)	49.1/(763)	.03 (df=2)
	NO	54.6/(415)	45.4/(345)	48.9/(760)	
	OTHER	43.8/(14)	56.2/(18)	2.1/(32)	
	Total (N)	796	759	1555	
<i>Viewing Others' Comments</i>					
Have you ever read other citizen's comments before sending in a comment?	YES	50.9/(410)	49.1/(396)	70.6/(806)	.82 (df=2)
	NO	48.8/(146)	51.2/(153)	26.2/(299)	
	OTHER	48.6/(18)	51.4/(19)	3.2/(37)	
	Total (N)	574	568	1142	
<i>Understanding Other Positions</i>					
<i>Among those who reported reading others' comments:</i>					
Do you gain a greater understanding of the positions or arguments of other citizens by reading their comments?	YES	50.6/(417)	49.4/(407)	73.2 (824)	.38 (df=2)
	NO	52.8/(65)	47.2/(58)	10.9 (123)	
	OTHER	45.5/(81)	54.5/(97)	15.8 (178)	
	Total (N)	563	562	1125	
Have you found that other citizen's comments are persuasive?	YES	49.9/(229)	50.1/(230)	41.5 (459)	.63 (df=2)
	NO	53.1/(129)	46.9/(114)	22.0 (243)	
	OTHER	49.4/(200)	50.6/(205)	36.6 (405)	
	Total (N)	558	549	1107	
<i>Changing Positions</i>					
Has your own position on issues EVER changed at all as a result of reading other citizens' comments?	YES	51.0/(208)	49.0/(200)	36.3 (408)	.70 (df=2)
	NO	48.6/(258)	51.4/(273)	47.2 (531)	
	OTHER	51.4/(95)	48.6/(90)	16.4 (185)	
	Total (N)	561	563	1124	

erest group websites, or email to comment. The survey suggests that those differences simply do not exist. There was a significant difference between electronic and paper commenters on only two questions, and in different directions. Paper commenters, by 74.6 percent to 67.1 percent (df=2; p<.01) over web-based commenters, were more likely to refer to the "arguments, studies, statements, or

positions made by agencies or individual organizations.” Since paper submitters are more likely to say that they reference other people’s work, an essential practice for creating quality discourse, our hypothesis that electronic commenters would demonstrate greater deliberative activity than paper commenters is not supported.

We suspect this finding may be due to the fact that many submitters of original paper comments also use the Internet and web-based agency dockets as a resource to collect information in crafting their comments. While there is a distinction between the means citizens use to comment, all types of commenters used electronic means to gather information in the commenting process. What this means is that differences between commenters who use only traditional methods and those who use web-based methods are not as obvious as might be expected. For example, the survey indicates that of those who submit comments in any format, nearly half (49.1%) have gathered information from agency websites. But there is only a modestly significant ($p < .05$; $df = 2$) greater number of electronic commenters (51.9%) than paper commenters (48.1%) who report having used an agency website. As for the overall lack of discursive indicators by electronic commenters, it may be that the technology, which makes commenting easier than ever before, encourages the rapid submission of comments, which is antithetical to more thoughtful and carefully reasoned arguments.²¹ Also, many form comments are generated via web services that offer commenters no chance to review the comments already submitted by others.

Differences Between Original and Form Commenters

By far, the most interesting and significant differences in this study are between those who submit original comments and those who submit form-based comments (see Tables 4 and 5). A better understanding of these differences may impact how agencies respond to public comment and how interest groups refine their campaigns. Many interest groups, in addition to drawing on their legal and scientific staff to draft detailed comments, respond to the rulemaking process with an aggregative approach, soliciting mass numbers of identical or near-duplicate comments from their members and other interested citizens. By all accounts, new information technologies have enabled the number of comments to

increase well beyond the capacity of agencies to cope without expensive, outside private consulting firms to report on the content of citizen comments. A key question is whether or not this technology improves or degrades the overall efficacy of citizen discourse (Shulman Forthcoming).

On the one hand, it may seem obvious that commenters who offer original contributions would have greater deliberative characteristics, as they have actually thought about their responses in more depth. The point here is not just that original commenters are more deliberative, but that there are key differences in the types of electronic submissions in the current rulemaking process. Simply making the comment process available on the web does not make it more deliberative. Current systems enable mass email campaigns, and so the potential for much less deliberative input. The results here illustrate that, in order for e-rulemaking to be more deliberative, systems need to develop ways to encourage and support original comment.

The differences between original and form commenters start with demographics. Men, those with higher levels of education, and those with higher incomes are significantly more likely to submit an original comment, while women, those with less education, and those with lower incomes are significantly more likely to submit a form comment. Contrast that with the fact that we found no significant demographic differences between those who submit paper comments and those who use electronic means. As with all political participation, sex, income, and education seem to play an important part in the overall composition of e-rulemaking input. This finding supports that of past examiners of rulemaking participants, such as Golden (1998).

Form Versus Original Differences in Information-Seeking. The differences between original and form commenters move beyond demographics and include the basic use of information. Over half (54.2 percent) of original commenters report having used an agency website to read information on a proposed rule. This compares to only 44.2 percent of the form commenters, suggesting a significant difference ($df=2$; $p<.01$). Both form and original submitters, however, claim they gather information on rules before submitting a comment; 48.0 percent of original submitters claim to receive “a lot” of information, compared to 42.4 percent of form submitters ($df=4$; ns). Similarly, there is not a great difference in the

rate at which the two types of commenters report referring to other arguments in their comments. Nevertheless, the nature of a comment—original or form—is a better predictor of the use of information before commenting than is the method of submission.

Form Versus Original Differences in Viewing of Others' Comments. While there is no significant difference between original and form commenters on their reading of others' comments, their perceptions of others' comments as persuasive, or their having changed their mind as a result of reading another comment, original commenters are significantly more likely to report (76.7 percent vs. 69.7 percent) gaining "a greater understanding of the positions or arguments of other citizens by reading their comments" ($df=2$; $p<.05$). While both sets of commenters read the positions of others, original submitters are more likely to report having a better understanding of those positions. It may be that original commenters see others' comments as part of a larger discourse and so pay attention to all sides of the issue. Yet this difference may also be a function of original commenters having greater faith that their comments could actually change an outcome. If form commenters are more pessimistic about their ability to affect outcomes, they may not read others' comments with any intentions of actually understanding others' positions. The differences, as well as some similarities, are summarized in Table 4.

Form Versus Original Differences in Trust. In addition to the modest differences between original and form commenters on the deliberative indicators described above, there are significant differences between the two on a number of indicators of trust in the process and the agency involved. For example, 56.6 percent of original commenters (both paper and electronic) believe their comments were actually read by a government employee, compared to only 43.4 percent of form commenters ($df=2$; $p<.01$). This is one of the most significant differences we found between form and original commenters. Electronic form commenters also appear to be the most cynical in terms of their feeling that their participation will have an impact on their satisfaction with the final rule. Conversely, those that sent paper original comments are the most satisfied with their participation and the outcome. Not only are form submitters more cynical about having their comments read and making a difference, they are also more likely to say that their participation led

Table 4. Summary of Form vs. Original Differences in Deliberation Measures

		Originals %/(N)	Forms %/(N)	Total %/(N)	Chi-Squared Significance
<i>Information Seeking</i>					
In general, how much information do you receive on rules before submitting a comment?	"A lot"	363/(48.0)	337/(42.4)	45.2 (700)	.225
	"Some"	320/(42.4)	377/(47.5)	45.0 (697)	(df=4)
	"A little"	55/(7.3)	63/(7.9)	7.6 (118)	
	"None at all"	9/(1.2)	11/(1.4)	1.3 (20)	
	"Don't Know"	8/(1.1)	6/(.8)	.9 (14)	
	Total (N)	755	794	1549	
When preparing your comments, do you refer to arguments, studies, statements or positions made by agencies or independent organizations?	YES	544/(72.1)	555/(69.8)	70.9 (1099)	.052
	NO	74/(9.8)	109/(13.7)	11.8 (183)	(df=2)
	OTHER	137/(18.1)	131/(16.5)	17.3 (268)	
	Total (N)	755	795	1550	
Have you ever used a federal agency's website to read information on a proposed rule?	YES	410/(54.2)	353/(44.2)	49.1 (763)	.000
	NO	334/(44.2)	426/(53.3)	48.9 (760)	(df=2)
	OTHER	12/(1.6)	20/(2.5)	2.1 (32)	
	Total (N)	756	799	1555	
<i>Viewing Others' Comments</i>					
Have you ever read other citizen's comments before sending in a comment?	YES	384/(69.0)	412/(72.1)	70.6 (806)	.497
	NO	157/(27.5)	142/(24.9)	26.2 (299)	(df=2)
	OTHER	20/(3.5)	17/(3.0)	3.2 (37)	
	Total (N)	571	571	1142	
<i>Among those who reported reading others' comments:</i>					
Do you gain a greater understanding of the positions or arguments of other citizens by reading their comments?	YES	432/(76.7)	392/(69.7)	73.2 (824)	.03
	NO	54/(9.6)	69/(12.3)	10.9 (123)	(df=2)
	OTHER	77/(13.7)	101/(18.0)	15.8 (178)	
	Total (N)	563	562	1125	

to a negative view of the agency running the rulemaking (56.9 percent for form commenters, vs. 43.1 percent of original commenters). Original commenters are almost 17 percent more likely (58.4 percent to 41.6 percent) to report a positive view of the agency (df=2; p<.01). Original commenters report being slightly more satisfied than form commenters with agency decisions on issues they have commented on (54.3 percent of originals are satisfied vs. 45.7 percent of form submitters) (df=2; p<.05).

Finally, users of form letters are simply more negative about the government in general. By 61.6 percent to 38.4 percent compared to original commenters they “rarely” or “never” trust the government to do what is right (df=2; $p < .01$). Simply put, original submitters have significantly higher levels of trust in the government to do what is right.²² These differences are reported below in Table 5.²³

Table 5. Original vs. Form Differences in Trust and Satisfaction

		Originals %(N)	Forms %(N)	Total %(N)*	Chi-Squared Significance
Do you think the comments you have submitted were viewed by a government employee?	YES	474/(56.6)	363/(43.4)	837/(53.9)	.000 (df=2)
	NO	83/(36.9)	142/(63.1)	225/(14.5)	
	OTHER	199/(40.6)	291/(59.4)	490/(31.6)	
	Total (N)	756	796	1552	
Does your participation generally lead you to have a positive or negative view of the agency?	POSITIVE	101/(58.4)	72/(41.6)	173/(16.5)	.002 (df=2)
	NEGATIVE	184/(43.1)	243/(56.9)	427/(40.7)	
	OTHER	227/(50.7)	221/(49.3)	448/(42.7)	
	Total (N)	512	536	1048	
Have you been satisfied with the agencies' decisions on issues that you have commented on?	YES	88/(54.3)	74/(45.7)	162/(12.3)	.011 (df=2)
	NO	371/(45.5)	445/(54.5)	816/(61.8)	
	OTHER	184/(53.8)	158/(46.2)	342/(25.9)	
	Total (N)	643	677	1320	
How often do you trust the federal government to do what is right?	All or some of the time	489/(56.1)	383/(43.9)	872/(57.3)	.000 (df=2)
	Rarely or Never	241/(38.4)	386/(61.6)	627/(41.2)	
	Don't Know	10/(45.5)	12/(54.5)	22/(1.4)	
	Total (N)	740	781	1521	

* percentages in “Total” column are calculated using total valid number of responses for each respective questions as a denominator. Totals may not equal 100% due to rounding errors.

Overall, the survey illustrates that people believe that form letters are less likely to be read by government employees and have an actual impact. It may be the case that a negative view of the agency and government in general was one of the reasons for commenting in the first place. A central question here is whether a lack of faith in the agency has led to some citizens’ refusal to take the time to write an original letter. On the other side, it may be the case that original commenters understand the rulemaking process

more thoroughly, and have more knowledge of (and maybe sympathy for) the agency involved.

On the Value of Electronic Comment and Mass E-Mail Campaigns. There is one other key finding regarding the difference between form and original commenters. Though it contradicts the lack of trust in government noted above, form commenters are more likely than original commenters to think that groups that organize mass mail campaigns have the ability to change proposed rules (86.7 percent to 81.7 percent). This may partly explain why form commenters are much more likely to submit comments more often than original commenters. Sixty-two percent of form commenters report submitting comments more than ten times, while only 44 percent of original commenters report that level of participation. This difference, however, can also be explained by the expertise and time involved in many original comments.

This faith that mass email campaigns have an impact has led to the increase in the popularity of the tactic. Nearly 50 percent of those surveyed said they submitted their last comment through an interest group website, and almost 40 percent reported that this method will also be how they comment next time. Only those that had submitted paper original comments said that they would continue that route over all others. While agencies such as the EPA and DOT have worked to improve the information on their web-based docket systems, and the federal government continues to develop a Federal Docket Management System with a single web-based public comment portal (Regulations.Gov), very few commenters plan to use such systems – only 12 percent versus the nearly 40 percent who plan to use interest group websites. Mass-mailed form letter comments originating from various environmental and other interest groups make up the vast majority of comments submitted on rules, and will continue to do so for the near future.

Yet electronic form commenters show the lowest scores on many deliberative indicators. Commenters who submitted using form emails via interest group websites were the least likely to look at other information and the least likely to report that their positions have changed as a result of reading others' comments. Mass email campaigns, as they are currently designed, reflect an aggregative form of democracy, not one focused on substantive deliberation. While such an approach is suited to pressure legislators who focus

on counting votes, it is neither deliberative nor effective on agencies required by the APA to seek original and substantive comment.

In addition, there is little consistent evidence to support the belief that mass email campaigns actually do change proposed rules. While the proposed “Waters” rulemaking was dropped, other highly controversial rulemakings went forward even while tens of thousands and sometimes hundreds of thousands of comments came in against them. Our interviews with agency rulewriters and officials, too lengthy to report on here, show that agencies do not value (and often openly resent) form letters; they simply do not meet the minimum requirement of a “substantive” comment (Shulman 2004). Importantly, however, our interviews and focus groups show that these same officials would welcome more substantive and original comments, as they could return the rulemaking process to that designed by the APA – one based on the collection of information and substantive input from interested parties outside of the government.

Conclusion: The Potential of E-Participation

The distinction between paper and electronic commenters, which was the basis of our original set of hypotheses, simply does not exist as we imagined it might. A majority of commenters, regardless of the medium of submission, are using electronic means of researching an issue, with paper commenters reporting a greater use of web-based agency docket systems. Comparing paper and electronic commenters on recent rules does not help us understand whether the new electronic systems are more deliberative than past paper-based notice and comment processes. One could try to explore differences between current rulemaking processes and past, pre-Internet processes, but given the weakness of the human memory, a survey would be an inappropriate method.

That said, the issue of the difference between original and form-based participation is obviously at the forefront of the questions regarding the potential deliberative activity centered on the rulemaking process. Original commenters embody many of the deliberative qualities we hypothesized given the move to an accessible open-docket system. The range of significant differences between original letter writers and form letter submitters might be partially explained by the introduction of a large number of

commenters (mostly form users) who are new to the rulemaking process. The ease with which interest groups can spread information to constituents about proposed rules open for public comment, and the sophistication of email action alert systems that allow individuals to “participate” by doing little more than clicking the “send” button on an interest group’s website, means agencies are getting more comments, especially from people who have not participated in the process in the past. This offers evidence for the cyber-pessimists, who believe that the Internet may actually decrease deliberation in rulemaking.²⁴ Though many of these participants, even electronic form submitters, reported to us that they seek out information before sending in their comments, form submitters are nevertheless much more cynical about the process, and much less deliberative in their engagement. This leads us to conclude that there might be a certain amount of political capability that must be acquired before these new participants have a level of efficacy and trust in the process that will justify the effort required to become more deliberative participants.

Interest groups could develop this capability, but most do not. In our research, we do find exceptional groups (such as the Union of Concerned Scientists) looking beyond first generation form letter campaigns to develop new techniques for generating better comments. So why don’t environmental groups, in particular, solicit more original, substantive, deliberative comments? Certainly, it is true that it is very easy to respond to a mass email by clicking “send.” It takes a bit more effort to participate in a substantive and deliberative process. But the weakness could be in movement strategy, rather than citizen lack of interest or capability. Environmental groups engage their membership in the rulemaking process with an aggregative approach, soliciting mass numbers of identical or near-duplicate comments, which the agencies then ignore, or delete.²⁵ Movement groups are using this aggregative approach, which is probably better suited to their past work within the legislative process, rather than a more substantive and deliberative approach that is more fitting for rulemaking under the APA process. Yet, according to the survey, a good part of the environmental constituency has shown an interest in more deliberative participation – reading others’ comments, learning, and participating in something more substantive than mass emails. In essence, the environmental groups pushing mass email campaigns

have been unable to adjust and take advantage of either the technological or political changes of the past few years.

If interest groups seek to expand citizen deliberation in rulemaking, they need to use web technology to solicit more substantive comments. For example, they can challenge members to think up new categories for agency cost-benefit analyses, as suggested by agency employees in our interviews. They could also ask members to enter postal codes, and then prompt them to report something about a local stream, mercury emitting industry, or health problems. Groups could also distribute parts of a proposed rule, and ask constituents to comment substantively on a specific section of interest. As West (2005) has argued, stakeholders need to be aware that “*effective* public comment also entails reasoned argumentation.” Citizen commenters in a September 2005 focus group organized by the authors were enthusiastic about the various opportunities for such input, whereas interest group activists we interviewed remain more skeptical or cautious about such efforts.

If agencies seek to use the Internet to increase deliberation over rulemaking, they apparently need to do more than simply allow citizens to submit comments by email. Others have suggested better information delivery, the availability of related studies and analyses, and word-searchable notices and dockets (for example, Lubbers 2006: 222). Perhaps another way to improve the process would be to develop a better user interface in the open dockets; Noveck (2004) advocates such a design-oriented approach. Agencies could also randomly respond to comments online during the rulemaking process, or supplement the formal comment process with online dialogs in order to illustrate attention paid to citizen comments. Federal agencies do not necessarily need to figure out how to get more people to comment through their websites, but they could benefit from figuring out how to get more commenters to trust the process and invest time in enhancing the discourse surrounding a proposed rule. Lubbers (2006: 236-7) argues that the “flipside of increased public participation, of course, is increased responsibilities of agencies to digest and react to a higher volume of comments.” Our point here is that agencies might be more proactive as well, and insert themselves earlier in the process, so that what they digest and react to might be more constructive. In the meantime, the deliberative divide between citizens who invest time to write original letters and those who merely submit form letters has the

potential to increase feelings of powerlessness or disenfranchisement on the part of both citizens and agency employees.

The point is that the potential to increase both political capacity and deliberation -- something valued by citizens, agencies, and the scholarship on public participation -- exists in the practices of both agencies and interest groups. Certainly, we see that some citizens are interested in rules, information surrounding various issues, and in what other citizens have to say in the comment process; many citizens are also willing to have their own positions challenged and possibly transformed in the engagement with others. This is an important opportunity, as 91 percent of respondents said they are very or somewhat likely to submit comments again in the future.

Yet we also see that technology exists not only to enhance the deliberative process (the open dockets and access to information on agency websites), but also to degrade discourse (the easy click-to-send web pages on interest group websites). One could argue that the first generation of Internet participation in rulemaking may have actually decreased the proportionate level of deliberation in rulemaking. But we could also take the stance that the technology has allowed the raw number of substantive and deliberative comments to increase. In other words, the potential of the technology may increase *both* types of comment -- deliberative and non-deliberative, substantive and non-substantive. More information on this issue needs to be gathered, but it is an important question for e-rulemaking -- and democratic participation in governance more generally.

So we conclude, in a way, were we started, by noting the potential of the internet generally, and electronic rulemaking specifically, to enhance democratic deliberation in citizen participation. Our central goal was to examine the optimistic claim that online participation would lead to richer and deeper communication between the public and government. While we found no evidence that electronic participation, per se, is any more deliberative or substantive than traditional forms of participation, we did find that citizen participants in general exhibit numerous deliberative attributes, that those that engaged the process enough to contribute original comments embodied the highest measures of

deliberative activity in the study, and that participants expressed a desire for increased avenues for participation and influence.

Information technologies are introduced into existing agency cultures and processes of public involvement. Unless more research is done to understand the ways in which these existing cultures inform democratic processes, information technologies will inevitably be designed to fit within the existing, and often not very deliberative or participatory, political and civic cultures. Our research suggests that the information technology needs to be more proactively developed and applied in order to overcome existing barriers in government-citizen interaction. Obviously, the technology will not stand still; we only hope that research like this will push the agencies and interest groups alike to develop systems that increase the amount of information, expand the exchange of views, and improve the democratic process in the development of better policy.

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Notes

¹ See: <http://www.online-deliberation.net/conf2005/>.

² See: <http://cdd.stanford.edu/polls/docs/2004/onlinedp-release.pdf>.

³ The federal eRulemaking Initiative (<http://www.regulations.gov/eRuleMaking.cfm>) is one of 24 E-Government efforts at the federal level (<http://www.whitehouse.gov/omb/egov/>). On the progress of the President's Management Agenda to date, see the GAO report "Electronic Government: Initiatives Sponsored by the Office of Management and Budget Have Made Mixed Progress" GAO-04-561T available at: <http://www.gao.gov/new.items/d04561t.pdf>.

⁴ Interest group-initiated mass mailed postcards, familiar from past activism, have been modestly enhanced as customizable e-form letters, often by expensive for-profit intermediaries.

⁵ Part of the reason for this is that environmental regulation in the US in the past few years has moved, for the most part, out of the realm of congressional legislation and into the realm of rulemaking. See Amy Goldstein and Sarah Cohen, "Bush Forces a Shift in Regulatory Thrust," *Washington Post* (August 15, 2004), A1, the first of a series of three in the *Post* on recent regulatory politics and which appeared about the same time as Joel Brinkley, "Out of the Spotlight, Bush Overhauls U.S. Regulations," *New York Times* (August 14, 2004).

⁶ This goes against the methodology of others examining rulemaking, such as Golden 1998, who explicitly states the argument to choose "typical" rules to "avoid any bias that might be introduced by examining only high-profile rulemakings" (p. 251). Again, the point is that we do this with good reason.

⁷ See *Federal Register* Vol 68, No. 10 pp. 1991-1998 (available at: <http://snipurl.com/dac3>). At a June 10, 2003 hearing before a Senate Subcommittee, G. Tracy Mehan, Assistant Administrator for Water, noted that most of the comments received were "the result of e-mail or write-in campaigns," whereas about 500 were "substantive" comments. See S. HRG. 108-352, p. 16.

⁸ See *Federal Register* Vol. 69, No. 20 pp. 4652-4752 (available at: <http://snipurl.com/dab9>). "As of February 2005, EPA E-Docket shows an actual count of more than ~490,000 public comments. An

initial count of ~536,000 included duplicate and triplicate e-mails, spam, and comments intended for other rulemakings.” See: <http://snipurl.com/dabd>.

⁹ See <http://snipurl.com/dabh>.

¹⁰ See Federal Register Vol. 68, No. 248, pp. 74908-74931 (available at: <http://snipurl.com/daw6>).

¹¹ The original goal was for a sample size of 1,500, with even distributions of 125 in each of the four comment categories (electronic/form, paper/form, electronic/original, paper/original) for all three rules. Due to difficulties in meeting the targets in each category, especially with respect to form letter for the waters rule (see Table 1), we oversampled on the CAFE rule in order to reach the overall target of 1,500.

¹² Thanks go to Michael Aquino, Tina Eyraud, Meg Inokumu, Jonathan Nez, Suzuki Susumu, Paul Vaughn, and Baohua Yen.

¹³ Again, after supplying the 536,000+ text files the EPA determined that nearly 50,000 of the e-mails were exact duplicates, triplicates, spam, or submissions for other rulemakings, hence there is a discrepancy between the estimated total number of comments received and the number of comments in our sample frame.

¹⁴ We used www.whitepages.com, and found that we were able to obtain phone numbers for slightly more than 60% of the names and addresses we entered.

¹⁵ Furlong (2004) uses a survey to examine interest group participation in rulemaking, but limited the survey to groups, rather than individual commenters. Golden (1998) also used a survey, but focused on how citizens became informed about a rule and how they knew when and where to comment. Again, we know of no other survey that examined the practices of citizen commenters on rulemakings.

¹⁶ While we are discussing “citizen” commenters, we should make clear that a small percentage of our respondents were involved in the rulemaking process in roles other than private citizen. Of those surveyed, 86.4% reported that they generally commented as private citizen, 7.1% as a paid employee, 3.4% as an unpaid volunteer, and 3.2% as something else (though mostly as a representative of an interest group). As we were interested in the e-rulemaking process

as a whole, we did not separate out any part of the population from this study.

¹⁷ Obviously, there are problems with operationalizing our questions within the methodology of survey research. Participants may understand the questions in ways different than we intended, self-reporting may exaggerate discursive indicators, and citizens may simply be mistaken about what they actually did during the rulemaking process. Still, we think it is central in an examination of these issues to get direct input from a large number of citizen participants in the rulemaking process, and are confident that our methods meet the standards of survey research.

¹⁸ This self-reported reference to others could be checked by examining a subset of the actual comments; here, one could compare self-reports of subjects with their own comment. Such an approach is not foolproof, however, as a commenter could refer to another's position in *thinking* about or *formulating* a comment, without a direct written reference. In our case, such an approach would not be possible or ethical either, as subjects were interviewed anonymously and so their responses could not be linked to a particular name and comment.

¹⁹ Then again, as only 50% say they visited agency websites, and it seems unlikely that 20% physically visited a docket room, this number needs further explanation. It may be that some who report reading others' comments saw samples on interest group websites.

²⁰ This follows many studies, including Thomas and Streib 2003, that have found visitors to governmental websites more likely to be white, with higher income and education.

²¹ We did not collect data regarding the time citizen commenters took to prepare their comments. While it seems intuitive that original commenters would take more time, future empirical research should include such a question.

²² For a very interesting discussion of the flipside of this issue – public administrators' trust in citizens – see Yang 2005.

²³ We do not report the results of comparisons between paper and electronic commenters on measures of trust and satisfaction because we found no significant differences on any of the measures reported in Table 5.

²⁴ See, for example, the discussions in Thomas and Streib 2003, Lubbers 2006, and Shulman Forthcoming.

²⁵ It is important to note that environmental groups do submit substantive comments on rules, developed with legal and /or scientific staff, at the same time that they solicit mass comment from their membership. From the standpoint of the group, this may be a rational strategy – they get to frame the substantive critiques the way they like at the same time they maintain the activity of members (and, often identify potential new members through outreach on the issue). Still, on the goal of impacting the substance of a rule, interest groups seem to ignore the potential substantive and deliberative input their members could bring to a rulemaking.

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Unifying Rulemaking Information: Recommendation for the New Federal Docket Management System

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& Stephen J. Balla*

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

UNIFYING RULEMAKING INFORMATION: RECOMMENDATIONS FOR THE NEW FEDERAL DOCKET MANAGEMENT SYSTEM

CARY COGLIANESE,* STUART SHAPIRO** & STEVEN J. BALLA***

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INTRODUCTION

In recent years, regulatory agencies, Congress, and the White House have taken steps to increase the use of information technology in the management of the rulemaking process. The latest such "e-rulemaking" effort is the design of a new, government-wide regulatory information

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system being developed by the Bush Administration. The system, known as the Federal Docket Management System (FDMS), aims for the first time to make all information supporting federal regulation available to the public via the Internet. By making information about government regulation available online, the Administration's e-Rulemaking Initiative seeks to improve the quality and legitimacy of the government's regulatory decisions.¹

If developed properly, the Administration's new online docket management system can also facilitate legal and social scientific research that, in the long term should improve regulatory policymaking. To advance this objective, we recently drafted a detailed letter to the Administration consisting of recommendations for the design of the new FDMS, both to help enhance the general public's accessibility to docket information, and to improve the availability of docket information for research purposes.² Our letter describes the information currently maintained by government agencies and emphasizes the importance of ensuring that no loss of information occurs in making the transition to the online docket system. It also presents a series of steps that the Administration should take to ensure that the information stored in the new system is of the highest quality and has effective search and downloading capabilities.

Shortly after drafting our letter, we obtained formal affirmation of our recommendations from fifty-five academic colleagues from across the country, who joined the letter which we then submitted to the Office of Management and Budget (OMB) and the U.S. Environmental Protection Agency (EPA)—the two agencies that are ultimately overseeing the development of the FDMS. The American Bar Association's Section on Administrative Law and Regulatory Practice also subsequently endorsed our recommendations in a further submission to the OMB.³

Given the importance of the FDMS to future research on rulemaking, as well as to the legal profession and broader public, we reproduce our recommendations at the end of this Article. Before turning to our recommendations, however, we place them in the context of new developments in e-rulemaking, the current Administration's effort to develop the FDMS, and the current state of empirical research on rulemaking.

1. See, e.g., <http://www.regulations.gov/eRuleMaking.cfm> (providing general information on the Administration's e-Rulemaking Initiative).

2. A copy of the letter is reproduced *infra*.

3. Letter from American Bar Ass'n Section of Administrative Law & Regulatory Practice, to Office of Management and Budget, Supporting Scholar Recommendations on Federal Docket Management System (Nov. 16, 2004), available at <http://www.abanet.org/adminlaw/OMBcomments.pdf>.

I. RULEMAKING AND EMPIRICAL RESEARCH ON THE
REGULATORY PROCESS

For decades, rulemaking has been one of the most common and important modes of policymaking within American government. Many of the most salient social and economic problems result in rules promulgated by regulatory agencies. For example, among the various governmental responses to the terrorist incidents of September 11, 2001 were new rules covering virtually every aspect of travel safety. Over the past several years, the Department of Transportation (DOT) and the Department of Homeland Security (DHS) have adopted many new rules on issues ranging from the screening of checked baggage for explosives,⁴ to the collection and sharing of information about air, rail, and maritime passengers.⁵ In every area of public policy, whether in efforts to protect the public food supply, promote the integrity of securities markets, or maintain the reliability and efficiency of electricity and telecommunications services, the government operates through rules issued by regulatory agencies.⁶

Rulemaking leaves virtually no aspect of citizens' lives untouched.⁷ It governs even the most mundane aspects of life, such as the size of the eyes in Swiss cheese⁸ and the fat content of cat food.⁹ Given the ubiquity of rulemaking, as well as its overall significance to society, researchers and practitioners have devoted justifiable attention to studying and understanding the processes through which rules are developed, as well as the outcomes that are associated with these processes.¹⁰ When it comes to

4. Civil Aviation Security Rules, 67 Fed. Reg. 8,340 (Feb. 22, 2002).

5. Implementation of the United States Visitor and Immigration Status Indicator Technology Program, 69 Fed. Reg. 478 (Jan. 5, 2004).

6. CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* (3d ed. 2003).

7. *Id.*

8. Standards for Grades of Swiss Cheese, 66 Fed. Reg. 7,458 (Jan. 23, 2001) (regulating the size of Swiss cheese eyes); see also CINDY SKRZYCKI, *THE REGULATORS: ANONYMOUS POWER BROKERS IN AMERICAN POLITICS* 8 (2003).

9. 98 C.F.R. 355.29.

10. There is, of course, extensive literature on rulemaking in administrative law. For just a small sampling, see, e.g., Michael Asimow, *Interim Final Rules*, 51 ADMIN. L. REV. 703 (1999); William S. Jordan, III, *Judges, Ideology, and Policy in the Administrative State: Lessons from a Decade of Hard Look Remands of EPA Rules*, 53 ADMIN. L. REV. 45 (2001); JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* (3d ed. 1998); Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS. 57 (Autumn 1991); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts have Contributed to the Electricity Crisis of the 1990's*, 43 ADMIN. L. REV. 7 (1991); PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* (2d ed. 2004); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law*, 74 COLUM. L. REV. 1231 (1974). In addition, a smaller social science literature exists. See, e.g., sources cited *supra* note 8 and *infra* notes 11-12, 18. For a sample of our own contributions to this literature, see, e.g., Steven J. Balla, *Legislative Success and Failure and Participation in Rulemaking* 10 J. PUB. ADMIN. RES. & THEORY 633 (2000); Steven J. Balla, *Administrative Procedures and Political Control of the Bureaucracy*, 92 AM. POL. SCI. REV.

public commenting, for example, it is clear from the existing literature that some agency proposals attract little or no public attention while others generate thousands upon thousands of responses.¹¹ It also appears to be the case that, although agencies tend to consider comments quite carefully, proposed rules tend to be altered very little in response to the arguments and evidence raised in public comments.¹²

Notwithstanding the attention that rulemaking has received by some researchers, we still lack clear, systematic answers to some of the most fundamental questions about government rulemaking.¹³ For example, we know very little about how different organizations and individuals outside of government try to influence the rulemaking process and how different their strategies affect agency decisionmaking.¹⁴ Other unanswered questions include: Why do some rules take many years to develop, while others are executed more expeditiously? Why are some rules challenged in court, while others are not? How do different agency procedures affect rulemaking decisions?¹⁵

663 (1998); Steven J. Balla & John R. Wright, *Interest Groups, Advisory Committees, and Congressional Control of the Bureaucracy*, 45 AM. J. POL. SCI. 799 (2001); Steven Balla & John R. Wright, *Consensual Rule Making and the Time it Takes to Develop Rules*, POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 187 (George A. Krause & Kenneth J. Meier eds., 2003); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 U. ILL. L. REV. 1111 [hereinafter *Empirical Analysis*]; Cary Coglianese & Margaret Howard, *Getting the Message Out: Regulatory Policy and the Press*, 3 HARV. INT'L J. OF PRESS/POLITICS. 39 (1998); Stuart Shapiro, *The Role of Procedural Controls in the Ergonomics Rulemaking*, (September 13, 2004), at <http://ssrn.com/abstract=590843>; Stuart Shapiro, *Speed Bumps and Roadblocks: Procedural Controls and Regulatory Change*, 12 J. PUB. ADMIN. RES. & THEORY 29 (2002); Stuart Shiparo, *Two Months in the Life of the Regulatory State*, 30 ADMIN. & REG. L. NEWS 12 (2005).

11. KERWIN, *supra* note 6; see also Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245 (1998); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 413 (2005).

12. KERWIN, *supra* note 6; see also William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 77 (2004) (reporting empirical results indicating that agencies make few changes in rules in response to public comments).

13. See *Empirical Analysis*, *supra* note 10 (reviewing the literature on rulemaking and discussing remaining open questions).

14. To be sure, there has been some work surveying interest groups and bureaucrats about their perceptions regarding influence over the rulemaking process. See KERWIN, *supra* note 6; Scott Furlong, *Interest Group Influence on Rulemaking*, 29 ADMIN. & SOC. 325 (1997). Still, despite the prevalence of interest groups in rulemaking, the number of empirical studies on their strategies remains remarkably small.

15. An important line of research does focus on various procedural, institutional, and political influences on bureaucracies, but much more work certainly remains to be done. See, e.g., WILLIAM T. GORMLEY, JR., *TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES* (1989) (exploring the use and effectiveness of incentives, coercion, and other approaches to political control of the bureaucracy); JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002) (demonstrating that delegation from political institutions to bureaucratic

Questions such as these remain largely unanswered because of the difficulty in obtaining information about government rulemaking. For much of the past half-century, since the landmark enactment of the Administrative Procedure Act (APA),¹⁶ public comments, along with the official records of rulemakings in general, have existed in paper form only. These paper records have usually been stored in docket rooms accessible mainly through in-person visits to Washington, D.C. and the area surrounding the nation's capitol.

Owing to the logistical difficulties associated with access to information about rulemaking, much of the existing research on rulemaking tends to focus on individual, often high-profile, rulemakings or, at most, a limited number of case studies. For example, the interested reader can find books on the Federal Trade Commission's rulemaking efforts starting in the 1960s to require health warnings on cigarette packages,¹⁷ the EPA's regulatory proceedings under the Clean Air Act in the 1970s,¹⁸ the National Highway Traffic Safety Administration's rulemaking activities in the 1970s and 1980s on passive restraints and other automobile safety features,¹⁹ and the Food and Drug Administration's efforts in the 1990s to regulate cigarettes as drug delivery devices.²⁰ Efforts by legal scholars and social scientists to study rulemaking more systematically have similarly been limited in scope to relatively small sets of actions taken by particular agencies, during limited periods of time.²¹ Given the importance of

agencies varies systematically across political systems); John T. Scholz & B. Dan Wood, *Controlling the IRS: Principals, Principles, and Public Administration*, 42 AMER. J. POL. SCI. 141 (1998) (showing that agency enforcement activities varies over time and across jurisdictions in ways that reflect both political pressures and principles such as equity); David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 259 (1999) (exploring the efficacy of structural and procedural controls on decisionmaking at the Federal Energy Regulatory Commission); B. DAN WOOD & RICHARD W. WATERMAN, *BUREAUCRATIC DYNAMICS: THE ROLE OF BUREAUCRACY IN A DEMOCRACY* (1994) (showing how the actions of administrative agencies are responsive to changes in the political institutions of government).

16. 5 U.S.C. §§ 551-59, 701-06 (2000).

17. A. LEE FRITSCHLER & JAMES M. HOEFLER, *SMOKING AND POLITICS: POLICY MAKING AND THE FEDERAL BUREAUCRACY* (1996).

18. R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (1983).

19. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); JOHN D. GRAHAM, *AUTO SAFETY: ASSESSING AMERICA'S PERFORMANCE* (1989).

20. DAVID KESSLER, *A QUESTION OF INTENT* (2001).

21. *THE POLITICS OF REGULATION* (James Q. Wilson ed., 1980); see also JEFFREY M. BERRY, *FEEDING HUNGRY PEOPLE: RULEMAKING IN THE FOOD STAMP PROGRAM* (1984); GARY BRYNER, *BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES* (1987); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 UNIV. CHI. L. REV. 821 (2003); Golden, *supra* note 11; Robert Hahn, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J. L. & PUB. POL. 859 (2000); JOHN MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION* (1988); Ioana Munteanu & J. Woody Stanley, *Participation in E-Rulemaking: Evidence from an Agency Electronic Docket* (2004) (unpublished manuscript, on file with author); Christopher H. Schroeder & James T. Hamilton, *Strategic*

rulemaking to society, existing social science research on the regulatory process remains remarkably sparse and unsystematic, especially compared to the extensive research devoted to other governmental institutions, such as Congress, the Presidency, or the Supreme Court.²²

Rulemaking research that focuses largely on case studies makes it difficult to discern regularities or patterns, distinguishing what generally occurs from unique or idiosyncratic experiences. What is needed is a set of tools that can facilitate the development of a broader, more cumulative and more systematic body of knowledge about rulemaking. New applications of information technology to rulemaking could provide the needed tools to advance the study of rulemaking. The use of e-rulemaking via the Internet holds the potential for fostering the collection, storage, and retrieval, and ultimately, the analysis of data concerning rulemaking processes and outcomes. If designed properly, such applications could make agency proposals, public comments, and other aspects of rulemaking records available and useable at a very low cost to interested persons all around the world.

II. THE DEVELOPMENT OF E-RULEMAKING

A key hallmark of the APA was its encouragement of transparency in governmental decisionmaking and participation by affected interests through the notice and comment process.²³ Although reactions to notice and comment rulemaking range from Kenneth Culp Davis's praise as "one of the greatest inventions of modern government,"²⁴ to Donald Elliott's less favorable characterization as a form of Kabuki theatre,²⁵ almost every regulatory expert believes that information technology can enhance transparency and the quality of participation in the rulemaking process.²⁶

Regulators and the Choice of Rulemaking Procedures: The Selection of Formal vs. Informal Rules in Regulating Hazardous Waste, 57 LAW & CONTEMP. PROBS. 111 (1994); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990); West, *supra* note 12.

22. In the early 1980s, R. Douglas Arnold characterized bureaucratic policymaking and implementation as an "undertilled" field of research in political science. R. Douglas Arnold, *Overtilled and Undertilled Fields in American Politics*, 97 POL. SCI. Q. 91, 96 (1982). Although much important work has been published in the intervening years, the rulemaking field still remains much less tilled than others within political science.

23. DAVID H. ROSENBLUM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946-1999 38, 42, 48 (2000) (tracing the development of the APA and its underlying objectives of public participation and transparency).

24. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 6.15, at 283 (1st ed. Supp. 1970).

25. See E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L. J. 1490, 1492 (1992) (describing notice and comment as a style of Japanese theatre in which women are played by men, for the reason that in rulemaking, public comments are routinely ignored by the agencies that formally solicit them).

26. See Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools*

The movement toward electronic rulemaking began in the early 1990s when the Administrative Conference of the United States issued several reports on the use of technology and the rulemaking process.²⁷ The Clinton Administration's National Performance Review also increased the use of technology by agencies in the development of new rules.²⁸ Around this same time, the *Federal Register* and *Code of Federal Regulations* both became available online.

Regulatory agencies soon thereafter began to allow members of the public to submit comments via email.²⁹ A few agencies digitized the rulemaking process further with the establishment of electronic dockets. In 1998, the DOT became the first regulatory agency to make available an online, department-wide regulatory docket, providing full access to all studies, comments, and other documents that form the agency's rulemaking record.³⁰ The EPA subsequently adopted its own agency-wide system.³¹ Several other agencies have implemented similar online dockets for

for *Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1422 (2002) (suggesting that the Internet could have a fundamental impact on how the public participates in federal policymaking); see also Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 170 (2004) (arguing that "[a]dministrative law . . . stands to be transformed by trends toward increased openness" fostered by information technology); Stephen M. Johnson, *The Internet Changes Everything: Revolutionizing Public Participation and Access to Government Information Through the Internet*, 50 ADMIN. L. REV. 277, 282 (1998) (arguing that electronic technology will enhance the rulemaking process).

27. See HENRY H. PERRITT, JR., REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ELECTRONIC DOCKETS: THE USE OF INFORMATION TECHNOLOGY IN RULEMAKING AND ADJUDICATION I (1995) (examining the benefits of information technology for agency processes), available at <http://www.kentlaw.edu/classes/rstaudt/internetlaw/casbook/index.htm> (last visited Mar. 14, 2005); see also HENRY H. PERRITT, JR., REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL AGENCY ELECTRONIC RECORDS MANAGEMENT AND ARCHIVES 395 (1990) (addressing the legal implications of the shift to electronic information technologies).

28. See NATIONAL PERFORMANCE REVIEW, IT03: DEVELOP INTEGRATED ELECTRONIC ACCESS TO GOVERNMENT INFORMATION AND SERVICES (1993) (extolling information technology initiatives to improve citizen access to government information and services), available at <http://govinfo.library.unt.edu/npr/library/reports/it03.html> (last visited Mar. 9, 2005); see also NATIONAL PERFORMANCE REVIEW, REG04: ENHANCE PUBLIC AWARENESS AND PARTICIPATION (1993) (endorsing electronic dockets as a means of facilitating public participation in the rulemaking process), available at <http://govinfo.library.unt.edu/npr/library/reports/reg04.html> (last visited Mar. 9, 2005).

29. See, e.g., Cary Coglianese, *The Internet and Citizen Participation in Rulemaking*, I/S: J. L. & POL'Y FOR THE INFORMATION SOC'Y (forthcoming 2005) (noting that the U.S. Department of Agriculture permitted citizens to submit comments via e-mail in its organic food rulemaking).

30. See CHRISTINE S. MEERS, U.S. DEPARTMENT OF TRANSPORTATION, DEPARTMENT OF TRANSPORTATION'S DOCKET MANAGEMENT SYSTEM I (2001), (discussing the Department of Transportation's electronic docket management system), at <http://www.digitalgovernment.org/library/library/pdf/meers.pdf> (last visited Mar. 9, 2005).

31. See U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA), EDOCKET (n.d.) (providing information on the EPA's online public docket and comment system), available at <http://docket.epa.gov/edkpub/index.jsp> (last visited Mar. 9, 2005).

individual rulemaking proceedings.³²

Electronic rulemaking took a particularly significant step forward in 2001 when the OMB announced a major E-Government Initiative.³³ Over the next two years, the OMB pursued twenty-four projects as part of its initiative, one of which focused on “online rulemaking management.”³⁴ The Bush Administration’s online rulemaking project, coordinated by the OMB and the EPA, has three stages. The first of these—the creation of www.regulations.gov—was completed in January 2003. [Regulations.gov](http://www.regulations.gov) allows the public to review all agency proposed rules open for public comment and to submit comments from a single website.³⁵

The second stage of the online rulemaking project, the development of the Federal Docket Management System (FDMS), is the focus of this Article. Currently, the Administration is working to create a single, online clearinghouse for information about the rulemaking proceedings at all federal agencies.³⁶ The FDMS will store, and allow for the retrieval of, all agency documents related to proposed and final rules issued by any federal agency. Essentially, the FDMS will make the public records of rulemaking activities, in their entirety, readily available via the Internet to anyone interested in tracking government rulemaking.

Administration officials envision a third stage to the online rulemaking project that will focus on the development of desktop tools for government rule-writers. This third stage, focusing mainly on the needs of government staff to process and analyze information, is not expected to be undertaken until a later time.³⁷

32. See Cary Coglianese, *E-Rulemaking: Information Technology and Regulatory Policy: New Directions in Digital Government Research*, in JOHN F. KENNEDY SCHOOL OF GOV'T REG. POL'Y PROGRAM REP. NO. RPP-05, at 13 (2004) (highlighting the use of information technology in rulemaking by, among others, the Food and Drug Administration and the Federal Aviation Administration), available at http://www.ksg.harvard.edu/press/pdfs/E-Rulemaking_Report.pdf (last visited Mar. 9, 2005).

33. See Press Release, Office of Management and Budget, OMB Outlines New Federal E-Government Strategy (Oct. 25, 2001) (announcing cross-agency initiatives to improve federal government service and maximize the benefits to the federal government from information technology), available at <http://www.whitehouse.gov/omb/pubpress/2001-54.html> (last visited Mar. 9, 2005).

34. See OFFICE OF MANAGEMENT AND BUDGET, IMPLEMENTING THE PRESIDENT'S MANAGEMENT AGENDA FOR E-GOVERNMENT 3 (Apr. 2003) (detailing government-wide and agency-specific efforts that are part of the E-Government Initiative), available at http://www.whitehouse.gov/omb/egov/2003egov_strat.pdf (last visited Mar. 9, 2005).

35. See Stuart W. Shulman et al., *Electronic Rulemaking: New Frontiers in Public Participation*, 21 SOC. SCI. COMPUTER REV. 162, 164 (2003) (discussing [Regulations.gov](http://www.regulations.gov) as a centralized portal for government rulemaking).

36. See Office of Management and Budget, *FY 2003 Report to Congress on the Implementation of the E-Government Act*, OMB ANN. REP. 20 (2004) (mandating that agencies migrate to a common electronic docket system), available at http://www.whitehouse.gov/omb/egov/fy03_egov_rpt_to_congress.pdf (last visited Mar. 13, 2005).

37. See Rick Otis, *c-Rulemaking 9* (Jan. 21, 2003) (discussing the third module of the Administration's e-rulemaking effort) available at <http://www.ksg.harvard.edu/cbg/Confere>

What effects will this movement to electronic rulemaking have on government rulemaking? E-rulemaking has generated considerable interest within the research community and has elicited a variety of predictions about its effects on government decisionmaking.³⁸ In one of the earliest treatments of e-rulemaking, legal scholar Stephen Johnson predicted that information technology would positively transform the rulemaking process, expanding public participation and educating citizens about regulatory initiatives.³⁹ However, not everyone has shared Johnson's optimism. Others have expressed concerns that electronic rulemaking could potentially lead to a crowding out of thoughtful analysis, facilitating strategic obfuscation by interest groups or otherwise obscuring sound decisionmaking.⁴⁰

In actuality, the effects of e-rulemaking will likely depend on how it is designed, implemented, and utilized. In order to maximize the positive effects from e-rulemaking, as well as to enable researchers to study more precisely what these effects are, government decision makers should give careful consideration to the design of any new technologies used in rulemaking.

nces/rpp_rulemaking/Otis_Presentation.pdf (last visited May 9, 2005); *Electronic Government: A Progress Report on the Successes and Challenges of Government-Wide Information Technology Solutions Before the House of Representatives Committee on Government Reform, Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census*, 108th Cong. (Mar. 24, 2004) (statement of Kimberly T. Nelson, Assistant Administrator & Chief Information Officer for Environmental Information, U.S. EPA) (discussing the third module which would focus on desktop tools for regulators), available at http://reform.house.gov/UploadedFiles/EPA%20E-gov%20test_Mar_24_2004.pdf (last visited Mar. 9, 2005).

38. See Jeffrey S. Lubbers, *The Future of Electronic Rulemaking: A Research Agenda*, in JOHN F. KENNEDY SCHOOL OF GOV'T., REG. POL'Y PROGRAM REP. NO. RPP-2002-04, at 2 (suggesting that the rulemaking process could be transformed through the use of new technologies), available at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-04.pdf> (last visited Mar. 9, 2005); see also Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 366-71 (2004) (illustrating the broad potential of electronic rulemaking).

39. See Johnson, *supra* note 26, at 279 (hailing the advent of the Internet and use of other technological innovations in agency decisionmaking); see also Stephen Zavestoski & Stuart W. Shulman, *The Internet and Environmental Decision Making: An Introduction*, 15 ORGAN. & ENV'T 323, 324 (2002) (acknowledging the potential of the Internet for increasing public participation in the context of environmental decisionmaking).

40. See Michael Herz, *E-Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2002-2003, 149-51 (Jeffrey S. Lubbers ed., 2004) (suggesting that increased public participation may reduce the substantive impact of comments); see also Thomas Beierle, *Discussing the Rules: Electronic Rulemaking and Democratic Deliberation*, RESOURCES FOR THE FUTURE DISCUSSION PAPER 03-22 (arguing that e-dockets and e-dialogues alone cannot make the rulemaking process deliberative); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L. J. 433, 436-37 (2004) (warning of the drawbacks that come with a shift to a centralized electronic rulemaking system); David Schlosberg & John S. Dryzek, *Digital Democracy: Authentic or Virtual?*, 15 ORGAN. & ENV'T 332, 333 (2002) (postulating that the movement towards "digital democracy" actually inhibits deliberation).

III. THE DESIGN OF THE FDMS

The most significant web-based application that is expected to become operable in the next year will be the new FDMS. As it is currently envisioned, the FDMS will serve as a single, online clearinghouse for information about the activities of all federal agencies that issue rules. Like the paper-dockets that have traditionally been kept within each agency, the FDMS will store agency proposals and rules, public comments, and agency studies and analyses.⁴¹ But it will do so electronically, in a form accessible to any member of the public with a computer and Internet connection, and eventually it will do so for all agencies within the federal government.

The potential benefits of a government-wide docket system cannot be understated, particularly in terms of helping close the gap that exists between the societal significance of rulemaking and the relative dearth of cumulative knowledge about this crucial mode of policymaking. These prospective benefits, however, will only be fully achieved if the government develops the FDMS in ways that ensure consistency in data fields, flexibility in searching, and ease in the ability to download data. As researchers with considerable experience in collecting and analyzing information about rulemaking, we have taken considerable interest in the design and implementation of the FDMS. We believe the FDMS promises not only to make the entire rulemaking process more transparent to the general public, helping improve rulemaking in the short term, but also to facilitate significantly more comprehensive and useful research on government rulemaking, helping improve rulemaking in the long term.

During the summer of 2004, Cary Coglianese worked with the EPA's e-Rulemaking Initiative staff to develop a public outreach strategy on the design of the FDMS. As part of that strategy, the EPA held a series of public meetings around the country in August, one of which Coglianese facilitated at the John F. Kennedy School of Government in Cambridge, Massachusetts.⁴² At that session, as well as the others held in California and Washington, D.C., the latter of which was attended by Steven Balla, the EPA shared with the public its current plans for the design of the FDMS, including displaying a mock-up of the FDMS interface.⁴³

The mock-up that the EPA displayed revealed something surprising to

41. See *Electronic Government*, *supra* note 37 (statement of Kimberly T. Nelson, Assistant Administrator & Chief Information Officer for Environmental Information, U.S. EPA) (characterizing the FDMS as a central electronic repository for rulemaking documents and materials).

42. Forum on Public Access to Federal Rulemaking Through the Internet, 69 Fed. Reg. 42727, 42728 (July 16, 2004).

43. See EPA, E-RULEMAKING INITIATIVE PUBLIC FORUM (2004) (depicting a proposed model of the FDMS website), available at http://www.ksg.harvard.edu/cbg/rpp/crulcmaking/papers_reports/HarvardPublicforumPresentation08-06-04final.pdf (last visited Mar. 9, 2005).

those who follow rulemaking closely: It did not appear to contain all the data fields found in existing online dockets, such as the DOT's Docket Management System.⁴⁴ It also did not include data fields for all the information currently reported by agencies to the *Federal Register*. While those who participated in the public meetings recognized that the EPA was displaying a mock-up rather than the final FDMS interface, the existence of glaring data gaps nevertheless prompted Coglianese to advise the EPA to pay closer attention to the information stored in the FDMS and Balla to emphasize the importance of the search and download capabilities of the system. At the time, it appeared to those outside the e-Rulemaking Initiative that the EPA and its contractor, the Lockheed Corporation, were more preoccupied with other concerns, such as technical issues about communication and data storage protocols for the new system. While such technical issues are clearly important, the ultimate value of the FDMS for the public and those who study rulemaking will depend on the information it contains, as well as on how it displays that information and allows users to search and download it.

In the early fall of 2004, we began to draft a detailed set of recommendations for the design of the new FDMS to help enhance both the general public accessibility of docket information, as well as its availability for research purposes. While we believed the input provided during the summer public meetings was valuable, we wanted to make sure that the staff at the OMB, the EPA, and Lockheed had clear and concrete suggestions about how to design the FDMS so it would have maximum value for both the public and the research community.

Having secured support of our recommendations from fifty-five academic colleagues from across the country, we submitted our recommendations on November 11, 2004 to Karen Evans, Administrator of the Office of Electronic Government and Information Technology, and John Graham, Administrator of the Office of Information and Regulatory Affairs, both at the OMB. We also sent copies of the letter to the key leaders of the e-Rulemaking Initiative at the EPA, including Kim Nelson, Rick Otis, and Oscar Morales, as well as to the principal liaison from Lockheed Corporation overseeing the project.

While we made the decision to limit signatures on the letter only to those who had published academic research on rulemaking from within the fields of law, political science, and economics, we nevertheless recognized that the recommendations we offered, if followed, would bring value to lawyers and other professionals whose work brings them into contact with

44. DOT, DOCKET MANAGEMENT SYSTEM, at <http://dms.dot.gov> (last visited Mar. 9, 2005).

administrative rulemaking. Within less than a week from the time we submitted our recommendations to the OMB, the American Bar Association's Section on Administrative Law and Regulatory Practice formally endorsed our recommendations in a separate submission to the OMB.⁴⁵ Given the potential importance of the FDMS to future research on rulemaking, as well as to the legal profession and broader public more generally, we reproduce our recommendations as part of this Article.

In making our recommendations, we emphasized three key principles in the design of the FDMS:

- *Consistency in Data.* We urged the OMB and the EPA to work to keep data fields consistent, both across agencies and over time.
- *Flexibility of Search.* We recommended that the FDMS be designed so that users will be able to define their own searches using any of the fields within the docket system.
- *Ease of Downloading.* We stressed that users should be able to download and export search results in large batches and in commonly used formats.

We believe these three principles capture both the needs of researchers who will use the FDMS to study the rulemaking process, as well as the needs of the informed public who will use the FDMS to find regulatory documents that impact their interests.

Each section of our letter to the OMB elaborates on these principles, offering specific recommendations about the design of the FDMS. The first section addresses the often confusing relationship that exists in the non-electronic world between dockets and *Federal Register* notices. We have noticed over the years that agency dockets and rulemaking filings do not often have a one-to-one relationship, as agencies sometimes open dockets for non-rulemaking activities and other times open multiple dockets for a single rulemaking. Unless the correspondence between agency dockets and rulemakings is addressed, users of the new FDMS will face considerable confusion. We recommend that the OMB consider designing the FDMS so that users will be able to search the system for a particular *Federal Register* notice and then easily find all other documents associated with that notice. Toward this end, it will be crucial to develop a system for coding *Federal Register* documents in a consistent way across agencies.

In the second section of our letter, we discuss the data fields that will be important to include in the FDMS. From our perspective, it is important that as much relevant data about each rulemaking be included so that researchers can gain a better understanding of how the regulatory process

45. See *supra* note 3.

works across large numbers of rulemakings and agencies. From the perspective of the broader public, individuals or interest groups should be able to quickly access all the information that would help them contribute to the regulatory process. We strongly urge the OMB to ensure that the move to the new FDMS result in no loss of information currently available to the public. Information that all agencies currently submit to the Office of the Federal Register, the Regulatory Information Service Center, and OMB, and the information that particular agencies currently maintain in their own public dockets should continue to be available as part of the FDMS. Moreover, the current information reported by agencies should only be treated as a lower bound for the information available in the FDMS, not an upper bound. The FDMS should have the flexibility and capacity to evolve and include new data fields necessary both for researchers and the public to understand agency rulemaking. Toward this end, we make certain suggestions for fields that it would be useful to include in the FDMS.

The final section of our letter addresses the search and download capabilities of the FDMS. This question is of particular import to the research community, for the FDMS has the potential to pave the way for more studies of large numbers of rulemakings. The ability of researchers to undertake such studies depends on the ease and flexibility of searching the FDMS. We urge the OMB and the EPA to ensure that users will be able to generate their own searches of any data field or combination of fields contained in the system. Users should also be able to easily download batches of data, not just individual documents, from these searches in any several commonly used formats.

Each of these three sets of recommendations corresponds to a crucial set of decisions that the architects of the FDMS will have to make. If designed properly to respond to these recommendations, the FDMS should allow researchers to conduct large-scale studies that have the potential to enhance our understanding of the rulemaking process. In addition, any interested member of the public will have access to a far wider range of information about agency intentions and views, which may provide the basis for more informed and useful comments.

* * *

CODA

On March 11, 2005, as this Article was in production, we received a formal response to our letter from John Graham and Karen Evans at OMB, in which they expressed their commitment to designing the FDMS in a

manner consistent with our recommendations.⁴⁶ Their response letter stated that “FDMS will support the vast majority of [our] recommendations” and that the new system will, at a minimum, “contain all the data currently used by Agencies, OMB, and the Office of Federal Register.”⁴⁷ We are, of course, encouraged at the expressed receptivity of the Administration to the ideas advanced in our letter. Ultimately, though, any verdict on the usefulness of the FDMS and the effectiveness of its design must await its actual implementation and use. As we have indicated, the benefits for future research on rulemaking, and more importantly the benefits that such research can generate in terms of improving regulation and the regulatory process, will depend on how users are able to interact with, access, and download the information contained in docket management system.

* * *

November 11, 2004 Scholar’s Letter to OMB Containing
Recommendations on the Design of the Federal Docket
Management System⁴⁸

The Administration’s eRulemaking Initiative will have important implications for access to regulatory information both for those who work on rules and those organizations and citizens who are affected by rules. We write as scholars of rulemaking to suggest priorities that should guide the eRulemaking Initiative so that all interested parties can better understand and contribute to this common and important mode of policymaking.

46. Letter to Dr. Cary Coglianese from John D. Graham, Ph.D., and Karen S. Evans, March 11, 2005, available at <http://ksghome.harvard.edu/%7ECCoglianese/OMBResponse.pdf>.

47. *Id.*

48. These recommendations originally took the form of a letter sent November 11, 2004 to the Hon. Karen S. Evans, Administrator of the Office of Electronic Government and Information Technology, and to the Hon. John D. Graham, Administrator of the Office of Information and Regulatory Affairs, Office of the Management and Budget. The authors of this article were the authors of the letter. They were joined on the letter by the following scholars as additional signatories: Richard N. L. Andrews, Michael Asimow, Bernard W. Bell, Lori Snyder Benneer, Barbara H. Brandon, John Brehm, Gary Bryner, Johnny C. Burris, Mariano-Florentino Cuéllar, Steven P. Croley, David M. Driesen, Daniel C. Esty, Victor B. Flatt, William F. Funk, Scott Furlong, Ted Gayer, Marissa Martino Golden, William T. Gormley, Jr., Robert W. Hahn, James T. Hamilton, Michael Herz, William W. Hogan, William S. Jordan, III, Cornelius M. Kerwin, George Krause, David Lazer, Jeffrey S. Lubbers, Gary Marchant, Jerry L. Mashaw, Peter J. May, Kenneth J. Meier, R. Shep Melnick, John Mendeloff, Joel A. Mintz, Beth Simone Noveck, Craig N. Oren, Henry H. Perritt, Jr., Matthew Potoski, Richard J. Pierce, Jr., David H. Rosenbloom, Thomas O. Sargentich, John Scholz, Peter H. Schuck, Peter Shane, Charles R. Shipan, Stuart W. Shulman, David B. Spence, Robert N. Stavins, Peter L. Strauss, Barton H. Thompson, Jr., Robert R.M. Verchick, David Vogel, Jonathan B. Wiener, William West, B. Dan Wood. A copy of the letter in the format submitted to OMB is available at: <http://ksghome.harvard.edu/~CCoglianese/ScholarLetteronFedDktMgtSystem.pdf>.

Collectively, we have studied rulemaking at dozens of regulatory agencies across the federal government. Based on our extensive experience using agencies' rulemaking dockets and accessing information from them for our research, we believe three principles are vital in designing the forthcoming Federal Docket Management System (FDMS):

- *Consistency in Data.* Every effort should be made to keep data fields consistent, both across agencies and over time. Consistency over time is especially important, so that information available in a post-Regulations.Gov era can be matched with earlier information.
- *Flexibility of Search.* Users should be able to define their own searches using any of the fields within the docket system. They should also be able to combine different fields.
- *Ease of Access.* Users should be able not only to search docket data in a self-defined way, but should be able to download and export search results in commonly used formats, such as comma-separated or Excel or both.

Adherence to these three principles will make it easier for researchers and other members of the public to follow, understand, and contribute to the rulemaking process. Using these principles to guide the FDMS will advance the eRulemaking Initiative's goal of making the regulatory process more transparent to the American public.

In addition to these principles, we offer several specific recommendations about the design, data, and downloading features of the FDMS. Our recommendations are divided into three parts. In Part I, we address the relationship between individual agency dockets and *Federal Register* documents. The *Federal Register* is the publication of record for regulatory policymaking and the relationship between individual dockets and specific *Federal Register* notices must be made clear in the new FDMS. In Part II, we enumerate the specific data fields that the FDMS should contain. We believe that important progress can be made with little effort by beginning with data currently reported by agencies as part of the Unified Agenda, *Federal Register*, and OMB's 83-R Form. Building existing reported data into the online docket system should be readily feasible, as it does not require agencies to report any new data. Finally, in Part III, we discuss in detail the kind of search and download capabilities that should be part of the FDMS. In each Part, we offer specific recommendations to the Administration as it goes forward to develop the new government-wide docket system.

DOCKETS AND *FEDERAL REGISTER* NOTICES

To make the information in the online docket system useful to researchers who study rulemaking, care will need to be given to matching

dockets with the *Federal Register* notices that agencies use to announce their rulemaking activities. This need arises because the way that dockets are used, as well as the type of information they contain, varies markedly across different agencies. Although individual dockets are closely related to individual rulemakings, the correspondence is not always one to one. Some dockets are opened for proceedings other than rulemakings. Some dockets are opened for rulemakings that are later abandoned. Some provide supporting documents for more than one rule. Sometimes agencies have multiple dockets for the same rulemaking (such as when an agency opens a new docket for addressing a petition for an amendment or reconsideration of a rule).

For researchers who study rulemaking, the relationship between dockets and rules needs to be clearly delineated and consistently treated. There are at least two main ways to address this issue: (1) create a system that allows for varied uses of dockets but still clearly links rules with associated dockets; or (2) require a strict one-to-one relationship between each rule and a corresponding docket. The latter should be feasible if the data in each docket are completely digitized, as it would be just a matter of copying all the pertinent records (even if they were previously in another docket) into the new docket. No matter how the connections between dockets and rules are made, it should be possible for researchers to search the online docket by *Federal Register* notices and identify the pertinent information from the supporting docket for each proposed or final rulemaking.

Recommendation: The designers of the new government-wide online docket system should recognize that currently not every docket corresponds to a separate rulemaking. Recognizing this fact, the system should be designed to allow users to search the system according to documents filed in the *Federal Register* (such as a proposed or final rule notice) and then to identify the supporting information associated with each *Federal Register* notice.

One possible way to create a system that accommodates varied agency use of dockets might be to create a structure so that information in the “docket detail” is general enough to apply to any and all *Federal Register* notices that might be filed in connection with a rulemaking. Such a docket detail probably should include a paragraph describing the activity that the docket supports. In addition, the docket would include nested “sub-domains” for each *Federal Register* notice associated with the docket. Some of the information in the docket system – such as whether a rule is

economically significant and requires OMB review – would be placed in the *Federal Register* notice sub-domain for the proposed or final rule, not in the overall docket detail itself. This is important because fields of data do sometimes change during the rulemaking process. For example, a proposed rule might not initially be considered economically significant, but changes made to it may make it more costly, making the final rule economically significant under the definition in Executive Order 12866 and the Unfunded Mandates Reform Act.

Recommendation: The FDMS should be designed so that information associated with individual *Federal Register* documents filed during a rulemaking can be included in the appropriate dockets and distinguished from information that applies across the board to the entire rulemaking.

Contemplating subdomains for each *Federal Register* notices highlights another important issue: the need for consistent categories to organize and categorize *Federal Register* notices. One important decision will be how to distinguish between “rule” and “non-rule” *Federal Register* notices. For example, some agencies may open dockets in connection with studies or non-binding guidance documents in addition to rulemakings. These non-rule proceedings should be kept distinct from rulemakings, but sometimes the distinction will not be known until later in the process. An agency may open a docket thinking it will create a new rule, but later may decide only to issue a non-binding guidance document instead.

Even for those *Federal Register* notices associated just with rulemaking, there is a need for consistency, both within and across agencies, in how to code the associated notices. Some categories seem to be places to start:

- ANPRM
- NPRM
- Supplemental NPRM
- Request for Comments
- Direct Final Rule
- Final Rule
- Correction/Technical Amendment
- Unified Agenda Notice or Entry
- Other (perhaps with a box allowing agency to enter a description)

Recommendation: The FDMS should make use of consistent coding of *Federal Register* documents, both across different rulemakings in the same agency as well as across different agencies.

DATA FIELDS FOR THE ONLINE DOCKET SYSTEM

Realizing the docket system's potential for improving scholarly and public understanding of the rulemaking process rests both upon the data within each individual docket and the ability to search and organize that data. We turn next to issues related to developing a complete set of the data fields for each docket. In Part III, we address issues about searching and downloading.

Including complete and appropriate data will not only facilitate scholarly research, but will also be useful to the broader public. The more complete the information in electronic dockets, the greater the likely contribution electronic dockets will make to the quality of public discourse on regulatory issues. Electronic dockets can help inform members of the public about proposed regulations and their impacts, but their impact will depend on having information in these dockets that is useful, complete, consistent, and easy to find.

TABLE 1

CURRENTLY SUBMITTED DATA FIELDS FOR RULEMAKING PROCEEDINGS

Data Submitted to the Office of the Federal Register	Data Submitted to the Regulatory Information Service Center	Data Submitted to the Office of Management and Budget
<ul style="list-style-type: none"> • Name of Rule • Agency • Department (if any) • CFR Volume • Date • Date of NPRM (for final rules) • Effective Date (for final rules) • Whether it is a direct or interim final rule • End of comment period (for NPRMs) • RIN 	<ul style="list-style-type: none"> • Name of Rule • Agency • Priority • Legal Authority • CFR Citation • Legal Deadline • Regulatory Flexibility Analysis Required? • Small Entities Affected? • Government Levels Affected? • Agency Contact • RIN 	<ul style="list-style-type: none"> • Name of Rule • Agency • Legal Deadline • Is Deadline Statutory or Judicial? • Stage of Development • Is rule economically significant under E.O. 12866? • Is rule an Unfunded Mandate under 2 U.S.C. 1532? • Agency Contact

The starting point for data to include in each regulatory docket should be those data that are already reported by agencies in the rulemaking process. This includes data that agencies submit to (1) the Office of the Federal Register for notices of proposed and final rulemakings, (2) the Regulatory Information Service Center for use in the Unified Agenda, and (3) the Office of Management and Budget for all significant proposed rules. (Table 1 lists the data included in each of these three categories.) It also

includes information OMB already makes available in association with its review of each proposed rule. Maintaining these existing data within the new online docket system will not only serve the principle of consistency, but could also facilitate future development of agency reporting practices that avoid the duplication Table 1 shows exists in the current system.

Recommendation: The FDMS should contain all the unique data that currently exist in the reports each agency already routinely submits to the Office of the Federal Register, the Regulatory Information Service Center, and the Office of Management and Budget.

The data listed in Table 1 represent the minimum data reported by each agency for every rule (or in the case of the data submitted to OMB, for every “significant” rule). Many agencies provide the public with still more information through their existing, agency-specific dockets. Table 2 gives examples of such data for the Department of Transportation (DOT) and the Environmental Protection Agency (EPA). The movement to a uniform, government-wide docketing system should not result in the loss of any information currently being made available by individual agencies, so at a minimum the new government-wide docket system should include the data fields shown in Table 2. Most of the relevant data are relatively simple to gather and can be of great use both to the general public and to scholars who study rulemaking.

TABLE 2
CURRENTLY REPORTED DATA FIELDS IN DOT AND EPA DOCKETS

Department of Transportation	
<i>Data for Docket as a Whole</i>	<i>Data Specific to Each Docket Document</i>
<ul style="list-style-type: none"> • Category (e.g. Rulemaking) • Docket Status • Subcategory (e.g. Airworthiness Directive) • Docket Subject • Docket Title • Data Entry Date • RIN Number • Action Office • Action Sought • Docket Parties • Statutory Deadline • Close of Comment Period • Last Update • Date Docket is Closed • Statutory Cite • Number of Documents in Docket • Statutory or Judicial Requirement • CFR Citation • Docket Attributes • Docket Abstract 	<ul style="list-style-type: none"> • Data Entry Date • Document Title • Next Due Date • Document Date • Filing Date • Answer Date • Reply Date • Next Due Item • <i>Federal Register</i> Citation • <i>Federal Register</i> Publication Date • Submitter • Submitter's Representative • Service Date • Effective Date • Assigned Document Numbers • Related Reply to Document #'s • Pages • Submissions • Abstract • File Size
Environmental Protection Agency	
<i>Data for Docket as a Whole*</i>	<i>Data Specific to Each Docket Document</i>
<ul style="list-style-type: none"> • Docket ID • Phase • Short Title • Title • Legacy Identifier • Description • Type • Comment Period Ends <p>* With links to Related Dockets, Contacts, Organizations, CFR citations, Acts, Chemicals, Goals, Documents and all of the above.</p>	<ul style="list-style-type: none"> • Document ID • Docket ID • Title • Description • Type • Author Date • Effective Date • Page Count • Phase • Media • Restricted Viewing

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 "Unifying Rulemaking Information: Recommendations for the New Federal Docket Management System" by Cary Coglianese, Stuart Shapiro, & Stephen J. Balla, published in the Administrative Law Review, Volume 57, No. 2, Spring 2005. © 2005 by the American Bar Association.
 Reproduced by permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Recommendation: If it has not already done so, the eRulemaking Initiative should ask participating agencies to submit a list of data fields currently contained in their agency-specific dockets, or otherwise conduct a survey of the data fields in existing agency dockets.

Recommendation: Moving to the new FDMS should result in no loss of information to the public. The new system should require agencies to submit information for all the data fields that are already found in regulatory agencies' existing dockets.

In addition to the data already contained in existing regulatory filings and agency dockets, we believe there are several new data elements that would be easily added to the new online docket system and should be made available to the user for every docket. These additional data elements include:

- The number of documents in the docket.
- The number of *Federal Register* documents in the docket.
- The number of public comments in the docket.
- The number of agency documents in the docket.
- The file size of the docket as a whole.
- A sortable (by author, title, and date) table of contents linking to individual documents and indicating their file size.

We anticipate that these additional elements, which could be added using automated functions, will help greatly in the organization and usefulness of the online docket system.

Recommendation: Each docket in the FDMS should contain basic summary data, such as the number of documents or comments filed, that could easily be added to the new online docket system in an early stage of its development.

Finally, to enhance researchers' ability to study the regulatory process and the public's ability to understand it, we believe that additional fields of data eventually should be added to the FDMS that are not currently reported by agencies in their docket systems. Although developing protocols for inclusion of some of these data will involve a longer-term effort, we hope that the work of the eRulemaking Initiative will establish a process for the future enhancement of the online docket system that can include consideration of additional data fields. Table 3, while neither definitive nor complete, simply illustrates some of the possible types of information that could be added to the online docket system in the future.

TABLE 3

DATA FIELDS TO CONSIDER ADDING TO THE DOCKET SYSTEM OVER THE LONGER TERM

- All associated *Federal Register* notices (from earlier, related rulemakings through to ANPRMs)
- Pre- and Post-NPRM consultations with outside groups such as advisory committees or stakeholder meetings
- Whether Negotiated Rulemaking was used
- Associated information collections under Paperwork Reduction Act and their burden hours
- Word count of Regulatory text
- Word count of Preamble
- Length of time for OIRA review (for significant rules)
- Whether OIRA recommended changes to the rule
- Summary of economic data on the rule, such as:
 - Total Benefits (a range if appropriate)
 - Total Costs (a range if appropriate)
 - Timing of benefits and costs
 - Discount Rate Used
 - Value of statistical life or life-year used (if appropriate)

Recommendation: Although the new online docket system should be designed at the outset to include all the data fields contained in existing docket systems, the system must have the capacity to evolve and have new data fields added that will improve both researchers' and the public's ability to understand agency rulemaking. The eRulemaking Initiative should avoid setting unnecessarily modest longer-term goals.

We recognize that including all of the fields we have suggested will not be a simple task. Thus, the first step should be to incorporate data already reported by agencies. The movement to a government-wide online docketing system, however, presents a significant opportunity for enhancing the current system of rulemaking reporting. Serious consideration needs to be given to the precise data fields to include in the FDMS.

SEARCH AND DOWNLOAD CAPABILITIES

For researchers, one of the most exciting aspects of the pending government-wide docket management system is its potential to transform the scope and method of the study of rulemaking. By making it possible

for researchers to access and retrieve large numbers of agency records electronically, the system promises to bring us to the cusp of a new era in understanding both the management of rulemaking and the public's participation in this important mode of policymaking. These prospective benefits, however, will only be fully realized if the system is designed to facilitate particular kinds of searches and downloads.

Historically, research on rulemaking has usually been oriented around the study of a single rule or a small number of rules. Such intensive case study approaches are certainly of great value, and this kind of research is likely to (and should) continue to be done in the years ahead. Another important approach to research, however, has been for the most part been infeasible in the era of paper dockets, namely studies that include a large number of rulemakings. Such "large-N" studies can significantly add to our knowledge of rulemaking by helping illuminate general patterns in rulemaking, thus complementing the detailed information provided by case studies.

How specifically can the docket management system open the door up to large-N research and all of the benefits that come from this mode of inquiry? Right now, information about a large number of rulemakings can only be assembled by visiting a wide variety of online sources or the physical docket rooms in Washington, D.C. that remain to this day the sole depository of documents for many rulemakings. The FDMS will make a major step forward by serving as a central clearinghouse for locating and piecing together the official written records of rulemakings conducted by agencies from across the federal government.

The advantages of the government-wide online docket system for scholarly research will be still further strengthened if two elements are built into it. First, the new docket system should allow users to search for dockets or documents with user-defined search terms of any data field or combination of fields. Second, the new docket system should allow users to download a large number of documents obtained through their searches.

The first element is the capacity to search for rulemakings according to particularly broad search criteria. For many users of the system, several relatively narrow search criteria are likely to suffice. These criteria might include docket numbers, keywords, and *Federal Register* citations. For researchers interested in breaking new ground in the study of rulemaking, the assembly of information for large samples of rulemakings necessitates searches that cast wide nets across time and jurisdiction or issue space. For example, a researcher might seek to identify the dockets that go along with all of the rulemakings that were completed by the Environmental Protection Agency over the past five years. Another researcher might want to track down the dockets for all of the rulemakings that were open for

public comment during the first six months of 2004. The general point is that the system would best facilitate research on rulemaking if a broad range of search criteria such as the following were present:

- Search by specific date or date range
- Search by agency
- Search by specific editions of the Unified Agenda
- Search by stage in the rulemaking process
- Search by a combination of these criteria

Recommendation: Flexibility should be the guiding principle when it comes to searching capabilities. The FDMS should permit users to generate their own searches of any data field or combination of fields.

In addition to accepting user-defined searches, the new docket system also must enable users to transfer information off the system to the researchers themselves. This transferred information can then be formatted and organized in ways that are directly amenable to data analysis and interpretation. Thus, a second key element of the system is the capacity to download large numbers of documents and even entire dockets in a transparent and useful way. Since all of the data in the FDMS will already be available to the public and are subject to FOIA, building a flexible download capability is consistent with current E-FOIA requirements and should actually save agencies the burden of having to respond to FOIA requests.

Recommendation: The FDMS should enable the user to download any and all data or documents retrieved through the system's search engine.

The needs of the research community, as one of a variety of communities with a stake in the development of the government-wide online docket system, are likely to dovetail in important ways with the eRulemaking Initiative's goal of making the regulatory process more transparent. For the research community, the FDMS promises not only to make existing modes of research far more efficient, but also to make possible underutilized modes of inquiry that can enhance our understanding of the management of and public involvement in the rulemaking process. This possibility, however, can only be fully achieved if the FDMS is designed to facilitate searches and downloads that are broadly defined across time and space, rather than limited to a handful of very specific criteria and pieces of information.

CONCLUSION

The creation of an online docket system has important implications both for academic researchers and anyone interested in better understanding government regulation. The principles we have enunciated will not require any dramatic changes to the regulatory process, nor even much additional commitment of resources. But we believe following these recommendations will help significantly advance the Administration's laudable goal of making it easier for the public to understand and participate in the rulemaking process.

* * *

THE ROLE OF SCIENCE IN RULEMAKING

TUESDAY, MAY 9, 2006

9:00 a.m.—Intro/Welcome

Neil Kerwin, Interim President, American University, Director of the
Center for the Study of Rulemaking

9:15–10:35 a.m.—Panel 1:

“OMB’S RECENT INITIATIVES ON REGULATORY SCIENCE”

Moderator:

Curtis Copeland, Congressional Research Service

Panelists:

Don Arbuckle, Acting Administrator, Office of Management and
Budget—Office of Information and Regulatory Affairs

Al Teich, Director of Science and Policy Programs,
American Association for the Advancement of Science

Bill Kovacs, Vice President for Environment, Technology &
Regulatory Affairs, U.S. Chamber of Commerce

Rena Steinzor, Professor, University of Maryland School of Law,
and Co-Founder of the Center for Progressive Regulation

NEIL KERWIN. Good morning everybody. I'd like to get us started this morning with a couple of introductory remarks. My name is Neil Kerwin. I am the interim president of American University (AU). I'm also a professor of public administration in the School of Public Affairs and the director of the Center for the Study of Rulemaking. I want to welcome you all to American University. I want to welcome you all to our still brand-new Katzen Center for the Arts, and in particular the Abramson Recital Hall. This is a session that I expect will be a stimulating and informative exploration of a topic central to the public policy process in the United States and in the process, of course, the quality of life in the United States.

I have a number of people I'd like to thank. We have partners in this this morning. The Subcommittee on Commercial and Administrative Law of the Judiciary Committee of the House of Representatives was the stimulus, I think, behind this particular session. The Congressional Research Service, and particularly Mort Rosenberg and Curtis Copeland were critical in the development of the session. And they worked very closely as an organizing committee with two members of the American University faculty, who you will hear from a little later today: Dr. Laura Langbein, who is the director of the doctoral program in the School of Public Affairs, and Jeff Lubbers, a professor in our Washington College of Law.

A session of this sort is one that the Center for the Study of Rulemaking takes as part of its mission. When we created the Center a couple of years ago, we were frankly still surprised and somewhat bemused that we were still the only one in the United States devoted exclusively to the study of a process of government that deserves a great deal of focused, organized, and institution-based attention. The field of rulemaking studies is happily, I believe, grow-

ing. It is diversifying, but frankly only slowly and certainly not—with regard to the amount of time and attention spent in the social sciences, at least, still not reached the points that other administrative processes have in terms of organized research. The intellectual debt that's owed to a still fairly small number of legal scholars, political scientists, policy analysts, and students of public administration is very great. But I happen to believe that their work has barely scratched the surface of a process that has become, in my view, irrefutably the most important source of law in America.

Today's focus is on the role of science in the rulemaking process. Whatever definition of rulemaking you prefer, whatever element of the process you choose to concentrate your professional attention and energies on, at its most basic, rulemaking is the transformation of information into legal obligations and rights. That information takes many forms, but the type of information that contributes most profoundly to a vast swath of rulemaking can be broadly categorized as scientific. Today, the panels focus on the state of scientific information in rulemaking, fully cognizant of the fact that scientific information contributes to a number of other stages in the regulatory process. I have been asked by the panels and the organizing committee to remind everyone that the focus is indeed today on rulemaking, so I would ask that all of us emulate the scientific method by staying to the extent we can on task, with discipline and perseverance, whatever the temptations to stray might be.

Again, I do want to thank a number of people for assisting in the organization of today's activity—Susan Jensen, Brenda Hankins, and Mike Lenn, Counsel to the Subcommittee on Commercial and Administrative Law, Mort Rosenberg, and Curtis Copeland from the Congressional Research Service, Jeff Lubbers, again, who I think many of you know as the author of "The Guide to Federal Rulemaking," which is, as best I can determine, Jeff, the major competitor to my text on rulemaking. It's a terrific book and a very bad career move.

[Laughter.]

Mr. KERWIN. And Laura Langbein, who is, I think as many of you know, a scholar of the regulatory process more than 20 years standing—they are the people who made this happen and who deserve the credit for the extraordinary group of scholars and experts that have been assembled here today.

So without further ado, and to introduce our first panel, let me turn to our colleague, Curtis Copeland.

[Applause.]

CURTIS COPELAND. Thank you, Neil. The first panel today is on the Office of Management and Budget's (OMB) recent initiatives in the area of science and rulemaking. In recent years, OMB has taken a number of actions—some unilaterally, some at the urging of Congress—that are expected to have a significant effect on rulemaking and in particular regulatory science. First, the Information Quality Act (IQA) or Data Quality Act enacted in December 2000 required OMB to issue guidance to federal agencies to ensure and maximize the quality, objectivity, utility, and integrity of information disseminated by federal agencies. OMB published the final guidelines in September 2001 as required by the statute and repub-

lished the guidelines in February '02. The guidelines were highly detailed, imposed higher standards of quality on quote, unquote, influential science information with a clear and substantial impact on important public policies or private sector decisions.

In September '03, OMB issued a bulletin on peer review and information quality that proposed establishing a process by which all significant regulatory information would be peer reviewed. The proposed bulletin was extremely controversial and generated nearly 200 comments, including comments from members of Congress and prestigious scientific organizations. As a result, in April 2004, OMB published a significant peer review bulletin that was broader in scope than the earlier bulletin but gave agencies substantial discretion to decide when information was influential. But OMB also retained a great deal of discretion to decide when information was highly influential. OMB published a similar final version of the bulletin in January 2005.

And finally in January 2006, OMB published a proposed bulletin on risk assessment for public comment and peer review by the National Academy of Sciences (NAS). Risk assessment is defined in the document as that which assembles and synthesizes scientific information to determine whether a potential hazard exists and/or the extent of possible risk to human health, safety, or the environment. The bulletin establishes general risk assessment standards and establishes special standards for influential risk assessments. Comments on the bulletin are requested by June 15, 2006.

What we want to do today is hear from a variety of perspectives on these initiatives, and we've assembled an illustrious panel to do so. Leading off will be Don Arbuckle. Currently—and Don didn't send me his bio so I had to make this up. Don is currently the acting director of OMB's Office of Information and Regulatory Affairs (OIRA). In that capacity, he oversees presidential review of regulatory, statistical, and information policy throughout the executive branch. Before becoming acting director in March—I believe this is your second tour, right? At least? It feels like more than that. Don had served as deputy director of the highest career position in OIRA since 1996. He has been at OIRA since its creation in 1981.

Don?

DON ARBUCKLE. I'm going to talk from here if you don't mind. There is no podium that I've ever met that has designed for the 95th percentile male. Curtis and Neil both have indicated that the focus of this seminar is on recent regulatory developments. "Recent" is of course—all is relative. There are some of you out in the audience who have been associated with this field of endeavor for many, many years. Mr. Tozzi, for example, one of those who was here at the creation, has been involved in this since Gondwanaland broke up and the Atlantic was formed. But others of you have been here for a lesser period of time.

But I wanted to point out that, in general, OMB's role in science, if you will, or the agencies that practice science is very broad and goes back about as far as OMB. The budget side in the budget process reviews agencies that are predominantly scientific agencies, or those programs that use science. We now have a management side that evaluates programs through an exercise we call the PART—Program Assessment Rating Tool. It has spawned, in an-

other case of Washington verbing the noun, a verb called PARTed; a program can now be PARTed. And our procurement and financial sides have of course looked at those aspects of agencies that use science and thus have some influence ultimately over those programs.

OIRA also—as Curtis noted, formed in 1981—has a long history engaging in all sorts of information collection and review, including regulatory, under the Paperwork Reduction Act, which specifically mentions information quality and the desirableness of this trait. Executive Order 12866 also indicates that one of the principles that agencies need to use when regulating is to use the best scientific, technical data available, the highest quality data. Our guidelines on performing cost-benefit analysis, now section A4, which is the, excuse me, most current version of those guidelines, also mentions the need to use the best possible scientific as well as other types of data and information when doing rulemaking, which is the very difficult task of trying to predict how humans and institutions will act in the future and how to direct that activity in a way that solves the problem that you're looking at and doesn't create a set of new problems—a very difficult job that the agencies have.

And then finally, of course there are these activities that Curtis mentioned, starting with the Information Quality Act, which was passed, I believe, in 2001. It has been alleged that this Act came in the dead of night—a one-line statute in the dead of night. This is a scurrilous lie. It's actually 38 lines long, although—

[Laughter.]

Mr. ARBUCKLE. —in that sort of bill text that the Congress uses, it's true that some of the lines are only one word long. Nevertheless, it is the law, and we met its mandates, publishing first guidelines to help ensure and develop the quality of information. The four standards in the act—quality, integrity, utility, and objectivity—were not defined so we started off by deciding that quality was the sum of the other three to sort of reduce our job by 25 percent anyway. So we defined and we explain in some detail in the guidelines themselves integrity and utility, which are reasonable straightforward and intuitive definitions, and objectivity, which is much more difficult and which takes up a good deal of the definitions section actually in the guidelines.

We do make this distinction that Curtis mentioned in information quality with influential scientific, financial, and statistical information, where we believe that the rigor of the application of the standards should be—should be higher, should be more. And in particular, the concepts that are focused on there are reproducibility and transparency. Literal reproducibility is not feasible, but it is, as a general matter, part of the scientific method. And transparency to make clear your assumptions and procedures and practices has definitely long been a part of the tradition that we call the scientific tradition, but it's part of a much larger breadth of thinking over the last 500 years or so.

One of the issues that we raise in that bulletin is peer review. That is, documents that have been peer reviewed are more or less assumed to have passed a test for objectivity. We issued a set of guidelines on peer review several years later after the Information Quality Guidelines, and these make a separation between influen-

tial scientific information, which—picking up on the Information Quality Guidelines—and highly influential, is—in sort of rough terms, information or documents that could be used that might have an impact of more than \$500 million annually. That is a rough threshold that we chose in order to try to distinguish where it made sense to have peer reviews which can be, aren't necessarily, but can be very energy, financially, and time intensive—where it made sense to do that, given that the possible impact of the action might be that substantial.

And then finally, we have published out there, as Curtis mentioned, for public comment, Guidelines on Risk Assessment. These were published in January. The comment period is still in effect, still going on. We also have referred these draft guidelines to the National Academy of Sciences. The panel has been chosen, and they are planning a public meeting. The first panel meeting and public meeting is at the end of this month, the 22nd and 23rd. I imagine some of you will be interested in attending that. The panel has been asked to look at the Risk Assessment Guidelines and to try to make sure that we are following the practices that the NAS itself has recommended in several studies over the course of the years to try to articulate both the benefits of this method of increasing the information attached to certain risks and hazards. They are trying to have a guidance bulletin that is broad enough or, let's say, specific enough to present best practices for the government but flexible enough to—for agencies that deal in very different types of endeavors to be able to use.

So that's a summary of these various activities. We are very much doing this in a manner that encourages public comment. If necessary, as we did with the Peer Review Guidelines, if it turns out that we're far off the mark, we can publish the guidelines again for a second round of comment. That proved to be extremely beneficial in the peer review context, and I think we wound up with a document after that was generally regarded as being—as capturing the essence of that, even if you don't like OMB being the capturer of the essence. And we're certainly interested in doing the same thing with risk assessment. This can be very highly technical. It's involved in issue areas that are highly controversial and politically sensitive—human health, safety, and the environment. So it's extremely important that the government be getting this right as often as it can and be paying attention to the general best practices that have evolved over the past 20 years or so.

So I think I'll stop there and let my other panelists join in.

Mr. COPELAND. Thank you, Don.

Before I go on, I should say that we had a conference call on Friday afternoon sort of as the minimal planning that we did for this panel. And each of the panel members agreed to limit their remarks to about 10 minutes to allow for about 40 minutes of questions at the end because they all felt that the best part of this would be the questions and answers. So I encourage you to be thinking of the questions and answers as we go along.

The next panel member is Al Teich from the American Association for the Advancement of Science (AAAS). He is the director of Science and Policy Programs at the AAAS. In this position, he is responsible for AAAS's activities in science and tech-

nology policy, directing a staff of 40 and serving as a key AAAS contact on science policy issues. He is a fellow of AAAS and a recipient of the 2004 Award for Science Achievement and Science Policy from the Washington Academy of Sciences. He is a member of the editorial advisory board to several journals, the author of numerous articles and book chapters, including a chapter on technology and government in the *Encyclopedia of Science, Technology, and Society*, and the editor of several books, including “Technology and the Future,” the most widely used college text in technology and society.

Al?

[Cross talk.]

AL TEICH. Good morning. So I’m representing the science community, I guess—the token scientist up here among this group of lawyers—and I’m going to talk about the Peer Review Guidelines and our experience with them and a few comments along the way. As Don said, OMB issued its Peer Review Guidelines or a proposed bulletin in September of 2003. This was—under the Data Quality Act—part of an ongoing effort to improve, as you can see, the quality, objectivity, utility, and integrity—all those good things—of the information disseminated by the federal government.

Peer review is a very widely used practice in science, but when OMB issued these guidelines, the immediate reaction was controversy and a certain amount of consternation in the scientific community. Why did this stir such controversy? As I said, peer review is very widely used in science. It’s used for choosing projects by project sponsors, funding agencies. It’s used for decisions in academia on promotion and tenure and other rewards that academic institutions give to their faculties. It’s used for decision making in publication. People send out articles for peer review, of course. Journals send them out. AAAS’s own journal, *Science*, has a rigorous peer review system. So what’s wrong with the idea of peer review in the context of OMB, in a context of regulations?

Peer review can do a variety of things, and there are certain things that it can’t do. In science, peer review can determine the significance of a piece of work or of a proposed project, or at least it can give you the considered judgment of a group of scientists who presumably are qualified to make that judgment. It can assess the soundness of methods. And when something passes peer review then is published, it’s thought that this gives it a certain amount of credibility in kind of an imprimatur of science on a set of results.

But it doesn’t mean that they’re necessarily correct. It only means that they have been reviewed and that they are worth considering. It’s not infallible—articles contain errors, and articles can even be based on misconduct and ethical breaches. So it’s not infallible, and we had a very public example of that not long ago when Hwang Woo-suk from Korea was found to have fabricated results in the area of stem-cell research that were thought to be revolutionary. They had been published in a number of places, including our own journal, *Science*. Turned out that he never did the experiments. So peer review will not necessarily pick up those kinds of things, and it won’t pick up science that contains errors necessarily either, although sometimes it does.

So, if peer review is such a widely used method within science, what were the reasons for the negative reactions to OMB's proposal? Well first of all, there was suspicion of OMB's motives. There were certain questions as to, what is the problem here? Here's the solution. What's the problem that we're trying to solve? Is there a problem with peer review of regulations that need to be addressed? And then there were the specific provisions of those guidelines, which placed strict constraints on the choice of reviewers—and I'm talking about the first proposal—the initial draft. There were questions about the potential anonymity or lack thereof of reviewers. There was the possibility for open public comment, which didn't have the constraints that the peer reviewers had. And there was the issue of possible litigation based on this, and that was one of the reasons for suspicion that people thought, aha, this is a way of undermining the regulatory process by tying things up in knots.

So scientists were suspicious of this in large part, I think, because the Data Quality Act, as Don said, was slipped into an appropriations bill in 2000. It was a very small provision. Nobody noticed it. It went completely unnoticed by the scientific community until it was written into law. There's no legislative history. There were no hearings, no floor debates, no committee reports. And yet, the Chamber of Commerce, called it the most significant change to federal rulemaking process since the Administrative Procedure Act. It was introduced in the House by Jo Ann Emerson; in the Senate by Richard Shelby.

If it is so significant, why is there no legislative history? One has to ask, you know, if this is such an important thing, is this the way we're supposed to be making laws in this country by putting provisions into unrelated acts without any kind of legislative consideration, especially things that are presumably as significant as they were said to be? Well, Jim Tozzi—his name was mentioned by Don. We have to thank Jim, I think, for this. Jim, are you here? I haven't seen him. Okay—hey, add to your fame here. Anyway, many scientists looked at this and said, well, this looks like a means of attacking regulation by attacking the science behind it. So as I said, they asked, what is the problem it was seeking to solve? And somehow they—you could draw the implication that the most important science in terms of regulations was not being adequately reviewed and had question whether that in fact was true.

So looking at the comments that came from the scientific community, they focused on a number of things. First of all, they focused on the constraints on the selection of peer reviewers. They gave little discretion to the agencies. Peer reviewers were excluded if they had expressed an opinion on a subject. Academics were excluded if they were funded by an agency, but employees of regulated industries weren't. There was a provision that called for, kind of, equal and opposite biases—if a peer reviewer had an unavoidable bias to find another one who had a counteracting bias without any discussion of the relative qualifications of the two reviewers. And finally, there was a question of attributions, which violated the generally, although not entirely widespread, procedure of giving anonymity to peer reviewers in science. And there was this question that I men-

tioned of delay, the prospect of litigation dragging out proceedings, and other factors that I've already mentioned.

I have to say that, as Don mentioned—and his predecessor, John Graham, actually was very open about this process at OMB—they read the comments that were received. And there were quite a few of them—almost 200, I think—and they listened to the science community. We met a couple of times with—together with the groups of other scientific society representatives, and they significantly improved these guidelines the second time around. The second draft was a much-improved version. It turned out to be relatively uncontroversial. It may have been a strategy in the first place. We don't know. But in any case, it certainly worked out, I think, to the advantage of both OMB and the science community.

The House Government Reform Subcommittee on Regulatory Affairs—as I said—held no hearings on the Data Quality Act prior to its passage. Five years after its passage, they held the first hearings to give an assessment—to ask agency representatives and public interests groups to give assessments of how they thought it was working. And of course, the predictable responses were given. The government agency said it was too early to give an accurate assessment. The public interest group said, well, they can't really talk because they're afraid they're going to lose their jobs. And the industry said, well, the agencies aren't really enforcing things strictly enough. So no surprises there.

The major development that occurred took place just a month-and-a-half ago in late March. The Salt Institute and the Chamber of Commerce had sued the Department of Health and Human Services (HHS)—the National Heart, Lung, and Blood Institute—for refusing their petition to change data that they had released showing that sodium lowers blood pressure. They said that this data was faulty. HHS said, no, it's not, and refused to do so. They took them to court, and the Fourth Circuit Court on March 21 agreed—saying that they don't have jurisdiction, that there is no provision in the act for judicial review and therefore that suit did not have merit.

Now, I suspect that there are people who are working on a legislative fix for that. It may be a little more difficult to do this time now that people are aware that this thing is going on. But we'll have to stay tuned and see what happens. Maybe we can get into this in the discussion period. There is also another piece of legislation. There is a bill introduced by Representatives Henry Waxman and Bart Gordon, two Democrats who want to abolish the Peer Review Bulletin entirely. They have the Restore Scientific Integrity to Federal Research and Policymaking Act. It was introduced over a year ago, and it eliminates this Peer Review Bulletin. That's my assessment of its chances of passage. That's a snowball by the way in the—those of you who don't recognize what it is.

[Laughter.]

Mr. TEICH. Anyway, I think I'll quit while I'm ahead. This is the place where you can find information on our activities in this area. That's my e-mail address in case you want to follow up anything, and that's our new AAAS bumper sticker with baby Einstein. Thank you for your attention.

[Applause.]

Mr. COPELAND. Thank you, Al.

Our next speaker is Bill Kovacs. Bill is the vice president for Environment, Technology, and Regulatory Affairs at the U.S. Chamber of Commerce. The Chamber of Commerce is the world's largest business federation, representing more than 3 million businesses—every size, sector, and region. Since assuming the position of vice president in March of 1998, Mr. Kovacs has, among other things, recruited and assembled the first science team to work in tandem with the policy staff to ensure that federal regulations are based on sound science. Mr. Kovacs is a frequent commentator on national, environmental, energy, and regulatory issues that impact the business community. He is regularly quoted in the nation's leading newspapers and appears on talk shows and television as a spokesperson for American business. He is listed in—and I wish I had this resume—Who's Who in the World, Who's Who in America, Who's Who in American Law, and Who's Who in Emerging Leaders. Bill?

BILL KOVACS. Well, thank you, Curtis. And it really is a pleasure to have this group assembled. And thanks to the Congressional Research Service because this really is an important talk and an important way of discussing an issue that really is a lot different. Let me just sort of respond, before I get into my remarks, to Al because everyone talks about, well, this thing was—Data Quality Act was slipped in in the middle of the night. Well, if you go back, there were five years of committee reports talking about having OMB be responsible for good quality data. And they used the same words—objectivity, utility. And the Congress asked and asked and asked, and finally they just put it into a statute. Now, we're going to have a question as to what the statute is worth, but we'll get to that later.

As you can tell from Al's comments, you know, the Chamber has been a very strong proponent of data quality and frankly all of OMB's guidance efforts. We really commend them because it was the first time, I think, in the history of the United States where we really tried to discuss science and how science is going to be part of the rulemaking process. And OMB systematically using the Data Quality Act went through and talked and required the agencies to do their own guidelines—start it on peer review, start it on good guidance, address cost-benefit. They did prompt letters if they thought the agencies' regulations were insufficient, and now they're on risk assessment. That is one amazing set of undertakings, and we really compliment them. Now, I'm going to get to the Salt litigation because at the end that puts everything that OMB does in question, but we'll get to that.

The Chamber's position is really clear, and you need to know where I'm coming from because as we talk about suspicion, you know, we're not dealing with Galileo here. We're dealing with a modern rulemaking process. And our position is really clear. We believe that the best regulation is transparent regulation, that all the studies and the models need to be put out in the public. We have even petitioned OIRA to do an open peer review process, at least to try it, to take one of the regulations and find out how it works because you don't have the four or five little anonymous people sitting in a hideaway making—trying to generate policy and manipulate numbers. You have put it out to the public to see what

all the scientists around the world might think of the issue. What's wrong with opening it up?

And the reason why the business community supports open and transparent regulation is because the community, of all of the people here, is the only one actually impacted. They pay \$1.1 trillion a year to deal with regulations. And so the other thing is the business community is the only one here that is impacted. If they do something wrong, they can be sued by the agency. They can be brought before a court. They can have trial lawyers bring class actions against them. They are subject to huge civil and criminal penalties. This is a lot different than the European system where you have a group of really onerous regulations with literally no enforcement. So we've got to keep in mind that we've got a system that's very flexible and really based very strongly on enforcement.

The big thing is going over—and I think Al was right when he said the scientific community was very suspicious. They didn't know where anyone was going because no one wanted to affect all of the federal contracts that they might have. And yet there's a bill before the House which is to just identify who gets the money in a federal contract and the opposition to that. No one even wants to allow the American public to know who even gets the money. And yet the critics were saying, well, if you have—if the Data Quality Act passes, you're going to be deluged with petitions. The business community like the U.S. Chamber—we're going to use it to shut the system down. Well in 2003, there were 97 petitions. In 2004, there were 57 petitions. There were 28 appeals. And that is so much different than Freedom of Information Act (FOIA) where there are tens of thousands of FOIA requests. And the reason why there were so few is the Data Quality Act requires an enormous burden. We have to first go do our own science. Then we have to present it to the agency in a petition for correction. That is not a simple task.

But the U.S. Chamber did two petitions, and I just want to lay them out really quickly because I still think I have a few minutes. The first was the data inconsistency. And there what we had addressed to the Environmental Protection Agency (EPA) is we said, you have 16 databases—key databases—and within the databases you have chemicals which have been assigned—the same chemical has been assigned different values, some differing by as much as a billion. We think you have a problem. Well, this was two years ago. The only thing we asked the agency to do was to form an inter-agency working group to get it right. And it was very interesting; U.S. Geological Survey agreed with this. The Federal Swiss Environmental Research Institute agreed with this and said, look, these databases are used throughout the world. We've got to get it straight. There were even some environmental groups. The EPA two years later still refuses to deal with the issue.

The Salt litigation—this is frankly an issue where I just got frustrated by everyone walking around—you know, the environmentalists and the scientific community saying, well, the Data Quality Act, there's really no judicial enforceability. And our side wanted to live on the belief that we had judicial enforceability, and somehow, if we ever really wanted to make it work, we really could. Well, that's bull. You know, we sat there, and we said, we're going

to pick a case. And we picked the Salt case, and the reason we picked it is because it involved influential data that everyone understood. And we wanted to do reproducibility. The information was never put into the public domain.

And what we did is we said, we want the data for reproducibility purposes. All we wanted—let's be clear. We asked the agency for the data so we could reproduce the results. The agency denied it. We appealed. The agency denied. We then, after final agency action, went into the courts, and we lost. The courts said we have no standing. The court was very clear that no human being, no chamber of commerce, no business, no anyone has standing, that this is strictly an OMB situation.

So what are we left with? Well, what we're really left with is the Data Quality Act, for all intents and purposes, is a really nice academic exercise. But other than that, unless OMB wants to enforce it, there really is—there are no teeth to it. So in terms of forcing good quality data into the federal regulatory process, that does not exist. It does not exist. So what do we do? One is we could go back to the Congress—and certainly we are—to get judicial review provisions put into the law. We could get a more far-reaching executive order to require OMB and give them a little more of a policing authority over the regulations, but that can be abolished with the next administration.

And so I guess what we're really down to is we've got to decide as a nation whether or not science should be part of the rule-making process and the best science, and that we use the best scientists and we're inclusive not exclusive. Or we just have to say, look, the whole process was a farce, and we really don't need whatever OIRA is doing other than data collection. And we need to move on, but we need to make a decision. It's a huge public policy decision. Thank you very much.

[Applause.]

Mr. COPELAND. Thank you very much, Bill. The last presenter—and certainly not the least—Rena Steinzor—Rena is the Jacob A. France research professor at the University of Maryland School of Law and has a secondary appointment at the university's medical school. She is a founder and member of the board of directors at the Center for Progressive Reform. Professor Steinzor teaches environmental law and two seminars on law and science, the first on risk assessment and the second on issues such as peer review, human testing, the precautionary principle, the relationship between science and economics, and the politicization of science. She is the editor with Professor Wendy Wagner of a book of essays entitled "Rescuing Science from Politics—Regulation and the Distortion of Scientific Research" to be published by Cambridge University Press at the end of June.

Rena?

RENA STEINZOR. And you can order the book on Amazon.

[Laughter.]

Ms. STEINZOR. I want to thank Curtis and Mort and American University. This is truly a rare opportunity for all the clashing sides to get together and have a good debate on this issue. I find these days that we do that less and less to the detriment of everyone, and I was struck when Bill was talking about how different

our worldviews have become. From his perspective, business is the only entity truly impacted by regulation as opposed to, from my perspective, all the kids who have asthma in the inner city and similar groups like that. And he also is very concerned about excessive enforcement when, from my perspective, there is barely a sign of life at most of the regulatory agencies. So it's always useful for us to compare notes and get a little reality check from both ends of things.

Now my kids are in high school and we always have rubrics that we work on as I play the homework police and they march around the house trying to evade my enforcement. And I thought I would adopt one today that was relatively simple and familiar: who, what, so what, when, where, and why.

First, the question of who. OMB is portrayed by Don and Bill as an agency with an important role in overseeing science. And yet there are virtually no scientists—very few scientists on OMB's staff. The staff is overwhelmingly dominated by budget analysts and economists. There probably are—and maybe Don can clarify this for us—more lawyers on the staff of OMB than scientists. So we do not need to resuscitate all the shopworn arguments about what the appropriate scope of OMB's oversight over federal rule-making—we don't need to resuscitate all that debate to cringe at the prospect that economists and budget analysts would be pulling their chairs up to the table every time scientists and science policymakers throughout the government tried to perform risk assessment, which is not a pure science function to be sure, but is primarily involved with scientific evaluation.

The what of this escapade—which is, I would suggest, one of the potentially most prominent legacies of John Graham's tenure. By far, he was the most ambitious director of OIRA in its history, and this proposal could really dwarf every other thing that OMB has done in this area. What it is is a governmental effort, from my point of view, that would straightjacket health and safety risk assessment. Built on a single chemical specific model, it would apply to an industry-wide assessment of the threat posed by terrorist attacks on chemical plants or an assessment of what increased reliance on nuclear power would mean for public health and safety.

So whatever its elements, this would be the first time that in 26 pages we set forth rules for this wide variety of assessments. And it's worth noting that the National Academy of Sciences, which has put out three, maybe four depending on how you count them, reports on risk assessment, starting with the Red Book in 1983, has gone out of its way to emphasize that it is not possible to impose a one size fits all straightjacket on risk assessment, that there are some principles and some ideas that should be incorporated, but that setting a basic rule for risk assessments is really not scientifically sound.

Ironically though—and this is worth pointing out—the Risk Assessment Bulletin does not apply to registrations of pesticides, individual nuclear plant facility licensing proceedings, or testing done for the purpose of approving new drugs. It's worth noting that all of those risk assessments are done primarily by industry-regulated industry, and the double standard is certainly curious. Maybe Don can enlighten us on why that choice was made.

Now, we've talked a lot about the Information Quality Act. I do want to remind us of its history. We are lucky to have Jim here because he was there first. The Information Quality Act was born out of the tobacco industry's frustration with the passive smoking study that EPA had done. And the tobacco industry is a model for what Professor Tom McGarity calls the corpuscularization of science; that is, looking at each piece of scientific evidence very critically, deconstructing every study, questioning each individual piece as opposed to viewing all the scientific evidence together and making a scientific judgment on what the weight of the evidence tells us.

The Information Quality Act is the way that people seek to isolate pieces of scientific evidence. And although it has fallen on hard times, to be sure as Bill mentioned, we have little doubt that we'll be revisiting this issue on Capitol Hill, probably not in the middle of the night as an appropriations rider, no matter how good the reporting was by various isolated committees, instead in the context of a full-fledged debate, which will, among other things, have to consider what will happen to the 800-odd federal judges who are already overwhelmed by their criminal docket if the gates are opened and any industry aggrieved by any single piece of government information can go to the courts and challenge it under the peer review guidance or under the risk assessment guidance should it become final.

So it's certainly true, to sum up the what and the "so what," that the Data Quality Act or the Information Quality Act, the corpuscularization of science will occur with or without it. But should judicial review be granted and even if it is not, the hooks that are provided in the proposed Risk Assessment Bulletin for corpuscularizing and challenging science will enrich these debates and make them proliferate greatly. And I take little comfort—again, this is a reality check—with the argument that so far we haven't had too many of these things. It's true that there haven't been that many. Some of them have been very, very significant, for example, the challenge that some people here were involved with to the SIPs for the northeastern states—the State Implementation Plans—because they included state rules on controlling paint. That one never officially turned into any challenge to the states, but behind the scenes there is good evidence that the states were subject to another round of browbeating about how they should really have a conversation with the paint industry and try and straighten out their differences. And the ozone attainment in the northeast is not a small matter. And that was just one Information Quality Act request.

The two key problems with the risk assessments guidelines, again, the one size fits all. The best explanation of that is that the guidance says that whenever possible, central risk shall be estimated. If you have a single chemical—take perchlorate, mercury, atrazene, arsenic—and you have the National Academy of Science's panel—multidisciplinary panel, which will now include presumably observers from OMB at least watching it, much less supervising how agencies use those reports—what you would see is an effort to take all the models—all the pieces of information—and somehow

come up with a weighted average, some kind of mathematical calculation that will express central risk.

And as difficult as it is for anyone who has been involved in one of these things to get their minds around how we would do this for a single chemical, shift the focus to the other extreme where we're trying to do an industry-wide assessment of the nuclear industry or an industry-wide assessment of chemical plants. And imagine how all the inputs, all the models, all the individual studies, the outcomes, which may or may not be in numerical terms, will be combined into a central risk estimate—not a range, although the bulletin does require the presentation of ranges. But it is absolutely emphatic on the development of a central estimate, and it just makes very little sense from a scientific perspective, I would submit. And I would be very interested to see what the scientist on the panel—what Al thinks of that.

Finally, the second problem with the bulletin is its conflation of assessment and management. In order to comply with the bulletin, agencies must flash forward to the end of the rulemaking and develop an assessment of all the risk reduction measures that might be available and what the cost—what the implications are of those risk reduction measures. And they must then compare it to a baseline risk. Now, I'm not going to sit up here in front of you and be naïve and silly enough to suggest to you that, again, risk assessment is a matter of pure science. Obviously science policy judgments come heavily into play.

But what that requirement would essentially mean, as the academy was told by Colonel Dan Rogers, the point person on perchlorate for the Department of Defense, that before the academy could finish its perchlorate risk assessment, it would have to consider the impact on training and the national security. Rogers told them that there is no room for reliance on science policy precaution. For its own sake, every layer of science policy precaution inhibits our ability to train, putting our combat forces and ultimately our nation at risk. This is a very heavy burden for a group of scientists who are not trying to make the ultimate decision about what to do about a risk but are merely trying to come up with some kind of qualitative assessment of it so that that assessment can be handed to the decision makers who make the final calls.

Now, I still have when, where, and how, so let's make short shrift of those. Not much has been happening in the rulemaking or standard setting word. All of this is about what will happen in the future, and we all have different ideas about how close that future might be. Watching the Hill would be a very important point. There was a letter yesterday that was sent by Congressmen Dingle, Waxman, Oberstar, and Gordon to the academy, asking them how they plan to carry out their charge on the bulletin and expressing concerns about it. Also we can expect to see a bill up on the Hill, as he has told us, trying to make sure that the Information Quality Act is judicially reviewable.

There is tremendous pressure in this election year both not to do anything and to institutionalize all of these tools for making sure that the future does not get out of control if and when power shifts in Washington. "How" would clearly depend on what the Academy says about the bulletin, what the Congress says—and there will be

probably many committees involved, especially the judiciary committees—and ultimately what OMB does in its effort to modify it in response to public comments and the energy it is willing to put into enforcing it.

So, how did I do on time?

Mr. COPELAND. Perfect.

Ms. STEINZOR. Okay.

UNKNOWN SPEAKER. I thought you were doing a filibuster.

Ms. STEINZOR. You did? Where is my phonebook?

[Applause.]

Mr. COPELAND. Thank you all very much for your presentations. We certainly have a range of opinions here and certainly plenty of grist for questions and answers. Laura has agreed to be the walk around person with the mike for this session—I'm going to do it later—so I would ask three things. One is wait for the mike if you have a question so that the transcription service can capture your question on the tapes. Secondly, identify yourself and, if you want to, your affiliation. And then finally, state to whom you would like to address the questions, whether it's to all the panel members or a particular one. There should be plenty of things here. If the discussion lags, I have my own questions, but I will hold those off. If any of the panel members have a question, they can let me know that they would like to pose to another—their fellow panel members. I'll throw it out to this point. Yes, right here.

Question: My name is David Frost. I work for the general counsel's office at the Department of Homeland Security. My question is, well, for anyone, I suppose. It's on the copuscularization of science. And I should say my science background is almost nil. I was really so traumatized by grade school math that I became a lawyer in a fit of despair. But I'm just wondering—this idea that you could challenge a piece of a scientific study or an aspect of the research—you suggest that, Ms. Steinzor, as if that were a bad thing. And yet it seems to me that if a piece of the research on which someone has proposed a policy is shown to be defective, then presumably everything that's built on it would also be. So is it really such a bad thing?

[Cross talk.]

Ms. STEINZOR. Well, in another shameless pitch for our book, let me just say that Professor McGarity, who has also written an article about it—and I can give you the citation for it—explains why corpuscularization is so damaging. But let me try quickly to compare it to the way scientists usually make decisions, which is on the basis on the weight of the evidence. Like every human endeavor, there is no individual piece of science that is free from flaws. Even a simple rat bioassay in a lab—there can be decisions made about the doses given to the rats, how often they are fed, whether they have genetic weaknesses. And that's a simple example.

There is also—a more complex example would be an epidemiological study where the population is selected in a certain way, where we have questions about what the level of exposure was, where we question whether we followed the illness for long enough. And all of those individual flaws—generally what scientists do is study the evidence very carefully, take it as a body—that's what meant by the weight of the evidence—and make a judgment about how to off-

set one study against another and how to take into consideration the flaws of the studies.

To take each study individually and say, it has a flaw and we are going to make a court case out of it—almost literally—and knock it off the table, ends up in the end meaning that you have nothing left to make a decision on, even in the best of all possible worlds, even with the best of all possible science. Tom, is that fair? He's speaking today so he's -

Mr. KOVACS. Let me see if I could also respond. I think your question really hit the nail on the head. But before I address that, first I want to say, you know, Rena, when you work for the U.S. Chamber and you promote the free enterprise system, there's not such thing as a shameless pitch. So go for it.

[Laughter.]

Ms. STEINZOR. You're going for it now?

Mr. KOVACS. Oh, we'll always buy your book and read it. Are you kidding me? Absolutely, you got one copy sold.

Ms. STEINZOR. Oh, good. You can get more than one copy maybe.

[Laughter.]

Mr. KOVACS. And we might, but we believe in reading all opinions, not just one set of them.

Ms. STEINZOR. I'm an avid fan of your reports.

Mr. KOVACS. Oh good, thank you. We agree on something.

[Laughter.]

Mr. KOVACS. You know, we actually thought about your question as we were filing our petitions, and it was really something that goes to the heart and soul of the act. And I think we came to several conclusions. One is there may be pieces of evidence or of information, or there may be assumptions that are so influential, and that's the whole purpose of qualifying some information as influential—that it really needs to be challenged.

But when you go to put one of these data quality petitions together, whether it be the 16 databases or the salt, it takes an enormous amount—I mean, we spent seven months between my in-house scientist plus the outside scientist at Cambridge Environmental to put this together and to look at the database. We literally had to go and find every single chemical that EPA regulated and then do a printout so that we could see on the 16 databases where the differences were. And the fact that all of that information had to be done first before we could even get there—but some of the things that came up—and then in the Salt litigation, there was an example where the data was really troubling. And all we wanted to do was get the data so that we could—so that we could run an analysis to see if we can come close to, you know, getting the same results.

But what was so interesting is, when EPA finally, you know, denied our claim and then we appealed, some of the things that EPA said—and I think you really need to understand how valuable EPA sees these databases. They have a disclaimer on databases, which makes you see the disclaimers actually look funny. The software and the accompanying files are provided as is and without warranties, whether expressed or implied. The user assumes the entire risk of using this program. Yet these programs are pushed on to the public through many regulatory programs. On another in-

stance, they said, well, we no longer own the database anymore. We've given them back to Syracuse Research so, you know, they're really responsible. And in some instances where they said there was complete and total peer review, we actually went back and found that there was no peer review. And in some instances we asked, well, let's take specific data—just as you were talking about—and actually go back to the original studies and see if the data that was collected in the original studies is the same entered into the database. And in many instances, that data was wrong.

So when you sit here and you see all of that, we're not really sure what the process is at the Chamber. We only have the resources to take on the big issues, where it's influential—salt or the databases. But there are instances where the data may be so important or the assumption may be so important that it really—you have to take it apart in order to understand the situation.

Mr. COPELAND. Lisa?

Question: Yeah, I have a question for Don. I just wanted to pick up on Rena's point about the risk assessment guidelines not being applicable to pesticides registration, nuclear licensing, and Food and Drug Administration (FDA) approvals. And a person who is cynical might look at those categories and think, those are actually categories in which industry would want a prompt risk assessment, not to be weighed down with risk assessment guidelines, because those are cases where the statutory scheme makes a risk assessment necessary before business can get under way. And so I'm just curious—I know there must be more to it than that. So I'm just curious why those things were exempted from the risk assessment guidelines.

Mr. ARBUCKLE. The intention behind that provision had nothing to do with the concern that Rena expressed. In the executive order—Executive Order 12866, I believe, in I.Q. and in the risk assessment, OMB generally tries to stay away from particular adjudications, from licensing, from cases where there is not, as our favorite Administrative Procedure Act (APA) expresses it, cases of general applicability and future effect. It's general applicability, the regulating as a general—provisions that affect more than one individual, one person, one company, one chemical, where the specifics of that individual case are what would guide the decision, not a broader policymaking provision. So that's why that provision is common to a number of other documents.

Question: [Off mike.]

Mr. ARBUCKLE. There's many other aspects of the government that also you could say that about, just about everything we do. It's still an individual adjudication, an individual decision, and we try to stay away from those.

Ms. STEINZOR. But, Don, that would mean, just to clarify, Vioxx and DDT, right?

Mr. ARBUCKLE. If it's an individual licensing or decision-making.

Mr. COPELAND. Okay, thanks.

Identify yourself.

Question: Yes, I'm Don Elliot from Willkie, Farr & Gallagher, and I also teach at Yale and Georgetown. While we're in the shameless self-promotion department, I was glad that my friend Rita Steinzor identified by case for the—under the Data Quality

Act for the paint manufacturers as the most successful or, in her view, nefarious use of the Data Quality Act so far on behalf of industry. Let me tell you just a little bit about the underlying facts and then ask you why you would regard that as a negative episode, rather than a positive one.

Assume with me hypothetically—which I believe to be the case and was the basis for the Data Quality Act petition—that the regulation of ozone in the northeastern states was based on a single scientific study and that it could be demonstrated that some of the data in the scientific study had been misread. In other words, in some instances where there were certain levels, they actually reduced—they actually resulted in lower ozone levels so that the study had been completely misinterpreted in the regulations.

The issue was raised in notice and comment rulemaking and was given short shrift. It was raised in multiple court cases, and it was given short shrift—just dismissed. It was raised under the Data Quality Act, and, at least by your hypothesis, that resulted in bringing the states and the industry to the table to work out a negotiated solution. From my standpoint, that's a great success story. That illustrates, I think, how the Data Quality Act fulfills a need that is not being adequately addressed by the notice and comment process, not being adequately addressed by judicial review. So it seems to me that rather than being some nefarious episode in which the states are sort of overridden, it results in getting industry and the regulators together to discuss correcting a scientific error.

Ms. STEINZOR. Again, it's different views of reality. The piece of information that was at issue was not a scientific study on health effects, as your petition indicated. It was a calculation done on how much certain reductions in the composition of paint would reduce the OCs. If you decreased certain solvents, would you decrease the OC off gassing?

I've spent many hours looking into the genesis of this, and I'm told by state regulators that their problem was that they could not get adequate information from the paint industry to make calculations that the industry would be satisfied with and that this piece of data on how much reductions you would accomplish was something that they used in their rulemakings. There were numerous opportunities—this is New York, Pennsylvania, Delaware, Maryland, New Jersey—numerous opportunities for the paint industry to introduce different data about reductions. Never happened. The single piece of information was in the state rulemaking docket. The states issued their rules. The rules were challenged in court. Some of the challenges were—they were very thorough. One of them was that, because there was an exemption for small manufacturers, the state rules violated the large manufacturers' right to equal protection, as just one example. That was in New York.

All of the rules were upheld, and then the paint manufacturers petitioned EPA to reject the SIPs because there was a piece of data in the underlying state rulemaking dockets that they didn't like. And that is taking the Data Quality Act to great extremes since it says nothing about state rulemakings. And the idea that EPA has the resources to go read state rulemaking dockets is pretty fanciful.

In any case, as I understand it, the states rejected Jeff Homestead through the regional office's request that they sit down with the paint manufacturers again. They've all gone through with their rules. I was talking to the guy in Maryland, I think, about a month ago, and it's my understanding that New York has done the same. So I'm sure you have another side of the story yet again, but that was an example of a long, intractable dispute that almost had yet another chapter but didn't because the states were frustrated.

Mr. COPELAND. Thanks.

Question: Yes. My question is for Bill Kovacs.

Mr. COPELAND. Identify yourself.

Mr. PASCUAL PASKY. I work with U.S. EPA, and I work with a lot of models. And I suspect that you and I probably agree quite a bit about the need for transparency, and where I think you and I might differ would be with the implication that perhaps transparency leads to the single verifiable truth. As I'm sure you know, one of the first instances where the Data Quality Act was used was against EPA to take down one of its climate change models because of the work that Patrick Michaels at the University of Virginia had done contradicting some of the results of the model.

Now, would not greater transparency be accomplished if the model were allowed to stay and allow Patrick Michaels or whoever else present an alternative hypothesis—an alternative model, put that up on the web, and then let the discussion proceed—competing models as opposed to thinking that there is a single hypothesis that transparency leads to, to the exclusion of all other alternatives? Would that not be a better example of transparency.

Mr. KOVACS. Well, first of all, I'm really thrilled that you asked that question because that really is a really significant point. First of all, you should know that we were the ones who urged literally from the beginning CEI to abandon the lawsuit. We thought it was one that you shouldn't—that there was four or five, \$6 billion worth of data that was collected in climate change, and we didn't really see how a Data Quality Act—that really would be parsing the pieces, and we thought that it should stay, not only that it should stay, that it should be subject to open review. So we probably agree with you on that. It should have stayed up. You should have opened it up to peer review, and we should have brought in everyone. And eventually, I think, two gentlemen from—from Australia or Canada—McIntyre (phonetic)—McIntyre, and there was one other one, who actually did go and look at Mann's (phonetic) work and did do an open review on the web. And it was really pretty fascinating.

But we would agree with you. Yeah, it should have stayed. We had that position all along, and we publicly urged CEI to abandon the suit.

Mr. ARBUCKLE. Curtis, can I make a comment?

Mr. COPELAND. Sure.

Mr. ARBUCKLE. The Information Quality Act has been soundly trounced here by Bill for one set of reasons and by Rena for another. Let me just give you the point of view basically for the career part of OIRA. We think that it's working quite well. That is, it doesn't give people an easy avenue to criticize government work, but it does give them an avenue with an appeal process. It was—

the Act was or our guidance on the Act—set it up very much—very much on purpose with a burden of proof on the petitioner so that the argument that could be had was based on information—that is, information and data—not on arguments about policy decisions.

We did not want it to become another avenue for having policy debates that may have already been decided. So there is a hefty data burden of proof on the petitioner. And then to pick up, the Act established guidance, not rules, and asked OMB to issue guidance and the agency to issue guidance, so it is more of an internal government quality control exercise than a regulation or a law that is challengeable through the judicial branch. We think that's the way it was set up on purpose.

Mr. COPELAND. So OMB would not support judicial review for the Information Quality Act?

Mr. ARBUCKLE. Nice try, Curtis.

[Laughter.]

Mr. COPELAND. I thought it was worth a shot. In the back. Oh, I'm sorry.

[Cross talk.]

Question: Kevin Bromberg, U.S. Small Business Administration, Office of Advocacy. This is a question for—for Al.

[Cross talk.]

Question: Is this better?

UNKNOWN SPEAKER. That's better.

Question: Kevin Bromberg, Small Business Administration—sorry, Office of Advocacy. This is for Al. The scientist question, you know, what's the need for additional peer review? You know, what's the problem? As someone who has spent over 25 years working on—I have the honor of reviewing EPA rules, but we can say this about other federal agencies. There is and was a great need for peer review of scientific materials coming out of, in my case, EPA. I can cite many war stories. And one real quick one is relatively current.

The Toxic Release Inventory lead rule, almost notorious, that came out in 2001 after a great controversy—there was a number of people who asked for peer review of that rule before it came out. We were among them, a lot of people from Congress, a lot of trade associates. The EPA said no. And the peer review that we've now obtained by the Science Advisory Board (SAB) after the fact, low and behold, said that the scientific basis for the lead rule, you know, was not correct. We were not surprised by that outcome.

There are many examples I found in my history. You know, they are not published in The Washington Post. You don't read about this, and that's part of the problem. But from people who are inside, you know, playing inside baseball—inside OIRA, inside the federal agencies—it was clear to me that having the peer review in advance would have had a different result on that rule.

Mr. TEICH. Was there a question in there?

Question: The question is, are you not—are you aware of the fact that there is a need for peer review at federal agencies. You suggested that you didn't think so.

[Cross talk.]

Mr. COPELAND. In back.

Question: Pat Casano, General Electric, Corporate Environmental Programs. I have a comment and then a question. I would encourage people to read the Fourth Circuit's opinion in the Salt case because in my view it doesn't definitively answer the question of whether judicial review is available. The key question in the case really was whether the agency's denial of the request for correction under the IQA was final agency action under the Administrative Procedure Act. And the Fourth Circuit didn't address that question. That is—that's the same problem with the earlier decision—I forget from which district court—that basically said in less than a page that judicial review is not available under the IQA. So people can certainly, you know, read the Fourth Circuit opinion and make their own judgments, but I really think it fails to address the key question and therefore doesn't definitively resolve that issue.

The question/comment is I think the discussion this morning points out why there is a need for the Risk Assessment Bulletin, which to me goes to the objectivity prong of the information quality guidelines. The science that the agencies do is very hard. It's not sticking a celery stalk in a glass of water with some food coloring in it and waiting to see if the celery turns blue. It's very difficult. There are lots of opportunities for mistakes. There are lots of opportunities where assumptions and defaults come into play. And so it's critical that it be an objective process, and everybody has a bias. Everybody has a perspective.

I think that the bulletin gets to that, in part at least, by the requirement for weight of the evidence. But one of the problems with that is that, as I understand it, there's no standard definition for what weight of evidence means or how you demonstrate that you've done a weight of evidence assessment. I was at an SAB ecorisk workshop recently and Glenn Suter from EPA said there are at least four different definitions of weight of the evidence. So I was pleased to hear Ms. Steinzor refer to that as what scientists generally do, but I'm curious as to whether there is a standard definition and what it is.

Mr. COPELAND. Is there a standard definition of weight of the evidence?

Mr. TEICH. Is there a standard definition of the weight of the evidence. I think it's—a little, you know, is what they say about pornography. You know it when you see it. It's difficult to define, but you know it when you see it. We have in sort of a common everyday culture a sense that there are always two sides to an argument. In science, there may well be two sides to an argument, but they don't necessarily carry the same weight, and they don't necessarily deserve the same degree of respect.

Scientists try to keep an open mind. Nothing is ever really final beyond being open to question. Science progresses by challenging existing findings and existing hypotheses and theories, but there are some things that would appear to be sufficiently well established they're not easily challenged. And those are the things that are supported by what we would call the weight of the evidence. It's an accumulation of studies over a period of time that's accepted by a large majority of the relevant scientific community. That's kind of the best I can do on that.

Mr. COPELAND. Okay, one last question.

Question: Thank you. Mark Powell with the Department of Agriculture. I have a question for Mr. Arbuckle. Thanks. The scope of the risk—proposed Risk Assessment Bulletin defines risk assessment strictly in terms of human health, safety, and the environment. Are there administrative reasons or legal reasons for defining the scope of the Risk Assessment Bulletin to that? There are, for example, federal insurance programs. There are influential assessments on risks to the built environment that aren't related directly to human health, safety, the environment, for example, the electricity grid—those sorts of things. Would those fall under the purview of other circulars or OMB administrative guidance?

Mr. ARBUCKLE. [Off mike.]

Mr. COPELAND. Why is the scope of the Risk Assessment Bulletin limited to health, safety, and environment?

Mr. ARBUCKLE. The answer to that is that, as you point out, there are very different types of risk assessment that exist across the spectrum of human study—insurance industry, financial institutions, and so on. And we felt that they were different enough than risk assessments in general that apply to health, safety, and environmental regulation that it would be not possible or particularly useful to try to incorporate all of these together. Now, one of Rena's point was the argument that we have straightjacketed, one size fits all guidelines within this area, and that is certainly not our intent. And we would expect the NAS to tell us so if they thought that was the case. But the idea is to try to provide a general set of best practice guidelines that can be used with the appropriate flexibility across this important spectrum of federal programs.

Ms. STEINZOR. Can I just add very, very -

Mr. ARBUCKLE. Also since we now have Bill and Rena after us, we didn't want to have the entire insurance industry and all the engineers of the world against us too.

Ms. STEINZOR. If the federal government is a family, then my answer to your question would be EPA is the bad child, and OMB is quite preoccupied with its activities and has been for many years. So that's—you'd agree to some of that, right?

Mr. ARBUCKLE. It's our favorite child.

[Laughter.]

Mr. ARBUCKLE. Tough love.

Ms. STEINZOR. I think it would like a little less attention.

Mr. COPELAND. We do have—we're trying to stay to—close to a schedule. If you have a question, you can pose it to them. These folks will be around, or some of them will be around for the day. Last thing—we'll take a 10-minute break. We'll be back at 10:45. Please thank this panel.

[Applause.]

TUESDAY, MAY 9, 2006

10:45–12:05 p.m.—Panel 2:

“SCIENCE AND THE JUDICIAL REVIEW OF RULEMAKING”

Moderator:

Jeffrey Lubbers, Washington College of Law, American University

Panelists:

Tom McGarity, Professor, University of Texas School of Law

Sid Shapiro, Professor, Wake Forest University School of Law

Peter Strauss, Professor, Columbia University School of Law

E. Donald Elliott, Partner, Willkie Farr & Gallagher, LLP

JEFFREY LUBBERS. We would like to get started. Good morning. Can we resume please? Thank you. I'm Jeffrey Lubbers. I teach administrative law down the road a piece at Washington College of Law, American University, and I'm privileged to be the moderator of this next panel.

We have an extremely distinguished panel of lawyers and teachers, all of whom have been teaching administrative law and regulatory courses for many years. And I'd also like to say, for the benefit of our congressional sponsors, that all of them have served as research consultants, and in some cases as members, of the Administrative Conference of the United States, which as most of you know has been reauthorized but is awaiting appropriations of a mere \$3 million to start up again. So that's one earmark I'm in favor of.

[Laughter.]

Mr. LUBBERS. Our second panel is on the subject of science of judicial review of rulemaking. Now, of course, judicial review is a key aspect of our federal regulatory process. Unlike in most countries around the world, in the United States, most significant agency rules are judicially reviewable upon their issuance, even before they are enforced. And the key issues in some cases are three: first, whether the rule was issued according to proper procedure; second, whether the rule is within the statutory authority of the agency, which gives rise to the Chevron question; and third, and perhaps most relevant to today's session, whether the rule is, quote, “arbitrary or capricious”—the term used in the APA in its policy choice or in its reliance on the factual record, including of course scientific facts.

So one key question has arisen in the courts, which is how the arbitrary and capricious test fits with scientific facts. Should it be the hard-look test that was used in the State Farm case by the Supreme Court or the soft-look test in other cases used by the courts, where the agency is said to be regulating at the front tiers of scientific knowledge? Might we need a Daubert-like test for scientific questions in judicial review, similar in tests used and announced by the Supreme Court, be used for admitting scientific evidence in private litigation.

The second major issue in judiciary review of rulemaking is whether the various special statutes—the statutory requirements in rulemaking that bear on scientific questions—should be judi-

cially reviewable; for example, the Regulatory Flexibility Act, which required special evaluation and assessment of impacts on small business, is judicially reviewable. It was added about 15 years after the original act in 1995. But as we've heard, the Information Quality Act has been held not to give rise to special avenues of judiciary review and the same is true as to the Paperwork Reduction Act. So we're going to hear about all these issues today.

Our order this morning will be, first, Professor Strauss, then Professor Shapiro, and then Professor McGarity, and then Professor Elliott. Because they are all professors, I could not limit them to 10 minutes; I've giving them all 14.

[Laughter.]

Mr. LUBBERS. I'm going to introduce them individually, if not corporcularly—

[Laughter.]

Mr. LUBBERS. —before they speak. So let me first begin with Peter Strauss.

Peter is the Betts Professor of Law at Columbia Law School, where he has taught administrative law and other courses since 1971. He also served as the general counsel for the Nuclear Regulatory Commission from 1975-77, where he helped the agency win the Vermont Yankee case at the Supreme Court—speaking of judicial review of rulemaking. He is certainly one of the most distinguished administrative law scholars in the United States, if not the world, with co-authorship of leading case books and treatises and influential articles that are too many to count. So today Peter is going to give us a short history lesson.

PETER STRAUSS. Thank you, Jeff. Actually all four of us, I think, are former government agency servants in science-based agencies. And when I was general counsel to the Nuclear Regulatory Commission we actually, even back in the '70s, did a lot about risk assessments. But the risk assessments that we were involved with were not only nuclear power and its risks but, at least on a comparative basis, the geopolitical risks of dependency on oil. I suggested to Don Arbuckle that the Department of Defense might be another good child for them to take good care of on the risk assessment front.

Rulemaking—science rulemakings in particular—have a number of shared characteristics that makes the question of judicial involvement with them, seems to me, of some importance. They turn on trends, scientific facts, highly technical judgments, that aren't just—as I think we heard from the previous panel—judgments that can be made objectively to a point, without a certain amount of judgment or guessing involved. They often have a strong political valence that can lead us to some suspicions about thumbs on the scale. Those of you who read the Washington Post this morning probably saw this wonderful line from Congressman Sherwood Boehlert, who is retiring. This is a town where everyone says they're for science-based decision-making until the science leads to a politically inconvenient conclusion, and then they want to go to plan B.

[Laughter.]

Mr. STRAUSS. There's a certain amount of documented OIRA pressure, although I'd expect Don to worry about that. We've seen

a lot of reports about presidential suppression of unwelcome science, especially on the question of global warming. We know that there is a good deal of legislative pressure and guidance as well. One of the things about rulemaking is that there's a declared record of the rulemaking, which might or might not be complete, and an agency explanation in its terms and that's the context in which judicial review takes place. One of my suggestions this morning is that judicial review might be, although it won't inevitably be, a source of a certain amount of back pressure against the politics.

Years ago a fellow I admire a great deal, William Peterson—I'm sorry, there are a lot of words, many more words, but I'll leave them up for a while, than you're supposed to use in PowerPoint—William Peterson uttered these comments about what he thought was the effect in EPA of extensive judicial review of rulemaking—basically that it kept the system honest, that it served as precedent for future rule-writers and gave those who care about well-documented and well-reasoned decision-making a lever with which to move those who do not.

So, continuing on down, there's a problem for judges, who, like Don Arbuckle's staff by and large, are not scientists, are not science trained and don't have much, if anything, in the way of science assistance. Can they go beyond the science explanations without permitting secondary and essentially adventitious disputes from both sides? But they are responsible to hold the agencies to the explanations they give and insist that they provide agencies centered reasoning.

And a final line on this slide—years ago, before Vermont Yankee, Professor Richard Stewart, then of Harvard, now of NYU—wrote about what he called the paper hearing—the tertium quid, as he called it. And it's not hard to see that what the paper hearing does is in some respects to reproduce in the judicial context the essential contesting feature of scientific inquiry rather than replicate trial. Who would want science issues to be decided by a jury or to be decided by non-scientists, rather than replicate trial? What it does is to replicate, in effect, the process of peer-review; that is to say, the exposure of evidence to the public for comment and then the coming to a conclusion in an explained way, which is what the courts reviewed, on the basis of the data received.

Now, there's a problem about this which is connecting this to the text of the Administrative Procedure Act, which in general is the statute that governs rulemaking. And the requirements of the Administrative Procedure Act are extremely simple. General notice—and if you read that language you'll see that the notice doesn't say anything about data, the inclusion of data. And then an opportunity to comment—and if you read that language particularly through the eyes of someone who might have enacted this statute in 1946—we're coming up on its 60th anniversary this June—I think you'll see that the opportunity they are imagining is the kind of opportunity that you have when you go before Congress to deliver a witness statement. You don't have the opportunity—and it doesn't say anything about your opportunity to see everything that the congressional committee knows; it's just your opportunity, yourself, to provide them with data such as you might.

And then the next thing it says is simply after consideration of everything that's presented, including what you yourself think you know, that you incorporate in the rules a concise, general statement of their basis and purpose. I like to define concise and general—concise: expressed in few words, brief and comprehensive in statement, not diffuse; general, again, as distinct from specific details. Concise-general has an ordinary meaning in the English language and I think we all know enough about rulemaking to know how far we have gotten from that.

The D.C. Circuit, just a month ago, captured these conclusions. This is not a science case; it's Bill Kovacs' organization, again, the Chamber of Commerce, but in this instance suing the SEC, but suing the SEC on exactly the grounds that concern us here today: the failure to make public the information on which it was relying in a form that would permit outsiders in the comment process to respond and comment. And the Court of Appeals agreed enthusiastically and emphatically, saying that the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, and that means exposure of your data.

How did we get there? The language of the APA, again, I will suggest to you, just doesn't say anything of the sort. For myself, I think the answer to that question came through the development of the Freedom of Information Act in the early 1970s. Once the Freedom of Information Act was in place, it became virtually malpractice not to file a Freedom of Information Act request for all data that the agency knew of involved in the rulemaking. Even if this wasn't directly connected to the rulemaking, it reflected a congressional policy on which courts could build and courts did build.

There was a vigorous debate in the D.C. Circuit in the wake of the Freedom of Information Act between Judge Leventhal and Chief Judge Bazelon. Chief Judge Bazelon, for whom I clerk—you might recognize as the author of the D.C. Circuit's opinion in *Vermont Yankee* that you've heard about. Terms of that debate were captured in a case called *Ethyl Corporation v. EPA*.

Leventhal, tying this very much to the issue of delegation, says that the system of review assumes judges will acquire whatever technical knowledge is necessary as background for decision of the legal questions, and on the basis on that background, go forward to access the adequacy of the arbitrariness or capriciousness of the agencies' results. Judge Bazelon completely distrusted the capacity of courts to reach those kinds of judgments. From his perspective, the only thing one could appropriately do was to impose procedures at the agency level that would assure a decision-making process leading to reasoned decisions that can be held up to the scrutiny of the scientific community and the public; a decision-making process at the agency level because he didn't think courts could do it.

That produced *Vermont Yankee*. And Judge Bazelon was told that he was wrong. Judge Leventhal was a Columbia alumnus. I used to see him in the halls of Columbia all the time afterwards, and he'd pat me on the shoulder and say what a wonderful thing it was that a Bazelon clerk had been responsible for his victory over Judge Bazelon in this particular dispute.

[Laughter.]

Mr. STRAUSS. And I smiled. I think Judge Bazelon has ultimately prevailed—prevailed essentially through the back door, if I can call it that way, of the Information Quality Act, the OIRA Review, all the variety of ways in which the political branches have taken over the injection of additional procedures and additional challenges to science judgment at the agency level.

One of Judge Leventhal's other achievements as a judge—he was a wonderful judge of administrative law—was to establish just the principle that the Court of Appeals for the District of Columbia reiterated last month; that is to say, that the notice and comment process means you have to reveal your data. I want to say to you again, I don't find that in the language of the APA as such. I think you can put it there if you put the APA together with the Freedom of Information Act. This is very clearly a rock-solid proposition of administrative law at this point, whether or not it is in the APA.

And I'll simply leave you with this context: There is, again, at least a chance that judicial review will stand in some way as back pressure to the influence of politics at the agency level, by, in Peterson's terms again, giving those who care about well-documented and well-reasoned decision-making a lever with which to move those who do not. Thank you.

[Applause.]

Mr. LUBBERS. Thank you, Peter. In speaking of Judge Leventhal, you reminded me that Judge Leventhal once wrote an article in which he proposed that appellate judges, especially D.C. Circuit judges, should hire science-trained assistants in addition to hiring law clerks. And I remembered that my old administrative law professor, Kenneth Culp Davis, also suggested that the Supreme Court should have a research service, something like the CRS, to help them with scientific and technical questions. So maybe you'll have a chance to comment on that afterwards.

Our next speaker is Sid Shaprio, who holds a university distinguished chair in law at Wake Forest University. He's a member scholar and board member at the Center for Progressive Regulation. His most recent book is, "Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation," published by the Environmental Law Institute Press. He's also the co-author of "Risk Regulation at Risk: Restoring a Pragmatic Approach," published by Stanford University Press; two law school textbooks on regulatory law and practice and administrative law, and an administrative law treatise. Sid has been a consultant to U.S. Department of Labor Occupational Safety and Health Administration (OSHA). He's testified in Congress on regulatory policy and process issues. He also worked at the FDA in his early career. Today he's going to talk about judicial review of the Information Quality Act.

SID SHAPIRO. Thanks, Jeff. Well, I feel I should also have a Judge Leventhal story. He said many wise things about administrative law, but I think this is perhaps the most apt. At one point Judge Leventhal observed, "In administrative law, complexity has a bright future."

[Laughter.]

Mr. SHAPIRO. I would like to talk about the Information Quality Act and whether or not there should be judicial review of it. It was pretty well described in the last panel, but basically, as we know,

it requires OMB to issue guidelines, the agencies to respond with guidelines, and to have a process to hear petitions for review. As you also heard in the last panel, the Fourth Circuit has ruled that there was no judicial review possible in the Salt Institute case, and as I will explain, they did so in a manner that suggests there can't be judicial review of the act in any case. You've also heard the supporters are interested in a legislative override, and therefore I think it's on the table to talk about whether or not that is a good idea.

As you know, the Fourth Circuit decision came in the Salt case. The Salt case involved a study called Dash—The Dietary Approaches to Stop Hypertension study. And the study led to two publications, one in the *New England Journal of Medicine* and one in the *Annals of Internal Medicine*, two of the country's leading medical journals. The findings were that all Americans could reduce blood pressure by lessening their sodium consumption. Then, as you also heard, the National Heart, Lung, and Blood Institute, which is part of National Institutes of Health (NIH), republished the findings of the studies in news releases, on their website and in at least one report.

The Salt Institute then filed a IQA petition—and I want to spend a minute talking about the petition because I think what happened in the petition in the case got confused in the last panel. You heard Bill Kovacs in the last panel say that what the Chamber was interested in was getting access to the data that underlie the two studies that were published in these medical journals. And the original impetus of the petition was a demand for that data. Now, the studies were conducted prior to the Shelby Act, so although these were government contractors, there was no obligation under the Shelby Act to turn over the information. The response of the agency was, well, you can file a Freedom of Information Act requesting, but, by the way, we don't have the data in our files so we're not sure that would be a very fruitful process. At that point, the Chamber amended its petition to ask that the data be correct and sought that the website descriptions of the results of the study be modified and that they report that sodium intake only reduces blood pressure for some groups and some persons, not for all Americans. So it essentially disputed the results of the study.

Now, the Information Quality Act does say as one of its conditions that information—scientific information—has to be reproducible. That's a quality aspect of the act itself. I don't know of anyone that has suggested, except perhaps Bill, that the Data Quality Act therefore establishes a legal right that people who petition the government can use the Data Quality Act as a kind of FOIA to get underlying data. I understood that all OMB meant was the study has to be done in a way that if someone had access to the underlying data, they could potentially reproduce the results or at least test them.

Judge Luttig, writing for a panel of three in the Fourth Circuit, dismissed the appeal because, he said, the Salt Institute lacked standing. First he noted that the plaintiffs must have an injury in fact, and the injury alleged by the Salt Institute was the asserted incorrectness of the public statements made by the agency. Second, he noted the IQA, by its terms, creates no legal rights in anyone.

It merely orders OMB to write guidelines and indicates the subjects the guidelines should address. Judge Luttig therefore concluded, quote, "Because the statute upon which appellants rely does not create a legal right to correctness, appellants have not alleged an invasion of a legal right and thus have failed to establish an injury in facts sufficient to satisfy article three." In other words, since the IQA does not create any legal rights in anyone, the Salt Institute cannot meet the redressability test of standing. Since the court lacked any authority to order the relief that Salt Institute was seeking, the lawsuit could not present a case in controversy.

So that presents the issue, should Congress overrule the Salt Institute case and make the IQA judicially reviewable? The primary argument in favor of judicial review is that it would increase agency compliance with the IQA. Of course, if you don't think the IQA is a good idea, and the think tank with which I'm affiliated does not, then judicial review only makes a bad situation worse. Putting aside that objection, however, one could respond to this argument by noting there is OMB enforcement of the IQA. Nevertheless, it has to be true that OMB can not be everywhere and that agencies are more likely to ignore their IQA duties if they are not subject to do judicial review.

This is the same argument that has led Congress to make the environmental impact statements and regulatory flexibility analyses subject to judicial review. Nevertheless, as I will explain in a minute, these requirements do not necessarily furnish a precedent for judicial review of the IQA. Furthermore, judicial review would make the IQA into an undesirable Daubert process, ossify rule-making and information disclosure, and create a substantial burden on the federal courts. As noted, there is judicial review of some regulatory impact analyses requirements, namely National Environmental Policy Act (NEPA) and RegFlex, although most are not subject to judicial review.

But judicial review in this context is for procedural compliance. Did the agency undertake the type of analyses it's supposed to undertake? Judges are not asked to determine whether or not the substantive judgments made by an agency are arbitrary and capricious in this type of judicial review. Judicial review of the IQA, by comparison, would involve precisely this issue. It would therefore enmesh judges in science policy disputes with no objective or clear resolution.

An additional problem is that judicial review would create an undesirable Daubert kind of process. An agency, EPA for example, often must decide the level of regulation on the basis of incomplete scientific information about the extent of a risk to people in the environment. Therefore, as you heard in the last panel, in order to access risk we have to plug the gaps by adopting science policy assumptions. These policies serve the precautionary orientation of the agency, often by adopting a worse case scenario such as, there is no safe level of exposure to a known or suspected carcinogen. If there is judicial review of IQA petitions, then the IQA becomes a kind of Daubert process because it establishes standards for what scientific evidence an agency may publish in its notice of proposed rulemaking. If there is judicial review prior to notice in comment, the courts indeed become the gatekeepers for rulemaking.

The problem with making the IQA into this kind of Daubert-like process, is this—the OMB-IQA guidelines—and as you’ve heard in the last panel, the proposed OMB risk assessment guidelines blur the line between defining what is acceptable quality for scientific information and what types of policy assumptions can be used to fill the gaps in the data. These guidelines therefore threaten to undermine the precautionary tilt that Congress has built into environmental and health and safety statutes. In theory this conflict might be avoided if Congress said the precautionary laws were to prevail in IQA lawsuits, but this still puts the courts in the position of determining when such conflict exists, which is a problematic activity.

Judicial review of the IQA also threatens—or actually worsens—rulemaking ossification. The IQA petition process is utterly redundant in the context of rulemaking. Persons with complaints about information can file comments, and then they have the opportunity for judicial review if those comments are ignored or not satisfactorily answered. If there’s independent review of information used in rulemaking, the door is open for litigants to start collateral attacks on discrete pieces of information that are part of the rulemaking record. If these attacks occur prior to rulemaking, they will delay it. If they occur during rulemaking or ever after, such lawsuits will be highly disruptive. I mention after because there have been petitions that are exposed attacks on information used in the completed rulemaking. It will also constitute a judicial burden, as you heard in the last panel.

So, all and all, caution is in order. The idea of judicial review seems to me to be highly problematic, and if it comes up and is proposed in Congress, it ought to be carefully considered. That didn’t happen the last time around, as you know, regarding adoption of the IQA. Hopefully this time we will get more considered judgment.

[Applause.]

Mr. LUBBERS. Thank you, Sid. You may have noticed there is one dispute that we haven’t resolved, whether it’s the Information Quality Act or the Data Quality Act. We’re talking about the same act here.

Mr. SHAPIRO. Did I call it both?

Mr. LUBBERS. It’s because it doesn’t have an official name. I think OMB is now calling it the Information Quality Act so that, I think, is taking over.

Our next panelist is Tom McGarity, who is an alumnus of EPA, but he is now a chair professor at the University of Texas, where he has taught and I think played intramural football since 1980. He teaches administrative law, environmental law, food and drug law, and a seminar in law and science. When he was a consultant of ours at the Administrative Conference and undertook research projects for us on some things like EPA or OSHA regulation, his technique, I remember, was to be a relentless interviewer. I think he interviewed everybody from the administrator to the janitor at EPA. Tom’s going to be discussing the aforementioned Daubert case on the admissibility of scientific evidence and its possible role in judicial review of rulemaking. And I hope he’ll tell us what the Daubert case actually requires.

TOM MCGARITY. Thank you, Jeff. I should also mention that I too am associated with this outfit called the Center for Progressive Reform. It used to be Center for Progressive Regulation but we're bigger than that now. And I did want to thank Curtis and Mort Rosenberg and, of course, Neil for putting this on. This is a great gathering of folks and a tremendous pulling together of expertise on this area of rulemaking, which many of us have studied, as it's pointed out, for many years. In the vein of shameless promotion, I should mention that Professor Wagner, who is on the next panel, and I are also working on a book in this area called, "Vending (?) Science," which we've signed a contract with Harvard University Press on, but it's not really ready to be purchased on the Internet yet, so, we're working away on that.

Some of the thoughts here were also included in an article that I wrote about three years ago in *Law & Contemporary Problems*, which I can certainly—if you have an interest in—send to you. The problem here I'm going to address is a little different than what Sid was talking about, judicial review of the Information Quality Act, or the Data Quality Act, however you want to call it, to a proposal that's in my view even more nefarious, and that is to incorporate Daubert-like principles of judicial review into judicial review of all scientific rulemaking or rulemaking with a scientific perspective.

Let me talk about Daubert. Daubert grew out of aggressive efforts of trial lawyers to press the limits of scientific knowledge on behalf of allegedly injured plaintiffs, and the equally aggressive reaction of the business community and the defendants in that litigation. No question that those efforts were really quite aggressive and in some sense perverted the science. Daubert gave rise to a Supreme Court case interpreting federal rules of evidence to limit, shall we say, a term that had been coined by a think tank up in New York called junk science. The Supreme Court saw this coming down the pike, used Daubert as its opportunity to put limits on this via the rules—federal rules of evidence.

Initially, it looked to be all about whether the Frye rule, which said that scientific evidence, in order to be admissible in court, had to be generally accepted in scientific community, applied under the federal rules of evidence to—not just in the criminal context where it had its origins, but to civil context as well, and the court said, no, federal rules of evidence have changed that. They have established the district judge as a gatekeeper for the presentation of scientific evidence to juries, and by and large, the resolution to factual issues and common law litigation is done by juries, and that the gatekeeper role is to assure the relevance and reliability of the scientific information that's presented. Well, relevance is something courts do all the time. That's all about the judicial function. Reliability in the context of science was a little different, a little questionable, as in fact, the court, on remand in the Daubert case, pointed out—not something that the courts are particularly comfortable with.

Well, as it looked like initially, certainly from the face of things, that Daubert represented a victory for the plaintiffs in that the case was remanded so that the plaintiffs could have a trial in which that evidence was evaluated under Daubert principles rather

than the Frye rule. The plaintiffs had lost under the Frye rule. It turned out to be quite the contrary, and it had a profoundly negative impact on efforts by the plaintiff's attorneys to use common law torts to hold companies accountable for the harm done by their products and activities. Now, attorneys from the very same companies are urging that this Daubert-approach, this Daubert-role for the court, which they urge successfully now to avoid common law liability. They want the federal courts to presume a federal similar role in reviewing agency action with respect to risk assessments undertaken by federal agencies.

In my view, and I think the view of many others, what they would like to do is incorporate this with what Rena has already described to you better perhaps than I can, this corpuscular approach that is evolving in Daubert hearings at the common law into the administrative law of judicial review of rulemaking. I won't elaborate on the corpuscular approach—she did a wonderful job of that—but it's really an idea that the court should focus on the flaws, whatever they might be, in the corpuscles of the data, the individual studies rather than the overall scientific reliability of the conclusions, the broader conclusions.

Now, I have several reasons that I would like to suggest to you for why "Daubertizing" judicial review of rulemaking is a profoundly bad idea. One, I'd like to seize on what Peter was saying; historically there's just no basis for it in the Administrative Procedure Act. Not even close. One might agree with Judge Leventhal that you have to put your data on the table via the Freedom of Information Act or whatever, or just general notions of evolving law of administrative jurisprudence that were evolving in the 1960s and 1970s, and still reject the conclusion that the court is to be a gatekeeper of the reliability of the science that the agency is applying in making its rules and resolving the kinds of science policy is used that arise typically in rulemaking. And policy does play a great role.

I reminded myself of this just the other day as I was looking back at the Federal Register preamble for all the original National Highway Traffic Safety Administration (NHTSA) standards, which at that time was in the Department of Commerce—all of the NHTSA standards—like the preamble for all of the EPA Ambient Air Quality standards. That's the National Ambient Air Quality standards about which we've had huge fights and gone to the Supreme Court about. The preamble to both of those rules was one page in the Federal Register. That was it back in the '60s and the '70s. That was it. That was the extent of the explanation you got and that you were entitled to. Things certainly have changed.

And of course change, as Bill Peterson said, it's a great tonic for the rulemaking process, for the agencies to know that they'll be reviewed by courts who are intelligent like Judge Leventhal. If Judge Leventhal—and I've said this many times—if Judge Leventhal were the federal judiciary, I'd be comfortable with hard-look review. But Judge Leventhal isn't all of the federal judiciary. There are other judges in the federal judiciary as well. And that's my first point really; they're not qualified. The judges aren't qualified to play this role. And I think that we're fooling ourselves if we think they are.

In the article that I wrote in *Law & Contemporary Problems*, I used the Flue-Cured Tobacco case, the judicial review of EPA's risk assessment from environmental tobacco smoke to show that—and I think I demonstrated it very well—how we had really a judge that was way beyond his proper range of expertise tearing apart an agency document that been years in preparation. Fortunately the Fourth Circuit, just as it did in the Salt Institute case, ultimately reversed that case and said, look, this isn't one we should be looking at. This case isn't right for review.

Second, I think that inevitably if the courts are going to play this gatekeeper role over the science, they're going to be playing a policy-making role as well, because science in the administrative context and the rulemaking context is a blend of science and policy, as Rena pointed out earlier this morning, and I'm sure Wendy will tell us, and certainly she's written about, at great length this afternoon. So what we do there is policymaking gets taken over by an undemocratic—which is to say not elected and unaccountable—institution. Well, agencies weren't elected either, but their heads were appointed by elected officials and they are more accountable than the judges who serve with lifetime tenure.

Third, I think—I don't want to press this too hard—it raises some serious separation of power questions that are just not relevant under *Daubert*. *Daubert* is just a matter of supervising the lower courts—evidence that goes before courts. Here we're talking about an agency which presumably has expertise, which is in the executive branch. It's supposed to be making these kinds of decisions.

Fourth, I think it ultimately will pervert regulatory science by encouraging even more elaborate efforts to bend science to the ends of that—either of the parties—interest groups, the stakeholders, or whatever—would like to bend it to. And I think that's bad because we may ultimately wind up with worse science and it will put us in a situation like we may have been in in the courts prior to *Daubert*.

Finally, I believe that the reformers, as they call themselves, who are suggesting this *Daubertization* of judicial review of informal rulemaking, are really not so much interested in good or sound, as they sometimes say, science as they are in desires of achieving regulatory relief of the sort that they have not been able to obtain in Congress. And to that extent, the whole exercise seems to me to be both illegitimate and undemocratic.

And with that, I'll turn it over to Don Elliott.

[Applause.]

Mr. LUBBERS. Thank you, Tom. I hope you'll forgive me for just noting one piece of irony, which is back in the day, liberals used to be in favor of judicial review and opposed to using standing and ripeness as blocks for judicial review.

Mr. MCGARITY. I'm still no fan of standing, by the way.

Mr. LUBBERS. Okay. Well, we'll hear next from Don Elliott. Don has three jobs, as he mentioned when he asked his question. He is a partner at Willkie Farr & Gallagher LLP, in Washington here, where he heads the firm's worldwide environmental department. He's also serving as adjunct professor of law at both Yale and Georgetown, where he teaches administrative and environmental

law at both places. He also served as the general counsel of EPA from 1989–91. And while a consultant at the Administrative Conference of the U.S. (ACUS), he conducted one of the first, and still one of the best, empirical studies of the impact of the Chevron case on judicial review with his colleague Peter Schuck. And Don was a late edition to our panel. I want to thank him for bailing us out when we lost a panelist. So I know you're doing this at rather short notice, but thank you.

E. DONALD ELLIOTT. Thanks, Jeff. I appreciate it. I appreciate being here. I'm a panel one wannabe.

[Laughter.]

Mr. ELLIOTT. I really think the action on science and rulemaking has really moved into the OMB review process. And I think it's really quite interesting that among my colleagues on the panel, who are among the very small group of most distinguished academic experts in this field, we have one of them talking about the history that took place with regard to rulemaking in the '70s—a creative period that basically ended with the Vermont Yankee case at the end of the decade—and my other two colleagues are talking about two things that judicial review might do in the future but that they advocate that it shouldn't do.

And I think one of the things that is significant about judicial review on the scientific side is really the dog that has not barked. I think judicial review has been a real failure in the last 30 years to try to develop the kind of techniques for managing highly technical and scientific cases that Judge Bazelon and Judge Leventhal were talking about in the middle 1970s. Peter and I were both clerks for Judge Bazelon. I was the law clerk that worked with him on the lower court opinion on Vermont Yankee that Peter got unanimously reversed in the Supreme Court. I was also the law clerk on the Ethyl case, which he mentioned.

But 35 years ago, Judge Bazelon was advocating the importance of peer review. And it really took Sally Katzen and John Graham and OMB to put in place the mechanisms for the development of a peer review process at the agency level. When I took over as EPA general counsel in 1989, EPA had six different ways of doing risk assessment among its programs. Each of the four programs has their own way and the Superfund Program had two or three ways of its own. And one of the things that Sally did—and I think it's really one of the great unsung stories of success in government—is really begin to standardize that process of risk assessment, create requirements for peer review at the agency level. And that process which she began was really continued by John Graham. I think this is no coincidence.

Really, the OMB review or the OMB process is a form of meta-regulation. It uses the same administrative law techniques to regulate the regulators. And it is more effective than case-by-case judicial review for many of the same reasons that environmental law is more effective than nuisance law. I've had the experience, both as EPA general counsel and as a private litigant, of taking several cases in parallel through the judicial review process. And I can tell you in both contexts that the OMB review process is consistently more sophisticated and better able to penetrate to the real issues

than a judicial review by non-expert judges for many of the reasons my colleagues have identified.

Peter and I have never talked about this but I do agree with him. And I've been teaching for many years that Judge Bazelon's view of the necessity of creating peer review and other institutions did ultimately prevail, even though Peter won in the short term and got Vermont Yankee reversed in the Supreme Court. On the long-term perspective, I think the rise of OMB review, particularly on scientific issues, is the major trend of our era. And I think it has happened precisely because courts have not been very generative. They have not contributed much to improving rulemaking in the last 30 or 35 years.

Well, my talk is really about where did they go wrong, and at the end, I'll come back and talk about what I think they can do now and what their role should be in conjunction with OMB review. The first key case is the Ethyl case, which has been mentioned. And in my view, Ethyl did a pretty good job of getting it right. It was a review of what is always cited as one of EPA's most successful public health regulatory measures—that is taking lead out of gasoline. And as the law clerk who worked on Judge Bazelon's opinion in that case, which was the deciding vote, I can tell you that the scientific evidence was very weak. And I think the Ethyl case demonstrates the need to give some leeway to scientific judgment, and not to adopt the kind of corpuscular view of data, which my friend Tom McGarity has attacked.

Judge Jay Skelly (phonetic) writes opinion conceived of the question for the court as a, quote, “delegated decision of legislative policy”—as a policy decision, which should not be reviewed with the rigor proper for questions of facts. So, a strong distinction between policy questions—and the way they should be reviewed in administrative law—and questions of fact. That was in 1976. Unfortunately, that approach was rather short lived, and the Supreme Court in the benzene decision in 1980, essentially reversed the precautionary decision and substituted a rule that the agencies must prove significant risk or incremental benefit from their regulations, and that the scientific underpinnings of that decision of significant risk should be reviewed as a matter of fact, rather than as a matter of policy. And I think that's where we began to go wrong.

And I've had a long-standing debate with my friend Leslie Carothers, the president of the Environmental Law Institute—who is actually one of the attorneys representing EPA in the Ethyl case—as to whether or not Ethyl has been overruled. It was recently cited by the D.C. Circuit so it hasn't been overruled, but it's been interpreted as applying only to one, narrow section of the Clean Air Act, whereas the benzene decision and its approach casts a very, very broad swath.

My wife, Gail Charnley, who is a scientist and risk assessor, and I have written in an article in the Environment Law Report in 2002, that by overemphasizing the factual component of risk assessment, U.S. courts have under-valued and fundamentally misunderstood the nature of the risk assessment enterprise. I think much the same point is written—is made in a fine but inappropriately named article by my former student and friend Adam Babich, “Too Much Science in Environmental Law.” It's not really that

there's too much science in environmental law; it's that there are a number of other policy questions that can't be undervalued.

An example of the consequences of the, I think, erroneous conceptualization of science as an issue of fact rather than an issue of policy, is the Corrosion Proof Fittings case written by Jerry Smith (phonetic)—who actually was my law school roommate—reversing an EPA precautionary regulation banning uses of asbestos and applying the benzene court's test. If you can't ban asbestos with hundreds of thousands of cases pending—and really one of the great public health disasters of our time, because you don't have sufficient factual support—it's very difficult to take precautionary reaction—it's very different to take precautionary action against almost any substance.

I saw Jerry recently. I was down arguing a case in the Fifth Circuit and I stopped by, and he said, "Don, I hear you don't like my benzene decision." And I had just testified a week or so earlier that I thought it was a public policy and public health disaster. Congress is actually considering passing a law that would essentially overturn that decision and give EPA authority to ban asbestos, but I think it's quite surprising that we are one of the few countries in the world that still allows asbestos to be included in manufactured projects.

How much science is enough science really depends on the context, and environmentalists once understood this. Dave Doniger (phonetic) in a great article in 1978 wrote, "It is one thing to say that some Americans must die so that other Americans may live. It is another thing to say that some Americans must die so that other Americans can have see-through plastic wrap," basically making the point that how much evidence is enough evidence to justify regulation will vary from context to context.

Unfortunately, though, today my friends like Lisa Heinzerling and Sid Shapiro and Tom McGarity have all led the charge on the notion that we should not really consider benefits or economics when we make a decision to regulate, and I think that's unfortunate. Even the European Commission, with regard in its discussions of precautionary principle, recognizes that the decision of how much precaution to undertake should also be based on an assessment of cost and benefits, and that judging what is an acceptable level of risks for society is inherently a political responsibility.

Ironically, I think excluding economics and the availability of substitutes from the discussion actually makes it more difficult to regulate certain substances, not easier, as some components wrongly suppose. The classic case on this in American law is *International Harvester*, by our old friend, Judge Leventhal, who pointed out that the extent of proof or the extent of scientific certainty that should be required should be a function of the consequences of an error in one direction or another. And in order to make that calculus of how much science is enough science, you can't consider scientific support in a de-contextualized way as an issue of fact that is completely unconnected from the other policy issues in question.

A good example is nanotechnology. I'm currently working a lot on nanotechnology. I'm teaching about it at both Yale and Georgetown. And nano materials are used in suntan lotion to make it

transparent, but they have a particular propensity or at least a possibility of passing through the skin. It would, in my view, require a lot less evidence to take some regulatory action about that use, which basically simply makes suntan lotion transparent rather than goopy and creamy, than if you were using nano materials say to target tumors in a pharmaceutical context. So it seems to me that it's not just a question of fact; inherently the question of whether or not there's enough evidence to regulate has to be discussed in the context of the benefits and the consequences of a decision in one direction or the other.

Well, what's the ad law payoff to all of this? Well, first, it's that the court should review questions of science and risk assessment more as questions of policy requiring transparent explication; i.e., under the State Farm standard in which the agency has to discuss its resolution of these policy questions, and less of questions of factual support in the record divorced from the policy context. Now, I say less; there has to be some data in the record but the key question is how that amount of data is evaluated in light of the risks in one direction or the other. And the last point is perhaps the most important one: Non-expert judicial review should reinforce expert peer review. I'm just finishing my last point and I've got one minute and 30 seconds left.

My view is that the courts need to view themselves in a secondary role and begin to reinforce the norms for science that have been developed elsewhere. For example, many of the risk bulletins that have been developed by OMB—the requirements for peer review at the agency level—should be taken into account by courts as they review the results of a rulemaking. And I think there is a great deal that can be done for the courts in a subsidiary role to enforce some of the norms and principles that have been developed elsewhere.

Thank you.

[Applause.]

Mr. LUBBERS. Thank you very much. We have about 20 minutes or so for questions, and I first want to give our panelists a chance to say anything they would like to say, and then Peter has something.

Mr. STRAUSS. Well, I just want to say that it's not only the judges who aren't scientists; neither are lawyers, usually, and that's the source of a good deal of the difficulty. To go back to the benzene case that Don referred to, for me, the great mystery about that case is that Justice Stevens' writing didn't see that Congress had given a panel of scientists in a department outside of OSHA—NIOSH—the National Institute of Occupational Safety and Health—the responsibility for helping OSHA set its priorities. And it had said again and again, benzene ought to be your priority. The court paid no attention to that. I still don't understand that.

Mr. ELLIOTT. And that would be a very good example, Peter, of what I call reinforcing expertise elsewhere. One point that I meant to make and I didn't make is I think the benzene case, arguably, is not sort of decontextualizing things. The court at least talked about the workplace, and you could read the text of the benzene decision as being limited to the OSHA Act. However, subsequently the Fifth Circuit adopted the benzene test across the board, under

all health and safety statutes. And that's really the time that the concept of science as a fact, you know, decontextualized from the other policy issues—that's really where the error takes place is when the Fifth Circuit reads the benzene decision not as a case about the workplace, but as a rule that applies across the board. And of course as an agency general counsel, you have to be concerned about the worst circuit because typically with a few exceptions, your regulations can be challenged in any circuit. So the law you're really up against is the Fifth Circuit law that says you have to show factually, with data and studies in the record, a significant risk in any case before you can regulate.

Mr. MCGARITY. Let me just chime in on benzene since it gives me an opportunity to talk about another long-departed-now institution, the Office of Technology Assessment. As they looked into the actual risks that were set out in Justice Stevens' hypothetical, where he has giving guidance to the Fifth Circuit and the agencies as to how to distinguish between a significant risk and an insignificant risk, he said, a one in a thousand risk of contracting cancer from breathing fumes at a gas station would clearly be a significant risk, whereas a one in million risk of contracting cancer from drinking a glass of water are one in a billion—I'm sorry, he said a one in a billion risk of drinking a glass of water would clearly be insignificant. As it turns out, those two risks are almost identical when you look at the exposure, which of course is very important in risk assessment. There's a lot more exposure to drinking water than there is to workers in gas stations. So the court in offering its more or less officious judgment as to the difference between the two risks offered no guidance whatsoever.

Mr. LUBBERS. Sir.

Question: Yes. Mark Frankel. I'm with the American Association for the Advancement of Science, AAAS. All of you have expressed some concern about the ability of federal judges to deal with scientifically complex matters. As you may know, federal judges have the power to appoint experts to serve as court appointed experts to help them work through those problems. And there have even been a few appellate decisions recently where the appellate court has remanded it back to the District Court and said, "You know what? You really should have appointed a court-appointed expert to help you." To what extent do any of you think that that might be a useful way of—not the only way but a useful way of dealing with the concerns that you raised?

Mr. ELLIOTT. Well, let me respond because I've written a lot of articles advocating it, and as Joe Cecil (phonetic), who is sitting next to you knows, I was part of the Carnegie Commission that really recommended that and then got the AAAS involved in making those recommendations. So I'm a longtime supporter and fan of judges appointing independent scientists and also science panels, which will be the subject of the next panel, and I've written a lot about that.

However, even under the best of circumstances, I don't think that really is a solution to the problem. And I think that over a 30-year period, we did not see judicial review developing the kind of meta-principles for how to review scientific rulemakings that we've seen developed by OMB through the notice and comment process very,

very quickly. But I do think the two of them need to work in tandem, but we should understand what has happened through the OMB review process, I think, as OMB filling a hole that has been left by the failure of judicial review to develop adequate principles for review of these kind of highly technical rulemakings.

Mr. LUBBERS. Sid.

Mr. SHAPIRO. There is really two dualities here, two sets of dualities. There's science and then there is regulatory science, which is science used in a specific context to decide about some risk in support or opposition to a particular regulation. And the closer we get to regulatory science, the more its chock full of policy assumptions and the less it's full of facts. So, I think Don is right so far.

The second duality is sort of two camps of people, sort of those who have faith in science, even in the regulatory science context, and the skeptics. And if you are in the first group, like Don Elliott, then you're for institutionalizing peer review and other devices to try to improve the science and help it—help the government make better decisions. If on the other hand you are a skeptic about what science can teach us in this area—no fault of science; there is just not enough time and data in the world to know all the answers we need to know—then surely you look at the science, but at some point you do your sort of procedural cost/benefit test and say, you know, we can keep looking at this science, we can keep parsing it, we can keep having a third level of peer review, we could even involve judges, but at the end of the day we aren't going to be any smarter. There is just nothing there to be smarter about.

So we just have to go on and make the kind of policy choices we need to make at the end of the day. If you're in the second camp, you tend to be more dubious even about institutionalizing these policy review processes, such as Don has urged, because they end up delaying things and they don't really produce much in the way of information.

Mr. STRAUSS. I think we do need to find ways of educating judges to about what they don't know and it's possible that science consultants could be helpful in that respect. But there is no way to get a court to reverse an agency judgment faster than to be able to suggest to it that the agency has based its judgment on some information, some education that it got privately from some experts that have consulted off to the side. And I don't see why that proposition should be any different for courts.

BILL HIRZY. I'm teaching here at American University. I'm on detail from EPA where I'm an officer of the union that represents professionals at headquarters. In 1990, during your tenure, Don, as general counsel, we filed a petition under Section 21 of the Toxic Substances Control Act, asking the agency to undertake rulemaking in connection with some carpet which was installed at headquarters and made a lot of people sick. I was president of the union during that time and when that information got out to the general public, I got calls and letters from all over the country about similar problems that other people were having. Subsequently, 26 states attorneys general also filed a petition with the U.S. Consumer Product Safety Commission (CPSC) in connection in this matter. A day before the agencies' response to our petition was due, a representative from your office came down to me and said,

Bill, we're not going to grant this petition because it would cost the carpet industry billions of dollars. I wonder if you could elucidate a little bit about the economic aspect of that decision in connection with what you're saying here. I understand now exactly what you meant but I'd like to have a little bit of a word from you if you would.

Mr. ELLIOTT. Well, I remember those days well. The EPA staff started calling a certain area of the Waterside Mall the "death zones" and refused to go into it. So I actually moved my office and my immediate staff down into the death zones and we lived there for the summer and put the interns in my office. Just a little bit of a—you know, I do think that consideration of the economics can sometimes lead to—or the benefits of something can sometimes lead to a decision not to regulate. And I certainly well understand, say, Tom McGarity coming up through the pesticide program, where lots and lots of scientifically demonstrated risks are deemed to be acceptable because of the economic benefits of a particular pesticide.

I think it goes both ways, and without getting into whether that decision was correct or not—and I don't really know; I wasn't involved in it—I always felt that those types of decisions should be made by the program officer rather than by the general counsel. So I wasn't really involved in that. But I would say that I do think that in deciding whether a small or unproven or undemonstrated risk is one that merits regulatory action, one does need to consider both substitutes and economic benefits as opposed to looking at the issue of hazard or even risk in isolation. I think it's incoherent to make a decision to regulate without considering the costs and benefits and also the availability of substitutes.

But I can't really try to justify the particular decision in the particular case that you're talking about because I really don't know what the facts were. And, you know, I don't think that every decision that EPA made during my tenure there was necessarily correct. I've now been out of government long enough that I can say that. But, you know, based on the limited facts that you provide about it, sounds like a bad decision, and there are some times bad decisions that get made in government. But I think it's important to try to decide what the right way to make decisions is and I suppose that's probably why I'm an academic rather than no longer in government.

UNKNOWN SPEAKER. Just one quick follow-up. Our later analysis of that decision was that in order for EPA to undertake the rule-making we asked for, you would have had to make a finding of unreasonable risk associated with that particular product, and that the billions of dollars it would cost to the carpet industry would have been the result of tort actions that would have followed EPA making such a finding.

Mr. ELLIOTT. Yeah, I mean, I have—I do think that—and I've written a lot and testified a lot that Section 6 of the Toxic Substances Control Act (TSCA) is broken and really needs to be fixed. And I think one of the lessons that EPA took away from the asbestos decision that I talked about is if you can't regulate asbestos with 100,000 studies in the literature and hundreds of thousands

of cases in the courts, when are you going to be able to use Section 6 of TSCA?

And unfortunately, I don't think Corrosion Proof Fittings is really an outlier. It's somewhat extreme, but I think it's very difficult to regulate in the United States based on relatively weak scientific evidence. And one reason for that is that we don't consider issues of substitute and we don't consider issues of benefit. And we've recently had this very debate with regard to the ratification of the (inaudible) conventions, with basically the Democrats opposing ratification of these international conventions because they want to limit the consideration of new substances solely to the issue of risk and not consider the potential benefits or the potential substitutes. And that just seems to be me to be incoherent. You can't decide to regulate based on science in isolation. It has to be part of a broader policy conversation.

Mr. STRAUSS. One of the characteristics of judicial review is that it does not engage in its own cost/benefit analysis, which is possibly all to the good. But this conversation has reminded me of the 15-year or so postponement of the introduction of airbags into American automobiles that resulted from the Sixth Circuit's determination that—unfortunately, the model that was used to test the sufficiency of airbags had a neck that was just not quite the right stiffness in relationship to the human neck, and therefore the airbag rule that was then ready to go into place could not be put into place.

UNKNOWN SPEAKER. Crash test dummy case.

Okay, yes.

PASCUAL PASKY. Hi. I'm Pascual Pasky with the US EPA. I'd like to return to the issue of transparency, particularly the transparency of the rules of the game. Professor Elliott cited Leventhal for the proposition that scientific proof should be a consequence or a function of the consequences of error. And the panel talked all about the procedure of rules that the public might use to guard against false positives. So my question is, what is the countervailing jurisprudence the public might use if they were able to point to overwhelming evidence—and I'm talking about both physical evidence as well as the evaluation piece, the economics piece—that the problem exists and therefore compel governmental action, guarding against a false negative?

Mr. ELLIOTT. Well, the mechanism is the one that the gentlemen behind you—I forgot his name—from EPA mentioned, and that is to file a petition for rulemaking. That exists under many of the environmental statutes. It also exists under Section 553(e) of the Administrative Procedure Act, where people outside the government can attempt to force the government to take action. And that is actually a distinctive portion of our administrative law that exists in very few other countries around the world, you know, essentially empowering citizens to come in and attempt to force government to take action.

Unfortunately, a series of court cases, which we could go into, have raised the bar very high and basically have said that for a citizen to come in and force the government to take action, the citizen has to put together pretty much the entire record and present it to the agency in order to force the agency to take action. And

since the record—since the record-compiling function is so high, as the Corrosion Proof Fittings case demonstrates—namely EPA spent 10 years and, you know, 100,000 page record and that wasn't enough—to put that type of burden on a citizen or environmental group and say you can only force the agency to take action if you bring them a complete record, which is basically what the case law says, I think really has deprived that section of the EPA and of many of the environmental statutes of the role that the drafters really envisioned for.

Mr. STRAUSS. It's a bit worse than that.

[Laughter.]

Mr. ELLIOTT. I was trying to be measured.

Mr. STRAUSS. No, No, because if the agency complies that record, the judicial review that occurs on the basis of its judgment is the hard look that we've been hearing about. If you compile the record and the agency says too bad, so sad, we're not going to do anything, you get, at best, a very soft look from the courts.

Mr. LUBBERS. I think that is all the time we have for our panel. I want to thank you for an excellent presentation.

[Applause.]

Mr. LUBBERS. This afternoon we have two panels on the capability of government agencies to use science. The next panel will convene at 1:15. For lunch, there's a map outside on the table. You just cross the street at the light, walk straight, and you'll hit a number of eating emporiums. Thank you.

TUESDAY, MAY 9, 2006

11:15–2:35 p.m.—Panel 3:
“SCIENCE ADVISORY PANELS AND RULEMAKING”

Moderator:

Mort Rosenberg, Congressional Research Service

Panelists:

Wendy Wagner, Professor, University of Texas School of Law

Jamie Conrad, Assistant General Counsel,
American Chemistry Council

Richard Parker, Professor, University of Connecticut School of Law

Fred Anderson, Partner, McKenna Long & Aldridge, Washington, DC

MORT ROSENBERG. Good afternoon. I think we're about to get started again. My name is Mort Rosenberg. I'm an attorney with the American Law Division of the Congressional Research Service, and I've been enlisted by the House Judiciary Committee, along with Curtis Copeland and T.J. Halstead of my division, to explore in a very unique way some of the emerging issues in administrative law and process. This symposium, I believe thus far, justifies the judgment of the House Judiciary Committee that gathering important information and ideas about understanding the current state of administrative law and process in the federal government outside of the confines of set-piece committee hearings was a sound and a wise judgment.

With this panel on science advisory committees in the rule-making process, we enter into an important and sometimes very volatile debate over whether we can or should attempt to clearly separate science and politics in the regulatory decision making process. To some, this seems paradoxical because we also want science to be relevant to policymaking. A better approach, some say, would be to focus attention on developing transparent, accountable, and effective processes to manage politics and science, not to pretend that it doesn't exist.

I think this panel is well qualified to address these and other issues. We have today Wendy Wagner, professor of law at University of Texas Law School; Jamie Conrad, assistant general counsel of the American Chemistry Council; Richard Parker, professor of law at University of Connecticut Law School; and Fred Anderson, a partner at McKenna, Long & Aldridge here in Washington, DC.

I'm going to start with Wendy. Wendy is the Joe A. Worsham Centennial professor at the University of Texas Law School in Austin. Before entering academia, Wendy served as an honors attorney with the Environmental Enforcement section of the Environment and Natural Resources Division of the United States Department of Justice in Washington and as the pollution control coordinator in the Office of General Counsel of the Department of Agriculture. Wendy teaches courses in torts, environmental law and regulation, and seminars on law and science and then on complex problem solving. Her research focuses on the law-science interface in environmental law, and her articles have appeared in numerous major law journals, you know, in the country. Wendy serves on the Na-

tional Research Council's Committee on the Selection and Use of Models in the Regulatory Decision Process. She also serves on the Council of the Administrative and Regulatory Law section of the American Bar Association, the council of the Society of Risk Analysis, and as a member scholar of the Center for Progressive Regulation. Wendy?

WENDY WAGNER. Thanks very much, Mort. As the first panelist on today's panel, I think I'm taking on the role of trying to sketch out a big picture of science advisory boards, and I also want to offer sort of a bottom line from that. So just to give that to you now just in case your metabolism kicks in and you start to fade me out, which I know happens at this time of day, the bottom line is that science advisory boards serve an extremely important function in rulemaking—extremely important.

But I analogize them somewhat to a very sharp, wonderful, expensive kitchen knife. They serve as a magnificent utensil in the kitchen. They can do wonderful things. But if you use them wrong, they not only don't have benefits, but they can have enormous adverse consequences. And I think the trick then is to find a way to use science advisory boards to bring out the positive aspects that they have to bring to rulemaking without getting into some of the horrific costs that can attend if you do them unwisely or imperfectly.

I'm going to first start again as sort of opening the entire day—our first panel on science advisory boards—to give some basic facts and figures on science advisory boards just to orient ourselves into this area. And then I'll plough into the two main points of my talk, first talking about why we need these science advisory boards, why they are so critical and what some of the dangers are—and I think Al Teich sort of hinted at some of those in his slide—and then go on to offer, based on reading the literature on science advisory boards, which is slim but extremely good, what I call, good practice presumptions that should guide science advisory boards in the future. If we're actually designing these, these are some presumptions or principles that might help us decide when we're actually doing it right and when we're doing it wrong.

All right, starting with some facts and figures, Mr. Kovacs said, "Forcing good quality data into the regulatory process does not exist." And I've got to say, in terms of science advisory boards, that the numbers at least suggest that's not the case. Today at this very moment, we have roughly 500 to 1,000 science advisory boards in process in the United States. They cost about \$150 million to \$250 million a year in managing them. At EPA the budget is roughly \$15 million to \$20 million to manage their science advisory boards. And they have about 100 members and 10 subcommittees or 10 committees. So they are a large infrastructure in our government, and I don't think we should be taking them lightly.

There's a whole wide variety of science advisory boards. And again this is just basic orientation in terms of facts and figures, and I think it makes it hard to say anything concrete about them because they are so incredibly varied. They can be established in a number of different ways. Some are actually required by statute. Some are simply authorized by statute. Some are created by the agency. Some are created by the president. So they can be estab-

lished in a whole variety of ways. Most of them tend to be permanent, at least the most significant one that we might think of, but some are in fact temporary. Some give actually binding advice on the agency. Most give non-binding advice, but again we've seen an important split there. And many do serve a very significant role. Mark Powell is here, and in his book "Science at EPA," he gives a lot of very helpful information about science advisory boards. He estimated that roughly 50 percent of EPA's major activities at some point got cleared through a science advisory board and that roughly they issue about 60-plus papers and letters a year. So they can play a very significant role in agencies, and I don't think we want to minimize the extent to which they are active in these things.

There are constraints on their operation or how they operate. The agencies may have specific guidelines that constrain how a science advisory board works or how it doesn't. But generally the default rule is FACA, the Federal Advisory Committee Act, and that sets out some very loose but important restrictions on how they do science advisory boards. So for example, they need to have open meetings unless there's a special exception. They need to balance the members. They need to look for conflicts of interests and have a policy on that, and they also need really good record keeping—all pretty standard legal requirements that apply to science advisory boards.

Now, in terms of their operation, another advisory board that is also caught under FACA and actually has its own little amendment is the National Academy of Science (NAS). And I just wanted to throw this slide in to make a point that I think is important when we think about science advisory boards. I want to urge you, at least in your own mind, to not think of the National Academy of Science in that same big category as agency science advisory boards, and this is for an institutional reason. Institutionally, the NAS's existence has been—and I'm sure all of you are familiar with their extremely important role essentially as a mediator in science policy disputes. Their entire existence institutionally depends on their credibility and neutrality. If they're viewed as partisan, down the road they're going to lose business, and they're going to cease to exist. So their main mode of operation is to assure that they appear credible and neutral, and that will keep them extremely vigilant in their operations.

The same, I would submit, is not true of agency science advisory boards. They want to be neutral—that's important to the credibility—but there are a lot of other values on the table as well that sometime I think will trump that. So institutionally I think it's treacherous to try to lump these two together. And so for your mental model, at least, let's think of something different than the National Academy of Science when we think of a science advisory board that has a whole bunch of different and varied and complicated institutional incentives.

All right, so that's a background. That's an overview. Now, the question is—I mentioned at the very beginning of the talk—I view these as essential to science-based rulemaking, or I can see how they're extremely important. What is the justification? Well, I think some of these issues have already come up before, but I want to go ahead and nail them down. And the first is what I call the

ugly truth about regulatory science. In most of these areas that we're talking about—EPA, FDA—we're dealing with regulatory science. And that has some peculiar features that make it especially vulnerable, especially fragile to attacks and also to disagreements.

Now, I want to highlight two, although there's many. The first I think you can see visually. I have up there a bibliography on studies that have been done on atrazine. This is on EPA's website so it's probably 10 years out of date, but nevertheless this is right off EPA's website. This is the bibliography of the studies and toxicology done on atrazine herbicide and its effects on human health and animals. Now, visually you can look at that, and you can see one problem appears, I think, pretty dramatically. And that is it doesn't look like the kind of studies that we're going to see research studies pushing the outer limits of theory and trying to understand truth. They're not going to be all excited about looking through those studies so they're not going to be engaged in that issue. Instead, they're probably going to kind of look the other way and go back to their research. Another thing you'll notice visually is all those studies have to be FOIA'd to be accessed.

So the point is the mainstream scientific community doing research is typically not going to be actively vetting and overseeing a lot of the regulatory science that the agencies are using for their decisions. Instead, it's going to fall under the radar and fly on its own without that kind of social network that we depend upon for high quality science.

There's another feature to regulatory science that's also extremely important—it's not visual—and that is the actual nature of it. When we do regulatory science as scientists and as lawyers—not as lawyers, I'm sorry, when we, the scientists, do regulatory science, we are doing it essentially usually by trial and error. For a lot of the applied regulatory questions, there isn't any grand theory into which we're plugging. And a lot of times we don't have a lot of empirical knowledge base to figure out what to do. So if we're trying to figure out the effects of atrazine on animals—on frogs, for example—we're kind of doing some trial and error, throwing some frogs in an aquarium, hoping we're getting the right size, giving them the right concentration. And there isn't anything beyond that.

Now, that feature means that a lot of studies used for regulation are based on a lot of tenuous assumptions that can't be validated, probably won't be validated, and don't even have theory to support them. So we take this fragile science not vetted by the scientific community, extremely tenuous and disconnected from the rest of mainstream science, and we throw it into the regulatory environment, where the stakes are high and there's an awful lot of interest in what those tenuous studies say.

That's when the science advisory board becomes so incredibly important because it serves two important roles. The science advisory board sits there and looks at this regulatory science, first of all, often for the first time. It essentially represents hopefully a diverse sampling of scientists who are brought to bear—because they're not ordinarily going to be involved in this stuff—to opine about the quality of this science, and we get a representative sampling of the scientific community that ordinarily wouldn't be there. But we also

bring them essentially to filter out the major clunkers and to develop some consensus around the stuff that looks halfway decent. So the scientist will say, oh, you packed the aquarium with 30 frogs. That's too many. That study stinks, and in fact that study may have been deliberately stinky in order to get the result that was wanted. The science advisory board may say that's not a reliable study or we weight that very lightly. But five versus seven frogs—we're not exactly sure. It looks credible. We'll kind of weight it.

So they protect and buffer the research that appears plausible, while clearing out the clunkers. And this serves a vital function. Can't help but throw the yin-yang in there—I'm sure it was foremost on all of your minds as well. I actually see the science advisory board very much as the opposite of what we see in adversarial notice and comment rulemaking. If we think about rulemaking and the notice and comment and judicial review process, it's built on the idea that we bring all the affected people into the room and battle it out and duke it out, and the truth emerges.

Science advisory boards, when done properly, conceptually at least, should be the exact opposite. You bring people that don't care about the outcome, that are disinterested, that are open-minded, that are vigorous, and they get in there and roll up their sleeves and actually try to come up with some centrist answers or suggestions about what the science is revealing, at the same time throwing out the clunkers. So it serves essentially as an essential ballast to keep the decent regulatory science in place and keep it free from endless contests that could occur, to the numerous assumptions. We could argue *ad infinitum* about whether an aquarium should have five or seven frogs. The science advisory board can help buffer and insulate some of that, at the same time throwing out the one with the 30 frogs.

Now, these things, I think, do serve conceptually a very vital role in rulemaking, but they come with a lot of attendant dangers just like the knife. The first is the very serious danger—and I'm sure it's not news to any of you—of actually setting the science advisory boards up in a way to reach a predetermined end—stacking them, saying, okay, well I'm not really going to have a representative sample of scientists. Instead, I'm going to have the scientists that I think will give me the right answer. And a political official will do that, and we'll have stacking going on. Stacking has been documented as a problem in the federal government. It's a very serious concern, and I'm sure that we'll hear more about it through the rest of the panel.

A second danger is that these science advisory boards are going to engage in a lot of policymaking. Now, let me be clear. There is no way to squeeze the policy out of regulatory science. So science advisory boards are going to be doing some policy. When they decide how heavily a study on frogs should be weighted, that's going to be based in part on its significance. If we want to be risk adverse about that particular issue, we might want to weight it more heavily if it indicates harm. If we're risk tolerant, then we'll weight it more lightly. It's impossible to separate the policy out from the science. But if not done carefully, we can pay no attention to that

and end up giving science advisory boards enormous amounts of policymaking power that gets into very dangerous ground.

A final risk that I'll just raise is one that Al Teich raised, and that's the ossification problem, the delay problem. We have these science advisory boards. Maybe we don't need them all the time. Maybe the reason we put them in place is they create a one to two, maybe three or four-year speed bump on any regulation. And to the extent you don't want regulation, that's a speed bump that's very much appreciated.

So these are the justifications and dangers of science advisory boards. And then going through the literature—and let me say the literature, as I mentioned, is slim, but it's outstanding. Sheila Jasanoff's "The Fifth Branch" is a must-read. Mark Powell, who is here, with his "Science at EPA," is another must-read. He doesn't go into science advisory boards in as great a detail but it has enormously helpful things.

When I looked at all the literature that existed at that level, I tried to create what appeared to be recurring themes in when science advisory boards were working well. I would suggest this is a project that should be continued by someone, which is exactly how do we develop a user guide for science advisory boards so they do these wonderful beneficial things without creating a lot of the costs? So essentially this tightrope walk—I over illustrated this so I'm going to slip it quickly. But the idea was, how do we keep the science advisory boards up on the wire and not have them fall? And the only thing catching them is poor, pathetic FACA. Only a lawyer would go to the trouble of Googling a picture like that by the way and pasting in all those terrible illustrations, but I'm using up my precious time to self-deprecate, so I'll stop.

[Laughter.]

Ms. WAGNER. All right, to some general practice presumptions for science advisory boards. The first thing that screams to me loud and clear in the literature is one I wasn't looking for, wasn't expecting, which is that they serve the most helpful role when they're consulted early in process, when they're involved right at the get-go. And that occurs for a number of reasons. At least two main ones is they're able to help the agency at that point. The agency is in a dialogue, asking some technical questions, getting some answers. We get to go back and forth, as opposed to positioning at the end of the pipeline, where they're essentially reviewing the agency's product and setting them up for judicial review. A second reason this is so important is it keeps the science advisory board away from the policymaking function. Involving them early gets them to look at technical issues, and then the agency can enter in with its own policy spin or policy issues on top of that technical input from the science advisory board. When they come at the end of the process again, a lot of policymaking can take place.

A second principle has to be neutrality, and I think a lot of research has to go into how to actually do this. I would say, in contrast to the Academy, which has strong, strong incentives to do it right, that we need a lot more rigorous rules, written down rules on how agencies should do science advisory boards right. Just to throw something out there, I would suggest that we need a rebuttable presumption that no one can serve on a science advisory

board that has an affiliation with a special interest and maybe even an affiliation going back 10 years, including contracting roles. There's an argument that we can't find enough qualified people for SABs. This would certainly tell us whether that's the case, but I think it's extremely important to have very, very vigorous protections to make sure that we're tapping into the scientific community to open-minded people who are going to be able to collaborate and look at the issues without a lot of predisposition.

Also, transparency is critical. I'm not sure that actually requires open meetings all the time. I don't really know, but it is absolutely critical to make sure that there's a window inside this process so that it can't be distorted.

A third principle is that, to the extent possible, the Science Advisory Board needs to understand its role is primarily technical, realizing that there's a big fuzzy overlap. And a lot more attention needs to be given to the charges given to science advisory boards. Tell us, science advisory board, where the science ends. Tell us when you really can't reach a consensus on what this pup study means or how to weight it because that kind of input is extremely important. It's a flag the policy then needs to enter, at least at that level.

A final sort of good practice presumption is to come up with some kind of formula or way of thinking about when we actually need these things and when we don't. My suspicion is that we tend to overuse and under use them. I think we clearly under use them in some areas where the agency tends to use a lot of parochial evidence or is captured. Natural resources may be an area where science advisory boards could actually help a lot—clean up some of the science that goes on inside the agencies. On the other hand, there may be a lot of dangers in overusing, as I mentioned, with ossification, so we need to come up with some sort of formula for when benefits of these things actually will outweigh their costs in terms of several years and maybe a couple million dollars and think through those issues. But it's important, I think, to identify in advance how we know when we have benefits outweighing the costs and not just simply to fly by the seat of our pants.

So, for reform and for the future, I think the one thing I learned from looking at science advisory boards is that there's an awful lot of important empirical research questions that need to be asked and answered about these things and a lot of issues that are still in very tentative positions given how long we've had them and how important they are. So I think we need to spend a lot more time on exactly the rules or who should be on them. We need to talk more about exactly the kind of transparency that they need. And also this may lead to some legislative and regulatory changes.

One is with regard to OMB's Peer Review Bulletin. I'm not sure what purpose that serves beyond the science advisory board role. So it may be an apples and oranges comparison. But if the OMB bulletin is essentially trying to do the same as peer review—I mean as science advisory boards—then this analysis, I think, suggests they got a lot of things wrong and may need to be revisited. They envision a process where peer review comes at the end of the process. The literature suggests that's a time where there's an awful lot of intertwined policy questions, and that could lead things awry.

It also suggests it's not a time where the agency is receiving constructive advice and improving the way it does things, but instead could be relatively detrimental.

Also, I would suggest at a legislative or regulatory level what we really need to do is come up with presumptions or principles for these science advisory boards. FACA doesn't begin to address the specific needs that science advisory boards have, and I think to make these things work properly and not go into some of the costs and dangers, we need to come up with much more specific guidelines for how they can be used. So with that, I'll close.

[Applause.]

Mr. ROSENBERG. Thank you very much, Wendy. Our next panelist to speak will be Professor Richard Parker. As I indicated, he is a professor of law at University of Connecticut Law School, where he teaches and writes in the fields of administrative law, environmental law and policy, and international environmental law. Richard has served as an assistant general counsel in the Office of the United States Trade Representative and special counsel to the deputy administrator to the United State Environmental Protection Agency, where his responsibilities included assisting in the supervision of a comprehensive review of agency science policy. He currently co-chairs the ABA administrative law section's committee on e-rulemaking and is leading the 21st Century Rulemaking Project, a collaborative, interdisciplinary research project, which is exploring ways to use information technologies to strengthen agency science and to improve transparency in complex agency rulemaking initiatives.

Richard?

RICHARD PARKER. Okay, thank you, Mort. It's a pleasure to be here and see so many familiar faces. It's also a bit daunting to look around the room and realize that most of the familiar faces in this room have a lot more experience in administrative law than I do. I've been studying rulemaking for about five years, and I think by the standards of this room that makes me probably a novice. But to try to compensate for that, I have gone and tried to talk with people in agencies about how science advisory boards actually work to try to draw on their experience. And the two agencies that I have focused on so far are the National Academy of Sciences and EPA. And I take Wendy's point entirely that they're very different bodies, but I think a science advisory board raises the same—similar issues of independence, of objectivity, of bias, of expertise, and so forth. So I think that they actually work in quite different ways. And I think some of the comparisons and differences between them will be instructive.

So what I'd like to do is just to talk with you a little bit about my findings looking at how science advisory boards actually work and ask in each case, how do they work? What are they? What are their problems, and how can they be improved? I start with the premise that they basically are a good thing, like Wendy said, but that they have certain problems.

There are four advantages basically that the science advisory boards have. First, they are relatively independent in the sense that they are not hired by the agency, and they're also not supposed to be, you know—in the case of science advisory boards any-

way—in league with stakeholders or financially beholden to stakeholders. So that's one benefit. Secondly, they have access to a broader range of expertise than you can often find from any single consulting firm, for example. If they're done well, you either have neutrality or you have access to a diverse and balanced set of viewpoints and scientific perspectives—again, the advantages of a panel as opposed to an individual firm. And finally, they ought to be at least relatively transparent, although we'll see the pros and cons of that as we go along.

At the same time, they could fail, as Wendy points out. They could smuggle political values into scientific studies. They can disintegrate into quarreling factions. They can end up with nothing but uncertainty. They can waste time and money. So I think, however, you have to compare reality with reality. And my guess is that a lot of the circumstances which produce these failures in science advisory panels are also going to produce a lot of problems under any other alternative arrangement. So in my view given the advantages, the right thing to do is to fix the problems or at least try to fix the problems and not ditch the concept.

So I guess that's backdrop of praise for the concept. Let's turn to a critique of how they actually work. In each case, the questions will be, how do they work, what are their shortcomings, and how can they be improved? And right away we raise—we face some issues.

The first advantage of science advisory panels that I mentioned is access to expertise. In the case of NAS, the National Academy of Sciences, there's no question that they have unparalleled prestige and the ability attract top talent. At the same time, there's—at least as far as I've been able to tell from my talks with people—not really a formal public nomination process the way there is in the agencies so the public can comment on a shortlist. It's more of a very informal consultation with a network of nominators, pretty much back channel. There are some criticisms out there. Again, I emphasize that I don't have a view of this really. I'm just reporting views that I've heard that it operates as kind of an old boy network with the same people, you know, reappearing time and again and other prominent scientists, at least as measured by their publications and presence in symposia, perhaps not represented.

EPA is quite different in the sense that they also have their informal network. They often consult with current members of their existing science advisory boards—another thing which kind of propagates perhaps an old boy network. But they also have this public nomination process. Here the problem is that, of course, a lot of scientists don't read the Federal Register and neither do their colleagues. However, corporate lobbyists do, or their paralegals do, and so you already have this tendency, I think, for imbalances to be created.

So I just want to suggest that perhaps we should consider a more proactive way, and I only raise this as an issue, which I throw out there for the purpose of provoking discussion and hopefully some insight. What about having a science registry? What about canvassing science and engineering departments around the country, scouring the literature, talking to heads of professional societies? To some degree that's already done now, I'm sure, and I don't want

to suggest that it's not being done. But do it systematically and actually develop a database of expertise in a wide variety of areas that are relevant to rulemaking. In that database, you could also consolidate a lot of your key information on qualifications, on conflicts and predilections, which would give you a leg up as you turn to the conflict of interest and the bias screening process. It would greatly reduce the delay and the marginal costs of new panel formation. And I think you could also—there's already sort of a basis for it in GSA's current database. So I just want to suggest that as a possibility.

The reason this is important is because time and again you hear claims that, if you don't relax the conflict of interest rules, you won't be able to get the expertise. Or if you try to balance the panel, you won't be able to get the expertise. We have a terrible shortage of expertise, we're constantly told. And it seems to me, if that's the case, no argument based on the shortage of expertise should be accepted until we are truly confident that we're doing all we can to cast the net as wide as we can and as skillfully as we can.

Okay, the second thing that I'd like to talk about is the whole issue of independence, and independence here is a code word for absence of financial conflicts of interest in a particular matter with some entity that would be affected by the outcome of that matter. And right off the bat we have a bit of an issue, and perhaps Wendy's distinction is an answer to this problem, but I'd like to raise it anyway.

Is government appointment in itself a fatal conflict to the independence of a science advisory panel? The National Academy of Sciences has taken the quite firm view that it is. And in fact, even before the recent scandals over the packing of science boards, back in 1997 when the NAS was told by the Court of Appeals to their surprise that they're actually subject to the Federal Advisory Committee Act, FACA, they went straight to Congress and said, we will not continue to do reports for you if you don't amend a couple of things about the way FACA applies to us at least. And one of the things they insisted be amended is the requirement that science committee members be appointed by the government. They said that's fatal to their objectivity, and they couldn't live with it. It was a deal breaker. And within days Congress had passed the law, which became Section 15 of FACA, which basically exempts them from that requirement.

This issue underlying their concern, of course, came to a boil in 2004 when the Union of Concerned Scientists issued a letter decrying this administration's stacking of scientists. They claimed that highly qualified panelists had been dropped by key science panels, while scientists working for industry subject to regulation had been appointed. This letter was signed by 49 Nobel Laureates, 63 National Medal of Science winners, and 171 members of the National Academy of Sciences. So I think it stands for a pretty clear expression of the science community's point of view that there's a real independence problem here.

That doesn't necessarily mean perhaps that you can't have government appointment of science. But perhaps the time has come to consider at least building in some safeguards such as, for example,

requiring that appointments be made off a roster that is approved by the National Academy of Sciences or by the AAAS, what have you—another case basically for a science registry. But it would check at least the tendency for politicization that we've seen in the last few years. And by the way, they were very clear in that letter that although the Bush administration's actions have been extreme, they are not—it's only a matter of degree, that these problems are longstanding problems.

But this question of government appointment is unfortunately not the end of the problem. There are also these gaps in coverage of conflict disclosure rules, problems with dollar thresholds, and the problem with disclosure rules not looking back very far. And let me, having rattled those off, talk about them in a little more depth.

One of the things in the conflict of interest area that immediately jumped out at me, at least when I looked at them, is that basically disclosure of a conflict of interest and defining something as a conflict of interest creates a fairly strong presumption that the person should be disqualified. That presumption can be overcome if they have unusual expertise that is relevant to the job of the panel and that overcomes, you know, the problem of their conflict. But it's a presumption of disqualification basically. And furthermore, the dollar thresholds for financial affiliation are ridiculously low. I think it's \$200 for income in a reporting period and a \$1,000 of assets—(unintelligible). No self-respecting consultant is going to let himself be bought for \$200. You know, come on.

[Laughter.]

Mr. PARKER. But the result of a combination of low thresholds and a presumption of disqualification has been basically a search for loopholes or gaps, and that is what has happened in spades. We had to begin with the wholesale exclusion of ad hoc consultants to standing committees. Now, ad hoc consultants are people who have very specialized expertise in the particular rule or study that's being considered. So even though they're ad hoc, they may be the most influential scientist in that room, and yet there's no—for that particular report—requirements, as I understand it, for them to disclose conflicts of interest.

Secondly, you have a proliferation of representative members. Now, this is something that I had never heard of outside the context of regulatory negotiation. I never heard of it in the context of science advisory committees until I started doing research for this paper. But representative members are basically members who are put there to represent particular interests, and therefore they don't have to disclose conflicts because the theory is that they're just there to represent interests, and so we don't expect neutrality of them.

The problem is the Government Accountability Office (GAO) in a recent report found that several agencies are comprising panels of nothing but representative members and then asking them for science advice. Furthermore, their conflicts aren't disclosed and in many cases, you know, they are asked questions which don't have to do with their client's interests, but have to do with what the agency should do or what it should believe about a particular role

of science. So this is a problem. This is an abuse that the GAO said ought to be corrected, and I totally agree.

Then finally you have proliferation of waivers basically, at least in some agencies. GAO found that in one agency, NIH, there were committees that were comprised of virtually nothing but people who had had waivers. So you have this—now the problem is that, again, you have a very draconian presumption combined with a low threshold, and so it creates this search for loopholes. My view is that perhaps we ought to relax the consequences of disclosure of conflict—treat it more as a balancing thing than as a disqualification thing, but really have a strong disclosure requirement so that people know where scientists are coming from. In any case, the current status quo is not ideal.

Another problem with the low threshold that I just want to quickly mention is that, while it seems strict, it's actually not very strict because these current rules don't require the disclosure of amounts over that threshold. So it doesn't distinguish between somebody who spent 20 years, you know, working for Exxon and being immersed in the Exxon point of view and somebody who got \$300 from Exxon to write a letter. And so as a result, these thresholds aren't very helpful. And so one of the things that we might consider is amending that, and I'll talk about how in just a second.

One last problem is the conflict of interest inquiry doesn't look back very far. And this is another, I think, response to the presumption of disqualification and the low thresholds that cause this search for loopholes. Form 450, which is the government-wide form that is used to disclose potential conflicts of interests looks back only one year. The National Academy of Science's doesn't look back at all. As I said, under NAS rules, if a scientist ended a 20-year employment relationship with Exxon yesterday, he's now technically eligible to serve on a carbon sequestration panel. Okay, contrast—academic journals, as I understand it, often require disclosure of affiliations going back five years, so that gives you kind of a benchmark.

Again, there's an empirical question. Could you populate panels with a longer look back period and still get the expertise you need? It seems to me even if you couldn't, you ought to be requiring disclosure of the affiliations even if you don't say that it means a disqualification.

Just a few points to sum up the conflicts business, basically what I've said is that we should close the gaps in disclosure requirements. We should raise the amount figure thresholds to some meaningful figure, but require reporting of at least approximate amounts over the threshold, say from 5,000 to 10,000, from 10,000 to 50,000. And then you should look back at least for 5 years for guidance as to perspective, balancing of perspectives. And look also at the duration and frequency—consistency of affiliation, not just a question of whether they did or not.

Let me move very quickly through the remaining slides because I know I'm running out of time here. Bias to administrative lawyers means an unalterably close bind that causes recusal. Now, bias in the science context, as I understand it, means something different. It just means a predilection, and in that context the real-

istic goal of panels is not to ensure the pure absence of bias in panel members, but to ensure an overall balance of perspectives.

The problem is that balance isn't often achieved in practice. In fact, some empirical studies have shown that science panels are grossly imbalanced in many cases, sometimes professionally and often in terms of ideology or interest, affiliation, and point of view. And in fact, we see basically "a don't ask don't tell policy" with regard to ideology, except for in a couple of cases of abuse. And it's commonly assumed that, you know, we shouldn't ask what a person's ideology is, but I wonder whether that expects too much of scientists, whether that asks them to be somehow in the world but not of the world in an unrealistic way. Wendy and I had an interesting discussion about that. I'm not sure, but perhaps it's time to reconsider that.

Again, the idea is not, in my view, is not to get purity of objectivity on the panel, but to get a reasonable balance. And we can do a better job of that, and the GAO said we could do a better job of it. And one reason why we have such poor balance is that only the National Academy of Sciences and one committee at EPA even have a systematic process for interviewing candidates for their perspective before they're selected.

One last slide on transparency and then we'll go. Transparency— is more transparency better? FACA and the agency process presume that it is, and here I'm talking about transparency in the proceedings of the committee themselves. The NAS, again, strongly disagrees. And the view of the National Academy of Sciences is that you need closed meetings to allow people to get off their positions without embarrassment, to make compromises, to make concessions on the science, and that without that people will lock themselves in stone. It also promotes objectivity by making it more difficult for industry—perspective employers or past employers of people on the panel to figure out what they're saying in the meeting. Obviously that's not the premise of agency practice, which is quite the opposite. So I think that difference is instructive and merits further consideration.

Quite clearly, Wendy is right that there are problems of cost, problems of delay, problems of adversary science, even on science panels. But I hope that I've been able to focus your attention on at least a few of the advantages and on the ways that they might be improved. Thank you.

[Applause.]

Mr. ROSENBERG. Our next speaker will be Jamie Conrad, who is an assistant general counsel for the American Chemistry Council. He has primary legal responsibility for legal reform issues, including regulatory enforcement and administrative law, and he provides legal and policy counsel and support of the Council's regulatory, legislative, and judicial advocacy in the areas of security and science policy. Jamie spent eight years in private practice with two major law firms in Washington, where his responsibilities encompassed regulatory advocacy, counseling, litigation, and transactional work under the major environmental statutes and numerous state laws. Jamie developed and edits the "Environmental Science Deskbook," and his writings on legal subjects have appeared in such journals as the *Administrative Law Review*, *Kansas*

Journal of Law and Public Policy, Environmental Health Perspectives, EOI's environmental report, and the Bureau of National Affairs (BNA) environmental report. Jamie?

JAMES CONRAD. Thanks, Mort, and let me add my thanks to the committee for convening this group and looking at these issues in this kind of a forum, which I think is probably as best suited as you can do collectively to explore the many complicated issues associated with the use of science in regulation. I realized—you may not have noticed this sitting where you are—but the speakers seated in the chair here can't see the other—whoever is presenting's slides unless they have a neck like an owl—you know, twists around. So I'm going to contribute to that problem by making them turn around to watch slides that they don't have copies of.

When I was asked to do this, I thought, well, the first thing I'll do is I'll get out my copy of Sheila Jasanoff's great book "The Fifth Branch" and look at it. And then I'll sort of think about, well, what theoretical contribution can I make to the law and literature on the science advisors as policymakers. And as I read a little more about the social construction of science, I thought, well maybe I'll stay away from theory and just deal with practice. And so I'll make some observations essentially sticking to my knitting—but about science advisory panel matters and issues that I've confronted in years doing regulatory work. And actually as I thought about them, there are some theoretical issues that kind of weave them together. And really what I'm interested in is the degree to which science advisory panels make clear and articulate in words what it is they're doing so that other people can evaluate how they came to the conclusions that they came to. And a related issue is, how is that interested parties can have some way of engaging the advisors or otherwise contributing to their own deliberations?

And I'll do this really just by talking about—depending on how you count them—either three or four panels—EPA's Human Studies Review Board, which is a brand new organization—just went into business this year—two different activities of the National Toxicology Program—Report on Carcinogens, which goes back to the '70s, and a more recent project that looks at risks to human reproduction—it's a much newer and, I'll suggest, more modern approach—and then last, the American Conference on Governmental and Industrial Hygienists. You will only see the acronym henceforth so memorize those words because that's what ACGIH stands for.

All right, Human Studies Review Board was created by a midnight rider without benefit of legislative hearing or oversight. Just to show that these things are evenhanded, Senator Boxer did get a rider attached to a EPA spending bill mandating the creation of a Human Studies Review Board. And that group began in operation this year as a FACA panel. Its charge is as written on the slide. Essentially it has two jobs—three. One is to look at research proposals involving human subjects, which they haven't really quite gotten to yet. The other is essentially going to phase out—looking at completed—well, the other is looking at completed studies after they've been done, including ones that were done in the past, which is sort of what they're consumed with doing now—is

kind of getting through the backlog of studies whose proposals they hadn't first reviewed. And then third, they will advise EPA upon request about how it can improve its own regulations and programs for human subjects research.

But what I'm most interested in and what they're really consumed with doing now is dealing with studies that have been done that EPA is now considering whether or not to rely on in re-registering pesticides. And there are many other applications of human subjects research as well. But what's characteristic of all of these is essentially some company did a study and submitted it to EPA either by law or because they chose to. EPA then looks at the study, comes to some conclusions about its scientific and ethical merits, gives that to the human subjects review board, which then meets in public session to decide—make judgments about the scientific and ethical values of the study.

Well, the entity who did the study is essentially in the FACA paradigm. And as the rules of this board have been set up, which I have the cite there to, the proponent of the study is essentially treated like anyone else who walks in off the street and would like to make a comment to the board. The written materials the board is going to see are released in advance but in some cases only a few days in advance. And if you want to respond, you get, in the case of the meeting in April, a day to respond. And then you have these public comment sessions, which are towards the end of the day, and you get five minutes.

And my concern with that is that in this role where a science advisory panel is essentially serving a kind quasi-adjudicatory purpose—they're evaluating one study and deciding whether this study should be approved, and I recognize they're looking at EPA's characterization of the study, but still it's a particular study. The people who know about that study and why it was done and how it was done ought to be given a sufficient opportunity to first of all see what it is that will be put before the board so that they're dealing with essentially the same body of knowledge and secondly have time both in writing and in oral presentations to answer the Board's questions and to otherwise explain things.

And in fact what happened in the meeting of the board in its first meeting in April—and I think this is a sort of paradigm example of how well a board can be put together in terms of the level of expertise and seriousness of the folks on the group. But the chair essentially said—after the board sat around saying, well, what about this, and somebody in the audience kept going like this. They finally said, "Do you know the answer to this question?" And the fellow said, "Yes." And so they created a process where, if they had a question and they thought that the representative of the company knew the answer, they would ask that person if that person had an answer. And that person couldn't ask them questions. I mean, it wasn't, you know, a trial type procedure. But they in essence kind of created a process where they could get technical input from the study's proponent and ended up giving that person 20 minutes to talk about their study. And some studies they approved, and some they disapproved.

Second case study—National Toxicology Program (NTP) decides what's a known or reasonably anticipated to be a human car-

cinogen. It's essentially a project run out of HHS involving other agencies. The National Institute of Environmental Health Sciences (NIEHS), which is spelled out there, administers it. They've been doing these since the '70s. This is kind of a rare bird in that both federal and state law actually are hard linked to the outcomes of the NTP reports on carcinogens, which is the process I'm talking about here. If something is labeled a carcinogen in a report on carcinogen, it goes on the OSHA HazCom standard, it goes on Prop. 65. As a result, these studies have actually been held reviewable in three different cases, although in each case, the judge referred—deferred to the program. There have been 11 of these reports thus far. There have been three lawsuits, as I just mentioned, and six—count them, six—information quality requests as of a year-and-a-half ago. We'll see why in a moment.

This process began—because it began in the '70s—as a very internal sort of thing. NTP announces that they're going to do a report on carcinogens, and lists the chemicals that it's concerned about. At that point, you can send in information that you find is useful. At that point, the doors close, and the staff develops a background document, which in the course of this entire process will never change. It's then reviewed by a group of scientists, which historically was the same people who just did the report and decided what chemicals would be reviewed. There is now a separation there. That group doesn't write a report. There are kind of summary minutes of its deliberations. It goes to a second review group of scientists from the interagency process that makes up the NTP. Again, some minutes, but no report. It then goes for a kind of last peer review to another interagency group made up of high-level agency scientists. Now suddenly there's an opportunity to weigh in on the background document and the previous deliberations to the extent you can glean what has happened in them. Again, historically not much notice. Again, you get five minutes, and this time it really is five minutes. They address about a dozen of them in the course of a day. And when they're done with those, there's again a sort of a transcript, but there's not a report. All this then goes back to the staff, who write a whole new document called a profile, which goes to the secretary, and he or she signs it.

Now, I submit that's kind of an old fashioned process back from the days that it was sort of seen as the government's role to decide what was bad for you and to regulate it before there was more of a notion of what Peter has explained has become kind of more of an interactive or dialogic gloss between agencies and interested parties. OMB wrote a letter to HHS saying, gosh, you've been hit by six Information Quality Correction Requests, more than any other department—activity of the federal government. Perhaps you could adopt some processes to try to make it clear what you're doing and thereby heading off correction requests as well as perhaps improving the process—the decision making process as it goes along. And so OMB made a variety of suggestions, I've listed here. It's not clear—I don't believe—that there has been a final decision on the part of HHS which of these it will do. I think that this last idea of a peer review of the draft profile itself—the things that's written at the very end—they may adopt.

Another approach, which I will hesitate to describe to you here is NTP's more recent effort. It's Center for the Evaluation of Risks to Human Reproduction. A couple of differences—they have an expert panel. You can comment on who ought to be in that expert panel. They can be drawn from outside of the NTP. So there's a chance that the experts will actually be much more expert about the particular topic being discussed than is the case with the reports on carcinogens. There are advanced meeting notices and draft reports made available so that people can comment on them. And the reports themselves get revised as the process goes along. It's NTP's own process so it's not kind of being imposed necessarily by a third or external party, and I'd suggest it's probably a better way to do the reports on carcinogens.

My last topic—ACGIH—not really an advisory panel in the traditional sense, but serving some of the same notions—a bunch of experts setting values which the agencies can use. Before OSHA, ACGIH was the predominant means by which values were set for safe exposures to substances or conditions in the workplace. And so when OSHA went into effect, they just adopted all the Threshold Limit Value (TLV) that were on the books, which made a lot of sense because, as we've seen, it takes OSHA a long time to set standards. And that was fine. But some other things are somewhat more problematic—the OSHA HazCom standard automatically by a labor interpretation incorporates the newest TLVs as they come out. TLVs are used as a benchmark of what constitutes a violation of the general duty clause of the OSHA act. And other agencies use TLVs as authoritative source when they're writing rules.

The problem with that is that while ACGIH used to be a fairly open process, that changed in the 1990s. They got a lot of money from NIOSH, and when that stopped they were faced with whether they should go out of existence or keep in business. They decided, like all bureaucracies whose first imperative is self-preservation, to stay in business, and they do that essentially by selling the TLV documents. That's now their major source of revenue. They're no longer an open process. They basically do these all themselves and then sell them. They don't do research. They don't peer review them. And most, I think, problematic is that many of the officials on the agencies who will use these reports serve in these ACGIH committees. And this is being litigated, not by us, but there are folks that think this has kind of gone a little beyond the fairness if not the pale.

And there are really, I think, two solutions to this. One is that, in processes like this that are essentially closed and being motivated by kind of profit motive, it's probably appropriate for agencies not to defer to these documents and to incorporate them automatically by reference. The other is that perhaps this group could become a real consensus organization, in which case there would be a federal statute—the Technology Transfer Act—that justifies agencies relying on them. That's it.

[Applause.]

Mr. ROSENBERG. Our final speaker will be Fred Anderson, who is a partner in the Washington law firm of McKenna Long & Aldridge. His practice involves strategic corporate counseling, regulatory affairs, litigation enforcement and crisis management. His

experience is especially concentrated in energy and natural resources, science and technology, and the environment. His practice involves regular engagement with executive and legislative branch agencies. He works with the Environmental Protection Agency, major federal departments and executive offices such as the President's Council on Environmental Quality, and the President's science advisor and the Office of Management and Budget. He serves as a member of the Executive Committee of the National Academy of Sciences' Committee on Science, Technology and Law, and is a member of the board of Atmospheric Sciences and Climate. He was both a member and a consultant of the Administrative Conference of the United States, and with the support of a dozen major scientific institutions, he filed an amicus brief in the United States Supreme Court on behalf of 58 Nobel Laureates and other prominent scientists in supporting the National Academy of Science's efforts to overturn an unfavorable lower court opinion applying the Federal Advisory Committee Act to academic academy committees. Relevant here, he is a former dean of the American Law School at American University here, and he was the first full-time president of the Environmental Law Institute.

Fred?

[Applause.]

FRED ANDERSON. No slides. Life is short, the panel is long; I'll be brief. If brevity is the soul of wit, I'll try to be very witty. I think today that a lot has changed with respect to science advisory panels, that there is a bit of a transition going on, a change in their role. I think there is grounds for asking today to what extent are the panels of science advisors to science courts? To what extent are they seeking to be science legislators? And are they being, some of them, science watchdogs in our era?

I think that science panels are hard-put. I will defend them to this extent: they're hard-put when they have to advise their agencies and the federal government. I think scientists, in a collaborative, negotiated consensus enterprise, like panels indeed are at their best when they have very broad mandates, or even when they're self-convening. I think of the two biotech or biotechnology Sillimore (phonetic) conferences years ago, even of the two search for extraterrestrial intelligence conferences that scientists self-convene. Just to be clear, I think that it should be clear now that the backdrop is that science advisory panels to the federal government are advisory only. I think that's quite plain from the Federal Advisory Committee Act legislative history, from cases like American Petroleum Institute against Costle, or Lead Industries Association against the EPA, or Corrosion Proof Fittings against EPA, and I would only say a couple of things that I think are illuminating to me. Perhaps you'd like to hear them.

I had a look at the Red Book produced by the National Academy of Sciences in 1983. It's sort of a bible about to be revisited by the academy all these years later. But here is what the panel said about risk-assessment, which is to my mind the arena in which science uncertainty is the greatest and the technical issues the thorniest. A scientific review panel's critique about agencies' risk assessment should not be binding. That is, the agency should not be obliged to revise its risk assessment if the panel regards it as

deficient. Agencies have a responsibility to state the basis of their actions and the authority for their actions must remain their own. That is the reverse direction from a panel years ago speaking about risk assessment. And I particularly liked—I was reading the article Wendy cited—again, the year 2000 Law Review article by Lars Noah, reading the footnotes, glancing occasionally at the text, and there he said the following:

“With regard to specific risk assessments for particular rule-making initiatives, some peer reviewers”—and I take that also to include panel members—“predictably will disagree about how best to interpret ambiguous research or resolve uncertainties. For that reason, agencies should not feel hamstrung by failures to convince their expert advisory panels. Just as an editor for a scientific journal retains the prerogative to ignore comments provided by a referee, federal agencies must not cede their power to pursue rule-making to independent and democratically unaccountable peer reviewers.”

I think that’s interesting. Today I think there is a broader claim, though, being made than that panels are advisory only. I just detect a whiff of a stronger assertion, a more muscular assertion that shared decision-making should be the model, verging on declaring the regulatory science, with a whiff of the science court coming in there, of a strong role in standard setting and even veto power based on science over what an agency proposes to do. I don’t have any doubt that it’s within a science advisory panel’s purview or ability, should I say, to reverse the burden of proof and get a court to think more under even the arbitrary and capricious standard of judicial review about what an agency’s done. I think that the influence of panels is strong, but I’m wondering if it isn’t going a little too far.

The example today is CASAC. That Old Testament prophet-sounding acronym stands for the Clean Air Science Advisory Committee of EPA. Rogene Henderson just wrote to the agency. She’s been a member—a very influential figure in CASAC history. Several CASAC members appear to believe that they’re, quote, “approving” proposed standards rather than giving advice and recommendations. What’s going on is that the EPA has had an internal review that hasn’t finalized a decision but it’s thought instead of giving a proposed National Ambient Air Quality Standard to CASAC for its sign-off, what they call closure—I always thought that term better applied to personal and emotional issues—but closure between CASAC and the leadership of the agency is sought based on a staff paper, and then a rule is proposed and there is public comment and the adversarial process takes over from there.

But the idea now is to issue an advanced notice of proposed rule-making covering a policy assessment document for air quality standards, and that document would go to the public and to CASAC, the science advisory panel, at one and the same time, and that is being viewed as undermining the process, but that’s one of the arenas in which the debate is being fought out, in addition to questions about who’s appointed to panels, whether or not they’ve been vetted for bias and conflict of interest and so on. Why is this going on? I think there are several reasons. One I think is a product of our era, the glorified here and now politics. There is a sense

that the Administration doesn't listen to scientists as well or as long or as often as it should, shouldn't pack panels, and so there is an alert, if you will, a kind of a yellow light flashing in the science community about the Administration's approach to science. There may also be a bit of a resurgence to the New Deal technocratic model where we have such complicated technical issues that it's hard even for an EPA administrator not to ask for the scientists to give the definitive opinion because the issues are so tough.

But I want you to at least consider this. I don't say you should swallow it whole, but I've been thinking that maybe some of the reforms that have gone on in recent years in the science advisory process may have had some perverse, as well as some healthy, impacts. The National Academy of Sciences, the Science Advisory Board at EPA, and others, have made their processes more formal and proceduralized. There's FACA itself and the Academy FACA amendments refer to, and then around 2002 the Science Advisory Board revised its procedures. And all of this proceduralization is driven by lofty principles—democratic legitimization, due process, transparency, public participation, impartiality. And so panels have been constituted to be more neutral, to have more balanced interests represented, more public input through open-mike sessions. And so to my eye, over the 35 years I've been doing this, the meetings have begun to resemble public hearings to a far greater extent than they did a couple of decades ago.

I think, too, there is a risk that scientists with too much experience, whose research represents part of what the consensus will have to be about, are being excluded I think too hastily from panel service, because I think that type of expertise is needed. Otherwise, you select scientists like you select a judge, and then they hear the evidence and then they opine. And, you know, part of the problem is when the scientists, who weren't all that informed really to begin with, or else they have a bias or too great an involvement, when they start hearing the evidence they begin to think that they—at least it appears sometimes to me that they have seen the issue anew and afresh, not through the head of an agencies eyes but through a scientist's eyes, and think that they may actually have a clearer picture of what should be decided than the agency itself.

So, I also think that this process of creating a hearing-like atmosphere, which by the way, to pay a back-handed compliment, means that public science advisory panels are being more fully attended. There are larger turnouts, there are longer public sessions, there are more carefully prepared presentations and they're more diverse, and more information gathering goes on from the panel. So, with a result that I think that they (inaudible) type of behavior that this rewards on part of stakeholder or panelists alike is that those who are more comfortable speaking to a large audience, those who are more verbally facile than perhaps some bench scientists are, are more at home and tend to hold a sway, which might not have existed 20 years ago when different rules applied.

If the public part of the panel meeting means that the panel feels like it is part of the hearing process or a democratic information gathering process, then it may really appear like an alternative public forum, and that may account—just might possibly account for some of the EPA's behavior in trying to go to its science advi-

sor—its science advisor is CASAC—about the same time it goes to the public because it sees all of that as part of one ball of wax.

What to do about it? I don't know that I'd want to recommend benign opacity, but I might recommend something like more confidential discussions, fewer public sessions. It's finding a way to permit panels with limited time and budget to work more with each other, to bond, to lay a foundation for a consensus, to shed public positions, minimize opportunities for grandstanding, and most of all, give space for effective, scientific peer pressure to work. I think that it will emerge that someone's view is foolish—that that will emerge a lot quicker with full disclosure. I certainly agree with others who have said that full disclosure of one's background and involvement—also find, sitting at some of these meetings, that disclosure occurs fast enough. It's in the warp and woof of the matter before the committee, and it will become quickly apparent what a person's leanings are and whether or not they can support that, scientist to scientist, in an informal setting.

And that is all I have to say. Thank you.

[Applause.]

Mr. ROSENBERG. Let me first quickly ask if any panelists want to respond or make other remarks. If not, I'll take questions from the audience.

PETER STRAUSS. The panel is on scientific advisory boards in rulemaking, and as I heard what you were talking about and saw your examples, it seemed to be largely about either proceedings in which some individual participant was interested. It was striking to me, Wendy, that in that slide that you showed, every one of those items had been authored by Ciba-Geigy. I assume this was some kind of proceeding around their particular interest or possibly about priority setting. And I don't think I heard—but I may just have been suffering narcolepsy—any discussion about the use of science advisory panels in rulemakings that actually are underway as rulemakings, rather than in, say, deciding what rulemaking would be appropriate to undertake. Am I missing something or was the panel really about priority setting rather than rulemaking as such?

Ms. WAGNER. I tried to mention in my slides some integration between science advisory boards and rulemaking, specifically the idea that science advisory boards would participate early in an agency's process, before notice and comment, in an advisory capacity. So, at least I tried to get that across. Now, the decision of when you actually need them in a particular rulemaking, again, that seems to be an issue that we really need to get better guidance on. But I did at least try to address the ideal time when they come into place in the process, which I think is early.

Mr. PARKER. I'd like to just follow up with that. One of the issues on the panel this morning was whether there should be guidance about peer review and so forth of adjudications of licensing decisions and so forth. And as I was sitting there listening, I think the argument was given that, you know, Vioxx is not a particular matter—is not a general matter of, you know, general applicability and so forth, but I was thinking it really is, you know. I mean, the future of Vioxx affects not just the manufacturer of Vioxx; it affects everybody.

And so I think to some degrees in a lot of these areas, the line between adjudication and rulemaking and administrative law is a bit artificial. I think the issues are quite similar in many cases. Science advisory boards are there to opine on the science that underpins rulemaking or licensing decisions in cases in things like Vioxx, and the important thing is get the science right. So I'm just wondering, you know, to what degree does it matter whether you're talking about science advisory bodies in rulemaking or not?

Mr. CONRAD. I think Peter's point is substantially well taken as there probably are issues unique to use of science in rulemaking that none of us talked about. On the other hand though, much of the—as Richard was beginning to say, the scientific documents, judgments, what have you that are brought into rulemakings by agencies, were already done in processes like the National Toxicology Program or EPA's IRIS panel. Much of the science stuff is done in ways—and this is part of the reason I think for the Information Quality Act and part of the reason people hate the Information Quality Act is that these things were kind of in a sort of pre-rulemaking universe. And so, I think that's—

Mr. ANDERSON. Well, two things. First, what I know about the uses of science advisory panels' reports in rulemaking is through judicial review, and you were on that panel this morning. So that's where you have a lens through which to examine this.

But the second thing is the CASAC example was all about the use of the science advisory panels' input in rulemaking. The statute—the Clean Air Act obligates CASAC to essentially recommend a standard for the agency under the National Ambient Air Quality Standards. And particulate matter, that's where the fight broke out because it's really a struggle over whether it's going to be the CASAC panel or the administrator in the air leadership in the agency that's going to control where this falls. I mean, the CASAC is at least saying you got to fall within the range we set. The administrator is—and the agency seems to be struggling with that a bit.

And also on the process level in rulemaking, the questions is, you know, are we going to the public with an advance notice of proposed rulemaking at the same time we give it to our scientist or not? That's a big change. And in the minds of some of the members of CASAC, this smacks of war.

LESLIE FRAZIER (phonetic). I'm with the Center for Food Safety and Applied Nutrition at the Food and Drug Administration. And I'll direct my question initially to Ms. Wagner but it maybe applies to others, but it followed-up on both the last commenter and your presentation. Given, from a regulator's standpoint, we're really trying to address what we see as an important public health issue when we're doing a regulatory action, and given the number of things that are out there now to do, including notice and comment rulemaking, but the Information Quality Act and shrinking resources that agencies have, which go against how fast and long the process is, what do you see are the arguments for continuing with—and I'm not minimizing the importance of the panels, but how do you convince agencies that it's worth spending those resources on science advisory boards when you're going to have to go through the OMB scrutiny? And as Mr. Arbuckle noted this morn-

ing, notwithstanding the \$20 million plus that EPA is spending, they're still OMB's favorite child. So, what are the arguments you put forth for engaging yet another early in the process situation when you're going to end up with all the other hurdles for Information Quality Act, peer review, et cetera?

Ms. WAGNER. That's a good question. At a conceptual level, it seems to me that the science advisory board process, when done early and done right, is the best way to immunize an agency against the future. So, I suppose you're sort of putting a lot of investment at the front-end to do it right and I think that actually will buffer all the onslaught that comes after that. Now, that's not to say that the onslaught that comes after that won't extract a lot of time and energy from the agency to respond to a lot of information quality requests or other thing, but I do think that they're going to have less stick when a science advisory board has worked closely with the agency to work through a lot of the technical issues and essentially clear out the clunkers and keep some buffer around the relatively good science.

Now, I'm not saying that would convince an agency to do it. I guess part of my concern is I'm not confident right now that the agencies want to survive through the process or even want their rulemakings to survive quickly or expeditiously, but let's assume that that's the case, that they actually want to get regulations out to protect public health. Honestly, I think the science advisory board process is a way to get through a lot of the contestations that turn out not to be productive and not to be using time or resources widely. Does that answer your question or?

UNKNOWN SPEAKER. It does and it doesn't because it seems like it shifts to then a challenge on who (inaudible) and slowing the process.

Ms. WAGNER. I mean, you point is basically that the advisory boards add yet another attachment point for special interests toglom onto the agencies and argue that it's doing something wrong. So each thing the agency does offers yet another attachment point for special interests toglom on—absolutely true. But it seems to be that when this is done properly, that it actually helps buffer substantively a lot of the subsequent challenges. So in the end, it seems to me actually you do end up with a forward trajectory if you do the science advisory board process correctly. I understand what you're saying, but that becomes sort of a hopeless endeavor, that we can really never do any meaningful reform of regulation because every time we do a reform it just adds another attachment point for the agency. I actually think there is some win-win.

Now, if we want to be honest and creditable about it, we would say that a meaningful science advisory board process replaces all the OMB meta-analysis; that when we actually do it right and we get the right principles in place, we don't need all this stuff. We don't need peer review bulletins, and OMB almost seems to acknowledge that. We don't need risk assessment guidelines. We don't need OMB to do anything to do with agency scientists. So I think if we want to be honest about it, if we do this right, then we can get rid of a lot of the other attachment points. We won't need them.

Mr. CONRAD. I agree with Wendy up until the OMB part.

[Laughter.]

Mr. CONRAD. But I have seen, to a dismaying extent, an attitude within agencies which would, I guess, best put pejoratively be described as never enough time to do it right but always enough time to do it over. And, you know, there's sort of been such a rush to get something out and then they get sued and it gets overturned and they have to go back and do it over again. If it were done right—and I think it would be immunized to some extent in the way that Wendy described—it's that much more immune to challenge I think and therefore likely to actually stand in the end.

Mr. ROSENBERG. Yes.

JEFFERY LUBBERS. Given the resource limitations that agencies face and the need for long-range thinking, it would seem like one of the best uses of a science advisory board would be to do what Peter suggested, which is priority setting. I know that EPA, some years ago, issued some priority setting reports that were very influential and I'm just wondering why aren't more agencies doing that, using their science resources to set long-term agendas for their regulatory picture?

Mr. ANDERSON. I agree. They're much better at that, Jeff. I mean, better—next to a self-convening science panel, like the two I gave examples on—prioritization, research agendas, that kind of advice they should be getting. EPA has done this well through the years with its—

Question: Are they still doing it?

Mr. ANDERSON. —comparative risk analysis, its—I don't know.

Mr. PARKER. One problem is defending a very, very broad-ranging comparative risk analysis like what went on in the '80s itself on scientific methodology grounds. And that earlier attack—that earlier study that you're referring to has been, you know, roundly criticized as basically a bunch of scientists sort of giving their arm-chair opinions rather than doing anything scientifically rigorous. So that's one problem I see, although I don't deny the basic point.

Mr. ROSENBERG. Thank you. Let me just say that we have to cut off the panel. We're running a little late. Part of the process will be (inaudible). Thank you very much.

[Applause.]

TUESDAY, MAY 9, 2006

12:45–4:45 p.m.—Panel 4:

“GOVERNMENT AGENCIES’ SCIENCE CAPABILITIES”

Moderator:

Laura Langbein, American University

Panelists:

Richard Belzer, Regulatory Checkbook

John Morall, Branch Chief, Office of Information and Regulatory Affairs, OMB

Robert O’Connor, Director of Decision, Risk and Management Sciences Program, National Science Foundation

Lisa Heinzerling, Professor, Georgetown University Law School

4:05–4:30 p.m.—A Congressional Perspective

Raymond V. Smietanka, Chief Counsel, Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary

4:30 p.m.—Closing Remarks

Curtis Copeland, Congressional Research Service

LAURA LANGBEIN. (Inaudible) more explicitly about the science and rulemaking and from the perspective that science is about method and about doing experiments to test hypotheses. This is true in physics, it’s true in natural science, it’s true in social science, and there has been no mention of social science, and so I wanted to have a panel that focused on the role of social science in rulemaking. OMB has long been using social science to do *ex ante*, before-the-fact analyses of the likely impact of rules using cost-benefit analysis and cost effectiveness analysis, combing estimates of probable impact and probable revealed values about various rules. However, I’m struck by how little *ex post* analysis of the actual impact of rules there is in rulemaking compared to similar *ex post* analyses of actual impact using science in social service policy areas where the role of science to do these kinds of analysis is simply not questioned. There wouldn’t be a panel like this in the social service area.

But it’s also important to consider the role of public opinions about policies and about risk because this is, after all, a democracy and politicians do pay attention to public opinion, despite rumors to the contrary. And it’s quite obvious that public opinion regarding risk and regarding discounting may be different from revealed behavior, and there needs to be some discussion about that. Science of course can inform public opinion, and when public opinion and scientific evidence about revealed behavior are in conflict, one question that I think needs to be discussed and has not been discussed is which one should have standing. How do we resolve the conflict between public opinion and scientific evidence?

So to help us sort out these issues we have four panelists, three social scientists and one lawyer. First, I would like to have Richard Belzer speak. Dr. Belzer is the president of Regulatory Checkbook and managing director of Neutral Source. Both are nonpartisan,

nonprofit organizations. Dr. Belzer has been a professor of public policy at Washington University. He was regulatory program manager for the Weidenbaum Center on the Economy, Business and Public Policy at Washington University. He was a principal investigator on a study that examined the extent to which federal regulatory agencies complied with statutory and presidential requirements governing the regulatory process. He was a staff economist at OIRA and he has conducted research in many areas of environmental and health policy. He has a doctorate in public policy from Harvard University.

Richard?

RICHARD BELZER. Thank you. Coming up here I noticed that for me it's an acoustical nightmare back here, and so I'm going to invoke my usual excuse when the Q&A time comes. If I don't like your question I'm going to tell you I couldn't hear it.

[Laughter.]

Mr. BELZER. The panel is on the scientific capacity of agencies, so I wanted to give a little bit of history and move forward into strategies that have been taken that have had some success, and maybe not as much as people had hoped, and then I'm actually going to go out on a very long and thin limb and propose a remedy. And so that means I'm going to get a lot of questions later and I'm not going to be able to hear them.

Just as far as history, the supply and demand for science and economics in regulatory areas was really minimal until Executive Order 12291 in 1981 and then NAS red book in 1983. For simplicity I'm going to combine all of that into the all-purpose term of regulatory risk analysis.

The first executive order made government-wide what President Carter had done piecemeal through what was called the Regulatory Analysis Review Group. A few of you are old enough to remember that, but the important thing here is that brisk analysis, as we know it—regulatory risk analysis—owes its existence to Jimmy Carter and Ronald Reagan, and that may be the only thing that these two men agreed on. Both the supply and demand for regulatory risk analysis has increased dramatically since 1981 and '83, but I would have to say the quality of regulatory risk analysis has improved only marginally. Why would that be? Risk analysts as a group say it's because these fields are underfunded. They're technically very complex. A lot more taxpayer dollars need to be devoted to it.

Of course, as a risk analyst I sometimes would agree with that, but it does tend to be self-serving. I'd have to say that financial regulatory risk analysis has proceeded just fine without many of these impediments, and it's simply not the case in the financial risk analysis there have been any significant need for additional funding. Political scientists often say there are institutional barriers within government bureaucracies and the usual paralyzing effects of interest groups, and we're heard today more about ossification of the regulatory process. And those also might be good explanations.

As an economist, I approach this with a little bit different perspective, and I think our problem has been a lack of competition in that regulatory agencies control the supply and the use—essen-

tially so the supply and the demand for regulatory risk analyses, and agencies, as a group, are at least as agenda-driven as private stakeholders or companies or Non-governmental Organizations (NGO)s or what have you. I think they're inherently and perhaps fatally conflicted in the assessment of risk and in the estimation of benefits and costs of risk regulation, and that I think is the source of the problem and the fundamental reason for all of the multiple tools that have been invented over the years, all intended to try to improve this.

OIRA review has been around a long time. Some people object to it, some people don't, but it's become I guess a built-in part of the regulatory landscape now. Like agencies, the OIRA process is inherently threatened by conflict of interest because OIRA does work for the President of the United States, and presidents generally have agendas. Now, that conflict isn't inevitable. Sometimes a president will want to do something that is consistent with the principles of, say, Executive Order 12866 or its predecessor.

Most of the conflicts that I have observed over 15-plus years of watching this, a lot of it is just really partisanship. The intensity of criticism of OMB rises dramatically during Republican Administrations and then it is quite muted during Democratic administrations, but the principles of the executive orders are rarely changed. And speaking as a former member of the career staff who worked 5 years under a Republican Administration and 5 years under a Democrat, I don't recall there being any significant difference in the attitude about the principles.

There are a number of other issues, and some of them have come up earlier today, and I guess I want to move on a little bit. With respect to the question of whether OMB could do proper scientific review—does it have the capacity, or could it have the capacity—a couple problems with it. The first is the size of the career staff is really half as large now as it was in the early 1980s and it never did, in the old days, have any scientific capacity. It did have more economists and policy analysts and what have you, and a handful of lawyers. John Graham did introduce a few science slots into the program, into the staff, but it is relatively small. If you only have about 40 professional staff members and the array of tasks that OIRA now has to do are just vastly greater than what it had to do 20 years ago, it's just unfeasible for it to do much better without a huge increase in staff, and I don't see any evidence of that happening.

The OMB review process itself has certain defects in it that are built in. It isn't timely. It occurs way at the end of the process after all the decisions have been made. By virtue of it occurring late in the process, it is inherently adversarial, it inherently generates conflict, and a lot of these things could be avoided if that process occurred in sequential stages and earlier, but it doesn't. OMB doesn't actually have a lot of authority—and for those of you who work for agencies, you're going to chuckle, I suppose, at that. OMB's only authority really is to say no, and as much as I enjoyed doing that when I was in OMB, let's face it; it isn't real constructive. I did offer my services to agencies early on in the regulatory development process; I encouraged them to co-opt me, but in no circumstance was that offer accepted.

Well, so I'm going to offer you a three-part strategy for fixing agency and OMB science capacities. I see the problem as monopoly behavior among agencies. They have total control over what science they use and many times what they generate. The Data Quality Act has had a little bit of effect in allowing more science to enter, but I don't think it's measurable. And then OMB has inherently limited scientific capacity and it operates at the end of the process, so it has all these limitations.

So let me offer three suggestions. The first—actually, let me preface this with a couple of observations about things that have been proposed that I think are unlikely to be effective. As popular as it seems to be on the panels today, I have serious doubts that judicial review is much of a solution. As much as people hesitate to delegate all this sort of scientific review to economists, who really are scientists, delegating it to lawyers gives me the heebie-jeebies. So I'm not convinced that would be all that helpful. If judicial review were limited only to a strictly procedural aspect of it, did the agency fulfill its technical, procedural obligations under the Information Quality Act, then arguably that would be helpful in getting agencies to abide by their procedural responsibilities. That's fine, but it doesn't do what a lot of the proponents of judicial review hoped for it to do. It also would be a lot less threatening to those who don't want judicial review to be effective.

Two other things that I think are unlikely to be effective. The first is relying on scholarly peer review. This is, I think, a considerable defect in the information quality guidelines that OMB issued. The rebuttable presumption that an article published in a peer-reviewed journal is objective—if you think about that it's just kind of silly. Journals are not in the business of publishing articles based on objective truth. They are rationing pages. They are helping professors determine their relative ranking in the pecking order. They do a lot of useful things, but this just isn't one of them.

And then second, relying on government-sponsored peer review is always going to have the problems we've heard about earlier today: who do the peer reviews work for? Are they doing scientific review? Are they doing policy? It gets very complicated. I am a proponent of a different model of peer review. I've been working on that through Regulatory Checkbook for a couple of years. I do think it's helpful. Perhaps because I think it's helpful, it's also becoming controversial.

Well, what would be successful? Now to my three parts. The first is, get scientists out of making policy and get policymakers out of doing science. Everybody knows that policymakers make bad scientists. What everybody doesn't seem to realize or accept is that scientists also tend to make bad policymakers. The more that scientists are asked to do policy, the more they'll be losing their legitimacy as scientists.

Second, I think we need to make the policy-driven assumptions that go into risk assessments and other documents as transparent as possible, but actually I think a genuine last resort in the absence of science. I'm an economist by training and I pay more attention to revealed preference than to stated preference. In Washington we do a lot more work on stated preference. We listen to what people say but we don't watch what they do. Regulatory agen-

cies often state a preference for scientific evidence over policy assumptions but they don't reveal those preferences when it comes to actually taking action. They refuse to provide clear guidance as to what exactly is the level of scientific evidence they're looking for. And what they do by being ambiguous is they create uncertainty, and the uncertainty then weighs down the expected value of scientific research, and at some point it becomes clear that science really doesn't have any weight at all in the policy process and the market demand for doing science will fade.

And then finally—and this is where I'm going to be out on a limb a bit—I do think that we need to instill competition in the generation of regulatory risk analysis. Now, competition works everywhere else to reduce costs, to increase output. It improves quality and it stimulates innovation. Now, are any of these things that we don't want in a regulatory risk analysis? I think they're things that we do want and our current system doesn't provide that.

Now, why is competition then in risk analysis essential? If the fundamental problem is monopoly power, the way I have portrayed it, then we know that monopolies will continue—because they have no incentive to do otherwise, they will continue to produce too little output at too high a price and at too low a quality. Regulatory agencies that act as monopolies should be expected—without having to be pejorative—to behave in that same manner. Regulatory agencies are conflicted in these decisions over what kind of risk analysis to do and how to go about doing it because they have interests in the outcome. The interests extend across political parties and they extend across interest groups. They apply to both the science of risk analysis and the economics of risk analysis.

For every industry or trade association that objects to how some agencies conduct chemical risk assessment, there is an environmental NGO that objects to how other agencies write biological opinions for endangered species. For every industry association that objects to the way benefits are estimated by an agency, there will be an environmental NGO that objects to what another agency will estimate the benefits from building dams or building highways and building levees will be.

So to create a market for that, to create a competitive market for regulatory risk analysis, what does it take? Well, what it takes is a mechanism for sorting out competing estimates, competing values and using that as the foundation for what we tell the public are the likely effects of what we're proposing to do. Now, there is a well-established method in the economics literature called final law for arbitration, and I submit to you that it's a very effective tool for depoliticizing science and economics and getting a better set of outcomes from that.

What are its essential features of final law for arbitration? Well, you probably haven't heard of it as that, but you've heard of it as baseball-style arbitration. A long time ago there used to be intense controversies over how much ballplayers ought to be paid. That has pretty much vanished, and it has vanished because if you're a veteran ball player, baseball player, and you don't want to go into the free agent market because you're maybe not eligible, you can go to final law for arbitration and the team puts forward what it believes

you're worth and you put forward what you're worth, and an independent chooses and that's it; it's over. It really quite simple.

So what does it take in this context? We did a relatively straightforward decision that would need to be made by the arbitrator. In the regulatory context it's very important that that not be what risk management decision ought to be made. Arbitrators cannot do that. Rather, it's what we should tell the public are the likely effects, both good and bad, both intended and unintended, of each option that we're considering. Second, we need an arbitrator—it has to be an arbitrator who would chose among these competing risk analysts. The arbitrator does not mediate settlement. He cannot compromise among the competing bids but must instead choose the best risk analysis from all the risk analysis available. This cannot be a regulatory agency doing it because the regulatory agency is partial to a particular outcome.

Now, I tend to let OMB do it because within the government it does seem to have the broadest view of the public interest, but I can anticipate a lot of objection to that, and I think the simple solution to that is for OMB to build a roster of competent independent arbitrators and use, if nothing else, a random decision-making process to select one, and then kick it out of OMB.

Now, third, an arbitrator has to have clear, pre-established, understood criteria to use, and then the arbitrator must actually use them. The criteria set forth in Executive Order 12866 provides a useful point of departure. They were established and implemented by a Democratic Administration, have been accepted and implemented by a Republican Administration. We are unlikely to do any better if we convened a thousand more symposia and tried to craft a new set of criteria.

To be eligible for service as an arbitrator, I propose only that the arbitrator be qualified technically and be willing to accept the executive order as the sole authority for selecting the best analysis. Now, why would we want to go do something as silly as this? Well, the final law for arbitration eliminates the incentives to exaggerate your case. If you exaggerate your case, you're more likely to lose. If you don't exaggerate your case, then the competing risk analysts are going to be much smaller in scope and diversity. They're going to vary on very technical, mundane, probably boring questions that only pointy-headed analysts would care about. And the level of pinnacle controversy has to decline because we're only debating some very small points.

Like in the baseball case, when baseball settles its arbitration problems relatively painlessly, cleanly, the baseball teams and the baseball players and the union all accept the outcomes and they walk away. I believe that this is a method for ascertaining once and for all, independently, what are the likely effects? What are the risks? What are the costs? What are the benefits of these individual alternatives that we're considering, and then let the risk managers and the political system then vet which one ought to be chosen from there.

Thank you.

[Applause.]

Ms. LANGBEIN. Our next speaker is John Morall. John Morall is probably well known to many of you. He is the branch chief for

Health Transportation and General Government at OIRA. He was the lead author for OMB's annual report to Congress on the costs and benefits of federal regulations and is generally an expert in the area of regulatory reform and regulatory analysis. He was a visiting economist at the American Enterprise Institute and at Brookings. He has a Ph.D. in economics from the University of North Carolina at Chapel Hill, and is going to speak to us (inaudible) briefly.

JOHN MORALL. Yes, I'll try to be brief. Well, thank you, Laura, for inviting me. I'm delighted to be here at the Katzen Center. I have very fond memories of that name—Katzen.

[Laughter.]

Mr. MORALL. I've also had a good time in this very Hall because I've watched my daughter play the violin for the AU orchestra here. And I also want to thank Neil Kerwin, who is probably not here. He is President of the University. He has done a great job this last—let's give a hand for Neil Kerwin.

[Applause.]

Mr. MORALL. He's running this very important Center at the same time that he's running American University—and I'm not just saying that because my wife works for him.

[Laughter.]

Mr. MORALL. Now, my remarks are my own and do not necessarily represent the views of OMB. Take Don Arbuckle to represent the views of OMB. But they do represent the views of someone who has reviewed the scientific and analytical support for all sorts of federal regulations for almost 34 years, the last 30 at the Executive Office of the President and the last 25 at OMB. So I've worked for six presidents. My observation is that the science capabilities of the agencies have significantly improved over these years, but that there is still room for improvement. By "science" I don't mean just physical sciences; I also mean the social sciences—economics, decision sciences and policy analysis. After all, economics does get a Nobel Prize.

I think there are two main reasons for the improvement over the years. The quality of the civil servants has improved, and I think that's in part because of the many schools that now are providing well trained scientists and policy analysts to government service, including the Kennedy School at Harvard and the Harvard School of Public Health, and also including AU. You may not know this, but the American University for the last two years has won more Presidential Management Fellows (PMF) than any other school. And to boast a little bit, I just hired a PMF—not from AU unfortunately; it was from another school. I think it was Oxford. She's getting her Ph.D. and she's an expert in health, and especially—I don't know if this will be useful for me, but she is one of the many experts in the world evidently on diabetes analysis for the British Public Health Service.

[Laughter.]

Mr. MORALL. Second, I believe that OIRA, over its 25-year history overseeing the regulatory process, has raised the quality of science analysis used in rulemaking. Just self-serving on my part? No, it's the view of dozens of countries around the world, who know how we deal with regulations. After, in many cases, following the

U.S. lead in deregulating economic regulation—with much success, I might add—they now want to learn how we systematically deal with risk regulation. Specifically they want to follow our lead and strengthen the science-based transparency and oversight of risk regulation. The U.S. government has just finished hosting two separate conferences on regulation with our two largest trading blocs, NAFTA and the EU. Both groups of officials, some from regulatory oversight agencies were very interested in how we do things at OIRA.

The Organization for Economic Co-Operation and Development (OECD) has just begun a program over several directorates—competition, trade and governance—focusing on risk assessment and best practices. In all these cases, the U.S. model has been an inspiration in the analytical capacity of the U.S. regulators—much admired. It's very useful I think for people who are studying U.S. regulatory processes to look at how it's done in other countries and to see the lack of transparency, the lack of science often—and maybe I'm exaggerating, but compared to the U.S. there is wide differences in transparency and the use of sound science.

Now, the role of OMB of course is to help manage the public's limited resources, whether gathered by government taxes, borrowing, or regulation. We take a broad perspective. We do not advocate for specific interests such as housing, national defense, education, commerce, labor, transportation, homeland security, or the environment. We advocate for all those interests and others by suggesting ways to maximize the benefits of government policy to society, given the well-known constraints. One of these ways is to provide guidance to agencies on best practices that other agencies are also using—we spread the word—in order to improve transparency, consistency, accountability and their decision-making. I make this point because advocates often would like less consistency, less transparency, and less accountability if it strengthens their cause. Why else would they complain about the legitimacy of guidance designed to improve governance rather than suggest constructive ways to improve it? The guidance comments on the risk bulletin, by the way, are still open.

By the way, apparently advocating for the public interest is also professionally satisfying. In a study conducted by the Institute for the Study of Public Policy implementation here at American University, OMB ranked one out of 30 agencies. The National Science Foundation was second. Unfortunately the Small Business Administration (SBA) was last. The Department of Homeland Security was, I think, next to last—even though you guys are supporting them.

[Laughter.]

Mr. MORALL. Now, before he started this effort—excuse me—one of OMB's main goals has always been to improve the quality of decision-making by asking for high-quality, objective data, facts, science and presenting it in organized ways to the accountable decision-maker. Notice we report to the accountable decision-maker; we don't make decisions at the staff level.

Dr. John Graham's Ph.D. was in decision science, not economics, by the way. Much of what we are talking about today is about his efforts to improve the basis for regulatory decisions. Don has al-

ready described many of them—Circular A-4, the IQ guidelines, peer review guidelines, and now the risk-assessment guidelines. All were developed through peer review notice and comment and pursuant to statute, and many represent best practices from other agencies. We worked also with the Office of Science and Technology Policy, the National Academy of Science, and consequently developed advisors to develop these guidelines, depending upon the type of guideline.

But before he started his effort, Dr. Graham first built up the quality and diversity of OIRA staff by hiring Ph.D.s in toxicology, engineering, epidemiology and health economics to go along with our Ph.D. economists, statisticians and policy analysts. A large part of this smarter regulation agenda—by the way, Canada calls theirs the smart regulation agenda and they're really upset that we call ours the smarter regulation agenda. Canadians seem to have this problem with the United States. A large part of his agenda was to increase transparency of the information gathering and the regulatory development process. Over time, by the way, more transparency has been built in to allow review. We have come a long way from the Quality of Life Review when Jim Tozzi was at the—was working on the Quality of Life Review in the Nixon White House. Think about going back to those days without that transparency and compare it to what we have today.

A lot of this, of course, has been forced on OIRA by Congress—rightfully so, I believe. And, by the way, our regulatory impact analysis (RIA) process is built on a notice and comments rule-making which is much more transparent than anywhere in the world that I know of. Now, information dissemination, peer review, RIAs, perhaps risk assessments and the regulatory development and consultation process are more transparent now, and transparency increases the quality of science and its use in regulatory decisions. Note the distinction here we should make between transparency and the analysis and the risk assessments and the science in transparency in the deliberative process. The National Academy of Science rightly needs to make deliberations. They need to have some closed doors. Obviously for the give and take, so do we in the Executive Office of the President.

Now, our push for quantification, monetization and formal probability estimates, all based on science when feasible and reasonable and qualitative evidence when not, makes our decision-making transparent, but it also makes it easier to criticize. As Professor Heinzerling knows, it's easier to criticize someone's numbers, especially if they're of mythic proportions, than to criticize advocacy for a good cause. One might think that quantitative analysis in transparency is apple pie, so why am I being defensive? Well, not everybody agrees with this, as we've heard somewhat already today. Professor Heinzerling has argued that it would be better if we left the picture blurry and declined to connect the dots between all our confusing and sometimes conflicting institutions and evidence. I think I quoted that right, right?

In fact, Professor Heinzerling argues not for improving the quality and objectivity of benefit-cost analysis in risk assessment, but for reliance on moral imperatives, the precautionary principle, and fairness. She argues that the priceless should not be priced. Per-

haps we are not so far apart. There are ways not to price priceless goods such as health. It has been developed by health economists and decision scientists and is used to determine the advisability of medical intervention. It's called cost effectiveness analysis—CEA. It uses health metrics such as quality-adjusted life use to quantitatively measure health. OMB sponsored a study by the Institute of Medicine, part of the National Academy of Science of course, as to whether this practice would be useful in regulatory decision-making and they said it would be. And I can attest that the moral imperatives, precaution and fairness do play a part in every final regulatory decision made by those accountable to the voters that I've been aware of over 25 years. And I agree that that is the way it should be as long as the quantitative evidence is also presented.

Now, Lisa may just—excuse me, Professor Heinzerling—I can call her Lisa, I guess.

[Laughter.]

Mr. MORALL. Lisa may disagree. Rick may also disagree. He argues that decision-makers almost ignore the benefit-cost analysis and go with the politics. I feel very comfortable being in the middle. That's how we at OMB view our job. Thank you.

[Applause.]

Ms. LANGBEIN. Our next speaker may give the appearance that there is really a closet—or not so closet—old-boy network up here, which raises—and I guess what I'm saying here is I think it's hard to detect old-boy networks because that was an issue that was raised in the previous panel.

Dr. O'Connor is the co-director of the Decision, Risk and Management Sciences Program at the National Science Foundation. He is also on the Subcommittee on Disaster Reduction of the National Science and Technology Council of the Executive Office of the President. He has spent 20 years—really 30 years of—done 30 years of research into public perceptions of cumulative, uncertain, long-term risks of technologies that are perceived as risky, and agency risk communications. His articles have appeared in journals on political science, in risk analysis, and in general social science journals. To make my points about the old-boy network, he too earned his doctorate in political science at the University of North Carolina at Chapel Hill, as did I, so there are three Tar Heels up here. We may look like an old-boy network but I think the communications among the three of us are zero.

[Laughter.]

Ms. LANGBEIN. He is professor emeritus of political science at Penn State University and he will talk to us about public opinion and risk.

ROBERT O'CONNOR. Laura, thank you very much. I thought I would be unique and not use my slides, but it turns out I'm not. So I still will not use them since I'm changing my presentation.

[Laughter.]

Mr. O'CONNOR. Changing the presentation also explains why I have to give the disclaimer—not that I had had this presentation approved anyway by the National Science Foundation. Since the title of the panel is “Government Agencies’ Science Capabilities,” I was going to talk about that, but instead I'm going to talk about two things: one, the science capabilities of the National Science

Foundation, and number two, what you asked me to talk about recently, public opinion toward risk, et cetera. I will be quick, I promise. I know you can't believe that, knowing me, but anyway—okay.

One reason I wondered why I was asked to be on this panel was that science capabilities of the National Science Foundation are just about zilch. We fund science; we don't do it. Yes, there is a small unit that does research itself, like the science capabilities and number of Ph.D.s turned out in sciences. And by the way, I would add, at the National Science Foundation, science includes social science. But that's essentially 95 percent of the budget leaves the building. It supports research; it does not do research. As a result, the Information Quality Act has changed nothing at the National Science Foundation. Wendy Wagner (phonetic) made a distinction between regulatory research and basic research. We fund basic research. Of course some of this has relevance to the regulatory process and regulations, but the purpose of the research that we fund is basic. It's to have exciting discoveries, new theoretical advances. That's it. We are legally prohibited from taking policy stands or positions on scientific issues. If you ask, what is the position of the National Science Foundation on Climate Change, the answer is we do not have one. We fund a good deal of research. We have a whole division of atmospheric sciences. We fund social science research about the economics related to climate change, public opinion—well, I can go on and on. We've spent millions of dollars. The people we fund are free to make what they will of their own research. They can reach whatever conclusions they want and promote whatever policies they want, but that's not the function of the National Science Foundation.

So, real quickly, yes, we do peer review. It's required. We take it very seriously. When I get a proposal I send it out to six mail reviewers—that's M-A-I-L reviewers. I also have an advisory panel. Two of those individuals will read the proposal. The advisory panel then gets together and reviews all of the proposals from that competition and gives me advice as to what category they put them—into the “must fund,” “should fund,” “could fund if we had lots of money,” or “decline”—anyway, you get the point. This is advisory. The actual funding decisions are made by program officers in practice.

Okay, have we funded research related to rulemaking and data quality? Of course. We funded research on how the public can estimate the value of risk reduction. We've funded research on the value of statistical life, on expert elicitation methods, on natural language processing, support for e-rulemaking, on the effect of accepting comments electronically, on the nature of the rulemaking process and its democratization, the effect, et cetera, et cetera, et cetera. If we haven't funded a particular topic you'd like to see funded, I suggest you send us a proposal. We are a bottom-up agency. In my program, I don't sit there and think, okay, for this next competition, the target date is August 18th. I'm looking for, oh, gender studies on negotiation effects, or whatever. None of that. We figure that you, the research community, is a lot brighter than we are, so make a case for why what you think should be funded is likely to produce important new knowledge. The two funding cri-

teria are intellectual merit and broader impacts. And that's all I have to say about the National Science Foundation.

Now—and I really will be brief—on public opinion on risk, I have four really—four comments, two of which are clichés. The first cliché is never underestimate public ignorance on subjects most people don't care about—

[Laughter.]

Mr. O'CONNOR. —which is most of the stuff you guys care about, except if you happen to be in EPA with the carpet and you're getting sick and—yeah, you care about it, but most of this stuff is inside baseball. Yeah, you care that in general your kids will be healthy and not exposed to unreasonable risks, blah, blah, blah, blah, blah, but the rest of it is inside baseball. So if you ask the public, you know, for the views of causes of stuff, you would be amazed at the general ignorance on topics the public doesn't care much about.

The second cliché—and I will resist the Thomas Jefferson quote you've heard a thousand times—is never underestimate the public's ability to learn and make reasonable judgments. As the public becomes concerned about an issue, if they read about it, learn about it, you'd be amazed. People have the ability to reason in a sophisticated manner. I sometimes don't like it when they disagree with my particular preferences, but we've got all kinds of data on this. The public can learn and does learn when it has a reason to.

Okay, my third point is—and this is a tough one to the risk group to say, but don't overestimate the importance of risk perceptions in the public's policy preferences and attitudes, that since we study risk and we think it's important, we think, well, that's got to be the game, but on lots of issues it is not. One area I've researched fairly extensively myself is public attitudes toward the proposed radioactive waste and spent fuel repository at Yucca Mountain, Nevada, better known as the “nuke dump.” This is not popular among the citizens of Nevada. Proponents have spent a lot of money trying to convince Nevadans that it's safe. Well, if they'd looked at my research they would have learned that Nevadans are, you know—realize that this is a hundred miles from Las Vegas out in the middle of the desert. The worst thing that's going to happen isn't going to be all that bad, so why don't they like it? They don't want it because they think it's just plain unfair. They don't have nuclear power-generated electricity in the state of Nevada. There's a tiny bit from California but, you know, basically they don't. They already argue that they've done their fair share as patriotic citizens with the nuclear test site—the feds only—(unintelligible)—percent of the land. And they think it's just unfair for the rest of the nation to take all of our spent fuel. If this repository is so safe, why not stick it in Pennsylvania? Or actually, there is a nice block of granite in Rosslyn—and I'm not kidding—which would be very suitable for a radioactive waste repository. So anyway, you get the point. So a lot of things go on in why people find a policy or something acceptable or not acceptable, so don't assume that it's all about risk because it's not.

And my final point is the role of public opinion in policy. Some folks—probably not this crowd—tend to think, gee, if you don't have the public clamoring for action, nothing will happen, that you

need to have an aroused public to get a policy change through Congress. I think that's a misreading of the history of public policy in this country. The Resource Conservation and Recovery Act for you environmental mavens out there, there was no public—certainly, yeah, people were concerned about dumps, but there was no great public outcry wanting that, no. The technical community and others figured out that it was about time to have a national policy that would make sense. It was fought and you got the Resource Conservation and Recovery Act.

There are three types of public opinion. There are times when the public demands action. For example, after 9/11, the federal government did not have option to say, well, this is a horrible event but we don't think we should do anything; we think it should be left to the states; after all, we have too much federal involvement in our lives anyway. That wasn't an option. The public demanded action.

Sometimes you have public opinion that says I don't care what you do as long as it's not this. In large parts of the nation bussing to achieve racial desegregation was something where you have aroused publics saying no; we won't stand for it; we will stop it.

Most of the time you have permissive public opinion. That is, you experts out there, whether it's science advisory boards or scientists—scientists are trusted in America—no, not scientists who work for the tobacco companies, but government scientists, university scientists; they are trusted. If the public will say, you know, do what makes sense, do the right thing, and even we are willing to sacrifice as long as it's reasonable.

One example and my final point is climate change. If you look to public opinion toward climate change, I would argue that it's a permissive public opinion. Most folks think, yeah, there's a problem out there and that they are willing to sacrifice as long as the sacrifices are, A, fair—nobody wants to be a sap—and B, effective; you're not going to sacrifice for something that is not going to work. Thank you very much.

[Applause.]

Ms. LANGBEIN. Our last speaker is Lisa Heinzerling. Lisa a professor of law at Georgetown. Her expertise is environmental law towards administrative law, cost-benefit analysis, and of course regulatory policy. She was editor and chief of the University of Chicago Law School Review. After she finished law school there, she clerked for Judge Richard A. Posner of the U.S. Court of Appeals and also for Justice Brennan.

She has been a visiting professor at Harvard and Yale Law Schools. Her scholarship is in environmental law, which has been published in many journals, including the Yale Law Review, the Harvard Law Review, and the University of Chicago Law Review, as well as the Georgetown Law Journal. And her book with an economist, Frank Ackerman, is of course "Priceless: On Knowing the Value of Everything and the Value of Nothing." And that was published recently in February 2004, and so I will be your shameless promoter. And she won the Georgetown University's Faculty Teaching Award, which I think is also a good recommendation for our next speaker. Lisa?

LISA HEINZERLING. I always tell audiences this: If you go and by my book “Priceless” on Amazon.com, please buy it with the “Da Vinci Code”——

[Laughter.]

LISA HEINZERLING. —so that they will say people who are buying “Priceless” are also buying—or people who are buying the “Da Vinci Code” are also buying priceless.

[Laughter.]

Ms. HEINZERLING. I have the coveted last panelist position of a long, but interesting day. When Laura asked me to serve on this panel, I noted that the panel title was in “Science Capabilities of Regulatory Agencies.” And I said to her, well, I assume you want me to talk about cost-benefit analysis. And she said, yes, and I said, but I don’t think that has anything to do with science, and she said, that is the point.

So here I am to talk about cost-benefit analysis. I’m talking about formal cost-benefit analysis. That is the kind that OIRA demands and OIRA reviews, the kind that requires the quantification of costs and benefits as far as possible, their monetization or translation into dollar terms of the benefits and costs of regulation, including saved human lives, human health, nature, and so forth, and the discounting of cost and benefits again, including lives and health.

This is not analysis that—simply in any respect possible—considers costs. I think Don Elliot—I told him this. He is not here right now to say anything, but I have said it to his face. I think he was wrong when he suggested—oh, Don, thank you, hello. When he suggested that I was against considering costs, or that somehow if you’re against cost-benefit analysis, you’re against considering costs. Most of our regulation in the federal government today in environmental regulation takes place under the rubric of technology-based regulation; not cost benefits, but considers costs.

What I’ll be talking about is the formal cost-benefit monetization, quantification discounting that I just mentioned at the outset. So I want to make three points about this kind of analysis. One, it is used as a one-way ratchet towards deregulation today. Two, the numbers are frequently made up. Three—and this is the most I think speculative point—I think it hurts rather than helps the scientific capability of agencies.

First, number one, cost-benefit analysis is used as a one-way street to deregulation. Rick Belzer said that OMB only says no. Here I agree with him. I’m in complete agreement. That is what they said; they say no. There are good reasons I think having to do with theory to expect that cost-benefit analysis generally in most cases will be skewed against health, safety, and environmental regulation. We can go into those if we have time for questions and answers.

What I want to talk about is the practice of cost-benefit analysis and the fact that in practice, cost-benefit analysis is used today in this town almost entirely to say no to regulation. It is not brought out when the proposal is to deregulate. It is wheeled out to undermine positive proposals for regulation. It is not wheeled out when the proposal on the table is deregulation. Let me just give you three examples. There are many more I could cite.

One, EPA a while back relaxed requirements for the new-source review program, or the program dealing with pollution, air pollution from large power plants and factories. Did it do a cost-benefit analysis? Was it required to do so by OMB? No. Some years ago the forest service declined to defend a policy protecting almost 60 million acres of forestland in the United States, publicly owned forestland. When they declined to defend that regulation, when they then offered a gutted version of the regulation, was there a cost-benefit analysis done of this legacy of almost 60 million acres and what would it mean to lose it? No.

When the EPA decided not to regulate greenhouse gasses from automobiles, was there a cost-benefit analysis done? No. When we deregulate, apparently it's fine not to do cost-benefit analysis, but when we regulate, we must do cost-benefit analysis to the nth degree. The basic idea here—as I say, the examples could be multiplied—is that cost-benefit analysis simply stays in our pockets or OIRA's pocket or the agency's pocket when deregulation rather than regulation is at issue.

This for me is a reason why the debate has become fundamentally uninteresting. It is terrible to say that if you have spent over a decade studying and writing about something, right, as an academic, and then suddenly to conclude this is uninteresting intellectually. It is meaningless almost intellectually. Why? Because it works in one direction: It is a device that is used to give scientific cover to fundamentally political enterprise.

As for the question Peter raised this morning about whether perhaps judicial review could be used as backpressure against this political pressure, whether judicial review could be used in order to stop agencies from acting quite so politically, I just offer you one example. Example comes from a rulemaking under the Clean Water Act, where it's quite clear from the paper record that OMB's role was to gut a standard that EPA had first come up with, and that OMB came back and said, nah, you know what; we don't want you to put in control technologies at power plants around the country; it's just too expensive.

When it came time for judicial review of that standard, the one document that the federal government didn't want in the record, in the administrative record to be reviewed by the court was the document showing how EPA had done what it did, and that is that it had caved to OMB's pressure. So that the idea—if that stands, the idea that judicial review will provide a backstop to the kinds of pressure I'm talking about I think is not realistic.

Number two: The numbers are frequently made up. There is precision without accuracy so that if I prefer, as John Morall quoted partially me, an article some time ago that I wrote—if I prefer to keep the numbers blurry it's because the numbers are so wrong. It is better to be honest about our lack of knowledge than to provide some number that is simply made up. These numbers are not offered with any resemblance to the kind of scientific rigor that is offered in estimates of risk, in my opinion. It is so bad, in my opinion, that one could, if one were inclined, file daily challenges to OMB's cost-benefit analysis under the information quality act.

I'm going to suffice with two examples. One, a huge issue today has to do with the setting of the National Ambient Air Quality

Standards for Particulate Matter. Fred Anderson alluded to this when he talked about CASAC a few minutes ago. Now, if you want to get—this is the kind of fun I have. The fun never lets up if you're a law professor interested in these issues. So you just go to the web and you can look at the RIA, and you just pick out stuff that doesn't make any sense, right. You can do this every evening if you want. And as citizens you should; you should look up these documents and say to yourself do they make sense.

Here is one example from the OIRA. Again, I could multiply them but we don't have time. Some kids have to stay home from school when they have asthma. And sometimes pollution makes that condition worse so they have to stay home because of their asthma condition.

And the question that arises when you do a cost-benefit analysis of air-quality standards, what is that worth—your kid has to stay home from school, what is that worth? Does it have to do with their educational losses? Does it have to do with their pain? Does it have to do with what the parents would be willing to accept in exchange, compensation and exchange for letting their kid get sick—all of that kind of stuff. What is it worth? Those are really hard questions. I don't think they are answerable by economists.

But here is the answer that is given in the OIRA. It has to do with a mother's median wages. So you look to see what does the mom make, right? What does she make per day, and that is what it's worth if a kid stays home. And by the way—and this is the greatest part; this is the part where I just think you just—it's just made up.

If the mom stays home, which a number of us do, then it's worth nothing if your kid has to stay home because of asthma. Why? And there is a wonderful sort of euphemistic account of this in the OIRA, but basically because you're home anyway.

[Laughter.]

Ms. HEINZLERING. I mean, really, how much more do you have to do? You're child is sick; you're home anyway; how much do you have to do? It's worth zero. We are giving it a big goose egg.

Okay? So that is one. That seems to me just a completely made up number from the OIRA. This is the kind of an analysis that if it sees the light of day when the public gets a hold of it, they don't like it. And so sometimes I think it's not a coincidence that these numbers and these kinds of analyses are buried in documents that you have to be me to discover. You have to be weird to want to look at them and get through them.

Okay, second example of made up numbers: A lot of times in cost-benefit analyses, especially of environmental regulation, the only thing that we can quantify for a whole variety of reasons are avoided deaths due to cancer. What happens to those? How do we value those? Well, here a big issue is not only what is the dollar value of dying, right—it turns out it's about \$5 million in case you were wondering, but what if you die in the future rather than today?

So cancer has a latency period 20 to 30 to 40 years. Is that worth less? The answer from the government is, yeah, that is worth less. And so we are going to discount it over those decades. And essentially if you know anything about this technique, discounting is

compound interest in reverse. So just like compound interest makes little things magically become big in the future, discounting makes future things magically become small. So if you discount that future death at any positive rate of return over decades, it looks trivial.

What is the point of this? Well, what is the basis for discounting? The discount rates that are used by OIRA are based on financial rates of return on private investment. It is real hard to see how that relates to our willingness to take a risk of getting cancer. I just don't see the relationship between private rates of return on financial investment and the risk of cancer.

And even the question about whether something in the future is worse than something today, there is some evidence that people fear cancer more than they fear other diseases. So here again, it just seems to me that there is mindless glomming onto a number just for the sake of having a number that really has no basis in fact. And, indeed, as I say, could be subject to an IQA challenge if anyone were of the mind to do so.

The last point: cost benefit analysis hurts the scientific capabilities of regulatory agencies. As I mentioned, it seems to me this is the most tentative and speculative point, but here is the idea. If you have results, scientific results that are going to get the goose egg in the column, right. You have moms who don't work and they are going to get a big zero when they stay home with their kids. If you have benefits in the column that they are going to occur in a few years so they get discounted practically to zero, what is the point of being so careful about getting at those numbers? You are just going to get a big zero; a big cipher in that column at the end of the day.

Then that raises for me what does that do to our incentives to getting those numbers right in the first place and certainly pay more attention to trying to get at these what I think are quite illusive numbers, means that we don't have the resources to aim at scientific questions. In this way it seems to me cost-benefit analysis is deeply but stealthily corrosive of science in regulatory decisions.

I want to make one last point about the U.S. model of regulatory impact analysis. Absolutely I'm aware that many delegations have come to John Graham and John Morall's door seeking information about the way they operate. After they appear at their office, they appear at mine, and they ask me, well, how does it really work, and I tell them. Thank you.

[Applause.]

Ms. LANGBEIN. I will allow each panelist one sentence, short, to rebut, because we are running out of time and the audience probably wants to say something and the day is supposedly officially over. So is—if somebody would like to make a short comment. Anyone? John?

[Laughter.]

Mr. MORALL. Lisa, it's just a tool; it's just a tool. It can be misused. You can find examples where it may have been misused, but a lot of the things you said are not simply true. I wish you could come to OMB and look at the quality of the people we have working there trying to do the right thing, looking at the analysis from a careful objective viewpoint.

It's not true—I can't speak about all of the examples you gave from EPA. I don't cover EPA. But I can talk about where we have used benefit-cost analysis to promote regulation. John Graham implemented what was called (inaudible) where we pushed the agencies to speed up rulemaking in transfat, in automated external defibrillators (AEDs) in the workplace, in describing how omega-3 can be helpful and beneficial, in several areas in the safety area. And I agree with you completely that the explanation of the asthma benefits are wrong. They did not use willingness to pay there.

As I was trying to point out, there is a new technique that John Graham has pushed that I think we should adopt from the medical area, and that is using cost-effective analysis that weighs it in a quantitative way but does not place the value on those things that are very difficult to value.

And finally, I just want to say something about discounting. We are not discounting lives; we are not discounting health. We are looking at the opportunity cost if you invested the resources that you could have used to eliminate those—how that would grow over time. It does grow at the rate of compound rate. In the Carter years, going back there, we used 10 percent. I had to use that on my paper that I did in 1986 that you criticized. But Bush 41, they lowered it to 7 percent, which is more in tune with the opportunity costs of capital that is shown by stock market data, for example, over the last 100 years. When John Graham came revised—(inaudible)—and lowered the number again to 3 percent, which also takes into account the time preference of consumption. So we have lowered those numbers over time.

So I agree that cost-benefit analysis can be misused. You can find many examples of how it's been misused, but it's just a tool.

[Applause.]

BILL HIRZY. I'm with the Professionals Union at EPA Headquarters.

A comment to Rich Belzer's suggestions on ways to improve the risk analysis of process: I agree with two out of the three that you recommended, and I can imagine you understand which one I don't agree with. The idea of getting policymakers out of science is a great idea and scientists out of policymaking. But the idea that you could do risk analysis I presume in the private sector and have competition among these risk analyses to provide guidance for risk managers doesn't make a whole lot of sense to me or to people that I represent. From this point, public policy is going to be developed based on these risk analysis.

Right now what you have or the people you have doing that kind of work are civil servants who, as you well know, raised their hand, just as do people in the military and swear to support and defend the Constitution against all enemies, foreign and domestic. What we have had to do at EPA over the years to resist being suborned by risk managers who come to us and say give me scientific cover for this decision; I want to do X, Y, and Z, and you tell me, give me some science that does that.

Our position as a union of defending people against that kind of thing is that we will not do that willingly. We will not suborn the constitutional process by which Congress passes a law, president signs it into effect, and the courts adjudicate the disputes that

arise over it. And what we do is give advice to people in the Executive Branch on how to proceed to fulfill their obligations when they take the oath also to support and defend the Constitution. We will not agree to violate the constitutional process by helping them violate the law and set regulations that simply do not comply with the law.

The Food Quality Protection Act is one of the things that is on the table right now that we are involved in. And I can't go into anymore details on that, but that to have anybody other than civil servants contributing to how the first cut of agencies are going to deal with risks, that doesn't make a whole lot of sense to us.

WARREN PRUNELLA. I'm with a consulting firm Econometrica. I was with the Consumer Products Safety Commission for years in the economic shop. And I am going to try and turn this into a question for you, Dr. Heinzerling. At the Consumer Product Safety Commission, we weren't obligated to turn any of our analyses into OMB. We had commissioners that were for the most part never economists. And there was a lot of resistance to cost-benefit analysis just I guess in general.

But we demonstrated to the commissioners that by looking at cost-benefit analysis, and especially concentrating on potential benefits in the health and safety area, by putting value on injuries, but putting value on life, showing what the potential benefits could be, by looking at all of the damages caused, dividing that by the number of products that were causing the damage in each particular case—and I can cite example after example—they saw that cost-benefit analysis gave them an entrée to regulating a product because the engineers and the compliance people would look and see that a product could be fixed for much less than the damages being done, and compliance people could show that they could enforce a rule. And cost-benefit analysis at the Consumer Product Safety Commission actually led to regulations. It didn't discourage regulation; they actually showed the potential for having a regulation, especially since we have performance standards rather than design standards.

And my question then is won't you reconsider?

Ms. HEINZERLING. (Chuckles.) What you consider? I think in the safety field there may be some technical difference, which is that my guess is you weren't doing a lot of discounting of future benefits at that time. That is a lot of what dooms health and safety regulation, health and environmental regulation is the discounting technique. The other thing I would say with all respect is the Consumer Product Safety Commission has not been as aggressive perhaps as other agencies. And if you started to get aggressive, my guess is those benefits would go down. In other words, we see pressure to lower benefits when the benefits appear high. I meant it when I said I thought it was a political exercise.

Mr. BELZER. Could I respond to what I think were a couple of questions in those few monologues but I'm not entirely sure.

One of the myths about OMB is that OMB does cost-benefit analysis. It doesn't. It reviews the work products of federal agencies. That is a fundamental difference. If you don't like the work product, don't look at OMB. It is just they are a review—do a review function; they don't do original work except at the margin, like

when John was trying to fill in the gaps on these reports to Congress.

Another thing I need to point out is that I got into this field in the early 1970s from an entirely different perspective than I guess I am presumed to be here now. The advocates for benefit cost analysis in the early 1970s were all environmental groups. And the topics that were of interest were federal projects: Bureau of Reclamation projects, Corps of Engineers projects, nuclear power plants, you name it. And the same kind of complaints that many people make today about errors in benefit cost analysis were made then too, and there was a reason for it, and I think I have tried to hit on that.

But the same reason that the Bureau of Reclamation in 1968 was not a good authority on what the costs and benefits were for a damn, a modern social regulatory agency like EPA or OSHA or FDA is hard pressed to do an objective analysis of the costs and benefits or risks of its own worth. It's just inherently conflicted, and the same problems that environmentalists like me were complaining about in the early 1970s are just back in a different form today.

Mr. MORALL. Can I make just one more quick point about the utility of benefit cost analysis, and that is that if you look at our report to Congress on the cost and benefits of regulation that we have done over six or seven years—and I think actually Lisa was a peer reviewer of one of them. If you look at the costs and benefits, you'll see that over the last 13 years, back to 1992—how many years that is—that is how far I would be able to go back with both costs and benefits looking at it very carefully—we have provided benefits to the public twice as high as the costs. And this has been especially—true in the Bush I administration, in the Clinton administration, and in this Administration.

Most of the benefits of the regulations come from environmental regulations, especially in the fine PM area, in cardiovascular. And if you look at that and you see that clearly there are huge benefits that can be shown from environmental regulation, you should not be so critical of benefit cost analysis applied to environmental regulations. In fact, we are severely criticized by people from the right like Rick Belzer for overestimating the benefits. And the agencies of course do the estimates, but we sign onto them; we probe them; we ask them when they issued the regulations in the OIRA, we have agreed that those are the best estimates we can come up with.

Ms. HEINZERLING. May I just say something?

Mr. BELZER. The problem is that they are the only estimates that you have. The only estimates that you have come from the regulatory agencies that are responsible for the programs, and my position has not been right or left; it's just those estimates are not reliable.

Ms. HEINZERLING. Can I just give two responses? One is to Rick's point about the estimates coming from the agencies. With the increased aggressiveness of John Graham, those numbers increasingly are helped on by OMB rather than simply being the product of agencies doing what they want.

And the second point about the OMB reports that John Morall was talking about, those show very clearly that one of the things that we can do that has the best cost-benefit profile is to regulate particulate matter, pollution. That is why it was so surprising to me that there was no cost-benefit analysis done of relaxing the New Source Review (NSR) rules, which would have brought that kind of pollution down.

MARK POWELL. I'm with the USDA Office of Risk Assessment and Cost-Benefit Analysis. I would agree that cost-benefit analysis obviously is a useful tool. As it would so happen, however, under various statutes, it's not one that can be legitimately considered. One case in point in particular is under international trade agreements, we are not allowed to consider the competitive economic impacts to domestic producers. So by requiring the generation of that sort of information, it calls into legitimacy your decisions based on consideration of evidence that you are not supposed to consider under the agreement.

A similar argument I imagine could be made under the National Ambient Air Quality Standards where economic information is intended to be excluded from the consideration at the point of setting the standard. So it is potentially useful information, however, sometimes the law says otherwise.

UNKNOWN SPEAKER. Was that a question, could you pick it up because it's really difficult to hear. This room is built (inaudible).

Ms. HEINZERLING. I think he was saying that sometimes cost-benefit analysis is useful but not legally allowed.

UNKNOWN SPEAKER. No, no—not legally allowed to be used.

UNKNOWN SPEAKER. Well, more than anything, that raises questions about the legitimacy of the decisions. If you demand that they estimate competitive impacts under our trade agreements—say that that cannot be considered, a decision (inaudible) why did you generate that analysis if I'm not permitted (inaudible).

Ms. HEINZERLING. Interesting.

UNKNOWN SPEAKER. I just want to respond to the point that, Lisa, you made about the accuracy of cost-benefit analysis. I want to invite you to re-look at recent cost-benefit analysis. We do use probabilistic-type work now where we do identify the uncertainty in our analyses, so we are often giving a range. Most of the uncertainty that we see in cost-benefit analysis actually is incorporated from risk assessments. I recall one risk assessment I saw where depending upon which mathematical model you picked in order to extrapolate the dose response function, there were 22 orders of magnitude of uncertainty. I guarantee you for all of the other elements that go into a cost-benefit analysis we have uncertainty that is nothing like that. We really don't make the numbers up.

Ms. HEINZERLING. Well, I would say that the numbers, the range of disagreement that is allowed among the core of economic analysts seems very small to me. The value of life is between 5 and \$7.2 million or something—discount rates of between 3 and 7 percent, that the range of disagreement that is allowed and allows you to speak with any authority within that community I think is very small. I don't think that has to do with science; I think it has to do with a different kind of creed.

UNKNOWN SPEAKER. (Inaudible.)

Ms. HEINZERLING. If you include in cost-benefit analyses, judging people's value of risk—for example, many times people will say parents—you will ask them, well, would you buy a more dangerous product if we gave you a discount? In other words, would you accept a greater risk in return effectively for compensation and they will say no. Are those votes included in cost-benefit analyses? No. And so to me the range would be much greater if we included a larger range of response from the potential population at risk.

Mr. MORALL. Actually, just to correct you—(inaudible)—A-4 suggests that you can use the value of life from 1 million to \$10 million, and if you have good reason to think that it's above or lower than then you can make a case for that too. And you can also use a lower discount rate than 3 percent. It is all up to the agencies to make the case.

Ms. LANGBEIN. Thank you very much. Just one final point to conclude, that it's important in addition to considering economic factors, but also to underline what Bob O'Connor said. And this is also backed up by science and experiments is that fairness counts.

UNKNOWN SPEAKER. Thank you very much and there is (inaudible).

[Applause.]

CURTIS COPELAND. As this panel leaves, it's my pleasure to introduce the last speaker of the day, with a congressional perspective. Can you hear me? In the last 16 speakers, the last 16 speakers, there has not been a congressional perspective. And so it's my pleasure to introduce Ray Smietanka as the last speaker of the day.

He is Chief Counsel for the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee; the person who is really responsible for this whole session today. His ideas and those of his staff are the people who really were the impetus for this. Ray has served as counsel on the Judiciary Committee since 1975. He has a B.A. from DePaul, an M.S. in journalism from Northwestern, and has a law degree from John Marshall Law School. Before law school, he worked as a reporter for the Benton Harbor Michigan News Palladium, and as a combat correspondent for the Army in Vietnam.

Please join me in welcoming Ray Smietanka.

[Applause.]

RAYMOND V. SMIETANKA. Thank you very much, Curtis. I really appreciate it. And I have had a very enlightening day, morning, and afternoon here. I almost feel bad following such a lively and interesting discussion because I know mine probably won't be as good as theirs.

I also feel so unaccomplished listening to all of the people that have come before me. I have nothing to sell on Amazon.

[Laughter.]

Mr. SMIETANKA. But I will have some baseball cards on eBay soon. And I have not been published in the Harvard Law Journal, but I have been published, as Curtis said in the Benton Harbor Michigan News Palladium, maybe about the same circulation? I don't know.

[Laughter, applause.]

Mr. SMIETANKA. I also want to thank you all today for our staff on the Subcommittee who have stayed here all day and have been fascinated by this discussion because it's going to be so useful for us in our work in the next few months—Susan Jensen, Brenda Hankins, and Mike Lenn.

In the ideal world, people with experience and good ideas make recommendations that are recognized for their merit and adopted without question. Of course in the ideal world, people with experience have either had the same experience, have had the same perspective on their different experience, or are persuaded by sound and convincing argument—come to the same conclusions whatever their experiences are. The Congress is different—not better, not worst, just different.

Members of Congress are neither experienced in everything, nor do they bring to their different experiences the same perspective. One would hope that they can be persuaded by sound and convincing argument to reach the same conclusions but that does not always happen. What one congressman or senator finds sound and convincing may not appear that way to another who has different constituencies, interests, and priorities.

And because politics is a science of governing and Congress is a representative body that does that governing, it melds the interests of vastly diverse regions and groups, balancing those interests, and it's a continuous proposition that sometimes trumps sound convincing argument. What we on the House Judiciary Committee have been seeking to do for the past year with the help of Mort Rosenberg and Curtis Copeland at the CRS, and all of you here today—thank you very much again—is to help improve the rules which govern the administrative process.

It has been well over a half-a-century since the Administrative Procedure Act was passed into law, and nothing goes that long without profiting from analysis and improvement. During the period of time we have had, the APA, we have had six amendments to the Constitution. The electorate has seven times shifted the executive branch from one party to another. Major legislative reforms have been adopted to virtually every aspect of our nation's life. And if that hasn't been enough, football now has sudden death, college basketball a shot clock, and major league baseball, at least the American league, has a designated hitter.

Commentators have identified three dimensions to politics which must be considered in proposing change: decision making, agenda setting, and preference shaping. What we are doing here is relevant to all three, but in each still resides challenges to ultimate achievement. What the Committee on the Judiciary hopes to accomplish is to solicit the best thought and analysis possible on improvements to the APA in different areas such as we discussed today and to translate these sound and convincing arguments for improvement that can sail between the Scylla and Charybdis of the legislative process.

First we seek to collect consensus proposals that would guarantee an easy mid-channel passage through the process. The fact that there is a consensus might ensure their adoption by the Congress. Second, issues of more substance may require action by the next Congress. And finally issues that cannot be agreed upon so

easily may need further study and presentation to a later Congress by reconstituted Administrative Conference of the United States, a body that hopefully can be fully funded and operating at the end of this year.

As we all know—it was referred to today—the Committee was instrumental in reauthorizing the Administrative Conference during the last Congress and hopefully it will be a fully funded and operating body by the end of the year considering many of the issues that we discussed here today.

[Applause.]

Mr. SMIETANKA. When we undertook this project at the direction of Chairman Sensenbrenner of the Committee, with the bipartisan support of the rest of the Committee, we recognized that politics affects everything in government, and administrative procedure is how government most directly affects most Americans, be it through the Internal Revenue Service, the Environmental Protection Agency, the Department of Agriculture, whatever.

We hope to improve the process for every American, and do not intend in our project now to decide the politics for any American. Recognizing and structuring the role of science in making rules can improve the process whereby rules are developed without influencing what exactly those rules are. Process and substance, these are distinct but related. Improving process can only improve the substance of the ultimate product. That is what we hope to achieve today here and the efforts that we put into it have been bolstered by what we heard.

Finally, we wish to extend our thanks to Neil Kerwin at the American University's Center for the Study of Rulemaking for helping make this event possible, and thank all of the presenters who preceded me. I feel after getting their views, their experience, their suggestions, it's—I feel like for me—and the least shall be last. Thank you very much.

[Applause.]

Mr. COPELAND. Well, I have the dubious honor of doing the concluding remarks. Neil Kerwin came up to me in the last session and said that he was unavoidably detained. And I will make three very brief statements, actually four.

One, Richard Parker just suggested that if we really wanted to get ACUS funded maybe we could get Jim Tozzi, to put a rider on an appropriations bill, which I thought was a good idea.

The transcript of this session today will be available on the Center for the Study of Rulemaking's website probably in fairly short order. They turned the last one around fairly quickly. So check back with the website. You will be able to get a transcript of this as well as the PowerPoint presentations that were given today.

Second, as was mentioned earlier, questions can be submitted to me or Mort or to the Committee or to the Center. If you have other questions that you didn't get a chance to ask, feel free to raise them and we will strive to get answers to them. Finally the thank yous—we mentioned Neil Kerwin. When you're interim president of the university you get a chance to offer a building like this, and it's truly fabulous.

Heather Cohen who has been sitting out at the table outside here all day. She and I were the first ones here a little before 8:00 this

morning. For a grad student, that is quite a thing to get here before 8:00. But everything, every little detail that you have enjoyed today from the nametags that are on your lapels to the coffee and things outside, and the fact that you got an invitation to this is because of Heather. So she deserves a big thanks.

[Applause.]

MR. COPELAND. And finally I want to thank you for coming. It's been a great day and I appreciate your attendance and all of the great questions. Thank you.

[Applause.]

**CONGRESSIONAL RESEARCH SERVICE (CRS)
SYMPOSIUM: PRESIDENTIAL, CONGRES-
SIONAL, AND JUDICIAL CONTROL OF RULE-
MAKING**

MONDAY, SEPTEMBER 11, 2006

Introduction/Welcome:

Dan Mulhollan, Director, Congressional Research Service

Panel 1:

**CONFLICTING CLAIMS OF CONGRESSIONAL AND EXECUTIVE
BRANCH LEGAL AUTHORITY OVER RULEMAKING**

Moderator/Introduction:

Morton Rosenberg, Congressional Research Service

Panelists:

Cynthia R. Farina, Cornell Law School

Kevin M. Stack, Cordoza School of Law

DAN MULHOLLAN. Good morning, everybody. I'm Dan Mulhollan, director of the Congressional Research Service, and I want to take a moment just to welcome you to this all-day symposium on presidential congressional and judicial control of agency rulemaking. I say it's to you all's credit that you're willing to roll up your sleeves for the day and take a look at this very important issue.

The process of developing or framing rules is viewed by some as central to the definition and implementation of public policy in the United States. So I think it's critical that in fact this event take place, and we're happy to sponsor this symposium as part of the House Judiciary Committee's bipartisan 2-year project on administrative law process and procedure.

I was taking a look and I thought that I would share this quote with you from Robert Jackson that many of you are quite familiar with. Justice Jackson said, "It is hardly lack of due process for the Government to regulate that which it subsidizes." At the Judiciary Committee's request, Mort Rosenberg and T.J. Halstead from our American Law Division, and Curtis Copeland from our Government Finance Division, have been working with the committee during the past 2 years to organize symposia, hearings, and original research on such topics as "The Role of Science in Rulemaking," "The Status and Promise of Electronic Rulemaking," "Judicial Review of Rulemaking," "The Implementation of the Congressional Review Act"—we all bow—and "The Nature and Extent of Public Participation before Rules Are Published in the Federal Register."

Currently, CRS is sponsoring a number of projects with public policy schools across the country, and one I'm particularly interested in is on the role of science advisory committees in the public policy process at the Maxwell School at Syracuse.

The culmination of the committee's project will be the preparation of a detailed report with recommendations for legislative pro-

posals in suggested areas for further research and analysis. For those of you in the universities, I really wish you particularly would pay attention because there is a great deal of fodder here and the previous studies that have taken place for a master's and doctoral thesis in a number of areas, including some good law review examinations. So please pay attention to that avenue as well. The transcript of today's symposium will be part of that report.

Mort, T.J., and Curtis have assembled a great group of scholars, experts and practitioners for today's session. It's a unique opportunity for you to hear and ask questions of some of the country's leading experts in the area of administrative law and practice.

In addition, I would like to recognize Justin Paulhamus and Angela Harris for their help in arranging the logistics for this symposium, and my colleague Bob Nickel as well.

Have a great day, and I'll turn over now to Mort Rosenberg.

MORTON ROSENBERG. Thank you.

[Applause.]

Mr. ROSENBERG. Thank you, Dan.

Before we start I think it's appropriate that we take a moment of silence in remembrance and recognition of the losses of the victims of the 9/11 tragedy that occurred about this time 5 years ago. (Pause.) Thank you.

This symposium is the culminating event in a very unique bipartisan study project that Dan mentioned, that was initiated by the House Judiciary Committee leadership and the Subcommittee on Commercial and Administrative Law. The committee was concerned that in the last decade, a period coincident with the absence of the Administrative Conference of the United States, many issues of administrative law process and procedure had emerged that have not been properly addressed or even properly identified.

At the beginning of the 109th Congress the committee put at the top of its oversight agenda the identification and study of such emergent issues, and put CRS in charge of developing the study. Its most important directive was to eschew the normal hearing or study commission process and to gather the necessary information for legislative action through empirical studies conducted by seasoned scholars, and through symposia with participants representing the diverse views of academia, public interest groups, the business community and Government.

Curtis Copeland, T.J. Halstead and I have adhered to that directive and have come to believe it to be a model of oversight that should be replicated when possible. Rather than the hit-and-run of the typical oversight exercise, we have been able to explore and utilize the wealth of research and informational resources readily available to Capitol Hill.

I've characterized the symposium as a culminating event not because it will provide definitive answers or resolutions for the administrative law and process issues we are just beginning to identify, explore and understand, but because it addresses the fundamental question of who will resolve those issues and how? Who controls decision making in the administrative bureaucracy—the President, Congress or the courts? And what kind of balance should there be if there isn't that right now?

Our first panel will discuss the competing claims of congressional and presidential authority over rulemaking. I mentioned that our mandate in setting up these forums has been to ensure diversity of academic, public interest, private sector and governmental viewpoints on the subjects we have covered—we are going to cover. This has been true today except for this panel. Despite some 20 overtures and invitations to academics and former and current executive branch officials we were unable to obtain a single firm commitment to present the Presidential authority position. Rather than cancel this important panel and go on without hearing the views of the two panelists who made early commitments and long preparation for this program, we prevailed on one of my fellow coordinators of this project, T.J. Halstead, to step into the breach.

On Friday afternoon T.J. was celebrating the completion of his eighth year of his already distinguished career with the American Law Division. A graduate of the University of Kansas Law School, he has established his reputation on the Hill for excellence in the areas of administrative law, separation of powers, recess appointments, the vagaries of the Second Amendment, and most often esoteric legal matters that nobody else in the division has the heart to take on. He's the reason I stick around and have stuck around for so long.

T.J. will lead off and will be followed by Cynthia Farina and then Kevin Stack, whose biographies I will give when their turns come. Also volunteering to be on this panel as a non-speaking but interested member and observer of presidential authority is Professor Peter Strauss.

T.J.

T.J. HALSTEAD. Thank you, Mort.

As Mort just indicated, I'll be spending the next few minutes giving an overview of the various factors—constitutional, statutory, and pragmatic—that form the basis of the assertion, on one hand, that the President alone is accountable for executing Federal law and possesses the authority to control its administration, and on the other that the President possesses extensive authority to control the administration of agency regulatory efforts by virtue of an implicit vesting of such authority in the President by statute.

Regarding the former category, this principle is a component of what has come to be called the unitary executive theory, which posits that the President, by virtue of his position as the only nationally elected official of the Federal Government, possesses broad supervisory and managerial powers over, as well as an encompassing political presence in, all administrative agencies.

In particular, this theory maintains that the President's constitutional authority to see that the laws are faithfully executed vests the chief executive with the responsibility and substantive authority to control every aspect of the workings of the executive branch, to set priorities, allocate resources, balance competing policy goals and resolve conflicts over agency jurisdiction and responsibilities extending to the point of imbuing the President with inherent authority to direct the actions of subordinate executive branch officials and employees, even in instances where congressional enactments do not explicitly grant such authority to the President.

Attorney General Cushing expounded upon this conception of presidential authority in the middle of the 19th century, declaring that the Constitution places all executive officers under the control of the President, and that no head of an executive department who possesses statutorily granted authority can lawfully perform an official act against the will of the President. And this conception of presidential authority has largely been followed by attorneys general to the modern day. And proponents of the unitary executive theory likewise point to the holding and broad dicta in the Supreme Court's 1926 removal decision in *Myers v. United States* as an implicit judicial validation of the maxims comprising the unitary executive theory.

The impact of the unitary executive theory in the regulatory context comes into relief when we consider the manner in which the nature of congressional delegations of authority has shifted during the evolution of the modern administrative state. Even the most strident proponents of executive authority acknowledge that the President's power to control and direct the administration of law by executive branch officials is bounded by the dictates of the statutory provision at issue, as I'll touch on in more detail shortly.

Professor Prakash of the San Diego University Law School has forwarded a theory of the President as chief administrator of the executive branch, arguing that both historical evidence and the text of the Constitution established that the President has the ultimate authority to control the exercise of any discretion that has been granted to any executive branch official. Even Professor Prakash, however, concedes that where a statute commands an executive officer to perform a non-discretionary or ministerial function, the President cannot then order the official to ignore that congressional mandate.

Prior to the New Deal, this dynamic enabled Congress to supervise and control administrative action taken by executive agencies through the issuance of specific and clearly delineated delegations of authority to those agencies; such as was the case, for example, arguably, with the Interstate Commerce Act, which is widely viewed and held up as a model of congressional enactment that makes a detailed and well-bounded grant of authority to an executive agency. However, concordant with the rise of the administrative state, an ever-increasing number of statutes that authorized agency action contained open-ended grants of authority that essentially left the resolution of significant public policy questions to agency discretion.

The motivation for Congress to delegate away large swaths of its policy making authority can alternately be ascribed to a recognition on the part of Congress that it lacked the knowledge or capacity to respond fully to issues arising from modernization or to an inability to reach consensus on legislative minutia, given constraints on congressional resources and the increasing diversity of interests represented in Congress.

Whatever factors can be cited for this development, the practical effect of these broad delegations of authority was to allow Presidents to use the principles of the unitary executive theory as a wedge to assert determinative control over the substance of agency

rulemaking efforts from both a textual and pragmatic vantage point.

Regarding the textual position for the chief administrator or chief executive theory of presidential power, legal scholars—again, such as Professor Prakash, Steven Calabresi and Christopher Yoo, among others—have asserted that an analysis of the historical and textual foundations of the Constitution necessarily leads to the conclusion that the President possesses the authority to execute the law himself and to control the execution of the law by other governmental actors.

In support of this proposition, these scholars give operative effect to the general vesting of executive authority in the President, such as in the take care clause and the opinions clause, and concordantly and concurrently assert that the necessary and proper clause does not in fact give Congress the power to vest an executive officer or department with independent power but instead permits Congress to enact legislation that aids the President's efforts to exercise his constitutional powers including the execution of the laws.

This conceptual framework undergirded President Reagan's efforts to embed unitary principles in the regulatory context by issuing Executive Orders 12291 and 12498, centralizing control of agency rulemaking in the Office of Management and Budget through a review and clearance procedure that gave the President a significant and arguably unprecedented degree of control over agency rulemaking efforts.

It's not surprising that this review process generated a significant degree of criticism and controversy largely centering on a perceived anti-regulatory bias, as well as a conception that the order constituted an unlawful transfer of power from the agencies to the President via the Office of Management and Budget.

The Department of Justice's Office of Legal Counsel responded to this legal argument asserting that the provisions of the order were valid, again, as an exercise of the President's power to take care that the laws be faithfully executed. Additionally, this OLC opinion argued that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies.

Many of the concerns voiced over the effect of the Reagan orders were at least temporarily assuaged by the more transparent review regime established by President Clinton with Executive Order 12866, but it rapidly became apparent that President Clinton was exercising a degree of control over agency rulemaking that rivaled—and in many ways surpassed—the Reagan- and Bush-era efforts in this context.

President Clinton asserted a greater degree of authority over the independent agencies by including them in the regulatory planning process, and he was also more active in issuing directives to agency heads concerning how he felt they should exercise their discretionary authority, issuing 107 such orders compared to just 12 throughout the Reagan and Bush administrations.

President Clinton's control over the rulemaking process extended so far as to result in his affirmatively proposing rules prior to any such announcement by the jurisdictional agency involved. The best

example of this was his 1995 announcement that by executive authority he would restrict the marketing and promotion of tobacco products to teenagers and that he was authorizing the FDA to take steps to achieve that goal. The formulation and promulgation of that rule never departed substantively from the President's initial proposal, and I think it's a good example of a President essentially asserting ownership of agency rulemaking action.

Dean Elena Kagan of the Harvard Law School has described the assertions of authority and the actions taken by President Clinton as supportive of her general theory of presidential administration, which posits that when Congress delegates administrative and law making powers specifically to department and agency heads, it is concurrently making an implicit delegation of those authorities to the President unless the legislative declaration specifically states otherwise, largely on the basis of her belief that this approach is the closest reflection of the intent and understanding of Congress, and also because of the attendant practical benefits she sees arising from that dynamic. Dean Kagan goes on to assert that this dynamic gives rise to the President's constitutional prerogative to supervise, direct and control the discretionary actions of all executive branch officials.

It's interesting to note, I think, that Dean Kagan's theory of presidential administration explicitly rejects the constitutional basis for unitary control of the regulatory state, instead relying upon policy rationales and principles of statutory interpretation to support presidential control of agency action. Despite this distinction, it seems apparent that this theory of presidential administration is a unitarian one in practical, if not doctrinal, effect.

As I mentioned a few minutes ago, the Clinton regulatory planning and review order included independent agencies within its ambit to a degree that the Reagan orders did not. And the order also went further than the Reagan orders by implicitly asserting the ultimate authority to displace the judgment of agency officials.

So while the underpinnings of the Reagan and Clinton orders are arguably based ultimately on constitutional authority and principles of statutory interpretation, the practical effect of both approaches has been to centralize control of the administrative process within the Office of Management and Budget in the Executive Office of the President to a significant and fundamental degree.

And a survey of the practices of the current administration I think indicates that while President Bush has a strongly unitarian conception of presidential power, his administration's actions in the regulatory context, and its attendant posture toward Congress can likewise be seen as being informed by the theories of Dean Kagan.

I think it's also significant to note that both the unitarian and presidential administration models of presidential control over agency rulemaking appear to be motivated not only by similar conceptions of presidential authority, but also by a belief that centralized presidential control of agency rulemaking promotes regulatory effectiveness and accountability.

Proponents of the unitarian conception of authority, such as Professor Calabresi, have asserted the President's unique role as the only nationally elected official coupled with the expansive authority vested in him by the Constitution, imbues him with the singular

authority to speak for the American people and to ensure that the will of the majority prevails over competing parochial interests that he feels prevent effective collaborative action by Congress.

Coupled with this notion of accountability to the populace, Professor Calabresi has additionally asserted that the power enjoyed by the President in this context likewise allows him to maximize regulatory efficiency by exercising coordinative and managerial power over agency rulemaking efforts.

This rationale mirrors the converse, arguably, pragmatic case that Dean Kagan forwards in support of aggressive presidential administration. In particular, Dean Kagan asserts that presidential leadership makes the regulatory process more transparent and understandable to the public, which in turn establishes an electoral link between the bureaucracy and the electorate.

Dean Kagan has asserted further that Presidential administration aids regulatory effectiveness in several ways, such as by allowing the executive branch to gauge cost effectiveness to allow for the setting of regulatory priorities and to ensure consistency across the spectrum of executive branch regulatory efforts.

Ultimately, proponents of both the theory of presidential administration and the unitary executive conception of Article II power have forwarded robust claims of presidential authority to control and direct agency rulemaking activity, and the substantive actions taken by every president from Reagan onwards have effectively entrenched these claims to the extent that Congress and the public have arguably become inured to the notion that the President may exercise his prerogatives in this context to exert significant and oftentimes determinative authority over the agency rulemaking process.

At this point I'll turn the discussion over to Professors Farina and Stack, who will rapidly disabuse you of the benefits of this approach, I presume.

[Laughter.]

[Applause.]

Mr. ROSENBERG. Our next speaker will be Professor Cynthia Farina. Cynthia is a professor of law and associate dean at the Cornell Law School, and is a nationally recognized authority on administrative law and related jurisprudence.

Following her graduation from Boston University Law School she clerked with the Honorable Raymond J. Pettine, the chief judge for the United States District Court of Rhode Island, and with the Honorable Spottswood Robinson III, chief judge of the United States Court of Appeals for the D.C. Circuit. She spent 3 years as a litigator in a private practice before joining the Cornell Law facility. Her scholarship and teaching focuses on administrative law, the Federal courts, due process and separation of powers. And Professor Farina is the co-author of a leading administrative law casebook and advises with the American Bar Association on issues of administrative law and practice.

Cynthia.

CYNTHIA FARINA. Thank you, Mort.

Good morning. Let me see if I can make the great technology here work. I would like to begin this morning with a story, not a once upon a time story because it happened this summer. The Na-

tional Ocean Service had been working for quite some time on a proposed marine sanctuary in the northwest Hawaiian Islands. The plan was for the President to have a news conference to announce the rulemaking that would finally set the configuration of the sanctuary and determine the use prohibitions within it.

Now, we have 13 marine sanctuaries already; why a presidential appearance to launch this rulemaking? Well, this would be the largest conservation area under the U.S. flag, larger than all the country's national parks combined—indeed, the largest marine conservation area in the world, home to more than 7,000 marine species, some of which are endangered, threatened, or rare. Being briefed for the event, the President apparently was impressed. And simply announcing the start of a notice and comment process isn't really very much when you come right down to it. It's sort of like telling everybody to stay tuned; there is going to be a ribbon cutting ceremony somewhere down the line. What's the point of being the leader of the most powerful nation in the world if that is all you can do?

But the National Marine Sanctuaries Act, enacted in 1972, amended and reauthorized six times since, is one of our most process-rich statutes going. There is tons of public stakeholder participation plus an unusually direct role for Congress. There is, however, also an older statute, the Antiquities Act of 1906, under which the President is authorized to declare, by public proclamation, historic landmarks, historic and pre-historic structures and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments.

And so on June 15, 2006, the President did not launch a rulemaking, but rather, by the stroke of a pen, created the Commerce Department's first national monument. And in the words of the official press release, "set aside the largest marine conservation area on Earth."

To preserve and protect the 10 islands, atolls and marine life in the monument, the Presidential proclamation also took up the text that would have been in the notice and comment and made it Federal law: No person can pass through the monument without Federal permission; vessels must carry an approved vessel monitoring system and give notice when they leave the area; swimming, diving and other recreational uses are restricted; research access is regulated; all commercial fishing in the area will be phased out over 5 years. Now, that's strong presidential control over rulemaking.

But this is a story with a happy ending, right? An exercise of presidential prerogative that immediately preserved an area of incredible ecological richness, and indeed of Hawaiian native cultural significance that is larger than 46 of our 50 states.

I want to be clear that I'm not asserting that anything illegal happened here—although apparently it was a creative use of the Antiquities Act—but I do hope that if this story doesn't make the hair on the back of your neck stand up, at least it gives you a slightly queasy feeling.

I also want to be clear that I think it's asking a great deal, if not the impossible, of a member of the executive branch, whether an appointed or a career person, to say to a president who is

champing at the bit for action, Mr. President, we are as anxious as you are to get this project going, and with your enthusiasm conveyed to the public and Congress we know this project will move forward expeditiously and confidently, but it's important that we follow the process of the Sanctuaries Act and the APA through to the end. That process takes time and it takes money—maybe too much of both—but we get something in return.

What do we get in return? Well, we don't have the time here to go into the debate on whether and how much the current rule-making process should be reformed. So I'm going to paint with a very broad brush in suggesting what you, Congress, and we, the people, get when the decision is made in a given statute that a certain set of public policy choices will be made through the rule-making process by delegation to agencies rather than through the political process of legislation or direct delegation to Congress.

Because of 40 years of court decisions about the rulemaking and judicial review provisions of the APA, agencies who undertake the notice and comment process know that they are functioning under two decisional paradigms that simply do not apply to Congress or the President as public policy makers: decisional transparency and legal rationality. You're familiar with the principal elements in each of these.

Now, again, let me be clear about what I am and am not saying here. First, these elements are relative, not absolute. No one would dispute that there is still a lot of "black box" and irrationality in rulemaking. The point is the relative difference between the administrative and the political processes on these points, which is huge, and was even occurring in the Clinton era.

Second, you, Congress, do not have to choose rulemaking. Legal rationality is not the only kind of rationality that exists or has value to a society. Decisional transparency is not the highest and best good. But where you have chosen rulemaking, which in fact you have done for most social, economic, and environmental regulatory policy, the notion of strong presidential control that's advocated by the unitary executive is fundamentally inconsistent with that choice.

But what about the democracy argument for presidential control, that precisely because you have chosen rulemaking as the way America makes most social, economic and environmental regulatory policy, and because the President is the only official elected by the entire nation, strong presidential control over rulemaking is the only way to provide democratic legitimacy to that policy?

Well, appealing as this may sound in theory, it runs into some problems with the real world facts. Now, to talk about those problems first I have to confess that the story I opened with was a bad one because it really was a story about the President controlling rulemaking when in fact presidential control over rulemaking is really a matter of control by the institution of the modern presidency. And we can take a brief detour to just two sets of statistics to see why.

Now, the first of these comes from the White House website for the eRulemaking Initiative. These numbers, particularly the 8,000 rules, seemed a bit high to me, but I guess these are the guys who ought to know, and you do get an idea of the order of magnitude.

Obviously a significant percentage of these 8,000 rules will not be highly or generally politically salient; many will be important only to a very narrow band of people or interests; although that does not necessarily mean that they won't be important public policy decisions in their regulatory area.

The second set of numbers is a very rough measure of the bureaucracy that, far more typically than in my story, will voice the President's will in rulemaking, and obviously these don't even include any layer in the Cabinet departments below the Secretary.

Now, again, let me be clear about what I am not saying. I am not advocating here a bad-man theory of Government. I can posit 1,800-plus highly competent people without ego or personal political ambition clouding their desire to discern and communicate the President's will on regulatory policy issues, and still we will have substantial principal agent problems implementing the ideal of strong presidential control over rulemaking.

But for the moment let's make the heroic assumption that the small army of people who in the typical case will be the means of exerting presidential control over rulemaking, will be accurate channels of an actual adequately informed presidential judgment. What about the bedrock assumption of a democratic justification argument for presidential control? That when an electoral majority chose George Bush in 2004, they did so because they approved of his domestic public policy positions and wanted more of them. Let's look at some data on that.

Now, the first—first from the month preceding the 2004 presidential election—and these data are arranged as the year proceeds—(pause)—that final was after the debates. Lest you think that 2004 was a particularly bad year, let's go back a cycle. As many of you probably know, the National Election Study has been done in some form since 1948 and is one of our most useful tools for monitoring public political knowledge about the election. Here are just a few of the high—or perhaps they're the low—points of the 2000 election. Professor Ilya Somin of the George Mason Law School analyzed this data.

Of the 31 questions asked in the 2000 NES, the average respondent got only about six more right than guessing, and three of the five most often gotten correct were the home states of Bush and Gore and Joe Lieberman's religion—not clear that they have a lot of substantive policy content.

Now, none of this is any surprise to political scientists and those familiar with the political science literature on elections and public opinion, or of course to the people who run political campaigns.

And finally, even on the occasional public policy issues where all the stars are aligned—where the issue is salient in the election, the candidates have clear and divergent positions on it, a high percentage of the public cares about the issue and gets the candidates' position on the issue right—there is still the problem that the enormous number of issues bundled together in presidential campaigns, only some of which are substantive issues, make it impossible to see the election outcome as a mandate to speak the will of the people in regulatory policy making.

There's actually a lot of data—survey data—on the stem cell issue. The Annenberg data is particularly good because the ques-

tion linked explicitly the use of stem cells with their source, human embryos.

So where does all this leave the claim of the unitary executive theory to strong presidential control over rulemaking? Well, ultimately of course, there is the Constitution. And I'm pleased to compliment T.J. on his excellent summary of unitary executive theory, which I would love to have a copy of to use for my students. In my own view, arguments from the text—whether they're from the Article II vesting clause or the take care clause or the necessary and proper clause or any other clause—are dispositive only if you already know where you want to come out.

By contrast, considering the entire design, the way the origination and operation of our Government's power structure plays out over and over, the answer seems to me fairly clear: The President should not control rulemaking any more than Congress should control rulemaking or the judiciary should control rulemaking. Each of the named constitutional actors should have an institutionally appropriate relationship of oversight, with the agency having primary responsibility for the rulemaking, an ongoing relationship in which none has the last word or the trump card, a relationship that situates rulemaking squarely within the norm for policy making in our system of Government.

Our thinking about separation of powers has been historically dominated by two sets of metaphors: one, the images of endless conflict, the search for dominance. The classic description is in Madison's *Federalist* 51. The other, the images of eternal paradox and the search for balance, best captured with Justice Jackson's classic elegance in *Youngstown*.

I want to close by suggesting a new image, one that I've been offering my students in the past couple of years in my separation of powers seminar. Now, this story has several versions—actually you can find many of them in Wikipedia. My favorite seems especially apt given the story that I began with today.

A child asked the wise woman of his tribe, "Mother, what keeps the Earth from falling into the great darkness?" "My child, the Earth sits on the back of a great turtle." "But, Mother, what does the turtle sit on?" "Another turtle." "And what about that turtle?" "There is yet another turtle." The child thought for a moment, smiled and was content. And so it is with us. There is always another move in the separation of powers game. Authorization needs appropriation and must be followed by implementation, which requires interpretation and enforcement, and none of these can survive long without legitimization, which of course cannot take place without jurisdiction, which is another form of authorization, and so on it goes.

Unless there is some catastrophic breach of constitutional faith, the sort of action that renders appeal to written constitution and separation of powers and checks and balances—futile—there is no last word, no end game. This is the genius of our system. No branch is or should be in control. It's turtles all the way down. Thank you.

[Applause.]

Mr. ROSENBERG. Thank you, Cynthia.

The next speaker will be Kevin Stack. Kevin is an associate professor of law at Benjamin Cardozo School of Law at Yeshiva University, where he teaches administrative law, presidential power, statutory interpretation, and civil procedure. He received his law degree from Yale Law School and then a Master of Literature from Oxford University. He clerked for the Honorable Kimba Wood of the United States District for the Southern District of New York and the Honorable A. Wallace Tashima of the United States Court of Appeals for the Ninth Circuit. He practices as an associate at Jenner & Block in Washington and joined the Cardozo faculty in 2002.

Kevin's most recent research has focused on the scope of the President's statutory powers and judicial review of agency action. Articles in this areas include "The Statutory President", which was published in the Iowa Law Review in 2005, and an article that I commend to you, "The President's Statutory Power to Administer Laws," published in Columbia Law Review in May of 2006. This year he became a vice chair in the Separation of Powers Committee for the Administrative and Regulatory Practice Section of the American Bar Association. And Kevin's going to talk to us about statutory construction and the unitary executive.

Kevin.

KEVIN M. STACK. Thanks a lot. It's a pleasure to be here today.

The question of conflicting claims of presidential and congressional control over rulemaking, as we've heard, is often played out in the realm of constitutional debate. That's the location of the unitary executive debate and the stakes of the unitary executive debate are, I think, clear and familiar. For instance, defenders of the unitary executive position believe that independent agencies are unconstitutional infringements on executive powers. They also believe, as we've heard, the President has constitutional authority to direct all agency action, including rulemaking. But there's another dimension for conflicting claims of control over agency action, and that's the statutory dimension.

In a statutory dimension the question is the extent to which the President has statutory authority to control agency action. This dimension has an immediacy and practicality to it because it begins with statutes currently on the books and asks to what extent they grant authority to the President to control agency action. So, for instance, suppose a statute grants rulemaking authority to the Secretary of Agriculture. To what extent does the President have statutory authority to control the exercise of discretion of the Secretary of Agriculture under that statute?

My remarks today will focus on that statutory question. My points fall under two basic headings. First, I'm going to defend a relatively narrow view of the President's statutory authority to direct agency action. I'll argue that the President has statutory authority to direct agency action only under statutes that grant power to the President in name. The President does not have statutory authority to direct agency action but the statute grants authority to the agency, not the President. Second, I'm going to suggest a few implications and practical consequences of that statutory conclusion as well as its implications for the constitutional debate.

Okay, so turning to the first question, the scope of the President's statutory power to direct agency action. This question, as T.J. mentioned, is an old one for American public law, and the opinions of two 19th century attorneys general, I think, nicely illustrate the contrasting positions of the debate. So in the one corner, which is the corner I'm going to defend, there's Attorney General William Wirt. In 1823, Wirt advocated the view that the grant of authority to an executive official is personal to that official and does not authorize the President to overrule the official.

So here I'm going to quote Wirt. I think it's worth quoting Wirt. "If the laws require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without violating the law." And Wirt goes on, "Were the President to perform it, not only would he be not taking care that the laws were faithfully executed, but he would be violating them himself." Thus Attorney General Wirt clearly advances the view that a grant of authority to an executive official is personal to that official.

In the other corner, a few decades later, Attorney General Caleb Cushing advocated precisely the opposite position. Cushing writes, "No head of department can lawfully perform an official act against the will of the President. That will"—that is, the President's will, "is by the Constitution to govern the performance of all such acts." Thus, I think we face a stark choice between a personal and a provisional view of delegation. In other words, when a statute grants power to an executive official, is the grant personal in the sense that it is to be performed by that official, or is it provisional in the sense that it can be performed by that official, but the official's view may always be supplanted by the President?

To be sure, there's wide disagreement about methods of statutory interpretation, but statutory interpreters across the spectrum will agree that statutory text and statutory context are the starting point for statutory interpretation. And I think even those basic principles of statutory interpretation provide a strong argument against the provisional construction of delegation of authority to agency officials.

The provisional view of delegation relies on the implication of statutory authority to the President. It reads "Secretary of Agriculture" to mean "Secretary of Agriculture subject to the control of the President." That implied implication of statutory text might be plausible, I think, if Congress did not frequently enact statutes that said just that. Congress frequently enacts statutes that expressly grant power to an agency official subject to the control of the President. In view of those statutes, which I call mixed delegations, it's much more difficult to read grants of powers to agency officials alone, as including, by implication, a grant of power to the President.

Congress has been enacting these mixed delegations for quite some time, so here are two examples, one old and one currently on the books. The old one is a statute in 1828 that granted the Secretary of the Treasury authority under the direction of the President to establish rules and regulations to secure the just, faithful, and impartial appraisal of all goods. The law that's currently on the books, Congress has granted the Secretary of Agriculture the

power to make rules regarding agricultural production with the approval of the President. In both, the Secretary is granted authority expressly subject to presidential control. So the claim, based on these mixed delegations, I think is relatively straightforward. They support a negative inference that when a statute grants power to an executive official, without mentioning the President, it should not include by implication a grant of power to the President, rather, when Congress seeks to create that structure of authority, granting authority to an executive official with oversight to the President, it can use and does use a mixed delegation.

Of course, we normally interpret statutes one at a time and the strength of this basic inference will depend upon the proximity of a simple and mixed delegation of authority. I think the strongest case will be when a simple delegation to an agency official and a mixed delegation occur in the same statute. In that case, I think the President would have a difficult time saying that he has the same authority under the simple delegation to the agency official and under a delegation to the agency official, which also expressly grants some control to the President.

The next strongest case, I think, are separate statutes that grant authority to the same official. In that case, I think the officials would rightly believe that they have different powers when they're granted authority solely in their own names as opposed to when they're granted authority subject to the supervision of the President.

Finally, we might embrace a freestanding inference across statutes. I think there are special reasons why this freestanding negative inference should hold even if we're suspicious as general matter about making cross-statutory inferences about congressional intent. At a practical level, the question of to whom to delegate authority is a recurrent question for Congress; it comes up every time Congress delegates authority. Congress is a repeat player in institutional design. That, I think, strengthens the grounds for making a presumption of congressional knowledge of this vocabulary of delegation.

Interestingly, some political scientists have provided some quantitative proof for the way in which these questions of institutional design matter to Congress. For instance, Princeton's David Lewis has shown that in periods of divided Government, Congress is more likely to insulate newly created agencies from presidential control through its design choices. That, I think, suggests special reasons to believe that Congress is particularly attentive and knowledgeable about delegation and therefore should be knowledgeable about its own vocabulary of delegation and that mixed delegations, therefore, should be understood as creating a kind of convention from which we can draw negative inferences.

So let's proceed for the moment with this statutory conclusion, that in view of mixed delegations the best reading of simple delegations to agency officials is that they are personal, not provisional. That, I think, has a number of immediate practical implications for the scope of the President's statutory powers as well as for statutory interpretation within the executive branch. So most clearly, it means that the President has statutory authority to direct agency action only when the statute grants authority to the President in

name. As a result, the scope of the President's power to review rulemakings should depend, in part, on the statutory recipient of authority. Thus, the OMB and OIRA should not have the same scope of authority to intervene in rulemaking when the statute grants authority to the President or grants authority to an executive official subject to presidential direction, as it does when a statute grants authority to an executive official alone.

I think that this statutory conclusion also has implications for statutory interpretation within the executive branch. It certainly makes clear that an official who is vested with authority doesn't have a statutory duty to comply with presidential directives. Thus, it creates the possibility for officials resisting the President's view and, at least temporarily, a check on presidential power within the executive branch. Of course, that check is only going to be a temporary one; nothing I've said would prevent a president from firing the recalcitrant officer. But this conclusion does limit the President's remedies with the official, either the President must be able to persuade the official or fire her, and that's certainly raises the cost of disagreement for the President with the official.

I don't believe that this statutory construction unduly constrains the President. The President still has a wide variety of tools of influence over agency officials, from the selection of his preferred and loyal nominee to ex parte communications during the rulemaking process, to the threat of firing. Those tools create a strong structural assurance of presidential influence over rulemaking but this statutory conclusion does rule out the President's claim of statutory authority to direct-agency action.

I think the statutory conclusion also has implications for the constitutional debate. I just want to spell out two them. If, as I've been suggesting, the most natural reading of delegations to agency officials is that they do not grant the President directive authority, then proponents of a unitary executive position must do something if they wish to square their constitutional commitments with a fact that Congress has granted enormous authority and discretionary authority to agency officials.

Proponents of a strong unitary position will be forced to claim that grants of authority to agency officials are ambiguous or sufficiently ambiguous as to whether they grant presidential oversight that their constitutional commitments should inform the interpretation to such an extent that they should be interpreted to imply presidential oversight.

Depending on the strength of our confidence in these statutory conclusions, the implications could be stronger still. If we were to conclude that a delegation to an agency official was clear or unambiguous in not granting directive authority to the President, then the proponent of the unitary executive would have to claim that statutes granting authority to executive officials are themselves unconstitutional. That would give some pause to the constitutional position, which motivates such a far-reaching rewriting of the administrative state.

In the end, what Congress might do with these statutory conclusions will depend on whether it seeks to enable or to create barriers to presidential control. But regardless of the aim in context, there are virtues of clarity when Congress makes express the struc-

tures of control that it seeks to create. For instance, if Congress seeks to grant presidential oversight then a mixed delegation is the obvious tool with which to do so. Likewise, if it seeks to require the President to act through particular officials, then mixed delegations can be put to that service as well.

Thanks.

[Applause.]

Mr. ROSENBERG. Thank you Kevin. Before I open it up to the floor, which I hope will have a number of questions, Peter, do you want to make some extemporaneous remarks on either side or in the middle?

Peter Strauss, for those who just don't know for some reason, is a professor of law at Columbia University and is an icon in administrative law and process and has been so for many decades.

PETER STRAUSS. And one of the things he's happiest about is making Cynthia Farina one of those co-authors of a noted administrative of law case book.

[Laughter.]

Mr. STRAUSS. I thought—well, one moment. I want to get my constitutional text and something else. So, I thought it might be helpful to do a couple of things. One of them is just to read. I'm sorry I don't have it on PowerPoint but just to read the constitutional text around which these debates occur. So, obviously, the first one is the first line of Article 2, the executive power shall be vested in the President of the United States of America and then it goes on for quite a while telling us how he should be elected and what else he should take and finally gets to such things as it says about what his authority is, unambiguously, he shall be the Commander in Chief of the Army and Navy.

In relationship to the rest of Government, these are its words. "He may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices." Now there are a number of things to remark about this rather weak formula.

One of them is that it's one of only two places in the Constitution that actually refer to the Government as distinct from the President; that is, the executive departments which may have heads. I guess three places because, in the appointments clause, he gets to appoint the heads of departments, and then in the necessary and proper clause of the Constitution it talks about making all laws which shall be necessary and proper for carrying into execution the foregoing power and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.

So the Constitution clearly contemplates that powers may be vested in departments or officers but it seems to contemplate that will happen in the Constitution. This is one of those unusual relics of how hot it was in August of 1787—

[Laughter.]

Mr. STRAUSS. —and how anxious the delegates were to get away from Philadelphia. They didn't really neaten up their document in the way they should have. It reflects some earlier provisions that actually had listed seven different departments and given them responsibilities. But I think we can see in these texts the contempla-

tion that there will be officers of Government and that they will have duties. And the question which is concerning us is what is the relationship of the President and to whom is vested the executive power of the United States to those duties that may be vested in departments, under the necessary and proper clause, of officers other than the President.

There's very little else in the Constitution itself to reflect on that question except the take care clause, which is frequently invoked without necessarily recognizing what I'm about to call to your attention. "He shall take care that the laws be faithfully executed." Now, I stress the word "be"; this is a passive construction; it's not "he shall take care to faithfully execute the laws"; it's "he shall take care that the laws be faithfully executed." Again, I suppose the suggestion is that there's somebody else that's doing the faithful execution and his job is to take care, to oversee the proposition—the possibility that they are doing that.

One other clause is frequently invoked by presidents. I've been—from the plane ride down this morning—I've been reading a report from a research assistant and my only excuse for waiting so long was that he e-mailed it to me last night at 1:23.

[Laughter.]

Mr. STRAUSS. About the frequency with which signing statements invoke the President's right to give recommendations to Congress about legislation. The President's position is this means that's his exclusive right and no member of the executive branch can talk to the Congress without first telling him and being subject to his control about what he is to say, and this is a position that has been present for quite some time.

What the Constitution says is he shall from time to time give to the Congress information on the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient. Entirely useful authority and responsibility for the President but notice what it doesn't say; it doesn't say anything about exclusivity on his part. And notice, as well, that if you contrast it with the other system that existed in the world at the time and that indeed does exist in parliamentary democracies, it's remarkably weak.

One of the striking things about American Government is that the executive officer cannot command congressional processes. He can't force Congress to consider anything; all he can do is recommend, and one could understand this formula in that term. That is, he can make recommendations in the hope that some Congressman or Senator—usually there's someone from his party who will do this—will be willing to introduce the measure and hope that his friends in the Congress will produce it in something like the shape in which he recommended it. But that seems to be all the constitutional language is talking about.

Now, I came to my sensitivity of these—I'll call them ambiguities in the constitutional language—from my position as general counsel of the Nuclear Regulatory Commission, one of those independent regulatory commissions, some 30 years ago. And at one point we had—there was pending before the Congress a proposal to domesticate the claim of executive privilege and require it to go through the President and be made by the President personally.

The Office of Management and Budget and the Office of Legal Counsel asked us what our views were on this proposed legislation, and one of the striking things we thought about the legislation was that it didn't include any reference to the independent regulatory commissions. They weren't to have the possibility of getting the President to invoke executive privilege on their behalf.

Well, for someone whose agency had atomic weapons plants and sundry other highly sensitive materials in its possession, this seemed highly unusual, so we sent over a recommendation. Whatever else was done, they should be sure to include the independent regulatory commissions, at least those like us, who have such sensitive information, in the possibilities of the President claiming the executive privilege, and we got back a little letter from OLC saying, "so sad, too bad, you can't have it, you're not in the executive branch."

[Laughter.]

Mr. STRAUSS. This letter generated a whole range of scholarship on my part, after my return to Columbia; it's very similar in its outlook to Cynthia's. But what I want to point out for the moment is the difficulty that this gives to the claim of strong unitary president, because Congress regularly, in the independent regulatory commissions, as it did for the first Department of the Treasury, says to executive officials, please report to us on the following subjects. Please submit your budget requests directly to us and a variety of other commands of that sort and those commands are regularly obeyed.

If one reads the signing statements, as I was reading them on the plane down this morning, one finds an unending pattern of presidential assertion. Congress cannot make anyone talk to it except through me again, again, and again; one of the dominating themes of the signing statements. Congress cannot get any Federal officer to recommend legislation except through me. Congress cannot demand of any Federal officer a report except through me. Very hard to square with the existence of the Federal Trade Commission and the Nuclear Regulatory Commission, so forth and so on, and for that matter, at the very least, an extremely aggressive reading of the constitutional words that I've given you.

So it will be clear to you that I'm not a particularly strong proponent of this unitary executive, but I noticed in the audience this morning someone who at an early stage was responsible for the development of what's now Executive Order 12866, which on the whole, I rather like and approve of. But I think he probably has—he may have a view of the President's position more favorable to it than I do. It's Jim Tozzi, who was an early actor at OMB and I wonder Jim, if there's anything you'd care to add by way of comment to what you've heard this morning.

JIM TOZZI. I would just add one point. Executive review and all we did on the order—these were the five presidents when I worked there. This is the issue that your very distinguished panel discussed, and it struck me that it was discussed in OMB very heavily. In fact, I dabbled with all the advice I got; as Professor Strauss said, I was the clear person in charge of this thing and we had tons of advice and we put them on our website if you want to see them. But the bottom line is, I think this debate... I'm not going to argue

with four people that were quite more solid on the details, including war powers. But I'll make two points.

First point from a management standpoint, it's pretty difficult for me to see why the President should be putting independence aside from the agency's classic case. I used to get these calls all the time from the EPA. For example, EPA, OSHA, and Agriculture on pesticides were in regular conflict over who had jurisdiction on the Federal side? Now, who is going to resolve those issues? Were we going to court? Were we going to go to Congress? And so we had to resolve it. And so one idea that I have seen on the business side, I think the President, as a matter of public policy, as the CEO, he should have these powers alone.

Second point is, having worked an entire career in Government, except for one time as for an attorney, I worked for the Defense. I've always had an attorney as a boss, a little of what, you know, comes down, and one point I would say, with all the points you made, the big issue of presidential control was really—already under Reagan, it was under the Ford and life review under Nixon, where these debates took place. And you know, without exception the five times I worked there, I never said, and OMB never said, that we had control over what an agency's rulemaking did.

My position is, or was, that we simply advised the head of the agency of our views. I don't think you've ever seen—I see a couple of my colleagues over there, Mr. Eisner and—(inaudible). You're laughing at that but we never assumed this issue that you're debating today because we granted it. We said it's the agency's prerogatives; we just gave them our opinion.

Mr. STRAUSS. I've got to give it to Jim; absolutely right as to coordination. You remind me of one additional thing I had meant to say. There was some talk about Congress and the public becoming inured to a certain view. For me, the truly important issue is whether Washington bureaucrats and in particular, Cabinet heads, heads of agencies, become inured to a certain view.

If—and to the extent that—a President impresses on his officers that their responsibility is to say, "yes sir boss, you're in charge", then we've lost something quite precious as distinct from the frame of mind. This is my responsibility, given to me by Congress, Mr. President, I hear you respectfully; but at the end of the day I'm the one who has to decide. And my concern—and I want to be very clear—this is a concern that came to me in the Clinton administration, not the current Bush Administration—my concern is that mind frame has been eroded; 107 directives from President Clinton to his Secretaries telling them what he expected them to do was a signal of that erosion, and the result is a significant loss of public responsibility.

Ms. FARINA. Yes, but—

Mr. STRAUSS. Oh, go ahead. I'm sorry.

Ms. FARINA. Can I follow from that? To follow up what Peter said, you know, as I said at the end of my presentation, the notion of each of the named constitutional actors having an institutionally appropriate oversight relationship with agencies seems to be clearly—in the case of the President—includes the essential function of management and coordination that would indeed cover inter-agency-jurisdictional conflicts and I don't think, at this point, any-

one denies that cost-benefit analysis and risk assessment, that those are absolutely essential elements of responsible rulemaking.

Now, that said, of course, the devil is in the details and, you know, we had a lot of ongoing work that we needed to do in how those processes ought to be done responsibly. And I think there is a question about whether—I think there continues to be a question—maybe we can't resolve it—about whether they can be done in a place where the President is also, simultaneously, asserting a kind of power to do substantive policy control with cost-benefits and risk-assessment control.

I think there is a real problem when you try to do those two things in the same location. Whether you can do them together in a way that won't continue to be controversial is unclear. But I take your point completely. That seems to me to be within the kind of institutionally appropriate oversight that the President ought to be engaging in. Did you want to—

Mr. ROSENBERG. Let me interject here a bit of a broader question and follow on from what Peter said and what Cynthia has said. Cynthia, you know, evoked good early childhood memories with your Yurtle the Turtle optimistic view—

[Laughter.]

Mr. ROSENBERG. —of the separation of powers and I wonder—my experience over the last 30 years, and particularly over the last ten, has been to look at it from the point of view of Congress. What's Congress been doing and whether there is beginning to be a change in a constitutional paradigm. A great deal, perhaps encouraged by the coalescence of Congress and whether the coalescence of Congress over a long period of time is something that we should be concerned about. Some scholars have pointed to the New Deal, arguing that that was a change in the constitutional paradigm for the regulatory state and for Congress' active role, as well as the Presidential role in administration.

I wonder, after not simply 6 years of coalescence, but perhaps more, and looking at signing statements. T.J and I have been studying signing statements for some time now. But you have to look behind the signing statements to what they're doing, and as the speakers today have mentioned, they are directions given directly to the administrative bureaucracy as to how they carry out their duties. I can give many examples of where these directions, some of which have come in signing statements which have declared the unconstitutionality or constitutional objections to particular provisions of law, have been carried out by the administrative bureaucracy.

The Prescription Drug Program's passage is an illustration of that. At that particular time, the Congress asked the chief actuary of CMS "what are your projections for this drug program?" And the chief actuary had to refuse to give his projections to the Congress, which were \$150 billion more over a 10-year period than was understood by Congress at the time it was taking this vote, and the chief actuary couldn't do it because he was directed by his superior, who was directed by the White House apparently, not to reveal those figures. Not revealing those figures made a difference probably, in the outcome of this. The chief actuary had for cause removal protection authority, yet he was threatened with firing if he

said something. That was upheld by OLC as part of the President's authority under the unitary executive and expanded ideas of executive privilege to be constitutional, that he has the authority to direct everybody no matter how low in the bureaucracy. I've seen examples of independent regulatory agencies adopting OLC opinions with respect to recommendations clauses, with respect to executive privilege.

I've seen [congressional] subpoenas that have been issued to agencies ignored and with impunity, with nothing to respond to. I'm wondering is—do we have a paradigm even if there is a change in the political structure of one or both houses of Congress? Are we going to see a difficulty in a rebalancing? And I put that to Peter and to the panelists. Kevin, come on up.

Mr. STRAUSS. Stand up Kevin.

Mr. STACK. Okay. Seems like a big and difficult question that Mort just posed, but a couple, maybe initial, thoughts. Some have described a kind of crystallization of the strategic advantages of the unilateral powers of the executive, in part because the President can act less constrained by the demands of coordination, and therefore often can have a sort of first mover advantage. That's the prominent work of William Howell, which then forces the other branches to respond and form constituencies in response to specific proposals, which I think can impede legislative action.

Part of this, also, is that I think the President has more incentives to gain institutional control over the mechanism of Government in so far as the President is held largely accountable for how the Government as a whole functions. There is a strong incentive for the President to increase control over the functioning of Government.

Congress, on the other hand, I think has less institutional incentives to push the boundaries of its authority. Its incentives are more ad hoc and substantive and in response to the nature of its own composition. So that might play into a kind of logic of progressive expansion of presidential power and relative congressional disinterest in that growth.

I certainly wouldn't say complete disinterest; I certainly wouldn't want to say that. So that there's just two points which might suggest the kind of background dynamic and structural conditions which are promoting relative congressional acquiescence in advancing assertions of presidential control.

Mr. ROSENBERG. Yes?

Q: I have a question for Kevin and it sort of builds on the beginning of Peter's presentation and—I'm not—I'm a little skeptical that you can put so much stress on the word "be" in the take care clause. Maybe I need to see a weather report and find out if it was unseasonably cool the day—(inaudible).

[Laughter.]

Mr. ROSENBERG. We can put more stress on that than the second half of the necessary and proper clause.

I just wondered, Kevin, what your theory says about a situation in which the President is convinced that the agency is doing something wrong, that the President is not satisfied with the way the laws are being executed. What is the—assume it's an unambiguous delegation directly to an agency, so we don't worry about the Presi-

dent having a statutory role. So what do you say about the situation in which the President observes that there's been a delegation directly to an agency, the agency is not performing its function the way the President thinks is appropriate. Does the President have the authority to act under the take care clause to ensure that the law's faithfully executed in the way that the President—obviously that's a delegation—(audio break)—the President would have to make an independent judgment about what proper execution of the law is.

Mr. STRAUSS. Yes. My thought on that would be that the President has political remedies, and can try to persuade the officials. If that fails, the President can sort of publicly disclose his displeasure with the official. If they're still at an impasse, then the President has the remedy of firing. But, in a sense, the delegation to the official—which of course is more politically costly to the President, but if the delegation runs to the official, Congress has forced the President to those political remedies.

Q: Then why do you say, though, about the situation there where the removal is restricted and so you could have a—(inaudible)—there's adequate cause, and that controversy I guess can end up in the courts.

Mr. STRAUSS. Right, and we have a couple of examples, one historical and one rather more contemporary, of just this kind of response. The historical one is Andrew Jackson's effort to get his—I think it was the Secretary of the Treasury to deal with the United States Bank in the way he wanted it to and he had to go through three Secretaries of the Treasury before he could find one who would do what he wanted.

The more recent example, of course, is President Nixon's effort to fire Archibald Cox as independent prosecutor who was an official who had by law been rendered irremovable except for cause and eventually in some litigation he was found to have—it was Nader versus Bork—who was found that he hadn't been properly removed, but nonetheless, history had marched on.

Mr. ROSENBERG. Any more comments for our panelists?

Jeff Lubbers.

JEFFERY LUBBERS. Yes. Thanks, Mort.

Just picking up on your comment about the FDA official who had for-cause removal protection yet still felt that he could not disobey an order coming from above—I mean, Kevin's suggestion that—or Kevin's comments made me think that Congress could try to immunize some of these rulemaking officials, some of these heads of agencies, by giving them for-cause protection so that they would feel more resistant to presidential directives. But one of the few cases I know where this has happened is the Social Security Administration. The administrator does have for-cause removal protection but I don't think SSA considers itself to be an independent agency with respect to the executive order and the other rule-making functions.

Mr. ROSENBERG. Indeed. The administrator of the Social Security Administration has the authority to send the budget directly to the Congress and has acquiesced in sending it to OMB before it's presented, so that—

Mr. STRAUSS. As constitutionally he must. I mean, the Constitution does give the President the right to require the opinion in writing of the heads of any of the executive branches and any matter within their duties. And I take it if he were not to respond to a direct presidential request for an opinion in writing, he would have committed insubordination at a constitutional level and could be removed for cause. That seems to me not the least bit controversial.

Mr. LUBBERS. But if you then took the next step and said, here's my opinion but I'm not going to follow your directive and issue this sort of rule that you want me to issue—

Mr. STRAUSS. Tossed.

Mr. LUBBERS.—then what?

Mr. STRAUSS. Tossed.

Mr. LUBBERS. Is that cause for removal?

Mr. STRAUSS. The President—no. I mean, at least on Strauss's construction, the duty is the duty of the head of the SSA as advised: I have your advice, Mr. President; I've given it respectful attention; this is my conclusion, exercising the responsibilities that have been placed in me. That doesn't sound like a cause for removal to me.

Mr. LUBBERS. But we've never had a case where a person protected by for-cause removal protection has actually fought being removed and gone to court.

Mr. ROSENBERG. Humphries did.

Mr. LUBBERS. Well—

[Laughter.]

Mr. STRAUSS. His widow, anyway. And well, and Weiner. There have been some but—

Mr. LUBBERS. They didn't have—(inaudible).

Mr. STRAUSS. Can I say one other one thing? This isn't quite on point but *Marbury versus Madison*, right? You all—those of you who are lawyers at least all remember that for its assertion of the right of judicial review. But in the course of the opinion, Chief Justice Marshall makes a distinction between those matters that are committed to the discretion of executive officers and those under which they have a duty to act. And he said, well, the courts can never be involved in matters as to which the executive officials have discretion. In that context, they are merely the mouthpieces of the President and the judicial function has no business.

I think you immediately notice, if you think about the extent of judicial review of exercises of agency discretion in ordinary administrative action, that there's a middle category that Marshall's neat dichotomy leaves out. Sure, for the Secretary of State, for the Secretary of Defense, for those matters as to which the Supreme Court justice once put it, "there is no law to apply," the courts have no business. And those officers do speak as the mouthpieces of the President and are subject to his direction, I would say in respect of their exercise of that kind of discretion. But when there is law to apply, when Congress has created a framework that is to be observed and may be enforced through the courts, even though we may also call that discretion, we're in a different state of affairs.

Mr. ROSENBERG. Cynthia? One last comment and we'll—this debate is going to go on all day. (Chuckles.)

Ms. FARINA. I guess I was just going to respond a little more globally to your question about congressional acquiescence and just sort of point out that we do tend to, I think, lose a sense of history about those large cycles. Certainly after the Nixon presidency, political scientists were bemoaning the fact that the presidency vis-à-vis Congress had taken a hit that it would never recover from, and it is hard—it is simply impossible to predict. Even with what seemed to be entrenched structural advantages that Kevin points to, that are very powerful, it is hard to predict when the next major institutional shift might come.

But what I try to use the turtles-all-the-way-down image with my students in separation of powers to point out is not—I don't think of it as an optimistic or a pessimistic view but rather as a descriptive matter, that there are a much larger array of moves that all three of the main constitutional actors are constantly engaging in on a large and a small level that I think particularly law students in law school tend to think about. They tend to think about a very static and small number of big moves. And those remain for Congress even in a world where Congress may not be making big moves a lot with the President.

And I think, for example, about appropriations in particular, and perhaps the example of rulemaking, the way Congress has stepped in and, using appropriations in some very targeted ways, closed down or made it more difficult for funding to flow to that project as a way of expressing a view in a struggle with the executive. I may not think that's a good—(chuckle)—a good move it's made, but it has very clearly used a power that it can use quite effectively, in some very targeted ways, and it's not obvious to me that that couldn't have been used, for example, in this particular instance. And that, compared to the President, is actually a move that Congress can make pretty easily that the President oftentimes has a very difficult time countering in the appropriations area. And that's just one of those moves that a lot of times at least law students don't think about at all.

Mr. ROSENBERG. Keep telling them.

Ms. FARINA. I do.

Mr. ROSENBERG. We will be closing our first panel of discussion now. We will have 10-minute break. Let me advise those of you who are not familiar with this building that there are restroom facilities out to the left and around on this floor. And we will return for our panel on judicial review of agency rulemaking in about 10 minutes.

Thank you.

MONDAY, SEPTEMBER 11, 2006

**Panel 2:
JUDICIAL REVIEW OF RULEMAKING**

Moderator:

Morton Rosenberg, Congressional Research Service

Panelists:

Jody Freeman, Harvard Law School

Peter L. Strauss, Columbia Law School

Richard J. Pierce, George Washington Law School

Jeffrey S. Lubbers, Washington College of Law
at American University

Joseph W. Doherty, Harvard Law School

MORTON ROSENBERG. Welcome back. Without in the least way denigrating in any way the other participants in this symposium, this is one of the most distinguished panels of administrative law experts that you may ever see or hear in any one place.

JODY FREEMAN. Stop!

[Laughter.]

Mr. ROSENBERG. I've got more. The level of legal erudition is off the scale.

[Laughter.]

Mr. ROSENBERG. Each one, in their way, has participated in the debate over the last decade or more over the proper role of the courts in reviewing agency rules. The ossification literature has, for the most part, pinned the blame on the courts for stultifying the rulemaking process. Part of the criticism has been based on the anecdotal assumption that some 50 percent of challenges to agency rules have been successful in appellate courts, leading to the criticism that the unelected judiciary is substituting its own policy judgments for those of the expert agencies, which has in turn caused agencies, it is said, to be wary and slow in issuing rules, or has led them to use non-rule rules or the adjudicatory process to issue substantive directions to the public.

It is to the substantiality of that anecdotal presumption that Professor Freeman and her colleague, Joe Doherty, will address. She kindly took on the task of reviewing the decisions of over 3,000 courts of appeals cases in every circuit over a 10-year period to determine if that anecdotal presumption is true, and today she presents us with her preliminary findings.

Jody Freeman is a professor of law at Harvard Law School, teaching administrative law and environmental law and natural resources law, and she is the director of the school's environmental law program. Her scholarship focuses on the public/private collaboration governance, regulatory innovation, negotiated approaches to regulation and privatization. She is co-author of a leading casebook in environmental law, now in its seventh edition, and co-editor of two forthcoming books on "Moving to Markets," and "Environmental Regulations and Outsourcing in the United States." Prior to joining the Harvard Law School faculty, Professor Freeman taught for 10 years at UCLA where, in 2004, she received the law school's

Rutter Award for excellence in teaching, and in 2001 was voted the Professor of the Year. She continues to be a fellow in the Evan Frankel Environmental Law and Policy Program at UCLA, which she helped found. She serves as vice chair of the ABA Administrative Law Section subcommittees on both Dispute Resolution and Environmental Law and Natural Resources, and in 2006 she chaired the Executive Committee on Administrative Law for the Association of American Law Schools.

Her colleague, Joe Doherty, is the director of the Empirical Research Group at the UCLA School of Law. He has written on a broad range of fields, including campaign finance, bankruptcy, elections, and public opinion. Jody?

Ms. FREEMAN. I just want to give a plug now—I just joined Jack Beermann’s administrative law casebook, and here’s—you know, Peter is up here, so you have two competing casebooks—and Cynthia’s here. You’ve got a lot of administrative law casebook authors in the room, so beware; we might try to sell you things on the way out.

When Curtis Copeland calls you and says, “I have a database,” try not to take the phone call.

[Laughter.]

Ms. FREEMAN. He said, I’ve got over 10,000 cases in the database and we’re wondering, do you want to maybe look at them? And my terrible mistake was to say, “don’t give it to anybody else.” And then I ran around and found Joe Doherty, who is the empirical analyst supreme and who runs the Empirical Research Group at UCLA. And this was just before I left to go to Harvard, and so we carried the project forward and we maintained our teamwork, and we’ve studied this collection of appellate cases from all the circuits over a 10-year period in order to figure out what was going on with judicial review of rulemaking.

So we want to give you the highlights, but you should know that the data we’ll present today—these data are literally hot off the presses. We have just completed—we’re not even through the entire set of cases but we’re through almost all the cases and we reserve the right to correct and amend. So this really is a draft and this is a real opportunity for us to get some feedback and questions if things don’t make sense to you, if the numbers look funny to you, and have a dialogue about what we found.

The purpose of the study is to investigate what happens to rules upon review, to determine the rate at which they are invalidated or upheld, or invalidated in part and upheld in part, to figure out the reasons for which the rules are invalidated or upheld and to see if there are trends in the data over this 10-year period about whether—about the nature of the litigants, whether that affects the rate of reversal or affirmance; whether there is something about the composition of the judicial panels that affects outcomes. We’re looking for all of these trends, and we’ve made the most progress figuring out rates of reversal and we’ve just started to do the step on figuring out the makeup of the panel, whether a Republican or Democratic appointment affects the outcome. So there are some things we know the answers to today and some things we don’t.

There is just a brief introduction I want to give you on how we came to settle on this particular set of cases so that you understand a little bit about the methodology and then Joe will take us through the highlights from the tables and then we'll open for discussion.

We started with a database of well over 10,000 cases that we got from the Administrative Office of the Courts with the help of Curtis and with the help of Mort, and it covers, as I say, this 10-year period from 1995 to 2004—and from that database of over 10,000 cases, we wound up with a smaller subset of 3,075, which was culled using a set of rules that the AOC used. So they generated the 3,075 cases for us because they decided to exclude a BIA cases—Board of Immigration appeals—and consolidated appeals, and then tried to further reduce them to cases that were decided on the merits and in which there was a published opinion. So we have this smaller subset.

From those 3,075 cases we then had to determine—and again, all of the circuits, 10-year period. We are not aware of—we think this database is unique. We then had to determine how many of these cases involved challenges to rules. So there was a threshold decision that we had to cull out all of the non-regulation cases, and then after that we wound up with a subset of—305?

JOE DOHERTY. So far.

Ms. FREEMAN. So far; we're not done. So we're at a point of determining the cases that are rules are at a rate of about 14 percent right now—14 percent of all the cases. And then we take those cases and we've trained a research team—this took a lot of time. It took a coding instrument to code each of these rulemaking cases to determine, again, outcomes, reasons for the outcomes, makeup of judicial panels, type of litigant, and every other piece of information we could think of to put into the coding instrument. No doubt we have missed a few. I'm sure you'll suggest some. We could go back and modify it and do it again.

I won't say more about the methodology, but just so you know, it is a census, not a sampling that we have here. We've gone through all the cases. Joe is going to talk about the results, as I say, but I just want to give you a couple of highlights.

The take-home message right at this moment is that over half of the rules are upheld completely—upheld outright—and we come up with a figure of 76 percent that are upheld in whole or in part. We're having a little internal debate about whether it's 72 or 76 percent at the moment, and that may continue, but it's around that figure.

The other kind of headline over this is, in part relying on somebody else's data—Steve Crowley of the University of Michigan is publishing a book coming out next year, Princeton University Press, in which he reports data in which he counts the number of rules on average per year generated by all agencies, and it turns out that to find out that simple information is incredibly labor-intensive, and as Cynthia noted this morning, the figures vary.

What Steve Crowley did is he went to two main sources: the RISC data, the Regulatory Information Service Center, which is in the GSA, and took their count, which was based on the Federal Register, and he also went to the GAO and took their count, which

is based on the Congressional Review Act's requirement that GAO count. He had two separate counts of how many rules are generated. You can imagine how complicated this is because, you know, do you count the rules that are really substantive or all the housekeeping rules, and he winnowed out—in both of these sources he winnowed down to the—tried to get an average, or at least a range, or how many rules per year that are substantive, that are meaty, coming out of all of the Federal agencies. And he comes up with a range of about 1,000 to 1,500, both coming from the GSA and coming from the GAO.

So we took Crowley's figure and we used it as a baseline, and using it, the rate of challenge of rules is about 3.4 percent—about 42 a year—and the rate of invalidation, in whole or in part, is about 21 percent.

Mr. DOHERTY. No.

Ms. FREEMAN. Wait—no?

Mr. DOHERTY. Overall, 0.7 percent.

Ms. FREEMAN. Overall—oh, that was a very bad mistake. The rate of—less than 1 percent of the rules are invalidated annually—less than 1 percent of the rules, using the baseline that Crowley provided, which is a very conservative baseline. We're taking the lower number of annual rules—substantive, meaty rules—less than 1 percent invalidated annually, which gives you a picture not of, you know—well, it's hard to get immediately to this conclusion, but if 0.7 percent of promulgated rules are invalidated every year, it doesn't quite feed the image of a sclerotic, ossified process in which agencies can't get anything done. It doesn't speak to how long it takes and the difficulties of promulgating rules, but it doesn't give the impression that rules aren't successfully being promulgated in the end.

And the last thing I want to mention, just by way of context, is of course ours is just one of a series—a number of studies that have been done over the years, now building into a body of empirical work in administrative law. And among those studies are very different kinds of inquiries, none that is quite like ours but some that are similar and that have relevant results, and once we conclude with the tables and the figures, I'll talk a little bit about those other studies, but to give you a little—to foreshadow a little bit, there is a very well known study by Peter Schuck and Don Elliott which was a study across all circuits, and it was a sampling technique they used over about a 20-year period to look at the rate of affirmance and reversal, and they came up with a rate of affirmance increasing over time from the late '60s to the late '80s where agencies were getting affirmed ranging from 55 percent and over 20 years rising to about 76 percent.

The difference between their study and ours is they looked at both adjudications and rulemakings and it turns out the rate of affirmance for adjudication is higher than for rulemaking, so you can't really do a comparison between our study and theirs without taking out the adjudications from theirs because that pumps up the rate of affirmance.

And they also concluded that the D.C. circuit is less likely to affirm than other circuits, and they also concluded that the rate of

affirmance is lower for health and environmental agencies in general.

So at the end of this we'll try to say something about how our work relates to that earlier study and to a few others—those done by Ricky Revesz about judicial ideology and the impact—different makeup that panels have on the outcomes of rulemakings; a study by Kerr (sp) on the same thing, and then a very controversial study by Jonathan Adler that focused specifically on EPA rulemakings during the Clinton administration and that concluded that—I'm paraphrasing—EPA is wildly out of control and pays no attention to the law. I think that study is over—I think the results of the study are misleading and I think there is a better, more accurate study to tell about the rates of reversal and how EPA, among other agencies, is performing.

So I give you now Joe Doherty and the tables.

Mr. DOHERTY. Thank you, Jody. I'm very happy to be representing the country west of the Cumberland Gap today.

Jody has already gone through the case selection. I'll tell you a little bit about the sampling and measurement. This is a sample of so far because we've had the sample from the 3,075. We've already collected data on about 2,300 cases. We've done a little bit of inter-rater reliability testing. We've had a lot of sessions with the RAs after they've coded the cases. So we're reasonably high on the reliability of the coding, but of course we'll always find errors.

Ms. FREEMAN. But it will be a complete census.

Mr. DOHERTY. It will—in the end, we will have all 3,075 done. Of the 2,300 we've done so far, 14 percent are rulemaking, and that works out to the 305 that we have in our dataset today.

The data collection included, obviously, the threshold, the procedural history: which statutes were at issue. And there is—I think I counted; we had about 200 different statutes in these 305 cases in one form or another. The judges and the basis for challenge, the outcome, and the remedy, these are things we coded for. There are about 60 or 70 different items in the database that we're coding for, and they're exclusive of each other. We're coding for things like the number of Fortune 500 companies that are plaintiffs, for example.

So here is a distribution of cases that we have. The EPA and the FCC dominate everything. Out of the 31 total agencies that were involved in these 305 cases, two-thirds of them are just those two agencies. The rest, as you can see, are distributed very—I don't want to say meekly, that's not the right term, but they're very poorly represented if you were to think that they would be randomly distributed. So what we did for the rest of the analysis is throw all of the other ones into a single category because the EPA and the FCC are the ones that really stand out.

Now, you have all the tables and so I'm going to walk you through very briefly and point out some of the things that Jody talked about, some of the things that I think can stand retelling. The bottom line here is the rate at which the rules are upheld outright—56 percent overall. It varies some by agency. The other agencies are upheld at a rate of 67 percent, the EPA at 55 percent, and the FCC at 45 percent. You'll also notice that the FCC is the one with the most complicated outcomes. They have the ones with the most sort of combination, the invalidated in part, upheld in

part, and remanded. We think that this is due to far more complicated rules that come through FCC. Jody is working with somebody on that. I'm a data guy, so you bring me the data, I'll give you an answer, but—

Ms. FREEMAN. By the way, I'm trolling for FCC experts because the FCC remains—I'm an administrative law professor who still cannot figure out half the time what the FCC is doing, so if there's experts on FCC rulemaking via order, come talk to me.

Mr. DOHERTY. And then the second big takeaway here is the invalidated rate. Invalidated outright is quite low.

Of the different bases on which the rules were challenged, it seems the catchall one is arbitrary and capricious. Sixty-four percent of the rules were challenged based on that one item. The FCC, half of those were on constitutional grounds, which, as we'll see in the outcome, that's where it dominated there as well. And then the EPA, the one that it is most challenged on, is under the Administrative Procedure Act. But overall, they're all quite high in the arbitrary and capricious category.

The next table, three, this is obviously because these are the—following the basis for the challenge, the outcome parallels, so this table parallels the last one. It's not clear here but if you've got a sort of a little—if you've got a math head, you can see that about 40 percent of the constitutional challenges are upheld, about 30 percent of the arbitrary and capricious and about 30 percent of the Administrative Procedure Act challenges are upheld. That's the bottom line. Down here where 14 percent of the challenges are upheld on constitutional grounds is about 40 percent of all of the challenges on those grounds.

The Chevron Step 1 and Step 2 analysis. Basically what this says is that if you reach a Chevron Step 2 analysis, the rule is going to be upheld, and the Chevron Step 1 analysis is where they get struck down. So if you reach Step 2, the agency will survive. Is that right, Jody? [Note: "Chevron Step 1" refers to the court determining whether Congress has directly spoken on the question at issue. If Congress has not done so, "Chevron Step 2" refers to the court determining whether the agency's interpretation of the statutory language is permissible.]

Ms. FREEMAN. Yes, and that compares with everything we say in class, so that's good.

[Laughter.]

Mr. DOHERTY. That's right. We wouldn't want the data to prove anyone wrong, because then the data must be wrong.

Table 5—I think this is probably the last page. I'll get to the graph in a second. This is kind of a complicated story. This is what—the kind of table you put together when you're saying, I need one more table for the presentation. These are just the cases that were invalidated or remanded or something other than upheld outright. And by the outcome, which is on the left-hand side, and then going to the right, which percent of these were overturned based upon that particular reason. So 22 percent of those that were invalidated were invalidated because they were unconstitutional; 30 percent were outside the allowed exceptions of the Administrative Procedure Act. This is just the distribution of why they were invalidated in the way that they were.

There is not a high number of cases in any of these, and when we finish the data collection, I don't expect we're going to find a lot more, so if you have any advice on how we should collapse these to make the statistics more meaningful, or if you think that there is just no point in doing that, I'd be willing to hear that too.

And then finally—I've got to go back. There it is.

Ms. FREEMAN. I was very excited about this when I saw it, and then—

Mr. DOHERTY. Statistics.

These relationships are not statistically significant. It looks like they're going on one direction and the other and like there is trend, but there really isn't. I tried it two or three different ways and I can't find a way to make this statistically different from the null hypothesis. So we cannot reject the null hypothesis if there is no trend going on here.

Ms. FREEMAN. So I spent all this time saying, what the hell happened in 1997, or whatever it was, and trying to figure out presidential—it's every thing you could imagine until we found out it wasn't significant.

Mr. DOHERTY. Yeah, so pay no attention to the spikes behind the curtain.

[Laughter.]

Mr. DOHERTY. But that in itself is interesting because we found in an earlier analysis a difference in the rules—the percentage of rules that were challenged over time. Around 1995, 1996, there were more challenges than there were later on, but that appeared to not have much of a bearing on the overall rate of being upheld.

Ms. FREEMAN. So at this point we are very reluctant to make much of this. We don't want to come in with an analysis of what it means and how it affects ongoing debates about whether agencies perform well or not. I don't think you can draw those kinds of inferences safely and carefully from the data, but what you can do is start to think about how this coheres with other studies to see if you've got studies that seem to reinforce each other and that tell a story about at least a range of rule survival and rule invalidation, and then from there try to piece together a story about what reasons seem to be the most important reasons why rules fail, and perhaps then go step by step to sort out where agencies may be weaker or stronger, how different agencies compare to each other, and then again, the information on the judicial panels will be very interesting.

So we're quite shy of saying anything too dramatic, which is always a little disappointing, but I do want to connect this to a few other studies and then make one point about what continues to be a relative dearth of empirical work on the administrative state. Notwithstanding that we are seeing a buildup of work and studies, we do lack a coherent and comprehensive empirical strategy, and I give tremendous credit to Curtis Copeland and Mort Rosenberg and their colleagues at CRS for sponsoring, at the behest of the Administrative Law Subcommittee of the Judiciary Committee of the House, this effort to do more empirical work, and a great deal of work in a very short time had begun as a result of their sponsorship and the phone calls that said "I have a database."

But I think we should be very clear that this is not the way you study administrative process if you want to do it responsibly for the long term. This is no slight against them—I think this is a very laudable effort—but we need a body, an agency, an institution, something that is capable of supporting, sponsoring, monitoring and then analyzing a lot of data from both the rulemaking side, the adjudication side, the informal invisible policy, decision making side, and we don't have it.

So what you're hearing from us is interesting, but even when you piece it together with the other work going on, we do not know much. As I said at one conference, when we stand up in front of an administrative law class, we actually don't know what we're talking about. We actually don't know much about the organism, the administrative state, that we're claiming to know about. And it's alarming when you consider that the output of administrative decisions dwarfs the Federal courts and dwarfs the output of Congress in terms of legislation. And we know the least about it. So I just gave you my punch line.

Let me just say a few words about these other studies. The study I referred to earlier, Peter Schuck and Don Elliot, studying all circuits—agency decisions across all circuits for about a 20-year period, including adjudications and rulemakings, comes up, as I said before, with a rate of affirmance of agency decisions going from about 55 percent up to 76 percent over a 20-year period. And as I said, the D.C. Circuit is less likely to affirm than other circuits, and health and safety—health, environment, and safety rules and decisions—the rate of affirmance for those a little bit lower.

Our study, generally speaking, is consistent with this except if you separate out rules alone, the rate of upholding rules—not rules and adjudications together—their rate of affirmance comes out somewhere around 43 percent. And their study stops in 1988. So we're actually showing a higher rate of validation for rules, a higher rate of affirmance than they are. But the tricky bit with this is it's never clear how particular researchers define invalidation, even when they say in whole or in part, what counts for an outright win may be slightly different than somebody else and so you really have to get into the methodology and figure out, well, what counted for them when they said affirmed. When we say "invalidated" or when we say "upheld," what counts for us? We're trying to be very conservative and if there is any doubt where some parts of the rules are upheld and some parts are not, we immediately put it in the mixed category and we only declare an outright win when it's an outright, total, complete validation and there is nothing left; there's nothing invalidated or remanded.

The Ricky Revesz study and the Kerr study, these are studies of judicial ideologies about which it's hard to draw conclusions about the rate of rule survival because they're not focused on the rate of rule survival; they're focused on whether it makes a difference that Republican- or Democrat-appointed judges sit on the panel, and there there is a consistent trend. We probably know the most about this—between the Revesz study and the Kerr study and Cass Sunstein's recent work, we probably feel pretty confident now to say ideology affects outcome, and that work has great attraction for administrative law scholars, of course, because it's really sexy to

get up and give a talk about how judicial ideology affects outcomes. But it doesn't—we can't draw that much from it when we're trying to figure out what's going on with rule survival and the reasons why rules fail or don't fail.

But you can pull out of the Ricky Revesz study, which was the study only of the D.C. Circuit—so, unlike ours, not all the circuits, only the D.C. Circuit—and from 1970 to 1996, and only the health and safety agencies—so, this, again, makes it hard to compare. Sometimes it's about apples and oranges in these studies. We pull out of his study a rate of reversal of rules that ranges from 27 percent all the way to 50 percent. So that really gives you quite a broad range, and we come down on the much lower end of the rate of reversal compared to that study.

And then let me just finally go back to the Jonathan Adler study that I mentioned, which was focused exclusively on the EPA. Adler's study looked at all the EPA regulations but reviewed only those in the D.C. Circuit—so, again, different from ours; we looked at all the circuits—and he covered an 8-year period, the Clinton administration essentially, from 1993 to 2000. He looked at 69 cases. He found that EPA rules were struck down—again, not defining, not clear to me yet what “struck down” means or what “mixed results” mean in his study—but he concludes that there is an invalidation rate for rules of about 54 percent, and that EPA prevailed, he says—again, not sure what “prevailed” means; is an outright win, the whole rule upheld or is it mixed?—EPA prevailed in only 33 percent of the cases.

Now, if that 33 percent figure is meant to be when EPA wins in whole or in part on its rules, quite different from ours, right, because we have a statistic that says you win outright or in whole or in part with your rule somewhere around 76 percent, and our outright win is 54 percent.

And he claimed—Adler claimed, based on his data concerning these 69 cases, that “EPA”—this is a quote—“has little regard for the limits or obligations of its statutory authority and little regard for the need to explain the basis for its decisions,” which I think is an overstatement based on the data. Adler's—I'm making a lot of this really because I think we have to be very careful in our empirical work, and I want to use this as an example of how I took a lesson from reading this study. Adler makes his conclusion that the EPA during the Clinton years is out of control based on a comparison with the Schuck and Elliott data I mentioned to you earlier. He looked at their 20-year study and said, well, the rate of affirmance there, all agencies, they were getting upheld at a rate up to between 55 and 76 percent in their study, so this rate of affirmance for EPA is dramatically low. In other words, EPA is getting struck down all the time compared to what we know from the Schuck and Elliott data. But the Schuck and Elliott data included adjudications, not just rules, and as the Schuck and Elliott study itself made clear, adjudications are affirmed more often at a higher rate than rules.

So if you include—I mean, if you include adjudications in their data, you pump up the rate at which agency decisions survive, and it looks then, in comparison, like EPA's rate of survival for rules is much, much lower and there is something wrong with that agen-

cy. But that's an apple-and-orange comparison, and so for that reason and other reasons, including that, even granting the figure to Adler that even if he were comparing apples and apples, there are other explanations for being struck down during the Clinton years, including ideological shift in the bench over this period of time, a difference between who is in on the bench of the Federal circuit courts during the Schuck and Elliott period of late '60s to late '80s compared to who is on the bench when Adler looks at his 8-year period. And we actually took a look at this and it turns out, of course there was a shift to Republican-appointed judges, a general trend in that direction. So if you believe the other studies on judicial ideology, that's a possible explanation of why EPA gets struck down more often, even granting him his number.

So all I'm saying here—Jonathan Adler is a colleague in environmental law and a friend, and I admire him, but all of us need to take great care with our empirical studies to make sure that we are comparing appropriate databases and drawing fair conclusions from them.

This leaves me with really just one point, which is when all is said and done, we're still standing here with one figure: 54 percent of an outright win on the regs, on the rules—challenged rules, which leaves you saying, wow, that's nearly half of some kind of loss, and in the end you could say, this is very bad. Mort opened up with, people get very alarmed—50 percent, 50 percent. And I guess my reaction is not the Adler reaction and it's not the reaction of alarm at a 50 percent loss rate because I think—there is a theoretical reason why you could say this shouldn't be alarming, and it's located in what many of you know as the Priest-Klein theory which says that one should anticipate a 50 percent rate of winning if you're actually litigating these cases. The easy cases settle and the hard cases that get litigated should fall out about evenly between the litigants, so you should expect around a 50 percent win rate and you shouldn't be surprised by that.

There has been a lot of criticism in academic literature of this theory because it originated in—because it originated in civil litigation, it wasn't meant to be applied, necessarily to administrative appeals, where there are repeat players and multiple parties, and where it's real cheap to take the last step to go to court after you've developed a case through the agency. So, the costs and the incentives aren't quite the same as they are in civil litigation. So you could say, given that we're in this repeat player area, we shouldn't expect the same 50 percent fallout rate that you see from Priest-Klein, so you can dispute that theory. But it still may have some purpose, we still should think carefully about whether, given the complexity of the rules, about political salience of many of these rules, the costs associated, the multiple parties, and the repeat players, whether we should really be surprised that the most challenging, difficult rules turn out to win or lose around a 50 percent rate. So I think we need more conversation to figure out what those numbers mean before we decide that agencies are not paying attention to the law and not giving any reasons for their decisions, which I think is an alarmist and over-reaction.

And finally, just leaving you with the larger figure, we have this 54 percent number for outright win, but we do have this much big-

ger number for winning in whole or part. So, you're heading up into the 70 percent rate. And interestingly, that is for winning—for mostly winning. And you have this very, very low invalidation rate. So, I think it—the most stunning result to me was putting together the Steve Crowley numbers for average annual substantive rules. With our figure in the end for how many rules get invalidated. And winding up with less than 1 percent. And that to me communicates something, and it also is reinforced by some data Cary Coglianese came up with in his article in the *Duke Law Journal*, where he was mostly talking about regulatory negotiation, about which some of you know a lot. He was talking about reg-neg, but on the way, in his article, he happened to try to correct some myths about empirical work. And one of the pieces of data he came up with was that only about a half a percent of the time do agencies really get stomped by courts. And more around that too, in our study of rules. So that, I think, is a very usefully little kernel of information.

We're going to keep parsing the data, you may catch a lot of things for us, which would be very helpful, so let's just open it up to discussion.

Mr. ROSENBERG. Thank you very much, Jody and Joe.

We're going to proceed as follows. Our next three panelists have their choice of discussing this data or going on to other emerging and important issues regarding judicial review. We thank Jody and Joe for what is obviously a beginning of a conversation, beginning of work, and this is landmark stuff. And that when they ultimately come to their final data, I think it's going to be a major piece of research that is going to be discussed for a long, long time.

Our next speaker is Jeffrey Lubbers. I'm going to cut down on the biographies because we need time. Let me just say about Jeff that he's a fellow in law and government at American University's Washington College of Law. He teaches courses in administrative law, environmental law, Federal legal institutions, and ADR. In his past, he has been the research director of the Administrative Conference of the United States, which is the organization that some hope will be revived so that they will be the kind of organization that does empirical work on administrative law, process, and procedure issues. Personally, Jeff and his output of, you know, on administrative law has been most helpful to TJ and me, as we try to inform the Congress about what administrative law practice and procedure is all about. And I bugged him, over the last couple of years, to get that book out. Because you can hold it in one hand and it now has an index and it is an easy to piece to find the most salient, the most—you know, and some of the more esoteric answers to questions that we get from the Congress. Jeff?

JEFFREY LUBBERS. Thanks very much, Mort. I'm very pleased to be on this distinguished panel. Any event that has even a subliminal text of recreating the Administrative Conference is something I want to be part of.

[Laughter.]

Mr. LUBBERS. And also, thank you for mentioning the book. I figured this was as close as I could come to a book tour for this book—

[Laughter.]

Mr. LUBBERS. —which is the fourth edition of a Guide to Federal Agency Rulemaking, which was originally started at the Administrative Conference in 1983. I had a small role in the first edition. But now it's being published for the ABA and there's some order forms in the back.

Now one of the things I noticed in updating this—the third edition of this book, which was written in 1998, was that judicial review of rulemaking had become a lot more complicated. And this section of the book required a lot of revision. Partly due to the sort of burgeoning amount of case law on the Chevron-Meade line of cases, which Peter will discuss later. Partly also due to the sort of inconsistency with which the courts have applied the arbitrary and capricious test, which Dick Pierce I think was going to talk about a little bit later. But also due to the increasing importance of rightness and finality as hurdles to challengers to agency rule-making action, or inaction.

So what I want to talk about today are some issues concerning the availability of judicial review. Are the courthouse doors open wide enough, and are they more open to particular types of challengers than to others? Has the presumption of reviewability, which was articulated by the Supreme Court in the Overton Park and Abbott Laboratories cases, begun to wane? And at the end I'll have a few questions and queries for our empiricists over here.

So, let me begin by addressing standing to sue, which is usually what we think about when we think about the threshold barriers to challenging agency action. Participants in agency rulemaking proceedings are usually members of a class that either stands to benefit or lose by the final agency rule. So standing is not normally an obstacle to review. However, the Government does like to raise standing concerns in litigation, and there have been some challengers that have been denied standing, because they failed to show that they would be adversely affected or injured by the rule. For example, in 1992, in the second Lujan case, the Supreme Court denied standing to some animal watchers who wanted to challenge a rule by the Interior Department that exempted overseas, federally-funded projects from the endangered species review process. And in so doing, this case made apparent a potential problem with the way the standing doctrine was developing. A plurality of that court, in that case, led by Justice Scalia wrote that, "When the plaintiff is not himself the object of a Government action, or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish standing."

Now Professor Farina has characterized this passage as creating, "Potential causation hurdles that asymmetrically burden beneficiary standing." But I think, in this—I don't have any empirical data for this—but as the cases have played out in the lower courts, this seems not to have been such a severe problem because courts have allowed challengers to argue that, for standing purposes, the proper comparison for determining causation of injury by the agency is not between what the agency did and the status quo before the agency acted. Rather the proper comparison is between what the agency did and what the plaintiff's alleged the agency should have done under the statute. Moreover, the courts have recognized many different types of cognizable injury, including aesthetic inju-

ries, recreational injuries, and the Supreme Court itself subsequently held agency failures to provide legally required information, or the agency's failure to follow procedural or analytical requirements, did present a justiciable claim without having—without the challenger having to show particularized injuries.

So I think the standing problems have not been as severe as might have been predicted after Lujan, but as they become less problematic, I think rightness and finality issues have become more problematic for challengers. A few decades ago, neither rightness nor finality posed much of a problem for the challengers. Abbott Laboratories ruled in 1967 that in most instances rules could be challenged in a pre-enforcement context, as long as the challenger could show the promulgation of the rule had an immediate impact on him or her. And finality was not normally a problem either when it came to final regulations. But in a series of cases in the 1990's, the Supreme Court began to pump up the finality and rightness doctrines. The cases beginning with the first Lujan case in 1990, followed by *Bennett v. Spear* in 1997, *Ohio Forestry v. Sierra Club* in 1998, and *Norton v. Southern Utah Wilderness Alliance* in 2004, did not involve traditional notice and comment rulemaking, but they've led to many lower court decisions dismissing petitions for review of regulatory action or inaction.

So let me just describe these four cases really briefly. In the first Lujan case in 1990, the court declined to hear a challenge to a Department of Interior's removal of some protections for a large swath of western lands. The challenge wasn't really directed toward explicit regulations, but instead to some changing policies for reviewing classifications of public lands. The court found a lack of ripeness, and noted a failure to allege the concrete effects normally required for APA review. So that was 1990.

In 1998, in the Ohio Forestry case, the Supreme Court seemed to be elaborating on the rather permissive ripeness test in Abbott Laboratories. But it added some things and the test made it difficult to challenge the sort of—(audio break, tape change). Now this case concerned the ripeness for review, for immediate review, of a forest plan, adopted by the Forest Service, which authorized the cutting of timber in Ohio National Forest. And the plan indicated that 80 percent of the permitted logging would permit clear-cutting of the timber. So the Sierra Club challenged this plan, and they won in the Sixth Circuit, which ruled that the plan was arbitrary and capricious for not allowing—looking at alternatives. But the Supreme Court unanimously reversed, and Justice Breyer wrote the opinion, and found that delaying review would not cause either a legal or practical hardship to the Sierra Club because it could still challenge the individual logging projects. Now, that would obviously be more expensive, but the court said the Sierra Club did not really have to modify its behavior immediately like the drug company did in Abbott Laboratories, and increased litigating costs were not enough of a hardship. So since then, it's been very difficult to challenge these sorts of agency planning documents that are required under many of these natural resources statutes. And I think that has made the planning process much less meaningful. So that's rightness.

Now as to finality. A year earlier, in 1997, Justice Scalia wrote for the court in the *Bennett v. Spear* case. And this is kind of a reverse endangered species act case, because ranchers were challenging some actions of the Interior—of the Fish and Wildlife Service, that would have protected fish by requiring reservoir levels to be high enough to protect these fish. But the ruling also meant that the ranchers couldn't use the water for irrigation. So first there was a standing aspect of the case, and Justice Scalia, writing for the court said, "I think the ranchers have standing. They were injured." It was interesting because it kind of—before that we tended to think of endangered species act as protecting endangered species, but here the ranchers were saying, "There were aspects of the act that protected us too." So that was the standing part of that case. But the court also created a new doctrine of finality that has become sort of a leading test for finality of agency action for purposes of judicial review. So the court kind of came up with a test that said, first the action must be the consummation of the agency's decision-making process, it must not be of a merely tentative or interlocutory nature, okay? And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. Well, that's a lot like the ripeness test, or the second prong of the ripeness test. And now, this case has become cited quite often.

And the last case is this *Norton v. Southern Utah Wilderness Alliance* in 2004. And this had to do with agency inaction. In this case, the environmental group tried to get declaratory or injunctive relief from the Bureau of Land Management's failure to act to protect Utah public lands from environmental damages caused by off-road vehicles. And they pointed to some language in the statute which they said required action by the BLM. The petitioners said, "We can sue under the APA Provision 7061 that allows for us to bring suits to compel agency action unlawfully withheld or unreasonably delayed." The Tenth District said, "No. No right to sue." The Tenth Circuit reversed this, and the Supreme Court reversed the Tenth Circuit unanimously. And in doing so, the court said, "You can only bring an action under this provision challenging agency inaction where the plaintiff asserts that the agency failed to take a discrete agency action that it is required to take." So the discreteness prong of this test ruled out challenges to broad, programmatic attacks, similar to the first Lujan case. And the second prong, the court said that even if it's discrete agency inaction, it has to be the sort of inaction that's demanded by law. So the court said this was not clearly demanded by law, therefore can't sue.

So, what difference do these cases really make? And I knew that Jody was going to bring some statistics, so I asked some of my law students to do a quick empirical experiment. So I asked them to collect all the Federal court cases since they were decided of—that have cited Ohio Forestry concerning ripeness, all the cases citing *Bennett v. Spear* on finality grounds, and all the cases citing Southern Utah since 2004. And the findings showed a rather surprisingly, at least to me, high rate of court dismissals of challenges to Government action or inaction. For example, since 1997, there were 104 district court cases citing *Bennett v. Spear's* finality test and over half, 53 out of 104 found a lack of finality. The Court of Ap-

peals level, the ratio was even more negative, 36 out of 58 cases found no finality, that's 62 percent. With respect to the ripeness cases, Ohio Forestry case showed a similar result, except this time the district courts were more negative—eight ripe, 17 unripe. Court of Appeals it was 50–50—nine ripe, nine unripe. The impact of Southern Utah was even more dramatic. In the district courts, of the cases citing this Supreme Court case, only two out of 16 were heard. In the Courts of Appeals, two out of ten. So, only four out of 26 cases were heard. And not surprisingly, most of these brought by environmental groups challenging programmatic decisions made by Federal land management agencies.

Now I haven't really analyzed these cases individually, and I don't want to make too much of them. But it certainly seems to me that the Government has a very high success rate when it now raises ripeness or finality defenses to lawsuits challenging agency action or inaction. Now again, not all of these involve classic regulations. Many involve challenges to agencies' plans, interpretations, policies, classifications, and letters. But keep in mind that most of these agency actions do fall within the APA's definition of rule-making.

So now, I have a few questions for Jody. Does your sample include cases involving any agency issuance that fits within the broad APA definition of rule, such as the sort of guidance documents that were involved in the cases that I just mentioned? That's the first question. The second is, if your sample only includes those cases where the rulemaking challenge was decided on the merits, what about those petitions dismissed on standing ripeness or finality grounds? Three, can you discern any trend, has the rate of dismissal on threshold grounds increased? And my feeling is that it might be because agencies are now moving to these non-rule rule-making types of policy makings because of the rigors of rule-making, the ossification problem. And four, what about this asymmetry that Professor Farina warned about, can you tell whether litigants who benefit from regulation and wish to challenge the inadequacy of the agency's response to health, safety, or environmental problems have been faring worse than litigants who are the objects of the challenged regulations?

So I look forward to seeing more of your results and I hope that a revised ACUS is around to analyze the results as well. Thanks.

Mr. ROSENBERG. Thank you, Jeff.

Ms. FREEMAN. Can I just answer that? (Inaudible.)

Mr. ROSENBERG. Let me get to the other two. You'll be the first. Our next panelist to speak will be Richard Pierce, Junior. Richard is a professor of law at George Washington University Law School. Before joining that faculty, he taught at Columbia University, the University of Virginia, Southern Methodist University, Tulane University, and the University of Kansas. He was also dean of the University of Pittsburgh Law School. He practiced with Sutherland, Asbill & Brennan, in Washington, D.C. And he is the author or co-author of "Administrative Law and Process," "Regulated Industries," the fourth edition of "Administrative Law Treatise," and "Economic Regulation." He has written numerous articles on government regulation, regulatory economics, and the characteristics of markets of electricity and natural gas. Richard?

RICHARD PIERCE. Thank you. I want to focus primarily today on the arbitrary and capricious test, as it is presently implemented and interpreted by the courts. As Jody's study showed, roughly 50 percent, maybe a little under 50 percent of agency rules are invalidated—that are challenged are invalidated in whole or in part. And the most frequent single basis for invalidation is the judicial conclusion that the rule is arbitrary and capricious. Now, arbitrary and capricious can mean most anything. It is a wonderfully malleable expression, and it was until recent decades believed to refer to an extremely easy-to-pass test. It was almost impossible to prevail in a challenge to a Government action based on an allegation that is arbitrary and capricious.

That changed in 1983 when the Supreme Court issued the famous *State Farm* opinion in which it announced or endorsed what is often called the "hard look" doctrine, also sometimes referred to as the duty to engage in adequate decision-making, adequate reasoning. And the best short-hand summary I can provide of that test is that it calls upon the court to decide whether the agency has provided adequate reasons in support of whatever it is that the agency has done. And as Jody's numbers show, and lots of other studies show, that is the most frequent single basis on which agency rules are invalidated.

Let me pause there for just a second and suggest that you not over-interpret the relationship that Jody pointed out between Steve Crowley and her numbers; that of the total number of agency rules issued—it's a very large number, roughly a thousand—versus the fact that only 3 percent are challenged. What that means is that in 97 percent of cases, regulatees were not at all dissatisfied with the rule. Okay, if any regulatee is dissatisfied with the rule, it is the subject of a petition for review.

Okay, I was in practice for years; I filed scores of them. They are cheap, as Jody pointed out. If you don't like it, you're going to file a petition for review. For some of them, there may be dissatisfied beneficiaries. As Jeff just pointed out, beneficiaries have to pass a whole bunch of a threshold rules to get into court. Regulatees have no such hurdles. So the number to think about is the population of cases that are the subject of challenge. And agencies can identify that population very easily *ex ante*.

Well, the way that the duty to engage in reasoned decision-making, or the "hard look" doctrine, works is an agency is reversed by a court if a court detects any flaw or gap in its reasoning in support of the action that it takes. It is absolute child's play to find flaws and gaps in support of anyone's reasoning, in support of taking any action. I challenge any of you in this room to come up with any action that you want to take, and give me a statement or reasons that I cannot pick apart. It is a piece of cake.

So what we have got is a doctrine that is extraordinarily open-ended and malleable. So what effect does it have? Well, the first effect it has is it induces all of the commentators on any controversial proposed rule to submit massive comments, including lots and lots of studies. And we get rulemakings that run somewhere between 100,000 and 1 million pages with scores of inconsistent studies.

Then the agency's job, in order to comply with the duty to engage in reasoned decision-making, is to provide what the APA refers to

as a concise general statement of basis and purpose in support of the rule that it has issued. And any agency that provides a concise general statement of basis and purpose will be reversed summarily through application of the “hard look” doctrine.

The statement of basis and purpose in support of any controversial rule—any rule that is disliked by any regulatee must run in the hundreds and sometimes thousands of pages to have any chance of being upheld. So this leads us to one of the major effects of this judicially created doctrine of “hard look” or duty to engage in adequate reasoning. That is the ossification effect. What it does is tell every agency if you want to issue a rule that you expect to be at all controversial, then it will take you many, many years and millions of dollars of your scarce resources to do so. That discourages agencies from engaging in rulemaking. That has a bunch of effects.

One effect is that when Congress passes a statute, as it does every few years or so, in which it orders an agency like EPA to issue, say, 25 or 30 rules in some area within a 36-month period of time, that is utterly worthless. The agency has no chance whatsoever being able to comply with that. If it put all of its resources into just that process, it still could not issue anything like the number of rules that Congress tells it to issue within that period of time. On average EPA complies with those statutory requirements between 13 and 15 percent of the time. It can't do anything else because of the way that the court interprets the arbitrary and capricious standard and applies it.

The other effect is one that Jody referred to earlier when she alluded to Ricky Revesz's 1997 study, and there have been other similar studies, the 2004 study that Cass Sunstein put in *Virginia Law Review*, and the one that will be—that is forthcoming that Cass has in the next *University of Chicago Law Review*.

What those studies show is that this doctrine, in the hands of judges who have very strong political and ideological views—and that is all judges. You don't get to be a judge unless you are a loyal, a long-time member of one political party or the other. So in the hands of any judge with strongly held political or ideological views becomes a means through which the judge can, on the basis on whim and caprice, decide that the agency has not complied with the duty and hence that the agency action is arbitrary and capricious.

What Ricky's study—Ricky Revesz, the dean at NYU, showed was that looking at D.C. Circuit panels, Republican judges were four times as likely as Democratic judges to find fatal flaws or gaps in the reasoning of EPA when EPA rules are challenged by regulatees. Well, this shouldn't come as any great shock to any of us. We certainly have to know that judges are all people with strongly held political and ideological views, and all you need to do to explain this phenomenon, which I find quite discouraging, is to add to that the nature of this test, this judicial doctrine. You must reverse the agency if you think that the agency did not provide reasons adequate to support what they did.

Well, I don't know about you, but any time somebody does something I dislike, I find flaws in their reasoning in support of it. So even though this test is not supposed to provide a means through

which a judge can simply say “you’re a Democrat; I’m a Republican; you’re out of here,” that is the net effect that it has, and the converse, because any judge is going to be tempted, and is thoroughly tempted just to say I disagree with the conclusion, so there has got to be flaws and gaps in the reasoning in support of the conclusion.

So I think this is just an abominable judicial doctrine. It is entirely judge made. It has horrible effects, and I would urge you all to read a piece that I reread again this morning by some fellow named Paul Verkuil in the 1981 volume of *Tulane Law Review*, entitled, “Waiting for Vermont Yankee II,” in which he argues that the Supreme Court needs to eliminate that doctrine. The case in support of that action has simply grown over the years. Thank you.

[Applause.]

Mr. STRAUSS. You have introduced me already.

Mr. ROSENBERG. I know.

Mr. STRAUSS. (Off mike.)

Mr. ROSENBERG. I just wanted to say welcome and that Mr. Pierce is not ambiguous. [Laughter.]

Mr. STRAUSS. But as usual guilty of understatement, it wasn’t 1983 and State Farm; it was 1971 and *Citizens to Preserve Overton Park v. Volpe*—

[Laughter.]

Mr. STRAUSS. —which is how Paul could publish the piece that he published in 1981, before State Farm had been decided.

This was wonderfully intriguing paper. I had already put on my list the questions that Jeff has already asked you. But I do want to add a couple of more. One is really a question about your coders. I am struck at the ratio between constitutional challenges as to whether a rule is within an agency’s authority and statutory challenges. It’s about three to one. It strikes me as highly counterintuitive and improbable, and I think you need to go back and check that ratio very carefully.

Ms. FREEMAN. I think the—(off mike).

Mr. STRAUSS. No, the EPA is two to one. The other agencies are four to one, four-and-a-half to one, so it runs across the coding, and I’m dubious about it. And I’m dubious about the non-providence of Chevron, although it’s interesting; it’s a related question. I’m dubious about the non-prominence of Chevron given the excitement of that case to courts. It has the highest rate of citation of any recent decision of the United States Supreme Court and administrative law matters, and to academics like myself.

The other question, which I hope is in your coding, and which is implicit in a number of the comments that have been made before, is whether you have any way of giving the figures against the stakes. In the 1,000 to 1,500 rules a year—that is the Crowley count—I imagine are a number of rules locating buoys for the Coast Guard, or doing similar kinds of things. I would suppose that when we are dealing with—maybe it can be as simple as major rules as declared by OMB. When one is dealing with major rules, the attention courts will give and the incentives that parties have to bring a judicial review are both higher, and I would be interested, at least if it were possible, to see if there were any differences in the outcomes of those settings.

And I want to add that when one is dealing with a major review—with a major rule, that is a rule having roughly having a million dollars a year impact on the economy, I don't, myself, have any problem with the rulemaking having to take a long time and being subject to rather an exacting review. And this is the agencies doing Congress' work, and we ought to be relatively sure that it is doing it well, although people who heard me earlier this morning will not be surprised to hear either that I do have some problem with the notion that in that kind of context, the President who is not subject to the obligations of reasoning, record respect, and so forth that the agencies are subject to—can simply call up ahead of the agency and dictate to how he wants the rules to come out.

Okay, so it was said that I would talk about Chevron and Meade. And you guys are hungry for lunch, and we ought to give Jody a chance to respond to what you have heard from us. And you have already heard that Chevron and Meade are the two large players in this study, so I am not going to say very much. I will say this: That the volume and use of interpretive rules, statements of general policy and the like, what I have called in other contexts publications rules, is in roughly the same ratio to things that appear in the Federal Register, as things that appear in the Federal Register are to congressional statutes. So the issues of judicial review of those instruments, very often precluded by ripeness and finality considerations, but possibly improperly so, are high stakes matters.

Suppose they are reviewed. Chevron deference. Well, the Supreme Court has told us rather emphatically a couple of times in Meade and a subsequent case called Brand X—I know it is Brand X because that is easy to remember. The front end is something like “National Telecommunications.” Eight to one, with Justice Scalia in one of his typically vociferous dissents disagreeing. But know in this instance, if you have a publication rule, something that wasn't adopted by these public processes that are supposed to produce something like that expertise and not simply political judgment, the best the agency can hope for is a kind of respectful attention and not the obedience that Chevron commands.

But then last year, in a case called *Oregon v. Gonzales*, the gap narrowed considerably. That was a decision five to three rather than eight to one. And I think we could pretty confidently count the missing Justice Alito as joining the three. So it becomes five to four. That Chevron deference ought to have been paid to an opinion issued by Attorney General Ashcroft without a moment's public consultation with those possibly interested in the matter as to his interpretation of drug laws. I should confess, by the way, that my name was one of the names on an amicus brief in the case arguing for the result that five justices of the Supreme Court agreed with. But nonetheless, five to four, let's say.

And now let me just draw the connection to the first panel this morning. If the President issues signing statements in which he announces his interpretation of law, and if his agency officials are under the impression, correctly or incorrectly, that once the President has told them what he thinks the statute means, that is what the statute means. And if those presidential statements are entitled to Chevron deference, even though they have not been issued

as a result of public consultative procedures, then we are I think in a very sorry mess.

Mr. ROSENBERG. Thank you, Peter.

[Applause.]

Mr. ROSENBERG. We will next give Jody a chance to answer some of the questions, and I just have one further question that they raised with Professor Pierce. Why do we have to wait for the Supreme Court to change the reasoning standard? Have you have some suggestions for Congress to do it, which I presume, the constitution—we can change the standard of review, and what reasons can there possibly be for not changing it? Jody?

Ms. FREEMAN. Boy, am I not going to answer that question.

[Laughter.]

Ms. FREEMAN. Dick, enjoy.

[Laughter.]

Ms. FREEMAN. Just very quickly, I really appreciate the early feedback because we also think that there a few things we need to look very carefully at. And of course we are going to do a cross check and recode everything so everything gets coded twice. But, quickly, to respond to Jeff's question about whether the definition of rule in the APA, including things not just notice and comment rules, we were looking only at notice and comment rules to try to just get a handle on those first—can certainly go broaden to interpretable—

Mr. STRAUSS. But 30—you give a figure of cases that were rejected because they didn't use APA procedures, that they pretended to be interpretive or—

[Off mike.]

Ms. FREEMAN. No.

[Off mike] —non-merits determination.

Mr. STRAUSS. No, no, no.

Ms. FREEMAN. No, no. They made a mistake, but it wasn't because of a—Ah, I know what you're saying—they didn't follow procedure because they weren't in the exception, the interpretive rule exception.

Mr. STRAUSS. That is correct. So it looks as if—

Ms. FREEMAN. But we coded the interpretive rules, but they are not in the end. Okay, we are not going to do this in public—okay, we're checking.

[Applause.]

Ms. FREEMAN. Also, we only—we didn't go to the threshold cases. We only did certain cases. The AOC first called out only the merits cases for us in the first instance. So we would have to go back to the original 10,000 database to get the non-merits cases that you're interested—the threshold cases that you're interested in. So but—but again, it can be done. You just need an army of—I just want to make the point that, again, this is not cheap, right. The Harvard Law School dean who happens to be an administrative law scholar, Elena Kagan, who happened to be in Clinton's administration, "thought great project," and I think I'll kick some money at this great CRC project. But not every law school dean is going to do that. And it's very precarious to do this in this piecemeal way; that is just another plug for an ACUS. But we can certainly fix these things, and we could look at the threshold cases, which, as Jeff

points out, is a really interesting—poses a really interesting set of questions about trends.

So we can't tell anything about what he wants to know, which is the trend in what is happening with ripeness and finality and are the beneficiaries getting the door closed on them compared to the regulatees. The other thing about Peter's point about using Steve Crowley's number of how many rules per year and shrinking it even further to make sure you have got the major rules. There is sort of a handy way to do that. You can go with his estimation that there are several dozen rules a year that fall in the major category under the executive order. And so that would obviously pump up the rate of challenge. And we can just monkey with that very easily, and we will do all of that to be fair.

Mr. STRAUSS. Well, I think you need to look at the reversal rates in relationship to the stakes.

Ms. FREEMAN. Yes, absolutely. We were just trying to get a rough cut. But going from his 4,500 figure down to, you know, 1,200, which is what we did, we were trying to give a sense of being actually quite conservative but you can be still more conservative about the high-stakes cases, absolutely.

And another couple issues on this point about the ratio of challenges in this data, how many get challenged under constitutional—for constitutional reasons, how many for statutory reasons. I too was surprised to see that, so we are going to look carefully at that—and the non-prominence of Chevron—also striking to us.

So, again, I just want to be very cautious because literally these tables were run on Friday. So—

[Laughter.]

Ms. FREEMAN. —we have pretty good confidence in the basic numbers. They may shift a few percent this way or that. I don't think we are going to be wildly off, so don't misunderstand when I say we're going to check everything. We think we are safely in a range, and I just want to be clear on what the range is.

When we said 66 percent of the challenge rules come out with an outright upholding of that rule, even if that moves a little bit one way or the other, we feel pretty confident we're going to be close to that figure. It doesn't mean that the inverse is true; it doesn't mean that 44 percent got invalidated. I want to be really careful. This is not a study, a draft study that says half win and half lose. Do not make that mistake. We come up with a figure of 76-or-so percent upheld in whole or in part. That is only a 20—what did we come up with?

Mr. Doherty: Twenty-one percent

Ms. FREEMAN. Again, you can fudge it 21 to 25. You can move it around, but in the neighborhood of between 20 and 25 percent that are invalidated outright in whole or in part.

So it is not that half of the rules get struck down. I just don't want you to leave the room and think half of the rules get struck down. And we will have another iteration of the data obviously before it's published. We will probably have two or three more iterations, but you have a sneak peak at where it is going.

Mr. ROSENBERG. Thank you.

Mr. PIERCE. You want me to respond to that?

[Laughter.]

[Off mike.]

Mr. PIERCE. All right, here is my response.

UNKNOWN SPEAKER. He wants a bill. He wants a bill.

In italics.

Mr. PIERCE. Here my response is I am very reluctant to press the on button on a sausage machine because I'm not sure what in the world will come out the other end of the sausage machine.

Mr. STRAUSS. My suggestion is that Congress legislate that arbitrary and capricious be italicized.

[Laughter.]

[Off mike.] —on FCC rulemaking suggest—

UNKNOWN SPEAKER. Thank God. [Laughter.]

Q: Microsoft's—[off mike]—a little bit. But just a couple of things to think about when you're trying to figure out why the reversal rate and rehab rate might be higher—[off mike]. And I have compared it across agencies. But I know from personal experience, the FCC rulemakings tend—and especially—(inaudible)—last decade or so involve a lot of different issues that are run together in one rule-making.

Ms. FREEMAN. Yes.

Q: That conceivably can be handled separately, and if they were handled separately, you might end up with orders of opinions or orders of—that are less internally inconsistent than courts recently have been finding things. I mean, they just throw a lot of issues in one—(inaudible).

And another thing, they take a very long time to resolve these. You might want to look at that versus other—on the one hand, because of the complexity, as Peter said, that is not inherently a bad thing; like, fear, that can be a good thing. But in an area where a lot of these rules of course have to do with issues in which the technology is changing very quickly, which is not the case with a lot of other agencies, by the time they eventually finished the rule and get before a court, and if you look at some of these cases, you'll see that the courts are looking at what has happened in the marketplace due to technological changes since the agencies went through this process. And that may be another reason why you get a higher reversal rate.

If you look at the—one of the biggest rules' capacity four or 5 years had to do with the unbundling of telephone networks. That was before the D.C. circuit on three occasions, under USTA and with such telephones such as—in the opening, when you look at those decisions and the FCC was reversed or remanded three different times, a lot of it had to do with how intelligence perceived the marketplace having changed due to technological changes between the time FCC issues a rule and gives that report to the court.

Finally, just another point that I think is significant when you look at the commission versus say, APA, when you take that agency, the FCC as a multimember agency of course. When you have a multimember agency—and this has increasingly been so with the FCC in the last decade, I think the politics seem to get more—I'm sorry—there tends to be more political decisions that leads to more divergence, more compromises that openly seem to be on principle, but in an ethical sense, but in the sense of just inconsistent deci-

sions will be made. And I think that the multimember commissions versus the single-headed agency is something that contributes to the reversal as well. Those are some leads.

Ms. FREEMAN. That is great. Thank you.

Mr. ROSENBERG. Any other questions from the audience? Before I—

Mr. STRAUSS. Can I just ask Randy a question whether you don't think in the particular case of the FCC the reversal rate might also be a product of judicial awareness. How many hundreds of millions of dollars are being allocated amongst hands on the basis of essentially ephemeral considerations? That is to say this is a context in which the fear of money's influence and other kinds of inappropriate influence is unusually high for Federal administrative action.

Q: It's possible. I mean, you don't see that explicitly in the decisions.

Mr. STRAUSS. No, no, we don't.

Q: But it could be as well. It could be.

Mr. ROSENBERG. This has been an extraordinary morning, and this panel itself has fulfilled its expectations. As I said, I believe that this is not a definitive, culminating exercise that we're doing today; it's defining, it's setting out the parameters for future research. Before I close this session, let me advise you and the panelists this morning and this afternoon about eating. We have a wonderful cafeteria, but it is a cafeteria. We also have the Montpelier Room, which has wait service, a buffet lunch, a wonderful view of Capitol Hill, and pleasant surroundings to continue this discussion if you want. You can push tables together I imagine and go at each other while you're eating.

[Laughter.]

Mr. ROSENBERG. And we will return and I expect even greater things from this afternoon's panel, and I hope everybody stays and questions us this afternoon.

MONDAY, SEPTEMBER 11, 2006

Introduction:

Morton Rosenberg, Congressional Research Service

Panel 3:

CONGRESSIONAL REVIEW OF RULEMAKING

Moderator:

T.J. Halstead, Congressional Research Service

Panelists:

Paul R. Verkuil, Cornell Law School

Jack M. Beermann, Boston University Law School

Charles W. Johnson, House Parliamentarian Emeritus

T.J. HALSTEAD. Good afternoon. Our next panel continues our theme for the day, switching our focus to congressional review of agency rulemaking. This panel is particularly timely as it roughly coincides with the 10-year anniversary of the Congressional Review Act, which for the first time established a dynamic allowing Congress to utilize an expedited review procedure to review and disapprove of virtually all Federal rules. However, 10 years on, it seems evident that the promise of improved congressional review of rules by virtue of the CRA has not been realized as the review dynamic set up by the CRA has only been utilized once during that timeframe.

Our panelists will look to the underlying reasons for the unique application of the CRA to date as well as various other issues that relate to congressional review of rules generally. My colleague and good friend, Mort Rosenberg is going to lead off with an introduction to frame the issue of the Congressional Review Act specifically. And just a quick word about Mort; we've seen him bandying about today. I don't know if you've had a formal introduction yet, but Mort's been with CRS since 1972 and for much of that time has served as our senior specialist in American public law. When I first came to CRS, I was focusing primarily on issues of criminal law and procedure and essentially by virtue of Mort's great enthusiasm I was pulled into issues of congressional oversight, separation of powers, and administrative law, with Mort acting as a siren of sorts to pull me into those issues. And it's been my great privilege and honor to have worked with him over the years and I've learned an immense amount from him and will look forward to hearing his comments now.

MORTON ROSENBERG. Thank you, T.J. Those of you who were here this morning saw my almost futile attempts to put the focus on Congress' responsibility for having some control over the rule-making process. Now I have the direct opportunity and I'm going to take it.

My review of a decade of experience under the CRA indicates that we know enough now to conclude that it has not worked well to achieve its original objectives; that is, to set in place an effective mechanism to keep Congress informed about the rulemaking activities of Federal agencies and to allow for expeditious congressional

review and possible nullification of particular rules. This was to be accomplished by requiring that all rules—under the broadest definition of the term so that not only rules subject to APA's notice and comment requirements, but guidances, policy statements, personnel handbooks, and the like—would also have to be reported to Congress and be subject to legislative disapproval.

An unreported rule—the first sentence of the act says—cannot be enforced. Expedited consideration procedures were provided for the Senate, but, however, not for the House. A disapproved rule, if not vetoed by the President, deprives the agency of authority to promulgate rules in the same area unless Congress authorized it by law to do so. Certain actions taken under the act were not to be subject to judicial review.

The House and Senate sponsors of the legislation stated the fundamental concerns they were addressing by the act, and I quote—and it's an interesting quote: "As the number and complexity of Federal statutory programs has increased over the last 50 years, Congress has come to depend more and more upon the executive branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to Federal or regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing Federal agencies so much latitude in implementing and interpreting congressional enactments."

"In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws and the executive branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority without at the same time requiring Congress to become a super regulatory agency."

The numbers accumulated over the past 10 years are telling. Almost 43,000 rules were reported to Congress over that period, including 632 major rules, and only one, the Labor Department's ergonomic standard, was disapproved in March 2001. Thirty-seven disapproval resolutions directed at 28 rules had been introduced in that period and only three, including the ergonomics rule, passed the Senate.

Many analysts believe the negation of the ergonomics rule was the singular event not likely to soon be repeated. Furthermore, it appears that not nearly all the rules defined by the statute as covered are reported for review. That number may be double those submitted for review. Federal appellate courts in that period have negated all or parts of perhaps 60 rules, a number that is significant in some respects, but is comparatively small in relation the number of rules issued in that period. It may be an indication that the courts have not seen enough rules or are being too lenient or that the agencies have indeed been faithfully reflecting the intent of those laws.

It was anticipated that the affected utilization of the new reporting and review mechanism would draw the attention of rulemaking

agencies and that its presence will become important factor in the rule development process. Congress was very well aware at the time of enactment of the effectiveness of President Reagan's executive orders centralizing review of agency rulemaking in the Office of Management and Budget's Office of Information and Regulatory Affairs, OIRA. Even in the face of aggressive challenges of congressional Committees, the Clinton administration with a somewhat modified executive order was in an aggressive posture of intervention into and direction of rulemaking proceedings continued a program of central control of the Administration. The expectation was that Congress through the CRA would enhance its influence in agency decision-making.

The ineffectiveness of the CRA mechanism, however, soon became readily apparent to most observers. The lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that would complement the Senate's procedure and numerous interpretive uncertainties of key statutory provisions may have deterred its use. The Justice Department, for instance, has successfully taken the position before two district courts, that the seemingly broad preclusion of judicial review in the CRA prevents a court from denying the effectiveness of an unreported rule; that is, to stop the agency from enforcing a rule that's never been reported. Subsequently, a third district court rejected those rulings and adopted a contrary position, holding that such a reading of the judicial review provision would simply nullify the statute's purpose by allowing agencies to decide whether or not to report. It is still an unresolved issue, an important unresolved issue.

By 2001, one commentator opined that if the perception of a rule-making agency is that the possibility of congressional review is remote—and I quote now, “it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that issue when it was promulgated years down the road,” an attitude that is reinforced so long as the agency believes the President will support its rules. Compounding such a perception that Congress will not likely intervene in rulemaking, particularly after 2001, has been the emergence of what has been called by one scholar who was with us this morning as the “new presidentialism” that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of executive power, which under Article II can legitimately take place only under the control and direction of the President, and the further claim that the President is uniquely situated to bring to the expansive sprawl of programs the necessary qualities of coordination, technocratic efficiency, managerial rationality and democratic legitimacy because he, alone, is elected by the entire nation.

It is argued that one of the consequences of this presidentially-centered theory of governance is that it necessarily diminishes the role of the other important actors in our collaborative constitutional enterprise. Were it to maintain that the Congress is constitutionally and structurally unfit for running democratic responsiveness, public regard of this, managerial efficiency and technocratic

rationality, this scholar suggested his response is why bother talking with Congress about what's the best way to improve the practice of government.

In a widely cited and influential 2001 article, the current dean of the Harvard Law School reflects the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President unless the legislative delegation has specifically stated otherwise. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions of all agency officials. The author states that—and I quote here: “A Republican Congress proved feckless in rebuffing Clinton's novel use of directive power. Just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory review process.”

She explains—again I quote, “The reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interest of individual Members of Congress usually prevent them from acting collectively to preserve congressional power, or what is the same thing, to deny authority of other branches of government.” She goes on to effectively deride the ability of Congress to restrain a president intent on controlling the administration of the laws. And a final quote from that article: “Presidential control of the administration in no way precludes Congress from conducting independent oversight activity. With or without significant—a significant presidential role, Congress can hold the same hearings, engage in the same harassment and threaten the same sanctions in order to influence agency's administrative action.” Congress, of course, always faces disincentives and constraints in its oversight capacity as this article earlier noted.

Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain. And, of course, Congress' most potent tools of oversight require collective action and presidential agreement. Its capacity to control agency discretion is restricted, but viewed from the simplest perspective, presidential control and legislative control of the administration do not present an either/or choice. Presidential involvement, instead, superimposes an added level of political control on to a congressional oversight system that, taken on its own, and for reasons just given, has notable holes. In Kagan's observations and theories, you have almost a blueprint for the Presidential actions and posture toward Congress of the current Administration.

Proponents of the CRA concept argue that it reflects a congressional recognition of the need to enhance its own political accountability and thereby strengthen the perception of legitimacy and competence of the administrative rulemaking process. It also rests on understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future. The Supreme Court's most recent rejection in 2001 of an impending revival of the non-delegation doctrine adds impetus for Congress to consider—consider several facets and ambiguities of the current mechanism. Absent effective congressional

review, current instances of avoidance of notice and comment rule-making, lack of full reporting of covert rules under the CRA, and increasing presidential control over the rulemaking process will likely continue.

Over 30 years of experience in dealing with issues of congressional oversight has led me to the conclusion that oversight must be understood as not simply a constitutional prerogative, but as a constitutional duty and responsibility. A consistent, vigilant fulfillment of that duty preserves and vindicates that prerogative.

There have been a number of proposals for CRA reform introduced in the 109th Congress that address more effective utilization of the review mechanism and most importantly a screening mechanism and an expedited consideration procedure in the House of Representatives. Two such bills, HR 3148 introduced by Representative Ginny Brown-Waite, and HR 576, filed by Representative Robert Ney, both provide for the creation of a joint committee to screen rules and for expedited consideration procedures in both Houses. HR 3148 also suggests the modification of the CRA provision that withdraws authority from an agency to promulgate future rules in the area in which a disapproved resolution has been passed with the enactment by Congress of a new authorization. That provision has been seen as a key impediment to the review process.

Should Congress decide to act, other options would be available. Congress could establish a joint congressional Committee to screen and coordinate the review of submitted rules in a truly expedited review procedure in the House of Representatives, both to be accomplished under the constitutional rulemaking authority of each House. A concurrent resolution could establish a joint committee as proposed by HR 3148 and the House itself can impose upon itself the expedited consideration procedure for the CRA. I will leave it to my fellow panelists to comment on whether any of these notions presented are realistic or necessary, and to perhaps to address the question: Do we really want Congress mucking around with agency rules?

Thank you.

[Applause.]

Mr. HALSTEAD. Our next speaker is Jack Beermann, professor of law in the Harry Elwood Warren Scholar at Boston University School of Law, where he teaches administrative law, civil rights litigation, introduction to American Law, and local government law. Professor Beermann is a noted scholar in the area of civil rights litigation against state and local governments and their officials. He has co-authored four books on administrative law, including a widely used case book and the Emanuel Law Outline on the subject. Recent articles of Professor Beermann's include "Congressional Administration" published in *San Diego Law Review* and "The Constitutional Law of Presidential Transition" in the *North Carolina Law Review*. Prior to joining the Boston University faculty in 1994, Professor Beermann clerked on the U.S. Court of Appeals for the 7th Circuit and in 2004 and 2005 he taught at the Interdisciplinary Center in Israel and in 2002, he taught at China University of Political Science and Law in Beijing.

Professor Beermann?

JACK BEERMANN. Thank you very much, and I want to thank Mort for inviting me to take part in this. It's a very great opportunity for me to talk about a subject that I've been thinking about. Since a few years ago, I was asked by a committee in the Rhode Island legislature to help them with some problems they were having. Evidently, the voters of Rhode Island were about to decide that they were going to shift from a system of parliamentary government, parliamentary supremacy, to a system of separation of powers. And their legislators were trying to figure out how they were going to maintain their power now that the governor was no longer going to be a ministerial employee of the legislature, but rather was going to have independent authority on his own. And the legislators were no longer going to be able to sit in executive agencies or appoint the members to executive agencies. So it's a very fascinating little tidbit of American history, and there have been others. A good article by Carl Bogus from the Roger Williams Faculty is about that transition and what led to that. It appeared about a year ago in the *Administrative Law Review*. I recommend that for anyone interested in separation of powers in comparative government.

But I want to talk about—what I told Mort I would talk about was how certain elements that come from the state experience can help inform Congress in its quest to do a better job from its point of view of supervising the Federal agencies, and in reviewing rule-making in particular. This question that came up this morning in Cynthia Farina's topic about, you know, the President's power—sort of whether democracy is embodied more in the President than the Congress. There's reason to think that Congress, being a more widely representative body, maybe is the more appropriate entity to have control, but the President also has some claim in being a nationally elected official.

I tend to be a very big believer in Congress, in the appropriateness and ability of Congress to be an effective supervisor, and I published an article that T.J. mentioned in the introduction about Congress' role in administration, where I show how intimately and deeply involved Congress is in the administration of the laws in all sorts of supervisory ways. And I think in many ways they parallel, and I chose the title "Congressional Administration" on purpose because Elena Kagan's article was called "President Administration." I think that for all the ways that President Clinton and now President Bush are sort of so deeply involved, caused people to raise eyebrows. I think the same phenomenon would occur if you take a close look at how much Congress is actually involved. So I'm not so sure there's much of a deficit of congressional review, but I think that if Congress thinks so and they want to figure out what ways to strengthen or maybe regularize their review in a better way, I'm willing to help.

So what I'm going to do is I'm going to actually have five topics I want to try to address, and they really build on this state model. The first thing I'm going to do is describe the state model, and the second thing I'm going to do is I'm going to draw some contrasts with the congressional review model that exist already in the CRA. Hopefully it won't depend too much on a previous knowledge of how the CRA works, but I think Mort has given at least enough

background that people should have to follow this. The third thing I'm going to do is talk about what Congress can do on its own in terms of unilaterally supervising the agencies more effectively, drawing on the state model. The fourth thing I'll do is talk about what Congress can legally require agencies to do to help them, which can be sometimes controversial for reasons we heard in T.J.'s presentation on the absent person's viewpoint about the President's authority to supervise. And the fifth thing I'm going to do is talk about the costs and benefits of Congress using some model like the state model, and considerations that might push in a slightly different direction. And this may be—you'll refer this as something that I tend to like to do, which is the cold water section of the presentation where I throw a little cold water on maybe some ideas that people may be a little bit hot about.

So first, let me just talk about what this model is at the states and I call it the JCAR model because in some states it's called the joint committee on Administrative Rules or Administrative Regulation. So that's how I refer to it, and Mort referred to it a little bit, but in many states there's a joint committee usually of somewhere around five or six members of each of the Houses of the State Assembly that sits, that is established only to review rules really, and so it's—they do a rule review and just much like the CRA, rules have to be reported to this committee and the rule cannot go into effect until a certain amount of time after this report has been made to the committee.

Now, the one thing that really marks the committee is that it has a very strong professional staff, but the legislators are all very much involved in this. And it's interesting—I was making some phone calls to find out from some state people how it works. So I called Illinois since that's where I'm originally from, and basically the person I got on the phone just kept extolling the virtues of the legislator who was deeply involved in this, who was going to run for Senate, and how great he would be if he got up to the Senate. And that was Barack Obama. So I guess he is interested in this, at least he was when he was a member of the Illinois General Assembly. And they needed strong professional staff at the state level because they have such short sessions. In many states they meet a couple weeks every 2 years and that's about it. So the professional staff is very important to the ability of them to function, especially given that they're out of session so much of the time. Of course, the executive branches are never out of session.

And what's interesting—very interesting is the analysis that these committees are charged with doing is really confined to the sort of things that courts do on judicial review, and I think this is because the legislature is worried about delegating too much of its own power to a subset of the legislature. So their idea is not that they just look and see whether or not they agree with the rules; they look for whether the procedures have been followed, and whether the rules are within the delegation. And that's, I think, where most of their attention is focused; are the rules within the delegation from the original statute, but also whether the rules are arbitrary and capricious. Which is maybe only a smokescreen for their own policy views, but I think they really take it as legally should this rule exist, and so they're not—they're really not—it's

not a free-roaming mission of any reason we want to reject these rules.

Now, there are various actions that these JCAR groups can take. They can refer the matter to the subject committee with a report. They can negotiate with the agency. Many of them have the authority to place a report on public record, which may influence judicial review. They can propose a concurrent resolution disapproving the rule, and some of these originally started out as—it would be a legislative veto, two-House veto, but most state courts have followed the Supreme Court's Chadha decision and have said that anything that the legislature does, which is going to have any legal effect, it has to go through both Houses and be presented to the governor. So there can't be unilateral state legislative action; it has to go to the governor.

Now, sometimes when the committee takes any action, it automatically extends the time period for the rule not being valid. In other words, if the rule can't be dealt with, say, in 60 or 90 days after submission at the time that the legislature goes next into a session, which can be a year and a half actually in some states, but so they have this delayed effectiveness. And then if the committee takes action, like refers it to the subject committee or proposes a resolution that may automatically extend the time period for the rule not being effective, the committee also sometimes has the authority in some states to seek judicial review based on the conclusions in their report. They get standing; they can go into court on their own and challenge the rule.

Now, you see there are some similarities with the Congressional Review Act having to do with—having to do with reporting of the agency, not being effective until there's a certain amount of time, but and also the joint committee can't veto the rule and any real veto in the rule has to go through both Houses because of the Chadha decision again. Now, there is some situation—there is the situation that the committee itself can cause a further delay in the rule and this could be problematic under Chadha and it's problematic even in some of the states under their—because the states as I said tend to follow the Chadha decision.

Now, so it's also similar in that the ultimate result tends to be this possibility of a concurrent resolution that has to be presented to the governor and also the fact that there's the negotiation process, which I think also happens when the CRA is lurking in the background. Now, the differences are also obvious having to do with sort of a more regularized professional staff, the joint committee, which is a great advantage, I think, because then anything this committee does is sort of like coming out of a conference. It has a great deal of authority within each House of Congress or with each House of the Assembly because it already has joint input from both sides of the Assembly, and it's also similar—it also tends to be similar because it's focused really on the rule in the delegation and I think under the CRA there tends to be a focus on the scope of the delegation.

There are also similar problems, and one of the problems I think under the CRA, which I don't think Mort mentioned, is that the CRA review is an all or nothing review; that is, when the rule comes to the Congress, this expedited procedure in the Senate is

only a reject or accept the rule as a whole, and that's a problem because maybe you have a 50- or 100-page set of regulations and there may be one part that's the most important and the most controversial, you want to let everything else stay in, but you want to get at this particular thing, and you can't without going through a much more complicated legislative process where there's an amendment rather than just an up or down rejection. And I think some of the state models also have this troubling question of the validity of the rules that aren't submitted, but I think the smaller size of state government means that they don't have as much of a problem of unsubmitted rules.

Now, one of the issues is whether—whether under this model if the joint committee can veto a rule, whether that really ought to be a subject to the Chadha rule that requires action like that to go through both Houses and be presented to the governor or the President. And I think that it is probably too late to relitigate Chadha, but sort of raise a question about whether if a rule has not yet gone into effect because its been submitted to a committee and then there's some action within Congress that legally compels the agency to pull back its regulation, whether—since the rule never went into effect, whether Congress is actually taking any action with changes in status quo in a way that ought to be subject to the requirement of bicameral presentment?

Okay, but let me go on to my third point, which is what can Congress require on its own? What can Congress require an agency to do on its own? And there's obviously no problem with Congress amending a regulation, passing a statute, which in effect amends a regulation. Nobody would argue against that. That's a legislative process and I don't think there's any problem with Congress hiring more staff, hiring a professional staff, forming this joint committee, writing a report on rules, make public this report so it can be used politically or maybe also in judicial review. Although courts may not accept it because it may look like post-hoc legislative history, right? Some Congress—three or four Congresses after the statute was originally passed or even longer—saying that the agency now is not following the intent of that Congress. That can be problematic.

But basically, they can say whatever they want. Just as the President can say whatever he wants in a signing statement. There's no legal restraint on this committee speaking. Now, what about having a sunset provision on all regulations? It seems to me that Congress could require sunset in all regulations, which is something that happened in some states, or require periodic review of all regulations by this joint committee and say that the regulations will have to be reviewed with the report to Congress. But this is a very expensive process, and the state experience was not very good with this. Congress can also use the scrutiny with this report as a basis for negotiation, and the negotiation is a very important part of the process. In congressional review of what agencies do, proposals get floated, and Congress negotiates.

The problem with this model is that the impetus to a negotiation only occurs after the rule has already promulgated. It's what gets submitted under both the JCAR model and the congressional review model of final rules, which means that if the negotiation is

going to have any effect, an agency is going to have to publicly pull back a rule that it has already made final and promulgate a new rule, and that can be very difficult. It can also cause a problem on judicial review because some who are disappointed with the changes can say that there's not any adequate enough record to justify the change, and under the current law, it seems like the consensus is that once an agency promulgates a rule, it's a final rule. Any changes it makes are not judged based on the record that justified the original rule; it's judged based on the record that justifies the changes.

Now, I happen to think that's wrong. I think that a rule that has never gone into effect and an agency decides for whatever reason, right after it promulgates the rule, to change the rule, that the change—the changed rule should be reviewed on whether it actually should survive judicial review, rather than looking only at the change and ask whether it should survive. That's a long discussion that I can't really go into, but in my view that it's a mistake to be overly strict about changes. Now, of course, the committee—the congressional Committee can certainly report and recommend legislation and can legislate to alter the rules of—it can alter its own rules to expedite considerations on the floor although whether future Congresses are bound to follow rule changes forever is also obviously problematic. It can always modify its own rules.

Now, can the congressional Committee on its own suspend the rule, or more likely can it deem by law that any action it takes like referring to the subset committee will then suspend the rule? And here you run into the Chadha problem I talked about earlier, and it seems there is some precedent that would say that this would be a permissible procedure. There's a Supreme Court decision that approves the comptroller general having a role in suspending the effect on the government contracts, and so it seems almost like somewhat of an exception to the Chadha understanding because the comptroller general is thought of as a really a legislative branch official rather than an executive official. But I think my sense is that the Supreme Court would not allow this, but it's something to think about. Whether if it's automatic, if the only time that committee suspends the effectiveness of a rule is when it takes some other reaction, that it's not voting just to suspend the rule, which looks like one subset of Congress having a legal effect, but rather it's doing something else which then results in suspension of the rule, it may be—it may be—it may be permissible.

Okay. Now, what can Congress require agencies to do? Certainly, Congress can set effective dates and require agencies to report to the committee in some form prescribed by Congress, that is, Congress has the power to make—set what the effective dates are and to set the effectiveness. Now, I know there are some arguments against this based on the unitary executive, and I'll get to that in a minute, but I don't think that that's really very controversial. Now, can the joint committee require an agency to withdraw rule and recast it based on the committee's views? Probably not. Probably under the Chadha decision the committee of Congress cannot legally require agencies to do this. We know that they do it informally all the time, but as far as legally, formally doing it, they probably cannot.

Now, what about Congress saying that regulations are just proposals that need to be confirmed at some point by Congress? Now, I think there are actually some—and this is where I'm going to get into this unitary executive—I think there are actually some reasons to question whether that's actually permissible. And we've heard a little about it this morning, that if the President's recommendation clause power is actually exclusive, which I don't think it is, but some people and I know—I think that my colleague, Gary Lawson, is under this delusion about the structural elements of the separation of powers putting restraints on this sort of thing. I think that some people might say that basically what this is doing is it's turning everything that the agencies do into recommendations, and none of these recommendations can be made without the President concurring, and the agency has to ask the President for permission to do this. Congress can't require it, and the biggest problem is that it becomes unmanageable though, that just as—if you read the Chadha opinion, you'll see that the reason Congress changed the structure of immigration law was to avoid having to enact a private bill every time they wanted to let somebody stay in the country who is otherwise deportable, and here you just imagine a Congress is not going to have the time to pass the high number of regulations that come beforehand.

Now, maybe Congress could do this in some targeted areas. Let's say some certain agencies that likely would have very controversial rules wanted to make it only proposals. You could imagine a—I consider this sort of a fantastic possibility, although Mort tells me that he has discussed this possibility—you can imagine the following procedure. You can imagine that the proposal goes to Congress, and that each House could have a rule that says when this type of proposal goes to Congress that if they don't take action within a certain amount of time that the clerk of that House can enroll a bill saying that it's passed by Congress as a bill by rule, that they just deem it to have passed the bill.

Now, I think that would be struck down in a second because it doesn't look like it follows the procedures for passing a bill—no one voted, but you could imagine Congress doing something like that, and maybe if we say that Congress has the authority to set its own rules, it has a rule which says that certain kind of bill read at a certain calendar, a certain kind of proposal read at a certain calendar if no one objects, it becomes a bill that gets deemed to have been passed by unanimous consent. We could—or even by unanimous vote—we could do that.

Now, it seems to me that any action that the joint committee is going to take that's going to have any sort of effect on what agencies do without going through an entire revote and repassage if it's going to be some subset of Congress that it's going to run into a Chadha problem. Now, here I'm going to talk about the costs and benefits of some sort of a state version used by Congress. Maybe this is where I'll throw a little cold water on the idea of ratcheting up scrutiny. I think that there are significant costs and some benefits to increased scrutiny of rules, that sort of a JCAR type review or some sort of delay by a committee or maybe some sort of other structure is possible. And in the back of our minds we have this

ossification problem. I think part of it is, that do we want to make it even more difficult for rules to get made?

Now, there are obvious benefits if Congress feels it can gain more control. It may improve agency awareness of Congress' desires in the areas that it is going to regulate. The JCAR model, by having a professional bipartisan joint committee, may counteract some of the narrow interest group kind of lobbying that tends to have maybe—some people say—an overly strong influence on agency action. The committee—the Congress' committee can help keep the agencies and Congress as a whole more honest in terms of what it's doing, but I think it's a very costly model—some in monetary and some in political cost, and I just want to go through those quickly.

First of all, I have sort of a—I guess I don't really subscribe to the idea that we're in the best of all possible worlds at all times, but I do think that whatever structures exist, by and large, tend to reflect what people want, what people are willing to do, and to me any sort of revolutionary changes surprise me because you wonder what happened to the people that were supporting the prior situation. And I think it really only happens if there's a huge amount of problem, rather than just the incremental kind of problem I tend to think is going on right now with the CRA. So how much is it really worth to Congress to be more involved? And there was this very important paper a while back, which talked about how much more effective it would be for Congress to act when somebody pulls an alarm and says there's a need to act than it is for Congress to be out on patrol looking for problems. That is just not a good use of your time to be in this police patrol mode. You're better off using your time when you wait for the alarm than if you go out and do something, and these models tend to push you more toward the police patrol model.

So obviously it's very costly to put in these committees. It's a lot of money to set up the committee and to spend the time that the members of that committee are going to have to spend just hiring all the staff. It's an enormous amount of time and energy. The political cost can also be strong. What is this perception if everybody shifts to Congress doing this? Does Congress want to be in a position where everything an agency does is their responsibility since they've taken it on and reviewed it under the thing—this new mechanism and implicitly they've approved it by not taking action against it? Do they want to have that perception? I think that sometimes that Congress gets blamed for everything now, and I think this may just increase the blaming opportunities for Congress.

What about the distraction? If they are focusing so much of their attention on review of rules, that may distract them from more pressing issues. And especially the timing issue comes to my mind, which is these are always reviewed at the outset when the rule is proposed, but the real problems may not surface till two, three, four, 5 years down the road when the rule is being applied. And so obviously there's a lot of attention that goes into it when rules are applied. The more attention you spend on the moment of promulgation—no matter how many professional staff members, you're still not get any more than 535 Members of Congress—so the more

attention that they have to focus on the promulgation stage, the less time and energy they are going to have to focus on the later stages when the problem is at rule application.

And again, there's this issue of all or nothing problem, which I've talked about earlier. So I think that, under current practices, all the reporting that has to go, that gets done to Congress, all of the informal kind of administration, supervision, oversight, and all the reporting that gets done, it just saps an enormous amount of energy from the possibility that Congress could focus more on the areas where it really needs to be. Now, I do think that the JCAR model may be sort of easier to use than the congressional review model because of the existence of a professional staff. And to me, though, the best thing might be to have the submissions go at the time of proposal so that when an agency issues a notice of proposal rulemaking, it also sends it to the congressional Committee. So the congressional Committee can actually submit public comments on the rule and try to influence—try to influence the rule as it comes out rather than the rule—rather than try to influence the rule after it's been issued. So that's one thing I would say—that Congress maybe ought to look at rules the time that the rules have been proposed more than at a time they're actually finalized.

Now, as I said earlier and just to finish, the Chadha decision seems to be a big roadblock to any congressional Committee taking action that's going to actually affect the way rules work, but it seems to me that the biggest roadblock is the political will to do anything more effective than the CRA, which turns out not to have been very effective at all.

Thank you.

[Applause.]

Mr. ROSENBERG. Our next speaker is Charles W. Johnson, who served as House parliamentarian from 1994 until his retirement in 2004. As parliamentarian, he advised House leaders on matters involving procedure and practices concerning the conduct of House business.

During his tenure years as a parliamentarian he was editor of the House Rules Manual and the document "How Our Laws Are Made," and was co-editor of "House Practice," currently in its second edition of 2003. He is presently serving as precedent consultant in the office of the parliamentarian and he is working on a forthcoming book on Parliament and the Congress with Sir William McKay, recently retired clerk for the House of Commons. He has testified before various congressional Committees and has served as adjunct professor at the University of Virginia Law School.

It's my pleasure to welcome Mr. Johnson.

CHARLES JOHNSON. Thanks a lot. I'm honored to be here. The Parliamentarian's Office is kind of a unique institution within the House of Representatives and in the Senate—nonpartisan. I want to give you a little background based on 40 years.

I was in that office 40 years to the day, so only the last 10 of which I was parliamentarian, but I was deputy and assistant, and when I came in May of '64, there was no statute on the books that required or permitted expedited congressional review of any regulation that I am aware of. There was an Executive Reorganization Act which allowed the President to propose reorganizations and

gave Congress 60 or so days to disapprove, but beginning with the Nixon administration as I recall it—and I don't think I'm alone in this recollection—with a Congress with overwhelmingly Democratic majorities in both houses and the Republican administration, there was some—there was obviously a combination of the awareness that Congress couldn't answer all the complexities that this country faced, needed to delegate to agencies and departments some rulemaking authority, but needed to keep the conditions and constraints on that and needed to be able to address concerns in an institutional way and so these statutes began to proliferate.

And I will just call your attention to the House rule—T.J. mentioned the House Rules Manual the last part of which—the House document 108-241 has a so-called disapproval section, which is a compilation of 32 statutes and subparts of those statutes which comprise exercises in House and Senate rulemaking to give privileged consideration, expedited consideration to reviews of various departments' and agencies' regulations. They are pretty much issue-specific until you get down to Congressional Review Act which is listed as number 28 out of 32. So for the first time in 1996, Congress in 3 days, after the Contract with America had put in place a vision—at least the House had a vision of a new direction for government, a year later the Congressional Review Act came to both houses and was passed within 3 days. No report. Congress didn't do its work as far as I know, as far as oversight, on why that law was needed and how it needed to be written.

The bill emerged out of committee by virtue of utilizing the Rules Committee in the House. It was passed by the Senate, attached to a much larger bill and passed both houses within 3 days.

So I will comment briefly as I have on one occasion and my successor John Sullivan did March 30th of this year. There was a testimony before the Judiciary Subcommittee of the House. And parliamentarians seldom testify, for a good reason, just as they seldom engage in symposia, you'll discover, for good reasons. But on March 6th of 1997 I went before the subcommittee on the House Judiciary Committee after 1 year of CRA being in effect, and of course our office was inundated with the paperwork. And I'll stand here and make a self-serving statement that I don't think all this paper needs to be submitted as paper to the Congress. We have the statistics on numbers; more than 43,000 in 10 years, most of which were non-major regulations.

If there could be a screening process to more definitively screen out the non-major regulations to avoid the necessity of formal referral and the manpower—and this sounds self-serving and it is to a certain extent, but I think some time in Congress would be freed up to look at major rulemaking. Now, if there's a dispute on what's major and what's not major, there should be an error on the side of having it submitted formally. That's not to say that Congress can't and wouldn't look at non-major proposed rules, but whether there has to be this paper trail is at least debatable and I testified against the need of that in 1997. Obviously, that suggestion didn't go anywhere.

I was more also interested in the review period when Congress in any session adjourns without having taken final action and CRA requires an automatic resubmission within 15 legislative days of

the next session. Be it the next session of the same Congress or of a subsequent Congress. Now, in a subsequent Congress where there's a new start up and new committee organization I can see the need to treat regulations as having been deemed to have been resubmitted. I don't see it between sessions of the same Congress. I think there can be an amendment to this statute in that limited respect.

I remember one of the first regulations that came in 1996, right after the law was enacted. It was a regulation on whether to hyphenate the word "rulemaking." And there was some question about whether that was "major." It was a big question about which committee or committees had jurisdiction over the referral of that regulation, but jurisdiction, as has been discussed earlier, is an important reason for perhaps Congress' acquiescence. There was an example given this morning of pesticide regulations where you've got regulations that are required by the Food, Drug and Cosmetic Act, which are within the jurisdiction of the House of Commerce Committee, regulations required by FIFRA from the Department of Agriculture, which go to the Agriculture Committee and then somebody mentioned NOAA, which—so there's at least two committees and there are two committees on pesticide regulation, so that complicates the referral and the potential review of regulations in the House.

Now, it's been mentioned that the Senate has an expedited procedure and the House doesn't, and in this compilation of the 32 statutes—as I say, it's in the House Rule Book, you can see it—there are several statutes which are silent on the question of House expedited review. Why is that?

Obviously, you can't be silent about it in the Senate and expect expedited review, and any single Senator absent an exercise of Senate rulemaking, which says the Senate must vote on the matter within X number of days and—in the CRA context it's 30 Senators—can petition for a discharge of a committee within a 60-day review period, so there's a way of forcing it to an immediate vote in the Senate. That's not so in the House. Why is that? Because the House as a majoritarian body has a Rules Committee. That Rules Committee—if you remember any other number—if you remember this number: 9 to 4, and most of you know what that means. That's the ratio of the majority to minority members on the House Rules Committee.

Really, the only important rule of the House, not just in a regulatory review context but in the legislative context these days, is the rule that empowers the Rules Committee to bring special orders of business to the House floor. And that's what was contemplated very abruptly, but clearly in the 1996 enactment of the CRA—that the Rules Committee in the House could recommend if necessary within the statutory review period an expedited procedure clearly with nine of the 13 members of that committee taking strong advice, shall we say, from the leadership as to whether or not to bring to the House floor, whether it's passed by the Senate or not, a House joint resolution of disapproval.

The only reason that CRA is listed in this disapproval compilation is because there is a mechanism as an exercise in rulemaking for the House which lays the Senate resolutions on the Speaker's

table—that becomes the resolution finally voted on. So in a sense that's a rule, and that's why it's put into this compilation, but otherwise the CRA stands as do several other statutes which are silent on expedited review. So you have to see the politics in that.

It's clear that the leadership, the recentralization in the House of leadership to decide what the House votes on and when, is an all-consuming factor, at least in this Congress certainly. Whether the next Congress would have a different composition and look more in a different direction on review of executive department regulation, since the executive will still be presumably from the other party, would remain to be seen.

The reality is, though, that jurisdictions are so important. I have seen failed efforts in many areas on modernizing committee jurisdiction. Now this joint committee approach had some appeal. To create a select committee in the House to review rules regardless of subject matter jurisdiction is unrealistic. The notion of a joint committee and whether it's a state model—Mort and both of these gentlemen have advocated it as the possibility—has some appeal if you're not suggesting that that joint committee has real authority to recommend legislation or disapproval. I'm trying to be realistic here.

I would think that the utmost extent of any conferred authority would be for the joint committee to say within a statutory framework, maybe which would have to be lengthened if they had some concerns, that the legislative committee of jurisdiction should then look more closely. I see that realistically as far as the House will go. In no other context is there a joint committee of any similar impact under House and Senate rules. There's a Joint Committee on Internal Revenue Taxation and the Joint Economic Committee are the only two joint committees which really don't—well, they can bring recommendations to committees, but not under timeframes or time-sensitive situations, so I'm just trying to bring a practical note to this.

But involved here is the issue of oversight. Now, the issue of congressional oversight of the authorization level is problematic. The critics have bemoaned the lack of oversight from congressional authorizing committees. I was honored, Mort will recall, in November of 2004 to participate in the CRS panel on congressional oversight. And my pitch was basically that the House rules and the Senate rules armed committees with the authority and need the direction to conduct the oversight—continuous oversight of all statutes and all agencies and departments executing those laws.

So the mandate is there. There is a mandate to file annual oversight programs, oversight plans that each committee has to file on an annual basis and then there's the post mortem at the end of each Congress where committees are told to report on their oversight. So the language is there to conduct effective oversight of a department or a program. The problem is one of will. And with compressed work schedules, fund raising imperatives, Congress meeting 2 days a week, term-limited chairmen and to a great extent term-limited staff who are appointed by those chairmen, you don't see the long timers anymore who may be more inclined to do effective skeptical oversight of an agency, because the staffers aren't there within the committees, so that's a problem.

All of these political reasons suggest that Congress, at least in its current makeup and what's currently important to Congress, isn't in the position to do all that much oversight in advance. I would say there's some credibility to this notion of a joint committee for initial screening.

I think it was Professor Farina who mentioned this morning that there is oversight done on the appropriations level and it's important. It's limited because the House rules permit in the House at least, and to a certain extent in the Senate, amendments to appropriation bills on the floor of each house and certainly the committee can tell agencies that they're not going to get funds to conduct certain rulemaking, whether it's proposed rulemaking or whether it's the promulgation of a rule already finalized.

Those issues come up annually and I don't have the numbers yet. I told Mort I'd get those numbers, so when you read perhaps the results of this symposium I'll have some numbers on how effective and how numerous these limitations on appropriation acts are, but I would say one thing: they are a heck of a lot more numerous and probably more effective than the expedited procedure under the Congressional Review Act, which as we stipulated is one joint resolution in 10 years.

So that's important—but it's limited to the 1 year. You can't say that there are no funds in this or any other act. It has to be limited to the 1-year funding availability, but it can go, and if Members of the Committees can raise these issues and appropriation bills are still, believe it or not, considered under so-called open procedures at least to the extent that if an amendment is a valid limitation on the use of funds, it can be authored and voted upon. In our office we know about this because we are asked all the time about amendments to restrict the promulgation or even to go so far as to say no funds in this act shall be used to prohibit the promulgation of a regulation. In other words, it's almost a double negative. You have to spend your money to promulgate.

So those are effective ways that at least Congress can symbolically vote on issues on an annual basis and they come to the floor under open procedures, but as far as the workability of the statute itself, I don't see, regardless of who is in the majority next year and subsequent Congresses. The notion of 9 to 4 on the Rules Committee, I think, will continue to be a restriction against amending the statute to put an expedited procedure in because it would be in a sense a decentralization of leadership control over the Rules Committee.

So it's something to look toward, something you can debate certainly, and I am glad to be here and be part of this debate.

Thank you.

[Applause.]

Mr. HALSTEAD. Our final panelist is Paul Verkuil, current professor of law at Benjamin Cardozo School of Law, Yeshiva University. He previously served as dean of that institution from 1997 to 2001.

After practice at two leading law firms in New York, he served on the law faculty of the University of North Carolina as dean of Tulane Law School and as president of the College of William and Mary. From 1992 to 1995, he was president and CEO of the Amer-

ican Automobile Association. Professor Verkuil was a visiting professor at the University of Pennsylvania and served as special master in the case of *New Jersey v. New York* involving the sovereignty of Ellis Island.

He is a life fellow of the American Bar Foundation and of the American Law Institute. Professor Verkuil is co-author of “Administrative Law and Process” and “Regulation and Deregulation.” He’s a leading scholar of law and regulation and has published more than 60 articles in this field.

Professor Verkuil?

PAUL VERKUIL. Well, I can only lose if I say anything more I’m sure, but thank you for the introduction. Is Dick Pierce still here? All right. He left. You know, that’s like Dick.

[Laughter.]

Mr. VERKUIL. How many of you were here in the morning? Okay. So you’re in on this joke that I’m about to reveal, which is that Pierce blames me for his outlook on why judicial review under the hard look doctrine doesn’t work. And that’s only the beginning of it actually. You know his view is—and it’s why it relates to the CRA—his view is that judicial review is a political process that is largely determined by who appointed you and what party you are, whether you like or dislike a rule—he said that, again—and that he therefore favors not hard-look review, which is intense review, which tends to reject rules, but he favors “Specific States Box” review, which is only constitutional review, the most minimum kind of review you can have. And so that’s his recommendation, or at least it was a few years ago.

In response to that article which he wrote on ossification of rule-making in the *Administrative Law Review*, I put in a little piece in the summer of 1995 suggesting that, well, maybe, Dick, if you don’t believe in judicial review because it’s too political, then we ought to put review of rules in the political branch of government; that is to say, in Congress. And so before there was a CRA, I suggested let’s have Congress review rules, you know—post-Chadha—that actually Congress—although I did say let’s have them approve major rules, which is not what we’ve got, but 6 months later there was a statute—the CRA—which said you could disapprove not only major rules, but any rules.

So we’ve come a long way. That’s been 10 years. Mort’s done a wonderful study, which I’ve had the benefit of, but let’s review these numbers again and just see what it really means. He says there are forty some thousand rules that have come before Congress—43,000, so that’s one number. Of those 43,000, 631 are major rules. There have been 37 resolutions of disapproval relating to—I think they were all major rules, and there’s been one, “success story”he demise of the ergonomics rule.

Now, it depends whether you’re a glass-half-full or half-empty person. Maybe that’s great news. Maybe we shouldn’t be worrying about this problem. Maybe, indeed, we can take this point of view that if the system is working so well, because Congress in the first place, when it delegates—if you believe in non-delegation principles, it actually doesn’t violate the non-delegation doctrine. It knows what it’s doing and it gives power to the agencies, and when these rules come back up, it’s very happy. After all, only 5 percent

of those 631 got any kind of disapproval and only one succeeded, so maybe you should look at it from that point of view. That's a possibility.

If you think of it as a negative, then it gets more complicated because then, just like with non-delegation doctrine, that has an ideal. I really think the CRA is a democratic ideal. It's a wonderful thing. We want Congress to have a second look at the rules that are being promulgated by agencies who are authorized to do that promulgation only because of Congress in the first place, so it has an ideal set up that we ought to applaud, I think.

Now, if you feel it's not working—if the number one is troublesome rather than praiseworthy, then it's a little harder to figure out how to make it better. Charles Johnson pointed out some important things which lead me to conclude that the paperwork burden is one problem. Well, the simple way they avoid the paperwork burden would obviously be just to limit these rules to major rules, to this 631. Why have all this other stuff up there? You don't really care about this stuff. That's not important. Now, you can say, I know, as we will, that agencies will slip things by you and they'll use non-rule rules and things will happen. Maybe so, but still the real action is in the major rules, so Congress could certainly limit its focus to that if you wanted to improve or intensify the process if you think there's a problem. That's one thing.

Now, you could say, as I think your report did, that maybe the definition of major rules can be manipulated by people like Sally Katzen or Jim Tozzi, who run OIRA. Maybe they'll play with the definition so things won't get before Congress. I don't know about that. I tend not to believe that they would do such things because they want to have the review in the first place, but you can answer whether I am right or not. Tozzi of course is capable of anything in this regard, so I wouldn't be sure.

But more than that if you want a real reform, why not just take the executive order 12866 and make it a statute and then we can talk about that and then you can give yourself a little more jurisdiction over how these rules get defined. That's another sort of subsidiary question that comes out of this.

In other words, the CRA shouldn't be blamed for things that aren't its fault. Indeed, I don't think, like many things, you can call the CRA a failure if it was never intended to be a success. Think about that. There are a lot of things we can still do. I would also look at—I thought it was very helpful to hear Jack talk about the states, because, after all, one thing is these committees that can be formed to help review things could start earlier, or you could have a committee; although, Mr. Johnson, you pointed out that the House is not going to give up certain prerogatives by creating joint committees, but maybe you could. But also these committees are helpful and they could be started earlier.

One of the bills that has come up doesn't just have joint committees proposed, but it actually proposes an agency of Congress, something called CORA, the Congressional Oversight Review Act? Congressional Office of Regulatory—something. I forget the "A" too, but—so in other words, create a statute—create an agency within Congress to review rules. Perhaps that would work. I don't know. I rather tend to think—and here again we get our plug in for

ACUS. I'd rather kind of think that agency already exists, and it's been authorized, and so let's just let ACUS do that kind of thing. If Congress really wants help, ACUS, after all, is an independent agency protected from the White House to some extent, and it's one that perhaps could perhaps play that role just as well. So you could get more oversight and more involvement through that process.

Now, another thing about all this has led me ponder about the CRA is whether you assume it's not working properly. And maybe, as I say, I just want you to be skeptical about that. Maybe it is working properly, but if we assume it's not then perhaps you can tinker with other things. Isn't it true that Congress believes the courts are its friend? I really think that the White House and the courts have a rocky relationship, and the agencies and the courts have a rocky relationship based on the fierce 50 percent calculation of reversal rates, which Jody is about to refine for us into a more precise and lesser important number in the empirical work. But let's assume it is, from the point of agencies, problematic with the reversals. I'm not sure it's problematic for Congress. I would think that the hard look review—Congress might like the hard look review, and if so you can think about doing more than simply italicizing arbitrary and capricious, as Peter Strauss has suggested. You can even put hard look review into the APA if Congress was concerned and saw the courts as an ally in controlling vagrant agency rulemakings.

So there are a lot of different techniques all of which were available, but one that I think should not be selected is to get rid of the CRA because the CRA does involve Congress in work it should be doing and the Members must learn, committees must learn an awful lot from this process. So it does seem to me a positive, and it should be if something—it could be amended, it could be narrowed as I suggest, but it is not anything that is—but a good thing in terms of democratic theory to put the Congress back into the business of taking a second look at rules and regulations that it authorized agencies to make on a post-Chadha basis when it has to act as a body and not just as a committee or as a single house.

So I guess from my point of view, I don't think I need to take much more time in that but to say that this is a fascinating problem. Maybe it's not even a problem at all, but it's a very interesting statute.

[Applause.]

Mr. HALSTEAD. Do the panelists have any rebuttals or questions for one another?

Mr. ROSENBERG. I've heard a lot of ambiguity today. What a great idea the CRA is. It may be working, but we don't know if it's working. And it's probably politically impossible to make it work. After 30-plus years, I am realistic about those problems. It is and it was intended to be, and I am not speaking facetiously, a democratic instrument of accountability for the Congress. It probably was passed in the form that it was with the idea that it really wasn't going to work, but it could work.

I believe that the problems raised with respect to the Chadha decision are a little bit exaggerated. Fast track is a mechanism that has the approval of the White House, at least with regard to item veto. There is nothing wrong with the President being able to pro-

pose repeals of parts of laws as long as Congress does it in an expedited way—that is, with no amendments or anything like that. So that has never been a problem. Indeed, I think the internal mechanisms of Congress and Congress' constitutional authority under Article I, Section 5, the rulemaking power of each house, provides it with sufficient authority to set up a joint committee, which would not be substantive, which would take care of that political problem if it would get that far, in the sense that you'd have representatives from both houses who would recommend action on rules to their jurisdictional committees after a screening process. The rules would have to come over as proposed rules.

There could be a deeming process, again established by the internal rules of the houses, that presents no Chadha problems if the rules which were sent over are proposals. There would be no backlog and further ossification of the rulemaking process because there could be en masse passage by means of a deeming process; a "rule rejection Wednesday" in which hundreds of rules that were not, by a process created internally, challenged within a set time period would be deemed to have passed, and you could have 99.98 percent or more of the rules go through expeditiously.

Mr. BEERMANN. Actually, I have one thing that I neglected to mention in my initial presentation and then I have another thing that I want respond to Paul. One of the things that some of the states did was allow their joint committee to seek judicial review. And I think if you create some agency like this CORA model or something like this, I think you could imagine that and I think they would have a big standing problem. I'm not sure the Supreme Court would allow them to—it's because of the—I think the current view is that there is no injury to anyone in their sort of action as a Member of Congress; there has to be some injury personal to them or something like that. But I think that's probably—in my view, that's not a good view of the way that that law ought to go, but I don't even have one of nine votes.

Mr. ROSENBERG. One of the purposes of congressional review is to lessen judicial review. Congress generally does not want court to review its own work, and may not want them to look at this. The purpose of congressional review is to substitute and to get away from court review; to have substantial evidence or reasonable decision-making in one way or another substituted for—to have the courts substitute their policy concerns and considerations with those of Congress. That's why you have congressional review.

Mr. BEERMANN. Now, let me just go on and say that—

Mr. VERKUIL. But anyway, let me just ask one question. Do you like Chevron? Does the man that's representing Congress—does Congress like Chevron?

Mr. ROSENBERG. I don't think Congress thinks about Chevron. If I were Congress, I wouldn't like Chevron. I've never heard of such a thing as implicit delegation of authority to make up laws.

Mr. VERKUIL. So you can get in the picture then, you can change that if you are concerned—if Congress is concerned.

Mr. ROSENBERG. How would I get into the picture anymore than I am now?

Mr. BEERMANN. I do want to respond to Paul's suggestion that the CRA is worth retaining because of its educative value or some-

thing like that. And I think that the one rule that got rejected was a perfect storm in the sense that, what you had was you had a president who would sort of make it a big idea that he was going to do this and then you had a Congress react by repeatedly passing appropriations riders saying you can't do this.

Finally, a year before he's going out of office, the President threatens to veto the appropriations bill if that rider is in there and you know, and now it's way at the end of—the cost of doing that is much lower now that he's at the end of the second term, so he goes ahead and he makes this threat and he makes it a credible threat, so they take the rider out. And why do they take the rider out? Well, they know that whatever rule he comes up with they're going to be able to veto, and they're going to time it so that the person who's there to sign or veto the bill is his successor, so they are hoping it's going to be one of theirs and not one of his.

And so maybe what you ought to do is to have the CRA only go into effect in the last 6 months of any administration so that—with the possibility that the new president will be willing to sign the resolution, but otherwise it seems to me you could have an office in Congress whose job it is to read the Federal Register and bring to attention to some committee whenever there seems to be anything that someone might be interested in. It doesn't seem to me like the idea that you have to send an extra copy of everything to the Congress so that some office—people like Mr. Johnson, can be inundated with paperwork that isn't going to go anywhere—it doesn't seem to be worth the money. It seems to me that, you know, just the way that trade associations have people that read the Congressional Record or the Federal Register to make sure that nothing that affects them goes out. You can do it that way and it just seems to me that if you really want to do something effective, you have to do it differently.

Now, probably they don't want to really do anything effective. The way that they did it—with the Contract with America—they didn't want to give the President the line-item veto authority, so they designed the most unconstitutional possible line-item veto and then passed it so they could say we passed it and those lousy courts got rid of it. Now, they've put in the Congressional Review Act and they can say they did it, but they know it's not going to actually have much effect. I think it's an exercise in symbolic politics rather than real regulation.

Mr. STRAUSS. Mort, it's striking that Congress put into the Congressional Review Act the provision that says explicitly the courts may not pay any attention to what we do under this act. So the notion that this was a substitution of congressional or judicial review is, I think, defeated by the text of the act.

I do think that Jack's last point is exactly the right one; that is to say, there is a relationship with the President here which on the whole is going to defeat congressional action, as long as it's the same president that was in office at the time that the rule was adopted.

The strong executive presidency throws out a couple of other obstacles. A strong executive president will think that it is unconstitutional to provide that agency rulemaking becomes immediately congressional business without his saying that it should be con-

gressional business. And reading those signing statements on my way down this morning, one repeated pattern I found was that when appropriations acts say to the President, "you may not study X," the President issues a signing statement saying, "I see that Congress has said that I may not study X, but I'm the President."

Mr. HALSTEAD. Well, I'm sorry to have to cut off such a robust discussion, but we'll take a quick 5-minute break and get into the next panel. Thank you very much.

MONDAY, SEPTEMBER 11, 2006

**Panel 4:
PRESIDENTIAL REVIEW OF RULEMAKING:
REAGAN TO BUSH II**

Moderator:

Curtis Copeland, Congressional Research Service

Panelists:

Sally Katzen, George Mason University Law School

David Vladeck, Georgetown University Law Center

Bill Kovacs, Vice President for Environment, Technology, and
Regulatory Affairs, U.S. Chamber of Commerce

Neil Eisner, Assistant General Counsel for Regulation and
Enforcement, United States Department of Transportation

CURTIS COPELAND. This shall be known as the panel that doesn't have Morton Rosenberg. I'm Curtis Copeland, I'm with the Congressional Research Service, I'm the person who called Jody Freeman and said, hey, I've got a database. We've heard a great deal of discussion today about whether Congress or the President or the courts control rulemaking; I'm here to answer the question. The reality is that on a day-to-day basis the President exerts a great deal more influence on rulemaking than either the courts or Congress and I'll take on anybody that wants to dispute that.

The epicenter of presidential control over the last 25 years has been OMB's Office of Information and Regulatory Affairs, or OIRA.

SALLY KATZEN. That's easy for you to say.

Mr. COPELAND. I know. Well, you see, I have tonsillitis still, so I have an excuse. So I won't talk for a very long and each of my panel members here have agreed that they will only talk about 10 or 12 minutes, so we're good to go here I think. OIRA was created by Congress in 1980, as Sally will detail in a minute, by the Paperwork Reduction Act, but it's located within the Executive Office of the President, so in some ways it embodies the tension between presidential control and congressional control.

OIRA reviews all significant rules that are issued by executive branch departments and agencies, other than those issued by independent regulatory commissions. It's a small office; there's only about 50 people and about 25 of those people do regulatory review. In addition to the 3,000 paperwork approvals they do every year, OIRA reviews about 400 final rules and about 300 proposed rules, and they review them at a very critical point in the process: just before publication in the Federal Register.

As Jim Tozzi mentioned—and Jim had to leave, but Jim mentioned this morning that OIRA only recommends changes to agencies' rules. And if you look in the OIRA database that they have, they talk about returns for agency "reconsideration," that's a polite way of putting it. These recommendations are from the agency that represents the President, and this is from an agency that controls the agency's budgets, so OIRA gets a great deal of deference from the agencies.

In addition to the reviews that OIRA has been doing over the last 25 years, though, the Bush administration appears to be a little bit different, and Sally will go in to some of those differences in a minute. And right now there is a pending nominee for the head of OIRA. Susan Dudley has been nominated. Susan is with the Mercatus Center. And so now seems to be a particularly opportune time to discuss the role that OIRA plays from a variety of perspectives. First from Sally Katzen, who headed the office for 5 years during the Clinton administration; from Neil Eisner, who has been on the receiving end of OIRA reviews for quite a number of years; and from David Vladeck and Bill Kovacs from the perspective of both public and business interest groups, respectively.

So with that, I'm going to dispense with a great deal of the reading of people's resumes, but I would note that Sally Katzen, our first speaker, is visiting professor of law at George Mason University Law School. She notably was administrator of OIRA from 1993 to 1998. She became a deputy director of the National Economic Council with the White House in 1998 to 1999 and returned to OMB as deputy director of management in 1999 to 2001.

Sally?

Ms. KATZEN. I'm going to try to cover—can you all hear me? I'm going to try to cover a lot of territory and I'll speak quickly because I think it's important to leave time for questions and dialogue at the end.

Since Richard Nixon, presidents, or I should say their senior aides, have called for greater centralized review of the administrative apparatus that is found in the executive branch. They've wanted to get their hands around agency rulemaking. Richard Nixon had something called the quality of life, Gerald Ford had the inflationary impact analysis, Carter had RARG—the Regulatory Analysis Review Group. These were all designed with the same kind of approach: find the important regs—call them major, call them significant, they're the biggies—and those regulations require the agencies to think, to analyze, to look at the consequences, most importantly the economic consequences of costs and benefits.

Then came Reagan in 1981 and he used what had been created under the Paperwork Reduction Act, the Office of Information and Regulatory Affairs, to carry out what he called and has been called Executive Order 12291. 12291 took a giant step forward from the “consider these things and study these things” to actually prescribing or establishing a standard for approval. You had to limit your regs to those that would maximize net benefits to society.

There were three key features of the Reagan executive order. One is centralized review, and this pertained not just to significant regulations but all regulations were going to be reviewed by OMB—that agency that is closest physically and psychologically to the President than any other agency is going to have its chance to review the work product of the agencies before they see the light of day or are published in the Federal Register, as the case may be. That's centralized review: a statement we're going to do it.

Now, he limited it to executive branch agencies. Although he had an opinion from the Office of Legal Council in the Justice Department that constitutionally he could extend this to the independent regulatory commissions, he chose not to because he recognized

what a “ginormous” step he was already taking. The centralized review is key one. Key two is the role of economics. This is a document which is not very long and repeats net benefits to society, costs, costs, costs, costs continually throughout the document. Look at the economic implications. And the third was, it was cast in terms of regulatory relief—not regulatory reform, not regulatory improvement, regulatory relief. Those were the three key ingredients.

Now, over the 12-year lifespan, 8 years of Reagan, 4 years of George Herbert Walker Bush, a lot of questions were raised, questions about separation of powers. This comes from a Democratic Congress watching a Republican White House treat their statutes in a way that they had not anticipated, holding up regs and doing things that they didn’t like. So you start getting the beginnings of this question of who is supposed to control.

You also saw a lot of arguments about transparency because certainly during the last years of the Republican administrations in the eighties and early nineties, OIRA was known as a big black hole. You didn’t know what happened. The reg went over and you couldn’t find out that it was there at OMB. And then nothing was heard. You didn’t know why, who, when, nothing. It might come out. It might come out very different, although you didn’t know how it went in so you don’t know how different it is when it comes out. And I loved Jim Tozzi’s comment that it was just a recommendation. In any event, it was not a very transparent process.

The third was this reliance on economic analysis, this insistence of looking at the costs and benefits as though only that which could be quantified counted. And I wish Cynthia—is Cynthia Farina here? She can give me that great quote from Einstein, the office in Princeton, is that not everything that you can count—not everything—

CYNTHIA FARINA. —that can be counted counts, and not everything that counts can be counted.

Ms. KATZEN. Right. Perfect. That’s knowledge. So in—I guess it was early spring of 1993, we have a Democratic president, Clinton, and a nominee to be head of OIRA, and my first task is to look at the executive order and recast it. Some probably, David, would have wanted us to tear it up, but there were some things that we thought were important and to this day, notwithstanding my own experiences, I believe it’s an important document. We wrote 12866—this was Clinton’s executive order, 12866. Some things were the same; we assumed the legitimacy of centralized review and we speak to the importance of economic analysis and essentially we kept the same process. We wanted to look at things at the notice stage and at the final stage before they saw light of day. But some things were different. In President Clinton’s executive order, while we spoke to the legitimacy of centralized review we reaffirmed the primacy of agencies. The agencies are, after all, the entities to which Congress has delegated the power; the agencies are, after all, the ones who have experience and expertise in the subject matters involved. You have 25 people at OMB, and they’re not going to have the same kind of institutional memory, the same kind of knowledge, the same kind of expertise that the agencies

have. So while they have something to say and they will say it, we reaffirm the primacy of the agencies.

Second is, while we encourage quantification to the extent possible, we explicitly recognized that non-quantifiable costs and benefits are essential to consider. That not everything can be counted and it is very important to take in to account those things which can't be counted. We also made it clear that this economic analysis was not dispositive, but simply informative. It is useful to know what the consequences of an action might be but it might not tell you the whole picture. There were significant changes that we made in transparency with meetings, with outsiders, we're now going to invite representatives from the agency, we're going to keep a list of them in our docket room, musty as it may be, we were going to make it clear when documents came over to OMB, and we were going to try to limit to 90 days our review period.

Most importantly from our perspective we tried greater selectivity. Instead of all regulations, we were looking only at the most significant regulations. Instead of trying to see 3,000 to 4,000 regulations a year, we were looking only at a much smaller percentage—300 to 400 in fact.

More important than the changes that we actually made was I think the change in tone. We wrote the document in a somewhat mushy way and that was designed to reflect an approach that was more collegial, more cooperative with the agencies than a fiat from on high.

Now, this tone was truly reflected in terms of the implementation because, during the Jim Tozzi/Jim Miller days, the OIRA staff was generally known as lean, mean junkyard dogs. And again any comment by Jim Tozzi that they were recommendations is truly laughable. They were tough and when they spoke, you listened period. We tried something a little less heavy-handed and I got tagged as being the OIRA administrator who believes in the hot tub theory of regulations. We'll get in the warm water and see how it is and we'll just all be friendly and we'll work this through together. But I would insist sometimes you can get more accomplished by being nice and cooperative and helpful and friendly than by being a bitch. At least this was my own experience and I happen to think that we were relatively successful in the hot tub theory of regulation.

In 2000, George W. Bush became president and we have a 5-year period of how his people have interpreted the same document because, while there was an amending executive order, 13528—258, something like that, there was no substantive change; it's a process change that replaces the vice president wherever he may appear with either the chief of staff or the OMB director. In all other respects they kept the document the same. While the words are the same, the implementation is not. There has been a very good study actually by GAO which looked at—and I'm smiling because Curtis was one of the people who participated in that—in fact, he led the effort, I think there—was to look at the early implementation and President Bush's nominee. And then administrator of OIRA John Graham explicitly said he wanted to be a gatekeeper; none of this collaboration stuff, he wanted to be a gatekeeper. In addition he took the economic analysis that we thought was an important input

and he made it a really important input. I mean not quiet dispositive, but close. The economics were going to rule.

He did move well beyond us in transparency, and to his credit I think opened up the process appreciably more by posting things on the internet and making it a lot easier. It is fair to say I think that the primacy of the agencies began to take a slight backseat, if they were not put in the trunk, and this I think is a question not of his or my personal preferences, but of the fact that the administrator of OIRA is a presidential appointee who well serves the President that has selected them. And in John Graham's instance, you're talking about a president who has been very strong on unitary executive and the strength of the executive branch and the centralized control.

John Graham pushed the envelope, I believe, and he did it with some significant success. He reinvigorated return letters. This is sending a regulation back saying we don't like this; redo it. Now, maybe it says reconsider, but there's also a six page single spaced appendix telling them how they should be reconsidering it. He used the Information Quality Act, which had been stuck in a—I think it's three paragraphs in a seven hundred page bill, to completely change the way challenges could be made to agency data. He rewrote cost benefit guidance. We had called it guidance. It is now no longer guidance; it is Circular A-4, which you will follow or bear the consequences if you don't. All the nice preparatory language we had has been changed by shall, must, and other terms of enforcement.

He developed peer review guidelines so that all scientific information would have to be peer reviewed and following certain strictures, which OMB would get into. He has proposed risk assessment guidelines, he has proposed guidance guidelines, he has proposed a number of things, all which speak to expanding presidential control of the agency work product. This is over a 16-, 17-year period. It has grown.

I think the one thing that has happened is that the issue of whether or not it's legitimate for centralized control, centralized review, centralized input—whatever word you want to use—is now an issue of the desirability not the legality. You rarely hear challenges to the legality of it. And I think that reflects real politics in this town, and that's politics with a small P, not partisan, but just real politics, of the strength of the President and what he is trying to accomplish.

And with that, I guess I'll turn it over to Neil.

[Applause.]

Mr. COPELAND. Thanks, Sally.

Neil Eisner is the assistant general counsel for regulation and enforcement at the U.S. Department of Transportation. Previously he held positions as assistant chief counsel for regulation and enforcement and deputy assistant chief counsel for litigation of the Federal aviation administration. Mr. Eisner is a member and a past chair of the ABA's Section of Administrative Law and Regulatory Practice, and adjunct professor at the American University College of Law.

Neil?

NEIL EISNER. Thank you, Curtis.

My job is to oversee the rulemaking process of the Department of Transportation. The Office of Management and Budget has to approve not just the rules that come through my office for review, they have to approve our budget, they have to approve our reports to Congress, they have to approve our testimony. It's kind of an oxymoronic experience to be asked to be on a panel to discuss what I think about OMB review of our regulations.

That said, and partly based on my experience in doing somewhat the same thing within the Department of Transportation, I have a very positive feeling and very positive thoughts about OMB's role. I may be somewhat unique in the Government. I may not be speaking for a lot of agencies, but they can be and are indeed valuable to us in terms of trying to do a good job in a rulemaking area. Most people do not like to have their work product reviewed by someone else. After they put a lot of time into it, they think they've gotten it right, but there are a lot of advantages that overseers can do. They're not necessarily better or brighter, and that's important for them to keep in mind also, but they have oftentimes a broader perspective, they have more experience oftentimes with the process. They're more removed. They're not the ones who are on their way out to rush to go to a big conference for industry and they want to get a rule on the street right away. They're not necessarily the ones who had made a promise to industry to get a rule out, or to an environmental group.

So they bring a different perspective to the thing. They have broader experience in looking at things like innovative solutions and trying to solve problems. And sometimes quite candidly they, or even in my office, we can see big mistakes that would've been made but for that oversight. For example, one agency once sent to my office for review a rule that caused a little confusion to my staff person who was reviewing it. He called up the agency and he said you've got \$7 billion in one chart and you've got \$7 million in another chart. I think they're supposed to be the same. How much is this rule going to cost—\$7 billion or \$7 million? The sad thing was they didn't know. It took them a couple of weeks to go back and straighten out their numbers. It was a \$7 billion proposal and the agency wasn't clear on that, and without some level of oversight they would have put that proposal out on the streets.

So there are three key points I want to make about OMB—why I think they are very valuable and why they are helpful to the process, but in each instance I've got some counter points that I want to make.

First point is OMB's power. They're mere existence helps agencies do a better job with their rulemakings. Senior officials—and I don't necessarily mean me, but I mean other senior officials in the Department of Transportation—may have problems with a particular proposal or a particular rule. They may not think it should go out. But oftentimes, for example, the administrator of an agency or an assistant secretary can backdoor those officials and go to the Secretary and get the Secretary's approval to get it out. Oftentimes what helps then is simply reminding people that the rule still has to go through OMB.

Sometimes stupid ideas are proposed. I mean really stupid. I will not embarrass anybody with some of the things that I've heard

over the years, but when I've heard some of these I simply look at them and I say "don't forget this rule has to go through OMB for review." And you'll see the look in their eyes and they'll say, "well, I think I'll think about this a little bit longer."

Sometimes their just being there is enough. It's important to remember because some people like numbers and they like to say, hey, this administration is not doing as good a job as others because they haven't returned as many rules. You don't have to return a rule to have an effect.

My counterpoint to this, however, is who is the decision-maker? I don't mean this in the sense we were talking about this morning about the power of the President and whether or not the President has the authority and the power to make these decisions. What I'm talking about is it's not even just Sally in OMB and whether she can speak to the President; it's whether a GS-13 or 14 staff person working for Sally is speaking for the President. Sally doesn't know—didn't know about every change that the desk officers would make or suggest to the agencies in a particular document. And the agencies don't feel that they can fight on every one of these. I am only aware of one instance in the Department of Transportation where any Secretary took an appeal to the President of the United States. You give in and you don't necessarily always make the rule better because some staff person won't approve it until it's changed.

My second point is about OMB review—they do three very valuable things while we're looking at the rulemaking document. Number one, they do require high quality analysis. This is not to say that a lot of agencies wouldn't otherwise do an excellent job. It is, however, to say that there are some that would not, and indeed there may be more than just some; there may be a lot of agencies that wouldn't do an analysis of any kind or if they did it, it would be relatively weak. OMB is there. They are requiring the analysis in appropriate situations. They also ask good questions. They have a tremendous amount of experience in the area; they have very good economists. They can make suggestions on better ways to look at things. They can help the agency do a better job. And they're also, as I said earlier, one step removed so they can be a bit more objective sometimes.

My third point in this area would be they also get other agencies involved more effectively than sometimes the department or agency can. I can go to an EPA or I can go to a Department of Labor, I can go to a Department of Commerce, but I may not necessarily be able to get a good decision out of them in a timely manner. Or I may get a decision where there's disagreement. OMB can help get the decision out in a timely manner, and they can help make sure that there's a reasonable agreement that will resolve the issue if they can't. Both agencies are working for the same president. Somebody's got to decide how to resolve this.

There are some counterpoints here, however. Agencies don't always have all of the data that OMB would like them to have. They have a lot of expertise. When an FAA pilot, an expert FAA pilot has flown in the cockpit for hundreds of hours, he may not have data but he's got some real good ideas of what works and doesn't work well in the cockpit. We can't always come up with the data

to prove the things that we believe are necessary to ensure safety. And it's sometimes referred to as tombstone mentality: you have to wait until people die so you have good data to show that you need to take action to save the next set of lives.

I'm not saying this is an everyday problem, but it does happen and sometimes Congress will get so frustrated at the inability of the agency to get the rule out that they will take away the authority to require any kind of an analysis to support it. And I'm not going to tell you that's a good idea. I think that's a bad idea. I think analysis can be helpful; I think the agencies may not necessarily have to make the decision based on whether the benefits exceed the cost, but ought to know what the rule is going to cost, how many people it's going to affect, and what the benefits are going to be, and indeed whether they've done things like already count those benefits to justify another rule that they'd issued earlier.

Another problem—another con point is there should not be an assumption that OMB economists are necessarily better than agency economists. We've sometimes confronted that when we say, "well, our experts say," and OMB staff will say, "well, our experts say" and therefore it has to be changed.

And regardless of whether you think that rulemaking is a political process, we have to remember that if it is too blatantly a political decision, the agency may have trouble effectively implementing the rule. You want people to think that it is a good, objective way to fix a problem and not something that was a political decision to satisfy certain parties.

And then, to use a phrase that Sally used for many years when she was at OMB, OMB has to avoid saying, "we gotcha." There is a tendency sometimes to have to prove the need for your office. I could have a very similar kind of problem in my situation. And if you have to prove your need by saying to the agency "I've got you," you're embarrassing the agency and not having the good working relationship that Sally referred to.

My third and final point was that OMB does issue good guidance. They do some very, very good work with respect to economic analyses. They're working on something now on risk assessments. They've worked on some things on peer review. They provide good, helpful knowledge to the agencies, especially those that are not used to doing these kinds of analysis. And there are some situations, such as discount rates or having a uniform decision from OMB on what discount rates are appropriate, that can be very helpful.

Here again, let me put in hopefully the last pitch you'll get today about the Administrative Conference in the United States: OMB is not, and they would probably agree, they are not neutral experts. That's an important counterpoint. They can put out very good economic analysis, and you may not see our next two speakers agree on whether a particular kind of analysis is good. They may think it hurts or it helps their particular interest.

ACUS was a neutral body. OMB is involved in the rulemaking decisions and you don't always get truly objective neutral advice from them. But also and I want to stress this—the term you've heard a few times today—the ossification of a process. Sometimes

there are too many requirements, too many “guidance documents” that are out there. I had one person I used to refer to quite frequently when I had got to my job because I had relatively little experience in the rulemaking area; most of my experience was as a litigator, so I used to call him for help all the time. And one time many, many years later I called him to remind him that his agency had not done something they were required to do under a particular requirement. And he said “Which requirement, Neil? I mean, there’s so many of them out there that change so frequently neither I nor my staff can keep on top of all of this stuff.” So what is intended to be good, what is intended to be helpful, sometimes can overwhelm the process.

Again I want to stress I am positive on their role. It helps me do a better job. That they’re there—their mere existence helps me. It works reasonably well—the process—but there’s room for improvement.

Thank you. [Applause.]

Mr. COPELAND. Thanks, Neil.

The next speaker is David Vladeck. David is the Director of the Institute for Public Representation and associate professor of law at Georgetown University Law Center, teaching courses in civil procedure, and first amendment litigation in Federal courts. He also serves as a scholar with the Center for Progressive Reform and is on the Council of American Bar Association’s Regulatory Practice Section. Prior to joining Georgetown’s faculty in 2002, he spent over 25 years with the Public Citizen litigation group, serving as its director from 1992 until 2002.

David?

DAVID VLADECK. Let me just begin by also putting in a plug for ACUS. I didn’t realize that was one of our jobs today, but having served on the Administrative Conference for quite some time, it’s the best value for your dollar in Washington, D.C. We were able to bring together groups of scholars and practitioners, Government lawyers, and others to roll up our sleeves and work shoulder to shoulder on real issues and put partisanship aside. The demise of the Administrative Conference has really been, I think, a blow to the development of administrative law. I think it’s high time that we saw it renewed.

I do not have the same praise, however, for OIRA, and what I’d like to do is spend my brief time this afternoon persuading you that centralized review for its own sake is not a good idea. After all, the person who gave us centralized review—it was not Ronald Reagan; it was Stalin.

[Laughter.]

Mr. VLADECK. And the question really is whether centralized review the way we practice it makes any sense. And I’d like to explain why I believe it does not, and why Neil’s point—although I rarely disagree with Neil—well, Neil’s points can be addressed more sensibly in other ways.

Indeed the ultimate irony I think is that if you measure the output of OIRA, if you measure whatever benefits Neil and Sally are willing to ascribe to, and you subject it to the cost-benefit analysis that OIRA subjects every major rule to, OIRA flunks. It ought to

be dismantled, it ought to close up shop because, under any kind of cost-benefit analysis, it fails.

Why do I say that? I think there are six major flaws in the way centralized review works in the United States and has worked since the first days of the Reagan executive order. For one thing, it's a one-way ratchet. For people who care about public health, there is only one way OIRA reviews rules: not to strengthen them, but to weaken them. OIRA's mandate is to buy protection at the lowest cost possible. Public health? A secondary consideration to economics.

Discounting is a big issue. Human lives that are going to be lost 20 or 30 years down the road are devalued to the point of having no real play in the analysis that goes on at OIRA simply because the time value of money ends up discounting the value of their lives to the point of nothingness. Old people, they don't count; their life expectancies are too short. Injuries, illnesses, things that are hard to quantify apart from death, those factors, too, are generally put to the wayside.

So the costs of substances like cadmium, which rot out workers' kidneys, are devalued by OIRA because it is too difficult for economists to figure out exactly what kidney dialysis, the loss of income, the pain that the family suffers—it's too difficult to quantify those costs and include them in the rulemaking calculus.

So the first problem with OIRA is that it is, and always has been, a one-way ratchet. It's a way that the administration, if it is so inclined—and I understand at times some administrations have not been so inclined—but it is a way for the administration to ratchet back the rulemaking process in a way that detracts from the statutes that Congress passes. If Congress requires rules to protect workers, it doesn't say "as cheaply as you can and we don't really care very much if a few of these people die because it costs a little money to protect their lives," yet that is the mandate OIRA has taken since its very first days, and that is the way it is operated.

Secondly, we've enshrined institutional incompetence. It is hard for me to sit and listen to Neil praise OIRA when we both worked on the rules that the Department of Transportation has tried to issue to protect the American people only to have their technical judgments about safety overturned by OIRA. The next car you buy is likely to have a gauge on the dashboard to tell you when its tires are under inflated. It turns out that's a very important safety technique. NHTSA developed a rule that should have been in effect now to devise a standard to ensure that the warning light on your dashboard actually tells you when tires are deflated. NHTSA has engineers. It has people who understand automobiles from top to bottom. NHTSA's judgment on this was overturned by the economists at OMB and OIRA who had been pressured by the tire industry to try a different approach. Ultimately, we got the courts to set it aside, but the delay in the rulemaking will cost people their lives. Why? Because OIRA's economists told—and mark my words they tell—NHTSA that it had to change its standard. That is (unintelligible) in the worst way. We are having economists second guess highly technical judgments made by agency experts. That is not good government.

Third, secrecy still affects the process. Yes, Sally made certain changes that I think did provide a measure of openness that was nonexistent in the black-box days that preceded her when you had no idea what was going on in OIRA. Now there is more of a record, but the opportunities for secret dealing between OIRA and agencies exist. They are still being used. To describe the process as open in my view is simply inaccurate. There is enormous amount of communication between OIRA and the agencies that precedes the rule-making process. It is off the record, it does not ever appear in any public rulemaking record, and that is where the real work is done.

There's enormous delay that is still built in to the process. We've heard the word ossification used many times this afternoon. That is simply an academic way to say that the regulatory process is now so overlaid with procedures, with regulatory requirements, agencies cannot get their work done in a reasonable time. OSHA cannot promulgate a standard in under a decade—a decade, that's 10 years, a decade. OSHA is confronted with a serious problem about workplace safety but must go through the regulatory process and to satisfy its masters at OIRA. It's going to take 10 years to have regulatory agencies that are charged with protecting public health and safety having to run a Rube Goldberg kind of gauntlet in order to take action to protect the public. The CRA is irrelevant in large measure because the discretionary rulemaking done by health and safety agencies is over. Most of the rules that you see as part of the CRA are rules that are required in some way by statutes that you wrote.

The tire standard that Neil and I both worked on—that wasn't because NTSA decided it was a good idea; it was because you in Congress decided it was a good idea, and told the agency to issue a standard. Of course, you didn't say "issue the standard that OIRA wanted," which is why the courts set it aside.

There is also the problem, I think, of the agency personnel having to share two masters. Neil obviously has successfully navigated that relationship. Many others who have served in high capacities in administrative agencies complain bitterly about OIRA, and having to first do your homework and have the teachers at OIRA grade it and often send it back. Not because the agency fails to satisfy its statutory mission—the mission that you in Congress has given it—but because the agency has failed to do things the way OIRA wants them to be done, not the way the statute requires.

One of the hidden costs of OIRA—this is my fifth concern—is that it has driven regulation underground. Part of the reason why there are fewer discretionary rules is because it is not worth it for the agency to have to submit to the OIRA process. So much of what took place in the course of rulemaking, where the public can get involved, where regulated industry can get involved in an open and transparent process, much of it now happens in ways that are completely untransparent. They are in enforcement actions. They are in guidance documents that are issued by edict, not after a public process. Much of the regulation of the economy these days takes place not through those notice and comment rules that are promulgated in the public process, but are simply issued by agencies. That to me is a serious step backwards. It has serious rule of law impli-

cations, but it is a direct and traceable consequence to the ham-handed way OIRA regulates what the agencies do.

So, you ask, what is the problem? If, in fact, OIRA pushes an agency to do something that is inconsistent with its statutory mandate, where are the courts? Why aren't there more challenges to OIRA's authority? The answer is, I think, quite a simple one: oftentimes the rules are changed in a way that favors industry at the expense of public health, and there are rarely organizations that have the resources to undertake judicial review. I've been involved in many cases challenging agency rules changed as a result of OIRA's actions, and by and large we're pretty successful. But judicial review is frighteningly expensive, it takes enormous amounts of resources to do, and because the harms that are visited by the way OIRA does its work tend to be borne very broadly by the American people, it's often the case that there is not an organization, an advocacy organization or some group of constituents, that are able to take the case to court.

So the process I don't think has a clear self-corrective mechanism other, I think, than the people in this room. One constituency that is harmed each time OIRA tells an agency to do something that is not consistent with the statute that the agency is enforcing is Congress. When OIRA first started to engage in strict regulatory review, the largest outcry came from Congress. At that time it was a bipartisan outcry even though, as Sally pointed out, we had a Republican president and a Democratic Congress. I don't think there has been an oversight committee hearing on OIRA and its function in quite some time. I know the GAO's issued some reports, but I think Congress has largely been quiescent on this issue, and if Congress wants to cede its authority in this way to the President, that is Congress' choice. But it is a choice that has, in my view, quite profound and quite deleterious consequences.

Thank you very much.

[Applause.]

Mr. COPELAND. Our last speaker here today is Bill Kovacs. Bill is vice president for environment, technology, and regulatory affairs at the U.S. Chamber of Commerce. His division initiates and leads complex multidisciplinary national issue campaigns on such issues as sound science in the regulatory process. In his former life, among other things, he was chief counsel and staff director for the House Subcommittee on Transportation and Commerce.

Bill?

BILL KOVACS. Let me get rid of all these notes up here. Well, thank you very much. It's really pleasure to be here, and I guess it's a unique situation for me. I had two firsts today. I was looking over the panel: I am the only person in the entire program who's not a law professor, so I don't know what that means. After what I say I will probably flunk all of their courses. And the second, which is really the more remarkable, is I'm probably going to be in the process of defending the deep, dark OIRA.

I would make the argument that the agencies, not OIRA, control the process, and the agencies through—I'll use the case example of the Data Quality Act—have absolutely submarined all of the OIRA authorities. So why does the U.S. Chamber care about the regulatory process and all of these technicalities, and whether Congress

is doing enough or the President's doing enough? Well, we care because we're the ones who pay the bill. The bill is \$1.1 trillion a year, and that's about four times more than all the taxes paid by corporations in the United States.

Second, the business community has to deal with roughly 191,000 regulations. And when you deal with this process every day you understand how complex they are. And the Congress—I mean, I'd be the first one to tell you, these people have tried. I mean, you've got more laws trying to control the regulatory process than you can get. And they have some good ones like Section 602 [610] the Regulatory Flexibility Act, where the agency is to review the regulations every five [ten] years and come back and inform the Congress as to which regulations they're going to do so they can get rid of old ones. And the agencies have, in effect, told Congress to go to hell. And Congress does have a lot of stuff on its plate, so everybody faces this standoff that the agencies tell OIRA to go to hell and they tell the Congress to go to hell. So this is why when we're dealing with it; the focus is really on the agency.

And the case example is really the Information Quality Act. When Congress passed that act in 2001, what it specifically said to the agencies is, look, we have to make the system transparent; we have to use the best quality information; it's got to be objective, it's got to be useful, and it's got to be accurate. And from that OIRA began to go out and then build one a series of regulations throughout the agencies on how to implement the Information Quality Act plus an appeals process. Secondly, they began putting in what they called the peer review guidance, which is to say that we ought to have the right types of scientists reviewing the program. They then moved in to risk assessment, and they moved in to a variety of other areas such as good guidance as to what's the difference between a regulation and just something that's more of an interpretative statute.

But each of these rested upon the Information Quality Act, so the key, when you're looking at OIRA's powers—yes, you have Executive Order 12866, which has been discussed all day, which gives certain authority, but that can be repealed instantaneously by the next administration. The IQA was the first time there was an attempt to put some real teeth into OIRA, to begin driving the agencies to use good information.

So why does the Chamber care about good information? One is it has been our policy because we're the ones who get sued when there's a screwup. If we comply with a regulation and it's wrong later, it's not a defense: we still get screwed and we still get sued. That's where industry is. So we have taken the position that there needs to be total transparency in the process. Not one single environmental group or public interest group has ever stated, "we agree with total transparency in the process." Put some models out in to the public domain. Put the studies out; put the identification of all the grants out. We're willing to live with the information because the information helps us prioritize the risks, and that's what's most important. It helps us prioritize how we're going to spend our money, and in the end that's how you make good public policy. It's really through good information.

Now, the Information Quality Act was attacked literally by every public interest group in the entire United States. No one supported it. We were going to overwhelm the agencies; it was going to be like hundreds of thousands of requests were going to put in. Well, none of these people have ever figured out how hard it is to file an Information Act request. Initially, in 2003, there were 56 information requests that were filed; 24 were appealed. In 2004, there were 129 with nine appeals; in 2005, there were 25 with 11 appeals; in 2006, there were four with no appeals. And I'll tell you why; it was going down hill. But the difficulty of filing an information request is that you have to figure out why the data that's being used by the agency is wrong, and then provide them with the correct data.

So in one instance—and I'll give you an example of how far off base agencies can be—EPA has a variety of databases; they have hundreds of them. Well, we took their 16 main databases and we decided to look at the value of the chemical in each of the databases. Well, in 16 databases the same chemicals all had different values. We said, wow, what does that mean? Well, we had our experts in environmental issues go back and recast the standard cleanup of a superfund site. Well, the difference between using the transport database and the CHEMFATE database was the difference between a \$7-million cleanup and a \$65-million cleanup. So it transfers to the real world. We decided—we told EPA, we're not suing them; we don't care. This is a process that's very complicated. We need to get it done. We gave them 100 percent of all of our experts' work. We gave them all the databases, all the printouts. We gave them everything. And what we got back from EPA is "petition denied."

Then we appealed and we said, look, what's your problem? We need some specifics. Well, they said a variety of very interesting things. One is "based on your petition we put a disclaimer on the database, so you use it at your own risk, and if it's wrong, who cares because you're the one responsible." Two, "we've transferred ownership of all the databases so we don't even own them anymore; they're just on our website—we're borrowing them from Syracuse Environmental." So we went through. They said, "well, we'll reconsider it again." Two and a half years later, EPA is still reconsidering the same thing and we've given them all the information. This is crucial public policy.

The second one, which was the salt litigation, when we took something a little bit simpler and we said, does the Data Quality Act have any ability to—or the Information Quality Act, have any ability to be enforced? And the Federal court said, no, there's no standing on any third person anywhere in the world. There was no injury in fact. This is completely between OIRA and the agencies. Well, OIRA has no ability even to make the agencies, once they file a denial of the information request, even to review it again or put it before an independent ombudsman. So when we look at OIRA we look at them as—they're really, I think they're a valuable organization in the sense that you have somebody to talk to, but you can also, if you want to, go and get an insurance policy and you can go to a therapist too. But the bottom line is you get the same type of information out. OIRA really doesn't have that kind of power.

So we in the business community, we think it ought to be transparent, we think everybody in this room ought to agree with transparency and the business community is going to lose in some of them. Sometimes they're going to win, but the bottom line is good policy is going to be made because we can prioritize risk. If we're going to take this process seriously, the agencies need to understand that they have to cooperate with Congress. There are laws on the books, and they have to spend a little bit of time helping Congress out. They are the ones with the expertise. Two, I think you need to enact into law Executive Order 12866 so that the agencies know that this has to be done. I think the agencies or OIRA need to have an ombudsman put in place either within the agencies or in OIRA so that you can take one of these data quality requests, which require enormous amount of effort, but when people put them forth they have pretty good information. This isn't like a FOIA request where you say "give me what you've got."

This is a very hard process where you go through a lot scientific study, and I think if you want to make the process more cooperative, the Information Quality Act really does that because it gets the agency and the public—and I'm not talking about the U.S. Chamber. Environmental groups can file it. Public interest groups can file it. We don't care. Let's challenge the information in the public. We're totally against—if these conversations, all the secret stuff between OIRA and the agencies is true and, well, you know, we don't like that backdoor stuff either; we think it ought to be transparent. But we need to move forward. We need to establish an independent right to sue under the Data Quality Act so we can seriously challenge it. We'll probably need to consider extending the Mandates Information Act to data quality and allow Members of Congress to actually put forth a point of order if the agency doesn't comply with like Section 602 [610] where they actually review the regulations, because when you have 191,000 regulations, it's hard to believe they're all needed.

So what we have to do if we're going to really get a handle on the regulatory process is to begin looking at the 191,000 regulations and say, out of this group, how many are business practices? Well, that probably takes care of 100,000 by this time because a lot of them have been around. You might get down—we've been talking three or four hundred; you're probably talking 50. But the 50 that are out there that are wrong are a really significant cost to this country and to the business community and to our international competitiveness. And so we need to get the process right and there are mechanisms within it.

And with that, I'm glad I had the chance to defend OIRA today and the agencies, but, anyway, thanks, and we'll have a discussion.

[Applause.]

Mr. COPELAND. Any quick rebuttals from any other folks on the panel? Yes?

Ms. KATZEN. I would like to make several points, which I will try to do very quickly. One, any call for total transparency that is based on the IQA—the Information Quality Act—is the height of hypocrisy since the Information Quality Act consists of three paragraphs—I will repeat—three paragraphs in a 700-page appropriations bill that was put in in the middle of the night without any

hearings, not 1 day of hearing, no discussion on either floor. It is a total nontransparent mandate. So I find that worth saying.

The other thing is that \$1.1 trillion as the cost of regulation is a figure that is so outrageous—it is concocted by extrapolating from extrapolating from extrapolating, and keeping the costs that were estimated before regulations ever even were suggested, ever in effect. Once they're made in effect, American ingenuity goes to it and the costs come down appreciably. The economic regulations are based on percentages of GDP. There are any number of studies that show that this 1.1 trillion, which is used day in and day out as a rhetorical gesture, should be put on the shelf, and we ought to talk about what's really there. The same with the 191,000 regulations. It's made up. It's not what people deal with.

I would also say, with respect to David, that you surprised me in that you seem to be worrying about the costs of OIRA involvement, never reflecting on the potential benefits. And it ill behooves, I think, someone to look at only one side of the equation.

[Laughter.]

Ms. KATZEN. I'm drawing a laugh, which is what I wasn't trying to do. But you have to look at the costs and the benefits. There may well be costs, although I don't necessary agree with him on all of them. There are also enormous benefits beyond those that Neil mentioned.

Mr. COPELAND. Okay, questions from the audience? (Cross talk.) I'm sorry, go ahead.

Mr. KOVACS. Well, I'm glad Sally's—(inaudible)—and I'm glad you dropped your theory that you said you used when you were at OIRA, that you—(inaudible)—or whatever.

[Laughter.]

Mr. KOVACS. Let me say several things just—

Ms. KATZEN. I'm not at OIRA now.

Mr. KOVACS. One is that if you go back—and this was all in the court record—there were 5 years of appropriations committees going over requiring OIRA to develop guidelines on better information. They didn't do it. And there were hearings on it; they may not have been in the—(inaudible)—but there were 5 years of committee reports. So that's just one of those fallacies that, if you keep on saying it enough, you hope it will be true.

The second thing is in the Crain and Hopkins study was put out by the Small Business Administration, and the last I checked, that's another branch of Government.

And finally, as to the 191,000 regulations, if you ever looked at the CFR, it's about eight feet by 14—it would be about 16 feet by four feet tall, and that's a lot of words, and they put out about 4,000 regulations a year and they put 43,000 out in 10 years—so 87,000 pages in the Federal Register. So maybe it's not 191; maybe it's 190, maybe it's 193, but it's up there. Beyond that, I don't know how you count.

Mr. COPELAND. Questions from the audience?

I have a question. Bill Kovacs recommended perhaps taking Executive Order 12866 and putting it into statute. I think I know where David would fall on that continuum, as to whether it should or shouldn't, but Sally and Neil, what do you two think about that?

Mr. EISNER. I don't think it would be a good idea to put it in the statute. I think it's an executive order that will need changes over the years, if for nothing else than to take the vice president out of the process and put the White House chief of staff into the process because of a particular administration. It's too difficult to amend going through statute. As someone mentioned this morning, you don't know what else might get added to it when you're trying to make a simple little fix like that.

Ms. KATZEN. I agree.

Q: (Off mike.) I'd be worried about the constitutionality of Congress telling the President how the President had to supervise his Cabinet and sub-Cabinet appointees. There are many, many good reasons why codifying the executive order is a bad idea, but one issue that hasn't been mentioned, I think, is the serious separation of powers problem that will come from that.

Ms. KATZEN. Not surprisingly, both the Clinton administration and the Bush administration have opposed it. They come from very different places, but they both oppose codifying that executive order.

Mr. COPELAND. Mort?

MORT ROSENBERG. I assume by "codification" the panel and Copeland may be saying let's take 12866 and make it a law. But why would you do that? There are other options. You could authorize the President to issue an executive order regarding the review of regulations, and put in there a bottom line, let's say, of transparency that's better than what's here now—put that in the law and give the President general authority that he has assumed for the last 26 years.

Mr. VLADECK. I'd like to see the signing statement were the President presented with that law.

[Laughter.]

Mr. VLADECK. I mean, that may be a better stratagem from Congress' standpoint and one way around some of the obvious separation of powers problems that would come from simply trying to enact the executive order into law. But I think the President would still be very unhappy about the whole—how he ought to exercise the coordination function among the executive branch officers.

Mr. COPELAND. There have also been proposals to expand OIRA's review to include independent regulatory agencies, given that they constitute a significant portion of the regulatory costs—however large they are. I know, Sally, whenever you wrote Executive Order 12866, you contemplated that, but then decided not to do that. Could the panelists talk a little bit about whether agencies like the FCC, SEC, and so forth should be covered by OIRA review?

Ms. KATZEN. Federal Reserve—

Mr. COPELAND. Federal Reserve?

Ms. KATZEN. Federal Election Commission.

No, I think this is a prudential matter. When Boyden Gray was drafting 12291 for President Reagan, the same issue was raised. And as I said, the Department of Justice opined that the President had constitutional authority to extend to independent regulatory commissions. They chose not to do it. We reconsidered the question and chose not to do it. I think there is an aspect of an independent regulatory commission that says it should somehow be kept a little

distant from the validly political actors. And this was not in that direction, and I think it's a sound one. It's not one based on the law. I think we had the authority; I think it's purely a question of desirability.

Mr. COPELAND. Okay, anybody else?

Bill?

Mr. KOVACS. I think we ought to get it straight while we've got her.

[Laughter.]

Mr. COPELAND. Okay.

Yes.

Q: I have a question.

Mr. COPELAND. Please identify yourself first.

Q: I'm sorry. My name is Letesha Love. I'm from the U.S. Government Accountability Office. And one of the things that we've talked about is 12866, and 12866 has a requirement also for agencies to take a look back at their regulations. We've been focusing here today mainly on the upfront analysis that happens, which is where most of the focus really happens. But I just wanted to get your take on how important you think that aspect of review is.

And also my second question is for Mr. Vladeck. And you mentioned that you don't think a centralized process for overseeing agencies' analyses or review is the way to go, and I'm wondering, do you have a recommendation for how to ensure that agencies are actually conducting rigorous analysis outside of the current process.

Mr. VLADECK. If I may, let me start with your last question first. There is built in to the APA, the Administrative Procedure Act, enormous opportunity for public review of the agency's decisional process. The agency is required to put on the public record all of the data, all of the information, all of its analytical work that it is relying on when it is issuing a rule. Industry and other Government agencies routinely participate in the rulemaking process. When OSHA issues a rule, you will see comments from other agencies, including the EPA, including at times other health and safety agencies, the Food and Drug Administration.

So to the extent that the argument is you need OIRA review to simply enable an open and public process, that is not so. This is separate and apart from the longstanding APA process. So if all you want to do is encourage better analysis and better government, there are opportunities to do that without creating OIRA and without giving a lot of separate and special authority.

The second point is this: I don't disagree that—if I were president, which isn't going to happen, but if I were president, I too would be very attracted to the idea of having some centralized control in the regulatory process. And I always thought the better of the Reagan executive orders is the one that's essentially ignored, which is 12498, which is the coordination executive order that charges OIRA with the responsibility of making sure that the agencies are working from the same page and are working collaboratively.

You still see many agencies addressing similar subject matters, but doing it quite independently of their sister agencies. I think that is a failing of OIRA. If I were organizing some form of central-

ized review, I would do it that way. I am unalterably opposed to the idea that OIRA ought to standardize things like risk assessment and cost-benefit analysis. The kind of cost benefit work, the kind of risk assessment work that one agency does is not easily transferable to the next.

OSHA deals mostly with epidemiological data, which is very different from the kind of data that the Food and Drug Administration looks at—very different from the kind of data that Neil has to analyze when he's working on a rule. The idea that there should be a cookie cutter approach to something like risk assessment strikes me as indefensible, and yet if you create an organization like OIRA, the hydraulic pressure is to use that power as broadly as possible, which is why we're seeing proposals out of OIRA to standardize all of these techniques government-wide without recognizing the unique responsibilities each agency has that vary tremendously depending on their statutory mandate.

Mr. COPELAND. What about the other part of her question? Does anybody else have a comment on the issue of look backs?

Ms. KATZEN. I do.

Mr. COPELAND. Okay.

Ms. KATZEN. Do you want to go first?

Mr. EISNER. Three important points about doing reviews of existing regulations. First of all, most people do not understand that every day of the week a well-run industry is reviewing its rules. If there is an accident, the next morning at the highest levels people are talking about why their rules did not prevent that accident. Every day inspectors are out in the field talking to people who are affected by their rules. They're seeing problems; they're recommending changes. The list goes on about what agencies do every day, and that's oftentimes lost on people who say you need to have some kind of a formal review process in order to fix your rules. Look in the Federal Register; most rules are not new rules; they are amendments to existing rules oftentimes resulting from agency decisions, but the rules are not working the way they were originally intended or they could be improved.

Second point: Some agencies, like my Department of Transportation, do try to do regular reviews. Every 6 months in our agenda we have an Appendix D that is a 10-year rolling program for us to review our existing regulations. There is very, very little public interest in that, very little participation, despite the fact that we encourage it.

The third and very key point I'd make is it's very resource intensive to go back and review existing rules. Agencies—I know one in particular that had an office set up to do nothing but review existing rules, and little by little they had to pull people off those projects to work on other requirements that they had: statutory mandates, problems they identified through other processes. And when I've talked to other agencies about it, that's one of the recurring things I hear: We want to do more; we don't have the resources.

Mr. COPELAND. Sally.

Ms. KATZEN. Yes, I agree with everything that Neil said. All presidents in my lifetime have asked their agencies to go back and dig out rules that they don't need anymore. They hear the rhetoric

about red tape and all these rules, and they say give me some I can get rid of. Every president tries it and the pickings are pretty lean. I mean, Neil said there's not a lot of public participation in this. I went to the Chamber of Commerce, to a big meeting there, and said, "tell me the rules you most hate, or even the ones you slightly dislike. Give me some nominees. Let me take a look at them and see if we really need them on the books." And I got very little. Now, maybe that's because I was representing a Democratic president and they didn't want to come forward in that light, but with President Bush, John Graham called for nominations for rules that could be reviewed and reconsidered and he didn't get 100,000; he didn't even get a thousand. He got in the tens and twenties of suggestions of rules that were filtered through back to the agencies.

The other thing—I wrote down something here—remember, a lot of the rules on the books are things which have already now been incorporated in our lives. Neil, the two biggest regulations—well, not the biggest regs, but the two regs that I lived with, was in the seventies, the seatbelts in cars. That's a regulation, to have seatbelts in cars. You want to review it? You want to spend time figuring out whether that makes sense? And let's say we decide now we don't need it because we have these airbags, which was the second one. You want to review that one? Let's get rid of seatbelts. How many car manufacturers are going to applaud that? They've already changed their production line; they put the seatbelts in. It's there. It's embedded costs, but more importantly, they are now selling safety. How many times do you turn on your television and see cars running into brick walls and they say, "our car is safer because we've got roll over, we've got side airbags, front airbags, back airbags?"

So these, quote, "onerous regs" and "preexisting regs" are in large part, I think, now part of our lives, and that whole effort, being as resource intensive as it is, should not be where the action is.

Mr. COPELAND. Bill?

Mr. KOVACS. I want to just remain consistent with Sally—(inaudible). There is a point for agreement. One of the things I suggested; when you look at the regulatory process, it isn't as complicated as everybody thinks. There are these 191,000 or whatever number there are, but a lot of them have been incorporated. A lot of them are general business practices today, and if you pulled them out it would unwind the system. But there are hundreds, and when John Graham did seek nominations there were hundreds, and they were clumped in a group of areas, especially in a lot of the privacy areas and the medical areas, some of them in environmental areas. They were clumped. And if you ask me how you deal with regulatory process. I do think look back is important because the agencies do have this information and they do know where there's a problem, and there is Section 602 [610] on the books, and they should be talking to Congress.

And, Neil, DOT does an excellent job of complying with 602 [610], but it's one of the few agencies. All of the other agencies combined may do five rules that are private rules. So the look back is important. That's really the first thing.

The second thing is when you analyze the regulatory process, break it into industry groups. Break it into the groups where, you know, it's just an old antiquated thing. If it shouldn't be in the books, get it off. Recognize that large groups of these rules are general business practices. Don't worry about them, and then take those 100 or 200 rules and really have more of an analysis. And maybe when you get to the cost-benefit, rather than all the speculative work that people talk about when we project the cost-benefit analysis going forward, let's take some of the rules—PM or a controversial rule—and let's look at what did we project and what did it really cost, and let's get real numbers as opposed to using phony numbers all the time.

So I think there are a lot. If there were a lot of nominations then we can go back to the process they were giving out to the agencies and very few agencies did anything with them. They just sort of ignored them. Again, going back to the fact that OIRA lacks the kind of power to make agencies do them.

Mr. COPELAND. We are almost on time—a little bit over. I'd like to thank this panel very much and then call Ray Smietanka up. So thanks first of all. [Applause.]

While this panel leaves and Ray comes up here, let me tell you a little bit about Ray. He is the majority chief counsel of the Subcommittee on Commercial Administrative Law and the House Committee on the Judiciary, serving in that capacity since 1995.

Ray and his colleague, Susan Jensen, who he was sitting next to there, are the folks that have been sort of the guiding force behind a lot of the stuff that Mort and T.J. and I have been doing over the last couple of years, trying to organize symposiums like this one, helping with the organizing of hearings, research like Jody Freeman's and Bill West's on the early stages of the rulemaking process. It was Ray and it was Susan that were really the starting point of that. And so I'd like to ask Ray to just end up our session today, just to talk a little bit about it from his perspective.

Thanks.

RAY SMIETANKA. Thank you very much, Curtis, and I want to thank you again and Mort Rosenberg and Dan Mulhollan, who helped sponsor this thing, and really have done the lion's share of the work on the Administrative Law Project, which I'm sure you've probably heard about. Everybody in the room here has probably contributed in some way. And I look around and I look at the program, and I see names and faces of people who have testified in front of our Subcommittee. Just about everybody out there has probably testified in front of our Subcommittee over the last 20 years, and it's good to see you all again.

I'm here actually again to speak on behalf of Chairman Sensenbrenner and Chairman Cannon, who obviously can't be here today because the House isn't in session, and he won't be here until tomorrow night. But they appreciate your efforts, and this is all going to be a part of the report on the Administrative Law Project, which hopefully will be coming out sometime later this month and transcripts of the—this is the third seminar that Morton and Curtis put on. I forgot to mention T.J. too. T.J.—pardon me—T.J. Halstead, who has been also very instrumental in the project.

And in any event, all the issues that have been brought up are going to be extremely useful in the future and will form the bulk of the report, but also I think it lays the bases again and I'm sure you remember if you were at the second seminar I made a pitch on the reappropriation of money for the Administrative Conference of the United States, which would be one of the best things that the Congress could do to improve the administrative law function.

I think Sally and David had talked about "is what it costs important, or is it what you'll get for your money that's important?" And I think the desirability of ACUS is in general agreement here, and certainly is in our Subcommittee. Mr. Cannon has become devoted to this idea that we can save money—vast amounts of money—by reappropriating and putting together ACUS as a functioning body to consider all these issues related to administrative law, the efficiency of agencies, the development of an efficient and working judicial review system, administrative review system for regulations, and the implementation of those regulations.

So again thank you very much. I appreciate it. I'm sorry I wasn't here for more of it. Some issues came up today that—I'm beginning to feel like Rocky Balboa in maybe Rocky IV. I can't remember.

[Laughter.]

Mr. SMETANKA. Am I about to fight Apollo Creed or is it going to be Mr. T or the big tall Russian guy? I'm not sure. And I have to go back and do some more of that, too, so I would much rather have spent the entire day listening to the issues here. I enjoyed the seminar we had at American University several months ago and if this last panel was any indication of what was done earlier, it was fascinating. Some of the issues that were talked about we've considered in our subcommittee for years. And I think David had testified on regulatory impact analysis years ago and maybe a few other issues, too, and Sally had been a witness many times on various things.

Anyway, thank you very much. I appreciate it and this has been, I think, a very useful and enlightening program for everyone. Thank you very much again. [Applause.]

Mr. COPELAND. I appreciate everyone's attendance here today. Thanks again.

[Applause.]

