ACUS 2.0: Present at the Recreation

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INTRODUCTION

By a variety of circumstances and some good fortune, I seem to have been connected to the Administrative Conference of the United States ("ACUS" or "the Conference") for much of its fifty-year life. This has given me a distinctive perspective on the Conference's value, limitations, and prospects for the future. With the reader's indulgence, I will use these three desiderata to frame my ACUS experience.

My commission for a five-year term as Chairman of ACUS was signed by President Obama and Secretary of State Clinton on March 4, 2010. So by the time this is published, my term will be up. But thanks to holdover authority contained in the Administrative Conference Act,[1] I may still be on duty.[2] After being sworn in by Vice President Biden, I officially became the tenth Chairman of the Conference. Then it hit me. I was the agency! Since ACUS was defunded some fifteen years before, it existed only in the memories of its loyal supporters.[3] We had become something like Lewis Carroll's Cheshire Cat, faded away with only the grin left to entertain Alice.[4]

From April to July 2010, I learned how to "stand up" a federal agency (with the help of dedicated former employees like David Pritzker on detail from the General Services Administration

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1 Administrative Conference Act, 5 U.S.C. §§ 591–96 (2012).

2 *Id.* § 593(b)(1).

3 *See, e.g.*, Jeffrey S. Lubbers, *ACUS 2.0 and Its Historical Antecedents*, ADMIN. & REG. L. NEWS, Spring 2011, at 9, 9–10.

4 *See* LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS 67 (Martin Gardner ed., 2000).

("GSA")). My duties were of the roll-up-the-sleeves variety: finding space (first temporary, courtesy of the Federal Trade Commission, and then permanent, through the GSA), hiring staff, buying furniture, selecting equipment, painting, carpeting, and so forth. There are many tales contained in my diary about encounters with the Office of Personnel Management and GSA that give meaning to the term "dreaded bureaucracy," but suffice it to say, restarting a federal agency is not for the faint of heart.

Once President Obama appointed the Council in July 2010, we were in business. Our first three attorney-advisors—Reeve Bull, Funmi Olorunnipa, and Emily Schleicher (later Bremer)—came on board along with Executive Director Mike McCarthy, General Counsel Shawne McGibbon, Chief Financial Officer Harry Seidman, and Public Affairs Specialist Kathy Kyle.

To bring public awareness to our revival, it was vital that a plenary session be held in our first year. On December 9, 2010, in an auditorium at the National Archives, Justice Scalia swore in our Council and members, and we debated and voted on our first recommendation since 1995. Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*,[5] with Professor Catherine Sharkey of New York University School of Law serving ably as consultant, was enthusiastically adopted, and we were officially back in the recommendation business.[6] Since then, there have been nine plenary sessions during which we have adopted thirty-one recommendations (and one statement). When added to the more than 200 recommendations and statements from ACUS 1.0, the Conference has produced a remarkable body of administrative law and agency management learning, all of which are accessible online at ACUS.gov.[7]

I. THE SINGULAR VALUE OF ACUS

While I have discussed the emergence of ACUS before,[8] here I want to explore the characteristics that make ACUS special. They fall into two categories: how it is organized and how it conducts its acts. An overarching problem of government is how to get agencies to com-

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5 ACUS Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81 (Jan. 3, 2011).

6 *Regulatory Preemption*, ADMIN. CONF. U.S., www.acus.gov/research-projects/regulatory-preemption (last visited May 27, 2015).

7 *Recommendations*, ADMIN. CONF. U.S., https://www.acus.gov/recommendations (last visited May 27, 2015).

8 *See* Paul R. Verkuil, *What the Return of the Administrative Conference of the United States Means for Administrative Law*, 1 MICH. J. ENVTL. & ADMIN. L. 17 (2012).

municate with one another. Agencies are mission-focused to the point of myopia, yet Congress inevitably grants similar missions to more than one agency.[9] ACUS is one of the few places where agencies can avoid insularity and barriers can be broken down.

Other agencies have cross-cutting responsibilities, but they cannot provide what ACUS offers. The obvious one is the Office of Management and Budget ("OMB"), which controls executive agencies through the budget process and oversees rulemaking review through its Office of Information and Regulatory Affairs ("OIRA"). Nothing gets an agency's attention like a budget meeting, of course, and OIRA review of agency rules centralizes the policymaking function. Although these activities can involve more than one agency, OMB often deals with agencies sensation. Another limitation on OMB's reach involves independent agencies, which are sometimes exempted from OIRA review and, in some cases, even from OMB budget review.[10] So while OMB is a much more powerful institution, it does not replicate the role of ACUS.

The Government Accountability Office ("GAO") is another broadly focused institution that plays a crucial role in evaluating agency programs. But GAO acts on behalf of Congress rather than the executive branch, and its relationship to agencies is by its nature more hierarchical than collegial. ACUS's collegial and collaborative functions extend beyond the organizational missions of OMB and GAO. Naturally, ACUS works closely with these agencies and benefits from their expertise and authority.

The Conference's convening power not only brings together agencies, but it adds a broad range of other stakeholders. And while the Conference's jurisdiction, unlike OMB's and GAO's, is limited by statute to procedural or process matters, much government activity

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9 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AIMD-97-146, MANAGING FOR RESULTS: USING THE RESULTS ACT TO ADDRESS MISSION FRAGMENTATION AND PROGRAM OVERLAP 4–5 (1997), http://www.gao.gov/assets/230/224628.pdf ("In response to requests from the Senate Committee on Governmental Affairs and more recently from House Leadership, we attempted to quantify the question of mission fragmentation by using spending patterns to describe the relationship between federal missions and organizations. By mapping department and agency spending against the federal mission areas described by budget function classifications, we showed that *most federal agencies addressed more than one mission and, conversely, most federal missions were assigned to multiple departments and agencies*." (emphasis added) (citation omitted)).

10 *See* DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONF. U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 114 (2012), https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINAL_May%202013.pdf (listing independent agencies excluded from OMB review of budgets, rulemaking, and legislation).

falls under that broad umbrella. As every good lawyer and legislator knows, having domain over procedures often facilitates substantive outcomes as well.[11] For example, with ACUS Recommendation 2012-8, *Inflation Adjustment Act*,[12] our purpose was a process one—to adjust (increase) civil penalties to reflect the impact of inflation. But the recommendation's impact can also be substantive since increased penalties enhance the deterrent effect of proscribed behavior. This recommendation has been endorsed in the President's 2016 budget, and we are working with Congress on potential legislation to implement it.[13]

You might say that ACUS's convening power is its inherent advantage. The fifty government members represent over 200 agencies, and many of the forty public members have previously served in government as well.[14] In the room at our plenary sessions is as much regulatory knowledge as can be gathered in government. I am tempted to say, paraphrasing President Kennedy's reference to Thomas Jefferson at the first White House dinner for Nobel Prize Winners,[15] that we have more talent in the room at the plenary sessions except on earlier occasions when our "founding father," Walter Gellhorn, might have been in the room alone. This concentration of expertise gives our recommendations persuasive force and often wisdom. Admittedly, being persuasive is not the same as being dictatorial. But persuasive force is still a kind of force; it emanates from the quality of consensus judgments about deep and often arcane matters of government process.

Even though we don't issue ukases, implementation of recommendations can be achieved through persuasive force. The success we have with agencies internalizing our work is quite significant. We follow up with agencies to urge implementation of recommendations as

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11 As John Dingell once observed, "I'll let you write the substance . . . and you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law & Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell, Chairman, H. Comm. on Energy & Commerce).

12 ACUS Recommendation 2012-8, Inflation Adjustment Act, 78 Fed. Reg. 2943 (Jan. 15, 2013).

13 OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE U.S. GOVERNMENT: FISCAL YEAR 2016, at 36 (2015), *t* https://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/budget.pdf.

14 *See* ADMIN. CONFERENCE OF THE U.S., GUIDE FOR MEMBERS 3–4 (2011), https://www.acus.gov/sites/default/files/documents/Guide_5-9_0.pdf.

15 *See* THEODORE C. SORENSEN, KENNEDY 384 (1965) ("This is the most extraordinary collection of talent . . . that has ever been gathered together at the White House—with the possible exception of when Thomas Jefferson dined alone." (internal quotation marks omitted)).

soon as they are adopted, and we frequently get appreciative responses. Sometimes it takes a while to receive these messages, but most agencies see it in their interest to comply.[16] Because our recommendations often highlight "best practices," most agencies want to move in the directions we recommend. Still, inertia is a constant reality. It helps greatly if the agencies' views are incorporated in the outcome through representation in the committee process and on the floor of the Assembly.

II. The Limitations of ACUS: Herein of "Should Consider"

The inability to demand compliance with recommendations surely cabins ACUS's authority. Unlike GAO, we cannot require responses to reports and place them before Congress. But the lack of overt authority can be compensated for in other ways. One way in which we get agencies to cooperate is, as mentioned above, by embarking on jointly initiated inquiries, which is a virtue of our structure. The cooperative atmosphere that prevails in our relationship with agencies often helps to smooth the way to compliance. In addition, the relationship of the Chairman of ACUS with the heads of many agencies also allows for productive nudging to occur. This is especially true with respect to the Council of Independent Regulatory Agencies,[17] a group of sixteen agencies that meets four to six times a year at ACUS.

But another potential limitation has to do with how the Conference negotiates the terms of recommendations. There is a patience in our recommendation process that might be called the "should consider" problem. At some point in the process, usually at the committee stage, the question becomes "should" an agency do something or should it "consider" doing so. If you are an agency official you naturally prefer maximum flexibility, so "should consider" has a certain appeal. When committee votes are closely divided, this view may prevail in order to reach a consensus. When these draft recommendations get to the floor of the Assembly, objections arise over the qualified nature of the formulation.[18] Some members may propose

16 While Jerry Mashaw once suggested that a detailed study of the impact of our recommendations would be "a monumental and perhaps impossible task," still we have good results from these implementation efforts. Jerry L. Mashaw, *Reforming the Bureaucracy: The Administrative Conference Technique*, 26 Admin. L. Rev. 261, 262 (1974).

17 *Council of Independent Regulatory Agencies*, Admin. Conf. U.S., https://www.acus.gov/CIRA (last visited May 27, 2015).

18 Several public members have criticized this tendency to qualify or soften recommendations, led most compellingly by Public Member Cynthia R. Farina of Cornell Law School.

that we drop the "consider" language. From a clarity of language perspective, that request can be persuasive. After all if what we have is only persuasive power, why water it down further. The problem, of course, is that the presence of "consider" was a carefully deliberated compromise at the committee stage, which makes it difficult to ignore on the Assembly floor. Despite this, votes are taken on the issue, and it is resolved more often than not in favor of the original locution. Interestingly, sometimes the request is in the other direction—to soften the language by adding "consider" to "should."[19]

Now I am as much an enemy of circumlocution and weasel words as anyone, but, as the agency head, I am also desirous of producing recommendations. Therefore, I accept this convention as a kind of diplomatic gesture, and I find it hard to view it as a serious institutional limitation. For one thing, whether we tell an agency it should do something or should consider doing something so rarely affects our implementation authority. We have never, for example, had an agency respond to our follow-up letters by pleading "consider" as a loophole. Some recommendations would not have left the committee without such verbal flexibility, and even then, we have witnessed close plenary votes on this score. On balance, we may have done some good and probably very little damage with this practice, except to the legacy of William Strunk, Jr. and E.B. White.[20]

That said, I certainly would support the idea that we should actively consider whether "should consider" is appropriate in all settings. So by all means raise the issue, especially at the committee or council review stage, if not at the plenary session itself. This leads to a larger point that ACUS should hold out for more decisive statements instead of compromising so much.[21] I think about this proposition often and act on it occasionally. Put me down as a committed relativist. I am always sensitive to the institutional nature of our role. As a "conference" we are partially a function of our members, and consensus is our product. Consensus has a variety of meanings; some say it

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19 Senior Fellow Sally Katzen made such a suggestion in connection with Statement 18, on OIRA timelines review of rules. *59th Plenary Session*, ADMIN. CONF. U.S., at 1:33:30 (Dec. 6, 2013), http://acus.granicus.com/MediaPlayer.php?view_id=2&clip_id=110.

20 *See* WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 23 (50th anniversary ed. 2009) ("*Omit needless words.*").

21 This point is sometimes pressed by Professor Peter Strauss of Columbia Law School, who holds Walter Gellhorn's Betts Professorship, sharing that legacy of our "founder." *See Peter L. Strauss*, COLUMBIA LAW SCH., http://www.law.columbia.edu/fac/Peter_Strauss (last visited May 27, 2015).

means unanimity,[22] others general agreement.[23] I'm in the latter camp, which means that a majority is enough to create consensus, and sometimes our votes are that close. The best approach is to demand a majority, and welcome unanimity when it appears.[24] Not every time, certainly, for then we would be too cautious and ultimately ineffective. But majority rule brings acceptance and bolsters compliance when we reach the implementation stage. So my rule on this is to raise issues and debate them enthusiastically, but at the end, converge on a negotiated solution that ensures consensus.[25]

III. The (Rosy) Future of ACUS

After five years as Chairman, and having been present at the recreation, I have a special vantage point on the Conference's future. Unlike in 1995 (when my friend and recent Vice Chair Thomasina Rogers held this office), I can promise you that we have a future. Much of my time during these last five years has been spent ensuring that such a statement can be made. During our fiftieth anniversary celebrations last year, which this issue of *The George Washington Law Review* celebrates, we received many indications of our continued and expanded value from the White House, the agencies, and the judiciary. But none was more reassuring than the joint statement from the leaders of House Judiciary Committee, which noted: "[T]here is no independent, nonpartisan entity—other than the Administrative Conference of the United States—that exists specifically so that Congress can call upon it to evaluate ways to improve the regulatory process."[26]

In this era of divided and contested government, such sentiments are rare indeed. This recognition should make us confident about our future.

So how might we face that future. It is a given that our consensus-built, nonpartisan recommendations process drives our work. But, it need not be the extent of it—there is much more we can do. First, we should continue working with individual agencies to assist them in

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22 *See* H.W. Fowler, A Dictionary of Modern English Usage 91 (1st ed. 1958).

23 *See* Bryan A. Garner, Garner's Modern American Usage 190 (3d ed. 2009) (defining "consensus" as "a majority opinion or generally accepted view").

24 Even with our contested Supreme Court Justices, 9-0 decisions far outnumber 5-4 ones. *See* Amanda Frost, *Academic Highlight: Sunstein and Supreme Court Unanimity (or Lack Thereof)*, SCOTUSblog (Oct. 21, 2014, 11:30 AM), http://www.scotusblog.com/2014/10/academic-highlight-sunstein-and-supreme-court-unanimity-or-lack-thereof/.

25 A tip of the hat here to our members who excel in the art of drafting around disagreements over language and meaning.

26 160 Cong. Rec. E1827 (daily ed. Dec. 11, 2014) (statement of Rep. John Conyers, Jr.).

solving seemingly intractable procedural and organizational problems. Often, rather than recommendations, these projects result in Office of the Chairman reports conducted either in-house by our committed attorney-advisors or by outside consultants. Our work with the Social Security Administration's ("SSA") disability adjudication process is exemplary on this regard.[27] We have not only helped SSA to solve longstanding procedural problems, but have also assisted it in securing OMB's approval for the issuance of appropriate new regulations.[28] This work can be expanded to other agencies.

Second, we should think big when it comes to analyzing process problems government-wide. Under the Administrative Procedure Act[29] there are two broad types of decision processes: rulemaking and adjudication.[30] Due to the rulemaking review role of OIRA, more attention has been paid to the former in recent years, but the adjudication category, which once was the primary method of government decisionmaking, has received almost as much attention.[31] Our forthcoming study entitled *Federal Administrative Adjudication*[32] seeks to

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27 *See, e.g.*, OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., EVALUATING SUBJECTIVE SYMPTOMS IN DISABILITY CLAIMS (2015), https://www.acus.gov/sites/default/files/documents/SSA%20Symptom%20Evaluation_%20Final%20Report_Revised.pdf; OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS ADJUDICATION PROCESS: ASSESSING THE IMPACT OF THE REGION I PILOT PROGRAM (2013), https://www.acus.gov/sites/default/files/documents/Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf; OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS PROGRAMS: ASSESSING THE EFFICACY OF THE TREATING PHYSICIAN RULE (2013), https://www.acus.gov/sites/default/files/documents/Treating_Physician_Rule_Final_Report_4-3-2013_0.pdf; OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., SSA DISABILITY BENEFITS PROGRAMS: THE DUTY OF CANDOR AND SUBMISSION OF ALL EVIDENCE (2012), https://www.acus.gov/sites/default/files/documents/ACUS_Final_Report_SSA_Duty_of_Candor.pdf; OFFICE OF THE CHAIRMAN OF THE ADMIN. CONFERENCE OF THE U.S., SSA REPRESENTATIVE PAYEE: SURVEY OF STATE GUARDIANSHIP LAWS AND COURT PRACTICES (2014), https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf. One project for SSA did result in a Conference recommendation; *see also* ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013).

28 *See* Submission of Evidence in Disability Claims, 80 Fed. Reg. 14,828, 14,830 14,835 (Mar. 20, 2015) (to be codified at 20 C.F.R. pts. 404–05, 416).

29 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

30 5 U.S.C. §§ 553–57 (2012).

31 Over its history, ACUS has issued fifty-seven recommendations concerning adjudication.

32 *Federal Administrative Adjudication*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/federal-administrative-adjudication (last visited May 27, 2015). The study is led by Professor Michael Asimow of Stanford Law School.

provide deep analysis of all agency adjudication practices. Stanford Law School is helping us in this massive effort by jointly funding the extensive analysis that is required to collect and categorize the individual data points on agency procedures from 135 agencies with more than 200 different adjudicatory schemes.[33]

Broad-based undertakings like this can help us understand trends and pave the way for innovations like Alternative Dispute Resolution and use of video hearings. In this regard, I was struck by an earlier critique of our mission from Jerry Mashaw:

> If the Conference could state with clarity what a particular sort of procedural system was supposed to do, evaluate whether it was doing those things and make believable predictions about the impact of alternative procedures on desired outputs, it would be in a position to bring to bear an expertise which combined basic values, an external perspective and a concern with functional reality. In short the Conference would possess a general expertise about administrative procedure which is not possessed by any individual agency, but which is highly relevant to the operations of all agencies.[34]

That is really what we are seeking with the Federal Adjudication Project—a general expertise about administrative procedure that no single agency could possibly obtain without the assistance of ACUS.

Conclusion

There is much for the Conference to accomplish and no lack of imagination to get us there. That, of course, will be the job of the next Chairman. By the time this issue appears that person should be on board. I look forward to watching ACUS flourish under his or her care from the vantage point of my former and now new status as a Senior Fellow of the Conference.

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33 *See generally id.*

34 Mashaw, *supra* note 16, at 267.