

An Informal Legislative History of the Reauthorization of the Administrative Conference of the United States

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ABSTRACT

The Administrative Conference of the United States (“ACUS”) is an independent, nonpartisan federal agency established by Congress in 1964. Although it technically marked its fiftieth anniversary last year, for fifteen of those years it was not in existence. Drawing on the author’s personal experience as a congressional staffer, this Article explains the legislative history of the efforts to reauthorize, fund, and finally staff the Conference.

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* This Article is written by the author solely in her individual capacity. She currently serves as Senior Minority Counsel for the U.S. House Judiciary Committee. Significant portions of this article are drawn from the House Judiciary Committee’s legislative materials pertaining to the Administrative Conference of the United States, particularly the Committee’s report on H.R. 3564, the Regulatory Improvement Act of 2007. *See generally* H.R. REP. NO. 110-390 (2007). In addition, the author very much appreciates the thoughtful comments received from her colleague, James Park, Minority Chief Counsel of the Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee; Jeffrey Lubbers, Professor of Practice in Administrative Law at American University Washington College of Law and Special Counsel of ACUS Matthew Wiener, Executive Director, ACUS; Mort Rosenberg, former Specialist in American Public Law at the Congressional Research Service (“CRS”); and Raymond V. Smietanka, former Majority Chief Counsel of the Subcommittee on Commercial & Administrative Law of the House Judiciary Committee. Any errors, however, are to be attributed solely to the author.

INTRODUCTION

The Administrative Conference of the United States (“ACUS”), which was established in 1964,¹ technically celebrated its fiftieth anniversary in 2014. Yet, for nearly fifteen of those fifty years, ACUS did not exist. In 1995, ACUS ceased operations because Congress failed to appropriate further funding for the agency.² This Article traces the legislative history of the bipartisan, bicameral effort to reestablish ACUS as a functioning agency, perhaps illustrating the best and worst of the lawmaking process.

I. THE END OF ACUS

From its inception, ACUS has generally enjoyed broad, bipartisan support across the political spectrum and across all three branches of the federal government. Supporters in Congress have included Senators Charles Grassley (R-IA),³ Orrin Hatch (R-UT),⁴ Patrick Leahy (D-VT),⁵ and Carl Levin (D-MI).⁶ From the federal bench, ACUS advocates include Justice Antonin Scalia, who served as a Conference Chair in the 1970s,⁷ and Justice Stephen Breyer, who was a

¹ The Administrative Conference Act was signed into law by President Lyndon B. Johnson on August 30, 1964. Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591–596 (2012)).

² For a comprehensive overview of the events leading to the Conference’s termination in 1995, see Gary J. Edles, *Lessons from the Administrative Conference of the United States*, 2 EUR. PUB. L. 571 (1996); Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19 (1998).

³ See, e.g., Letter from Senator Charles E. Grassley et al., to Senator Richard C. Shelby, Chairman, Treasury, Postal Serv. & Gen. Gov’t Subcomm. of the Senate Comm. on Appropriations (Sept. 8, 1995) (expressing “strong support” for continued funding for ACUS and observing that the Conference “achieves concrete results that save both the government and the private sector money.”); see also Letter from Senators Charles E. Grassley & Howell Heflin to Senator Richard Shelby, Chair, Subcomm. on Treasury, Postal Serv. & Gen. Gov’t Subcomm. of the Senate Comm. on Appropriations (July 19, 1995) (“strongly urg[ing] that funding for [ACUS] be authorized in the FY 96 Treasury, Postal Service and General Government Appropriations bill”).

⁴ See, e.g., Letter from Senator Charles E. Grassley et al., *supra* note 3 (containing signatures of four Republican and four Democratic Senators who wanted the Conference to “continue its valuable, cost-saving work”).

⁵ See Press Release, Senator Patrick Leahy, *On House Passage of H.R. 3564, The Regulatory Improvement Act of 2007* (July 14, 2008), <http://www.leahy.senate.gov/press/on-house-passage-of-hr-3564-the-regulatory-improvement-act-of-2007>.

⁶ See Letter from Senator Charles E. Grassley et al., *supra* note 3; see also 141 CONG. REC. 22,365–66 (1995) (statement of Sen. Carl Levin) (“The Nation could not expect to find a more economical source of the services ACUS provides . . .”).

⁷ Letter from Justice Antonin Scalia, U.S. Supreme Court, to Senator Charles E. Grassley, Chairman, Subcomm. on Admin. Oversight & the Courts of the Senate Comm. on the Judiciary (July 31, 1995) (“I can say that in my view th[e] benefits [of ACUS] are substantial: the

member of ACUS and participated in its activities from 1981 to 1994.⁸ In fact, as will be discussed in greater detail below, both Justices testified in congressional hearings—on not one, but two historic occasions—before the House Judiciary Committee, where they expressed unqualified support for ACUS.⁹ Lastly, from the executive branch, ardent ACUS supporters include President George H.W. Bush, appointee C. Boyden Gray,¹⁰ and Sally Katzen, Administrator of the Office of Information and Regulatory Affairs during the Clinton Administration.¹¹

ACUS has also received wide support from nongovernmental entities.¹² Organizations such as the American Bar Association,¹³ the Federal Bar Association,¹⁴ National Resources Defense Council,¹⁵ and

Conference has been an effective means of opening up the process of government to needed improvement.”).

⁸ Letter from Justice Stephen Breyer, U.S. Supreme Court, to Senator Charles E. Grassley, Chairman, Subcomm. on Admin. Oversight & the Courts of the Senate Comm. on the Judiciary (Aug. 21, 1995) (“I believe that the Conference is a unique organization, carrying out work that is important and beneficial to the average American, at rather low cost.”).

⁹ See *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 14–44 (2010) [hereinafter *Administrative Conference*, 111th Cong.]; *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. 10–28 (2004) [hereinafter *Reauthorization*, 108th Cong.]; see also *infra* Part II.A (discussing testimony of Justices Breyer and Scalia at ACUS reauthorization hearing).

¹⁰ *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 104th Cong. 33 (1995) [hereinafter *Reauthorization*, 104th Cong.] (prepared statement of C. Boyden Gray, Council Member, ACUS) (stating that ACUS “is an investment repaid many times over”).

¹¹ See, e.g., *Administrative Conference*, 111th Cong., *supra* note 9, at 60–68. For example, Ms. Katzen testified:

And so I say with some confidence categorically that no other entity can do what ACUS can do. And I am not saying that no one can’t do it as well or as efficiently. I am saying no one can do it, period. And so to keep ACUS alive and well is really critically important.

Id. at 60 (testimony of Sally Katzen, Executive Managing Director, Podesta Group).

¹² See, e.g., Letter from Joseph A. Morris et al. to Senator Richard C. Shelby, Chairman, & Senator J. Robert Kerrey, Ranking Member, Subcomm. on Treasury, Postal Serv. & Gen. Gov’t of the Senate Comm. on Appropriations (July 20, 1995); Letter from Susan Au Allen et al., Concerned Friends of the Admin. Conference, to Representative Steny H. Hoyer (Aug. 2, 1994).

¹³ See *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 103d Cong. 66–73 (1994) [hereinafter *Reauthorization*, 103d Cong.] (statement of Thomas M. Susman on behalf of the American Bar Association); Letter from Joseph A. Morris et al., *supra* note 12 (containing signature of Janet E. Belkin on behalf of the American Bar Association).

¹⁴ *Reauthorization*, 103d Cong., *supra* note 13, at 96 (statement of Hon. Marvin H. Morse on behalf of the Federal Bar Association) (“FBA is convinced that ACUS provides a unique,

the Public Citizen Litigation Group,¹⁶ as well as the American Automobile Association,¹⁷ Citizens for a Sound Economy,¹⁸ and the Generic Pharmaceutical Industry Association¹⁹ have all expressed support for ACUS.

ACUS enjoys such broad support for several reasons. As Professor Jeffrey Lubbers of the American University Washington College of Law, who formerly served as the Research Director for ACUS, explained:

ACUS sponsored considerable research in administrative law, leveraging a small research budget to hire academic consultants who sacrificed market-based fees for the sake of enhanced peer review, access to government decision makers, and a chance to affect agency activities. Their research reports became the basis for formal recommendations, drafted in the open with substantial public participation by committees of members. Semi-annual plenary sessions considered committee recommendations for adoption. Adopted recommendations were published in the *Federal Register* and *Code of Federal Regulations*, widely disseminated around the government, and actively promoted by the Conference's staff. Due to the consensus-based process used by ACUS, it managed to achieve a high rate of implementation for its (non-binding) recommendations. ACUS also sponsored basic research (e.g., on agency caseload statistics), and published numerous guides, sourcebooks, and manuals for agency (and public) use. Its Chairman and professional staff regularly presented testimony and advice on pending legislation.²⁰

continuing opportunity to obtain improvement in governmental process, practice and procedure at a minimal price tag.”).

¹⁵ See, e.g., Letter from Joseph A. Morris et al., *supra* note 12 (containing signature from David G. Hawkins on behalf of the National Resources Defense Council).

¹⁶ See *Reauthorization*, 103d Cong., *supra* note 13, at 37–48 (statement of David C. Vladeck on behalf of the Public Citizen Litigation Group).

¹⁷ See Letter from Susan Au Allen et al., *supra* note 12 (containing signature of Paul R. Verkuil on behalf of the American Automobile Association).

¹⁸ See Letter from Joseph A. Morris et al., *supra* note 12 (containing signature of Dr. James C. Miller III on behalf of Citizens for a Sound Economy).

¹⁹ See Letter from Susan Au Allen et al., *supra* note 12 (containing signature of Lewis A. Engman on behalf of the Generic Pharmaceutical Industry Association).

²⁰ Jeffrey Lubbers, “*If It Didn’t Exist, It Would Have to Be Invented*”—*Reviving the Administrative Conference*, 30 ARIZ. ST. L.J. 147, 149 (1998) (footnotes omitted).

Over the course of its existence from 1968 to 1995, ACUS issued approximately 200 recommendations, the majority of which have been at least partially implemented.²¹

Notwithstanding last-minute entreaties from a broad array of ACUS supporters—including letters from Justices Breyer²² and Scalia,²³ as well as members of Congress from both sides of the aisle²⁴—Congress ultimately terminated ACUS's funding in September 1995.²⁵ There appears to be no definitive reason why its funding ended, but there are various factors that could have contributed to ACUS's demise.²⁶

21 ACUS Notice: Final Listing of Recommendations and Statements Regarding Administrative Practice and Procedure, 60 Fed. Reg. 56,312 (Nov. 8, 1995) (stating that “over two-thirds [of ACUS recommendations] were implemented in whole or in part”).

22 See Letter from Justice Stephen Breyer, *supra* note 8.

23 See Letter from Justice Antonin Scalia, *supra* note 7.

24 See, e.g., Letter from Representatives George W. Gekas, Chairman, Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary, to Senator Richard C. Shelby, Chairman, Subcomm. on Treasury, Postal Serv. & Gen. Gov't of the Senate Comm. on Appropriations, at 1 (Sept. 11, 1995) (writing on behalf of the House subcommittee that has authorizing jurisdiction over ACUS, the authors expressed “strong support for the position of the Senate in providing \$1.8 million in funding for ACUS in FY 96”).

25 As passed by the House, the appropriations bill did not include funding for ACUS. See H.R. 2020, 104th Cong. tit. IV (1995) (recognizing that any funds shall only be used for termination, not operation, of ACUS). In the Senate, however, Senator Shelby offered an amendment with Senator Grassley restoring the Conference's funding in the amount of \$1.8 million. See 141 CONG. REC. 22,453 (1995). His amendment, which had six cosponsors, namely Senator Heflin, Senator Roth, Senator Levin, Senator Kohl, Senator Thurmond, and Senator Glenn, passed the Senate by voice vote. See *id.* Nevertheless, the conference report reconciling differences between the House and Senate appropriations bills defunded ACUS:

For necessary expenses of the Administrative Conference of the United States, established under subchapter V of chapter 5 of title 5, United States Code, \$600,000: Provided, That these funds shall only be available for the purposes of the prompt and orderly termination of the Administrative Conference of the United States by February 1, 1996.

See H.R. REP. NO. 104-291, at 6 (1995).

26 ACUS's “invisibility factor” may have been a factor because it generally played a low-profile role and was possibly viewed as not doing “anything that is visible to most legislators or their constituents.” Jonathan Groner, *ACUS Fracas: Last Rights for Administrative Conference*, LEGAL TIMES, Sept. 25, 1995, at 1, 15. A witness testifying on behalf of the American Bar Association in support of ACUS observed:

Part of the problem . . . is that much of the work of the Conference is not very exciting. Race to the courthouse. Even ADR. Very, very important. Worth a great deal of money to agencies. But not the stuff that you read in the newspapers, and not the stuff that people, unless they have some interest in it or have worked on it, are likely to study . . .

Reauthorization, 103d Cong., *supra* note 13, at 66–67 (statement of Thomas M. Susman on behalf of the American Bar Association); see also *id.* at 71 (noting that “administrative procedure, simply stated, is not sexy stuff”). Other scholars agree that ACUS lacked visibility. See Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53

After funding lapsed, ACUS was obligated to wind up its activities and cease operations, which involved archiving its records and disposing of its tangible property.²⁷ In fact, some of its computer equipment was ultimately acquired by the then-newly established National Bankruptcy Review Commission, for which this author coincidentally served as General Counsel.²⁸

U. PITT. L. REV. 813, 846 (1992) (“Beyond the Judiciary committees, where the Conference does a great deal of its work, there is a general lack of information among congressional staff about [ACUS and its work].”); Alexis Simendinger, *Administrative Conference Near Demise Under House, Senate Appropriations Ax*, BNA Daily Rep. for Executives, July 27, 1995, at A-26 (noting that ACUS was viewed as being a “tiny, obscure agency” that simply failed to survive “budget-slashing times.”).

Others believe the demise of ACUS was part of a much larger effort to shrink the federal government. See, e.g., Colman McCarthy, *Mourning an Agency Mugged by Congress*, WASH. POST, Nov. 7, 1995, at E11 (recognizing that some Republican leaders understood that ACUS “is the principal proponent within the federal government of ways to reduce wasteful and expensive litigation”); James Warren, *Congress Eliminates a Department That Actually Worked*, CHI. TRIB., Nov. 12, 1995, at 2.

Still others claim that the Conference failed to have an advocate in the Senate Republican leadership. See Simendinger, *supra*, at A-26. For example, Senator Richard Shelby (R-AL), who chaired the Senate appropriations subcommittee with jurisdiction over ACUS, characterized the Conference’s work as “redundant” and stated that it could “be accomplished elsewhere.” *Id.* He said, “[a] lot of people thought, and we came to the conclusion too, that [ACUS is] basically a waste of money.” *Id.*

While most of the Conference’s recommendations were noncontroversial, occasionally some generated substantial opposition, which might also explain the Conference’s demise. One in particular—pertaining to administrative law judges (“ALJs”)—produced a “firestorm of rhetoric that eclipsed cold logic and calm debate.” *Reauthorization*, 103d Cong., *supra* note 13, at 30–31 (statement of Alan W. Heifetz, Chief A.L.J., U.S. Department of Housing and Urban Development). As former General Counsel Gary J. Edles described the proposal:

ACUS urged the creation of a larger pool of eligible candidates for ALJ positions. It further recommended that the existing statutory ban on any form of performance appraisal for ALJs be replaced by a system that would permit some appropriate form of periodic review of individual ALJ performance. ACUS believed that a method of periodic review could be created consistent with the need to retain ALJ decisional independence. ACUS also recommended creation of a system for investigating both complaints of improper conduct by ALJs and improper agency infringement on ALJ decisional independence. Importantly, ACUS declined to endorse a proposal popular among certain ALJ organizations, but disfavoured by Government agencies, calling for the transfer of ALJs from their employing departments and agencies to a central corps of administrative law judges.

Edles, *supra* note 2, at 601–02.

²⁷ As Professor Jeffrey Lubbers of American University’s Washington College of Law recalled when he was the Research Director for ACUS, the Conference’s “resources and archives were distributed rather hurriedly, its members left hanging, and its staff unceremoniously ‘rified.’” Lubbers, *supra* note 20, at 152.

²⁸ See NAT’L BANKR. REVIEW COMM’N, BANKRUPTCY: THE NEXT 20 YEARS (Oct. 20, 1997), <http://govinfo.library.unt.edu/nbrcreport/01title.html>.

II. THE REVIVAL OF ACUS

Prior to its termination in 1995, Congress assigned ACUS various responsibilities over the course of its existence. These included the Government in the Sunshine Act²⁹ and the Equal Access to Justice Act,³⁰ both of which required agencies “to consult with ACUS before promulgating rules to ensure uniformity.”³¹ In addition, “ACUS served as the key implementing agency for the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act . . . [and] the Congressional Accountability Act [“CAA”]”³² In fact, the CAA, enacted just nine months before ACUS was terminated, directed ACUS to conduct a comprehensive study of the General Accounting Office, the Government Printing Office, and the Library of Congress³³ in order to issue a report on “whether the rights, protections, and procedures, including administrative and judicial relief, applicable to [the specified agencies] . . . and their employees are comprehensive and effective”³⁴ The report required the study to include “recommendations for any improvements in regulations or legislation, including proposed regulatory or legislative language.”³⁵

Interestingly, members of the House and the Senate continued to introduce bills assigning various responsibilities to ACUS not long after it became defunct.³⁶ In fact, such bills were introduced in nearly every Congress for more than ten years after ACUS terminated its

²⁹ 5 U.S.C. § 552b(g) (2012).

³⁰ 5 U.S.C. § 504(c)(1) (2012).

³¹ H. REP. NO. 110-390, 110th Cong., at 4 (2007).

³² *Id.* at 4–5 (internal footnotes omitted).

³³ See Congressional Accountability Act of 1995, Pub. L. No. 104-1, § 230, 109 Stat. 3, 23 (1995).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Three bills sought to establish an Office of Government Information Services in ACUS. See OPEN Government Act of 2007, S. 849, 110th Cong. § 11 (2007); OPEN Government Act of 2005, S. 394, 109th Cong. § 11 (2005); OPEN Government Act of 2005, H.R. 867, 109th Cong. § 11 (2005). Three others required the Conference to report to Congress on the frequency of fee awards paid by certain Federal agencies. See Equal Access to Justice Reform Amendments of 2001, S. 106, 107th Cong. § 1(g) (2000); Equal Access to Justice Reform Amendments of 2000, S. 2907, 106th Cong. § 1(g) (2000); Equal Access to Justice Reform Amendments of 1998, S. 1613, 105th Cong. § 1(g) (1998). Finally, two bills would have required the Attorney General and the Secretary of Health and Human Services to consult with ACUS with respect to developing guidelines for alternative dispute resolution mechanisms for health care liability claims. See Common Sense Medical Malpractice Reform Act of 2001, S. 1370, 107th Cong. § 12(b) (2001); Health Care Liability Reform and Quality Assurance Act of 1997, S. 886, 105th Cong. § 111 (1997).

operations.³⁷ While some might cite this as yet another example of dysfunction in Congress, others—especially proponents of ACUS—likely see this as long-enduring congressional recognition of ACUS's worth.

In sum, ACUS served as a valuable resource for the federal government generally and particularly for members of Congress and congressional committees. Although the author commenced her service with the House Judiciary Committee in 1998, approximately three years after ACUS ceased operations, she and her colleagues continued to use ACUS's Federal Administrative Procedure Sourcebook (as published in 1992) for many years thereafter as an authoritative reference guide and as a handy compendium of administrative laws and related materials then in effect.³⁸

A. *Initial Reauthorization Efforts*

Most bills that ultimately become law have a champion, that is, a member of Congress who appreciates the need for the legislation, is willing to convince his or her colleagues of its worth, and is prepared to press for its enactment. With respect to the legislation that reauthorized ACUS and allowed for its funding, Representative Chris Cannon (R-UT) deserves much of the credit.³⁹ First elected in 1996 from the Third District of Utah, Representative Cannon served six terms in Congress.⁴⁰ In the spring of 2003, Representative Cannon became Chair of the House Judiciary Committee's Subcommittee on Commercial and Administrative Law ("CAL Subcommittee").⁴¹ The jurisdiction of the CAL Subcommittee at that time included oversight of certain components of the U.S. Department of Justice and issues pertaining to arbitration, bankruptcy, interstate state tax, interstate

³⁷ See *supra* note 36 (detailing various bills from 1997 to 2007 introduced in Congress involving ACUS action).

³⁸ See ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK: STATUTES AND RELATED MATERIALS (2d ed. 1992). Note that the American Bar Association has carried forward this valuable publication. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK (William Funk, Jeffrey S. Lubbers & Charles Pou, Jr. eds., Am. Bar Ass'n, 4th ed. 2008) (5th ed. forthcoming 2015).

³⁹ See Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, FED. LAW., Nov./Dec. 2004, at 26.

⁴⁰ Cannon, Christopher B., BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bio.guide.congress.gov/scripts/biodisplay.pl?index=C000116> (Sept. 21, 2015).

⁴¹ See H.R. REP. NO. 108-24, at 5 (2003), *reprinted in* 2004 U.S.C.C.A.N. 1021 (naming Representative Cannon as Chair).

compacts, the Legal Services Corporation, and privacy.⁴² In addition, the CAL Subcommittee had jurisdiction over the Administrative Procedure Act and was the authorizing subcommittee for ACUS in the House.⁴³

Even before being elected to Congress, Representative Cannon had a longstanding interest in administrative law issues.⁴⁴ As Associate Solicitor for Surface Coal Mining with the U.S. Department of the Interior from 1983 to 1986, he worked on the Coal Mining Reclamation Act and assessed its regulatory impact on the price of coal.⁴⁵ In addition, his brother Joseph A. Cannon, then President of the Geneva Steel Corporation in Provo, Utah, served as a public member of ACUS from 1988 to 1990.⁴⁶

Upon assuming the chairmanship of the CAL Subcommittee in 2003, Representative Cannon cited the reauthorization of ACUS as one of his principal priorities.⁴⁷ ACUS's authorization had expired at the end of fiscal year 1994,⁴⁸ but its statute, the Administrative Conference Act,⁴⁹ was never repealed. Subcommittee staff collected background materials on ACUS during that summer, and researched its prior appropriations history and whether ACUS's statutory mission needed to be revised to reflect current concerns, among other issues. As part of this effort, staff met at length with American University Washington College of Law Professor Jeffrey Lubbers, the Research Director of ACUS from 1982 to 1995,⁵⁰ who served as a boundless resource for CAL Subcommittee staff over the years.

Although nonpartisan, a revitalized ACUS was susceptible to being viewed as responsive to the concerns of a partisan agenda. In the fall of 2003, for instance, President George W. Bush identified the

⁴² See H. COMM. ON THE JUDICIARY, 108TH CONG., RULES OF PROCEDURE (Feb. 12, 2003) (setting forth the jurisdiction of each subcommittee of the House Judiciary Committee).

⁴³ See *id.*

⁴⁴ Telephone Interview with former Rep. Chris Cannon (R-UT) (Oct. 2, 2014).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Act of Oct. 12, 1990, Pub. L. No. 101-422, 104 Stat. 910 (1990) (authorizing appropriations to ACUS through fiscal year 1994); see also *supra* note 25 and accompanying text.

⁴⁹ Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified at 5 U.S.C. §§ 591-596).

⁵⁰ Jeffrey S. Lubbers, ADMIN. CONF. OF THE U.S., <http://www.acus.gov/contacts/jeffrey-s-lubbers> (last visited Sept. 21, 2015). Professor Lubbers currently serves as Special Counsel of the Administrative Conference. *Id.*

need to simplify and streamline regulations as part of a six-point plan to revitalize the nation's economy.⁵¹ He explained:

People are more likely to find work if the resources of businesses are not spent complying with endless and unreasonable government regulation from Washington, D.C. We will meet our duty to enforce laws, whether it be environmental protection laws or worker safety laws. But we want to simplify regulations in this administration.⁵²

Republicans, as the majority party in the House, supported legislative initiatives in alignment with the Bush Administration's goal to reduce the regulatory burden. The principal themes of these concerns were articulated by Representative Cannon:

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 \$9,000.⁵³

The CATO Institute, a libertarian think tank, released a report in 2003 stating that the number of pages published in the Federal Register during 2002 (including 4,167 final rules) increased by nine percent over the amount published in the prior year, yet only 269 laws were enacted during that same year.⁵⁴ In addition, Republican House

⁵¹ See Press Release, White House Office of the Press Secretary, *President Bush Outlines Six Point Plan for the Economy* (Sept. 4, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030904-5.html>.

⁵² *Id.*

⁵³ *Regulatory Flexibility Improvements Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 1 (2006) (statement of Rep. Chris Cannon).

⁵⁴ CLYDE WAYNE CREWS JR., CATO INSTITUTE, *TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 1* (2003). In comparison, the figures for 2014 were 3,541 final rules and 222 public laws. See Clyde Wayne Crews Jr., *2014 Ends with a*

members were concerned that agencies issued regulations that were not based on “sound science.”⁵⁵

Democrats, on the other hand, expressed concern that excessive deregulation and efforts aimed at thwarting the regulatory process could jeopardize public health and safety. For example, House Judiciary Committee Democrats argued that the Republicans were “complain[ing], obstruct[ing], and otherwise try[ing] to hinder federal agencies as they work to enforce laws protecting the environment, public health, and worker safety”⁵⁶

Although both the House and the Senate, as well as the Presidency, were under Republican control, Representative Cannon recognized that support for reauthorizing ACUS should not emanate solely from one political party as this would be an anathema to ACUS’s historically nonpartisan mission. Thus, Representative Cannon sought to steer the reauthorization of ACUS in a bipartisan direction. To best bridge the political divide with respect to garnering support for ACUS, CAL Subcommittee Chief Majority Counsel Raymond V. Smietanka, working on behalf of the House Republicans, suggested reaching out to Justice Breyer, his former colleague with whom he worked when Justice Breyer served, on behalf of the Senate Democrats, as Chief Counsel of the Senate Judiciary Committee between 1979 and 1980.⁵⁷ Prior to his appointment to the Supreme Court, Justice Breyer was a liaison to ACUS for the Judicial Conference⁵⁸ of the

78,978-Page *Federal Register*; 3,541 *Rules and Regulations*, COMPETITIVE ENTER. INST. BLOG (Dec. 31, 2014), <https://cei.org/blog/2014-ends-78978-page-federal-register-3541-rules-and-regulations>.

⁵⁵ For example, Senator Gordon H. Smith (R-OR), upon the introduction of his bill, the Sound Science for Endangered Species Act Planning Act of 2004, S. 2009, 108th Cong. (2004), as his first legislative action of the new session, claimed that there had been “a number of situations in which Federal agency scientists either demanded actions not supported by scientific data, or actually fabricated the data itself,” and that his legislation was necessary “to help restore sound science to agency decisionmaking.” 150 CONG. REC. 58 (2004).

⁵⁶ H.R. REP. NO. 105-441, at 21 (1998).

⁵⁷ Justice Breyer served as Special Counsel for the Senate Judiciary Committee’s Subcommittee on Administrative Practices from 1974 to 1975, and as Chief Counsel of the Committee between 1979 and 1980. See *Stephen Breyer*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/supct/justices/breyer.bio.html> (last updated Sept. 1994). Thereafter, Justice Breyer was subsequently one of the initial appointments to the U.S. Sentencing Commission. *Id.* During that time, Mr. Smietanka served as Minority Counsel to the House Judiciary Committee’s Subcommittee on Criminal Justice and had worked with Justice Breyer on various aspects of federal criminal law and sentencing reform legislation. Telephone Interview with Raymond V. Smietanka (Oct. 8, 2014).

⁵⁸ The Judicial Conference of the U.S. was initially established by Congress to help it assess the administration of the federal court system through the Conference of Senior Circuit Judges in 1922. See Act of Sept. 14, 1922, Pub. L. No. 298, § 2, 42 Stat. 837 (1922).

United States from 1981 to 1994.⁵⁹ He has also authored books and articles on administrative law and economic regulation.⁶⁰

When asked about whether he would be willing to testify at an oversight hearing on ACUS, Justice Breyer expressed interest, but explained that he wanted to confer with his colleagues regarding the propriety of doing so. In addition, he offered to ask Justice Scalia whether he too would be interested in jointly testifying at the hearing, in light of the fact that Justice Scalia had served as the third chairman of ACUS from September 1972 to August 1974.⁶¹ Shortly thereafter, Justice Breyer informed Subcommittee staff of his and Justice Scalia's willingness and availability to testify. As CAL Subcommittee Chair Chris Cannon later observed at this hearing, this would be the first time in more than twenty years that a Supreme Court justice, let alone two Justices simultaneously, would "testify before Congress, particularly with respect to matters not directly pertinent to the judiciary's funding or operations."⁶² Equally important was the fact that their joint participation underscored the bipartisan underpinning to the effort to reauthorize ACUS.⁶³

The hearing occurred on May 20, 2004.⁶⁴ Subcommittee members from both sides of the aisle appeared and generally expressed support for ACUS.⁶⁵ The only witnesses were Justices Scalia and Breyer, both of whom testified without reservation in exuberant support of ACUS and its reauthorization.⁶⁶ Justice Breyer, for example, cited ACUS's "unique" role in identifying ways to improve the federal regulatory process.⁶⁷ He explained:

⁵⁹ *Reauthorization*, 108th Cong., *supra* note 9, at 15 (statement of J. Stephen Breyer).

⁶⁰ *Stephen Breyer*, *supra* note 57.

⁶¹ *Reauthorization*, 108th Cong., *supra* note 9, at 9.

⁶² *Id.* at 1 (Rep. Cannon observed that "[a]ccording to the Congressional Research Service, the last time 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").

In 2011, Justices Breyer and Scalia testified again before the Senate Committee on the Judiciary "about the role of judges under the Constitution, offering unscripted responses on issues like conflicts of interest and cameras in the courtroom." Emmarie Huetteman, *Breyer and Scalia Testify at Senate Judiciary Hearing*, N.Y. TIMES, Oct. 6, 2011, at A21 ("Justices rarely appear before the Senate panel after their confirmation hearings. The last such occasion was when Justice Anthony M. Kennedy testified about judicial security and independence in 2007.").

⁶³ *See Reauthorization*, 108th Cong., *supra* note 9, at 1.

⁶⁴ *Id.*

⁶⁵ *See generally id.*

⁶⁶ *See id.* at 10–27.

⁶⁷ *Id.* at 15 (prepared statement of J. Stephen Breyer).

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.⁶⁸

Justice Scalia also described ACUS's "unique" characteristics.⁶⁹ Citing its "combination of talents from the academic world, from within the executive branch—because many of the members of ACUS were representatives of the agencies, usually general counsels—and, thirdly, from the private bar, especially lawyers particularly familiar with administrative law," he observed, "I did not know another organization that so effectively combined the best talent from each of those areas."⁷⁰ In sum, Justice Scalia said that he "obviously" thought ACUS was "a worthwhile organization"⁷¹ and that it was "an enormous bargain."⁷²

The CAL Subcommittee held a second oversight hearing on ACUS on June 24, 2004.⁷³ This hearing focused on why ACUS should be reauthorized.⁷⁴ Witnesses at the hearing were former George H.W. Bush Administration White House Counsel C. Boyden Gray on behalf of the American Bar Association; Professor Gary J. Edles, Fellow in Administrative Law at American University Washington College of Law and former ACUS General Counsel from 1987 to 1995; Professor

⁶⁸ *Id.* at 16.

⁶⁹ *See id.* at 10 (statement of J. Scalia).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 21. Justice Breyer concurred, noting the "huge" savings to the public as a result of the Conference's recommendations. *Id.* at 22.

⁷³ *See id.* at 29–126.

⁷⁴ *See id.* at 29.

Philip J. Harter, Earl F. Nelson Professor of Law Center for the Study of Dispute Resolution, University of Missouri Law School; and Professor Sallyanne Payton, William W. Cook Professor of Law at the University of Michigan Law School, on behalf of the National Academy of Public Administration.⁷⁵ Written statements were also submitted into the hearing record from Sally Katzen, who served during the Clinton Administration as Administrator of the Office of Information and Regulatory Affairs at the Office of Management and Budget from 1993 to 1998; and Professor Paul Verkuil of Benjamin N. Cardozo School of Law, who would later become the tenth Chair of ACUS in 2010, among others.⁷⁶

Like the prior hearing, each witness at this latter hearing enthusiastically endorsed ACUS's work and supported its reauthorization.⁷⁷ Issues explored at this hearing included: (1) whether ACUS should be reauthorized without any modification; (2) whether ACUS should be established as part of another agency, such as the Justice Department or the General Services Administration, or whether it should be privatized; (3) the priorities of a reconstituted ACUS; and (4) the amount of funding necessary to authorize ACUS.⁷⁸

Noting that there were "some strains in the [administrative law] system," C. Boyden Gray, for instance, testified:

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.⁷⁹

Looking ahead to what a reauthorized ACUS might address, Professor Edles observed:

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.

⁷⁵ See *id.* at 58–90.

⁷⁶ See *id.* at 30–57.

⁷⁷ See generally *id.* at 59–90.

⁷⁸ See *id.* at 29–126.

⁷⁹ *Id.* at 59–60 (statement of C. Boyden Gray). Mr. Gray also cited as a hallmark of ACUS its nonpartisan mission. See *id.* at 60–62 (prepared statement of C. Boyden Gray).

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[?]⁸⁰

Building on the success of these two hearings, Representative Cannon—along with thirty-three cosponsors drawn from both sides of the aisle—introduced H.R. 4917, the Federal Regulatory Improvement Act of 2004, on July 22, 2004.⁸¹ Evidencing the bipartisan support for the legislation, the bill's original cosponsors included Representative F. James Sensenbrenner, Jr. (R-WI), then Chairman of the House Judiciary Committee, and Representative John Conyers, Jr. (D-MI), the Ranking Member of the Committee. Representative Cannon also personally reached out to Representative Steny Hoyer (D-MD), the Minority Whip of the House, and reminded him of his prior support of ACUS.⁸² As a result of Representative Cannon's efforts, Representative Hoyer agreed to become an original cosponsor.⁸³

As introduced, the bill amended ACUS's organic statute in two respects. First, it revised § 591 of title 5 of the U.S. Code, which specifies ACUS's purpose.⁸⁴ As originally enacted,⁸⁵ the statute establishing ACUS set forth its purposes as follows:

[T]o provide 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 ac-

⁸⁰ *Id.* at 63.

⁸¹ H.R. 4917, 108th Cong. (2004). By the time of final passage by the House, the bill had thirty-five cosponsors consisting of seventeen Democrats and eighteen Republicans. *See H.R. 4917—Federal Regulatory Improvement Act of 2004: Cosponsors*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/house-bill/4917/cosponsors?q=%7B%22search%22%3A%5B%22%5C%22H.R.+4917%5C%22%22%5D%7D> (last visited Sept. 21, 2015).

⁸² Telephone Interview with Rep. Chris Cannon (R-UT) (Oct. 2, 2014).

⁸³ *Id.*

⁸⁴ H.R. 4917 § 2.

⁸⁵ Act to Enact Title 5 of U.S. Code ("Government Organization and Employees"), Pub. L. No. 89-554, 80 Stat. 388 (1966) (originally enacted as section 571 of title 5 of the U.S. Code).

tivities and other Federal responsibilities may be carried out expeditiously in the public interest.⁸⁶

As amended by H.R. 4917, ACUS was assigned four additional purposes: “[1] to promote more effective public participation and efficiency in the rulemaking process; [2] to reduce unnecessary litigation in the regulatory process; [3] to improve the use of science in the regulatory process; and [4] to improve the effectiveness of laws applicable to the regulatory process.”⁸⁷ In an effort to ensure bipartisan support, the text of these additional purposes was drafted to avoid introducing controversial mandates such as demanding agencies use “sound science” in promulgating regulations or requiring agencies to prioritize reducing regulatory burdens over public health and safety.⁸⁸

Second, and most critically, the bill revised § 596 of title 5 of the U.S. Code to authorize \$3 million for fiscal year 2005, \$3.1 million for fiscal year 2006, and \$3.2 million for fiscal year 2007.⁸⁹ These amounts were derived based on inflation-adjusted estimates of ACUS’s last authorization dating back to 1994.⁹⁰

In light of the fact that the 108th Congress was soon to end, Representative Cannon made a request that the bill be discharged from the House Judiciary Committee, which was granted without objection on October 8, 2004.⁹¹ That same day, the House considered the legislation on unanimous consent and passed it without amendment by voice vote.⁹² The measure was received by the Senate on the following business day, when on October 11, 2004, it passed without amend-

⁸⁶ *Id.*

⁸⁷ H.R. 4917 § 2. It has been observed that these additional purposes may have been “perhaps unnecessary,” but nevertheless “quite appropriate.” See Lubbers, *supra* note 39, at 27.

⁸⁸ Cf. H.R. 4917 § 2 (omitting certain controversial mandates in “Purposes” section).

⁸⁹ 5 U.S.C. § 596 (2012). Prior to amendment, section 596 provided:

There are authorized to be appropriated to carry out the purposes of this subchapter not more than \$2,000,000 for fiscal year 1990, \$2,100,000 for fiscal year 1991, \$2,200,000 for fiscal year 1992, \$2,300,000 for fiscal year 1993, and \$2,400,000 for fiscal year 1994. Of any amounts appropriated under this section, not more than \$1,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.

5 U.S.C. § 596 (1992).

⁹⁰ See S. 2979 108th Cong. (2004); Memorandum from Morton Rosenberg, Specialist in American Public Law and T.J. Halstead, Legislative Attorney, American Law Division to Rep. Chris Cannon, Chairman, House Subcomm. on Commerce and Admin. of the Comm. on the Judiciary, Cong. Research Serv. 2 (Oct. 7, 2004).

⁹¹ See 150 CONG. REC. 22,752 (2004).

⁹² *Id.*

ment on unanimous consent,⁹³ and President George W. Bush signed the bill into law on October 30, 2004.⁹⁴

ACUS was finally reauthorized, which was a significant accomplishment, but it still needed to be appropriated funding by Congress so it could actually become operational. Efforts to achieve that next goal began shortly after ACUS was reauthorized.⁹⁵ Unfortunately, the obtaining funding for ACUS would not be as expedient as the process by which ACUS was reauthorized.⁹⁶ Indeed, it would be an arduous process that would take nearly five more years to achieve.

B. Attempts to Obtain Funding for ACUS

1. 109th Congress

In 2005, the 109th Congress commenced and the House remained under Republican leadership.⁹⁷ On January 26, 2005, the House Committee on the Judiciary conducted its organizational meeting at which it approved its Oversight Plan for the newly convened 109th Congress.⁹⁸ The Oversight Plan, at the direction of Representative F. James Sensenbrenner, Jr., then-Chair of the Committee on the Judiciary,⁹⁹ tasked the CAL Subcommittee to prepare a comprehensive study and report on the state of administrative law, process, and procedure in the United States in anticipation of the newly reauthorized ACUS being appropriated funding by the new Congress.¹⁰⁰ The goal of this bipartisan endeavor was to conduct a nonpartisan, academically credible analysis of these issues with particular emphasis on certain specified areas.¹⁰¹

⁹³ 150 CONG. REC. 23,401 (2004).

⁹⁴ See Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255 (2004).

⁹⁵ See, e.g., Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Senator Ted Stevens, Chairman of the Senate Comm. on Appropriations, & Senator Robert C. Byrd, Ranking Member of the Senate Comm. on Appropriations (Nov. 12, 2004).

⁹⁶ See *infra* Part II.B.

⁹⁷ See *Congressional Profiles: 109th Congress (2005–2007)*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Congressional-Overview/Profiles/109th/> (last visited Sept. 21, 2015).

⁹⁸ 151 CONG. REC. D37 (daily ed. Jan. 26, 2005).

⁹⁹ See CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 109TH CONGRESS, LIST OF STANDING COMMITTEES AND SELECT COMMITTEE AND THEIR SUBCOMMITTEES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES TOGETHER WITH AN ALPHABETICAL LIST OF THE MEMBERS AND THEIR COMMITTEE ASSIGNMENTS 22 (2006).

¹⁰⁰ H.R. REP. NO. 109-29, at 175, 180 (2005) (Oversight Plan of the H. Comm. on the Judiciary, 109th Cong.).

¹⁰¹ See *id.* at 180.

The study and report were conducted with significant guidance and substantive analysis provided by the Congressional Research Service (“CRS”), a component of the Library of Congress that provides objective research and analysis to Congress.¹⁰² Indeed, much of the work was performed by three CRS staff members: Morton Rosenberg, Specialist in American Public Law; Curtis Copeland, Specialist in American National Government; and T.J. Halstead, Legislative Attorney.¹⁰³ In addition, Professor Jeffrey Lubbers at American University Washington College of Law contributed his expertise.¹⁰⁴

Over the course of this undertaking, which became known as the Administrative Law Process and Procedure Project for the 21st Century (“Admin Law Project”),¹⁰⁵ the CAL Subcommittee conducted a series of legislative and oversight hearings,¹⁰⁶ sponsored several empirical studies on rulemaking,¹⁰⁷ and coordinated three symposia on

¹⁰² See SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE H. COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REPORT ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 11 (Comm. Print 2006) [hereinafter ADMIN LAW PROJECT REPORT].

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.* at 191–294 (describing hearing on the “Administrative Law, Process and Procedure Project for the 21st Century”).

¹⁰⁶ See *Administrative Law, Process and Procedure Project for the 21st Century: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2006); *The 60th Anniversary of the Administrative Procedure Act: Where Do We Go From Here?: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2006); *Regulatory Flexibility Improvements Act: Hearing on H.R. 682 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2006); *The 10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2006); *Administrative Law, Process and Procedure Project: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Defense of Privacy Act and Privacy in the Hands of the Government: Joint Hearing on H.R. 338 Before the Subcomm. on Commercial & Admin. Law & the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2003). These hearing records were included in the appendix of the Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century. See ADMIN LAW PROJECT REPORT, *supra* note 102, at 191–984.

¹⁰⁷ Three empirical studies were conducted under the auspices of the Congressional Research Service (“CRS”) as part of the Admin Law Project. One was conducted by Professor William West of the Bush School of Government and Public Service at Texas A&M University, which examined “how agencies develop proposed rules,” particularly with respect to “how rulemaking initiatives are placed on regulatory agendas,” and the degree to which “public participation and transparency factor in the pre-notice and comment phase of rulemaking formulation.” See ADMIN LAW PROJECT REPORT, *supra* note 102, at 2, 27, 985.

Another study considered the “effects of judicial review of agency rulemaking by federal appellate courts.” *Id.* at 2. This study, which was commissioned by CRS and conducted by Professor Jody Freeman of the Harvard Law School, was still ongoing by the time the Admin Law Project Report was issued in December 2006. *Id.* at 2–3, 761.

The third study sought to assess the role of science advisory committees in agencies and to

rulemaking.¹⁰⁸ The end product of this effort was the 1,436-page “Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century,” which was finalized at the conclusion of the 109th Congress in December 2006.¹⁰⁹ The Admin Law Project Report set forth preliminary recommendations for further study and possible legislative action with respect to seven areas: “(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.”¹¹⁰ A total of nearly sixty specific issues divided among each of these areas were identified for further analysis.¹¹¹

answer questions as to how members were selected, what protections, if any, existed to guard against conflicts of interest of committee members, and how issues were selected for review. *Id.* at 3. This study was commissioned by CRS to be conducted by Professor Stuart Bretschneider of The Maxwell School of Citizenship and Public Affairs at Syracuse University. *Id.* This study was not completed. See *Regulatory Improvement Act of 2007: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) [hereinafter *Regulatory Improvement Act Hearing*] (testimony of Morton Rosenberg). An interesting development occurred over the course of this study. *Id.* Several federal agencies were reticent to participate in this study. *Id.* To encourage cooperation, then-CAL Subcommittee Chair Linda Sánchez (D-CA) and then-Ranking Member Chris Cannon (R-UT) distributed a letter to federal agencies requesting their cooperation in the study. See *id.* at 8. Based on feedback from CRS, however, federal agencies were still hesitant to participate in the study and, as a result, it did not reach fruition. See *id.* at 13. This experience, yet again, underscored the need for an entity like ACUS to exist, as many of its members were drawn from federal agencies, which, in turn, helped to establish the Conference’s credibility and encourage cooperation by these other agencies. See ADMIN LAW PROJECT REPORT, *supra* note 102, at 3, 177. For a discussion about the lack of cooperation, see *Regulatory Improvement Act Hearing, supra*, at 7–16.

¹⁰⁸ The first symposium, entitled *E-Rulemaking in the 21st Century*, was held in the House Judiciary Committee’s main hearing room on December 5, 2005, in cooperation with the CRS and the Regulatory Policy Program at Harvard University. See ADMIN LAW PROJECT REPORT, *supra* note 102, at 1059. This symposium, which was open to both members of Congress and their staff, as well as to the public, “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.” *Id.* at 1060 (quoting Cary Coglianese). The other two symposia were held off-site and transcribed in their entirety. *The Role of Science in Rulemaking* was held at American University’s Center for the Study of Rulemaking on May 9, 2006. *Id.* at 1253. Issues discussed at this symposium included: OMB’s recent initiatives on regulatory science, science and judicial review of rulemaking; science advisory panels and rulemaking; government agencies’ science capabilities; and congressional perspectives. See *id.* at 1253–1343. The final symposium, entitled *Presidential, Congressional, and Judicial Control of Rulemaking*, was held at CRS on September 11, 2006. See *id.* at 1345.

¹⁰⁹ See generally *id.*

¹¹⁰ *Id.* at 1.

¹¹¹ See *id.* at 3–10.

One of the underlying goals of the Admin Law Project was to call attention among members of Congress, congressional staff, and the public to ACUS, especially those who were new to Congress or unfamiliar with ACUS's work.¹¹² In particular, as part of the Admin Law Project's educational mission, efforts were undertaken to dispel myths about ACUS.¹¹³ For example, it became apparent in 2005 that there was a misconception among some House members and their staff that activities of the Office of Management and Budget were duplicative of functions that ACUS would perform.¹¹⁴ To correct this misconception, CAL Subcommittee staff requested the CRS to prepare a memorandum comparing the duties of each, which was then distributed to interested parties.¹¹⁵

Throughout this period, outreach efforts to the House Appropriations Committee by outside parties continued. The American Bar Association ("ABA"), for example, repeatedly reached out to the appropriators.¹¹⁶ Unfortunately, ACUS failed to be appropriated funding prior to the conclusion of the 109th Congress, notwithstanding the efforts by Representative Cannon and the CAL Subcommittee staff.¹¹⁷

2. 110th Congress

Although the 110th Congress marked a shift in control of the House from the Republicans to the Democrats, bipartisan support for ACUS by members of the House Judiciary Committee continued. One of the Committee's first undertakings in the new Congress was to acknowledge its continued support for the Admin Law Project as reflected in the Committee's Oversight Plan adopted in February

¹¹² See *id.* at 1.

¹¹³ See *id.*

¹¹⁴ See Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Senator Christopher Bond, Chairman, and Senator Patty Murray, Ranking Member, Subcomm. on Transp., Treasury, the Judiciary & Housing & Urban Dev. of the Senate Comm. on Appropriations, at 3 (July 1, 2005).

¹¹⁵ See Memorandum from Morton Rosenberg & T.J. Halstead, Cong. Research Serv., to Susan Jensen, Subcomm. on Commercial & Admin. Law of the House Comm. on the Judiciary (Aug. 3, 2005).

¹¹⁶ See, e.g., Letter from Robert D. Evans, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Senator Thad Cochran, Chairman, and Senator Robert C. Byrd, Ranking Member, Senate Comm. on Appropriations (July 18, 2006); see also Letter from Robert D. Evans, *supra* note 114.

¹¹⁷ See Rick Melberth, *Congress Votes to Reauthorize Administrative Conference of the United States*, CTR. FOR EFFECTIVE GOV'T (July 22, 2008), <http://www.foreffectivegov.org/node/3739> (noting that Congress "failed to appropriate any funding for the conference to reorganize and begin work").

2007.¹¹⁸ In anticipation of the approaching push to finalize fiscal year 2008 appropriations, outreach efforts continued; for example, the ABA again reached out to House and Senate appropriators to encourage them to fund ACUS.¹¹⁹

As of September 30, 2007, ACUS's authorization was set to expire. Although an agency with an expired authorization does not necessarily need reauthorization to be funded, such reauthorization may help facilitate its appropriation.¹²⁰ Essentially, reauthorization of an agency is a way for the authorizing committee—in this case, the House Judiciary Committee—to communicate its approval to the appropriators that the agency should be funded.¹²¹ To this end, CAL Subcommittee Ranking Member Cannon introduced H.R. 3564, the Regulatory Improvement Act of 2007, on September 18, 2007, with CAL Subcommittee Chair Linda Sánchez (D-CA) as an original cosponsor.¹²² As introduced, this bill sought to reauthorize ACUS for another four years, authorizing funding in the following amounts: \$1 million for fiscal year 2008, \$3.3 million for fiscal year 2009, \$3.4 million for fiscal year 2010, and \$3.5 million for fiscal year 2011.¹²³

Just two days after H.R. 3564's introduction, the CAL Subcommittee held a hearing on the bill,¹²⁴ after which it marked up the measure and reported it favorably to the full Judiciary Committee on September 19, 2007 without amendment.¹²⁵ The following month, the House Committee on the Judiciary ordered the bill favorably reported by voice vote also without amendment on October 10, 2007.¹²⁶

¹¹⁸ See H. COMM. ON OVERSIGHT & GOV'T REFORM, OVERSIGHT PLANS FOR ALL HOUSE COMMITTEES, H.R. REP. NO. 110-83, at 144–46 (2005) (Oversight Plan of the H. Comm. on the Judiciary, 110th Cong.).

¹¹⁹ See Letter from Denise A. Cardman, Acting Dir., Am. Bar Ass'n, to Senator Robert C. Byrd, Chairman, Senator Thad Cochran, Ranking Member, Senate Comm. on Appropriations, Representative David Obey, Chairman, and Representative Jerry Lewis, Ranking Member, House Comm. on Appropriations (Aug. 1, 2007).

¹²⁰ For an overview of the appropriations authorization process, see WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 48–53 (8th ed. 2011).

¹²¹ See *id.*

¹²² H.R. 3564, 110th Cong. (2007).

¹²³ *Id.* § 2.

¹²⁴ See *Regulatory Improvement Act Hearing*, *supra* note 107. Witnesses at the hearing were two of the three principal drafters of the Admin Law Project Report, namely, Mort Rosenberg and Curtis Copeland of CRS; Professor Jeffrey S. Lubbers of American University Washington College of Law and former Research Director for ACUS; and Professor Jody Freeman of Harvard Law School, who supervised the Admin Law Project's judicial review study. See *id.* at 7–75. The American Bar Association also submitted a statement for the hearing record in support of the legislation. *Id.* at 84–92.

¹²⁵ H.R. REP. NO. 110-390, at 14 (2007).

¹²⁶ *Id.*

On October 22, 2007, the House of Representatives passed the bill reauthorizing ACUS under suspension of the rules, a process whereby typically noncontroversial bills are considered.¹²⁷ Representatives Cannon and Sánchez spoke in support of the legislation, which passed by voice vote without amendment.¹²⁸

The Senate did not take up the legislation until June of the following year. Although the bill ultimately passed by unanimous consent, it was because of an amendment offered by Senator Tom Coburn, which authorized appropriations at a flat amount of \$3.2 million for fiscal years 2009 through 2011.¹²⁹ On July 14, 2008, the House agreed to the Senate amendment to the bill.¹³⁰ On July 30, 2008, President George W. Bush signed the bill into law.¹³¹

The following month, then-House Judiciary Chair John Conyers, and Ranking Member Lamar Smith, together with CAL Subcommittee Chair Sánchez and Ranking Member Cannon, sent a letter to the House appropriators urging them to appropriate funds for ACUS.¹³² Again, these efforts were unsuccessful.

3. *111th Congress*

Various political changes occurred as the 111th Congress convened in 2009. Representative Cannon was defeated in his state Republican primary election and consequently lost his seat in Congress.¹³³ Democrat Barack Obama was elected President of the United States and the Democrats retained control of both Houses of Congress.¹³⁴ Efforts to jump-start ACUS as well as to ensure its continued funding for the 2010 fiscal year were ongoing during 2009.¹³⁵

¹²⁷ 153 CONG. REC. 27,840 (2007).

¹²⁸ See *id.* at 27,839–40.

¹²⁹ 154 CONG. REC. 14,166 (2008).

¹³⁰ 154 CONG. REC. 14,827 (2008).

¹³¹ Regulatory Improvement Act of 2007, Pub. L. No. 110-290, 122 Stat. 2914 (2008).

¹³² See Letter from Representative John Conyers, Jr., Chairman, House Comm. on the Judiciary, et al., to Representative David R. Obey, Chairman, House Comm. on Appropriations, et al. (Aug. 8, 2008).

¹³³ See *Cannon Ousted in Republican Primary*, CBS NEWS (June 25, 2008, 2:15 AM), <http://www.cbsnews.com/news/cannon-ousted-in-republican-primary/>.

¹³⁴ See Adam Nagourney, *Obama Elected President as Racial Barrier Falls*, N.Y. TIMES, Nov. 4, 2008, <http://www.nytimes.com/2008/11/05/us/politics/05elect.html>.

¹³⁵ See Letter from Thomas M. Susman, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Senator Daniel K. Inouye, Chairman, Senate Comm. on Appropriations, et al., at 1–2 (June 24, 2009).

a. *ACUS Is Finally Funded*

To reinvigorate interest in ACUS, House Judiciary Committee Chair Conyers and Ranking Member Smith sponsored a bipartisan congressional briefing on April 15, 2009, which was open to the public.¹³⁶ The briefing was moderated by Sally Katzen, former Office of Information and Regulatory Affairs (“OIRA”) Administrator during the Clinton Administration.¹³⁷ Participants included Michael Fitzpatrick, Associate Administrator at OIRA; Professor Jeffrey Lubbers, American University Washington College of Law; Professor David Vladeck, Georgetown University Law Center; Curtis Copeland, a CRS Specialist in American National Government; Mort Rosenberg, with the Constitution Project and a former long-time CRS Specialist in American Public Law; and representatives from various federal agencies and advocacy organizations.¹³⁸ An overview of ACUS and its accomplishments and potential projects for a newly reauthorized and funded ACUS were discussed.¹³⁹ The briefing also included a roundtable discussion of emerging issues.¹⁴⁰

The clear message of the program was that ACUS should be funded. As Professor David Vladeck (who had just been named earlier that week to be the director of the Federal Trade Commission’s Bureau of Consumer Protection)¹⁴¹ observed, the loss of ACUS—over the course of the fourteen years since its demise—had degraded the effectiveness of federal agencies and “has had a devastating impact on the development of administrative law.”¹⁴² Mort Rosenberg, on behalf of the Constitution Project, observed that ACUS—because of its nonpartisan status—was able to help “open doors to other government agencies that might otherwise be reluctant to expose administrative deficiencies to outside experts”¹⁴³ Furthermore, Michael Fitzpatrick, Associate Administrator at OIRA, confirmed that his agency was “not set up to grapple with issues in depth and in the thorough way that ACUS c[ould].”¹⁴⁴ Finally, Tom Susman, director of the

¹³⁶ See, e.g., Ralph Lindeman, *House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference*, BNA Daily Rep. for Executives No. 71, at A-18 (Apr. 16, 2009).

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ Kim Hart, *Law Professor to Lead FTC’s Consumer Unit*, WASH. POST, Apr. 15, 2009, at A16.

¹⁴² Lindeman, *supra* note 136 (quoting David Vladeck).

¹⁴³ *Id.* (quoting Mort Rosenberg).

¹⁴⁴ *Id.* (quoting Michael Fitzpatrick).

ABA, expressed concern that “[c]ongressional committees . . . lack the expertise and time to deal with fine-grain administrative issues”¹⁴⁵

Notwithstanding the fact that the United States was in the midst of the Great Recession, funding for ACUS was finally included in legislation as part of an omnibus appropriations bill, H.R. 1105, as introduced on February 23, 2009 and as passed by the House on February 25, 2009.¹⁴⁶ The bill, in pertinent part, simply appropriated \$1.5 million for fiscal year 2009.¹⁴⁷ Although the Senate spent several days considering the bill as well as numerous amendments proposed to it, the measure was ultimately passed with the ACUS funding provision intact and unchanged on March 10, 2009.¹⁴⁸ The 466-page bill was signed into law the following day by President Obama.¹⁴⁹

At this point, ACUS was not only now reauthorized, it was officially funded—at least for the time being, as the funding was only valid through the end of fiscal year 2009, i.e., September 30, 2009.¹⁵⁰ This meant that efforts now had to focus on obtaining fiscal year 2010 funding for ACUS.

Although the President’s Budget Request for fiscal year 2010 submitted on February 26, 2009 included a funding request for ACUS in the amount of \$2.625 million,¹⁵¹ there was no guarantee that the appropriators would honor that request. On June 24, 2009, the ABA wrote the Senate and House appropriators urging them to appropriate ACUS “at the full authorized level” of \$3.2 million.¹⁵²

In the summer of 2009, the House and Senate appropriations committees both reported comprehensive fiscal year 2010 appropriations bills that included funding for ACUS. As reported by the House Appropriations Committee on July 10, 2009, ACUS was appropriated \$1.5 million for fiscal year 2010,¹⁵³ which was \$1.125 below the Obama Administration’s budget request of \$2.625 million. In its report accompanying the bill, the House Appropriations Committee explained:

¹⁴⁵ *Id.*

¹⁴⁶ See H.R. 1105, 111th Cong. div. D, tit. V (2009).

¹⁴⁷ See *id.*

¹⁴⁸ 155 CONG. REC. 6825 (2009).

¹⁴⁹ See Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, div. D, tit. V, 123 Stat. 656 (2009).

¹⁵⁰ See 123 Stat. at 524. .

¹⁵¹ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2010, at 1179 (2009).

¹⁵² See Letter from Thomas M. Susman, *supra* note 135.

¹⁵³ H.R. 3170, 111th Cong. tit. V (2009).

As of June 2009, a Chairman to head the Conference has not been named, no staff have been hired, and no fiscal year 2009 funds have been expended. In light of this, the Committee does not recommend the funding increase proposed in the budget request.¹⁵⁴

The House narrowly passed this legislation by a vote of 219 to 208 on July 16, 2009, without amendment to the ACUS funding provision.¹⁵⁵

Meanwhile, on July 9, 2009, the Senate Appropriations Committee reported S. 1432, a bill appropriating funding for various federal agencies that included \$1.5 million in appropriations for ACUS.¹⁵⁶ The Report accompanying this legislation specified, however, that ACUS could carry forward one-half of the \$1.5 million appropriated for fiscal year 2009, which had not been expended by ACUS because without a Chair (who had to be nominated by the President and confirmed by the Senate), it could not begin operations.¹⁵⁷

The House Appropriations Committee then considered H.R. 3288, a bill appropriating fiscal year 2010 funding for the Departments of Transportation, Housing and Urban Development, and other related agencies.¹⁵⁸ This legislation, as initially passed by the House and considered by the Senate, did not include funding for ACUS.¹⁵⁹ The House and Senate appropriations committees reconciled their respective bills in conference, which, in turn, issued a conference report¹⁶⁰ for H.R. 3288 that consisted of comprehensive appropriations bill funding the Departments of Transportation, Housing and Urban De-

¹⁵⁴ H.R. REP. NO. 111-202, at 57 (2009).

¹⁵⁵ 155 CONG. REC. 18,126 (2009).

¹⁵⁶ S. REP. NO. 111-43, at 75 (2009).

¹⁵⁷ *See id.*

¹⁵⁸ *See* H.R. 3288, 111th Cong. (2009).

¹⁵⁹ *See id.*

¹⁶⁰ An apt description of the congressional conference process is the following:

Under the Constitution, before measures can be sent to the White House for presidential consideration, they must pass the House and Senate with exactly the same bill number and legislative text. House- and Senate-passed versions of the same bill frequently differ, sometimes only slightly but often on critical points. But whatever the differences, the two versions must be reconciled by mutual agreement. Whenever possible, this reconciliation is undertaken informally. However, a fair percentage of all bills passed by both chambers require action by the most prominent of the bicameral reconciliation methods: the formation of a House-Senate conference committee—an ad hoc joint committee composed of members selected by each chamber to resolve differences on a particular bill in disagreement. Major and controversial legislation usually requires conference committee action.

OLESEK, *supra* note 120, at 294.

velopment; Health and Human Services, Veteran Affairs, and Commerce, among others, as well as ACUS.¹⁶¹ This legislation appropriated \$1.5 million for ACUS¹⁶² and included the Senate's authorization allowing ACUS to carry forward one-half of the \$1.5 million appropriated for the prior fiscal year.¹⁶³

The House agreed to the conference report by a vote of 221 to 202 on December 10, 2009.¹⁶⁴ Thereafter, the Senate agreed to the conference report by a vote of 57 to 35.¹⁶⁵ President Obama signed the 376-page measure into law on December 16, 2009.¹⁶⁶

The reasons why it took nearly five years to fund ACUS after reauthorization likely explain why it was initially defunded in the first place in 1995.¹⁶⁷ These reasons include congressional unfamiliarity and misconceptions about ACUS's work, legislative imperatives to eliminate federal agencies and governmental programs viewed as unnecessary, and efforts to reduce the federal budget generally.¹⁶⁸

b. Staffing the ACUS

To officially begin operations, the President needed to nominate a chair for ACUS.¹⁶⁹ Strategically, this was important because appropriators, faced with other priorities, could have construed the Administration's failure to nominate a chair as evidence that there was no urgent need to fund the agency.

Supporters of ACUS pursued a dual-track approach for appointing a chair. Given the fact that there may be delay in the appointment process as the result of other higher priority appointments that the newly elected President would need to consider, the ABA—along with other ACUS supporters—sought to use a procedure “set out in [ACUS's] authorizing statute (5 U.S.C. § 595(b)) that allows for an ACUS vice chairman—who does not need Senate confirmation—to act as chairman when the top post is vacant.”¹⁷⁰ In addition, on August 18, 2009, the ABA corresponded with Michael Fitzpatrick,

¹⁶¹ See H.R. REP. NO. 111-366 (2009).

¹⁶² *Id.* at 152.

¹⁶³ *Id.*; see also 155 CONG. REC. 29,962 (2009).

¹⁶⁴ 155 CONG. REC. 31,041 (2009).

¹⁶⁵ *Id.* at 31,626.

¹⁶⁶ See Consolidated Appropriations Act, 2010, Pub L. No. 111-117, 123 Stat. 3034 (2009).

¹⁶⁷ See *supra* note 26 and accompanying text (describing potential explanations for defunding ACUS).

¹⁶⁸ See *id.*

¹⁶⁹ 5 U.S.C. § 593(b)(1) (2012).

¹⁷⁰ Ralph Lindeman, *Supporters Devise Strategy to Start Up ACUS Before Current Funding Expires on Sept. 30*, BNA Daily Rep. for Executives No. 83, at AA-1 (May 4, 2009).

who was then the Acting Administrator of OIRA, to express the hope “that the Obama Administration will shortly announce a nominee to chair” ACUS.¹⁷¹ As later observed, the ACUS’s supporters “ultimately . . . decided to wait for a chairman to be nominated and confirmed.”¹⁷²

As of late August 2009, public reports began to surface that the President was imminently prepared to nominate Professor Paul Verkuil former Dean of Yeshiva University’s Benjamin N. Cardozo Law School to chair ACUS for five years.¹⁷³ In fact, it would take another three months before the White House formally announced its intent to nominate Verkuil as ACUS Chair on November 3, 2009.¹⁷⁴ This announcement also included the names of twenty-seven other individuals whom the President intended to nominate to serve in various other government positions unrelated to ACUS.¹⁷⁵ The following day, the President formally submitted his nomination for ACUS Chair to the Senate Judiciary Committee.¹⁷⁶ In turn, the Senate Judiciary Committee, on December 10, 2009, held its executive business meeting at which it ordered reported by unanimous consent Verkuil’s appointment to ACUS.¹⁷⁷ On March 3, 2010, Professor Verkuil was confirmed by the Senate¹⁷⁸ and was sworn in on April 6, 2010.

c. A Reauthorized and Funded ACUS Commences Operations

As of April 6, 2010, ACUS could commence operations because (1) it had a chair appointed by the President and confirmed by the Senate, and (2) it had also been appropriated funding for at least the

¹⁷¹ Letter from William V. Luneburg, Chair, Section of Administrative Law and Regulatory Practice, Am Bar Ass’n, to Michael A. Fitzpatrick, Acting Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, at 1 (Aug. 18, 2009) (on file with H. Comm. on the Judiciary Democratic staff).

¹⁷² Ralph Lindeman, *Revived Administrative Conference Seeks to Energize Federal Agency Thinking*, BNA Daily Rep. for Executives No. 157, at C-1 (Aug. 17, 2010).

¹⁷³ See, e.g., Ralph Lindeman, *White House to Name ACUS Chairman Before Current Fiscal Year Ends Sept. 30*, BNA Daily Rep. for Executives No. 165, at AA-1 (Aug. 28, 2009).

¹⁷⁴ See Press Release, White House Office of the Press Secretary, *President Obama Announces More Key Administration Posts* (Nov. 3, 2009), <http://www.boozaallen.com/media-center/press-releases/2009/11/42720848>.

¹⁷⁵ See *id.*

¹⁷⁶ S. COMM. ON THE JUDICIARY, 111TH CONG., NOMINATION NO. PN1137-111 FOR PAUL R. VERKUIL TO BE CHAIRMAN OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES FOR THE TERM OF FIVE YEARS (2009) (Nov. 3, 2009).

¹⁷⁷ S. COMM. ON THE JUDICIARY, 111TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING (Dec. 10, 2009), <http://www.judiciary.senate.gov/imo/media/doc/ExecutiveBusinessMeetingResults-12-10-2009.pdf>.

¹⁷⁸ 156 CONG. REC. 2550 (2010).

next six months.¹⁷⁹ Nevertheless, in light of the fragility of the economic climate nationally and with respect to appropriations in particular, both the Democratic and Republican members of the House Judiciary Committee sought to explore ways to call attention to the fledgling ACUS agency to ensure that its funding would continue into the next fiscal year. In fact, on March 4, 2010, the day following the Senate's confirmation of the ACUS Chair, preparations began for a House Judiciary Committee hearing and, again, Justices Breyer and Scalia were invited to testify. Later that month, they confirmed their willingness and availability to testify. The hearing was scheduled for May 20, 2010, exactly six years from the date on which they previously testified before the Committee.¹⁸⁰

Unlike the 2004 hearing on ACUS, however, the May 2010 hearing consisted of two panels. The first consisted of the Justices, and the second consisted of the following witnesses: Paul R. Verkuil, ACUS Chair; Sally Katzen, Executive Managing Director, Podesta Group; Jeffrey S. Lubbers, Professor of Practice in Administrative Law, American University Washington College of Law; and Curtis W. Copeland, CRS Specialist in American National Government.¹⁸¹

As before, the Justices expressed strong support for ACUS. Justice Breyer, for example, observed:

Given the Conference's rather low cost (a small central staff, commissioning academic papers, endless amounts of volunteered private time, and two general meetings per year), it is indeed a pity that, in allowing the Conference to lie dormant for years, we have weakened our federal government's ability to respond effectively, in this general way, to the problems of its citizens.¹⁸²

Stating that he was "delighted" that ACUS was finally operational,¹⁸³ Justice Scalia extolled ACUS's cost-saving value.¹⁸⁴ He explained:

I think it was one of the best bargains, results for the buck, that the government had during the years while it was in existence. It is impossible to tell you or to get you to appreciate how expert the private lawyers were, who donated their time to considering the studies done by the consultants for

¹⁷⁹ See *supra* Part II.A–B.3.b.

¹⁸⁰ See *supra* note 64 and accompanying text.

¹⁸¹ See *Administrative Conference*, 111th Cong. *supra* note 9, at 14–90.

¹⁸² *Id.* at 16, 18–19 (statement of J. Breyer).

¹⁸³ *Id.* at 20 (statement of J. Scalia).

¹⁸⁴ See *id.* (statement of J. Scalia).

the conference. And all of that was gratis, of course. The other members of the conference were academics and government officials, usually general counsels.¹⁸⁵

Justice Scalia concluded his introductory remarks with this cautionary observation:

Justice Breyer mentioned, and I think he is quite correct, that ordinarily these matters of administrative procedure are too technical to attract anybody's attention, and they tend to be under the radar. To tell you the truth, I am not sure that is all bad. One of the things I worried about with the conference was the danger of its being politicized[,] of its studies being directed to helping business or not helping business, that one interest group or another would come to dominate either the conference assembly or the recommendations that were presented to the assembly.¹⁸⁶

The Justices also discussed potential issues for consideration by the newly reestablished ACUS. Justice Scalia, for instance, noted that "the biggest problem" that the federal courts face is when they should and should not "defer to the judgment of the agenc[ies]," as the standard was "quite vague."¹⁸⁷ Justice Breyer, directing his comments to the subcommittee members, elaborated:

So people know what they want. They want a cleaner environment or they want better health care, whatever those things are that they vote for. And they are put at a general level. Now, you, then, legislate at a pretty general level. But you have to decide to what extent you want the agency to write the details. And if you give them too much power, well, then you have taken power away from the ordinary American. But if you give them too little power, they won't be able to achieve those general objectives. You don't tell the Army what hill to take.

. . . .

So, ultimately, you are trying to make that decision. But you don't focus on it when you write the bill.

. . . .

So we have to interpret these statutes on an issue that is inevitably important to you, but you haven't told us. And that, I think, as Justice Scalia said, is a very difficult problem, be-

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 21.

¹⁸⁷ *Id.* at 33.

cause it comes down to the question of how much do we interfere with the agency.¹⁸⁸

In his prepared statement, ACUS Chair Paul Verkuil referenced fifteen potential areas listed in the administrative law landscape that a newly established ACUS could consider.¹⁸⁹ Similarly, Curtis Copeland, on behalf of CRS, culled from various sources a litany of issues that ACUS could study.¹⁹⁰ The ABA also submitted a detailed list of potential projects for ACUS to undertake.¹⁹¹

On July 8, 2010, the White House announced that President Obama appointed three members to ACUS's council and identified the remaining appointees under consideration.¹⁹² ACUS continued to fill other member positions and acquire staff, and, in September 2010, ACUS announced its public membership.¹⁹³ The following month, ACUS sent notification that it had appointed its senior fellows.¹⁹⁴

In the meantime, House and Senate appropriators increasingly recognized the progress of ACUS's standup efforts. The House Appropriations Committee, for example, reported a bill that included \$1.5 million in funding for ACUS.¹⁹⁵ The House thereafter passed this legislation, leaving the ACUS funding provision intact.¹⁹⁶ The Senate Appropriations Committee, on the other hand, reported a measure

¹⁸⁸ *Id.* at 33–34 (statement of J. Breyer).

¹⁸⁹ *See id.* at 54–58 (statement of Paul Verkuil).

¹⁹⁰ *See id.* at 81–87 (statement of Curtis Copeland).

¹⁹¹ *See id.* at 95–117 (letter from ABA)

¹⁹² Press Release, White House Office of the Press Secretary, *President Obama Announces More Key Administration Posts* (July 8, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-7810>. President Obama announced that Preeta D. Bansal, General Counsel and Senior Policy Advisor for the Office of Management and Budget, was appointed Vice Chair of ACUS; that Thomasina Rogers, Chair of the Occupational Safety and Health Review Commission, and Michael Fitzpatrick, Associate Administrator of OIRA, were appointed council members of ACUS; and that the following individuals were under consideration for the remaining seven council slots: Ronald A. Cass, President of Cass & Associates; Professor Mariano-Florentino Cuellar of Stanford Law School; Julius Genachowski, Chair of the Federal Communications Commission; Theodore Olson, former Solicitor General; Thomas Perez, then-Assistant Attorney General for Civil Rights Division at the U.S. Department of Justice; Jane Sherburne, General Counsel at BNY Mellon; and Patricia McGowan Wald, former Judge of the United States Court of Appeals for the District of Columbia Circuit. *See id.*

¹⁹³ *See* Press Release, Admin. Conf. of the U.S., *Administrative Conference of the United States Announces Public Members* (Sept. 28, 2010), <https://www.acus.gov/newsroom/news/administrative-conference-united-states-announces-public-members>.

¹⁹⁴ *See* Press Release, Admin. Conf. of the U.S., *ACUS Announces Senior Fellows* (Oct. 4, 2010), <https://www.acus.gov/newsroom/news/acus-announces-senior-fellows>.

¹⁹⁵ H.R. 3170, 111th Cong. tit. V (2009).

¹⁹⁶ 155 CONG. REC. 18,078, 18,126 (2009).

that included \$3.2 million in funding for ACUS.¹⁹⁷ The report accompanying this bill noted that, with respect to ACUS:

The Committee recommends \$3,200,000 for ACUS, equal to the budget request and \$1,700,000 above the fiscal year 2010 enacted level. The Committee is pleased that ACUS utilized carryover funds to begin its operations in fiscal year 2010. The Committee expects to be regularly apprised of ACUS activities and looks forward to reviewing a comprehensive Congressional Justification for the fiscal year 2012 budget concurrent with the President's budget submission.¹⁹⁸

The Senate appropriations bill did not progress further because Congress ultimately passed a series of continuing resolutions funding the federal government generally, which provided nearly level funding for ACUS.¹⁹⁹

Representative Cohen began the May 20, 2010 hearing by stating that he intended to introduce legislation reauthorizing ACUS in light of the fact that its current authorization was due to expire in 2011.²⁰⁰ Thereafter, negotiations at the staff level continued into the fall on draft legislation, but nothing was finalized prior to the November 2010 midterm congressional election. Nevertheless, ACUS finally held its first plenary session in fifteen years, which commenced on December 9, 2010.²⁰¹ Over the course of that session, the newly revitalized ACUS issued its first recommendation.²⁰² As Chair Verkuil observed, ACUS's ability to issue a recommendation, within just the first months of becoming operational, was a "significant accomplishment."²⁰³

For the fiscal year 2011 appropriations cycle, the House considered H.R. 1473, the "Department of Defense and Full-Year Continuing Appropriations Act, 2011," which was introduced on April 11, 2011 and included \$2.75 million in funding for ACUS for fiscal year

¹⁹⁷ S. 3677, 111th Cong. tit. V (2010).

¹⁹⁸ S. REP. NO. 111-238, at 79 (2010).

¹⁹⁹ See Continuing Appropriations Act, 2011, Pub. L. No. 111-242, 124 Stat. 2607 (2010), amended by Pub. L. No. 111-317, 124 Stat. 3454 (2010), amended by Pub. L. No. 111-322, 124 Stat. 3518 (2010).

²⁰⁰ *Administrative Conference*, 111th Cong., *supra* note 9, at 2.

²⁰¹ See Adoption of Recommendation, 76 Fed. Reg. 81 (Jan. 3, 2011).

²⁰² See *id.* As described in the public notice announcing the adoption of this measure: "The recommendation addresses issues relating to Federal agency procedures regarding consultation with State and local governments and for considering State interests in rulemakings that may result in the preemption of State law." *Id.*

²⁰³ Press Release, Admin. Conf. of the U.S., *Revived Administrative Conference Publishes First Recommendation in Fifteen Years* (Jan. 4, 2011), <https://www.acus.gov/newsroom/news/revived-administrative-conference-publishes-first-recommendation-fifteen-years>.

2011.²⁰⁴ Three days later, the House passed the bill on April 14, 2011, with the ACUS funding intact.²⁰⁵ The Senate thereafter passed the bill the same day without amendment,²⁰⁶ and the President signed it the following day.²⁰⁷

4. 112th Congress

As a result of the November 2010 midterm elections, the Republicans regained control of the House in the 112th Congress and legislative priorities changed.²⁰⁸ Nevertheless, Representative Smith (R-TX)

²⁰⁴ H.R. 1473, 112th Cong., tit. V. § 1541 (2011).

²⁰⁵ 157 CONG. REC. 6171 (2011).

²⁰⁶ 157 CONG. REC. 5972 (2011).

²⁰⁷ See Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, 125 Stat. 38 (2011).

²⁰⁸ For example, one of the first bills introduced in the 112th Congress was H.R. 10, the Regulations From the Executive in Need of Scrutiny Act of 2011, also known as the REINS Act, which would require Congress to approve certain major rules before they could become effective. H.R. 10, 112th Cong. § 2 (2011). Its supporters claim it is necessary to address the perceived detrimental impact of overzealous federal regulators and needless regulations by requiring a more detailed drafting process for legislation and regulations. See *id.* For instance, House Judiciary Chair Lamar Smith (R-TX), who was an original cosponsor of the legislation, explained:

[T]he American people in November voted for real change in Washington. One change they want is to stop the flood of regulations that cost jobs and smothers job creation.

.....

Because the officials who authorize these regulations are not elected, they cannot be held accountable by the American people. The REINS Act reins in the costly overreach of Federal agencies that stifles job creation and slows economic growth. It restores the authority to impose regulations to those who are accountable to the voters, their elected Representatives in Congress.

REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing Before the Subcomm. on Courts, Commercial, & Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 5 (2011) (statement of Chairman Lamar Smith).

On the other hand, opponents of the legislation were concerned that it could jeopardize the federal government's ability to protect public health and safety. See *id.* at 3–4 (statement of Subcommittee Ranking Member Steve Cohen). As CAL Subcommittee Ranking Member Steve Cohen (D-TN) observed:

Most importantly, regulations help protect the health and safety of everyday Americans, including our children, our neighbors, our colleagues, our grandparents, and ourselves and the public at large.

The fact is that Federal regulations help ensure the safety of the food that we eat, the air that we breathe, the water that we drink, the products we buy, the medications we use, the cars we drive, the planes we fly in, and the places we work. Indeed, most Americans are able to take for granted the safety of these things assured because of the existence of Federal regulations.

The REINS Act threatens to make it harder for such beneficial regulations to be implemented.

Id. at 4.

introduced a bill reauthorizing ACUS on July 8, 2011, with Representative Coble as an original cosponsor.²⁰⁹ The measure authorized flat-funding for ACUS in the amount of \$2.75 million for fiscal years 2012 through 2014.²¹⁰ At the House Judiciary Committee's markup of the bill, CAL Subcommittee Ranking Member Steve Cohen offered an amendment increasing the authorized appropriation to \$3.2 million, which was the exact amount previously authorized for ACUS in the prior Congress.²¹¹ As a compromise, the bill was revised to authorize \$2.9 million for the same period of years, which was adopted by voice vote.²¹² As amended, the bill was ordered reported favorably by the Committee.²¹³

Thereafter, the House passed the bill on August 1, 2011, by a vote of 382 to 23, reflecting its significant bipartisan support.²¹⁴ The bill was reported by the Senate Judiciary Committee with an amendment on September 22, 2011.²¹⁵ As reported, the bill authorized the same level of funding, but required not less than thirty-five percent of ACUS's annual appropriations to be expended on projects it would undertake.²¹⁶ It also required ACUS to issue an annual report detailing the agency's operations.²¹⁷ In addition, the bill required an annual independent audit of ACUS's financial statements as well as the preparation of an annual budget.²¹⁸ No further action was taken on the measure in the Senate.²¹⁹

5. *113th Congress to the Present*

Although ACUS's last reauthorization expired as of the end of fiscal year 2011, no bill has been introduced to further reauthorize the Conference. Nevertheless, Congress has continued to appropriate

²⁰⁹ H.R. 2480, 112th Cong. (2011) (as introduced by H.R. Comm. on the Judiciary, July 8, 2011).

²¹⁰ *Id.* at § 2.

²¹¹ H. COMM. ON THE JUDICIARY, 112TH CONG., MARKUP TRANSCRIPT OF H.R. 2480, THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES REAUTHORIZATION ACT OF 2011, at 174 (2011).

²¹² H.R. REP. NO. 112-154, at 5-6 (2011).

²¹³ *Id.* at 6.

²¹⁴ See 157 CONG. REC. H5867-68 (daily ed. Aug. 1, 2011).

²¹⁵ See 157 CONG. REC. S5902 (daily ed. Sept. 22, 2011).

²¹⁶ H.R. 2480, 112th Cong. § 2 (as reported by S. Comm. on the Judiciary, Sept. 22, 2011).

²¹⁷ See *id.* at § 3.

²¹⁸ See *id.*

²¹⁹ See H.R. 2480—112th Congress, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2480> (last visited Sept. 21, 2015).

funding for ACUS²²⁰ and has continued to recognize its value by pursuing measures that would assign it additional responsibilities. For example, Representative Cynthia Lummis (R-WY) in the 113 and 114 Congress sponsored legislation that would amend the Equal Access to Justice Act (“EAJA”)²²¹ to require ACUS, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, to report to Congress annually on the amount of fees and expenses awarded pursuant to EAJA.²²² During the 113th Congress, this legislation was passed by the House on May 6, 2014, but it was not considered in the Senate.²²³

Over the course of its existence from 2011 to date, ACUS has leveraged its small budget to conduct many useful activities including the adoption of thirty-two recommendations and one formal statement.²²⁴ These recommendations range from offering a method to help resolve disputes arising under the Freedom of Information Act²²⁵ through the use of alternative dispute resolution approaches²²⁶ to cost-saving measures such as a recommendation providing practical guidance to agencies regarding how best to conduct hearings by video teleconferencing technologies.²²⁷ Most recently, ACUS issue a recommendation offering suggestions intended to improve the “accuracy and transparency” of how the executive branch keeps the public apprised of forthcoming significant regulatory actions.²²⁸ In addition, the public can view ACUS’s proceedings live via its website as well as access various reports and papers submitted in response to such proceedings.²²⁹ And, in keeping with past practice, ACUS also sponsors

²²⁰ See, e.g., Pub. L. No. 113-235, div. B, tit. V, 128 Stat. 2130, 2357 (2014); Pub. L. No. 113-76, div. B, tit. V, 128 Stat. 5, 208 (2014).

²²¹ 28 U.S.C. § 2412(d)(1)(A) (2012).

²²² H.R. 384, 114th Cong. (2015); H.R. 2919, 113th Cong. (2013).

²²³ 160 Cong. Rec. H3433 (daily ed. May 6, 2014).

²²⁴ *Administrative Conference Documents—Recommendations*, ADMIN. CONF. U.S., <https://www.acus.gov/recommendations> (last visited Sept. 5, 2015).

²²⁵ 5 U.S.C. § 552 (2012).

²²⁶ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 2014-1, RESOLVING FOIA DISPUTES THROUGH TARGETED ADR STRATEGIES (2014), <http://www.acus.gov/sites/default/files/documents/Recommendation%202014-1%20%28Resolving%20FOIA%20Disputes%29.pdf>.

²²⁷ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 2014-7, BEST PRACTICES FOR USING VIDEO TELECONFERENCING FOR HEARINGS (2014), https://www.acus.gov/sites/default/files/documents/Recommendation%25202014-7%2520%2528Video%2520Hearings%2529_1.pdf.

²²⁸ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 2015-1, PROMOTING ACCURACY AND TRANSPARENCY IN THE UNIFIED AGENDA (2015), https://www.acus.gov/sites/default/files/documents/Unified%20Agenda%20Recommendation%20FINAL_0.pdf.

²²⁹ *Administrative Conference Research Projects—Current Projects*, ADMIN. CONF. U.S., <https://www.acus.gov/current-projects> (last visited Sept. 21, 2015).

various research projects. For example, ACUS is examining how agencies utilize ombudsmen and intends to identify best practices.²³⁰

As the 113th Congress drew to a close, House Judiciary Committee Ranking Member John Conyers, Jr. (D-MI), together with House Judiciary Committee Chairman Bob Goodlatte (R-VA), and Representatives Spencer Bachus (R-AL) and Henry C. “Hank” Johnson, Jr. (D-GA), respectively Chairman and Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, issued a statement recognizing the fiftieth anniversary of the Administrative Conference that was published in the Congressional Record.²³¹ In pertinent part, the statement noted:

This year marks the 50th anniversary of the Administrative Conference of the United States, an independent federal agency tasked by Congress to make recommendations intended to improve the administrative process and to provide nonpartisan expert advice. Over the course of its existence, many of these recommendations have been enacted into law or voluntarily implemented by federal agencies and the federal judiciary. As a result of the Conference’s excellent work, our Nation’s federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement.

From its inception in 1964, the Conference has provided invaluable guidance to all three branches of government, including federal agencies, Congress, and the federal judiciary—about how to make the regulatory process more responsive, efficient, and cost-effective. Members of the Conference are drawn from executive and judicial branches of the federal government, academia, as well as from the private sector.

Congress has assigned the Conference important responsibilities in the implementation of the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, the Equal Access to Justice Act, the Congressional Accountability Act, and the Magnusson-Moss Warranty-Federal Trade Commission Improvement Act. In addition, the Conference has facilitated judicial review of agency decisions and helped eliminate various technical impediments to such review. And, the Conference helps save taxpayer dollars. Just one

²³⁰ *Administrative Conference Research Projects—Ombudsman in Federal Agencies*, ADMIN. CONF. U.S., <https://www.acus.gov/research-projects/ombudsman-federal-agencies-0> (last visited Sept. 21, 2015).

²³¹ 160 CONG. REC. E1827 (daily ed. Dec. 12, 2014).

agency alone—the Social Security Administration—estimated that the Conference’s recommendation to change that agency’s appeals process would result in approximately \$85 million in savings.²³²

CONCLUSION

Efforts to reauthorize ACUS in 2004 reached a successful conclusion in a relatively short period of time—a process that took a bit more than three months to achieve, between the introduction of legislation and being signed into law.²³³ In contrast, it took approximately five years—over the course of several sessions of Congress—to finally fund ACUS.²³⁴ Moreover, it took about another year for ACUS to have a chair appointed and sworn in so that it could formally recommence its operations.²³⁵ Tellingly, even though ACUS has not yet been reauthorized after the 2011 expiration of its authorization, Congress continues to assign it tasks in recognition of its continuing value.²³⁶

²³² *Id.*

²³³ *See infra* Part II.A (describing ACUS reauthorization).

²³⁴ *See infra* Part II.B (describing efforts to fund ACUS after reauthorization).

²³⁵ *See infra* Part II.B.3.b (describing staffing ACUS after reauthorization).

²³⁶ *See infra* Part II.B.5 (describing current ongoing ACUS projects).