

ACUS 2.0: Bridging the Gap Between Administrative Law and Public Administration

Funmi E. Olorunnipa*

ABSTRACT

Although both operate in the public sphere, administrative law and public administration are two distinct disciplines and a wide gap, both in theory and in practice, exists between the two. This Article briefly examines that gap and explains how the Administrative Conference of the United States (“ACUS”), an independent federal agency dedicated to improving the administrative process, helps to bridge that gap through its membership, its projects and recommendations, its Chairman Office’s work, and other activities. This Article ends by suggesting ways ACUS can continue to bridge the gap between administrative law and public administration.

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INTRODUCTION

Although separate doctrines in theory, public administration and administrative law can, at times, be intertwined. While it is clearly recognized that the two are distinct disciplines, their connection is not always recognized by scholars or practitioners.¹ On the one hand, ad-

* Attorney Advisor, Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of ACUS, its committees or its staff.

¹ See Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn’t*, 69 PUB. ADMIN. REV. 803, 806–08 (2009) (pointing out how public administrators have an “anti-legal temper”); Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 10–13, 23–25 (2013) (noting how administrative law often fails to recognize principles of public administration).

ministrative law is the body of law that governs the activities of administrative agencies of government and essentially regulates public administrative practices.² On the other hand, public administration is the implementation of government policy combining management, politics, and law to achieve policy objectives.³

Despite these differences, administrative law and public administration both operate in the public sphere, and at times, they do aim to achieve common goals. Through promulgating rules, enforcing statutes, providing guidance, adjudicating administrative cases, receiving public comments, and exercising discretion, among other things, agencies manage the business of government through administrative law and process.⁴ In addition, a principal objective of administrative law is to ensure efficient and just administration. Similarly, public administration focuses on the effective and efficient administration of government. In practice, public administrators and administrative lawyers often work side-by-side on the same government problems from different angles. Each plays their own pivotal role in efficiently and effectively addressing critical issues and thus, both should regularly consider how they might work collaboratively to address problems in government. Despite commonalities, however, it seems the intersection between public administration and administrative law is largely ignored. Accordingly, a wide gap, both in theory and in practice, exists between the two fields of discipline.⁵

Why this gap exists is not entirely clear. It may be because the law, which is based on rules and compliance, can often come into conflict with the logic of management and program administration, which focuses primarily on achieving policy goals through a variety of actions. It may be because practitioners in both fields are solely focused on addressing problems using principles from their own disciplines alone, working in silos, and thus hampering collaboration. It is true that tensions may exist and practitioners in both fields may face challenges when they seek to work collaboratively to solve problems in government. The presence of challenge, however, need not divert

² See generally DAVID H. ROSENBLUM, *ADMINISTRATIVE LAW FOR PUBLIC MANAGERS* (Jay Shafritz ed., 2003).

³ See generally *id.*

⁴ See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–90 (2004) (describing the policy-making tools available to federal agencies).

⁵ See Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517 (2015) (noting how scholarship in both administrative law and public administration acknowledges the divide in the two disciplines).

practitioners from making sincere efforts to bridge the gap between administrative law and public administration, especially where doing so would aid their objectives in solving key government problems. In particular, administrative lawyers working in government are public servants who can play a vital role in aiding the effective administration of government while also preserving the rule of law. Accordingly, where understanding the work of public administrators and working collaboratively with them can further this objective, administrative lawyers should consider doing so as a way to bridge the gap between the two fields.

I. HOW ACUS HELPS TO BRIDGE THE GAP

Individual lawyers seeking to work with public administrators in their respective agencies may look to the work of the Administrative Conference of the United States (“ACUS”) for examples of how to bridge the gap between administrative law and public administration. After a fifteen-year hiatus, ACUS reopened its doors in 2010, with President Barack Obama calling the agency, “a public-private partnership designed to make government work better.”⁶ To meet its statutory mandate, ACUS seeks to improve administrative law and process in government through in-depth study of critical issues at agencies and by issuing recommendations based on those studies.⁷

Although the core focus of ACUS’s work has been on addressing pure administrative law and process issues arising in government, the agency has also played a broader role by helping to bridge the gap between administrative law and public administration. But the vision for ACUS to serve as a link between the two worlds predated the rebirth of the agency in 2010. For example, in 1998, current ACUS Chairman Paul Verkuil wrote: “The ‘new’ Conference . . . could become a mechanism to connect legal procedures to the management issues that underlie them. The artificial distinction between legal and management process should give way to a unified concept of public management”⁸ The vision articulated in that 1998 article has now

⁶ Press Release, *Office of the Press Secretary, President Obama Announces More Key Administration Posts*, 7/8/10 (July 8, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-7810>.

⁷ See 5 U.S.C. § 594(1) (2012) (authorizing ACUS to carry out its purposes by “study[ing] the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and mak[ing] recommendations”).

⁸ Paul R. Verkuil, *Speculating About the Next “Administrative Conference”: Connecting Public Management to the Legal Process*, 30 ARIZ. ST. L.J. 187, 187 (1998); see also *id.* at

come to life through ACUS's current membership, its projects and recommendations, and its activities.

A. Bridging the Gap Through ACUS Membership

ACUS fosters dialogue between the administrative law and public administration fields by having experts from both disciplines as Conference members. In addition to having leading administrative law scholars and practitioners, ACUS also has members who are officials at leading public administration organizations such as the Partnership for Public Service and the IBM Center for the Business of Government.⁹ ACUS members submit project ideas and discuss ACUS studies and proposed recommendations through its committee process and at its biannual plenary sessions.¹⁰ Thus, having public administration experts in the room with administrative lawyers as ACUS selects and discusses its studies informs the agency's work and helps to identify ways the two fields can work together to solve government problems.

B. Bridging the Gap Through ACUS Projects and Recommendations

Indeed, ACUS has already undertaken a number of projects illustrating the link between public administration and administrative law, and many of these projects have led to recommendations suggesting improvements that can be made by practitioners in both fields. For example, ACUS Recommendation 2013-7, *The GPRA Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration*,¹¹ examines perceived and real constraints to cross-agency collaboration under the Government Performance and Results Act (GPRA) Modernization Act¹² and highlights tools available to help agencies collaborate.¹³ Based on a study conducted by a leading professor of public administration,¹⁴ the recom-

200–01 (“Since the problems will emphasize management as much as legal solutions, [ACUS] should not be dominated by lawyers.”).

⁹ See *About the Assembly*, ADMIN. CONF. U.S., <http://www.acus.gov/about-assembly> (last visited July 22, 2015) (providing the names, titles and affiliation of all current ACUS members).

¹⁰ See *Research Projects: Browse Projects by Stage*, ADMIN. CONF. U.S., <http://www.acus.gov/projects-by-stage> (last visited July 22, 2015) (describing the ACUS project process).

¹¹ ACUS Recommendation 2013-7, *GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration*, 78 Fed. Reg. 76,273 (Dec. 17, 2013).

¹² GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (2011).

¹³ ACUS Recommendation 2013-7, 78 Fed. Reg. at 76,273–74.

¹⁴ See JANE E. FOUNTAIN, *THE GPRA MODERNIZATION ACT OF 2010: EXAMINING CON-*

mendation offers guidance to public administrators and lawyers to help increase transparency, improve information sharing, and facilitate better agency reporting under the Act.¹⁵ The recommendation is also aimed at enhancing the role of agency attorneys and other agency staff in facilitating cross-agency collaboration.¹⁶

In addition, ACUS Recommendation 2012-3, Immigration Removal Adjudication,¹⁷ addresses the problem of case backlogs in immigration removals through a series of recommendations aimed at enhancing efficiency and fairness in the immigration court process.¹⁸ The recommendation, based on a comprehensive study done by a law professor and a court management expert, is directed at both public administrators and lawyers working on immigration cases at the Department of Homeland Security and the Department of Justice's Executive Office for Immigration Review.¹⁹

Another recommendation aimed at bridging the gap is ACUS Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities,²⁰ which addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies.²¹ The recommendation, based on a study conducted by two law professors, proposes some reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, agency consultation provisions, and tracking and evaluating the effectiveness of coordination initiatives.²² ACUS Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings,²³ also has elements aimed at both public administrators and administrative lawyers. The recommendation offers practical guidance regarding how best to conduct video hearings, and addresses technical

STRAINTS TO, AND PROVIDING TOOLS FOR, CROSS-AGENCY COLLABORATION (Dec. 3, 2013) https://www.acus.gov/sites/default/files/documents/GPRMA%20Project_Final%20Report_Fountain_12_3_13_0.pdf.

¹⁵ ACUS Recommendation 2013-7, 78 Fed. Reg. at 76,273–74.

¹⁶ *Id.* at 76,274.

¹⁷ ACUS Recommendation 2012-3, Immigration Removal Adjudication, 77 Fed. Reg. 47,804 (Aug. 10, 2012).

¹⁸ *Id.* at 47,804–08.

¹⁹ *Id.*

²⁰ ACUS Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012).

²¹ *Id.* at 47,810–12.

²² *Id.*

²³ ACUS Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings, 79 Fed. Reg. 75,119 (Dec. 17, 2014).

and procedural practices as well as fairness and satisfaction in the use of video hearings.²⁴ To further aid those administering video hearings, the recommendation also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.²⁵

C. Bridging the Gap Through ACUS Office of the Chairman Work

Some of the work of the ACUS Office of the Chairman has linked the worlds of administrative law and public administration as well. For example, the Office is currently working with the Social Security Administration ("SSA") on several on-going projects aimed at improving process and procedures at that agency.²⁶ Such projects will culminate in reports to the SSA, which will include recommendations suggesting improvements to be made by both lawyers and public administrators at the agency.²⁷ In 2012, ACUS also published the *Sourcebook of United States Executive Agencies*,²⁸ prepared by leading political scientists, which examines the agencies and other organizational entities of the federal executive establishment, including independent agencies.²⁹ The book, a unique and valuable resource for both public administrators and lawyers, catalogues a comprehensive set of characteristics for each entity, including agency structure and organization, personnel, decision-making processes and requirements, political oversight, and sources of funding.³⁰ Similarly, in 2014, the Office did a report for the Equal Employment Opportunity Commission ("EEOC") evaluating the status and placement of adjudicators at that agency.³¹ Using principles from both law and public administration, the agency objectively evaluated the legal, regulatory, budgetary, and organizational considerations that would be relevant if the EEOC chose to use Administrative Law Judges rather than Administrative

²⁴ *Id.* at 75,119–20.

²⁵ *Id.* at 75,120.

²⁶ See generally *Office of the Chairman Projects*, ADMIN. CONF. U.S., <https://www.acus.gov/office-chairman-projects> (last visited July 26, 2015) (listing current projects).

²⁷ See, e.g., *SSA Federal Courts Analysis*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/ssa-federal-courts-analysis> (last visited July 26, 2015); *SSA Symptom Evaluation in Disability Determinations*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/ssa-symptom-evaluation-disability-determinations> (last visited July 26, 2015).

²⁸ DAVID E. LEWIS & JENNIFER L. SELIN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES.: *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES* (2012), https://www.acus.gov/sites/default/files/documents/Sourcebook%202012%20FINAL_May%202013.pdf.

²⁹ See generally *id.*

³⁰ See generally *id.*

³¹ See *The Status and Placement of Agency Adjudicators*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/status-and-placement-agency-adjudicators> (last visited July 26, 2015).

Judges to preside over federal sector equal employment opportunity hearings.³²

D. Bridging the Gap Through Other ACUS Activities

Other ACUS activities illustrate the agency's work in bridging the gap through facilitating dialogue and discussion between experts in public administration and administrative law. One of the very first events ACUS held when it reopened its doors in 2010, was a workshop bringing together law and public administration experts from the private and public sectors to discuss technological best practices in dealing with high-volume caseloads.³³ In April 2013, ACUS Chairman Verkuil spoke about ACUS work and how administrative lawyers and public administrators might inform each other's work at a meeting of the National Academy of Public Administration's Standing Panel on Executive Organization and Management.³⁴ In March 2014, Chairman Verkuil gave the opening plenary keynote at the American Society for Public Administration's annual conference where he shared ACUS work with conference participants and called for increased discussion between the scholars and practitioners in both disciplines.³⁵ In January 2015, ACUS co-hosted a panel discussion, *Political Order and Political Decay*, with the Hoover Institution and Stanford Law School.³⁶ The panel focused on examining Francis Fukuyama's forthcoming book entitled *Political Decay of American Political Institutions* and discussed problems in and possible solutions to the political structure in the United States and the quality of government.³⁷ ACUS work has also been featured in the *Public Administration Review*, a leading journal in the field.³⁸

³² See *id.*

³³ See *Technology in the Management of High-Volume Caseloads*, ADMIN. CONF. U.S. (Nov. 1, 2010, 8:00 AM), <https://www.acus.gov/meetings-and-events/event/technology-management-high-volume-caseloads>.

³⁴ NAT'L ACAD. OF PUB. ADMIN., ANNUAL CONG. REPORT FISCAL YEAR 2013, 12–13, <http://www.napawash.org/images/AnnualReportCongress/2013CongressionalReportFINALweb.pdf>.

³⁵ See Am. Soc'y for Pub. Admin., *ASPA 2014 Annual Conference: 2014 Awards*, at 4 (Mar. 12, 2014), http://www.aspanet.org/public/ASPADocs/Annual%20Conference/2014program_awards_FNL.pdf.

³⁶ See *Political Order and Political Decay*, ADMIN. CONF. U.S., <https://www.acus.gov/meetings-and-events/event/political-order-and-political-decay-0> (last visited July 26, 2015).

³⁷ See *id.*

³⁸ See Paul R. Verkuil & Jane E. Fountain, *The Administrative Conference of the United States: Recommendations to Advance Cross-Agency Collaboration Under the GPRA Modernization Act*, 74 PUB. ADMIN. REV. 10, 10–11 (2014).

II. HOW ACUS CAN CONTINUE TO BRIDGE THE GAP

In the nearly five years since the agency has restarted operations, ACUS has gone a long way in helping to bridge the gap between administrative law and public administration. In 2014, the agency celebrated its fiftieth anniversary. Looking forward to the next fifty years, ACUS is uniquely positioned as an agency that can bring together officials from across government, the private sector, and public interest organizations and as an agency that can think critically about how to solve complex process and procedure problems in government. With this standing, ACUS can and should continue to play a key role in bringing the worlds of administrative law and public administration together. Undoubtedly, ACUS's core mission centers around improving administrative law and process in the federal government and bridging the gap should not detract from this mission. Instead, by continuing to allow public administration scholarship and practice to inform its work, ACUS's core mission will be better rooted in the practice of solving government problems—a practice where both administrative law and public administration play significant roles.

In looking forward, ACUS can continue to improve its work in bridging the gap between administrative law and public administration by doing the following:

- Selecting dynamic public administration experts as ACUS members in order to enhance dialogue between ACUS members who are administrative law experts and those who are experts in the field of public administration.
- Seeking new ideas for ACUS projects from members who have background and expertise in public administration.
- Occasionally taking on projects which will lead to recommendations focused on critical issues of administrative law and which specifically examine how those issues intersect with public administration issues.
- Encouraging input on ACUS projects from members who are public administration experts, particularly where aspects of an ACUS project may yield recommendations directed at public administrators.
- Retaining consultants who have specific expertise in public administration or both public administration and law where doing so would be appropriate and beneficial for an ACUS project.
- Continuing to share ACUS work and highlighting the possibilities for collaboration with public administrators through writ-

ten articles or participation in panels or workshops by ACUS staff or members.

- Hosting forums or panel discussions about critical administrative law and public administration issues where scholars and practitioners can engage in dialogue about the two disciplines and how they might work collaboratively to address critical government problems.