The Administrative Conference at Fifty: An Agency Lives Twice

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Abstract

This Article traces the successful resurrection of the Administrative Conference of the United States ("ACUS"), a federal agency uniquely dedicated to improving the efficiency and fairness of administrative agencies to better serve the American public. The Article begins by recounting ACUS's history of accomplishment, from the time it opened its doors in 1968 to 1995, when Congress took the ill-advised step of shutting ACUS down. The Article then describes ACUS's improbable resurrection, suggesting that, as a result of the diligence of ACUS's supporters, Congress was persuaded that no other institution, governmental or private, could fill the void left by ACUS's abolition. Finally, the Article salutes ACUS's reconstitution and points to two of ACUS's recent reports and recommendations to show how much a difference a small agency dedicated to the mission of improving the administrative state can make.

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Introduction

Although the idea of rebirth is deeply embedded in certain religious traditions and mythology, it rarely, if ever, occurs in the observable world and, as best as I can tell, never in the administrative state.

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Once agencies pass away, they stay that way. For example, no one is clamoring for the resurrection of the Interstate Commerce Commission or the Civil Aeronautics Board. That was certainly the presumption when ACUS was disbanded in 1995[1] as the result of a squabble too petty to describe here.[2] But at the time Congress was debating ACUS's fate, the Agency's demise was not inevitable. Many tried to persuade Congress to retain and strengthen ACUS, rather than disband it.[3]

Part I of this Article lays out the value that ACUS displayed in its first life and why ACUS loyalists fought so hard against its closure. Part II provides an explanation of why ACUS's demise left a void. It also briefly recounts the remarkable story of ACUS's reconstitution. Part III explores two case studies (out of the more than thirty successful projects ACUS has completed since its reopening in 2010) to show that ACUS continues to play an invaluable role in improving the administrative state.

I. THE VALUE OF ACUS'S FIRST LIFE

Twenty years ago, as a public member of ACUS and director of a public interest law firm, I testified before the Subcommittee on Ad-

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1 *See* Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 105–13 (1998) (discussing ways to regain expertise of ACUS without contemplating reauthorization of ACUS itself as likely).

2 For those interested in the full backstory, see *id.* at 90–103.

3 *See Reauthorization of the Administrative Conference of the United States: Hearing before the H. Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary*, 103d Cong. 1 (1994). All of the witnesses at the Hearing testified in favor of ACUS's reauthorization. *See id.* at 2, 30, 37, 49, 66. Sally Katzen, then Acting Chair of ACUS, testified for the Agency. *See id.* at 2 (statement of Sally Katzen, Acting Chairman, Administrative Conference of the United States). Thomas M. Susman, then a partner at Ropes & Gray, testified on behalf of the American Bar Association. *See id.* at 66 (statement of Thomas M. Susman, Partner, Ropes & Gray, Washington, DC, on behalf of the American Bar Association). I testified in my capacity as Director of Public Citizen Litigation Group. *Id.* at 37 (statement of David C. Vladeck, Director, Public Citizen Litigation Group). The remaining witnesses, American University Law Professor Thomas O. Sargentich, and the Honorable Alan W. Heifetz, who was then the Chief Administrative Law Judge for the Department of Housing and Urban Development, were all members of the Conference. *See id.* at 30 (statement of Alan W. Heifetz, Chief Administrative Law Judge, U.S. Department of Housing and Urban Development); *id.* at 49 (statement of Thomas O. Sargentich, Professor of Law and Co-Director, Program on Law and Governance, Washington College of Law, American University). Apparently the Committee was unable to find a single witness—member or not—who was willing to testify in opposition to ACUS's reauthorization. The witnesses' testimony is reprinted in Commentary, *Testimony Before the House Committee on the Judiciary Subcommittee on Administrative Law and Governmental Relations in Support of the Reauthorization of the Administrative Conference of the United States*, 8 ADMIN. L.J. AM. U. 649 (1994) [hereinafter Commentary, *Testimony Before the House*].

ministrative Law and Governmental Relations of the House Judiciary Committee in support of ACUS's reauthorization, as well as ACUS's annual appropriation request, which for fiscal year 1995 amounted to a whopping $2.6 million, or about what the Defense Department spends in the time it takes you to read this sentence.[4] In that testimony I made three overarching points, which were the central arguments made as well by the other witnesses supporting ACUS's reauthorization.[5] First, by harnessing the energy and expertise of volunteer administrative law experts and senior government officials, ACUS provides an invaluable service at a negligible cost to taxpayers.[6] Second, no other institution, public or private, is capable of grappling with the complex procedural issues that lie at the core of ACUS's mission.[7] And third, ACUS's recommendations are almost invariably adopted and implemented by agencies, resulting in better service to the public at lower costs.[8]

A. ACUS's Value in Promoting Efficiency

No other institution of government more effectively leverages tax dollars than ACUS. ACUS's role is to promote administrative efficiency and improve the regulatory process to better serve the public.[9] A more efficient government is a less costly government. And many of ACUS's recommendations result in substantial cost-savings to the government, and, at the same time, lead to the delivery of better services to the public.[10] ACUS not only helps the government work better and smarter, but ACUS also performs this service at virtually no cost to the taxpayer.[11] ACUS is the Tom Sawyer of government—

4 My testimony is reprinted in Commentary, *Testimony Before the House*, *supra* note 3, at 697–702.

5 *See generally id.* at 649–708.

6 *Id.* at 697 (emphasis omitted).

7 *Id.* at 700 (emphasis omitted).

8 *Id.* at 701 (emphasis omitted).

9 *See* 5 U.S.C. § 591 (1994). Today, the purpose is again codified at 5 U.S.C. § 591 (2012).

10 Take one example. ACUS recently issued recommendations on the use of video hearings. ACUS Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011). ACUS's recommendation, if adopted by agencies that engage in high-volume adjudication like the Social Security Administration, the Department of Veterans Affairs, and the Executive Office for Immigration Review at the Department of Justice, will give these agencies an opportunity to provide fair and efficient decisionmaking while saving hundreds of millions of dollars and reducing the time that claimants have to wait to have their cases resolved. *See id.* at 48,795–96.

11 ADMIN. CONFERENCE OF THE U.S., FY 2015 CONGRESSIONAL BUDGET JUSTIFICATION 3 (2014), http///www.acus.gov/budget-justification/acus-2015-congressional-budget-justification

everyone wanted to help Tom Sawyer paint the fence,[12] and every administrative law expert and senior agency official wants to join ACUS. It is humbling to look at the roster of ACUS members. They are the giants of the academic community, key representatives from the regulatory agencies, distinguished members of the federal judiciary, high-ranking executive-branch officials, and leaders of the bar, including the public interest bar.[13] There is no better, more diverse, or more expert group of regulatory gurus in the nation. And no one, except for ACUS's small professional staff, and a handful of project consultants, gets paid for their service.[14]

B. ACUS's Unique Institutional Expertise

No other institution—governmental or otherwise—is capable of grappling with the difficult problems ACUS confronts as a matter of routine. Administrative law is not for the faint of heart. As former ACUS Chair, and now Justice, Antonin Scalia put it, "[a]dministrative law is not for sissies."[15] The issues are often difficult, contentious, and volatile—issues that most political appointees would happily leave for their successors. But ACUS's job is to solve the tough problems that no one else will touch. Consider one example: by the early 1990s, it became obvious that government could no longer put a Food and Drug Administration, Department of Agriculture, Environmental Protection Agency, or Securities and Exchange Commission cop on every beat.[16] The government's resources were simply not up to the task of policing every market effectively. But it was equally clear that industry self-regulation was no answer.[17] No one thought that letting "regulated" industry "regulate" itself was a good idea. The question then was what should the government do to close this worrisome and growing resource gap? ACUS examined whether agencies could increase compliance with federal standards by using industry-funded,

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[hereinafter ACUS FY 2015 Budget Justification] (requesting $3.2 million and noting that "none of [ACUS's] members, except for the Chairman, are compensated for their services").

12 *See* MARK TWAIN, THE ADVENTURES OF TOM SAWYER 17–21 (1876).

13 For a current roster of ACUS's members, see *Members*, ADMIN. CONF. U.S., http://www.acus.gov/assembly (last visited Jan. 23, 2015).

14 ACUS FY 2015 Budget Justification, *supra* note 11, at 3, 21.

15 Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511.

16 *See* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 175 (1995) (discussing inability of Congress and executive-branch agencies to, among other things, delegate authority to enforce all of their rules).

17 *See id.* at 174–78 (differentiating "audited self-regulation" from "purely private" self-regulation and arguing for greater use of the former).

but independent, self-regulatory bodies to augment the government's enforcement resources and explored what constraints would be necessary to make certain that the public was adequately protected.[18] ACUS ultimately issued recommendations on the issue[19] that led to third-party-audited self-regulatory programs that have been successfully implemented by several agencies.[20]

The point here is that no other institution is capable of providing the expertise to grapple with tough questions like this one on a sustained basis. Single-issue agencies lack the breadth of expertise and experience ACUS can bring to bear.[21] Nor can academic institutions adequately address these issues.[22] They are not constituted to do the sustained, highly technical work that is needed to sort through the serious procedural problems that ACUS is designed to tackle even assuming (probably incorrectly) that any academic institution could match ACUS's expertise.[23]

C. ACUS Gets Results

ACUS's recommendations differ markedly from those issued by the typical "blue ribbon" panels that often get constituted in Washington only to have their reports languish on a shelf. ACUS has had remarkable success in getting agencies and Congress to implement its recommendations. ACUS's recommendations translate into legislative reforms, streamlined procedures, elimination of duplication or overlap, reductions in inefficiencies, substantial cost-savings, and, most importantly, better service to the public.[24] ACUS's recommendations are generally adopted[25] for a number of reasons: the high caliber of ACUS's members and staff; the credibility that ACUS has earned; the fact that every recommendation is based on a comprehensive report

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18 ACUS Recommendation 94-1, The Use of Audited Self-Regulation as a Regulatory Technique, 59 Fed. Reg. 44,701, 44,701–03 (Aug. 30, 1994). The recommendation was based on a study by Professor Douglas C. Michael, which was also published in an issue of the *Administrative Law Review* and is cited above. *See* Michael, *supra* note 16, at 171 n.*.

19 *See* ACUS Recommendation 94-1, 59 Fed. Reg. at 44,701.

20 *See, e.g.*, FDA Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 78 Fed. Reg. 45,782, 45,793 (July 29, 2013) (codified at 21 C.F.R. pts. 1, 16 (2014)).

21 *See* Fine, *supra* note 1, at 112.

22 *See id.* at 110–11.

23 *See id.*

24 *See* Commentary, *Testimony Before the House Committee*, *supra* note 3, at 683–86 (testimony of Thomas M. Susman) (cataloguing some of ACUS's successes).

25 *See id.* at 701 (testimony of David C. Vladeck) (estimating the "fully seventy-five percent of ACUS recommendations [had] been implemented in full or significant part" in 1994).

prepared by one or more leading academics and then intensively reviewed by an ACUS committee and ACUS's Council; the fact that ACUS's recommendations are process-oriented and leave substantive issues for others; and perhaps most importantly, that ACUS's full-time staff follows up on recommendations and assists agencies in effectuating the reforms ACUS recommends.[26]

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These points were also developed in depth by the other witnesses before Congress.[27] At the end of the hearing, we thought that we had made headway in addressing Congress's concerns. And there was good news. Although Congress did not pass a reauthorization bill in 1994, it did appropriate $1.8 million for fiscal year 1995, the same amount Congress had appropriated for 1994.[28] It would be up to the next Congress to decide whether to reauthorize the Agency. ACUS had gotten a reprieve.

II. Death and Resurrection

Unfortunately, ACUS's reprieve proved short-lived. The following year Congress decided to close ACUS's doors.[29] It refused to reauthorize the Agency and appropriated a modest amount of funds that were available only for "the prompt and orderly termination of the Administrative Conference of the United States by February 1, 1996."[30] Most of ACUS's supporters held out little hope that the Agency would, like the mythic Phoenix, rise again from the ashes.[31] After all, the political consensus that brought ACUS into being and kept it moving ahead for twenty-eight years had unraveled, ACUS's

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26 *Id.*

27 *See generally id.* at 649–708.

28 *See id.* at 649. *Compare* Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, 108 Stat. 2382, 2396 (1994), *with* Treasury, Postal Service, and General Government Appropriations Act, 1994, Pub. L. No. 103-123, 107 Stat. 1226, 1238 (1993).

29 *See* Treasury, Postal, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 480 (1995).

30 *Id.*; *see The Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 79 (2010) (statement of Curtis W. Copeland, Specialist in American National Government, Congressional Research Service).

31 *See, e.g.*, Jeffrey Lubbers, "*If It Didn't Exist, It Would Have to Be Invented*"*—Reviving the Administrative Conference*, 30 Ariz. St. L.J. 147, 154 (1998) ("[A]s a former ACUS General Counsel has observed, 'In a climate of government retrenchment, ACUS is not likely simply to be re-established. Rather, to employ the jargon of the day, it would have to be reinvented.'" (internal quotation marks omitted)).

career staff—all highly-prized administrative law experts—quickly dispersed to new perches, and Congress was led to believe that other institutions, such as think tanks, academic institutions, and the American Bar Association, could step in and fill the void created by ACUS's dismemberment.[32] But some of the ACUS faithful remained convinced that Congress would, at some point, come to its senses and again understand that the work ACUS performed was vital to a strong administrative state and cannot be replicated by any other entity.[33]

ACUS's resurrection did not come quickly. The effort first started to gain traction in 2004, when the House Judiciary Committee's Subcommittee on Commercial and Administrative Law ("Subcommittee") decided to take a fresh look at ACUS. The kick-off event was a hearing to consider ACUS's reauthorization that featured appearances by both Justice Scalia and Justice Breyer, both of whom not only strongly supported reauthorization, but also came armed with suggestions for projects a newly reconstituted ACUS could address.[34] To follow up on the hearing, the Subcommittee asked the Congressional Research Service ("CRS") to prepare a memorandum summarizing the arguments in favor of reauthorization.[35] The CRS memorandum laid out a compelling case for reauthorization, and also pointed to a large number of issues that ACUS was uniquely suited to address.[36] Based on the hearing and CRS memorandum, Congress passed a reauthorization bill in October 2004, but provided no funding for the Agency.[37] The Subcommittee then followed with hearings in 2005, and again in 2007, to solicit the advice of a number of administrative law experts about the projects that could be assigned to ACUS

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32 *See* Fine, *supra* note 1, at 77. *Cf.* Lubbers, *supra* note 31 at 152–53, 161 (discussing "aspects of ACUS' functions [ ] picked up by other agencies" and the private sector, but concluding that ACUS's services were needed). Professor Lubbers had been ACUS's Research Director. Lubbers, *supra* note 31 at 147 n.*.

33 *See id.* at 161.

34 *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. 10–27 (2004) (statements of Hon. Antonin Scalia & Hon. Stephen G. Breyer, Associate JJ., Supreme Court of the United States).

35 Memorandum from Morton Rosenberg, Specialist in Am. Pub. Law, & T.J. Halstead, Legislative Att'y, Am. Law Div., Cong. Research Serv., to Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary 1 (Oct. 7, 2004).

36 *See id.* at 3–5.

37 *See* Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255, 2255–56 (appropriating money for fiscal year 2005, 2006, and 2007, but not fiscal year 2004).

if it were brought back to life.[38] Congress reauthorized ACUS for a second time in 2008, but once again failed to fund the Agency.[39]

Finally, in 2009, with the backing of the Obama Administration, Congress appropriated the necessary funds. This led to ACUS's reconstitution in March 2010,[40] when the Senate confirmed Paul Verkuil as the new Chairman.[41] While Chairman Verkuil was awaiting confirmation, the Subcommittee held a final roundtable to focus on the issues the recently reauthorized and appropriated agency might address.[42]

The challenge of reconstituting ACUS was a formidable one. Fifteen years had passed since the Agency had been dismantled. While ACUS had a storied legacy, it also had an uncertain future. The Agency had no office (for the first few months, ACUS made its home in some spare FTC offices), it had no staff, it had no members, yet, and it had to meet high expectations from Congress.[43] As is so often the case, ACUS's successful re-launch is largely attributable to the person chosen by President Obama to head the Agency, Paul Verkuil, an administrative law expert who is also (no irony here) an expert administrator.[44] Among his many accomplishments, Chairman Verkuil served as a law school dean (twice) and a university president.[45] He brought with him a well-deserved reputation for getting things done.[46] Within weeks, Chairman Verkuil had recruited a top-notch staff, appointed public and government members to the Agency, helped President Obama select ACUS's Council, and got

38 *See Administrative Law, Process and Procedure Project: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005), http://www.access.gpo.gov/congress/house/pdf/109hrg/24282.pdf; *Regulatory Improvement Act of 2007: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110 Cong. 1 (2007), http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg37845/pdf/CHRG-110hhrg37845.pdf.

39 *See* Regulatory Improvement Act of 2007, Pub. L. No. 110-290, 122 Stat. 2914, 2914 (2008) (appropriating money for fiscal year 2009, 2010, and 2011, but not fiscal year 2008).

40 *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3183 (2009); S. REP. NO. 111-43, at 75 (2009).

41 *See About the Chairman*, ADMIN. CONF. U.S., http://www.acus.gov/about-chair (last visited June 23, 2015).

42 Ralph Lindeman, *House Judiciary Convenes Expert Panel on Reviving U.S. Administrative Conference*, BNA Daily Rep. for Executives, at A-18 (Apr. 16, 2009).

43 *See supra* notes 34–42 and accompanying text; Jonathan Siegel, *Our History: Told by You*, ADMIN. CONFERENCE U.S. (Nov. 17, 2014, 8:53 AM), https://www.acus.gov/newsroom/administrative-fix-blog/our-history-told-you-jonathan-siegel.

44 *See About the Chairman*, *supra* note 41.

45 *Id.*

46 *See id.*

ACUS back to work.[47] Remarkably, ACUS was able to hold its first plenary session, after a fifteen-year hiatus, in December 2010, barely eight months after Chairman Verkuil's confirmation.[48]

III. ACUS: An Agency Lives Twice

ACUS has again demonstrated why it plays such a pivotal role in our administrative state. In barely five years, the Agency issued more than thirty recommendations on critical topics as diverse as science in the administrative process,[49] cost-benefit analysis,[50] improving consistency in social security disability adjudications,[51] immigration removal adjudication,[52] and agency use of third-party programs to assess regulatory compliance.[53] These are all complex issues; all demanded the specialized, expert attention that ACUS could bring to bear, and all are being implemented by agencies that clamored for the benefit of ACUS's expertise.[54]

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47 *See, e.g.*, Megan Kindelan, *ACUS Announces Senior Fellows*, Admin. Conf. U.S. (Oct. 4, 2010, 5:20 PM), https://www.acus.gov/newsroom/news/acus-announces-senior-fellows; Megan Kindelan, *Administrative Conference of the United States Announces Public Members*, Admin. Conf. U.S. (Sept. 28, 2010, 6:45 PM), https://www.acus.gov/newsroom/news/administrative-conference-united-states-announces-public-members; Megan Kindelan, *President Announces More Key Administration Posts*, Admin. Conf. U.S. (July 8, 2010, 11:54 AM), https://www.acus.gov/newsroom/news/president-announces-more-key-administration-posts.

48 Admin. Conference of the U.S., 53rd Plenary Session Minutes 1 (2010), https://www.acus.gov/sites/default/files/documents/12-2010-Plenary-Minutes-6-7-2011.pdf [hereinafter 53rd Plenary Session Minutes].

49 ACUS Recommendation 2013-3, Science in the Administrative Process, 78 Fed. Reg. 41,357 (July 10, 2013).

50 ACUS Recommendation 2013-2, Benefit-Cost Analysis at Independent Regulatory Agencies, 78 Fed. Reg. 41,355 (July 10, 2013).

51 ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013).

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

53 ACUS Recommendation 2012-7, Agency Use of Third Party Programs to Assess Regulatory Compliance, 78 Fed. Reg. 2941 (Jan. 15, 2013). I was especially pleased to see ACUS issue a recommendation on third-party programs to assess regulatory compliance. ACUS had issued a recommendation on this issue in 1994, ACUS Recommendation 94-1, The Use of Audited Self-Regulation as a Regulatory Technique, 59 Fed. Reg. 44,701 (Aug. 30, 1994), and many agency programs had been based on those recommendations. But with the passage of twenty years, ACUS's 1994 recommendations needed to be updated, and ACUS's 2012 recommendations are far more detailed than the ones it issued in 1994. *Compare* ACUS Recommendation 94-1, 59 Fed. Reg. at 44,701–03, *with* ACUS Recommendation 2012-7, 78 Fed. Reg. at 2941–43. For a list of all of ACUS's Recommendations, see *Recommendations*, Admin. Conf. U.S., http://www.acus.gov/recommendations (last visited June 14, 2015).

54 *See, e.g.*, FDA Accreditation of Third-Party Auditors/Certification Bodies to Conduct Food Safety Audits and to Issue Certifications, 78 Fed. Reg. 45,782, 45,793 (July 29, 2013) (codified at 21 C.F.R. pts. 1, 16 (2014)).

ACUS has been so productive that it is impossible in a brief Article to discuss the Agency's work in its entirety. Instead, this Article will focus on two of ACUS's recent recommendations: (1) the first one ACUS issued after its reconstitution, addressing agency procedures for considering preemption of state law,[55] and (2) one of ACUS's most recent recommendations, addressing petitions for rulemaking.[56] These recommendations are a reasonably representative sample of ACUS's work.

A. Regulatory Preemption Case Study

The decision to address regulatory preemption as ACUS's first project was a bold one. The often bitter debate over the power of federal agencies to preempt state law began in the middle of George W. Bush's presidency, when federal regulatory agencies like the Food and Drug Administration, the National Highway Traffic Safety Administration, and the Consumer Product Safety Commission started to claim that their regulations broadly ousted state products liability law, at times even in the absence of a statute that expressly preempted state law.[57] As a result, pharmaceutical and medical device companies, auto manufacturers, and other consumer product manufacturers began to move to dismiss what were once thought to be garden-variety product liability actions on preemption grounds.[58] The preemption issue was being played out in courts around the country, and the Supreme Court ultimately had to resolve a significant number of these cases.[59] Congress was also concerned about whether agencies were taking overly aggressive stands on preemption, and a number of con-

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

56 ACUS Recommendation 2014-6, Petitions for Rulemaking, 79 Fed. Reg. 75,117 (Dec. 17, 2014).

57 *See* David C. Vladeck, *Deconstructing* Wyeth v. Levine*: The New Limits on Implied Conflict Preemption*, 59 CASE W. RES. L. REV. 883, 883–84 (2009); *see also* PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION (William Buzbee, ed., 2009).

58 *See id.* at 894, 901.

59 For cases involving products regulated by the FDA, see, e.g., Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2470–72 (2013); PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2572–73 (2011); Wyeth v. Levine, 555 U.S. 555, 559–63 (2009); Riegel v. Medtronic, Inc., 552 U.S. 312, 315–16 (2008). For cases involving products regulated by the National Highway Traffic Safety Administration, see, e.g., Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1134–36 (2011); Geier v. Am. Honda Motor Co., 529 U.S. 861, 864–68 (2000). For broader discussions, see David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA's Efforts to Preempt Failure-to-Warn Claims*, 96 GEO. L.J. 461, 462–63 (2008); Vladeck, *supra* note 57, at 884–92, 904–10.

gressional committees held hearings to explore the issue.[60] The issue was perhaps best crystalized in *Wyeth v. Levine*,[61] where the Court held that a state products liability action brought by a woman injured by an FDA-approved drug was not impliedly preempted by the Food, Drug and Cosmetic Act or applicable FDA regulations.[62] In arguing in favor of preemption, the FDA pointed to preemptive language it added to the preamble of a final drug-labeling rule.[63] But the Court rejected the "preemption by preamble" approach used by the FDA and refused to accord deference to the FDA's pro-preemption position.[64]

At the root of the debate, however, were questions of administrative law: What power, if any, do agencies have to claim that their regulatory action preempts state law, and, assuming that power exists, how should that power be exercised? ACUS addressed this issue two decades earlier, and had issued a recommendation that agencies take care to engage in considerable consultation—with state governments, stakeholders, and other interested parties—before taking action that might preempt state law.[65] When Presidents Reagan and Clinton issued "Federalism" Executive Orders they both borrowed heavily from ACUS's recommendation.[66] Although the Clinton Executive Order was still in force during the Bush Administration, many agencies did not adhere to it.[67] When President Obama took office, he issued a presidential memorandum directing that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with

60 *See, e.g.*, *Regulatory Preemption: Are Federal Agencies Usurping Congressional and State Authority?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 1 (2007); *Should FDA Drug and Medical Device Regulation Bar State Liability Claims?: Hearing Before the H. Comm. on Oversight and Gov't Reform*, 110th Cong. 1 (2008).

61 Wyeth v. Levine, 555 U.S. 555 (2009).

62 *See id.* at 581.

63 *See id.* at 575–76.

64 *See id.* at 577.

65 ACUS Recommendation 84-5, Preemption of State Regulation by Federal Agencies, 49 Fed. Reg. 49,838, 49,838 (Dec. 24, 1984).

66 In subsections 4(d) and 4(e), President Reagan's Executive Order, Exec. Order No. 12,612, 3 C.F.R. 252, 255 (1988), and President Clinton's Executive Order, Exec. Order No. 13,132, 3 C.F.R. 206, 209 (1999), borrowed "almost verbatim" language from ACUS Recommendation 1984-5. *See* CATHERINE M. SHARKEY, ADMIN. CONF. U.S., FEDERAL AGENCY PREEMPTION OF STATE LAW 3 n.1 (2010), https://www.acus.gov/sites/default/files/documents/Sharkey-Final-ACUS-Report_12_20.pdf.

67 *See supra* notes 57–64 and accompanying text.

a sufficient legal basis for preemption."[68] The memorandum also instructed agencies to cease engaging in preemption by preamble; instead, preemption determinations had to be made in the regulation itself.[69] And the memorandum underscored that agencies were to adhere to the principles laid down in President Clinton's Federalism Executive Order.[70]

In revisiting this issue, ACUS began its work in its customary fashion. It enlisted the assistance of a top-notch administrative law expert to prepare—with the help of ACUS's staff and one of ACUS's committees—a detailed report laying bare the problem and proposing ways to grapple with it.[71] Catherine M. Sharkey, a professor at NYU School of Law,[72] was selected to prepare the report. Professor Sharkey had already written extensively on regulatory preemption[73] and was able to prepare a detailed final report prior to the December 2010 plenary session.[74] In hindsight, her achievement is remarkable. The ninety-page final report, with over 450 footnotes, was based on Professor Sharkey's research and empirical work, which involved extensive interviews with many federal and state government officials, and in-depth case studies of the regulatory rulemaking records of six federal agencies.[75] No doubt the final report benefitted as well from the expert critiques provided by the government and public members of ACUS's Rulemaking Committee. In other words, Professor Sharkey's report was not simply a law review article with a different name; it was instead the work of a seasoned scholar who had ready access to high-level government officials and was supported with government resources that ordinarily are unavailable to most academics. The result was a report that provided a solid footing for ACUS's recommendations, and was adopted by the Conference at the plenary session.[76]

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68 Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693, 24,693 (May 22, 2009).

69 *See id.*

70 *See id.*

71 SHARKEY, *supra* note 66, at 1 n.*, 3–7.

72 *See id.* at 1 n.*; 53RD PLENARY SESSION MINUTES, *supra* note 48, at 4.

73 *See, e.g.*, Catherine M. Sharkey, *Federalism Accountability: "Agency Forcing" Measures*, 58 DUKE L.J. 2125 (2009); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

74 *See* 53RD PLENARY SESSION MINUTES, *supra* note 48, at 4.

75 *See* SHARKEY, *supra* note 66, at 11; Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 521 n.* (2012).

76 53RD PLENARY SESSION MINUTES, *supra* note 48, at 5. ACUS's final preemption report

What is striking about the recommendations is that, notwithstanding the highly partisan war over implied regulatory preemption that was waged in the courts and Congress,[77] ACUS managed to draw a line that its members could broadly endorse.[78] The recommendation drives home a number of key principles: (1) Congress should address foreseeable preemption issues explicitly when it enacts a statute affecting regulation or deregulation; (2) agencies should establish procedures for determining whether preemption is warranted, including early consultations with state and local officials and other stakeholders; (3) agencies should ensure that they comply with the applicable Federalism Executive Order; and (4) agencies should establish procedures for notifying state attorneys general when they are considering rules that may have a preemptive effect on state law.[79] Had these procedures been in place earlier and followed by agencies, most of the questions about the legitimacy of agency action, and much of the contentious litigation over agency preemption pronouncements, could have been averted. More importantly, going forward, agencies have a clear path to follow in making preemption determinations. And setting that path was precisely ACUS's goal in undertaking this project.

B. Petitions for Rulemaking Project Case Study

ACUS's work on the Petitions for Rulemaking Project proceeded along the same basic track. The Administrative Procedure Act ("APA")[80] provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[81] For a variety of reasons, there was not a great deal of litigation over the "petition" provision of the APA until the early 1980s.[82] In 1986, ACUS issued a brief set of recommendations urging agencies

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is available here: *Preemption Report*, ADMIN. CONF. U.S., http://www.acus.gov/report/preemption-report.

77 *See generally* THOMAS O. MCGARITY, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES (2008) (detailing the extensive battles over federal agency preemption of state common law claims).

78 53RD PLENARY SESSION MINUTES, *supra* note 48, at 5 (describing favorable vote to adopt Recommendation 2010-1 after two amendments were suggested).

79 ACUS Recommendation 2010-1, Agency Procedures for Considering Preemption of State Law, 76 Fed. Reg. 81, 83 (Jan. 3, 2011). Professor Sharkey's report for the Conference was also published as *Inside Agency Preemption* in the Michigan Law Review. *See* Sharkey, *supra* note 75, at 521 n.*.

80 Administrative Procedure Act (APA), 5 U.S.C. §§ 551–559, 701–706 (2012).

81 *Id.* § 553(e).

82 *See* David C. Vladeck, *Unreasonable Delay, Unreasonable Intervention: The Battle to Force Regulation of Ethylene Oxide*, *in* ADMINISTRATIVE LAW STORIES 190, 190–228 (Peter L. Strauss ed., 2006).

to establish procedures for the receipt and processing of petitions, to maintain a public log of pending petitions, and to notify petitioners promptly of the agency's disposition of their petitions.[83]

By the time ACUS was reconstituted, the questions surrounding the petition process had mushroomed, in part because, although many agencies were following ACUS's recommendations, agencies were doing so in ways that differed markedly from one another,[84] and in part because companies and organizations were increasingly using petitions to force agency action or to influence agency priority-setting.[85] But the terse language of the APA's petition provision leaves many important procedural questions unanswered.[86]

These unanswered questions fall into two categories. The first category pertains to the rights of petitioners: Do agencies have an obligation to adopt procedures for handling petitions?[87] Do agencies have to respond to every petition?[88] What are adequate grounds for denying petitions?[89] Must an agency denial be based on statutory criteria? Or may the agency rely on non-statutory factors, such as resource constraints or the agency's own priority-setting in denying a petition? How long may an agency take to respond to a petition?[90] And if an agency denies a petition, does the petitioner have a right to sue?[91] These questions, although fundamental, have not been clearly answered by the courts, and agencies take widely divergent views on the correct answers.[92] The second category of questions relates to how agencies administer the processing of petitions. Agency processing practices are tremendously varied, and there is no consistent view as

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83 ACUS Recommendation 86-6, Petitions for Rulemaking, 51 Fed. Reg. 46,988, 46,988–89 (Dec. 30, 1986).

84 *See* JASON A. SCHWARTZ & RICHARD L. REVESZ, PETITIONS FOR RULEMAKING 47 (2014), http://www.acus.gov/report/petitions-rulemaking-final-report ("In 1986, [the author of Recommendation 86-6] made this observation on official agency procedures for petitions: 'Some have none; others largely mirror, without elaborating much on, statutory procedures; and still others have adopted rather detailed requirements going considerably beyond the procedures expressly mandated by statute.' Nearly 30 years later, the observation holds." (alteration omitted)).

85 *See id.* at 45–46.

86 *See* 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

87 SCHWARTZ & REVESZ, *supra* note 84, at 6.

88 *See id.*

89 *See id.*

90 *See id.* at 6, 13–17.

91 *See id.* at 6.

92 *See id.* at 6, 13–14, 47–49.

to best practices.[93] As a result, petitioning parties are often confused over the procedures they need to follow, and agencies often deal with petitions on an *ad hoc* basis.[94] In many respects, the quagmire over petitions is a perfect issue for ACUS to tackle.

To do so, ACUS engaged the assistance of NYU Professor Jason A. Schwartz and Professor (and former Dean) Richard L. Revesz, both of whom had studied the issue.[95] They began by conducting extensive empirical research on 104 agencies to identify each agency's practices in dealing with petitions.[96] The survey took stock of all aspects of an agency's handing of petitions, from how the agency publicizes its procedures, the number of petitions each agency receives, the time it takes the agency to review and act on the petition, to the process the agency uses to determine whether to grant or deny the petition.[97] The survey revealed what experts had long suspected, namely, that agency practices were widely divergent, even within agencies.[98] Professors Schwartz and Revesz also conducted a comprehensive review of the growing caselaw on petitions for rulemaking, finding, not surprisingly, inconsistent decisions on virtually every key issue.[99]

The scholars' ninety-three-page report provides the basis for ACUS's ambitious, far-reaching recommendations to improve the petition process. The recommendations begin with an analysis of the APA, and explain that—read in its entirety—the statute requires agencies to respond to petitions for rulemaking "within a reasonable time,"[100] to give petitioners "prompt" notice when a petition is denied in whole or in part,[101] and to provide "a brief statement of the grounds for denial."[102] The recommendations then offer a number of concrete steps agencies should take to improve the process, including: (1) establish written policies or rules laying out how the agencies receives, processes, and responds to rulemaking petitions, and notifies the public about the information that is needed to enable the agency to evalu-

93 *See id.* at 41, 47–49.

94 *See id.* at 41–43, 47.

95 *See id.* at 1 n.1.

96 *See* Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking Final Report—Appendix C*, ADMIN. CONF. U.S. (Nov. 5, 2014), http://www.acus.gov/appendix/petitions-rulemaking-final-report-appendix-c [hereinafter *Appendix C*].

97 *See* SCHWARTZ & REVESZ, *supra* note 84, at 5–6.

98 *See id.* at 41; *Appendix C*, *supra* note 96.

99 *See* SCHWARTZ & REVESZ, *supra* note 84, at 9–30.

100 *Id.* at 13.

101 *Id.* at 13–17.

102 *Id.* at 17–20.

ate the petition's merits; (2) adopt procedures for communicating with parties submitting petitions, both prior to and while petitions are pending, to facilitate the exchange of pertinent information; (3) put into place practices that enable third parties to learn of the pendency of petitions and, when appropriate, solicit public comment on rulemaking petitions; and (4) establish an easily accessed, public docket for each petition, and when an agency denies a petition, provide a reasoned explanation for the grounds of that denial.[103]

As with the preemption project, these recommendations, if followed by agencies, will obviate many of the problems that have plagued the petitioning process for decades. Equally important, the adoption of consistent, uniform practices within and across agencies will simplify the process of filing petitions for regulated parties and other organizations that might seek to initiate rulemaking. Confusing agency practices should not be a barrier to pursuing a petition right that Congress thought worthy of codification in the APA. There is nothing in the recommendations that pushes agencies to look on petitions more or less favorably. The recommendations are aimed at improving the process by which agencies evaluate petitions; they do not put any weight on the scales agencies use to decide whether a petition is meritorious or not.

Conclusion

ACUS is back, and that is good news. In only a brief few years, ACUS has proved that its abolition was a mistake, and that it provides an indispensable service in continuing to fine-tune our administrative state to better serve the public and to work more efficiently. This Article has highlighted only two of the more than thirty projects ACUS has completed in the past five years. Multiply ACUS's success with the preemption and agency petitions projects more than fifteen times over and a clearer picture of ACUS's value emerges. A tiny agency with a staff of fifteen or so, using the leverage of its members, is once again making enormous improvements in the way government delivers services to the public. Let us hope that this time ACUS is here to stay.

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103 *See id.* at 70–84.