

ESSAY

WHAT THE RETURN OF THE  
ADMINISTRATIVE CONFERENCE OF  
THE UNITED STATES MEANS FOR  
ADMINISTRATIVE LAW

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INTRODUCTION

Administrative law, writ large, is about the way agencies behave, and how other institutions and the public react to that behavior. By promulgating rules, adjudicating cases and claims, enforcing statutes, providing guidance, collaborating with interest groups, exercising discretion, and so forth, agencies manage and implement the business of government.<sup>1</sup> They do this under the auspices of the Executive Branch, but the other branches assert authority over the agencies as well. Congress does so by legislating, budgeting, and overseeing, while the courts do so by interpreting statutes and requiring rational behavior from agencies. These important and essential activities fill many law school publications with statutes, cases, and rules. But the branches that produce this body of law are institutionally constrained—they have difficulty testing hypotheses or experimenting with alternatives before statutes are enacted, cases are decided, or rules are promulgated.

Congress and the courts often act in a data vacuum. True, Congress holds hearings and requests reports from the Government Accountability Office or the Congressional Research Service—but legislation often results from extraordinary events rather than from systematic study.<sup>2</sup> When the courts use the common law process of incremental decision making, they can

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

2. Congress, as the institution closest to the electorate, often responds to dramatic events rather than systematic studies. Indeed, statutes sometimes bear the name of their precipitating cause (e.g., The Lindbergh Law, The Brady Law, etc.). See Ethan Trex, *11 Laws Named After People*, MENTAL FLOSS (Dec. 17, 2009, 12:43 PM), <http://www.mentalfloss.com/blogs/archives/43307>.

sharpen insights over time, but that process has now been overwhelmed by statutory law.<sup>3</sup> Courts are institutionally unsuited to be experimenters.<sup>4</sup> The Executive Branch can review most agency regulatory agendas and rules through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA). However, OIRA has limited ability and time to try out alternatives or conduct empirical studies.<sup>5</sup> The agencies have greater capacity in this regard—guidance can precede rules, for example—but they are also under pressure to act, not theorize, due to statutory deadlines, oversight hearings, and budget and personnel ceilings. The rulemaking process gives agencies the ability to learn before doing, but, too often, agencies begin with their positions staked out and their minds made up.<sup>6</sup> On matters of procedure and process, there may be even less time available, despite the fact that experimentation and cross-agency comparisons could greatly improve agency performance.

This is where ACUS comes in. The Conference studies the “efficiency, adequacy and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs.”<sup>7</sup> The Conference

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3. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-2 (1982) (recognizing that the courts are “choking on statutes” and advocating a common law approach to their revision and updating).

4. For due process reasons, trial courts are limited by record requirements and relevancy standards, except for a limited judicial notice capacity. See, e.g., FED. R. EVID. 201, 401. Appellate courts are bound by the record below, except for amicus briefs, which can offer broader context. The Supreme Court has discretionary jurisdiction and a legal policy-making role, but it lacks the institutional resources to find facts. In original jurisdiction cases, for example, facts are determined by special masters. See generally FED. R. CIV. P. 53.

5. OIRA is a small shop with a big job; it reviews hundreds of agency regulations annually. Its capacity to experiment or “game” alternatives is very limited. OMB's Office of Performance and Personnel Management conducts some empirically-based government initiatives, like employee surveys, but cannot do much experimental work either.

6. Cf. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492, 1494-95 (1992) (comparing rulemaking processes to Kabuki theater in that they create the illusion of an exchange of views). One of the promises of e-rulemaking, the process of issuing notices and receiving comments over the Internet, is that it can open up the process at an earlier stage to facilitate greater agency interaction with the public. ACUS has a project underway to address this possibility. *Agency Innovations in e-Rulemaking*, ACUS, <http://www.acus.gov/research/the-conference-current-projects/e-rulemaking-study-of-agency-innovations/> (last visited Oct. 10, 2011).

7. 5 U.S.C. § 594 (2006). ACUS's mandate is wisely limited to procedural matters, where bipartisan agreement is more likely to be found. Even those substantively opposed to the role of government in society can agree on the more neutral questions of process. Indeed, procedure encompasses principles of universal appeal. The philosopher Stuart Hampshire believes “fairness in procedures for resolving conflicts is the fundamental kind of fairness . . . fairness in procedure is an invariable value, a constant in human nature.” STUART HAMPSHIRE, *JUSTICE IS CONFLICT* 4 (2000). Of course, even procedure can have a political dimension. See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007); Paul R. Verkuil, *The Emerging Concept of Administrative*

can be viewed as the government's "laboratory" for administrative process and procedure. ACUS does not perform controlled experiments like the National Institutes of Health (NIH) does;<sup>8</sup> it conducts applied research by using empirically-based analyses to understand the way the administrative process works. It then transfers those insights to the agencies for action and follows up with agencies to ensure compliance with its recommendations. This implementation phase is also empirically-driven.

For the Conference, agencies themselves are the laboratories. It views agencies not unlike how Justice Brandeis viewed states in the federal system.<sup>9</sup> Agency experimentation can lead to process systemization through the identification and expansion of best practices. Systemization has been part of ACUS's mission from its inception. In 1960, Dean James Landis advised President John F. Kennedy to create ACUS with these words: "The concept of an Administrative Conference of the United States promises more to the improvement of administrative procedures and practices and to the systematization of the federal regulatory agencies than anything presently on the horizon."<sup>10</sup>

When the Conference engages an expert consultant for a study, it connects the analytical world of academic research to the real world of administration. This has benefits for both sides. For the academy, Conference work helps address the longstanding criticism of legal scholarship's lack of empiricism.<sup>11</sup> There is an increasing awareness of the value of

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*Procedure*, 78 COLUM. L. REV. 258, 268–78 (1978) (describing the procedural conflicts behind the enactment of the APA).

8. See, e.g., Michael S. Lauer & Francis S. Collins, *Using Science to Improve the Nation's Health System: NIH's Commitment to Comparative Effectiveness Research*, 303 JAMA 2182 (2010) (describing how comparative effectiveness research drives scientific research at NIH).

9. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the Federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Of course, ACUS looks to agencies for innovative procedural ideas, rather than social and economic experiments, but it similarly believes that agency experimentation, even if unsuccessful, can create important lessons for other agencies.

10. JAMES LANDIS, REPORT TO THE PRESIDENT ELECT 74 (1960). President Kennedy established a temporary ACUS with Exec. Order No. 10,934, 3 C.F.R. 102 (1962). It was permanently established by statute in 1964 by President Johnson. Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591-596 (2006)).

11. The primary data set for legal researchers has long been the case law and statutes produced at the federal and state levels. Study of these data was defined by Christopher Columbus Langdell as a kind of scientific method. The legal realists challenged this vision of law in the 1930s by questioning the assumptions and motives of judges and legislators. Today, the legal realist inquiry itself has become empirically-based. See Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

empiricism in law.<sup>12</sup> Indeed, even the never-ending stream of articles on the *Chevron* doctrine has begun to shift in this direction.<sup>13</sup> In general, however, studies of what agencies actually do still remain in short supply.

This was not always true. Some of the best descriptions of what agencies do were produced in the 1940s when the Administrative Procedure Act (APA) emerged. A highlight was Walter Gellhorn's empirical studies of agencies for the Attorney General's Committee on Administrative Procedure.<sup>14</sup> It is notable that Professor Gellhorn, a "founding father" of ACUS,<sup>15</sup> continued to demand evidence-based reports from its consultants in his long tenure on the Council of the Administrative Conference, a fact to which I can personally attest. Even before Gellhorn, scholars like Ernst Freund had urged the study of "internal" administrative law—what agencies do rather than what the courts do to them.<sup>16</sup> These earlier efforts underscore Dean Landis's notion that ACUS can, through empirical research on administrative law and process, systematize agency best practices.

The Conference also adds value for agency officials. By engaging highly focused and overworked bureaucrats with the world of scholarly analysis, ACUS facilitates an exchange of views that enhances the quality of administrative management. Agency officials welcome advice on how to improve their procedures and practices, and thoughtful critiques from ACUS are

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12. The growing interest in empirical studies has produced a peer-reviewed publication, the *Journal of Empirical Legal Studies*. See *Journal of Empirical Legal Studies*, WILEY-BLACKWELL, <http://www.wiley.com/bw/journal.asp?ref=1740-1453> (last visited Oct. 11, 2011). Outstanding empirical work has been done in administrative law.

13. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825 (2006); Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L. J. 984.

14. Professor Walter Gellhorn, as Staff Director of the Attorney General's Committee on Administrative Procedure, produced twenty-seven monographs detailing the processes and functions of individual agencies. See ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-10 (1st Sess. 1941); ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 76-186 (3d Sess. 1940).

15. Professor Gellhorn was appointed by President Kennedy to the Council of the Temporary Administrative Conference. He subsequently served on the Council of ACUS until his death in 1995. He was the only Council member granted, in effect, lifetime status. See Peter Strauss, *A Memorial to Walter Gellhorn* [sic], AM. BAR ASS'N, <http://apps.americanbar.org/adminlaw/news/vol21no3/gelhorn.html> (last visited Oct. 11, 2011).

16. See ERNST FREUND, CASES ON ADMINISTRATIVE LAW, at v (2d ed. 1928) (stating that "administrative law continues to be treated as law controlling the administration, and not as law produced by the administration"). See generally Verkuil, *supra* note 7, at 266-67. For a valuable contribution that refocuses scholarship on what agencies do, see Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2010).

well received. This does not mean, of course, that these officials simply accept the views of the Conference or its consultants. They fight hard for their positions, as our lively committee meetings amply demonstrate. In the end, reasoned recommendations based on facts make agency operations more efficient, effective, and fair—values that are touchstones of the ACUS mission.

## I. HOW ACUS WORKS

ACUS is institutionally empowered to study what agencies do. It collects “information and statistics” from agencies,<sup>17</sup> and agency compliance with requests for data or interviews is the norm. The agencies view the Conference as a collaborator, not an overseer. This collegiality usually leads to cooperative undertakings, sometimes requested and funded by the agencies themselves.

Our 101 members comprise the Chairman, ten additional Council members appointed by the President (usually five from the government and five from the public), and ninety other members (fifty senior government officials and forty private citizens designated as “public members”).<sup>18</sup> Notably, the current public members include individuals who have served in every presidential administration since that of Lyndon B. Johnson. The public members are selected on a bipartisan political basis, which ensures that the Conference’s work is as balanced as possible in an era of partisan division.

When the Conference convenes in plenary session twice a year to debate proposed recommendations, it is known as the Assembly.<sup>19</sup> The fifty government members represent over 200 agencies or sub-agencies.<sup>20</sup> When liaison representatives and Senior Fellows are added in, the resulting forum is deeply diverse politically, intellectually, and experientially. This remarkable

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17. See 5 U.S.C. §§ 591, 594 (2006). See generally H.R. REP. NO. 112-154, at 3–4 (2011) (documenting the importance of ACUS’s mission to regulatory reform).

18. See ACUS, GUIDE FOR MEMBERS 3–4 (2011), available at <http://www.acus.gov/about>. The public members are practicing attorneys, scholars of administrative law or government, and others “specially informed by knowledge and experience” in administrative procedures. See 5 U.S.C. § 593 (2006).

19. See 5 U.S.C. § 595 (2006).

20. See *Government Members*, ACUS, <http://www.acus.gov/about/the-assembly/government-members/> (last visited Oct. 11, 2011). Many of our members are general counsels or chiefs of staff of executive departments, each of which have numerous sub-agencies under them. All of the departments are designated as members by the President, and the independent agencies are statutory members. Two hundred and eleven agencies are “represented” by ACUS in this manner.

Assembly, called a “public-private partnership” by President Obama,<sup>21</sup> exists nowhere else and costs the government virtually nothing.<sup>22</sup>

Ideas for projects are generated from a variety of sources, including relevant committees on the Hill,<sup>23</sup> organizations like the American Bar Association,<sup>24</sup> and the Conference members themselves.<sup>25</sup> The Conference staff creates project proposals that are approved by the Chairman and Council. Consultants are then sought (sometimes in-house) to carry out the projects under the direction of one of the six ACUS committees.<sup>26</sup> These consultants, who have numbered in excess of 300 over the life of the Conference, are a veritable “Who’s Who” of administrative law scholars.<sup>27</sup> They produce reports with proposed recommendations that are vetted by the relevant committees and then voted on by the Conference as a whole. The discussions in committee and at the plenary session are conducted pursuant to the Federal Advisory Committee Act,<sup>28</sup> which ensures two things: (1) that the public is informed of (and by our practice often participates in) the

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21. When President Obama named ten members of the Council on July 8, 2010, he said, “ACUS is a public-private partnership designed to make government work better . . .” *President Obama Announces More Key Administration Posts*, WHITEHOUSE.GOV (July 8, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-announces-more-key-administration-posts-7810>.

22. The public members receive travel and per diem payments for the meetings they attend. ADMIN. CONFERENCE OF THE U.S., FY 2012 CONGRESSIONAL BUDGET JUSTIFICATION 26 (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/02/ACUS-2012-Cong-Budget.pdf>. The donated value of their time, however, if estimated by hourly rates, amounts to an annual contribution to the government of over half of the Conference’s overall budget.

23. See SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY (Comm. Print 2006).

24. Letter from the Am. Bar Ass’n Section of Admin. Law & Regulatory Practice to Michael A. Fitzpatrick, Acting Adm’r, Office of Info. & Regulatory Affairs (Aug. 18, 2009) (on file with ACUS) (setting forth potential projects for the re-initiated ACUS).

25. For example, the members met in breakout sessions during the December 2010 plenary to propose new projects for the Conference. See *Administrative Conference of the United States, 53rd Plenary Session*, ACUS (Dec. 9, 2010), <http://www.acus.gov/wp-content/uploads/downloads/2011/01/Plenary-Transcript-53rd-Session.pdf> (transcript of conference). Agencies also request assistance from ACUS for specific projects and workshops throughout the year.

26. See, e.g., *Congressional Review Act RFP*, ACUS (May 20, 2011), <http://www.acus.gov/resources/congressional-review-act-rfp/> (soliciting proposals from potential consultants). The six ACUS committees are the Committee on Adjudication, the Committee on Administration and Management, the Committee on Collaborative Governance, the Committee on Judicial Review, the Committee on Regulation, and the Committee on Rulemaking. *The Committees*, ACUS, <http://www.acus.gov/about/the-committees/> (last visited Oct. 5, 2011).

27. A list of consultants has been compiled by Scott Rafferty, Deputy Director of Research and Policy, and will soon appear on the ACUS website.

28. Federal Advisory Committee Act, 5 U.S.C. app. 2 (2006).

deliberations; and (2) that resulting recommendations are the work of the committees and the Assembly, not just the consultants or the staff.

ACUS was revived in 2010<sup>29</sup> after fifteen years of darkness.<sup>30</sup> It has since held two plenary sessions, during which the members voted to adopt five recommendations from ACUS-sponsored studies that reflect the empirical nature of our research. The first recommendation, *Preemption of State Law by Federal Agencies*, deals with pressing issues of federalism that have produced numerous Supreme Court decisions. It was supported by a study performed by Professor Catherine M. Sharkey of New York University School of Law. Professor Sharkey's empirical work involved extensive interviews with fifty people in federal and state government, and in-depth case studies of the regulatory rulemaking records of six federal agencies. There is little doubt that both the Recommendation (2010-1)<sup>31</sup> and the resulting scholarly article<sup>32</sup> benefited enormously from access to key players at agencies, and from the expert critiques provided by the government and public members of the Rulemaking Committee.

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29. The Conference officially returned on March 3, 2010, when I was confirmed by the U.S. Senate as Chairman. *Administrative Conference of the United States—Paul R. Verkuil*, U.S. SENATE COMM. ON THE JUDICIARY, <http://judiciary.senate.gov/nominations/111thCongressExecutiveNominations/AdminConfUS-PaulVerkuil.cfm> (last visited Oct. 5, 2011). President Obama appointed the ten additional members of the Council in July 2010, and it was fully staffed shortly thereafter. See Peter Orszag, *ACUS is Back*, OMBLOG (Jul. 9, 2010, 8:21 AM), <http://www.whitehouse.gov/omb/blog/10/07/09/ACUS-is-Back>. The 53rd Plenary Session was held in December 2010, and the 54th in June 2011. *The Administrative Conference of the United States—2010 Plenary Session*, COMMERCE.GOV (Dec. 13, 2010, 8:18 PM), <http://www.commerce.gov/os/ogc/developments/administrative-conference-united-states-2010-plenary-session>.

30. Orszag, *supra* note 29. Why the Conference was defunded in 1995 is a complicated question of legislative priorities, political shifts in power, and dissatisfaction with some recommendations. See generally Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19 (1998). The entire first issue of Volume 30 of the *Arizona State Law Journal* is devoted to discussing the demise and possible revival of ACUS.

The defunding of ACUS was seen as a mistake from the start, and many influential figures worked for its revival. The two most important voices were Justices Stephen G. Breyer and Antonin G. Scalia, the latter a former Conference member and Chairman. *Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 14-30 (2010) (statements of Justice Breyer and Justice Scalia). On August 1, 2011, right after the debt ceiling vote, the House voted 382 to 23 to reauthorize ACUS through 2014. *Bill Summary & Status—112th Congress (2011-2012)—H.R. 2480—All Information*, LIBR. OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02480:@@L&summ2=m&#> (last visited Oct. 5, 2011). This is quite a bipartisan endorsement.

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

32. Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012).

Professor Steven Balla of the Trachtenberg School of Public Policy and Public Administration at The George Washington University was the consultant on the *Rulemaking Comments* project, which became Recommendation 2011-2.<sup>33</sup> Rulemaking has long been an interest of the Conference, and the advent of new technology and social media make it a subject ripe for review. Professor Balla analyzed numerous rulemakings between 2008 and 2011 where there were reply comments from the public to agencies utilizing *regulations.gov*, which posts information on 123 government agencies. He sampled comments, then did extensive interviews and follow-up. In this case as well, ACUS connections made this empirical work possible.

Perhaps the most extensive empirical study since ACUS's revival was conducted for the *Government Contractor Ethics* project by Professor Kathleen Clark of Washington University School of Law. Government contractor ethics has become a subject of intense interest during the last two administrations because contractors, both military and civilian, have grown exponentially relative to full-time government employees.<sup>34</sup> Professor Clark's research involved over ninety initial and follow-up interviews with government and private sector personnel, and extensive meetings with officials at the Office of Government Ethics, the Office of Federal Procurement Policy, and the Department of Defense. In addition, since contractor ethics rules are of intense interest to the private sector, meetings were held by our staff and Professor Clark with appropriate business interests and the public interest community. The resulting study<sup>35</sup> and Recommendation 2011-3<sup>36</sup> are deeply supported by this empirical process.

Finally, experiential learning was at the heart of the *Agency Use of Video Hearings* project done in-house by attorney-advisor Funmi Olorunnipa.<sup>37</sup>

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33. Rulemaking Comments, Recommendation 2011-2, 76 Fed. Reg. 48,791 (Aug. 9, 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/06/COR-FINAL-Rulemaking-Comments-Recommendation.pdf>.

34. See, e.g., Paul C. Light, *The New True Size of Government* (N.Y. Univ. Sch. of Pub. Serv. Organizational Performance Initiative, Research Brief No. 2, 2006), available at [http://wagner.nyu.edu/performance/files/True\\_Size.pdf](http://wagner.nyu.edu/performance/files/True_Size.pdf).

35. Kathleen Clark, *Financial Conflicts of Interest In and Out of Government* (Wash. Univ. in St. Louis Sch. of Law Legal Studies Research Paper Series, Paper No. 11-02-03, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1785520##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1785520##).

36. Compliance Standards for Government Contractor Employees—Personal Conflicts of Interest and Use of Certain Non-Public Information, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

37. See FUNMI E. OLORUNNIPA, AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION 3 (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Revised-Final-Draft-Report-on-Agency-Use-of-Video-Hearings-5-10-11.pdf> (examining the experience of agencies that have already used video hearing technology and identifying potential uses of the technology by other agencies with high-volume caseloads).

This project involved demonstrations of new video hearing technology in the Social Security Administration's disability hearing process, which led to a "best practices" recommendation, Recommendation (2011-4),<sup>38</sup> for expanding the use of such technology to other high-volume caseload agencies like the Department of Veterans Affairs and the Executive Office for Immigration Review at the Department of Justice. Understanding the technology behind video hearings, and the opportunities it offers agencies for fair and efficient decision making, has the potential to transform government adjudications, while saving hundreds of millions of dollars, and reducing the delays that members of the public face in having their claims resolved.<sup>39</sup>

These examples of ACUS studies and recommendations provide a glimpse of how empirical research can make government procedures and processes more fair, efficient, and effective.<sup>40</sup> They are only the most recent examples of a Conference commitment to understanding how agencies work, and how to make them work better. From the beginning, Conference studies have employed data collection and interviews as research techniques. In fact, the current Chairman, in an earlier life as a consultant to ACUS, contributed an empirical study that looked into how the informal adjudicative processes of forty-two agencies actually worked.<sup>41</sup>

## II. ENVIRONMENTAL LAW AND ADMINISTRATIVE LAW

This new journal connects fields that are sometimes viewed as separate enterprises. But, in many ways, environmental law *is* administrative law.<sup>42</sup> Through its recommendation and research efforts, ACUS has at least viewed the fields as first cousins, if not siblings. It is appropriate to reemphasize these connections in this inaugural issue.

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38. Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011).

39. In the immigration setting, the lengthy queues mean that those seeking asylum can be kept in detention for years before their cases can be heard. Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 590 (2007).

40. The fifth recommendation, Legal Considerations in e-Rulemaking, supported by an in-house study prepared by Bridget Dooling, a detailee from OIRA, has by its very nature less of an empirical bent. Still, it involved extensive interviews with agency general counsels and legal staff. Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

41. See Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976) (describing how many of the "procedural ingredients" required by *Goldberg v. Kelly*, 397 U.S. 254 (1970), were actually present in a broad set of agency adjudications).

42. This assumes, of course, that the substantive and procedural limits that apply to the APA and ACUS also apply to the work of the Environmental Protection Agency (EPA). See *supra* note 7.

When the organizing mechanism of administrative law, the APA,<sup>43</sup> was enacted in 1946, the field of administrative law was characterized by the work of the independent agencies, and adjudicatory decision making was the norm.<sup>44</sup> This structure remained largely in place through the 1960s, when, because of its procedural advantages, rulemaking soon became the most significant aspect of agency practice.<sup>45</sup>

With the advent of EPA in 1970, the focus of administrative law shifted dramatically.<sup>46</sup> In some ways, the shift had occurred even earlier in *Scenic Hudson Preservation Conference v. FPC*, which found an agency duty to consider “aesthetic, conservational and recreational aspects of power development” in the Federal Power Act.<sup>47</sup> This judicial expansion of regulatory responsibilities inspired the creation of EPA and gave environmental law enormous influence over the APA’s standing to sue requirements.<sup>48</sup>

The creation of EPA was also an organizational milestone for government. Administrative law has always been concerned with the allocation of powers among the branches and the role of independent and executive agencies.<sup>49</sup> In 1970, President Nixon created the Ash Council under congressionally-granted reorganization powers.<sup>50</sup> The Council focused on the formation of EPA, which required the transfer of agency functions from numerous departments, and it debated the kind of agency that should be created to house these powers. The three choices were to place EPA within an existing department, to set it up as a free-standing executive agency, or to create it as an independent commission. Despite congressional desire for

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43. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

44. Perhaps the most widely studied agency in those days was the National Labor Relations Board (NLRB), which employed large numbers of “hearing examiners” (now administrative law judges) and utilized the formal adjudication provisions of the APA. *See, e.g., Universal Camera Corp. v. Nat’l Labor Relations Bd.*, 340 U.S. 474 (1951) (discussing, in part, the use and meaning of the substantial evidence test under the National Labor Relations Act and the APA and the decision-making role of hearing examiners).

45. *See, e.g., United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (holding that rules can be used to reduce issues in adjudications).

46. In addition, 1970 was the year the Occupational Safety and Health Act (OSHAct) became law, putting workplace safety at the center of the labor/management agenda. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

47. *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F. 2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

48. *See Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (recognizing that, in addition to economic harms, non-economic harms like aesthetic and environmental harms can lay the basis for standing under the APA). *See generally* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS § 5.4.2 (5th ed. 2008).

49. *See generally* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

50. The Council (formally known as the President’s Advisory Council on Reorganization) was created under the direction of Roy Ash, hence the Ash Council.

an independent commission,<sup>51</sup> President Nixon decided by Executive Order, pursuant to reorganization authority,<sup>52</sup> to create EPA as an independent agency in the Executive Branch,<sup>53</sup> thereby transforming the regulatory landscape with a stroke of the Executive pen. The swiftness of that move seems unthinkable today. For example, more than a year after its creation, the Consumer Financial Protection Bureau (CFPB)<sup>54</sup> remains without a confirmed director due to congressional challenges for, among other things, its not having been established as an independent agency.<sup>55</sup>

The appointment and confirmation process has also changed dramatically from what it was in 1970. President Nixon named William Ruckelshaus to be the first head of EPA, and he was confirmed two days after its creation was announced.<sup>56</sup> President Obama is still negotiating with Congress to get the head of the CFPB confirmed. Moreover, reorganization power, which Congress granted to President Bush when he established the Department of Homeland Security in 2002,<sup>57</sup> has now expired. President Obama must approach Congress for new reorganization authority if he wants to reorganize agencies like the Department of Commerce to focus on international trade and competitiveness, for example.

An emphasis on EPA's regulatory scope came as a consequence of the deregulation movement of the 1970s. In discrediting economic regulation, that movement ushered environmental and safety regulation to the center

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51. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 467 (2008) (describing congressional responses to creation of EPA).

52. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) (providing the initial organization of EPA).

53. An "independent agency in the Executive Branch" means a free-standing agency rather than an executive department, like Health and Human Services. It is in contrast to "independent agencies," which are run by commissioners who enjoy for-cause removal protections. See S. COMM. ON GOVERNMENTAL AFFAIRS, 96TH CONG., *THE FEDERAL EXECUTIVE ESTABLISHMENT: EVOLUTION AND TRENDS* 31-38 (Comm. Print 1980) (describing different forms of government entities).

54. The CFPB was a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 1955-2113 (2010).

55. The Consumer Bankers Association recently said: "We would prefer to see the bureau run by a commission . . . [like] the Consumer Product Safety Commission . . ." Ben Protess, *Choice to Lead Consumer Bureau Shows an Aggressive Streak*, N.Y. TIMES, July 19, 2011, at B5. The Senate and House members who support this view are holding up the confirmation process. Their views reflect a long tradition of the party not in the White House preferring independent commissions to executive organizations. See Devins & Lewis, *supra* note 51, at 472-75.

56. Ruckelshaus was confirmed as Administrator of EPA on December 2, 1970, and sworn in on December 4, 1970. EPA, THE GUARDIAN: ORIGINS OF THE EPA (1992), available at <http://www.epa.gov/aboutepa/history/publications/print/origins.html>.

57. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, 2243.

stage of administrative decision making.<sup>58</sup> By abolishing agencies such as the Civil Aeronautics Board and the Interstate Commerce Commission, and limiting the regulatory missions of agencies like the Federal Energy Regulatory Commission, the burden of agency policy making shifted from rate setting to regulation of social (or external) costs at EPA and the Occupational Safety and Health Administration (OSHA). Since these agencies are inevitably engaged in a policy-driven process, their decisions remain controversial and political. Not surprisingly, the most cited case in the federal courts, *Chevron USA, Inc. v. NRDC*,<sup>59</sup> involved policy choices made by EPA.<sup>60</sup> The *Chevron* “domain”<sup>61</sup> dominates administrative law courses, and EPA regularly produces major Supreme Court opinions.<sup>62</sup> If one measures an agency’s significance to administrative law by citation count, EPA is the clear winner. And even if one only counts the number of appellate decisions involving an agency, EPA ranks very high.<sup>63</sup>

Moreover, another staple of administrative law courses, the OIRA regulatory review process, might not exist without the need to review rules produced by EPA and OSHA. The 1970s precursor to OIRA, President Nixon’s Quality of Life Review, was created largely to review EPA and OSHA rules.<sup>64</sup>

Another way to measure the significance of EPA’s effect on administrative law is to look at the work of ACUS. The Appendix lists the twenty-six environmental projects pursued by the Conference from 1971 to 1995.<sup>65</sup> No agency’s activities have occupied the Conference as much as EPA’s, except

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58. See DAVID BOIES & PAUL R. VERKUIL, PUBLIC CONTROL OF BUSINESS 558–617 (1977) (emphasizing the shift from economic to social-cost regulation).

59. 467 U.S. 837 (1984) (exhibiting deferral to EPA’s policy expertise under the Clean Air Act).

60. Similarly, OSHA’s workplace safety mission led one Justice to call for a revival of the non-delegation doctrine. See *Indus. Union Dept. v. Am. Petroleum Inst.*, 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring).

61. See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

62. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (finding that EPA had statutory power under the Clean Air Act to address global climate change).

63. If immigration appeals are set aside, EPA produced over ten percent of administrative agency cases in the courts of appeal in FY 2010. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS—2010 ANNUAL REPORT OF THE DIRECTOR 96 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinesspdfversion.pdf>.

64. See James Tozzi, Advisory Bd., Ctr. for Regulatory Effectiveness, Address at the 30th Anniversary of OIRA Event at George Washington University: OIRA’s Formative Years (May 20, 2011), available at [http://www.thecre.com/pdf/20110523\\_OIRA\\_GWU\\_2.pdf](http://www.thecre.com/pdf/20110523_OIRA_GWU_2.pdf).

65. See *infra* app. If the projects led to recommendations, these projects will soon be available on the ACUS website and the recommendations will be republished in the *Federal Register*. If the projects only produced reports, they will be available on *Hein Online* at a future date.

perhaps the Social Security disability program, whose process requirements continue to demand attention.<sup>66</sup> It is very likely that the reborn Conference will continue to keep EPA and environmental law high on its agenda.<sup>67</sup>

### CONCLUSION

New ventures are stimulating and creative, as I am sure the editors feel about this first issue. I have a little of that feeling myself after restarting ACUS from scratch, a process that included finding space, ordering furniture and computers, and, most significantly, hiring staff. We have a wonderful esprit at ACUS, in large measure because everyone chose to join this exciting new venture. They are proud of ACUS and its deep tradition of empirical study of administrative law.

I wish the *Michigan Journal of Environmental & Administrative Law* a long and productive life, much like the Conference has had, but without the fifteen-year gap from which we are just emerging.

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66. See OLORUNNIPA, *supra* note 37.

67. The recent ACUS recommendations on rulemaking received extensive comments from representatives of EPA during the committee process. See Legal Considerations in e-Rulemaking, *supra* note 40; Rulemaking Comments, *supra* note 33.

## APPENDIX

## ACUS STUDIES AND RECOMMENDATIONS

<i>Year</i>	<i>Author/Consultant</i>	<i>Subject</i>	<i>Related Recommendation</i>
1971	Stolz	NEPA Study	–
1971	Flannery	Land Use Decisions and the Environment: the BLM	–
1971	Smith	Bureau of Reclamation Environmental Decisionmaking	–
1972	Cramton-Berg	Enforcing the National Environmental Policy Act in Federal Agencies	–
1972	Cramton-Boyer	Citizens Suits in the Environmental Field: Peril or Promise?	–
1973	Cramton-Berg	On Leading a Horse to Water: NEPA and the Federal Bureaucracy	–
1973	Reeves	FAA Recommendations Implementing NEPA	–
1973	Hines-Nathanson	Establishing an Environmental Court	–
1973	Murphy	Procedures for Resolution of Environmental Issues in Licensing Proceedings	73-6
1974	Shaw	Procedures to Ensure Compliance by Federal Facilities With Environmental Quality Standards	75-4
1976	Currie	Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act	76-4
1979	Baram	Regulation of Health, Safety and Environmental Quality and the Use of Cost-Benefit Analysis	79-4
1982	Merrill	Federal Regulation of Cancer-Causing Chemicals	82-5
1984	Ogden	Public Regulation of Siting of Industrial Development Projects	84-1
1984	Anderson	Negotiation and Informal Agency Action: The Case of Superfund	84-4
1985	Boyer-Meindinger	Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits under Federal Environmental Laws	85-3
1990	Baram	Risk Communication by Regulatory Agencies in Protecting Health, Safety, and the Environment	90-3
1990	Elliott et al.	Providing Economic Incentives in Environmental Regulation	–
1992	Shapiro	The Dormant Noise Control Act and Options to Abate Noise Pollution	92-6
1992	Kornhauser-Revesz	De Minimis Settlements Under Superfund	92-9

<i>Year</i>	<i>Author/Consultant</i>	<i>Subject</i>	<i>Related Recommendation</i>
1992	Brickman et al.	An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims	–
1992	Schatz	Environmental Regulation in the Antarctic	–
1993	Hornstein	Regulating Pesticides: FIFRA Registration, Reregistration, Suspension, and Cancellation Procedures	93-5
1994	Yaffee-Wondolleck	Negotiating Survival: An Assessment of the Potential Use of Alternative Dispute Resolution Techniques for Resolving Conflicts Between Endangered Species and Development	–
1995	Kerwin-Langbein	An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency	–
1995	Healy	An Evaluation of the Fairness and Effectiveness of the Judicial Review Preclusion Provision in the Superfund Statute	–

