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THE ADMINISTRATIVE CONFERENCE AND THE POLITICAL THUMB

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# The Administrative Conference and the Political Thumb

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In his valuable contribution to this Symposium, Richard Pierce underscores the role ACUS has played over the years in encouraging on-the-ground fact-finding by its consultants, who have usually been academics consulted at the beginning of careers that ever after would be marked by this encounter with the realities of the administrative process. As the mentee of Walter Gellhorn, who directed the remarkable empirical studies of federal agency procedures that underlay the eventual Administrative Procedure Act and who was a member of the ACUS Council from its initiation in 1964 until its end, perhaps its most active member, it is easy to agree. My own first serious essay into administrative law scholarship, arranged by Walter, was an ACUS project that placed me for two months at the BLM offices in Denver, Colorado, observing how policy decisions concerning land use issues happened to arise in both adjudications and rulemakings – and learning that the prevailing supposition that agencies chose from the top which of these procedural routes to pursue was (at least there) unrealistic.<sup>1</sup> Not unimportantly, the empirical research ACUS has promoted – like mine, like Professor Pierce’s, and like the others’ he recounts – has been research requiring physical presence and observation – interviews, facts on the ground more than the disembodied data sets that fuel the “empirical” research of economists and many political scientists. Next to actually serving in an administrative agency – the deepest of educational experiences about the subject we teach – it is research like this that is most likely to free the young scholar from the illusion that administrative law is all about, as Louis Jaffe

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<sup>1</sup> Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of the Mining Law, 74 Colum.L.Rev. 1231 (1974).

once put it, “Judicial Control of Administrative Action.” What a contribution, then, ACUS has made not only to improvements in the functioning of government, but also to the way in which administrative law is presented in law school classrooms, and written about in the academic literature.

Reading Professor Pierce’s analysis, however, one is struck by the extent to which it reflects Professor Jaffe’s limited view. He properly uses as “an example of the value of empirical research understanding the rulemaking process,” and invokes what scholars have learned on the ground about the relative<sup>2</sup> silence of the period preceding the notice of notice-and-comment rulemaking with which the APA’s stated procedure essentially begins. Pre-notice processes, he demonstrates, are typically much longer than the period following notice. For Professor Pierce, consideration of the prevalence of meetings with the regulated, and not regulatory beneficiaries, during this dark period, plus the consequence that proposals will then inevitably reflect hard-fought compromises that will prove difficult for the public notice-and-comment period to dislodge, is a source of considerable concern.<sup>3</sup> Then, addressing possible sources of pro-

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<sup>2</sup> The availability in recent years of a biennial Regulatory Agenda and annual Regulatory Plan suggests that, even apart from the active or accidental publicity agencies have always given of their future rulemaking plans, structural information about potential rulemakings not yet noticed for comment is now regularly available, and Presidents and others have strongly encouraged affirmative outreach to potentially affected interests during this period. Congress’s enactment of a negotiated rulemaking process, 5 U.S.C. 661 et seq., is to the same effect, as the negotiations entailed are in formal terms to develop a consensual *proposal* for rulemaking, not a rule as such.

<sup>3</sup> For agencies like the EPA, who regularly hear from committed NGOs (as, for EPA, environmentalist NGOs like the Natural Resources Defense Council), the street may have more two-way traffic than his analysis suggests. See Coral Davenport, “Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint Order,” *The New York Times*, July 7, 2014, p. A9, available at <http://nyti.ms/1ziAtnd> (visited July 16, 2014). It appears that, responding to agency bureaucrats’ fears of the results of administration change in both liberal and conservative

regulated bias in these outcomes, he suggests only four: first, the collective action problems that the public, a diffuse multitude, must inevitably face in relation to problems that have high stakes for small numbers on the other side; and then three lines of judicial decision. Two, he argues, add to the importance of the pre-notice period by contributing to the vulnerability of rulemaking to changes made after a rulemaking proposal has been published for comment: judicial decisions defining the necessary content of notice, and judicial decisions demanding thorough reasoning about changes in statements of basis and purpose. Finally, by making it easier for the regulated than regulatory beneficiaries to seek review, he argues, judicial decisions on standing add to the influence the regulated have over rulemaking outcomes by underscoring the comments most important for the statement of basis and purpose to address. The collective action problems are inescapable, but if these judicial decisions could be changed, he suggests, perhaps there could be more attention to the public interest.

Whatever the merit in these concerns, however, many administrative law scholars (including the author) believe that the most important influences on the duration, outcomes, and resulting rigidity in rulemaking proposals emerging from the pre-notice period come not directly from the regulated, but from agencies' political overseers. Thus, the pre-notice period that underlies Professor Pierce's analysis also troubles Professor Lisa Heinzerling in a forthcoming *Texas Law Review* analysis, "Classical Administrative Law in the Era of Presidential Administration." ("Presidential Administration." in her title refers to an influential analysis penned by Justice

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administrations, even opposing pressures from elsewhere within a current administration, interest groups have brought agency-"friendly" suits during the pendency of policy determinations, resulting in settlements favorable to the then prevailing agency preferences. Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 *Seattle U. L. Rev.* 891, 897-99 (2014).

Kagan shortly after her return from the White House to Harvard Law School,<sup>4</sup> celebrating the steady growth of presidential controls over executive agency rulemakings during the preceding three decades and, particularly, in the Clinton administration she served.) For Professor Heinzerling, long a critic of White House involvement (in EPA rulemaking in particular), the loud and controlling voices during the pre-notice period, the transformative impacts, come from the White House – often, to be sure, reflecting industry interests, but now as the heavy, directly political thumb of superior authority. Since the Reagan administration, the White House Office of Information and Regulatory Affairs (OIRA) has been responsible for oversight of cost-benefit analyses required of all executive agencies in advance of important rulemakings – today, under President Clinton’s Executive Order 12866, as slightly modified by the Obama Administration. For important rulemakings, these required analyses (and others Congress or the White House have required) are dominant influences during the pre-notice period, and have given it a strongly secretive and political character, not one that is assuredly transparent and technocratic as classical administrative law assumes it will be. As she writes, “it seems clear today that there are many [political] somebodies who matter and who are empowered to delay or stop agency initiatives.” “[T]he secrecy and coziness of presidential administration stand in sharp contrast to the transparency and inclusiveness of classical administrative law.” Attention to the impact of these *governmental* political inputs from outside the agency is surprisingly missing from Professor Pierce’s analysis.

Unlike Professor Pierce, Professor Heinzerling is worried not about the impacts of judicial control of administrative action, but about the consequences of its absence. The single judicial

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<sup>4</sup> 114 Harv. L. Rev. 2245 (2001).

development *she* blames for the dominance and politicality of the prenotice period in rulemaking is the D.C. Circuit's influential opinion in *Sierra Club v. Costle*.<sup>5</sup> Written by a judge (Patricia Wald) who served as Assistant Attorney General for legislative affairs during the Carter administration, and so would have frequently dealt with the White House, this influential opinion professes indifference to the possibility that political influence might actually and silently have influenced EPA's choices among alternatives in an important and complex rulemaking, so long as those choices were supported by a statement of basis and purpose relying on the information the agency had, and an ostensible reasoned decision-making process. In a 100-page exemplar of hard look review, she found the agency's public reasoning process adequate and the chance that it might have been influenced by the President immaterial.

Perhaps we should be happier to attribute the distortions and rigidities unquestionably resulting from the pre-notice period, just as Professor Pierce argues, if they can be attributed to White House interventions rather than the interventions of interested industrial forces. In his peroration, he raises the possibility that the public interest might actually be served by the impact of forces external to a single-purpose agency, over-zealous to promote its particular, but limited, public responsibility and obtuse to other important considerations that may be at play. To be sure, OIRA meets with outsiders just as agencies do; as Professor Heinzerling observes, those meetings are predominantly with the regulated just as agency meetings with outsiders are, although on her account the disproportion is much lower;<sup>6</sup> and OIRA's limited transparency

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<sup>5</sup> 657 F.2d 298 (D.C. Cir. 1982).

<sup>6</sup> She reports a 5:1 ratio, in contrast to his estimate of 14:1 for the Volcker rulemakings, 170:1 for the EPA. And see n. above.

reveals only attendees, and not what might have been said. But then any resulting interventions in agency processes, and there are many, come with White House imprimatur. Countering agency tunnel vision stands alongside the President's constitutional responsibility for assuring the faithful execution of the laws as an important rationale for the executive orders under which OIRA functions. The possibility that OIRA's unmentioned engagement during the pre-notice period is in fact the dominant source of its impacts thus could validate Professor Pierce's speculations. It seems at least possible that these interventions bespeak not special interest bias, but the electorally validated voice of the overall public interest.

This may serve to suggest that empirical study of agencies' relations with their overseers would – even should – be a rich field for ACUS's work. Recalling my own experience as an agency general counsel almost four decades ago, after having taught “classical administrative law” for four years, I remember the shock of coming to understand that my (independent) agency's relationships to the courts had so much less impact on its day-to-day functioning than its relations with the White House, the Congress, and their associated bureaucracies. Judicial review is not unimportant; at least when it can come from both the left and the right – as Professor Pierce persuasively argued in his defense of pre-enforcement review of rulemaking against its critics<sup>7</sup> – it has the tendency to keep agencies honest, to free them from the temptation only to appease the one side of the issues under consideration that is likely to appeal. But as

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<sup>7</sup> Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 Admin. L. Rev. 59,, 89-91 (eliminating pre-enforcement review would deossify rulemaking “at a social cost [that is] intolerably high. ... Asymmetric access to judicial review ... would introduce a powerful systematic anti-regulatory bias in the implementation of all regulatory systems.”)

Professor Heinzerling argues, *Sierra Club* appears to give presidential influence free reign within the possibilities an agency's rulemaking record leaves open to its judgment.

OIRA's administration of impact analyses for individual rulemaking proposals under E.O. 12866 is only one among the many important hierarchical controls within the executive branch. OIRA also controls agency rulemaking agendas and agency information practices. Inspectors general constantly explore issues of legality, efficiency and waste. Special Counsel of the Small Business Administration monitors adherence to the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). The Administrative Procedure Act calls on the Director of the Office of the Federal Register to control agency incorporation by reference of industrial standards, converting them into legal obligations whose texts are not directly made public. OMB controls agency budgets; other agencies control office space and materiel, or the allocation of positions in the Senior Executive Service. And so forth. These are not judicial controls, but anyone who has spent time in an administrative agency understands how profoundly they influence the conduct of its business. And, save for impact analysis issues under Section 6 of E.O. 12866 (and its predecessors), few of them have been significant subjects of empirical study in the literature.

From Congress, political pressures can raise similar issues, whether exercised through budgetary controls, oversight hearings, or personal interventions. The Congressional Review Act, Unfunded Mandates Reform Act, and others, provide general contexts in which congressional pressures might be felt. The Government Accountability Office, a congressional agency, has auditors permanently stationed in government agencies, patrolling their corridors for waste and inefficiencies in the use of appropriated funds and generating reports that command

immediate agency attention. One may hope that these influences will be brought to bear with integrity, with an embrative eye to genuine public interest, and not simply for political advantage; but this is hardly inevitable. And, again, the empirical literature on these issues is quite thin. Both the public and the agencies represented in ACUS's Assembly could be well served by empirical studies addressed to oversight relationships, as well as agency internal functioning.

One perhaps ought not, however, be surprised to find that here ACUS's record has been a mixed one, strongly preferring issues that can be addressed at the level of agency action, and hesitant to speak to issues about the government's internal processes for supervision and political control. Its assembly is a mix of academicians, private practitioners and agency lawyers with the latter in the majority. The opportunity that agency lawyers have to reason with each other about shared operational issues is one of the ACUS's major benefits. Recommendations that speak to the agency level provide that benefit, readily imagined as exercises in mutual support. To be sure, agencies also share frustrations with their overseers. Yet making common cause on issues involving one's political overseers has an adversary as well as a cooperative element. Discouragement to pursue such inquiries might come from political loyalties, from fears of the consequences of criticizing powerful superiors and – perhaps particularly – from the leadership of ACUS itself. The President selects the ACUS Council, which initially approves projects and eventually shapes recommendations for Assembly consideration, and today's Council includes both the present and the next previous General Counsel of OMB. Although its Chair serves a fixed term suggesting significant possibilities of independence, he is also a presidential appointee and – as important – necessarily relies on White House for support in many respects. Even

though ACUS is very modestly funded by appropriations – and work suggesting the existence of inappropriate congressional political interactions with agencies or limiting principles for those interactions would be unlikely to prompt increases in them – its defunding by Congress 1995-2010 was heralded as a budget-saving measure. Given this history and these vulnerabilities, perhaps a gun-shy attitude is simply to be expected. It is simply easier, less freighted, to structure inquiries that lack a potentially adversarial, critical edge. Yet there is then a limit, however understandable, to the empiricism ACUS encourages – a limit that tends to exclude what may in fact be the more important influences on agency actions.

During its first period of activity, 1968-95, ACUS spoke often to Congress, but rarely to its other overseers, and not at all to some – for example, the GAO, or the Council on Environmental Quality that one could imagine frequently influencing agency actions. Thus, of the 208 recommendations or statements it made during its first period of activity, half included a recommendation to Congress for legislative action, but only 11 made recommendations to the courts, and 18 to elements of the White House establishment, including OMB.<sup>8</sup> Of these 18, few placed ACUS in the position of recommending changes that, while favorable to agency interests, might have been regarded by the White House as critical of its conduct in relation to them. The first time ACUS called its work a “Statement” rather than “Recommendations,” in 1971, it was to express disagreement with the Ash Council, appointed by President Nixon, which had recommended converting some independent commissions into executive agencies, and

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<sup>8</sup> Thanks to Logan Gowdey, CLS ‘16 and Andrew Sutton, CLS ‘16, for thoughtfully and carefully coding them all.

increasing the judicialization of some processes.<sup>9</sup> Not until 1980 did it again speak to the EOP, recommending changes in implementing the Advisory Committee Act<sup>10</sup> and generally supporting the confidentiality of White House communications with agencies during rulemaking<sup>11</sup> – as Judge Wald would reiterate for the D.C. Circuit the following year.<sup>12</sup> It was another eight years before ACUS would develop suggestions arguably critical of the work of transition teams between administrations<sup>13</sup> and controversial respecting valuation issues in cost-benefit analysis,<sup>14</sup> and its transparency and extent.<sup>15</sup> In 1990, ACUS sought to advise President and Congress both on the handling of executive privilege disputes,<sup>16</sup> but the following year it treated as an agency matter *only* “Federal Agency Cooperation with Foreign Government

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<sup>9</sup> ACUS Statement No. 1, Views of the Administrative Conference on the “Report on Selected Independent Regulatory Agencies” of the President’s Advisory Council on Executive Organization, 2 ACUS 27 (May 7, 1971).

<sup>10</sup> ACUS Recommendation 80-3, Interpretation and Implementation of the Federal Advisory Committee Act, 45 Fed. Reg. 46,775 (July 11, 1980).

<sup>11</sup> ACUS Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

<sup>12</sup> See n.5 above

<sup>13</sup> ACUS Recommendation 88-1, Presidential Transition Workers’ Code of Ethical Conduct, 53 Fed. Reg. 26,026 (July 11, 1988).

<sup>14</sup> ACUS Recommendation 88-7, Valuation of Human Life in Regulatory Decisionmaking, 53 Fed. Reg. 39,586 (Oct. 11, 1988).

<sup>15</sup> ACUS Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1988).

<sup>16</sup> ACUS Recommendation 90-7, Administrative Responses to Congressional Demands for Sensitive Information, 55 Fed. Reg. 53,272 (Dec. 28, 1990).

Regulators.”<sup>17</sup> In its final years, inter alia, it asked the President to create a body to coordinate services to migrant workers,<sup>18</sup> to streamline the cost-benefit analysis process to reduce its burdensomeness,<sup>19</sup> and to establish a mechanism for prioritizing the review of aging regulations.<sup>20</sup>

ACUS has brought 29 studies to the point of adopted recommendations and statements since its revival in 2010. Twelve of these were necessarily addressed to the agency level only. Two were addressed in whole or in part to the courts, involving no political sensibilities.<sup>21</sup> No recommendation spoke to informal congressional interaction with agencies or the work of the GAO, but of nine that one thinks might reasonably have made legislative recommendations to Congress,<sup>22</sup> and perhaps reflecting its dysfunctionality today, only four<sup>23</sup> did. ACUS had no

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<sup>17</sup> ACUS Recommendation 91-1, Federal Agency Cooperation with Foreign Government Regulators, 56 Fed. Reg. 33,842 (July 24, 1991).

<sup>18</sup> ACUS Recommendation 92-4, Coordination of Migrant and Seasonal Farmworker Service Programs, 57 Fed. Reg. 30,106 (July 8, 1992).

<sup>19</sup> ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670 (Feb. 1, 1994), correction at 59 Fed. Reg. 8507 (Feb. 22, 1994).

<sup>20</sup> ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (Aug 18, 1995).

<sup>21</sup> Legal Considerations in E-Rulemaking; Recommendation 2011-1(content of records on review); Remand Without Vacatur; Recommendation 2013-6 (supporting existing judicial remedy),

<sup>22</sup> The Federal Advisory Committee Act - Issues and Proposed Reforms, Recommendation 2011-7; Review of Regulatory Analysis Requirements, Recommendation 2012-1, Midnight Rules, Recommendation 2012-2; Paperwork Reduction Act, Recommendation 2012-4; Improving Coordination of Related Agency Responsibilities, Recommendation 2012-5; Reform of 28 U.S.C. Section 1500, Recommendation 2012-6; Inflation Adjustment Act,

recommendations to make to Congress about Review of Regulatory Analysis Requirements, Midnight Rules, Improving Coordination of Related Agency Responsibilities, the Government in the Sunshine Act, or “Ex Parte” Communications in Informal Rulemaking.

Notice, however, the higher degree of political sensitivity generally attaching to these issues than to those on which ACUS did speak to Congress. The omissions were sometimes quite deliberate.<sup>24</sup> “Government in the Sunshine Act,” Recommendation 2014-2,<sup>25</sup> took its impetus from the known effect of the Act in reducing collegiality and politically responsible joint action on multi-member commissions. ACUS had received a study to this effect just before its 1995 suspension of operations, too late to act upon, and renewed study confirmed it. Yet despite the considerable evidence of this effect before ACUS’s Committee on Regulation and a recent statute favoring the FCC in this respect, Conference officials thought it too unlikely to be productive to warrant legislative proposals. Concerning review of regulatory analysis requirements, a hot-button issue with major impacts on contemporary rulemaking, it satisfied itself with a prefatory comment (i.e., neither a recommendation nor a statement, that would promote staff follow-through)

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Recommendation 2012-8; Government in the Sunshine Act; Recommendation 2014-2; and “Ex Parte” Communications in Informal Rulemaking, Recommendation 2014-4.

<sup>23</sup> The Federal Advisory Committee Act - Issues and Proposed Reforms, Recommendation 2011-7; Paperwork Reduction Act, Recommendation 2012-4; Reform of 28 U.S.C. Section 1500, Recommendation 2012-6; Inflation Adjustment Act, Recommendation 2012-8.

<sup>24</sup> As the author is a member ACUS’s Committee on Regulation, and a frequent attender of its plenary sessions, many statements in this essay, like this one, are based on personal participation in ACUS proceedings.

<sup>25</sup> 79 Fed. Reg. 35,990 (June 25, 2014).

“encourag[ing] the Executive Office of the President and Congress to consider consolidating certain analysis requirements to the extent overlap exists and to promote uniformity in the determination of whether any given analysis requirement applies. Although the Conference seeks to assure that existing analytic requirements are applied in the most efficient and transparent manner possible, it does not address whether the number or nature of those requirements might not be reduced in light of their cumulative impact on agencies.”<sup>26</sup>

Respecting “ex parte” communications in rulemaking, ACUS’s Recommendations explicitly excluded the possibility of issues arising from congressional communications from consideration. Even when ACUS did speak to Congress, it did so with ultimate politeness. Ordinarily, its recommendations to agencies state what agencies “should” do. In its recommendations on the Paperwork Reduction Act, the only “change” ACUS affirmatively recommended in the Act was to reconfigure OMB’s annual reporting obligations to reflect the ready availability of much of the information now required to be reported on government websites. On more fraught issues – whether public participation should be streamlined for information demand renewals without significant change, or whether OMB could be permitted to grant some agency information demand requests requiring less scrutiny for five rather than three years – the ACUS recommendations asked Congress only to “look at” or “consider” possibilities of amendment.

Respecting executive branch relationships, too, ACUS has yet to undertake empirical analysis of some important oversight relationships that one might think quite fruitful, if arguably fraught – as, for example, OIRA’s oversight of regulatory plans under Section 4 of E.O. 12866. Presidential claims to coordinate agency activities (which *have* figured in other recent studies) and to set policy priorities are, if anything, stronger than its claims to oversee, perhaps control,

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<sup>26</sup> Recommendation 2012-1 at

particular rulemakings under E.O. 12866 Section 6; yet the administration of Section 4 has been virtually unexamined in the literature and is obviously a matter of considerable interest to agencies. Twelve of ACUS's recent recommendations<sup>27</sup> did or might have involved recommendations to executive branch actors (largely in the Executive Office of the President) as well as to agencies, and one also finds similar – occasionally more striking – patterns among them. Four of these recommendations involved settings in which subordinated executive branch agencies were involved, EOP/agency cooperation was more likely than conflict, or (by reason of its command of foreign relations issues) EOP authority was clear; in these settings ACUS's recommendations spoke quite directly.<sup>28</sup> For all but one of the remaining eight,<sup>29</sup> the continuing

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<sup>27</sup> Incorporation by Reference, Recommendation 2011-5; International Regulatory Cooperation, Recommendation 2011-6; The Federal Advisory Committee Act and Proposed Reforms, Recommendation 2011-7; Review of Regulatory Analysis Requirements, Recommendation 2012-1; Midnight Rules, Recommendation 2012-2; Paperwork Reduction Act, Recommendation 2012-4; Improving Coordination of Related Agency Responsibilities, Recommendation 2012-5; Science in the Administrative Process, Recommendation 2013-3; GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration, Recommendation 2013-7; Improving the Timeliness of OIRA Regulatory Review, Statement 18; Reducing FOIA Litigation through Targeted ADR Strategies, Recommendation 2014-1; and “Ex Parte Communications in Informal Rulemaking, Recommendation 2014-4.

<sup>28</sup> International Regulatory Cooperation, Recommendation 2011-6; Improving Coordination of Related Agency Responsibilities, Recommendation 2012-5; GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration, Recommendation 2013-7; Reducing FOIA Litigation through Targeted ADR Strategies, Recommendation 2014-1.

<sup>29</sup> Midnight Rules, Recommendation 2012-2, speaks directly to both incumbent and incoming presidential administrations about the somewhat fraught (but, the report suggests, often illusory ) appearance that outgoing

cautiousness of – even silences in – ACUS’s approach to executive branch overseers is quite striking.

For example, 5 U.S.C. §552(a)(1) permits agencies to “incorporate by reference” into their regulations – that is, to convert into legal obligations – voluntary industrial standards non-governmental organizations such as the American Society of Mechanical Engineers develop (e.g., respecting requirements to assure boiler safety). The binding legal requirements thus created cannot readily be known in the ways most law can be, however, either at the proposal stage or after they have become law. While single print copies are maintained for inspection at the National Archives and at the adopting agency’s headquarters, persons interested to know the content of their legal obligations must ordinarily acquire the standards from the adopting NGO, at the cost and under the terms it chooses to set for them.<sup>30</sup> The process risks undermining the usual rulemaking procedure, since the standards are generated elsewhere and when incorporation is proposed the usual if not inevitable reality is that the text of the standard proposed to be adopted and any supporting materials are not themselves made public in the rulemaking. This effect is particularly strong when, as OIRA guidance on the practice encourages,<sup>31</sup> agencies promote the development of a standard and its officials are themselves

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administrations facing a change in political administration push through rulemakings they fear the incoming administration would prove unwilling to carry to completion. The issue is self-evidently bipartisan, and the recommendations look in the direction of limiting the outgoing administration’s practice and enhancing the incoming administration’s controls.

<sup>30</sup> For a general discussion of these issues, see Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 *Wm. & Mary Bill Rts. J.* 497 (2013).

<sup>31</sup> OMB, Circular A-119.

participants in the NGO's consensual processes.<sup>32</sup> Potential commenters who have not participated in the NGO process are then left substantially in the dark as to what the proposal is. Since the standard has already been finalized by its adopting standards organization, one could see this as an even more striking instance of the realities Professor Pierce addresses, with the rule-to-be essentially taking final form before even the deficient public notice characteristic of incorporation by reference has been given.

ACUS recommendations on "Incorporation by Reference," Recommendation 2011-5,<sup>33</sup> make numerous sensible recommendations to rulemaking agencies using this procedure, recommendations that are particularly likely to be effective in supplementing public awareness at the proposal/comment stage of rulemaking. ACUS refused, however, to address a word to any of the three overseeing agencies – the Office of the Federal Register, the National Institute of Standards and Technology (in the Department of Commerce), and OIRA – that share responsibilities for controlling the practice, and that might, by revising their approaches, eliminate or at least substantially contain<sup>34</sup> the offense thus given to the general principle that

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<sup>32</sup> For example, the notice of proposed rulemaking for the rule mentioned in n. below, incorporating standards on pipeline hazard warning that had been developed by the American Petroleum Institute, remarked that the API had undertaken to develop the standard at agency's request, and that agency officials "attended all meetings of the force as observers and provided direction and input into both the process and the content of the standard." 69 Fed. Reg. 35279, 35281 (June 24, 2004).

<sup>33</sup> 77 Fed. Reg. 2257 (Jan. 17, 2012)

<sup>34</sup> The offense is particularly strong when the matter incorporated is itself regulatory, as distinct from stating a technical means of complying with requirements that are independently and sufficiently stated in governing statutes or regulations. When, for example, the Department of Transportation's Office of Pipeline Safety (now the Pipeline

law is not subject to copyright. And this despite transformations worked by the information age that virtually compel revision of their outdated regulations and guidance documents.<sup>35</sup>

ACUS's cautiousness in addressing possibly fraught issues of executive oversight is particularly striking in the four recent ACUS recommendations or statements work touching on the pre-notice period in rulemaking, the very context that so concerns Professor Pierce. Several of the ACUS recommendations from its initial period did forthrightly address sensitive issues arising in connection with the presidentially mandated impact analysis process,<sup>36</sup> that in one form or another has existed at least since the Carter administration.<sup>37</sup> OIRA's impact on

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and Hazardous Materials Administration) incorporated by reference standards developed by the American Petroleum Institute to govern required public warnings about pipeline hazards, 49 C.F.R. §192.616(a), one could not have regarded the standards as simply providing technical amplification of regulatory requirements on which the public would have had an independent opportunity to comment. The existing statutes, regulations, and guidance all reflect this distinction, suggesting that incorporation by reference must be limited to technical matters, n. above, but in practice this distinction has not been enforced. The ACUS recommendations ignore it, and the current proposals, n. below, explicitly eliminate any trace of it.

<sup>35</sup> The Office of the Federal Register's regulations, 1 C.F.R. Part 51, were written in 1982, when the practice of incorporation protected the volume of the Federal Register and the C.F.R. from tens of thousands of additional printed pages – no longer a consideration in the era of agency electronic libraries. OIRA's Circular A-119 was generated in the Clinton Administration. In probable consequence of a petition for rulemaking filed by the author and others, both are now proposed for revision. [Http://Regulations.gov](http://Regulations.gov) dockets OFR-2013-0001 and OMB-2014-0001.

<sup>36</sup> See nn. , , and above.

<sup>37</sup> E.O. 12044. Presidents Nixon and Ford sought similar inquiries for important rules, but without establishing an executive order framework.

rulemaking, which largely occurs during this period, has long been a major concern of academic administrative law literature. At the agency level, if not inside OIRA with its revealed penchant for privacy,<sup>38</sup> empirical research has been richly possible.<sup>39</sup> In three of the recent four, ACUS declined to speak to OIRA's role during this time; in none did it voice Professor Pierce's concern with baleful influence by the regulated during that period.<sup>40</sup>

Regulatory Analysis Requirements, Recommendation 2012-1,<sup>41</sup> was earlier discussed as an example of ACUS's gentility in addressing Congress.<sup>42</sup> It acknowledged the concerns of many that proliferating impact analysis requirements contribute to the costs, sluggishness and resulting inflexibility of proposal generation. That impact predominantly occurs in the pre-notice period. Yet while "ask[ing] the Executive Office of the President and Congress to consider streamlining the existing regulatory analysis requirements, ... [the Recommendation] does not address whether the number or nature of those requirements might not be reduced in light of their

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<sup>38</sup> Too much of the literature reveals the extent to which OIRA has failed to carry through on promises of transparency that were an important element of the executive orders' creation. Mendleson

<sup>39</sup> Bressman and Vanderbergh; Wagner

<sup>40</sup> Note that the two recent studies Professor Pierce relies on for his analysis of the pre-notice period (Kimberly Krawiec, Don't "Screw Joe the Plumber": The Sausage-Making of Financial Reform, 55 *Ariz. L. Rev.* 53 (2013) and Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards, 63 *Admin L. Rev.* 99 (2011)) were *not* ACUS consultant studies. Neither piece looks directly at OIRA's impact, although the second (whose authors include Wendy Wagner, see text at n. below) briefly asks whether its intervention might possibly counteract the internal effects of the unbalanced levels of direct communications by industry with EPA, and expresses considerable doubt about that.

<sup>41</sup> 77 *Fed. Reg.* 47,801 (August 10, 012).

<sup>42</sup> See text at n above

cumulative impact on agencies.” “Asking to consider” is a considerably gentler tack than ACUS recommendations generally take.

‘Ex Parte’ Communications in Informal Rulemaking, Recommendation 2014-4,<sup>43</sup> also discussed with respect to Congress,<sup>44</sup> builds on an earlier recommendation for agency practice developed in the wake of a controversial D.C. Circuit opinion and widely implemented.<sup>45</sup> Remarkably (and perhaps expectably) from Prof. Heinzerling’s perspective, it “ does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA)<sup>46</sup> ... [or] interagency communications outside the process of executive review.” Nor does it voice any concern with extra-governmental contacts during the pre-notice period, the contacts that so exercise Professor Pierce. Indeed, building on a directive of the Clinton administration,<sup>47</sup> it explicitly recommends: “4. Agencies should not

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<sup>43</sup> 79 Fed. Reg. 35,993 (June 25, 2014)

<sup>44</sup> See text at n, above.

<sup>45</sup> Admin. Conf. of the United States, Recommendation 77-3, Ex Parte Communications in Informal Rulemaking Proceedings, 42 Fed. Reg. 54,253 (Oct. 5, 1977), adopted in response to the D.C. Circuit’s groundbreaking decision in *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, (D.C. Cir.1977). See Nathaniel L. Nathanson, Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings, 30 ADMIN. L.REV. 377, 377 (1978).

<sup>46</sup> See Admin. Conf. of the United States, Recommendation 88-9, Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1989); Admin. Conf. of the United States, Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980) [This is Fn. 11 in the original.]

<sup>47</sup> In the prefatory discussion, ACUS explains “Before an agency issues a Notice of Proposed Rulemaking (NPRM), few if any restrictions on ex parte communications are desirable.<sup>7</sup> [7]Recognizing these principles, the

impose restrictions on ex parte communications before an NPRM is issued.”

Professor Heinzerling’s concern with secretive White House political influence was quite strikingly absent from the third of these recommendations, “Science in the Administrative Process,” Recommendation 2013-3.<sup>48</sup> Here, ACUS’s consultant, Professor Wendy Wagner, had undertaken a study addressing the assurance of integrity in agency science. Integrity in government science had armed President Obama’s 2008 campaign, characterized his very first message to agency officials upon taking office,<sup>49</sup> and had also informed her prior scholarly work, strikingly supportive of President Obama’s stated concerns, during the preceding Bush administration.<sup>50</sup> Supported by numerous interviews and other indications, her report to ACUS raised significant issues of OIRA interventions continuing in President Obama’s administration, interventions that appeared to bear importantly on her study’s concern with assuring the integrity of government science. ACUS officials resisted this empirical element of her study, at first requiring her to revisit these issues, providing greater and confirming detail. This, she did. They

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Clinton Administration directed agencies “to review all . . . administrative ex parte rules and eliminate any that restrict communication prior to the publication of a proposed rule,” with the limited exception of “rules requiring the simple disclosure of the time, place, purpose, and participants of meetings.” See Memorandum for Heads of Departments and Agencies, Regulatory Reinvention Initiative (Mar. 4, 1995), available at <http://www.acus.gov/memorandum/regulatory-reinvention-initiative-memo-1995>. This memorandum, which has never been revoked, continues to inform agency practice.] Communications during this early stage of the process are less likely to pose the harms described above and can help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.”

<sup>48</sup> 78 Fed. Reg. 41,357 (July 10, 2013).

<sup>49</sup> Office of the President, Memorandum for the Heads of Executive Departments and Agencies (Jan. 21, 2009).

then refused to use her findings as an element in constructing the Conference recommendations drawing on her study. These recommendations provided useful suggestions to agencies how they might structure their internal processes to support scientific integrity in their work. Strikingly, though, it made no recommendations about intra-governmental influence arguably aimed at “bending science,” and this despite the consultant’s report of OIRA interventions. Not a word would be said to OIRA, despite the empirical findings she had made, that were strengthened after ACUS had instructed her to revisit the issue. Such sensitivity about speaking to agency overseers, perhaps especially those in the executive branch, seems so often to characterize ACUS’s work.

Improving the Timeliness of OIRA Regulatory Review, Statement 18,<sup>51</sup> is addressed to what had become a notorious failure of OIRA to honor its promises of expedition in performing its impact analysis reviews under Section 6 of E.O. 12866 – again, primarily occurring during the pre-notice period. Here, the phenomenon could not be gainsaid, however much OIRA’s representatives on the ACUS Council might have wished that. ACUS *did* speak directly and critically to OIRA, albeit in the mild, context-sensitive form of a “statement,” not the usual “recommendations.” Here, consultant Curtis Copeland, a veteran of both the General Accounting Office and the Congressional Research Service, and so well positioned to learn what for others might be swept under the rug, reported in detail about the extensive delays OIRA had caused in rulemaking during the pendency of President Obama’s campaign for a second term. Professor Heinzerling substantially relies on his study to support her indictment of the departures

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<sup>50</sup> Tom McGarrity and Wendy Wagner, *Bending Science* (2008).

<sup>51</sup> 78 Fed. Reg. 76,275 (Dec. 17, 2013)..

presidential oversight has produced from the classical administrative law view of rulemaking. During the run-up to the 2012 presidential election, OIRA not only sat on draft impact statements submitted to it for periods that, on average, essentially doubled the maximum period the executive order promises for their consideration; by informal means it also saw to it that some drafts would not be submitted, so that that clock would not start to run.<sup>52</sup> Although ACUS's leadership used the study to produce only a "statement," not recommendations, it was clear that criticism had been offered. The statement earned detailed coverage, not usual for ACUS's work, in the Washington Post.<sup>53</sup>

One hopes that Copeland's study will mark a turning point for ACUS, and that the empirical studies it supports will now more frequently consider oversight relations within the executive branch. That they occurred so infrequently during ACUS's first lifetime is perhaps not so surprising; although the growth of presidential administration began in the 1970's, as Professor Heinzerling's concern with *Sierra Club v. Costle* reflects, its emergence as a dominant concern of the administrative and constitutional law literature has been more recent. "Presidential Administration" appeared six years after ACUS suspended operations, defunded, in 1995. So one might reasonably believe that only since its revival four years ago has a need for such studies

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<sup>52</sup> His re-election has somewhat moderated, but not eliminated the problem. In a recent email, Mr. Copeland reported that a recent look at the OIRA website revealed, "as of today, there were there were 119 rules under review at OIRA. Of those, 44 had been under review for more than 90 days, including 17 for more than six months. Eleven have been at OIRA since at least 2012, and seven since at least 2011 (including one since 2010). Email to the author, July 10, 2014.

<sup>53</sup> Juliet Eilperin, "White House delayed enacting rules ahead of 2012 election to avoid controversy" (Dec. 13, 2014), available at <http://wapo.st/1hTTmFU> (visited July 16, 2014).

become so apparent. Yet the current debates about the nature and proper dimensions of “presidential administration,” the ongoing and important oversight relationships involved in the work of the GAO and inspectors general, the enduring supervisory relationships created by the Small Business and Regulatory Enforcement Fairness Act, the Paperwork Reduction Act, Department of Justice administration of the Freedom of Information Act (and the newly created Office of Government Information Services), General Services Administration and Office of Personnel Management controls over materiel and staffing, the administration of computer services under the government’s Chief Information Officer – all these raise issues common to the agencies ACUS serves, and on all of them disciplined empirical work leading to recommendations presented to the ACUS Assembly could add importantly to public understanding, and to the efficiency and fairness of government operations.