

Columbia Law School

## Scholarship Archive

---

Faculty Scholarship

Faculty Publications

---

2015

### The Administrative Conference and the Political Thumb

Peter L. Strauss

Columbia Law School, [strauss@law.columbia.edu](mailto:strauss@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Administrative Law Commons](#), [Law and Politics Commons](#), and the [President/Executive Department Commons](#)

---

#### Recommended Citation

Peter L. Strauss, *The Administrative Conference and the Political Thumb*, 83 GEO. WASH. L. REV. 1668 (2015).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1867](https://scholarship.law.columbia.edu/faculty_scholarship/1867)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

# The Administrative Conference and the Political Thumb

*Peter L. Strauss\**

## TABLE OF CONTENTS

|  |      |
|--|------|
| INTRODUCTION .....   | 1668 |
| I. THE POLITICAL THUMB IN ADMINISTRATIVE LAW .....               | 1670 |
| II. THE UTILITY OF STUDYING THE POLITICAL THUMB .....            | 1673 |
| III. ACUS HAS BEEN HESITANT TO STUDY THE POLITICAL<br>THUMB..... | 1674 |
| A. <i>ACUS's Work During Its First Years</i> .....               | 1675 |
| B. <i>ACUS's Work Since Its Revival</i> .....                    | 1677 |
| i. ACUS's Continued Caution with Congress .....                  | 1678 |
| ii. ACUS's Reluctance to Address the White<br>House .....        | 1680 |
| CONCLUSION .....   | 1687 |

## INTRODUCTION

In his valuable contribution to this special issue, Richard Pierce underscores the role the Administrative Conference of the United States (“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.<sup>1</sup> As the mentee of Walter Gellhorn, who directed the remarkable empirical studies of federal agency procedures that underlay the eventual Administrative Procedure Act (“APA”)<sup>2</sup> and who was a member of the ACUS Council from its initiation in 1964 until the end of its first active period, 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 Bureau of Land Management offices in Denver, Colorado, observing how policy decisions concerning land use issues hap-

---

\* Betts Professor of Law, Columbia Law School; Senior Fellow, Administrative Conference of the United States.

1 See Richard J. Pierce, Jr., *The Administrative Conference and Empirical Research*, 83 GEO. WASH. L. REV. 1564 (2015).

2 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551-559, 701-706 (2012)).

pened 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>3</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 and 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 once put it, “Judicial Control of Administrative Action.”<sup>4</sup> 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 “[a]n [e]xample of the [v]alue of [e]mpirical [r]esearch[,] [u]nderstanding the [r]ulemaking [p]rocess,” and invokes what scholars have learned on the ground about the relative<sup>5</sup> silence of the period preceding the notice of notice-and-comment rulemaking with which the APA’s stated procedure essentially begins.<sup>6</sup> Prenotice processes, he demonstrates, are typically much longer than the period following notice.<sup>7</sup> For Professor Pierce, the prevalence of meetings with the regulated during this dark period, and the dearth of meetings with the regulatory beneficiaries, is a source of considerable concern,

---

<sup>3</sup> Peter L. Strauss, *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).

<sup>4</sup> LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

<sup>5</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, *see* Exec. Order No. 12,866 § 4, 3 C.F.R. 638, 642–44 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012), 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. § 561–570a, 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. *Id.* § 563.

<sup>6</sup> Pierce, *supra* note 1, at 1564–66.

<sup>7</sup> *Id.* at 1567.

as is the consequence that proposals will then inevitably reflect hard-fought compromises that will prove difficult for the public notice-and-comment period to dislodge.<sup>8</sup> Then, addressing possible sources of proregulated 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.<sup>9</sup> Two of these lines, he argues, add to the importance of the prenotice period by contributing to the vulnerability of rulemaking to changes made after a rulemaking proposal has been published for comment: these are the judicial decisions defining the necessary content of notice, and those demanding thorough reasoning about changes in statements of basis and purpose.<sup>10</sup> The third line of decisions are those making it easier for the regulated, rather than regulatory beneficiaries, to seek review; these decisions on standing, he argues, 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.<sup>11</sup> The collective action problems are inescapable, but if these judicial decisions could be changed, Professor Pierce suggests, perhaps there could be more attention to the public interest.<sup>12</sup>

### I. THE POLITICAL THUMB IN ADMINISTRATIVE LAW

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 prenotice period come not directly from the regulated, but from agencies' political overseers. Thus, the prenotice period that underlies Professor Pierce's analysis

---

<sup>8</sup> *See id.* at 1567. For agencies like the EPA, who regularly hear from committed non-governmental organizations ("NGOs") like the Natural Resources Defense Council, the street may have more two-way traffic than a simple count of meetings would suggest. *See* Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. TIMES (July 7, 2014), <http://nyti.ms/1ziAtnd> (detailing how prenotice proposal from environmentalist NGO, Natural Resources Defense Council, became the basis for a proposed EPA rule). When agency bureaucrats fear the results of administration change in both liberal and conservative administrations, or even opposing pressures from elsewhere within a current administration, they may reach settlements favorable to their preferences in agency-"friendly" suits interest groups bring during the pendency of policy determinations. *See* Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 897-99 (2014).

<sup>9</sup> Pierce, *supra* note 1, at 1569.

<sup>10</sup> *Id.* at 1571-72.

<sup>11</sup> *Id.* at 1572-73.

<sup>12</sup> *See id.* at 1573-74.

also troubles Professor Lisa Heinzerling in a recent analysis, *Classical Administrative Law in the Era of Presidential Administration*.<sup>13</sup> (“Presidential Administration” in her title refers to an influential analysis penned by Justice Kagan shortly after her return from the White House to Harvard Law School,<sup>14</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 prenotice 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.<sup>15</sup> 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.<sup>16</sup> Today, these analyses are conducted under President Clinton’s Executive Order 12,866, as slightly modified by the Obama Administration.<sup>17</sup> For important rulemakings, these required analyses (and others Congress or the White House have required) are dominant influences during the prenotice 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 that today there are many [political] somebodies who matter and who are empowered to delay or stop agency initiatives.”<sup>18</sup> “[T]he secrecy and coziness of the process of presidential administration stand in sharp contrast to the transparency and inclusiveness of classical administrative law.”<sup>19</sup> Attention to the impact of these *governmental* political inputs from outside the agency is surprisingly missing from Professor Pierce’s analysis.

---

<sup>13</sup> Lisa Heinzerling, Response, *Classical Administrative Law in the Era of Presidential Administration*, 92 TEX. L. REV. See also 171 (2014).

<sup>14</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>15</sup> Heinzerling, *supra* note 13, at 175–77.

<sup>16</sup> See Exec. Order No. 12,498, 3 C.F.R. 323 (1986), reprinted in 5 U.S.C. § 601 app. at 476–77 (1988), revoked by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 88–92 (2012).

<sup>17</sup> See Exec. Order No. 13,563, 3 C.F.R. 215 (2012), reprinted in 5 U.S.C. § 601 app. at 102–03 (2012); Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. § 601 app. at 88–92 (2012).

<sup>18</sup> Heinzerling, *supra* note 13, at 174.

<sup>19</sup> *Id.* at 173.

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 development *she* blames for the dominance and politicization of the prenotice period in rulemaking is the D.C. Circuit's influential opinion in *Sierra Club v. Costle*.<sup>20</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 decisionmaking process.<sup>21</sup> In a 100-page exemplar of hard look review, Judge Wald found the agency's public reasoning process adequate and the chance that it might have been influenced by the President immaterial.<sup>22</sup>

Perhaps we should be happier with the distortions and rigidities Professor Pierce persuasively connects to the prenotice period, if we can attribute them 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, overzealous to promote its particular, but limited, public responsibility and obtuse to other important considerations that may be at play.<sup>23</sup> 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>24</sup> and OIRA's limited transparency reveals only attendees, and not what might have been said.<sup>25</sup> But then any resulting interventions in agency processes, and there are many, come with White House imprimatur. Countering

---

<sup>20</sup> *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981); see Heinzerling, *supra* note 13, at 173.

<sup>21</sup> *Sierra Club*, 657 F.2d at 407–08.

<sup>22</sup> *Id.*

<sup>23</sup> See Pierce, *supra* note 1, at 1574.

<sup>24</sup> She reports a ratio of 5:1 for OIRA meetings. Heinzerling, *supra* note 13, at 176. In contrast, Professor Pierce estimates the prenotice agency meeting advantage for the regulated as approximately 14:1 for the Volcker rulemakings and 170:1 for the EPA. See Pierce, *supra* note 1, at 1567; see also *supra* note 8.

<sup>25</sup> See Heinzerling, *supra* note 13, at 176.

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.<sup>26</sup> It seems at least possible that these interventions bespeak not special interest bias, but the electorally validated voice of the overall public interest.

## II. THE UTILITY OF STUDYING THE POLITICAL THUMB

The forgoing exposition suggests that empirical study of agencies' relations with their overseers could—even should—be a rich field for ACUS's work. Recalling my own experience as the Nuclear Regulatory Commission's 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>27</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 Professor Heinzerling argues,<sup>28</sup> *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 Executive Order 12,866 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

---

<sup>26</sup> See Pierce, *supra* note 1 at 1574.

<sup>27</sup> See Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 89–91 (1995) (“[Eliminating pre-enforcement review] would deossify rulemaking . . . at a social cost [that is] intolerably high. . . . Asymmetric access to judicial review . . . would introduce a powerful systemic anti-regulation bias in the implementation of all regulatory systems . . .”).

<sup>28</sup> Heinzerling, *supra* note 13, at 178.

Act,<sup>29</sup> as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>30</sup> 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.<sup>31</sup> The Office of Management and Budget (“OMB”) controls agency legislative and budget submissions; 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 Executive Order 12,866 (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,<sup>32</sup> Unfunded Mandates Reform Act,<sup>33</sup> and others, provide general contexts in which congressional pressures might be felt. The Government Accountability Office (“GAO”), 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 embrave 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.

### III. ACUS HAS BEEN HESITANT TO STUDY THE POLITICAL THUMB

One perhaps ought not, however, be surprised to find that here ACUS’s record has been a mixed one, strongly preferring issues that

---

<sup>29</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601–612 (2012)).

<sup>30</sup> Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (codified at 5 U.S.C. §§ 801–808, 15 U.S.C. § 657 (2012)); 5 U.S.C. § 612 (2012).

<sup>31</sup> 5 U.S.C. § 552(a).

<sup>32</sup> *Id.* §§ 801–808.

<sup>33</sup> 2 U.S.C. §§ 658–658g, 1501–1504, 1511–1516, 1531–1538, 1551–1556, 1571 (2012).



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 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. Discouraging pursuit of 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 immediately preceding General Counsel of OMB. Although its Chair serves a five-year fixed term, suggesting some possibilities of independence, he is also a presidential appointee<sup>34</sup> 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 from 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 otherwise encourages and Professor Pierce so properly celebrates—a limit that tends to exclude what may in fact be the more important influences on agency actions.

#### A. *ACUS's Work During Its First Years*

During its first period of activity, 1968–1995, ACUS spoke often to Congress, but rarely to its other overseers, and not at all to some—

---

<sup>34</sup> 5 U.S.C. § 593(b)(1). It may be significant that neither this section nor 5 U.S.C. § 595(c), addressing the Chairman's authority, state the terms on which he may be removed from office; that the Supreme Court was willing to *assume* “for cause” protection for the members of the SEC, a multi-member commission, in the face of statutory silence, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 487 (2010), does not establish that the Chairman does not serve at will.

for example, not to the GAO or to the Council on Environmental Quality—that one could imagine frequently influencing agency actions. Thus, of the 208 recommendations or statements<sup>35</sup> ACUS made during its first period of activity, half included a recommendation to Congress for legislative action, but only eleven made recommendations to the courts, and eighteen to elements of the White House establishment, including OMB.<sup>36</sup> Of these eighteen, few caused ACUS to recommend changes that, while favorable to agency interests, might have been regarded by the White House as critical of its conduct in relation to agencies. Indeed, the first time ACUS called its work a “Statement” rather than a “Recommendation,” 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 increasing the judicialization of some processes.<sup>37</sup> Not until 1980 did it again speak to the Executive Office of the President (“EOP”), recommending changes in implementing the Federal Advisory Committee Act<sup>38</sup> and generally supporting the confidentiality of White House communications with agencies during rulemaking<sup>39</sup>—as Judge Wald would reiterate for the D.C. Circuit the following year.<sup>40</sup> It was another eight years before ACUS would return to political controls, developing suggestions arguably critical of the work of transition teams between administra-

---

<sup>35</sup> A “Recommendation” identifies specified actions that should be taken; a “Statement” simply renders advice, and this weaker format has typically been used in addressing the White House and its agencies. See *Recommendations*, ADMIN. CONF. U.S., <http://www.acus.gov/recommendations> (last visited Feb. 24, 2015) (“On occasion, the Conference membership has acted to adopt a ‘Statement’ to express its views on a particular matter without making a formal recommendation on the subject. Conference statements are typically the product of the same process that leads to recommendations, but may set forth issues, conclusions from a study, or comments, rather than recommendations.”). All recommendations and statements produced by ACUS to date can be found on its website.

<sup>36</sup> For a full list of the recommendations and statements made by ACUS’s *first* incarnation, see 60 Fed. Reg. 56,312 (Nov. 8, 1995). Thanks to Logan Gowdey, Columbia Law School ‘16 and Andrew Sutton, Columbia Law School ‘16, for thoughtfully and carefully coding them all.

<sup>37</sup> See ADMIN. CONFERENCE OF THE U.S., ADMINISTRATIVE CONFERENCE STATEMENT: VIEWS OF THE ADMINISTRATIVE CONFERENCE ON THE “REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES” OF THE PRESIDENT’S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 27 (1972). Statements do not have the precatory force of recommendations. See *supra*, note 35.

<sup>38</sup> 5 U.S.C. app. §§ 1–16; ACUS Recommendation 80-3, Interpretation and Implementation of the Federal Advisory Committee Act, 45 Fed. Reg. 46,775 (July 11, 1980).

<sup>39</sup> See ACUS Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980).

<sup>40</sup> *Sierra Club v. Costle*, 657 F.2d 298, 407–08 (D.C. Cir. 1981).

tions<sup>41</sup> and controversial respecting valuation issues in cost-benefit analysis,<sup>42</sup> and its transparency and extent.<sup>43</sup> In 1990, ACUS sought to advise both the President and Congress on the handling of executive privilege disputes,<sup>44</sup> but the following year its recommendation, “Federal Agency Cooperation with Foreign Government Regulators,”<sup>45</sup> addressed *only* agencies, and not the White House. In the final years of its first generation, inter alia, ACUS asked the President to create a body to coordinate services to migrant workers,<sup>46</sup> to streamline the cost-benefit analysis process to reduce its burdensomeness,<sup>47</sup> and to seek the establishment of a mechanism for prioritizing the review of aging regulations.<sup>48</sup>

### B. ACUS’s Work Since Its Revival

By the end of 2014, ACUS had brought thirty-two studies to the point of adopted recommendations and statements since its revival in 2010. Thirteen of these were necessarily addressed to the agency level only, and two were addressed in whole or in part to the courts,<sup>49</sup> involving no political sensibilities. Seventeen of them, then, potentially involved issues on which Congress and/or the White House and its agencies might have been addressed. While these second generation recommendations have occasionally addressed Congress and the White House, they were frequently less developed and their diction was less forceful than the importance of these political relationships might suggest. Moreover, ACUS has noticeably avoided important issues in recent years.<sup>50</sup>

---

<sup>41</sup> See ACUS Recommendation 88-1, Presidential Transition Workers’ Code of Ethical Conduct, 53 Fed. Reg. 26,026 (July 11, 1988).

<sup>42</sup> ACUS Recommendation 88-7: Valuation of Human Life in Regulatory Decisionmaking, 53 Fed. Reg. 39,586 (Oct. 11, 1988).

<sup>43</sup> ACUS Recommendation 88-9: Presidential Review of Agency Rulemaking, 54 Fed. Reg. 5207 (Feb. 2, 1989).

<sup>44</sup> ACUS Recommendation 90-7: Administrative Responses to Congressional Demands for Sensitive Information, 55 Fed. Reg. 53,272 (Dec. 28, 1990).

<sup>45</sup> ACUS Recommendation 91-1, Federal Agency Cooperation with Foreign Government Regulators, 56 Fed. Reg. 33,842 (July 24, 1991).

<sup>46</sup> ACUS Recommendation 92-4, Coordination of Migrant and Seasonal Farmworker Service Programs, 57 Fed. Reg. 30,106 (July 8, 1992).

<sup>47</sup> ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670 (Feb. 1, 1994), *corrected*, 59 Fed. Reg. 8507 (Feb. 22, 1994).

<sup>48</sup> ACUS Recommendation 95-3, Review of Existing Agency Regulations, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

<sup>49</sup> ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272 (Dec. 17, 2013); ACUS Recommendation 2011-1, Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

<sup>50</sup> As a current example, consider its pending attention to the Unified Agenda, by which

*i. ACUS's Continued Caution with Congress*

Since 2012, no recommendation has spoken to informal congressional interaction with agencies or to the work of the GAO. Out of nine that one thinks might reasonably have made legislative recommendations to Congress,<sup>51</sup> and perhaps reflecting that body's dysfunctionality today, only four<sup>52</sup> did. ACUS had no 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,<sup>53</sup> or ex parte communications in informal rulemaking.

It is striking to observe 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>54</sup> For example, "Government in the Sunshine Act," Recommendation

---

agencies biannually publish brief accounts of rulemaking activities, including those that have not yet reached the point of a notice of proposed rulemaking. *The Unified Agenda: Promoting Regulatory Transparency, Planning, and Public Participation*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/unified-agenda-promoting-regulatory-transparency-planning-and-public-participation> (last visited Feb. 24, 2015). The important *political* control here lies in Section 4 of Executive Order 12,866, requiring agencies annually to coordinate with the White House their proposed rulemaking agendas for the coming year. Exec. Order No. 12,866 § 4, 3 C.F.R. 638, 642-44 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88-92 (2012). That subject is not addressed in the consultant's otherwise remarkably thorough empirical study of the issues suggested by the project's title. Nor does this aspect of White House control appear in Recommendation 2014-6, "Petitions for Rulemaking"; and Recommendation 2014-5, "Retrospective Review of Agency Rules," speaks almost entirely to agencies about a practice that has been impressed on them by the White House and spoken to in each of the past several presidential administrations. Both of these recommendations were adopted in the December 2014 meeting of the Conference Assembly.

<sup>51</sup> ACUS Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014); ACUS Recommendation 2014-2, Government in the Sunshine Act, 79 Fed. Reg. 35,990 (June 25, 2014); ACUS Recommendation 2012-8, Inflation Adjustment Act, 78 Fed. Reg. 2943 (Jan. 15, 2013); ACUS Recommendation 2012-6, Reform of 28 U.S.C. 1500, 78 Fed. Reg. 2939 (Jan. 15, 2013); ACUS Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012); ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808 (Aug. 10, 2012); ACUS Recommendation 2012-2, Midnight Rules, 77 Fed. Reg. 47,802 (Aug. 10, 2012); ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801 (Aug. 10, 2012); ACUS Recommendation 2011-7, The Federal Advisory Committee Act—Issues and Proposed Reforms, 77 Fed. Reg. 2261 (Jan. 17, 2012).

<sup>52</sup> ACUS Recommendation 2012-8, Inflation Adjustment Act, 78 Fed. Reg. 2943 (Jan. 15, 2013); ACUS Recommendation 2012-6, Reform of 28 U.S.C. 1500, 78 Fed. Reg. 2939 (Jan. 15, 2013); ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808 (Aug. 10, 2012); ACUS Recommendation 2011-7, The Federal Advisory Committee Act—Issues and Proposed Reforms, 77 Fed. Reg. 2261 (Jan. 17, 2012).

<sup>53</sup> 5 U.S.C. § 552b.

<sup>54</sup> As the author is a member ACUS's Committee on Regulation, and a frequent attendee

2014-2,<sup>55</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 recently proposed provision<sup>56</sup> favoring the Federal Communications Commission 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,<sup>57</sup> that would promote staff follow-through):

[ACUS encourages] 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>58</sup>

Respecting *ex parte* communications in rulemaking, ACUS's Recommendation explicitly excluded the possibility of issues arising from congressional communications from consideration.<sup>59</sup>

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,<sup>60</sup> the only "change" ACUS affirmatively recommended

---

of its plenary sessions, many statements in this essay, like this one, are based on personal participation in ACUS proceedings.

<sup>55</sup> ACUS Recommendation 2014-2, Government in the Sunshine Act, 79 Fed. Reg. 35,990 (June 25, 2014).

<sup>56</sup> Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014).

<sup>57</sup> See *supra* note 50.

<sup>58</sup> ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801, 47,801 (Aug. 10, 2012)

<sup>59</sup> ACUS Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, 79 Fed. Reg. 35,993, 35,994 (June 25, 2014).

<sup>60</sup> Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of 5, 20, 30, 42, and 44 U.S.C.).

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.<sup>61</sup> 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.<sup>62</sup>

*ii. ACUS's Reluctance to Address the White House*

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 Executive Order 12,866.<sup>63</sup> Presidential claims to coordinate agency activities (which *have* figured in other recent studies<sup>64</sup>) and to set policy priorities are, if anything, stronger than its claims to oversee, perhaps control, particular rulemakings under Executive Order 12,866 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 the actions ACUS has most recently taken<sup>65</sup> did or might have involved recommendations to executive branch over-

---

<sup>61</sup> ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808, 47,810 (Aug. 10, 2012).

<sup>62</sup> *Id.* at 47,809–10.

<sup>63</sup> See *supra* note 50.

<sup>64</sup> E.g., ACUS Statement #18, Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

<sup>65</sup> ACUS Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014); ACUS Recommendation 2014-1, Resolving FOIA Disputes Through Targeted ADR Strategies, 79 Fed. Reg. 35,988 (June 25, 2014); ACUS Statement #18, Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013); ACUS Recommendation 2013-7, GPRA Modernization Act of 2010: Examining Constraints to, and Providing Tools for, Cross-Agency Collaboration, 78 Fed. Reg. 76,273 (Dec. 17, 2013); ACUS Recommendation 2013-3, Science in the Administrative Process, 78 Fed. Reg. 41,357 (July 10, 2013); ACUS Recommendation 2012-5, Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012); ACUS Recommendation 2012-4, Paperwork Reduction Act, 77 Fed. Reg. 47,808 (Aug. 10, 2012); ACUS Recommendation 2012-2, Midnight Rules, 77 Fed. Reg. 47,802 (Aug. 10, 2012); ACUS Recommendation 2012-1, Regulatory Analysis Requirements, 77 Fed. Reg. 47,801 (Aug. 10, 2012); ACUS Recommendation 2011-7, The Federal Advisory Committee Act—Issues and Proposed Reforms, 77 Fed. Reg. 2261 (Jan. 17, 2012); ACUS Recommendation 2011-6, International Regulatory Cooperation, 77 Fed. Reg. 2259 (Jan. 17, 2012); ACUS Recommendation 2011-5, Incorporation by Reference, 77 Fed. Reg. 2257 (Jan. 17, 2012).

seers (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<sup>66</sup> involved settings in which subordinated executive branch agencies were involved, EOP and 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. For all but one of the remaining eight,<sup>67</sup> the continuing cautiousness of—even silences in—ACUS's approach to executive branch overseers is quite striking.

For example, 5 U.S.C. § 552(a)(1) empowers the Director of the Office of the Federal Register to permit agencies to “incorporate by reference” into their regulations—that is, to convert into legal obligations—voluntary industrial standards that have previously been developed by nongovernmental organizations (“NGOs”) such as the American Society of Mechanical Engineers (e.g., respecting requirements to assure boiler safety).<sup>68</sup> 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 the NGO sets.<sup>69</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.

---

<sup>66</sup> ACUS Recommendation 2014-1, 79 Fed. Reg. 35,988; ACUS Recommendation 2013-7, 78 Fed. Reg. 76,273; ACUS Recommendation 2012-5, 77 Fed. Reg. 47,810; ACUS Recommendation 2011-6, 77 Fed. Reg. 2259.

<sup>67</sup> ACUS Recommendation 2012-2, 77 Fed. Reg. 47,802, speaks directly to both incumbent and incoming presidential administrations about the somewhat fraught (but, the report suggests, often illusory) appearance that outgoing 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>68</sup> 5 U.S.C. § 552(a)(1) (2012). The process is governed by 1 C.F.R. Part 51. One of the several incorporations by reference of portions of the ASME's boiler code may be found at 46 C.F.R. § 53.01 (2013).

<sup>69</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).

This effect is particularly strong when, as OMB guidance on the practice encourages,<sup>70</sup> agencies promote the development of a standard and its officials are themselves participants in the NGO's consensual processes.<sup>71</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 in this 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's 2011 recommendations on incorporations by reference,<sup>72</sup> made numerous sensible recommendations to rulemaking agencies using this procedure—recommendations particularly likely to be effective in supplementing public awareness at the proposal/comment stage of rulemaking, and that have been supported by recent changes in the governing regulations.<sup>73</sup> 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<sup>74</sup>—that share responsibilities for controlling the practice, and that might, by revising their approaches, eliminate or at least substantially contain the offense thus given to the general principle that law is not subject to copyright.<sup>75</sup>

---

<sup>70</sup> Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546 (Feb. 19, 1998) [hereinafter OMB Circular A-119]. Revisions to Circular A-119 are under consideration, and presumably will be made to reflect the amendments the Office of Federal Register has recently made in Part 51 of its regulations, but had not been announced in time for citation here. To track further developments, see *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=OMB-2012-0003> (last visited Feb. 24, 2015).

<sup>71</sup> For example, the notice of proposed rulemaking incorporating standards on pipeline hazard warning that was developed by the American Petroleum Institute, see *infra* note 75, remarked that the API had undertaken to develop the standard at agency's request and that agency officials "attended all meetings of the task force as observers and provided direction and input into both the process and the content of the standard." Pipeline Safety: Public Education Programs for Hazardous Liquid and Gas Pipeline Operators, 69 Fed. Reg. 35,279, 35,281 (June 24, 2004) (codified at 49 C.F.R. pts. 192 & 195).

<sup>72</sup> ACUS Recommendation 2011-5, Incorporation by Reference, 77 Fed. Reg. 2257 (Jan. 17, 2012).

<sup>73</sup> *Id.*; Incorporation by Reference, 79 Fed. Reg. 66,267 (Nov. 7, 2014) (to be codified at 1 C.F.R. pt. 51).

<sup>74</sup> See generally ACUS Recommendation 2011-5, 77 Fed. Reg. 2257.

<sup>75</sup> See Strauss, *supra* note 69, at 529–37. The offense is particularly strong when the matter incorporated is itself regulatory, as distinct from stating a technical means of complying with



And this despite transformations worked by the information age that virtually compel revision of the overseers' outdated regulations and guidance documents.<sup>76</sup>

ACUS's cautiousness in addressing possibly fraught issues of executive oversight is particularly striking in the four recent ACUS recommendations or statements also touching on the prenotice period in rulemaking, the very context that so concerns Professor Pierce.<sup>77</sup> 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>78</sup> which in one form or another has existed at least since the Carter administration.<sup>79</sup> OIRA's impact on rulemaking, which largely occurs during this period, has long been a major concern of academic administrative law

---

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 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) (2013), 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 (as amended), and guidance all reflect this distinction, suggesting that incorporation by reference must be limited to technical matters, *see, e.g.*, OMB Circular A-119, *supra* note 70, but in practice this distinction has not been enforced. The ACUS recommendations ignored it; OFR's proposed rule, *see* Incorporation by Reference, 78 Fed. Reg. 60,784 (Oct 2, 2013), explicitly eliminated any trace of it, but in the amendments as adopted, Incorporation by Reference, 79 Fed. Reg. 66,267, it has been restated.

<sup>76</sup> Until their recent amendment, Incorporation by Reference, 79 Fed. Reg. 66,267, the Office of the Federal Register's regulations, 1 C.F.R. pt. 51 (2014), retained the form in which they were first written in 1982. In 1982, 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. OMB Circular A-119 was generated in the Clinton Administration, and at this writing revisions to it remain pending. To track further developments, *see* OMB Circulars; Proposed Revisions: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=OMB-2014-0001> (last visited Feb. 24, 2015). The request itself may be found at Request for Comments on a Proposed Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 79 Fed. Reg. 8207 (Feb. 11, 2014).

<sup>77</sup> Pierce, *supra* note 1, at 1566–69.

<sup>78</sup> *See supra* notes 42–43.

<sup>79</sup> *See* Exec. Order No. 12,044, 3 C.F.R. 152 (1979), *revoked* by Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 473–76 (1988), *revoked* by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012). Presidents Nixon and Ford sought similar inquiries for important rules, but without the persisting executive order framework. *See* OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997), [http://www.whitehouse.gov/omb/infoereg\\_chap1#tnfrp](http://www.whitehouse.gov/omb/infoereg_chap1#tnfrp).

literature.<sup>80</sup> At the agency level, if not inside OIRA with its revealed penchant for privacy,<sup>81</sup> empirical research has been richly possible.<sup>82</sup> In three of the recent four recommendations and statements touching the prenotice period, 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>83</sup>

“Regulatory Analysis Requirements,” Recommendation 2012-1, was earlier discussed as an example of ACUS's gentility in addressing Congress.<sup>84</sup> It acknowledged the concerns of many that proliferating impact analysis requirements contribute to the costs, sluggishness, and resulting inflexibility of proposal generation.<sup>85</sup> That impact predominantly occurs in the prenotice period. Yet while “ask[ing] the Executive Office of the President and Congress to consider streamlining the existing regulatory analysis requirements[,] . . . [the Conference] does not address whether the number or nature of those requirements might not be reduced in light of their cumulative impact on agencies.”<sup>86</sup> “Asking to consider” is a considerably gentler tack than ACUS recommendations generally take.<sup>87</sup>

---

<sup>80</sup> See, e.g., Lisa Shultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 57–59 (2006); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 557–58 (1989); Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1844–64 (2013).

<sup>81</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. See Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1147–49 (2010).

<sup>82</sup> WENDY WAGNER, *SCIENCE IN REGULATION: A STUDY OF AGENCY DECISIONMAKING APPROACHES 1* (2013); Bressman & Vandenbergh, *supra* note 80, at 65–91.

<sup>83</sup> Note that the two recent studies Professor Pierce relies on for his analysis of the prenotice period, Kimberly D. 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. See Pierce, *supra* note 1, at \_\_\_\_\_. Neither piece looks directly at OIRA's impact, although the second (whose authors include Wendy Wagner, see *infra* text accompanying notes 95–99) 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. See Wagner, Barnes & Peters, *supra* at 151.

<sup>84</sup> See *supra* note 58 and accompanying text.

<sup>85</sup> See ACUS Recommendation 2012-1, *Regulatory Analysis Requirements*, 77 Fed. Reg. 47,801, 47,801 (Aug. 10, 2012).

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* text accompanying note 62.

“Ex Parte” Communications in Informal Rulemaking, Recommendation 2014-4,<sup>88</sup> also discussed with respect to Congress,<sup>89</sup> builds on an earlier recommendation for agency practice developed in the wake of a controversial D.C. Circuit opinion, and widely implemented.<sup>90</sup> Remarkably (and perhaps expectably from Professor Heinzerling’s perspective), the recommendation acknowledges that it “does not address ex parte communications in the executive review process, including before the Office of Information and Regulatory Affairs (OIRA) . . . [or] interagency communications outside the process of executive review.”<sup>91</sup> Nor does it voice any concern with extra-governmental contacts during the prenotice period, the contacts that so exercise Professor Pierce.<sup>92</sup> Indeed, building on a directive of the Clinton administration insisting that prenotice communications to agencies about possibly forthcoming proposals be unencumbered,<sup>93</sup> it explicitly recommends: “Agencies should not impose restrictions on ex parte communications before an NPRM is issued.”<sup>94</sup>

Professor Heinzerling’s concern with secretive White House political influence was strikingly absent from the third of these recommendations, “Science in the Administrative Process,” Recommendation 2013-3.<sup>95</sup> Here, ACUS’s consultant, Professor Wendy Wagner, had undertaken a study addressing the assurance of integrity in agency science.<sup>96</sup> Integrity in government science had armed President Obama’s 2008 campaign, and characterized his very

---

<sup>88</sup> ACUS Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

<sup>89</sup> See *supra* text accompanying note 59.

<sup>90</sup> ACUS Recommendation 77-3, Ex Parte Communications in Informal Rulemaking Proceedings, 42 Fed. Reg. 54,253 (Oct. 5, 1977). The Recommendation was 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>91</sup> ACUS Recommendation 2014-4, 79 Fed. Reg. at 35,994 (footnote omitted).

<sup>92</sup> See Pierce, *supra* note 1, at 1566–69.

<sup>93</sup> In the prefatory discussion, ACUS noted: “Recognizing [that few if any restrictions on ex parte communications are desirable], the 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. This memorandum, which has never been revoked, continues to inform agency practice.” ACUS Recommendation 2014-4, 79 Fed. Reg. at 35,994 n.7 (alteration in original) (internal quotation marks and citation omitted).

<sup>94</sup> *Id.* at 35,995.

<sup>95</sup> ACUS Recommendation 2013-3, Science in the Administrative Process, 78 Fed. Reg. 41,357 (July 10, 2013).

<sup>96</sup> See WAGNER, *supra* note 82.

first message to agency officials upon taking office.<sup>97</sup> In Professor Wagner, ACUS had selected a consultant whose scholarly work during the preceding Bush administration had been strikingly supportive of President Obama's stated concerns.<sup>98</sup> Supported by numerous interviews and other indications, now she reported significant OIRA interventions continuing into President Obama's Administration,<sup>99</sup> 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 they required her to revisit these issues, providing greater and confirming detail. This, she did. They then refused to use her findings as an element in constructing the ACUS recommendations drawing on her study. As adopted, these recommendations did provide useful suggestions to agencies on how they might structure their internal processes to support scientific integrity in their work. Strikingly, however, it made *no* recommendations about intragovernmental 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, findings 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>100</sup> is addressed to what had become OIRA's notorious failure to honor its promises of expedition in performing impact analysis review under Section 6 of Executive Order 12,866—again, primarily occurring during the prenotice 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 "Recommendation."<sup>101</sup> Here, the ACUS consultant was Curtis Copeland, a veteran of both the General Accounting Office and the Congressional Research Service, and thus well positioned to learn what for others might be swept under the rug.

---

<sup>97</sup> Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 10 (Jan. 21, 2009).

<sup>98</sup> *E.g.*, THOMAS O. MCGARITY & WENDY E. WAGNER, BENDING SCIENCE: HOW SPECIAL INTERESTS CORRUPT PUBLIC HEALTH RESEARCH (2008).

<sup>99</sup> See WAGNER, *supra* note 82, at 6–7.

<sup>100</sup> ACUS Statement #18, Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013).

<sup>101</sup> See *supra* note 35.

He reported in detail about the extensive delays OIRA had caused in rulemaking during the pendency of President Obama's campaign for a second term.<sup>102</sup> Professor Heinzerling substantially relies on this study to support her indictment of the departures presidential oversight has produced from the classical administrative law view of rulemaking.<sup>103</sup> 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>104</sup> Although ACUS's leadership used the study to produce only a "Statement," it was clear that criticism had been offered. The Statement earned detailed coverage, not usual for ACUS's work, in the *Washington Post*.<sup>105</sup>

#### CONCLUSION

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* reflects, its emergence as a dominant concern of the administrative and constitutional law literature has been more recent. Professor, now Justice, Kagan's germinal article, *Presidential Administration*, documenting and celebrating President Clinton's innovations in commanding the regulatory process, appeared six years after ACUS suspended operations, defunded, in 1995. So one might reasonably believe that only since its revival five years ago has a need for such studies become so apparent. Empirical study of Washington's political and oversight relationships could provide valuable insight on many fronts: the nature and proper dimensions of "presidential administra-

---

<sup>102</sup> See CURTIS W. COPELAND, *LENGTH OF RULE REVIEWS BY THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* 4 (2013).

<sup>103</sup> See Heinzerling, *supra* note 13, at 174–75.

<sup>104</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, forty-four had been under review for more than ninety days, including seventeen 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 from Curtis Copeland to the author (July 10, 2014) (on file with author).

<sup>105</sup> Juliet Eilperin, *Policies Delayed Before Election*, *WASH. POST*, Dec. 15, 2013, at A1.

tion;" 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, by the Paperwork Reduction Act, by Department of Justice's administration of the Freedom of Information Act<sup>106</sup> (and the newly created Office of Government Information Services), by General Services Administration and Office of Personnel Management controls over materiel and staffing, and by the administration of computer services under the government's Chief Information Officer. Here lies fertile ground for ACUS that remains unexplored. All of these settings raise issues common to the agencies ACUS serves. On each, 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.

---

106 5 U.S.C. § 552 (2012).