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ACUS 2.0 and its Historical Antecedents

By Jeffrey S. Lubbers*

To better understand the future of the recently revived Administrative Conference of the United States, it is necessary to understand its history—that would be ACUS 1.0, so to speak. But I'm not going to talk too much about ACUS 1.0. Instead I want to discuss ACUS 1.0's forefathers—if that is not too much of a mixed metaphor.

It's not easy to pinpoint ACUS's true origins. But in doing so I have the benefit of an excellent unpublished history prepared by ACUS's first permanent Research Director, the late David B. H. Martin, on which I have relied heavily for this talk.¹ He traced its roots to 1936 when President Roosevelt appointed the President's Committee on Administrative Management, otherwise known as the Brownlow Committee. This group of public administration scholars produced a report that led the President to recommend legislation to reorganize the Executive Branch. But the Committee also made a recommendation that was not implemented at the time: "The President needs a research agency to investigate the broad problems involved in the administrative management of the government—problems of administrative organization, finance, coordination, procedures and methods of work, and the many technical aspects of management."²

A few years later, President Roosevelt did appoint the famous Attorney General's

Committee on Administrative Procedure, which held hearings and, under the direction of Walter Gellhorn, produced a series of detailed monographs on agency procedures that ultimately led to the enactment of the APA in 1946.³ But the Committee's initial proposed bill also contained provisions that would have created an Office of Federal Administrative Procedure to "[c]onduct such inquiries into the practices and procedures of the agencies as [the Director] may deem necessary," make recommendations to the agencies on the "most satisfactory" of such procedures, and receive and investigate complaints regarding agency procedures.⁴ The report compared it to the Administrative Office of the United States Courts in the Judicial Branch.

Although the APA followed most of the recommendations of the Attorney General's Committee, it did not create the Office of Federal Administrative Procedure. But President Truman in 1947 appointed the U.S. Commission on Organization of the Executive Branch, otherwise known as the Hoover Commission.

Its extensive, two-year study revived the suggestion for creating an Office of Administrative Procedure in the Executive Office of the President, or alternatively that the Bureau of the Budget use its existing statutory authority to establish a separate unit to undertake this function. In either case the office should, "with the aid of carefully selected legal consultants," study the "administrative disposition of controversies before all Government agencies."⁵

But again this call went unheeded, except that in 1949 the House Judiciary Committee requested the Judicial Conference of the United States to "endeavor to develop some time-saving procedures in certain types of cases, including those before regulatory agencies."⁶ The Judicial

Conference responded by urging the President "to call a conference of representatives of the administrative agencies for the purpose of devising ways and means for the elimination of unnecessary delay, expense, and volume of record in administrative proceedings."⁷ This recommendation was derived from a report from a committee chaired by D.C. Circuit Judge E. Barrett Prettyman. After this work, Chief Justice Vinson wrote to President Eisenhower suggesting he call for such a conference.

In April 1953, President Eisenhower responded by establishing the President's Conference on Administrative Procedure, with fifty-seven agency representatives, three federal judges, three administrative hearing examiners, and twelve lawyers experienced in the field of administrative law. Judge Prettyman was appointed to be the Chairman. Its first plenary session was addressed by Attorney General Brownell. This has been called the "first temporary Administrative Conference" or the "Eisenhower Conference."

Its final report was delivered in March 1955 and contained thirty-five recommendations.⁸ Its first recommendation was that the President create an Office of Administrative Procedure in the Department of Justice. Its final resolution, adopted unanimously, was that the President "constitute upon a permanent basis a conference somewhat similar to this one" to conduct studies and make recommendations concerning improvements in administrative procedure, and cooperate with the Office of Administrative Procedure, if established.⁹

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¹ DAVID B. H. MARTIN, *THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AN HISTORICAL EVOLUTION* (Mar. 21, 1978) (unpublished draft, on file with author). I hope that it may eventually be posted on ACUS's website: www.acus.gov.

² *Id.* at 2 (quoting the Brownlow Committee Report).

³ Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 77-8 (1941).

⁴ *Id.* at 194 (quoting section 7 of a bill proposed by Committee).

⁵ Martin, *supra* note 1, at 9 (quoting from Recommendation No. 7 of a Hoover Commission Task Force Study entitled "The Independent Regulatory Commissions").

⁶ *Id.* at 12 (quoting from the House Judiciary Committee's request made in September 1949).

⁷ *Id.* (quoting from the Judicial Conference's resolution adopted at its September 1951 meeting).

⁸ See REPORT OF THE CONFERENCE OF ADMINISTRATIVE PROCEDURE (1955), (on file with author). The report contains twenty-two recommendations to the agencies, two to the President, three to the Judicial Conference, seven to the Civil Service Commission, and one to the General Services Administration.

⁹ Martin, *supra* note 1, at 22 (quoting the resolution adopted by the Eisenhower Conference at its third plenary session on November 9, 1954).

continued on next page

Attorney General Brownell eventually created an Office of Administrative Procedure in 1957 as a unit in the Office of Legal Counsel (OLC).¹⁰ It was a tiny office and primarily prepared statistical reports for about a decade.

Meanwhile though, pressure grew on President Eisenhower to follow up on the proposal to create a continuing Conference. A 1960 resolution of the Judicial Conference, a speech by Chief Justice Warren to the ALI Annual Meeting in 1960, and letters from the chairmen of six independent regulatory commissions all urged action on this front. Eisenhower asked Judge Prettyman to begin work on this task, but the election of John F. Kennedy intervened, and immediately after his election Kennedy asked Dean James Landis to prepare a report on the regulatory agencies. In his December 1960 report Landis urged Kennedy to organize an Administrative Conference of the United States.¹¹

Moving quickly, in April 1961, President Kennedy by Executive Order established the second temporary Administrative Conference of the United States.¹² Again Judge Prettyman was appointed as Chairman and Walter Gellhorn and Dean Landis were appointed to its Council. It produced thirty recommendations and a final report delivered in December 1962. The first part contained the thirty recommendations and a summary of its activities.¹³ The second part was devoted to the Conference's proposal for a permanent Administrative Conference.¹⁴

Again Kennedy moved quickly to lay the groundwork for legislation to create the permanent ACUS. The Senate passed the bill unanimously on October 30, 1963. President Kennedy was assassinated

three weeks later, but the House passed an amended bill in August 1964, the Senate agreed a week later, and President Johnson signed the bill on August 30, 1964.¹⁵

But then things languished for a time. ACUS was not high on President Johnson's priority list nor the Department of Justice's. But that changed with the passage of the Freedom of Information Act in 1966 and ongoing congressional consideration of a series of technical amendments to the APA proposed by the ABA. As told by then-head of OLC Frank Wozencraft,¹⁶ suddenly DOJ needed help and began to instigate action to stand up ACUS. Mr. Wozencraft—who later became the Vice Chairman and a valuable member of ACUS—also was principally responsible for finding ACUS's first Chairman, Jerre Williams, Professor at the University of Texas Law School and later a Fifth Circuit Judge. Chairman Williams was nominated in October 1967, confirmed in January 1968, and the first Council was appointed on February 7, 1968.

The resulting "permanent" ACUS operated until October 31, 1995. In its twenty-eight years of operation it made nearly 200 recommendations to the agencies, the President, the Congress, and the Judicial Conference. Some of ACUS's recommendations resulted in major changes in the federal administrative process, others led to significant improvements in the procedures of individual agencies.

Congress also gave ACUS statutory responsibilities for implementing aspects of certain statutes, including the Equal Access to Justice Act, Congressional Accountability Act, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Government in the Sunshine Act of 1976, the Railroad Revitalization and Regulatory Reform Act of 1976, and the Negotiated Rulemaking Act of 1990.

ACUS also provided low-cost training programs for independent agency commissioners and agency general counsels. And it produced useful publications

such as sourcebooks, guides, and hundreds of specific subject-matter studies.

In 1994 and 1995, ACUS got caught up in the budget and appropriations battles of the time and, through a series of unfortunate events, lost its funding and had to close its doors on October 31, 1995. Notably however, its statute was not repealed.¹⁷

This is not the time or place to discuss in detail the accomplishments of ACUS 1.0 or the tangled history of its defunding.¹⁸ But in 1998, I felt confident that the decision to close ACUS would be revisited in the future and wrote an article titled *If it Didn't Exist, it Would Have to Be Invented—Reviving the Administrative Conference*.¹⁹

My confidence was born out of the history I have just recounted. Serious proposals for an agency like ACUS were always on the table from the time of the Brownlow Committee in 1936. I believe there will always be a need for such an organization to oversee our sprawling administrative process. And as we know, Congress did move to reauthorize the Conference in 2004 with legislation pushed by the Republicans in the House of Representatives, and signed by President Bush,²⁰ and again in 2008 when President Bush again signed a reauthorization bill, this time initiated by the House Democrats.²¹ Appropriations were provided, and when President Obama appointed Paul Verkuil and the Senate confirmed him on a voice vote in March 2010, ACUS 2.0 was underway.²²

This is the foundation on which ACUS is being rebuilt. ◻

¹⁰ *Id.* at 28 (citing Attorney General Brownell's Order No. 142-57, issued February 6, 1957).

¹¹ JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 87 (Recommendation 15) (December 1960).

¹² Exec. Order No. 10,934 (Apr. 13, 1961).

¹³ See FINAL REPORT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Dec. 15, 1962) (on file with author).

¹⁴ See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 25-27 (undated monograph, on file with author) (quoting from report and recommendation for a permanent ACUS, issued Dec. 17, 1962).

¹⁵ Pub. L. No. 88-499 (Aug. 30, 1964) (codified as amended at 5 U.S.C. §§ 591-96 (2006)).

¹⁶ Symposium, *Forty-Second Session of the Administrative Conference of the United States*, 53 U. Pitt. L. Rev. 857, 864-65 (1992) (comments of Frank Wozencraft quoted in Gary J. Edles, *The Revival of the Administrative Conference of the United States*, TEX. TECH L. REV. (forthcoming 2011)).

¹⁷ Indeed, in the 2004 reauthorization, Congress added additional purposes to the Administrative Conference Act in 5 U.S.C. § 491. See Pub. L. No. 108-401, § 2(a), 118 Stat. 2255, 2255 (Oct. 30, 2004).

¹⁸ For extensive commentary on this, see Symposium, *Administrative Conference of the United States (ACUS)*, 30 ARIZ. ST. L.J. vol. 1 (1998).

¹⁹ 30 ARIZ. ST. L.J. 147 (1998).

²⁰ See Warren Belmar, *The Continuing Saga of the Administrative Conference of the United States: Reauthorized But Not Yet Funded*, 30 ADMIN. & REG. L. NEWS 2 (Winter 2005); Jeffrey S. Lubbers, *Consensus-Building in Administrative Law: The Revival of the Administrative Conference of the U.S.*, 30 ADMIN. & REG. L. NEWS 3 (Winter 2005).

²¹ See Warren Belmar, *Will Congress Fund the Administrative Conference of the United States?*, 34 ADMIN. & REG. L. NEWS 13 (Fall 2008).

²² See Warren Belmar, *A New Chapter in the Life of the Administrative Conference of the United States*, 37 ADMIN. & REG. L. NEWS 27 (Winter 2011).