IMPROVING THE ADMINISTRATIVE PROCESS: A REPORT TO THE PRESIDENT-ELECT OF THE UNITED STATES (2008)*

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW
AND REGULATORY PRACTICE†

INTRODUCTION

As the forty-fourth American President, you will face a pressing need to improve the process by which federal agencies make law and affect the lives of millions of Americans. The American Bar Association's Section of Administrative Law and Regulatory Practice has prepared this report for your consideration in the hope that we have identified focused, non-partisan strategies for improvement and reassessment. The Section is composed of specialists in administrative law. Both politically and geographically diverse, they include private practitioners, government attorneys, judges, law professors and member of nonprofit organizations. Officials from all three branches of the federal government sit on its

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* We are pleased to reprint the original language of this Report as a service to our readers. –EDS.

† The recommendations in the report were endorsed in principle by a vote of the Council of the Section on August 8, 2008. The Council gave final approval to the report on September 29, 2008. The views expressed herein are presented on behalf of the Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

This report was prepared for the Section by an Ad Hoc Committee on Administrative Law Transition. Members of the Committee: Michael Asimow, Bernard W. Bell, Cary Coglianese, James W. Conrad, Mariano-Florentino Cuellar, Cynthia A. Drew, John Duffy, Fred Emery, Cynthia Farina, H. Russell Frisby, William Funk, Philip J. Harter, Michael Herz, Otto Hetzel, William S. Jordan III, Eleanor D. Kinney, Katy Kunzer, Renee M. Landers, Ronald Levin, Jeffrey Lubbers, William V. Luneburg, Randolph J. May, Richard S. Murphy, Paul R. Noe, James O'Reilly, Richard Parker, Ed Rubin, Sidney Shapiro, Peter Strauss, Thomas Susman, Wendy Wagner, Joe D. Whitley, The Honorable Ann Young, and John Hardin Young.

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In generating this report, the Section sought at every stage to achieve consensus among the broad range of interests represented in our membership. As a result, we believe the recommendations discussed in the report should have wide support and be susceptible of early acceptance.

RECOMMENDATIONS

In brief, our report urges you, first, to make prompt appointments of well qualified individuals to serve in your administration. Second, we urge you to join forces with Congress to rationalize and streamline the rulemaking process. More specifically, in overseeing the rulemaking process, you should (a) support the use of sound scientific risk assessment, (b) aggressively advance the use of information and communication technologies, (c) insist that agencies receive the funding they need for excellence in science and technology, and (d) seek to improve the management of the regulatory process. Third, we urge you to ensure that when federal agencies act to preempt state law, they should address these issues in explicit terms and act only after appropriate consultation with affected state officials. Fourth, we urge you to support ABA-sponsored legislation to reform the adjudication provisions of the Administrative Procedure Act. Finally, we urge you to take steps to revive the Administrative Conference of the United States, which Congress has recently reauthorized but not yet funded.

Appointment of Your Administration

Among your very first decisions will be to choose the appointees who will people your administration. At the highest level, this requires senatorial confirmation; but many appointments are made by you alone or by those whom you appoint to high office with senatorial confirmation. These are political judgments at root, yet we believe law and experience offer perspectives that are appropriate for us to address here.

First, we exhort both you and the Senate to act promptly.

Unfilled vacancies imperil effective administration. Nonetheless, past Presidents have not always been prompt in sending nominations forward, and the Senate has not always been prompt in considering nominations

once sent. Your primary control over the administrative apparatus does not reside in your ability to issue orders or to monitor performance, but rather is exercised through your selection of sound administrators to lead those agencies. That counsels deep and urgent attention to the appointment process on all sides.

Second, effective administration of regulatory and beneficiary programs requires the appointment of persons of high ability to positions of leadership.

We recognize that Presidents regularly appoint people who have actively participated in the successful presidential campaign, or who are party loyalists, or who are promoted by influential constituency groups. Appointments stemming from these factors can, of course, be appropriate. Nevertheless, we, as practitioners and others involved in the substantive areas that will be directly affected by your appointments, urge you not to allow those factors to overshadow qualities such as competence, leadership ability, and familiarity with the programs that will fall within their charge. Such qualifications in the people you appoint are important to the fulfillment of your own constitutional responsibility to take Care that the Laws be faithfully executed.

A related and equally vital quality for you to seek in your appointees will be a sense of being committed to carrying out the programs that they will respectively be asked to administer. "Faithful execution of the laws" begins with a President and top officials who are committed to fulfilling the objectives charted by statute. Of course, there may be times when a particular statutory requirement tends to undermine the effectiveness of the program as a whole, or conflicts with your appointees' policy preferences, or your own. When such conflicts arise, efforts by you and your administration to secure legislative revision or repeal of those mandates can be entirely appropriate. Unless and until such change occurs, however, the principle of the rule of law dictates that such statutory provisions must be followed.

Third, we observe that many time-honored qualifications for presidentially appointed offices are embedded in legislation.

We know that some argue that virtually any statutory qualifications requirement unconstitutionally infringes upon the President's appointment powers. Whatever conclusions people might reach on that constitutional issue, our judgment is that many of these statutory requirements have proved over time to be salutary. For example, the requirements that the Solicitor General of the United States be a person "learned in the law" and

that the Surgeon General be appointed from individuals who "have specialized training or significant experience in public health programs" have surely enhanced the stature of their offices, contributing to the respect they have generally enjoyed. The statutory exclusion of active duty personnel from top posts in the Pentagon has surely contributed to the maintenance of the fundamental principle of civilian control over the military.

Statutory qualifications sometimes reflect more political choices. These, too, have generally been salutary. As a means of assuring relative balance in the performance of the multi-member authorities it has created, Congress has often written limitations on party status into the governing statutes so that no more than a bare majority may belong to the same party. In other contexts, it has specified representation of particular interests on these bodies. For example, a statute provides that in making appointments to the Federal Reserve Board, "the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographic divisions of the country." Compliance with provisions of this kind can help an administration to secure the cooperation of disparate interests essential to the success of the governmental program.

In short, we believe that these sorts of statutory qualification requirements warrant your respect. With regard to new legislative proposals including qualifications requirements, we urge you to engage with Congress during the legislative process if you believe that such requirements unduly constrain the range of your potential appointees in some concrete way.

Oversight and Improvement of the Rulemaking Process

Notice-and-comment rulemaking is a cornerstone of the Administrative Procedure Act (APA), the basic charter of federal agency procedure. This process was intended to provide an efficient and open method of promulgating rules. Today, however, it is neither as efficient nor as open as it could be. In order to promote these values, while also ensuring that administrative rulemaking serves the priorities of the incoming Administration, we recommend that, upon taking office, you undertake the following courses of action:

First, we urge you to ensure that White House oversight of agency rulemaking is transparent and efficient.

The system of centralized executive review of agency rulemaking evolved under several administrations and is currently embodied in Executive Order 12866, which has been in place during the past two

presidential administrations, with limited amendments adopted in 2001 and 2007. The practice of White House oversight and coordination it reflects has longstanding bipartisan (and ABA) support as an important element in realizing the aims of efficient, coordinated, yet reasonably open administration in a democratic system.

The current system has two elements: coordination of the overall rulemaking programs of agencies and review of particular rulemaking proposals. Both elements are sound, but in their details may warrant reflective reconsideration. At the initial stage of setting priorities, your administration has important interests in coordination among agencies and in securing the priorities of your administration. Accordingly, we recommend that you make more effective use of the planning mechanism of Executive Order 12866 by convening the agency heads early in your administration to coordinate regulatory priorities. Other issues of possible concern at the initial stage include:

> (i) whether the planning process strikes an effective and appropriate balance among the respective responsibilities of all its participants, including those whom you (with the Senate's blessing) will have made directly responsible for agency administration; and
> (ii) whether additional measures of transparency might be warranted to assure the public's trust that decisions taken are grounded in proper concerns of public policy.

At the following stage, that of reviewing agency efforts in particular rulemakings, the important considerations are those of efficiency, faithfulness to underlying legislative mandate, and, again, political acceptability. At present, review is limited to "significant" regulatory actions and guidance documents (usually those with high economic consequences or important policy implications); we support maintaining this limitation in the interest of efficiency. Assiduous avoidance of delays and continuing respect for openness are also important elements in the process of centralized regulatory review.

Second, we urge you and Congress to join forces to rationalize and streamline the rulemaking process.

Over time, both Congress and the executive have laden the process of informal rulemaking with multiple requirements for regulatory analysis. Viewed in isolation, a good case can be made for each of these requirements. Their cumulative effect, however, has been unfortunate. The addition of too many analytical requirements can detract from the seriousness with which any one is taken, deter the initiation of needed rulemaking, and induce agencies to rely on non-regulatory pronouncements that may be issued without public comment procedures but have real-world

effects. In 1992, the ABA House of Delegates highlighted these concerns when, at our Section's urging, it unanimously called upon the President and Congress to "exercise restraint in the overall number of required rulemaking impact analyses" and "assess the usefulness of existing and planned impact analyses."

The Section anticipates that the next four years will be a time of legislative as well as executive interest in rulemaking. In your interactions with Congress on these important issues, you and your Administration should work to replace the current patchwork of analytical requirements found in various statutes and Executive Orders with one coordinated statutory structure. This structure should work to relate rulemaking requirements to the importance of a given proceeding. "Rulemaking" is not an undifferentiated process—some rules have major economic or social consequences, while many others are relatively minor in scope and impact. Thus, detailed requirements should be reserved for rules of greatest importance, and uncomplicated procedures should be used for routine matters of less public significance.

We urge consideration, as part of that process, of the effectiveness of cost-benefit analysis in the regulatory oversight program. Cost-benefit analysis is valuable as a metric for understanding the economic impact of regulation; at the same time, the rulemaking proceedings within which it is conducted must ultimately culminate in a decision that implements the normative values embodied in the agency's enabling legislation. Controversies over the strengths, limitations, and consequences of cost-benefit analysis as it actually operates in practice have given rise to a substantial literature, both academic and popular. The advent of a new presidential administration furnishes a very appropriate occasion for taking stock of that debate. Accordingly, we hope that you and your appointees will be attentive to these varying appraisals of cost-benefit analysis in the course of establishing your own administration's program for regulatory oversight.

Third, we urge you to support the use of sound scientific risk assessment.

Many agencies are responsible for regulating risks to health, safety, or the environment. In order for them to implement these missions, they must have adequate expertise in state-of-the-art risk and benefit assessment methods to support optimal risk management. Under the sponsorship of our Section, the ABA has developed a detailed recommendation containing principles for the use of risk assessment in the regulatory process. *See* http://www.abanet.org/adminlaw/risk02.pdf. The recommendation urges, for example, that risk assessments should be based on a careful analysis of

the weight and quality of the scientific evidence, including such site-specific and substance-specific information as may be available, as well as information about the range and likely distribution of risk. It also emphasizes that scientific findings and professional judgment in risk *assessments* should be explicitly distinguished from the policy judgments in risk *management*. In addition, the recommendation provides that the process should be kept as free as possible from political bias, and that risk assessments should explicitly acknowledge and explain the limitations of their methodology, data, and assumptions. As your incoming administration undertakes to familiarize itself with the challenges of risk assessment and risk management, we commend the ABA principles to its attention.

Fourth, we urge your Administration to aggressively advance the use of information and communication technologies in rulemaking.

Effective use of such technologies can promote transparency, enhance the breadth and quality of public participation in regulatory decisionmaking, help agencies make better rules more efficiently, and provide (for the first time) readily accessible inter-agency and cross-agency rulemaking data for use in program oversight and evaluation.

Progress in technology-supported rulemaking ("e-rulemaking") has already begun with the creation, over the last six years, of a government-wide electronic docket and database of rulemaking materials (the Federal Docket Management System, or "FDMS") and a web portal, regulations.gov, that allows the public to view and comment on proposed rules. To tap the full potential of e-rulemaking, however, much more needs to be done. A national blue-ribbon Committee on the Status and Future of Federal e-Rulemaking, established under the auspices of the Section, has concluded an 18-month study of FDMS and regulations.gov, and you will receive its report and recommendations. Here, we summarize some of its principal conclusions which we commend for your consideration.

- To gain the benefits of strong, centralized leadership, a lead agency should be charged with developing a core system for e-rulemaking to be shared by all agencies. Appropriations should be specifically dedicated to this task.
- To gain the benefits of individual agency initiative and experimentation, this core system should adopt an open architecture that encourages agencies to customize their e-rulemaking efforts in innovative ways designed to serve their particular stakeholders.
- To encourage development of an administrative culture that embraces e-rulemaking, your administration should ensure that agencies have the resources and leadership needed to comply with the E-Government Act of 2002, which, to the degree practicable,

requires agencies to make all materials in their rulemaking dockets promptly available on-line to the public.

- To enhance public understanding of agency policies, agencies should use the on-line electronic libraries they are required to keep under the Electronic Freedom of Information Act to make available, and readily searchable, important yet often hard-to-find items such as general statements of policy and interpretive rules. Agencies that make such materials available in their own e-libraries should also make them available from the centralized FDMS so that both public users and users in other agencies can retrieve materials in either location through a single search request.

Finally, to help realize the goal of easy online access to rulemaking materials government-wide, we urge you to make efforts to bring the independent commissions into the cross-government system.

Fifth, we urge you to insist that agencies receive the funding they need for excellence in science and technology.

When regulatory priorities and programs are grounded in robust scientific and technical analysis, the benefits are enormous; conversely, the risks of debilitated, under-performing programs are enormous—indeed, they are increasingly apparent. Over the years, Congressional mandates and regulatory demands on many agencies have grown dramatically, but these demands often have not been matched by adequate funding. The burgeoning growth in scientific techniques and understanding only heightens the hurdles facing the agencies.

Agencies that regulate risks to health, safety and the environment touch the lives, health and well-being of all Americans and have a major impact on the economy and security of our nation. Other countries around the world traditionally have looked to the United States for leadership on scientifically sound, risk-based regulation. Federal agencies will not be able to fulfill their missions if their expertise and organizational structure are weak. Effective regulation and American leadership in the world on regulatory issues surely will not be possible if the agencies cannot even keep pace with scientific advances. Our nation is at risk if the scientific and technical expertise of the agencies is inadequate.

For example, the Food and Drug Administration—and until recently the Consumer Product Safety Commission—have not been adequately funded to address important safety challenges during a time when international trade has dramatically increased and public confidence has fallen. EPA has not been adequately funded to implement chemicals management initiatives even as chemicals management policy is changing around the world.

Consider a recent report by FDA's Science Board raising alarm that FDA cannot fulfill its mission because its scientific base has eroded, its scientific organizational structure is weak, its scientific workforce does not have sufficient capacity and capability, and its information technology infrastructure is inadequate. A crucial part of the problem is the lack of resources during a time of revolutionary change in science and ever-increasing demands on the agency. The result is reactive priority-setting and a fire-fighting regulatory posture instead of a culture of proactive regulatory science.

As FDA's Science Board stated: "Inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or, even worse, the wrong decision on regulatory approval or disapproval." Adequate resources are imperative to bolster the agencies' science capacity and capability, to implement cutting-edge approaches to modeling, risk assessment and data analysis, and to bolster agencies' information infrastructure.

Sixth, we urge you to ensure that attention be given to improving the management of the regulatory process.

The development of regulations is a complex task that necessarily draws on a variety of technical disciplines and requires the coordination of multiple levels within an agency and among agencies. Moreover, agencies are expected to work with interested stakeholders in developing and implementing regulatory objectives. The efficient operation of government and the ability of an administration to achieve its policy goals require that this process be managed appropriately. The management of regulation currently enjoys little support in the form of funding, research, technical innovation, and career development from the President, Congress, the public management, and academic communities. But it is essential. It requires, among other things, knowledge, techniques, and experience needed for effective engagement of internal and external stakeholders. Because of the importance of rulemaking, we recommend that you, as the new President, should ensure that management of the regulatory process will occupy a more prominent position in major government-wide management initiatives and programs.

Preemption of State Law by Agency Action

Since the earliest days of the Republic, there have been conflicts between federal and state regulation of the same matters. In part as a result of congressional ambiguity, federal agency preemption of state law remains a nationally important issue. Of particular concern to many have been

statements by agencies asserting that their regulations preempt state tort law, despite the absence of clear statutory language mandating or authorizing such preemption. It is not our purpose to take a side in these debates. Rather, it is our hope that, whatever policies your administration may pursue, agencies subject to your direction will deal with this issue in a manner that is explicit, transparent, and open to public participation, particularly the participation of those state entities most directly affected by possible preemption. The ABA has long recommended that federal agencies should clearly and explicitly address preemption issues in the course of regulatory decisionmaking.

The ABA has also recommended that when an agency proposes to preempt a state law or regulation, it should attempt to provide affected states notice and an opportunity for appropriate participation in the proceedings. Similar provisions have been incorporated into a series of presidential executive orders culminating in EO 12988 and EO 13132, both issued by President Clinton and continued by President Bush.

It is fair to say that agencies have not faithfully adhered to these principles. We do believe, however, that preemption is important enough that state and local officials should be informed of proposed agency actions that may have preemptive effect and should be offered an opportunity to consult with the agencies about those proposed actions. Moreover, in any proposed or final rule or order, an agency should, where relevant and to the extent feasible, include express language regarding what it believes is the preemptive effect of its action and the source of the authority for such preemptive effect. Such clarity and publicity will aid regulated entities, regulatory beneficiaries, state and local officials, and courts in determining the meaning and effect of federal regulations.

Enhancing the Legitimacy and Uniformity of Agency Adjudications

We urge you to support legislation that would enhance both the legitimacy and uniformity of agency adjudicatory decisions.

When the Administrative Procedure Act was enacted in 1946, its adjudication provisions set forth a standard package of procedures, including use of independent, impartial hearing examiners, a hearing process, and separation of the functions of investigation, prosecution, and decision. At the time, there was a widespread expectation that when agencies were required by statute to provide hearings in adjudications, the hearings would have to comply with these new provisions, particularly the mandate for an independent, impartial decisionmaker and separation of functions.

The Act also specifies, however, that these procedural protections are required only for adjudications "required by statute to be determined on the record after opportunity for an agency hearing." Many courts—including the D.C. Circuit—have ceded broad discretion to agencies to determine for themselves whether the language of their organic statutes triggers application of APA formal adjudication requirements. As a result, even when conducting hearings in matters where the decisionmaker is limited by statute to the record created by the parties, many agencies have managed to avoid the APA's adjudication procedures.

In 2005, the American Bar Association adopted Resolution 114, urging Congress to provide the APA protections of an impartial decisionmaker (not necessarily an Administrative Law Judge), separation of functions, and prohibition on *ex parte* contacts to all non-APA statutory hearings in which the decisions are to be made based upon the evidence compiled in the statutorily required hearing. We urge you to support enactment of legislation embodying these requirements.

Administrative Conference of the United States

We urge you to promote the revival of the Administrative Conference of the United States (ACUS), a governmental entity that systematically promoted improvements in the administrative process.

For over 25 years, ACUS advised the federal government on and coordinated important reforms to the administrative procedural law that is the backbone of federal regulation. ACUS enjoyed strong bipartisan support and assisted all three branches of government from 1964 until it lost its funding during the appropriations process in 1995. Its underlying statutory authority remains, however.

ACUS was a bargain—it employed a very small staff and attracted numerous academic consultants, on an as-needed basis, who received very modest payment for engaging in substantial research tasks. ACUS also leveraged the volunteer efforts of a great many administrative law luminaries—government officials, private lawyers, judges, and academics—who served in a variety of capacities and attended semiannual meetings for no compensation beyond travel reimbursement. The result, as former OMB Director James Miller noted, was a highly productive forum in which experienced persons deliberated with breadth of input, depth of knowledge, and common interest in developing consensus-based recommendations. As explained in a detailed Congressional Research Service (CRS) memo in September 2005, and follow up testimony in 2007, ACUS proved to be an extremely useful and cost-effective agency. Indeed,

federal agencies currently are spending more money to address issues that ACUS could resolve than ACUS's entire proposed budget.

A large proportion of the Administrative Conference's recommendations eventually achieved implementation in whole or part. As a result, the Conference generated significant improvements in the administrative process. For example, it prepared influential studies and recommendations on such subjects as Social Security procedures, Freedom of Information Act reforms, user fees, and procedural aspects of protecting whistle blowers in the health and safety areas. It was at the forefront of encouraging agency use of alternative dispute resolution (ADR) techniques which can save considerable resources. The Conference took a leading role in drafting the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, and then worked to build agencies' capacities to implement those statutes, offering expertise and training opportunities beyond the scope of what an individual agency could do alone.

In 2004, Congress held hearings on ACUS reauthorization during which all six witnesses—including Supreme Court Justices Stephen Breyer and Antonin Scalia—praised the work and cost-effectiveness of the agency. Following those hearings, Congress unanimously approved bipartisan legislation to reauthorize and resurrect the agency, which President Bush signed into law on October 30, 2004. Regrettably, funds were not appropriated before the reauthorization period expired at the end of FY 2007. Therefore, new legislation was introduced with bipartisan support in September 2007, H.R. 3564, to renew ACUS' reauthorization through FY 2011. The President signed the bill, as amended, into law on July 30, 2008, as Public Law 110-290.

Since ACUS ceased operation, no entity in the executive branch regularly convenes officials from across the government, along with interested private practitioners and academics, to deliberate about how to improve the fairness and effectiveness of administration. Such a forum for collegial self-critique and development of best practices is eminently desirable. In this regard, two points are of critical importance: First, the Conference did not and would not have the authority to implement any of its recommendations; rather, its only role was to provide advice for others to consider and implement when and where they believe it is appropriate. Secondly, ACUS assiduously avoided political issues. Its recommendations addressed only the administrative process and not broader political issues as to whether governmental action should or should not be taken on the basis of broader policy considerations.

An adequately funded ACUS would provide a forum that could craft nonpartisan solutions to a host of pressing administrative law and regulatory controversies. These include the role of science in agency

decisionmaking, electronic rulemaking, possible codification of the process of presidential review of rulemaking, the proper role of the Information Quality Act, refinements to the Congressional Review Act, and many others.

Accordingly, the Section urges the incoming President to support the re-establishment of the Administrative Conference. The agency should continue to be structured to give non-partisan analysis and advice; it should be afforded independence from particular policy-based responsibilities, so that it will maintain its credibility as a detached analyst. To this end, the new President should direct that funds be identified for such an agency in his budget, and should support necessary steps by Congress to provide appropriations for the agency. These steps would make a major contribution to enhancing the government's capacity to improve itself in our era of dynamic change.