



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – March 27, 2012

Committee Members

Miriam Nisbet, Chair
Daniel Cohen (by telephone)
Daniel Elliott
Jody Freeman (by telephone)
Remington Gregg
Will Gunn (by telephone)
Michael Herz (by telephone)
John Kamensky
Patrick Patterson

Administrative Conference Staff

Paul Verkuil
Jeffrey Lubbers
David Pritzker

Public

James D. Grant, Villanova Law School

Consultants

Jody Freeman (committee member)
Jim Rossi (by Skype and telephone)

Committee Chairman Miriam Nisbet opened the meeting shortly after 9:00 AM. After participants in the meeting were identified, she called upon Administrative Conference (ACUS) Chairman Paul Verkuil, who welcomed the attendees and summarized the background of the Conference's project on coordination of rulemaking and other means of interagency coordination. He noted that this is something of an experimental process, in that the initial research did not start under Administrative Conference sponsorship. Mr. Lubbers explained that he had seen an advance copy of an article being prepared for publication by Professors Freeman and Rossi in the Harvard Law Review, and believed that with some modification, it could serve as the basis for a potential ACUS recommendation. The draft report represents the requested modification.

Ms. Nisbet asked Prof. Freeman to summarize the study. Prof. Freeman explained that the genesis of this work was in some of her prior writing on agency consultation processes and her experience serving in the White House on agency coordination initiatives, particularly the joint rulemaking on fuel efficiency standards, followed by extensive discussions with Prof. Rossi. In preparing the report to ACUS, the authors have edited out the political science aspects of the original article as to why Congress chose to create statutory schemes with divided or overlapping regulatory responsibilities in "shared regulatory space." The challenge to agencies is how to navigate their way through overlapping and sometimes conflicting authorities, where they need, in some way, to be coordinating their efforts. These situations arise in a variety of contexts: energy, border security, financial regulation, food safety, and many other areas. Moreover, these processes do not necessarily have a formal structure as cost-benefit analysis or regulatory review do, and for this reason, OIRA or OMB may not be the best instrument for promoting better coordination among the agencies, not just in joint rulemaking, but in other areas of shared regulatory space as well.

Ms. Nisbet said she sees the task for the committee as highlighting the problem and turning this challenge into a plan to improve decisionmaking across the government. Prof. Rossi observed that the goals are more coordination and improving the nature of coordination. As a means of proceeding, Mr. Lubbers suggested

that the committee first work through the text of the draft recommendation and then conform the preamble to the result of the discussion.

Mr. Kamensky stated that he has been studying coordination for the last decade at the IBM Center, and that this is not a settled field, even with respect to terminology, such as whether to refer to collaboration instead of coordination. The draft recommendation seems to be worded as though it is more settled. Also, the draft seems to be worded more in terms of regulation. The new GPRA Modernization Act designates cross-agency coordinators in the White House and cross-agency goals. He said that there are undefined areas here, such as the authorities and resources of these coordinators; and that an ACUS recommendation should not be putting boundaries around who will do what. A lot of tools and frames are being considered. However, he suggested that the scope of the recommendation have some kind of bound. Prof. Freeman responded that perhaps the preamble as now drafted reads as more limiting and settled than the report and should be reworded. The research was motivated by a desire to conceptualize the field and an effort to create a framework for talking about it. The aim was to make a modest start, not to preclude innovation. Mr. Lubbers noted that the report's consideration of "shared regulatory space" goes beyond joint rulemaking, but that it is still possible to bound the scope of the recommendation so that it would not address coordination or collaboration in every area of government activity, but, for example, might have a specific regulatory focus.

Prof. Freeman suggested that the recommendations focus on the ideas of developing coordination policies, sharing best practices, asking OMB to help support and fund interagency consultations, and tracking the high profile joint rules and memoranda of understanding (MOUs) and similar instruments so that we can learn from them. These would be fairly modest good government efforts, at a high conceptual level. Maybe the content of the draft preamble is more of a problem than the recommendation text.

Mr. Cohen said that the issue for him is that the recommendation seems to suggest too much structure. He cited his own work with Commerce in connection with the famous salmon example mentioned publicly by President Obama, which demonstrated how informal contacts could be effective. Mr. Cohen urged that the recommendation text de-emphasize any particular structure and eliminate any implication that OIRA is necessarily the solution.

Prof. Freeman noted the qualitative nature of the study, rather than quantitative, and said that the article acknowledged some existing practices that operate successfully in the background. But reports from GAO and others have highlighted real problems such as jurisdictional issues in food safety and issues in connection with Dodd-Frank and border safety. Prof. Rossi added that whatever institutional approach the recommendation takes should not crowd out informal interaction. We aren't trying to capture every agency interaction, just areas where there are overlapping areas for action.

Further committee discussion then addressed the breadth of the recommendation's coverage (e.g., joint rulemaking, regulation in general, the notion of "shared regulatory space") and the extent to which it sets out a role for OIRA, the Regulatory Working Group created under Executive Order 12866, or any other specific identified entity, and the level of structure to be suggested.

Mr. Kamensky suggested that the recommendation not try to formalize interactions that have been successful on an informal basis. Moreover, by formalizing something that has been informal there might be unintended consequences and a potential for mischief, such as a new administration wiping out a list of existing MOUs. He questioned whether the research is adequate to support some kind of overarching

principle (i.e., not context-specific such as applying to food safety). Ms. Nisbet said the flip side is that you may have agencies with shared regulatory space, but which are reluctant to come to the table to share their regulatory approaches. Mr. Kamensky cited as good examples of an organizing construct the “national strategy documents” formerly used (e.g., for border protection), but which have not been utilized by the present administration. He also mentioned a concern about creating barriers to cooperation by requiring any specific approvals or reviews.

Mr. Patterson noted that his agency, EEOC, has overlapping jurisdiction, especially with DOL in connection with contract compliance, and they have found that the degree of cooperation often depends on local history.

Prof. Freeman suggested that the recommendation should make clear that there are many ways agencies can work together and should identify several ways they are doing this. Such a listing isn’t exclusive; there are other mechanisms that should be explored. The idea is to promote use of them, where appropriate.

To help focus the scope question, Prof. Freeman noted that the Harvard Law Review article’s title is “Agency Coordination in Shared Regulatory Space,” and there was a consensus among committee members to use that title. She also emphasized that the report is not limited to literal overlaps of authority. There are different species of the problem such as fragmentation of authority. What is common is that the agencies are sharing parts of a larger enterprise.

Mr. Herz inquired about the extent to which independent agencies are within the scope of the recommendation, and said it must be clear about how the principles apply to independents, especially where referring to White House review. Mr. Verkuil mentioned that the same point came up in ACUS discussions of international regulatory harmonization, because of a concern about the extent to which the White House should control. Mr. Lubbers suggested that this issue is severable and should not be made a focal point of the recommendation. Prof. Freeman said that the recommendation should be neutral, but can note that the issue goes across the executive/independent agency boundary. She further observed that it would be helpful to delete much of the language in the draft preamble about OIRA, and there was agreement to do so.

The committee now turned to specific details about various paragraphs in the text, to reflect the discussion up to this point. There was agreement to combine portions of paragraphs 2 and 4 concerning MOUs.

Among the points discussed further:

- The text should make clear the scope of the recommendation.
- Who should have responsibility for developing government policy on interagency coordination?
- There should be an appropriate role for the Executive Office of the President.
- Agencies should not be overburdened, but some tracking would be valuable for evaluating interagency coordination practices.
- There should be a mechanism for sharing best practices.
- Resources will be needed to participate effectively in interagency processes.
- Dispersed authority between federal and state governments is outside the scope of the recommendation.

Ms. Nisbet, Prof. Freeman, Prof. Rossi, and ACUS staff will refine the draft recommendation to reflect the decisions made during the meeting and will conform the preamble to the revised text. The result will be circulated to committee members to ensure accuracy.

To obtain agency and public comments on the draft recommendation, it will be circulated to ACUS members and posted on the ACUS website.

The meeting was adjourned at 11:30 AM.