To: Alissa Ardito, Neil Eisner

From: Cynthia R. Farina, Rulemaking Committee member

Re: Potential ACUS position on ABA proposal for Administrative Procedure Act amendments

Date: April 18, 2016

A death in the family prevented my joining the first committee meeting on this topic, so I don't have the benefit of the meeting discussion. Nonetheless, I think there are some general principles that might usefully guide the Committee's response to the ABA recommendations.

1. ***We should be wary of endorsing legislative action based on ACUS recommendations that were not directed to Congress in the first instance.***

> ACUS typically debates not only the *content* of a recommendation but also (i) *to whom* it is addressed and (ii) the *range of discretion* appropriately surrounding the recommended action. To borrow the old torts maxim about negligence, "Proof of an ACUS recommendation in the air, so to speak, will not do." The substance of a recommendation cannot properly be understood apart from the entity to which the recommendation is directed, as well as the extent to which ACUS decided to recommend that the entity take a particular course or, instead, "consider" carefully whether it should take such a course. The vote of the Conference comprised all these elements – change one of them and it is no longer what ACUS recommended.

2. ***We should not seek a legislative fix for anything that isn't demonstrably broken.***

> In part, this principle expresses respect for legislative resources that are scarcer than ever in these polarized times. Additionally, it warns about being careful what we wish for. What comes out of the legislative process can look very different than what went in, so there should be a strong justification before taking the risk of outputs that could actually do harm. Finally, this principle takes a realist view of legal mandates. External directives already address several aspects of the ABA proposals.[1] Yet another directive is unlikely to matter much *unless* rule opponents can use it to persuade a court to delay or vacate a rule. New grounds for attacking a rule predictably produce overinvestment in litigation resources, a recognition that leads back to the important question whether there is *really* a problem worth Congress trying to fix.

It seems to me that almost all of the ABA proposals run afoul of one, or both, of these principles. This doesn't mean the Committee couldn't recommend ACUS endorsement – but it certainly means we shouldn't feel guilty about declining to endorse proposals which often differ in framing and/or nuance from what ACUS actually adopted.

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[1] For example, since 1993, E.O. 12,866 has said: "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days."§ 6(a). Jimmy Carter's 1978 order was more mandatory ("Agencies shall give the public at least 60 days to comment on proposed significant regulations. In the few instances where agencies determine this is not possible, the regulation shall be accompanied by a brief statement of the reasons for a shorter time period," EO 12,044 § 2(c)), while Obama's EO. 13,563 added technology: "To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days."

With the caveat that I don't know what others had to offer at the meeting, these are my reactions to the specific proposals:

1-2: I share Jerry Mashaw's view about not messing with general judicial success. Yes, some judges still insist that Vermont Yankee illegitimates 40 years of judicial rulemaking review, but until we begin to hear this from a critical mass of SCOTUS justices, Congress has better things to legislate about.

3: The ABA background report gives a lot of good policy reasons for ample comment periods, but when it comes to actual evidence, it cites an ACUS consultant report finding a 39-day average comment period length for a smallish sample of *non-significant* rules. The memo doesn't mention that the consultant found a 45.1 day comment period average for his (concededly small) sample of economically significant rules, or report his conclusion that there were often circumstances in particular cases that could justify the shorter comment period. ACUS and almost every sitting president since Carter have thought 60 days is a presumptively desirable period for important rules. Do we have any basis for thinking that agencies are systematically, and without good reason, ignoring these views?[2]

4: This is a sneaky proposal, combining trivial editorial changes (interpretive for interpretative, rulemaking for rule making) with changes that could have impacts not discussed in the ABA background memo. I've always understood the reference to "*particular* applicability" as acknowledging, e.g., that the definition of rule expressly includes ratemaking. What would be the impact of the proposed change on all of the regulatory actions listed in the last sentence of the definition?[3] As for "future" effect, in the case cited (Bowen v. Georgetown Hospital), only Justice Scalia thought the APA definition prevented retrospective rulemaking – and then only when the rulemaking was purely retrospective (changing past legal consequences of past actions). The actual holding was that a legislative clear statement would be required before assuming an agency has power to engage in purely retrospective rulemaking. Are courts having real problems with the existing definition? The "evidence" cited in the background memo is an article by Justice Scalia written in 1978, ten years before all the other members of the Court refused to join his reading of the APA definition of rule.

5: ACUS does indeed have a recommendation expressly to Congress in this area, but I personally think there's a sizable difference between ACUS's language "Congress should consider expressly authorizing *agencies* to delay…" and the ABA recommendation that Congress authorize "a new presidential administration" to delay. Moreover, in line with Jerry's concern, our recommendation has a time limit "up to 60 days." Relevant to my second general principle, note the footnote in our recommendation pointing out that prior administrations have imposed such delays without express authorization. Giving the President more power seems a peculiar priority for the contemporary Congress.

6 -7: In light of the extremely careful wording and various nuances of our Recommendation 2014-5 on retrospective review and Recommendation 2015-1 on the Unified Agenda, I don't see how we could

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[2] A group of Cornell researchers is currently working on a Regulations.gov dataset of 4 recent years of rulemaking, across all agencies. We are still cleaning the data, but I just got a first-cut analysis that showed a mean of 57 days and a median of 60 days for rules that agencies coded as "significant." This may change with further data refinement, but certainly suggests that the 60-day benchmark has had some impact.

[3] "'rule'…includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganization thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing…" Cf. the Attorney General's Manual (1947), referring to "a great mass of particularized rule making, such as schedules of rates".

endorse this blunt-edged approach – which, without judicial review, probably won't be more effective than our existing Recommendations anyway.

8: This is potentially the most far-reaching of these proposals. I'm very sympathetic as a policy matter, but has ACUS really not considered these exemptions since 1973? (and then only the third one). I can't see the Members making such a significant recommendation without a full study via our normal process.

9: Again, it's apparently been a long time (1995?) since ACUS considered this area. Our methodology of studying actual practice, exchanging information about various agency needs and circumstances, and debating recommendations with the input of agencies, researchers, practitioners, and advocacy groups imparts confidence, as well as legitimacy, to our recommendations. I like the substance of this proposal – and I know that some agencies are doing at least some of these things already—but I'd like to go through our full vetting process before we advocate codifying this level of detail.

As for the reply comment issue, experimentation is good if it's accompanied by data gathering and refinement. A problem with this list is that it fails to include the most important prerequisite: making sure that **all** comments are promptly made available for viewing on Regulations.gov.