

December 18, 2024

To: Becaja Caldwell, Attorney Advisor, Administrative Conference of the United States, c/o [info@acus.gov](mailto:info@acus.gov)

From: Mitchell Berger, [mazruia@hotmail.com](mailto:mazruia@hotmail.com) (submitting in private capacity)

Re: Consultation with State, Local, and Tribal Governments in Regulatory Policymaking; Request for Comments; Public Listening Sessions, <https://www.federalregister.gov/documents/2024/12/18/2024-29931/consultation-with-state-local-and-tribal-governments-in-regulatory-policymaking-request-for-comments>

Dear Ms. Caldwell: In response to the ACUS request for input concerning suggestions for consultation with state, local and tribal governments, I write to suggest the following: ACUS should recommended federal agencies fully include in regulatory policymaking and consultations US Territories and the Freely Associated States and ACUS should recommend that federal, state, local, tribal and territorial consultations be publicized and transparent to residents of these areas.

- A. **ACUS should recommend that federal agencies should fully include in regulatory policymaking and consultations US Territories and the Freely Associated States:** In contrast to policies applying to tribes, states or local governments, the US Territories and FAS often are not considered or consulted in legislation, regulations or program development or implementation. US territories include American Samoa, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and the U.S. Virgin Islands. As well, the US “oversees federal assistance under the Compacts of Free Association to the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.”<sup>1</sup> Collectively, the US Territories have a population of roughly 3.7 million and the Freely Associated States about 200000 people. Many people from these areas live in the continental US.<sup>2</sup> ACUS in its announcement does not specifically ask about consultations between federal agencies and territorial governments or those of the FAS. However, the territories have a unique position relative to state governments and the US government has signed Compacts of Free Association with the FAS detailing economic aid and support. Programs such as Medicaid and Medicare function differently in the Territories

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<sup>1</sup> <https://www.doi.gov/library/internet/insular>; <https://uscode.house.gov/view.xhtml?path=/prelim@title48/chapter10&edition=prelim>; <https://www.doi.gov/oia/reports/FAS-GAO-Reports>; <https://www.doi.gov/oia/financial-assistance>; <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-the-Territories.pdf>; <https://www.doi.gov/oia/COFAinUs>; U.S. Territories: Coordinated Federal Approach Needed to Better Address Data Gaps, <https://www.gao.gov/products/gao-24-107605>; <https://www.cbpp.org/blog/federal-data-inequities-in-us-territories-hinder-inclusive-and-precise-policymaking>; <https://www.census.gov/programs-surveys/international-programs/about/idb/island-areas.html>; <https://www.georgetownpoverty.org/wp-content/uploads/2022/11/AdvancingDataEquityUSTerritories-Nov2022.pdf>; <https://www.gao.gov/products/gao-20-491>; <https://www.cbpp.org/blog/puerto-rico-and-other-territories-should-get-food-assistance-equity-in-upcoming-farm-bill>; <https://www.kff.org/medicaid/issue-brief/recent-changes-in-medicaid-financing-in-puerto-rico-and-other-u-s-territories/>; <https://www.gao.gov/products/gao-23-106050>; <https://www.kff.org/report-section/community-health-centers-in-the-u-s-territories-and-the-freely-associated-states-issue-brief/>; Roberts T, Song Z. Medicare Advantage Financing and Quality in Puerto Rico vs the 50 US States and Washington, DC. *JAMA Health Forum*. 2022;3(9):e223073. doi: 10.1001/jamahealthforum.2022.3073

<sup>2</sup> See e.g., <https://www.pewresearch.org/fact-sheet/us-hispanics-facts-on-puerto-rican-origin-latinos/>; <https://arstatedatacenter.youraedi.com/the-marshall-islands-migration-and-arkansas/>; <https://www.hawaiinewsnow.com/2024/08/17/citizens-micronesia-states-marshall-islands-palau/>; <https://www.gao.gov/assets/gao-20-491.pdf>; <https://www.guampedia.com/chamorro-migration-to-the-u-s/>

and in many cases residents of the Freely Associated States and even some Territories (Samoa, CNMI) may not be eligible for many programs or are not eligible on the same basis as those in the states. In some cases, agencies have the discretion to include these areas in grants or relevant statutes and regulations expressly include these areas or agencies have been instructed to facilitate their participation (as by waiving matching requirements)<sup>3</sup>. In other cases, legislative changes may be needed to include these areas in programs or grants. ACUS in its report should note the unique challenges faced by the US Territories and Freely Associated States and the importance of agencies including them in regulatory development as well as grants, programs and data collection as permitted by law.<sup>4</sup> Some have called for the Office of Management and Budget and others to assess the impact of legislation on the US Territories as is done for tribal areas and if this were done it likely would carry over to issuing or revising regulations that implement these requirements.<sup>5</sup> ACUS can recommend similar Executive Orders or policies applying to the US Territories and FAS. ACUS also can recommend that when feasible and permissible agencies should include territorial/FAS governments in regulatory consultations on the same basis as state, local and tribal governments.

**B. ACUS should recommend that federal, state, local, tribal and territorial consultations be publicized and transparent to residents of these areas:** ACUS elsewhere has recommended to agencies measures to support public access to information, public participation and engagement in regulatory activities.<sup>6</sup> Others such as the Office of Management and Budget also are supporting these efforts.<sup>7</sup> Consistent with these recommendations federal agency consultations with state, local, tribal and territorial governments should to the extent possible be publicized and citizens in these areas should be able to provide input. Notably, this is not only the responsibility of federal agencies but one shared by local, tribal, state and territorial governments. Even when discussions must be confidential or some information cannot be shared, it is likely that at least some information about these discussions can be publicly and proactively disclosed. Thank you for considering these suggestions.

Sincerely, 

Mitchell Berger, mazruia@hotmail.com Note: Please note that I am submitting these suggestions in my personal/private capacity. The views expressed are mine only and should not be imputed to other individuals nor to any public or private entity.

<sup>3</sup> <https://www.doi.gov/pressreleases/biden-harris-administration-announces-move-reduce-financial-burden-us-territories>

<sup>4</sup> <https://www.acus.gov/projects/consultation-state-local-and-tribal-governments-regulatory-policymaking>

<sup>5</sup> <https://www.govexec.com/oversight/2023/08/federal-agencies-often-neglect-us-territories-new-legislation-aims-fix/389172/>; <https://www.whitehouse.gov/omb/briefing-room/2024/12/09/how-omb-has-strengthened-the-relationship-between-tribal-nations-and-the-united-states/>; <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/06/executive-order-on-reforming-federal-funding-and-support-for-tribal-nations-to-better-embrace-our-trust-responsibilities-and-promote-the-next-era-of-tribal-self-determination/>

<sup>6</sup> <https://www.acus.gov/page/public-availability-information>; <https://www.acus.gov/projects/public-engagement-rulemaking>; <https://www.acus.gov/projects/statement-principles-public-engagement-agency-rulemaking>

<sup>7</sup> <https://www.whitehouse.gov/omb/information-regulatory-affairs/broadening-public-engagement-in-the-federal-regulatory-process/>