

April 28, 2016

RE: ACUS Review of ABA Recommendations for Reforming the APA

To whom it may concern,

The Center for Science and Democracy at the Union of Concerned Scientists appreciates the subcommittee's careful consideration of the ABA recommendations. As subcommittee chair Neil Eisner pointed out, ACUS is being asked to comment on legislative changes to the APA, a far more delicate task than recommending reforms to federal agencies for their consideration.

Because of this, it is crucial that the subcommittee carefully consider the ABA's words, to ensure that these recommendations do not inspire legislation that has serious consequences and may harm the regulatory process.

We have many reservations about the ABA recommendations as a whole. We believe that the ABA has not demonstrated that these changes to the APA are necessary, and that they address current problems in the rule-making process. We believe that agencies, by and large, offer sufficient time for public comment, and simply lack the resources to do more retrospective review than they currently do. The biggest problem with the regulatory process is delay. Too often, agencies are held up by lengthy reviews by OIRA, or must spend far too many staff hours drafting rules that will arm them against any court challenges. Regulated industries have ample opportunities to challenge regulations at every step of their development. The available empirical evidence demonstrates unequivocally that regulated industries not only take advantage of these opportunities, but indeed dominate them to the exclusion of the public at large. These recommendations will do nothing to address either regulatory delay or the pervasive industry of regulated entities on the regulatory process. It also will not reduce political interference in agency rulemaking.

We would suggest that the subcommittee not support the ABA recommendations. However, if the subcommittee does intend to support the ABA's suggestions, some revisions and clarifications are crucial:

Recommendation One: CSD strongly urges ACUS to make a clear distinction between materials agencies rely on when rulemaking, and the materials agencies may consider. Requiring agencies to disclose the studies on which **they relied** to develop a major regulation is a reasonable request. We agree with the ABA's use of "**rely**," although we are wary of demanding disclosure after the rulemaking is final. Unless new science is so dramatic to prompt an agency to revise a regulation, we don't see the wisdom in keeping the docket open.

Recommendation Two: CSD believes that the use of “considered” creates a far broader and much more dangerous mandate: Presumably, as was discussed in the preceding subcommittee meeting, it could include textbooks on basic science, or the entire body of knowledge that informs a scientist’s understanding of the subject that the regulation addresses. Such a broad mandate will delay rulemaking, sap agency time and resources, and make agencies much more vulnerable to questions and challenges. In the worst case scenario, regulated industry will exploit ambiguities and uncertainties over this requirement to delay rulemakings, waste agencies’ scarce resources, and attack the rule during judicial review. Activist judges that oppose agency rulemakings could similarly exploit these ambiguities and uncertainties to improperly strike down agency rules. We support the subcommittee’s draft statement, which defines “consider” very narrowly. It is crucial, however, that this meaning of “consider” be part of the ACUS final statement.

We are attaching our Science Magazine commentary, documenting the dangers of recent congressional approaches to science, and the lengths to which some members have gone to use disclosure as a weapon to foreclose science-informed rulemaking.

Resolution Five: New administrations routinely have revisited “midnight rules.” This seems to be a solution in search of a problem. If ACUS does want to address this, it should incorporate its own recommendation on “midnight rules,” including a 60-day time period for review.

Resolution Six: Provided agencies have the resources to do retrospective review, we do not see the usefulness in requiring them to develop a plan for such reviews. We also do not believe that offering regulated industries yet another avenue for advising the government on rulemaking enhances democracy. On the contrary, we believe it increases the potential for regulatory capture.

Further Resolved: It is unfortunate but true that the notice and comment process, as currently practiced, does little to foster true democracy. Resources and expertise are heavily weighted in favor of wealthy special interests. The average American lacks the time, money and opportunity to engage in regulatory discourse. Reply-comments would add to regulatory delay and increase special-interest influence.

See accompanying Rosenberg, et. al. Science article, 29 May 2015, Vol 348, Issue 6238, pages 964-966.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Rosenberg", with a stylized, flowing script.

Andrew A. Rosenberg
Director, Center for Science and Democracy
Union of Concerned Scientists
2 Brattle Square
Cambridge, MA 02138 USA