



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Rulemaking

Minutes

March 25, 2011

Members Attending

Robert S. Rivkin (Chair)	Neil R. Eisner	Cynthia Farina (by phone)
Sally Katzen (by phone)	George W. Madison	Jerry L. Mashaw
Randolph J. May	Elizabeth A. M. McFadden	Nina Mendelson (by phone)
Richard J. Pierce, Jr.	Esa L. Sferra-Bonistalli	Robert A. Shapiro
Carol Ann Siciliano	Steven C. Silverman	

ACUS Staff Attending

Jonathan R. Siegel	Emily F. Schleicher	Jeff Lubbers
Director of Research & Policy	Staff Counsel	Special Counsel

Invited Guests Attending

Bridget C.E. Dooling (Consultant)	Heidi Cohen Department of the Treasury	Ted Hirt Civil Division, Department of Justice
Valerie Kovacevic Environmental Protection Agency	Rick Otis Environmental Protection Agency	Sarah Shortall Department of Labor
Martin J. Sussman Social Security Administration	Jim Tozzi ACUS Public Member	

The meeting commenced at 9:00 in the Conference Room of the Administrative Conference. Mr. Rivkin initiated introductions of the committee members. Mr. Siegel provided a brief introduction and addressed some administrative matters. He explained that the Conference has a history of working to make rulemaking better and that e-rulemaking is the new trend that warrants attention.

Overlap With Balla Report

Mr. Pierce observed that Ms. Dooling and Professor Balla's reports overlap and asked whether the Committee on Regulation had met on Thursday, March 24 and discussed the issue. Mr. Siegel said yes, and explained the main issue of overlap goes to how agencies should post comments on regulations.gov. Ms. Dooling recommends auto-posting, while Professor Balla recommends agencies publish both the date of submission and the date of posting.



Role of the Report

Ms. Siciliano asked for a clarification regarding the role of the report, as well as its fate after a recommendation is adopted. Mr. Rivkin explained the report provides information to the Conference and Committee. The Committee considers it, but is free to deviate from it. Mr. Siegel added the report is not the Committee's product. Mr. Eisner explained that Ms. Dooling may do further research and change the report, and can publish it after the Committee's proceedings are concluded. Ms. Siciliano noted that the Committee must nonetheless consider the report's power and persuasiveness because it may support the recommendation, even if the Committee deviates from the report. In light of this, she asked whether it was appropriate for the Committee to suggest ways for Ms. Dooling to make the report more robust. Mr. Rivkin agreed this would be appropriate. Professor Pierce suggested committee members could provide feedback to the consultant directly, outside of the meeting.

Does the APA Pose Impediments to E-Rulemaking?

Mr. Rivkin opened the substantive discussion of the report with the question of whether the APA poses impediments to e-Rulemaking. Ms. Dooling says no. Ms. Siciliano expressed strong support for this conclusion. We're not going to get amendments to the APA, so we have to work within it. At the same time, there are a lot of issues not addressed in the report, so the statement that the APA poses no impediments to e-Rulemaking may be too sweeping. She suggested the Committee could simply conclude that the APA does not need to be amended to deal with the issues addressed in the rest of the recommendation.

Ms. Siciliano observed that some issues outside the scope of the recommendation are not clearly excluded from draft recommendation one, such as the application of the APA to agency use of wikis, blogs, and Twitter. Ms. Kovacevic noted that agencies are interpreting how the APA applies to these tools very differently. Mr. Eisner suggested the Committee limit recommendation one by clarifying that its conclusion applies only "with respect to these recommendations." Mr. Silverman suggested another solution might be to cut off recommendation one after "e-rulemaking." Professor Farina supported striking the rest of the sentence because there may be other kinds of legislative changes to the APA needed to address other substantive issues. Professor Katzen suggested the Committee hold this discussion until it has addressed the other, more specific issues. Then the Committee could meaningfully assess whether the recommendation could be cast as "none of the above require changes to the APA." Mr. Rivkin thought this a wise suggestion, and the Committee appeared to agree.

Ms. Sferra-Bonistalli expressed her wish that blogs and wikis were discussed more in the report. Ms. Dooling asked what legal issues would be involved. Ms. Sferra-Bonistalli responded that the report could touch on record retention issues and how an agency can make sure comments received on a blog get into the docket. Ms. Siciliano asked whether blog comments would trigger an agency's obligation to respond. Mr. Eisner suggested the Committee could



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include a recommendation for further research into agency use of wikis, blogs, etc. He further noted that OMB has issued some guidance on those subjects, and we would want them to join the discussion.

Organized Mail Campaigns and Technological Proxies

Mr. Rivkin raised the issue of organized mail campaigns, asking Ms. Dooling to summarize the relevant recommendations. Ms. Dooling explained she had examined how an agency's obligation to consider comments applies with respect to mass mail campaigns. She further considered how agencies can best handle the workload associated with such campaigns within the APA's framework. She concluded that technology, particularly analytic software, could be helpful. Ms. Kovacevic noted that the eRulemaking PMO is currently evaluating software solutions.

Mr. Silverman asked whether the legality of using software or other technological proxy devices has been addressed in other contexts, such as FOIA. Ms. Dooling said she had not found any in the APA rulemaking context, but had not examined the question in other contexts. Professor Lubbers noted that using software is analogous to using contractors—something agencies already do. Ms. Kovacevic expanded on this, explaining that proxies would only be used for a first pass and would be followed by personal review. Mr. Siegel agreed. He noted an agency could cross a legal line in using certain kinds of review tools in certain ways, but found it hard to believe an agency would be legally required to read every identical comment. Mr. Silverman agreed, but queried where that line is. He further noted that if an agency receives a high number of identical comments, the number should matter. If an agency used technology to neutralize that factor, there may be a legal problem. Mr. Siegel noted the software would tell the agency how many identical comments were received, and Mr. May observed that the report considers that possibility.

Mr. May suggested draft recommendation two should say “with regard to mass mail campaigns” or the like. Professor Mendelson agreed it could be clearer, perhaps stating the Committee “sees no obstacle to agencies using a variety of devices to review comments, but agencies should make it a practice to disclose the numbers of comments received.” Mr. Rivkin asked whether the number of comments received in a mass mail campaign is typically reflected in a docket. Mr. Shapiro said yes. Professor Mendelson agreed, but noted that such organizations often now encourage comments to modify a provided text so not all the comments sent in the campaign are not exactly identical. She suggested that agencies should report the number of similar or identical comments they received, as well as the number reviewed and considered. Mr. Siegel noted that the Committee on Regulation is considering a similar recommendation.

Mr. Eisner suggested that the real issue here is the record. Agencies need to provide more specificity. Where many identical comments are received, agencies may place only one



copy in the record, but should identify how many such comments were received and from whom. And they should retain all the electronic copies somewhere. Ms. McFadden observed that the countermeasures some organizations have taken to make the same comments non-identical pose a problem to this approach. Mr. Eisner agreed, and said that agencies would have to put such comments into the record separately, and preferably electronically. Professor Farina submitted that the Department of the Interior has been using software in some of its large rulemakings, and Ms. Dooling should talk to them. She agreed that agencies must be careful to make sure the use of such software is legally sufficient. She suggested that recommendation two could include an additional sentence providing that “this should include identifying forms of comments that pose problems and recommending policies that discourage or prohibit use of these forms.”

Professor Farina also cautioned that the Committee should not assume that the only problem here is mass mail campaigns, because an agency may receive a lot of individual comments that are not form comments, but add little content to the docket. Mr. Rivkin asked what Professor Farina would do to address that issue. She responded that the Committee should simply refrain from being too specific in its recommendation. Ms. Sferra-Bonistalli suggested the Committee focus on what agencies can do to welcome rather than combat countermeasures. For example, maybe agencies should allow people to sign onto other comments already made in the rulemaking.

Professor Mashaw objected to the undercurrent of the discussion, which seemed to suggest that electronic management of rulemaking comments is a step down from the status quo. The reality is that it may be better than what agencies currently do—hire college sophomores as contractors to review comments. Professor Pierce agreed that the recommendations shouldn’t be too detailed or prescriptive. The Committee has to be sensitive to variability among agencies and the fact that these issues are a moving target. He further noted that the Supreme Court has said that agencies must consider comments, but have left the “how” up to agencies.

Requiring Electronic Submission of Comments

Mr. Rivkin next raised the question whether agencies could legally require electronic submission of comments. Mr. Madison asked how many Americans have internet access. Mr. May responded that about 67% have high-speed broadband, but that there is some variation for certain groups, particularly low income and minority groups, though the gaps are closing. Rates are lower for the elderly, too. He noted that there has been rapid growth in access, and there is plenty of data available. Mr. Rivkin emphasized the question before the Committee is not whether agencies should impose an electronic submission requirement, but only whether the law would permit them to do so. Mr. Eisner expressed his view that the APA’s is not worded to permit such a requirement. Mr. Siegel disagreed.

Professor Pierce expressed his view that the Committee should not address this issue because there is a lot of disagreement, and it will be litigated. Professor Pierce noted he agreed



with Mr. Eisner and disagreed with Mr. Siegel, and suggested that if the Committee were to make a recommendation on this subject, it would need to be very well-supported and with no dissent. Mr. Rivkin asked whether the Committee could recommend that whatever the legality, agencies shouldn't impose an electronic submission requirement now. Mr. Silverman said that he would not be comfortable with that. Some agencies may want to experiment, and if there is wide divergence of opinion, maybe the Committee should just note that and say agencies should proceed as they see fit.

FDMS System of Records Notice

Ms. Dooling explained that recommendation three deals with the FDMS system of record notice, which has been around for a while. She suggested it is time to reevaluate whether it works. Mr. Eisner asked whether there are problems with the system. Ms. Dooling responded that some clarification of the respective responsibilities of FDMS and the agencies is needed. Mr. Rivkin asked whether anyone disagreed. No one did.

Professor Katzen observed inconsistency in the phrasing of recommendations three through eight. She suggested OMB should have some role here because the recommendations go to rulemaking and information policy. She further suggested it might be appropriate for the Committee to recommend something more than for agencies to “think about it.” Could we be more definitive? Professor Mashaw agreed the recommendations seem timid, but said that based on the report, it would be hard to say more.

Ms. Dooling asked Ms. Kovacevic whether OMB was in the interagency workgroup. Ms. Kovacevic said yes and explained OMB is very involved in the process. Mr. Rivkin asked whether Professor Katzen had any suggestion to make the recommendations stronger and ensure OMB's role in the process. Professor Katzen said she did not, and Mr. Rivkin said perhaps Conference staff could come up with something.

Agency Processing of Comments

Mr. Rivkin raised recommendations four through six for discussion. Mr. Otis observed that these appear to fit into the category of operational issues, not legal issues, facing regs.gov. Mr. May suggested that although the report is focused on legal issues and impediments, operational issues naturally come up. Professor Mendelson noted that the Conference has in the past addressed both law and policy. Mr. Siegel agreed and explained that the origin of the project was legal issues, but that those sometimes lead to practical issues. Mr. Rivkin suggested that the staff could refocus the recommendations before the next meeting. Mr. Shapiro suggested the Committee should be concerned about transparency—that is, it should not just say what agencies can do, but urge them to explain their actions to the public. Professors Mendelson and Mashaw suggested the key is how agencies deal with replying to comments, and this is an area of overlap with the Balla Report.



Auto-Posting Comments

Mr. Rivkin asked what the Committee thought of Ms. Dooling's recommendation that agencies auto-post comments. Mr. Eisner said that he was opposed, explaining that agencies need to index comments before posting them, even if staff are not required to screen the comments. Ms. Sferra-Bonistalli asked why, and Mr. Eisner suggested that comments may be posted in the wrong docket and, if they are not indexed first, staff may not be able to find them later. Ms. Shortall suggested that auto-posting would be difficult for mass mail campaigns, because the large volume of comments could bury other comments in the docket, both for the agency and the public. Mr. May pointed out users should be able to search the docket. Professor Lubbers asked how an agency could post only one representative sample from a mass mail campaign if it were auto-posting.

Ms. Siciliano explained that agencies are liable for some disclosures in posted comments, and EPA would thus continue to screen regardless of whether the Conference recommended auto-posting. She further noted that it can be very burdensome for agency staff to determine and then post the relevant portion of a copyrighted material referred to in a comment. And agencies have no obligation to beef up comments by undertaking that burden, especially when they may be wrong about which portion the poster intended to rely on.

Ms. Kovacevic asked whether the real issue is auto-posting or the timing of posting? The eRulemaking PMO has already collaborated with OMB to get comments online quickly. Mr. Rivkin reminded the Committee that the Balla Report recommends agencies post the dates on which a comment is received and posted. Mr. Siegel reported this recommendation went over well at the Committee on Regulation's first meeting.

Mr. Rivkin asked for the Committee's sense of whether it could agree on a recommendation that agencies auto-post comments. Ms. Sferra-Bonistalli, Mr. Siegel, and Ms. Dooling agreed that it was the quickest option operationally, and that it could reduce the burden on agencies by using flagging or crowdsourcing to identify inappropriate disclosures. Ms. Dooling added that by adopting a process that includes a step where agencies make the decision about whether to post something, you create legal issues that might not otherwise exist. She suggested that finding a workaround on the backend, by restructuring your process, can make those issues disappear. Mr. Eisner objected that if an agency has an obligation not to disclose something, auto-posting won't work.

Ms. Dooling noted that few sites operate like Regulations.gov. In most online forums, the default rule is auto-posting, combined with flagging for purposes of monitoring. Mr. Otis said that, in his experience, many listservs screen comments. He further observed that flagging merely puts the judgment in other hands, and agency screeners may make different decisions than the people who flag postings. And it can be a lot of work for agency staff to evaluate flags. Mr. Madison suggested that agencies might need to be more cautious than other private website



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operators, because Congress might come after an agency if obscene material ends up being posted on Regulations.gov.

Ms. Shortall added that auto-posting may also infringe copyrights, thereby opening an agency to litigation. Different agencies have reached different conclusions on regarding the potential liability and how to protect against it. In light of that, perhaps the recommendation should be aimed at getting comments up faster, without urging a particular mechanism to achieve that goal.

Mr. May noted the recommendation just encourages agencies to explore changing the default to auto-posting. Ms. Kovacevic offered that Regulations.gov is currently working to provide an option that would allow agencies to permit auto-posting with flags. But an agency would have to choose to turn that function on. Mr. Eisner and Mr. May expressed their view that the recommendation should focus on the expeditious posting of comments. Mr. Siegel suggested the issue should be left to the Committee on Regulation, which is considering just such a recommendation.

Mr. Silverman suggested the Committee needs more research on whether an agency would be liable for disclosures if it decided to auto-post comments. Mr. Rivkin asked for a show of hands on whether the Committee was prepared to recommend that agencies explore auto-posting or if such a recommendation would be premature and require further research. The majority felt more research was required.

Flagging Comments

Following a brief break, the Committee turned its attention to recommendations four, five, seven, and eight. Mr. Eisner suggested that recommendation four say that the eRulemaking PMO “should provide a method for users to flag comments” rather than “explore” whether to provide such a method. Professor Farina offered that software available that screens for major obscenities, and it could be used on Regulations.gov. Mr. Rivkin observed the software might make flagging unnecessary, and Professor Farina agreed, adding that flagging often creates more trouble than it’s worth. Mr. Eisner asked whether the problem was limited to obscenity, because he read recommendation four to be broader, also encompassing privacy, security, etc.

Professor Farina suggested commenters could be required to answer certain questions about the content of comments between the time they click “submit” and the time comment is actually posted. Would that respond to liability concerns? Mr. Eisner liked this idea, but pointed out it would not help with hardcopy comments that are scanned in and then posted. Professor Farina countered that agency staff would probably look at those kinds of comments anyway. Professor Mendelson objected that a commenter cannot waive another person’s privacy or copyright, so the option may have limits.



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Mr. Silverman wondered whether the solution was something more like recommendation two—directing agencies to share experiences and best practices for dealing with these kinds of challenges. Professor Mashaw and Mr. Eisner agreed. Mr. Silverman suggested the group of recommendations could be consolidated into a single recommendation, with that as the upshot. Ms. Dooling added the recommendation could suggest the Conference provide the forum for agencies to share best practices.

Protected Information in Comments

Mr. Rivkin noted the recommendation may need to include trade secrets, copyrighted material, and inappropriate language, and asked whether the members had other suggestions to add to the list. Mr. Sussman identified PII. Ms. Dooling explained that “personal information” is intended to be a broader term than just PII. Mr. Shapiro asked whether the recommendation should address how agencies should deal with irrelevant comments. Mr. Rivkin offered that the Committee should decide which types of issues to identify specifically, and then include a term that can be a catchall for others.

Whether to Keep Paper Copies of Documents Scanned to Electronic Form

Ms. Dooling explained that electronic docketing is the most mature and useful part of e-Rulemaking. Once an agency scans something into the electronic docket, Ms. Dooling was unable to find any legal reason to retain the paper copy. Professor Katzen asked whether the public can get to a docket once it’s only in electronic form and is archived? In her experience, this has proven difficult.

Mr. Eisner noted the National Archives and Records Administration (“NARA”) has said agencies can destroy the paper once it has been scanned, and the recommendation is consistent with that position. He inquired whether the Committee ought to recommend that agencies should destroy the paper. It can save a lot of money. Mr. Silverman asked whether that was really true, and Mr. Eisner explained that DOT found it saved \$1.4 million a year in 2001 by destroying the paper, thus not having to store it. Mr. Silverman asked whether it is the Conference’s role to recommend a policy that agencies should destroy paper copies, or whether it should stick to clarifying agencies’ legal obligations. Mr. Siegel explained that it has been more common for the Conference to issue policy recommendations as opposed to legal ones.

Ms. Sferra-Bonistalli suggested that, with regard to the paper copies issue, the Committee could highlight available FDMS functions that auto-archive. Ms. Kovacevic responded that while these tools are available, agencies have to work with NARA to determine if their use is consistent with the record schedule.

Ms. Siciliano said she was uncomfortable with the legal statement in recommendation nine regarding the destruction of paper copies and asked whether the Committee would articulate the legal basis in the preamble. Mr. Siegel replied in the affirmative. Ms. Siciliano suggested



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we should examine other statutes aside from the APA and Federal Records Act, just to be sure there is no other legal impediment. Mr. Rivkin agreed, and asked whether the recommendation should say agencies can destroy paper, or that they should? Assuming agencies need not retain paper copies, should we simply recommend that they can destroy them? Several members responded “aye.” Mr. Eisner suggested that recommendation nine could start with “electronic dockets that meet NARA standards for creating the official record.” Professor Lubbers suggested we should get informed comments from NARA and run the draft recommendation by them before the next meeting.

Electronic Records on Review

A member asked whether an electronic docket is a proper record for court, and Mr. Eisner responded in the affirmative, explaining the agency simply certifies the electronic record. With respect to recommendation 11, Professor Mashaw believed the Conference had not in the past made recommendations to courts. Professor Lubbers said that the Conference had, although its statute says only that it can make recommendations to the Judicial Conference. Mr. Eisner suggested recommendation 11 should be revised to omit the second clause of the first sentence, replacing it with the second sentence. Ms. Dooling explained her intent was to encourage courts to allow electronic filing of all materials, and not just the record. Mr. Eisner objected that this would be outside the scope of the project.

Mr. Rivkin asked whether anyone objected to the recommendation that agencies provide a description of objects received as comments. Ms. Shortall suggested the recommendation could be broadened to include photographs. Mr. Eisner suggested the Committee could also recommend FDMS accept digital and audio materials. Ms. Dooling noted this could raise 508 issues, but Mr. Eisner said such issues could be avoided by, for example, providing a transcript on a video.

Electronic Recordkeeping

Mr. Rivkin asked if there was no objection to recommendation 12. Mr. Eisner said he would make it stronger. Ms. McFadden agreed, suggesting agencies should be pushed to update their schedules. Thinking about it is not enough. Ms. Kovacevic observed it could be difficult for agencies to do that. NARA’s hurdles can be a problem for electronic recordkeeping.

Scope of the Recommendation

Professor Katzen asked whether the recommendations were intended to cover those agencies that have not joined Regulations.gov. She suggested that restricting the recommendations’ scope by talking about FDMS and the interagency workgroup might leave those agencies out. Ms. Dooling explained she intended the recommendations to cover all agencies, but was concerned that failing to identify specific actors might leave things too



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amorphous and mean that no one takes the issues up. Perhaps, however, the recommendation could include a catch-all to clarify it covers all agencies.

Mr. Rivkin then summarized the Committee's areas of agreement and identified next steps ahead of a second meeting to be held in late April. Mr. Siegel suggested staff convene a "drafting subcommittee" to assist in revising the draft recommendation. Mr. Rivkin and the members agreed this was a good idea.