

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES
REAUTHORIZATION ACT OF 2011

JULY 19, 2011.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary,
submitted the following

R E P O R T

[To accompany H.R. 2480]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill
(H.R. 2480) to amend title 5, United States Code, to authorize ap-
propriations for the Administrative Conference of the United States
for fiscal years 2012, 2013, and 2014, and for other purposes, hav-
ing considered the same, reports favorably thereon with an amend-
ment and recommends that the bill as amended do pass.

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The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Administrative Conference of the United States Reauthorization Act of 2011”.

SEC. 2. AUTHORIZATION OF APPROPRIATIONS.

Section 596 of title 5, United States Code, is amended to read as follows:

“§ 596. Authorization of appropriations

“There are authorized to be appropriated to carry out this subchapter not more than \$2,900,000 for fiscal year 2012, \$2,900,000 for fiscal year 2013, and \$2,900,000 for fiscal year 2014. Of any amounts appropriated under this section, not more than \$2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries”.

PURPOSE AND SUMMARY

The Administrative Conference of the United States (“ACUS” or “Conference”) is an independent, nonpartisan agency created to analyze the Federal administrative law process and to provide Congress, the President, the Judiciary, and Federal agencies with recommendations and guidance. The Conference’s last authorization, passed in the 110th Congress, expires on September 30, 2011.¹ Accordingly, H.R. 2480, the “Administrative Conference of the United States Reauthorization Act of 2011,” extends the authorization of appropriations for the Conference through the end of Fiscal Year 2014.

BACKGROUND AND NEED FOR THE LEGISLATION*Brief History of the Conference, Its Mission, and Its Structure*

Responding to “the steady expansion of the Federal administrative process” and attendant “concern over the efficiency and adequacy of department and agency procedures,”² Congress established the Conference in 1964.³ The Conference was created as a small public/private think tank to “study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States[.]”⁴ In addition, the Conference promotes the “interchange among administrative agencies of information potentially useful in improving administrative procedure” and “collect[s] information and statistics from administrative agencies and publish[es] such reports as it considers useful for evaluating and improving administrative procedure[.]”⁵ Congress also has assigned the Conference specific statutory responsibilities.⁶

The Conference consists of 101 members: the Chairman, a 10-member Council, and 90 other members.⁷ The President appoints the Chairman for a 5-year term and each Council member for 3-

¹ See “Regulatory Improvement Act of 2007,” 110 P.L. 290 (July 30, 2008).

² Exec. Order No. 10,934, 26 Fed. Reg. 3233 (Apr. 13, 1961).

³ See “Administrative Conference Act of 1964,” 88 P.L. 499 (Aug. 30, 1964), *codified at* 5 U.S.C. §§ 591–596. Temporary conferences were established in 1953 by President Eisenhower, *Memo-
randum Convening the President’s Commission on Administrative Procedure*, Pub. Papers 219–
22 (Apr. 29, 1953), and in 1961 by President Kennedy. Exec. Order No. 10,934, 26 Fed. Reg.
3233 (Apr. 13, 1961).

⁴ 5 U.S.C. § 594(1).

⁵ *Id.* § 594(2)–(3).

⁶ See, e.g., “Government in the Sunshine Act,” 5 U.S.C. § 552b(g); “Equal Access to Justice Act,” 5 U.S.C. § 504(c)(1).

⁷ 5 U.S.C. §§ 593, 595.

year terms.⁸ Fifty of the 90 other members represent each independent Federal regulatory agency and executive department. The remaining 40 are “members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.”⁹

Justice Scalia, who was Conference Chairman from 1972 to 1974, has described the Conference as “a worthwhile organization” that offers “a unique combination of talents from the academic world, from within the executive branch . . . and, thirdly, from the private bar, especially lawyers particularly familiar with administrative law.”¹⁰ Former members include C. Boyden Gray, Counsel to President George H.W. Bush; Jack Quinn, Counsel to President Clinton; and, Sally Katzen, Administrator of the Office of Information and Regulatory Affairs (1993–99). Justice Stephen Breyer was an active member of the Conference from 1981 to 1994. Current members of the Council include Ronald A. Cass, Dean of Boston University School of Law (1990–2004); Theodore B. Olson, Solicitor General of the United States (2001–04); and Judge Patricia Wald, U.S. Court of Appeals for the District of Columbia Circuit (1979–99). Except for the Chairman, all members of the Conference serve without receiving any compensation.

For approximately 30 years, ACUS was a unique source of recommendations for improving Federal regulatory practices and procedures. During this time, the Conference promulgated approximately 200 recommendations, “most of which have been at least partially implemented.”¹¹ The Conference did so, moreover, at an exceptionally high benefit-cost ratio. For example, the Social Security Administration estimated that the Conference’s recommendation to change that agency’s appeals process would save about \$85 million annually.¹² By adopting a pilot program to implement the Conference’s recommendations for the use of alternative dispute resolution, the Federal Deposit Insurance Corporation found that it saved \$9 million in legal fees and expenses in just the first 18 months.¹³ Commenting on the Conference’s track record of success, former White House Counsel C. Boyden Gray observed, “as long as there is a need for regulatory reform, there is a need for something like the Administrative Conference.”¹⁴

⁸ 5 U.S.C. § 595.

⁹ 5 U.S.C. § 593.

¹⁰ *Reauthorization of the Administrative Conference of the United States: Hearing Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 108th Cong. 10 (2004).

¹¹ ABA Administrative Procedure Database Site Specific Digital Texts: Recommendations of the Administrative Conference, available at <http://www.law.fsu.edu/library/admin/acus/acustoc.html> (last accessed July 14, 2011); see also Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 46 n.102 (Spring 1998) (“It has been estimated that 75% of the legislative proposals of the Administrative Conference were adopted in whole or in large part.”).

¹² See White Paper, “Cost Savings Generated by the Administrative Conference of the United States,” at 3 (copy on file with the Committee), citing “ACUS Report to House of Representatives: Questions Submitted For The Record By The Committee On Appropriations” (Mar. 27, 1995) (copy on file with ACUS).

¹³ See *Id.* at 4.

¹⁴ *Reauthorization of the Administrative Conference of the United States Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. 31 (1995) (statement of C. Boyden Gray).

Lapse and Restoration of Funding

Notwithstanding the Conference's history of success, appropriations lapsed in 1995. Several factors appear to have led to this lapse.¹⁵ One cause may have been the Conference's low profile in Congress.¹⁶ Some have suggested that ACUS simply failed to survive budget-cutting times. Others have pointed to a perception that the Conference's functions could be performed elsewhere in the Federal Government, such as at the Office of Management and Budget.

Although funding lapsed, the statute creating ACUS was not repealed; Congress even continued to give ACUS responsibilities as if it were not dormant.¹⁷ Responding to continued bipartisan support for its prior work, Congress reauthorized ACUS in 2004 and again in 2008.¹⁸ The 2008 reauthorization bill was introduced by former Rep. Chris Cannon (R-UT), then Ranking Member of the Subcommittee on Commercial and Administrative Law, with Rep. Linda Sánchez (D-CA), then Chair of the Subcommittee on Commercial and Administrative Law, as an original co-sponsor. Current Chairman Lamar Smith (R-TX) also co-sponsored the 2008 legislation.

The Conference's new chairman, Paul R. Verkuil, was confirmed by the Senate on March 3, 2010, and sworn into office on April 6, 2010. The Conference's current authorization will expire at the end of this fiscal year; the Conference is currently authorized at \$3.2 million annually.¹⁹ On July 7, 2011, the House Appropriations Committee reported legislation appropriating \$2.608 million for the Conference in Fiscal Year 2012.²⁰ The Conference was appropriated \$1.5 million for Fiscal Year 2009, \$1.5 million for Fiscal Year 2010, and \$2.75 million for Fiscal Year 2011.²¹

The Need for H.R. 2480

After more than a decade of dormancy, ACUS has only just begun to operate at full capacity. Chairman Verkuil is a respected scholar of administrative law and a good choice to lead the Conference. ACUS is in a position to do much good work vis-à-vis regulatory reform and at relatively little cost to the taxpayer.

¹⁵ See generally Fine, note 11 *supra*.

¹⁶ See Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 814, 846 (1992) ("Beyond the Judiciary committees, where the Conference does a great deal of its work, there is a general lack of information among congressional staff about [ACUS and its work]").

¹⁷ See, e.g., S. 849, the "OPEN Government Act of 2007," 110th Cong., § 11 (2007) (establishing an Office of Government Information Services in ACUS); H.R. 867, the "OPEN Government Act of 2005," 109th Cong., § 11 (2005) (establishing an Office of Government Information Services in ACUS); S. 1370, the "Common Sense Medical Malpractice Reform Act of 2001," 107th Cong., § 12(b) (2001) (requiring the Attorney General and the Secretary of Health and Human Services to consult with the Conference with respect to developing guidelines for alternative dispute resolution mechanisms); S. 1613, the "Equal Access to Justice Reform Amendments of 1998," 105th Cong., § 1(g) (1998) (requiring the Conference to report to Congress on the frequency of fee awards paid by certain Federal agencies); S. 886, the "Health Care Liability Reform and Quality Assurance Act of 1997," 105th Cong., § 111 (1997) (requiring the Attorney General and the Secretary of Health and Human Services to consult with the Conference with respect to developing guidelines for alternative dispute resolution mechanisms).

¹⁸ "Federal Regulatory Improvement Act of 2004," 108 P.L. 401 (Oct. 30, 2004); "Regulatory Improvement Act of 2007," 110 P.L. 290 (July 30, 2008).

¹⁹ See "Regulatory Improvement Act of 2007," 110 P.L. 290 (July 30, 2008).

²⁰ See H.R. 2434, 112th Cong., Title V (2011).

²¹ "Omnibus Appropriations Act, 2009," 111 P.L. 8, Title V (Mar. 11, 2009); "Consolidated Appropriations Act, 2010," 111 P.L. 117, Title V (Dec. 16, 2009); "Department of Defense and Full-Year Continuing Appropriations Act, 2011," 112 P.L. 10, § 1541 (Apr. 15, 2011).

Regulatory reform is a high priority of the Judiciary Committee in the 112th Congress. This effort builds on work begun in the 109th Congress by the Subcommittee on Commercial and Administrative Law, whose Interim Report regarding potential administrative law reforms contained numerous recommendations for legislative proposals and suggested areas for further research and analysis that ACUS could perform.²²

After resuming operations in April 2010, ACUS is supervising a full program of applied research to promote its statutory goals. Currently, ACUS is conducting more than 10 research projects, including two involving electronic rulemaking (or E-Rulemaking), which are intended to improve public participation in the rulemaking process and to develop best practices among agencies. ACUS has also initiated a study aimed at identifying and recommending ways to eliminate purposeless procedural rules that result in the non-merit-based dismissal of claims by or against the Federal Government. With regard to the use of science in the regulatory process, ACUS is studying the effect of judicial standards in civil litigation on the work of administrative agencies, and the potential use of science advisory panels.

One ongoing initiative of ACUS is to encourage agencies to utilize video hearings more fully. The Social Security Administration has found that its own limited use of video hearings is saving the agency approximately \$59 million per year. At its June 2011 plenary session, ACUS adopted a recommendation to identify best practices and considerations for video hearings and urging more widespread adoption of video hearings by agencies.²³ The Conference also is examining possibilities of reducing backlogs of Freedom of Information Act requests through alternative dispute resolution techniques.

The proposed legislation, H.R. 2480, as amended by voice vote, authorizes the Conference at \$2.9 million annually for Fiscal Years 2012, 2013 and 2014. This is an appropriate authorization level under the current budgetary and economic circumstances. Given the Conference's record of producing Federal savings many times greater than its own appropriations, the Committee believes defunding ACUS altogether would be "penny-wise and pound-foolish." The amount authorized represents almost a 10% cut from the Conference's current authorization level. This is a prudent reduction that will not undermine the Conference's ability to perform its core mission of regulatory reform.

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 2480.

²²*Interim Report on the Administrative Law Process and Procedure Project for the 21st Century, Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary*, 109th Cong. (Comm. Print No. 10, Dec. 2006).

²³See Administrative Conference Recommendation 2011-4, "Agency Use of Video Hearings: Best Practices and Possibilities for Expansion" (June 17, 2011), *available at* <http://www.acus.gov/wp-content/uploads/downloads/2011/06/Recommendation-2011-4-Video-Hearings1.pdf> (last accessed July 15, 2011).

COMMITTEE CONSIDERATION

On July 14, 2011, the Committee met in open session and ordered the bill, H.R. 2480, favorably reported with an amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2480.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2480, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 15, 2011.

Hon. LAMAR SMITH, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2480, the Administrative Conference of the United States Reauthorization Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF,
Director.

Enclosure

H.R. 2480—Administrative Conference of the United States Reauthorization Act of 2011.

SUMMARY

H.R. 2480 would authorize the appropriation of \$2.9 million annually over the 2012–2014 period for the Administrative Conference of the United States, an independent advisory agency that would assist the Federal Government in developing and implementing improvements for the regulatory process. Assuming appropriation of the authorized amounts, CBO estimates that implementing the bill would cost about \$9 million over the 2012–2016 period. Pay-as-you-go procedures do not apply to this legislation because it would not affect direct spending or revenues.

H.R. 2480 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of State, local, or tribal governments.

ESTIMATED COST TO THE FEDERAL GOVERNMENT

The estimated budgetary impact of H.R. 2480 is shown in the following table. For this estimate, CBO assumes that the amounts authorized by the bill will be appropriated near the start of each fiscal year and that outlays will follow the historical rate of spending for similar activities. The costs of this legislation fall within budget function 750 (administration of justice).

By Fiscal Year, in Millions of Dollars						
	2012	2013	2014	2015	2016	2012–2016
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Authorization Level	3	3	3	0	0	9
Estimated Outlays	3	3	3	*	0	9

Note: * = less than \$500,000.

PAY-AS-YOU-GO CONSIDERATIONS:

None.

INTERGOVERNMENTAL AND PRIVATE-SECTOR IMPACT

H.R. 2480 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of State, local, or tribal governments.

ESTIMATE PREPARED BY:

Federal Costs: Mark Grabowicz
Impact on State, Local, and Tribal Governments: Melissa Merrell
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2480 extends the authorization of appropriations through the end of Fiscal Year 2014 for the Administrative Conference of the United States, which is credited with making recommendations regarding Federal agency regulatory processes that have saved millions in taxpayer dollars.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2480 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the Act as the “Administrative Conference of the United States Reauthorization Act of 2011.”

Sec. 2. Authorization of Appropriations. Section 2 authorizes \$2.9 million in funding for the Conference for FYs 2012, 2013 and 2014. Section 2 also limits the amount that may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries to not more than \$2,500.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

PART I—THE AGENCIES GENERALLY

* * * * *

CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER V—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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[§ 596. Authorization of appropriations

[There are authorized to be appropriated to carry out this subchapter not more than \$3,200,000 for fiscal year 2009, \$3,200,000 for fiscal year 2010, and \$3,200,000 for fiscal year 2011. Of any amounts appropriated under this section, not more than \$2,500

may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.】

§ 596. Authorization of appropriations

There are authorized to be appropriated to carry out this subchapter not more than \$2,900,000 for fiscal year 2012, \$2,900,000 for fiscal year 2013, and \$2,900,000 for fiscal year 2014. Of any amounts appropriated under this section, not more than \$2,500 may be made available in each fiscal year for official representation and entertainment expenses for foreign dignitaries.