The Administrative Conference of the United States: The View from the Federal Bench

*Moderated by Chairman Paul R. Verkuil**

*The Honorable Patricia McGowan Wald***

*The Honorable Stephen F. Williams****

*The Honorable S. Jay Plager*****

*The Honorable John M. Walker, Jr.******

A discussion held on October 16, 2014, at the Administrative Law Conference of the Section of Administrative Law and Regulatory Practice of the American Bar Association (Washington, D.C.).[1]

CHAIRMAN VERKUIL: I'm Paul Verkuil. We're having this wonderful program today. The federal judiciary has always had a close relationship with ACUS. Judges are well represented among the nonvoting members as liaisons and senior fellows. They include three Supreme Court Justices—Breyer, Kagan and Scalia—and of course in Justice Scalia's case he was also a former chair of the Conference. But they also include our panelists, Judge Wald who recently served on ACUS's Council and Judges Plager, Walker and Williams, each of whom is a senior fellow and a valuable participant in ACUS's plenary sessions.

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* Chairman, Administrative Conference of the United States.

** Former Judge, United States Court of Appeals for the District of Columbia Circuit; Former Member of Council, Administrative Conference of the United States.

*** Senior Judge, United States Court of Appeals for the District of Columbia Circuit; Senior Fellow, Administrative Conference of the United States.

**** Senior Judge, United States Court of Appeals for the Federal Circuit; Senior Fellow, Administrative Conference of the United States.

***** Senior Judge, United States Court of Appeals for the Second Circuit; Senior Fellow, Administrative Conference of the United States.

1 What follows is an abridged transcript of the discussion. Minor corrections and modifications have been made to the transcript by the participants, the staff of Administrative Conference of the United States, and the editors of *The George Washington Law Review* to enhance its readability. The staff and editors have also added footnotes with citations to key materials discussed by the participants.

ACUS's work has been cited over 150 times by the federal courts, most recently by Chief Justice Roberts in his *City of Arlington v. FCC*[2] dissent. The federal judiciary played a crucial role in our creation, starting with the temporary administrative conferences under Presidents Eisenhower and Kennedy.

Jerre Williams, our first chairman, and later a judge on the Fifth Circuit, at the opening plenary session in May 1968 introduced a temporary chairman, Judge E. Barrett Prettyman, by calling that great judge a founding father of ACUS. And Judge Prettyman then said that he was a passionate devotee of the thesis that government is supposed to work.

That sentiment was echoed by President Obama when ACUS was restarted in 2010, when he said that "ACUS is a public-private partnership designed to make government work better."[3] That's why I put the quote up. When you walk into our offices, it is on the wall. It's a reminder every day to all of us about what our mission really is.

By the way, a transcript of today's discussion will appear in a forthcoming issue of *The George Washington Law Review* commemorating the fiftieth anniversary of the Conference. I would like to thank the editors of the *Law Review* and in particular the Editor-in-Chief, Whitney Hermandorfer, who is here with us. So without more, let me pose a question to our talented group of judges. Let's start off with the question of what each of you would do to make ACUS help government work better. So, John, Judge Walker.

JUDGE WALKER: Paul, I'm surprised you called on me. I'm down here at the end of the table, and I'm the only judge present who is not from Washington, and I would have thought that you would have called on the Washington experts.

CHAIRMAN VERKUIL: Well, I'll put Plager in your place.

JUDGE WALKER: Oh, I'm not trying to dodge the question. I think that there are things that can be done to assist in judicial review, and I think that's a perspective that all of us offer here and that we ought to be mindful as ACUS goes forward of the role that courts play in reviewing agency decisions.

And about whether it's an interpretive rule versus a legislative rule, there is a standard of review, the amount of evidence, all of which is open to debate in various cases, and there is also a lot of

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2 City of Arlington v. FCC, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting).

3 *Chairman*, ADMIN. CONF. U.S., https://www.acus.gov/directory/chairman (last visited June 10, 2015).

discrepancy from statute to statute in terms of judicial review standards.

So to the extent that these rules can be harmonized and made to be more in accord with a kind of basic model, with obvious exceptions that might be required in particular instances, I think that ACUS would perform a great, great service in trying to do that to the extent possible.

I want to quickly thank ACUS for its fifty years of service to this country and to our chairman. This is the agency that does not cost the public a lot of money, and it performs largely beneath the radar because it stays out of politics, by and large, and at the same time it helps to make the regulatory state, which we're deeply involved in, function better. It's a great institution, and it performs a very valuable service. There are ways in which it might do its job better, but we may be discussing that a little bit today, but I just wanted to make those comments.

CHAIRMAN VERKUIL: Thank you, Judge Walker. Judge Williams, go ahead.

JUDGE WILLIAMS: Well, I do have a particular thought as to what ACUS might do, and in a general way that thought is that it might plunge more deeply into some, I think, possibly very serious problems of the administrative state. But before I touch on my primary example of that, I do want to say what I think is key about the Conference generally.

What the Administrative Conference has to offer is quite remarkable, and it's based I think on four things, which are not always—in fact very rarely—brought together in combination. One is obviously expertise. The next two are representation across agencies of the federal government and interest groups of the private sector. All the interest groups that are involved in the effects of agency activity are likely to get their voices, to some extent, heard. And finally, the capacity for empirical research. That seems to be quite an uncommon cocktail.

The particular example of getting into more tricky issues, ones less procedural and more alarming, perhaps, than most of the procedural questions that ACUS deals with, is the extent to which enforcement of agency decisions may or does constitute one step in criminal litigation. There are both normative questions and factual questions resolved in those steps. And the extent to which agencies represent a way in which steps towards actual criminal liability are decided, other-

wise than by Congress or the courts, seems to me at least deeply problematic.

CHAIRMAN VERKUIL: Thank you. Judge Wald.

JUDGE WALD: I really should be last because I'm not a judge anymore.

CHAIRMAN VERKUIL: You're always a judge in our hearts. [LAUGHTER].

JUDGE WALD: Not in your minds. [LAUGHTER]. But also it's been almost fifteen years since I left the court system, at least the national court system, so my perspective may be somewhat different. However, a couple of things occur to me that ACUS might think about, and I emphasize that they're my ideas, not to be in any way attributed to the current government board I work for,[4] which is in the intelligence area.

But I've been affected by being outside of the court and outside of the usual regulatory or the traditional regulatory agency in my current work with the Intelligence Oversight Board. It strikes me that the intelligence agencies affect just as many people certainly as the regulatory agencies—and just as significantly—but they are not and cannot be, like the regulatory agencies, subject to the Administrative Procedure Act[5] due to the need for secrecy.

Nonetheless, it seems to me that many of the decisionmaking principles which are involved in the Administrative Procedure Act involve the notion of how you come to a decision—leave public comment out of it for the moment—how internally, inside the agency, decisions are made and what the principles are, whether it's preponderance of the evidence or substantial evidence or writing, and that some of them at least could have some applicability to intelligence agencies.

My own impression, and it's only after a couple of years of working in one of them, is that perhaps because so many of the intelligence agencies originated in the Defense Department, there is a bit of a military, or at least military-like, tradition in their decisionmaking processes, much more deference to the hierarchy, without explanation or reasoning. But I do think that just a look might be worthwhile. And intelligence may not be the only one. There may be other agen-

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4 Privacy and Civil Liberties Oversight Board.

5 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

cies that, because of their specialized field, cannot be made subject to the Administrative Procedure Act and are in the same place.

But I think there are a lot of aspects to the decisionmaking process, and it would be an interesting committee assignment to look at one or two to see how their decisionmaking process goes and whether or not there's some other agencies.

The other thing is much more prosaic. No matter how much everybody, especially Judge Posner, likes to emphasize the great desirability of all judges writing all of their own opinions rather than relying on their law clerks, the fact remains that the law clerks play, especially in the regulatory cases, a major role. When you're faced with a record of tens or hundreds of thousands of pages, you're going to have to have some aides get you through that. I'm wondering whether or not some kind of ACUS manual or some kind of text on decisionmaking could be useful. Many of these law clerks come in with just one course in administrative law, no matter how good, and have no experience in actually the logistics of handling administrative records, et cetera, and so something that would be geared to them I think might prove useful, not only to them, but to the judges too.

So the last thing I'll mention very quickly is a couple years ago while I was still on the ACUS Council, Bob Katzmann, who was then on the Second Circuit, and is now of course the Chief Judge on the Second Circuit, came to talk about a program which he had worked on when he was down here working at Brookings, and which I and some other judges on the D.C. court had worked on too.[6] He was saying he thought that program, could and should well be expanded. Actually, it has been picked up, I was glad to hear, in a couple of other courts. An awful lot of the courts' statutory interpretation work involves looking at a case and saying "That didn't need to happen." Well, I mean, there is this little thing in the statute that didn't need to be there and requires an unfortunate result. There isn't any clear legislative intent; there isn't even a clear policy to explain the text, but under some standards of statutory interpretation you can't get out of ruling in a counterproductive way.

And under the program we had, those decisions would be sent to a neutral body, which Bob arranged over in the Congress, and relayed on to the various congressional committees which had oversight, and some of them actually did get fixed because Congress didn't have any

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6 For a description of the program, see Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. Rev. 637, 687–93 (2012). For Judge Katzmann's suggestion that ACUS consider adopting a similar program involving the executive branch, see *id.* at 693.

great intent in keeping it the way it was. It had to be fixed quickly. Congress didn't have any great big interest involved in them. It would be useful to see how that program has worked and whether or not it should be expanded.

I'll end here by saying a very few words about what I think ACUS's great value has been to the federal courts, and again this is retrospect on my part. The rulemaking reviews particularly, you know, involve very complex, wide-scale programs, and they affect millions of people and many, many interests (economic, sometimes even social) in our country. And yet they have to, when they are challenged, they have to be part of the adversary process, so inevitably you get two sides—maybe an amicus, admittedly, but amici very often have particular interests too—and you get only the adversary components of picking, you know, the best parts of the record or the best arguments. And I think it's very useful for a court, when it is involved in reviewing the process, which is what it is doing in a great many of the cases, it's very useful for it to have the backup of ACUS's work because ACUS represents more than the parties' interest in the case before it. ACUS represents the interests, or at least the input, of practitioners out there who may not be involved in the immediate case but would certainly be involved in the outcome. And ACUS also has a somewhat more dispassionate view of the particular process that's in dispute, its usefulness, its nonusefulness, so it's kind of like getting a lift above those thousands of pages of briefs and record and being able to look at something from a more neutral point of view. I found that to be extremely valuable.

CHAIRMAN VERKUIL: Thank you, Judge. I would say about Judge Katzmann's plan to talk to Congress about correcting those sort of errors, legislative errors that are found of review of court decisions, that we have worked with him on that and see a role for us in facilitating that. In fact, Matt Wiener, ACUS's executive director, might say something about that when we get to questions, if that makes sense. Judge Plager.

JUDGE PLAGER: Well, at least three of us vote for Bob Katzmann's program. That was on my list also. For those of you who aren't familiar with it, when he was with Brookings, I believe, he came up with a proposal that judges who decide cases dealing with federal statutes that are inadequately drafted or have ambiguities or what have you, that it would be helpful if the courts would send an informal reference to the appropriate committee in Congress, pointing out why the statute is a problem, perhaps citing the case in which it was dis-

cussed. I thought that was a wonderful idea back when Bob first proposed it. It's never really caught on, I think, widely. There has been some follow up but not very much. It is not widely done.

In my court, for example, we deal regularly and frequently with federal statutes because of a particular jurisdictional reach that we have in a variety of areas. We're almost always wrestling with federal statutes, and they're almost always up before us because there's something in the statute that there is to argue about. So that's just one example.

But we do not routinely send such an informal comment to Congress. Why is that? Well, I'm not sure. I think there is a little reluctance on the part of individual judges, and even, for that matter, on the part of the courts, to have direct communication with Congress about a particular statute that needs fixing. I'm not sure why that is, but there is a sense that that's crossing lines between the third branch and the first branch. I don't personally feel that way, but I have to admit that I've written a number of opinions pointing out where a statute falls short, but I have not taken the opportunity to send that to Congress for action, in part, I suspect, because most of us don't think much will come from it. Whether ACUS could play a useful role in that, I don't know, but I would join my colleague in urging that we give some thought to that.

Now, before I make any other suggestions about what ACUS could be doing differently or better, I want to comment that what ACUS does now I think is marvelous and much to be admired and protected. And I particularly commend ACUS for the way it goes about undertaking its particular study areas, finding consultants who are knowledgeable in those areas, and can prepare reports, most of which have a strong empirical base. There is a lot of good empirical research being done by law professors and others now, much to be commended.

ACUS has a study underway on retrospective review of regulations—that is, working with the agencies and OIRA[7] to develop an effective program on retrospective review of regulation, going back and figuring out whether these rules make much sense and are accomplishing much.

When I was administrator of OIRA that was one of my major efforts. It didn't go very far because at that time it had not surfaced

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7 Office of Information and Regulatory Affairs. OIRA is located within the Office of Management and Budget.

high enough. But I think now it's getting good play, and I hope that ACUS can urge that forward. While I'm on that, just to fill out a note, there are three, what I consider, major overseers of the regulatory behavior of the federal government: ACUS, OIRA, and the ABA[8] Section of Administrative Law. Now, there may be others, and perhaps in the discussion we'll hear about them. I happen to know those three. I was on the Council of the ABA Section, at one time I was administrator of OIRA, and obviously I'm now involved with ACUS, so I have some familiarity with all three of those and their role in overseeing the administrative process and how that impacts on the judiciary.

The ABA is good at representing the practicing bar and the interests of the larger law profession. OIRA does an excellent job in what it is able to do, but it is subject to the peripheral leadership of the administration at any given time. It's not that they come up with politically directed responses, but that their focus or their interests will be attenuated or pushed depending upon what the particular administration is interested in.

OIRA has some of the best professionals you've ever seen, but ultimately it is part of the Executive Office of the President. I hope you all know what OIRA is, the Office of Information and Regulatory Affairs. I always forget that not everybody is an OIRA specialist. Anyway, they have a wonderful professional staff, but to some extent where that staff goes and what it does is of course a part of the larger program of the President's office.

ACUS is really the only honest broker in the business, in the sense of saying that ACUS balances professional interests of the bar and commerce with government officials and government interests. And that's a wonderful merger of important interests. And those three entities together, I think, can provide important help to the regulatory apparatus, which in turn will provide important help to the judges who have to listen to all this litigation about regulatory matters.

In case you're not aware how many regulatory matters there are, OIRA has just published a draft annual report, and they report that from fiscal year 2004 through fiscal year 2013, that's a ten-year period (they usually use ten years) the federal agencies published a little over 37,000 final rules. 37,000 final rules in the last ten years.[9] That's an

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8 American Bar Association.

9 OFFICE OF MGMT. & BUDGET, OFFICE OF INFO. & REGULATORY AFFAIRS, 2014 DRAFT

enormous production of regulatory activity, and while not all of those rules will end up in those courts, a significant number of the important ones do.

Now, changing subjects quickly, a couple of my colleagues gave you large pictures to look at about what ACUS could do. Let me give you a couple of small ones. When I became a judge, they sent me to baby judges school, and I thought that was very useful. I understand, although I don't know from personal knowledge, but I understand that OPM[10] has a baby judges' school for new administrative law judges, for ALJs.

I think at one time, and perhaps all of the time, but at one time there was some interest in providing some schooling for certain new officials and agencies. I think one of the things that ACUS might seriously consider adding to its quiver would be some kind of regular opportunity for new administrative officials, particularly those in agencies that are active in the regulatory field, and particularly those officials who are responsible for that regulatory apparatus, to become familiar with the sorts of things that ACUS has talked about and has done and some of the problems that the regulatory apparatus presents for itself and some that it presents for the general public.

One of the things, as an OIRA administrator, I constantly found very aggravating was that agencies don't really talk to each other. Each agency thinks it has the ultimate mission in the country, and they're very good at it. And you can't really blame them because that's how they get rewarded for being good at what their agency does. But one agency might do something that's not helpful or even inconsistent with what other agencies do. That sort of experience I gained over the years, but most agency officials don't spend years. There's a big turnover. I think ACUS can play a significant role in that. I have one or two other ideas, Paul, but I'll save them.

CHAIRMAN VERKUIL: Well, please, make sure you put them down because your insights are extremely valuable given your experience in the executive branch.

JUDGE PLAGER: That's true.

CHAIRMAN VERKUIL: And you were also a distinguished law school dean under whom I had the privilege of teaching one summer in Indiana.

Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities 8 (2014).

10 Office of Personnel Management.

JUDGE PLAGER: You did. We were desperate. I mean, no, we were so—we were so grateful. [LAUGHTER]

CHAIRMAN VERKUIL: You always told me I was the first choice. So anyway, just let me step back. There are so many points here. I like your hierarchy of overseers of the administrative state, ACUS, OIRA, and the Ad Law Section. We're all sort of interrelated here, if not intermarried in some way.

JUDGE PLAGER: Oh, let me just add that what I was pointing to in raising—that was I congratulate ACUS and the Administrative Section for having a gathering like this where we can have interchange, and we need to do more of that and include OIRA.

CHAIRMAN VERKUIL: We recently had a statement on OIRA review, the timeliness of OIRA review, which I came and talked to you about, and you helped very much in that statement.[11] And it goes back, just to tie it altogether, when you were head of OIRA, I was then, I think, chair of the Administrative Law Section, and the question we negotiated with—

JUDGE PLAGER: Talk about incest. [LAUGHTER]

CHAIRMAN VERKUIL: We negotiated over what should be the amount of days that OIRA takes to review a rule, and in those days we came up—you agreed to sixty, but now it's ninety. And the question is for us, in our timeliness review, it was going way beyond ninety into some cases, years.

So we did look into that. I think we did so with OIRA as cooperatively as possible, and we have great relationships there.

And we're now working on retrospective review. I should say that retrospective review is one of the major recommendations that will come out of our shop this time in our December plenary Session, December 4 and 5.[12] Everyone is invited. You're also invited to participate in person or electronically in our committee process. We just finished the second meeting on retrospective review.

This is a major issue initiative in government, and it's always hard for the agencies, with their limited budgets, to look back on rules, let alone continue to get the new ones out, many of which are subject to time limits by Congress or by the courts, and you can appreciate how complicated it is. We are really taking a very serious look at this issue,

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11 Administrative Conference Statement #18: Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76275, 76275 (Dec. 17, 2013).

12 ACUS Recommendation 2014-5, Retrospective Review of Agency Rules, 79 Fed. Reg. 75114 (Dec. 17, 2014).

and people are doing great work on it, so please be looking for it when it comes out in December.

Now, and finally, I would just say in addition to retrospective review, we've really been focusing on our relationship with the courts and the judiciary.

One issue that came up for us years ago—and the recommendation that I think of is 93-4[13]—which said we should encourage informal rulemaking, discourage formal rulemaking, and even hybrid rulemaking, which, as you recall, is some variation of the two, stick with the standard of notice and comment format, limit the size of statements of basis and purpose, and the record, which Judge Wald talked about, is the problem with the courts having to deal with the thousands of pages of records on every rulemaking review. So that was the thrust of our recommendation way back then.

But over the years there's been at least an academic and I think a judicial concern about what's called ossification of rulemaking. And I thought I might ask in that light whether Judge Williams has a thought about how judicial review has contributed or not to the problem of ossification of rulemaking.

JUDGE WILLIAMS: Thank you. I guess I'm highly skeptical. If we, the United States agencies, collectively produced 37,000 rules in the last ten years, this would suggest 3700 per year. That doesn't sound like ossification to me. There certainly are vast rulemaking records, but usually in cases involving vast government initiatives which are said by one side certainly to impose very heavy costs and are said by another side to produce enormous benefits.

And it does seem to me that if you're proposing to do something which has twenty billion in costs, twenty billion in benefits, it's worth paying pretty close attention and taking years. That doesn't seem to me so bad. I also should report that the administrative law caseload of the D.C. Circuit has plummeted since I came on twenty-eight years ago.

JUDGE WALD: Saving for all the good stuff.

JUDGE WILLIAMS: Nobody has a good explanation, but it does suggest that probably—indeed, it is clear that—a very large number of those 37,000 rules go through unscathed. Presumably they're minor in impact. They don't generate the very substantial concern that leads to litigation.

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13 ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670 (Feb. 1, 1994) (corrected at 59 Fed. Reg. 8507 (Feb. 22, 1994)).

CHAIRMAN VERKUIL: Judge Walker.

JUDGE WALKER: I just wanted to go back over the discussion we had about Chief Judge Katzmann and his ideas about having better communication with Congress.

I've sent a few letters to Congress; I've never gotten a reply. They don't write. They don't call.

JUDGE PLAGER: Do they send flowers? [LAUGHTER]

JUDGE WALKER: In the Judicial Conference of the United States, there is generated every year something called the Judicial Improvements Bill, and it's routine, it goes up every year, and there are little fixes here and there of a nonpolitical nature, really, something that seems to be uncontroversial but good government.[14] And I wonder whether ACUS might get into the business of doing something like that. It could be legislative procedures improvements or regulatory processes improvements. You know, obviously you're not going to rewrite the regulations for the EPA,[15] but of a nonpolitical nature, and if that were—became traditional it might be a vehicle for doing some of these fixes of a legislative kind. With judicial participation in ACUS, the judges who are participating in ACUS could be kind of a funnel for some of those—some of those ideas as well, and that might be a vehicle to think about that.

Also, you know, and it could be clarification in the language, housekeeping matters, such as asking Congress to think about a statute of limitations that they've left out of the statute, in the rush of legislation, that kind of thing. And my hunch is that the Affordable Care Act,[16] also known as "Obamacare," may generate a few areas of controversy over time in the legislative and regulatory arena. The environmental act that was passed at the end of the Carter Administration kept the courts busy for decades. And this might be a way of alleviating some of these problems, reducing some of the costs of litigation, and resolving these questions upfront rather than having to wait for cases.

CHAIRMAN VERKUIL: Judge Wald.

JUDGE WALD: A couple of quick points, one on counseling. We started the program with—and I think Ruth Ginsburg, who was still on our crew, was very much involved in it too. And at that time, to answer one of the problems, we sent, whatever, the chair, the panel,

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14 *See* 28 U.S.C. § 331 (2012).

15 Environmental Protection Agency.

16 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. & 42 U.S.C. (2012)).

would send the notification over but not to the committee. We never wrote directly. Bob Katzmann had arranged for there to be a fairly neutral office. It might have been in the office of the majority or minority leaders or something that did not go directly to the committees, et cetera, so that it kept away from the direct contact. The same concern arose there. And it seemed to work.

We actually—I don't know what happened afterwards, Steve, but we did actually send over several, and a couple of cases, you know, we got some action. That's one.

Secondly, I just want to mention in terms of schooling for people, judges and regulatory, my experience. Quickly, I realized after the first couple of regulatory cases I was assigned to as a new judge that I needed help, so I called the Federal Judicial Center and said, you know, is there any program, anything that would kind of get a judge attuned to the regulating world, not just the glossary, but the rules of the road.

So I asked my husband, who was a regulatory lawyer, what to do—what do lawyers do or how do they get into this world. A school for all state and I think federal public utility commissions, both communications, energy, et cetera, out in Michigan, and you went through an intensive seven days, and they had all the experts come in and everything else in terms of explaining the operational business of all these agencies.

So I called up the Federal Judicial Center, and they were offering a great spectrum of programs, including deconstruction of literature, and I said, could I go to that federal school, could I go to that school for utility managers out in Michigan? They said "we've never had a request like that before," but they let me go, and it turned out to be intensely useful. It was just an intensive exposure to the world.

And the last point I would make on ossification, that debate was going on in my time too. I never really bought into it. Well, one reason, it seems to be—you know, I can joke when we talk about the huge records, and they are huge, but we had a system to manage them in the sense that the appendix, the appendix made both parties pick out the portions that they considered to be relevant for the judge to look at.

Occasionally, you might ask for something extra there, but usually for the people in the briefs, for the parties in the briefs to cite to the pages in the appendix that were relevant to their arguments, so it really was not undoable. I realize in retrospect that maybe the *Sierra*

Club v. Costle[17] decision, which was in my second year on the court, did not need to be 200 pages. I'm fully ready for that—that particular comment—but the fact is we got it out in six months. So I tend to agree with Steve on that. I think ossification is a bit of a bum rap.

CHAIRMAN VERKUIL: Do you have anything that you'd like to add to this?

JUDGE WALKER: No, sir.

CHAIRMAN VERKUIL: So *Sierra Club*.

JUDGE WALD: Now that you bring the subject up.

CHAIRMAN VERKUIL: I'm just picking out areas where the Conference has made moves and the courts have responded and utilized them, and I think that's one of them. And I happen to know this one pretty well because I was the consultant back then.

But the Conference had a recommendation, 80-6,[18] and the question was—well, it started out with the Conference's interest in ex parte contacts and ruling; and that is, an informal rulemaking where things are wide open. There are still the questions about contacts made with the agency by the outside—by members of the public, by industry, and so forth—before the notice of proposed rulemaking.

And we had a special commission back in 1977 in light of the *Home Box Office, Inc. v. FCC*[19] case in the D.C. Circuit, which is very familiar to you, and from there we prescribed some limits on this sort of wide open ex parte contact practice.

Recently this past year we've revisited that recommendation,[20] but the ex parte question then became even more intriguing. Could the government be engaging in ex parte contacts? And that's the purpose of 80-6, which was whether OIRA and other government agencies were receiving and giving information to agencies off the record and whether there should be constraints on that sort of White House participation in agency rulemaking.[21]

Recommendation 80-6 came up with a compromise, which said that factual information should be placed in the record but not ideas and oral communications that were policy and not fact. You then got

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17 Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

18 ACUS Recommendation 80-6, Intragovernmental Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.80-6 (1993).

19 Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977).

20 ACUS Recommendation 2014-4, "Ex Parte" Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014).

21 *See* ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6.

the case in *Sierra Club*,[22] and I know you cited the recommendation and the—and I assume the article—and the article was behind it, which I had the privilege of writing.

JUDGE WALD: I cited every article that was ever written on this.

CHAIRMAN VERKUIL: Well, I thought you carefully selected these articles. But anyway, was it helpful to you? I mean when you were deciding this case early on in your career, your brilliant career, did the ACUS recommendation and supporting materials make a difference for you?

JUDGE WALD: Well, insofar as at my advanced stage of life I can take my memory back that far, yes, I think it was. Actually, I went back and reread the decision before this forum, the *Sierra Club* decision, and I found that we cited it a couple of times,[23] so I know that it was useful. As you pointed out, *Home Box Office* was the principal case on the subject of ex parte comments up to that point and was written by Judge Wright.

CHAIRMAN VERKUIL: Yes, indeed.

JUDGE WALD: Well, anyway, *Home Box Office* had pretty much followed the path of adjudicatory rulings, and said that traditional due process was necessary in informal reviews.[24] And along comes, you know, *Sierra Club*, with ACUS's recommendation for a different, more flexible procedure, but in terms of the court we had to decide which direction we were going in. So your article and the ACUS recommendation were useful for several things.

I don't know whether the early ACUS recommendation, but certainly your article and the latest ex parte 2014 ACUS report, picked it up the criticism of using the "ex parte" term to apply to those communications outside the record.[25] I know it's embedded now in the conversation so we'll never get rid of it, but it bears noting that you had said it originally, we said it, and we took a whole paragraph to point out these really are not ex parte comments in the usual ex parte sense, you know, that one party gets it and it kind of gets to go to the agency without the other party ever knowing.

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22 Sierra Club v. Costle, 657 F.2d 298, 407 n.528 (D.C. Cir. 1981) (quoting ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6) (citing Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980)).

23 *Sierra Club*, 657 F.2d at 394 n.469, 407 n.528.

24 Home Box Office, Inc. v. FCC, 567 F.2d 9, 57 (D.C. Cir. 1977).

25 *See* ACUS Recommendation 2014-4, 79 Fed. Reg. at 35,993; Verkuil, *supra* note 22, at 982.

Well, anyway, I'll just point out a couple of ways in which ACUS was very helpful in drafting the opinion. In *Sierra Club*, we had the Clean Air Act,[26] which had some of its own particular review provisions, so it wasn't strictly an APA standard of review.[27]

I'll also point out, because the issue is still around in the latest ACUS report, that all of the conversations in the *Sierra Club* rulemaking were post comment.[28] The written documents had been put on the record, but the question was whether or not oral conversations—the content of oral meetings—should be put in.[29] For instance, Senator Byrd—of the coal state of West Virginia—had nine meetings with the EPA by the time the public record closed and the EPA's ultimate decision came out.[30] And an actual change was made during that time in one of the important subsidiary parts of the rule in terms of the limits on the restricted level of sulfur from the coal, so there were a lot of red hot signals that something was going on.

We did decide that the meetings had to be docketed, but as to the content of the oral meetings, we would follow the statute, which required a much lower standard for disclosure than your current ACUS recommendations because the statute said that these comments, their content, had to be on the record only if they figured heavily in the ultimate decision—that they actually had influenced the outcome of the rulemaking and any error in nondisclosure was so egregious that a different result would most probably have resulted, which is certainly a much higher standard peculiar to that Act.[31]

But I think that debate may still be around because the way we upheld that particular provision was to say, well, your agency will get an awful lot of stuff post comment which would be considerably more than is involved in its decisionmaking; a lot of it was not decisive in this case and not necessary to disclose. Finally, I would say that it seems to me that *Sierra Club* parallels pretty closely to the current ACUS report and even the ACUS report back then in terms of if there were oral meetings and oral comments which were of decisive value, then they need to be made known, they need to be accessible to the parties, so that they can comment on it. It seems to me, however, we did go easier on the intragovernmental things.

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26 Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401–7671 (2012)).

27 *Sierra Club*, 657 F.2d at 311–12.

28 *Id.* at 386.

29 *See id.* at 386–87.

30 *Id.* at 387.

31 *See id.* at 402, 409–10.

CHAIRMAN VERKUIL: Right.

JUDGE WALD: In fact, now that I look back on it, I was a little pompous in the origins of our reasoning, but anyway there was a bit of talk about the original founders, you know, how they expected there to be an energetic and responsible executive who would be able to apprise itself of all of the comments and all of the input of all the various people, interested in its actions so that only if there were some brand new considerations of critical importance which had not been addressed and had not been accessible to the parties would it be necessary to overturn the agency.[32]

CHAIRMAN VERKUIL: Sure.

JUDGE WALD: Some might say we were really easy on the Senator, on Senator Byrd, because he said, "well, Congress is a third party in our government" and we're not going to repeat every time there's a meeting with Congress—there were fifty-five inputs between the end of the comment period and the issuance of the rule by Congress people—and we agreed. So we said "Only if their meetings raise something which is inappropriate."[33]

CHAIRMAN VERKUIL: Just for the audience, it is true, it's a strange phrase. Ex parte in rulemaking doesn't really fit because there are no parties in rulemaking; there are interested persons, so that was the one point. But we're stuck with the term because we couldn't find this time around, again, another way to phrase it that was better because it's now part of the lexicon, so ex parte it is and it will stay.

JUDGE WALD: Yeah.

CHAIRMAN VERKUIL: Judge Williams, did you want to make—

JUDGE WILLIAMS: I just want to say that ACUS and Judge Wald must have done a very good job because in my twenty-eight years I don't think I've had an ex parte communication problem or at least one that wasn't just readily disposed of. That made me feel that I obviously wasn't paying attention at the time that 2014-4 was adopted. It may have been a meeting where I wasn't able to be present. What was left to mop up at that point?

CHAIRMAN VERKUIL: Well, we went back and reviewed the 1977 report to see what the agencies themselves, what they were doing

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32 *See id.* at 405–08.

33 *See id.* at 314–15 n.22, 409.

with their "ex parte rules" because only a few agencies had stepped out and we reviewed the status of that. Judge?

JUDGE PLAGER: If you are a regulated industry or a business that is in the sights of the regulatory agency and you get wind of a proposal or a modification of an existing regulation, there are really four ways for you to participate.

One is you can wait until all the regulations are written and published for comment and then put your comments in. If you happen to be the lawyer for such regulated industry and you give them that advice, they'll find another lawyer.

What are your other alternatives? Your other alternatives are go to the agency more or less off the record to people you have gotten to know, you hope, and find out what they're doing and why they're doing it and what you can do to affect it. That's called lobbying, particularly; it's called lobbying.

The other alternative is you go to Congress and Congress takes some pride in being able to fix things so Congress would then get in touch with the agency or whatever is going on.

The third or now the fourth alternative would be to go to the White House, and that usually meant going to OIRA and putting your voice in the mix at that point.

When I became administrator of OIRA, there was at least thought to be a certain amount of what we'll call ex parte contacts with the OIRA process by outside interests when there was a regulation being reviewed by OIRA. As you all may know, under the executive orders now the agency can't publish until it has gone through the OIRA review process, OIRA acting on behalf of the President, who, after all, is the ultimate head of the agency.[34]

Well, I quickly realized that I could be spending an enormous amount of time fending off people who wanted to come and tell me their problem, and that wasn't what I thought was my job. So I adopted a policy, an invariable policy, and made it known that I was uninterested in talking to anyone other than the agency that was proposing the regulation, which, of course, we had to talk to because that was our job to review the agency proposal. And I made it clear to the outside world that I really didn't want to hear from them and that if they wanted to be heard from, they—as far as I was concerned, they could do it the first way I suggested, wait until the document was published for review.

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34 *See* Exec. Order No. 12,866 § 6(b), 58 Fed. Reg. 51,735, 51,742 (Oct. 4, 1993).

Now I wasn't naive enough to think that that shut off any and all ex parte communication between outside interests and the White House staff or whatever. But it worked very well for me because in my time as OIRA administrator I could honestly say I never heard from the White House chief of staff or legal counsel or from either of the two OMB[35] directors with whom I served telling me about somebody who'd come to see them and was wanting this, that, or the other thing done on a regulation.

In other words, everybody honored my position, which was no ex parte communication with the administrator of OIRA. I have no idea what was going on elsewhere in the building or elsewhere in the administrative world, but I thought the combination of shutting off Congress's participation in ex parte and the message that most of the agencies have gotten that that isn't the way the system should work. I plugged, I thought, the last hole in that formal process.

I have no idea what the rules are today. I haven't asked, and I'm not sure I want to know, but I can say if anyone is thinking about becoming an OIRA administrator, it's the only way to do it because it left me free to go fishing and do a lot of other things that I really wanted to rather than talk to the current crop of lobbyists.

CHAIRMAN VERKUIL: Well, I'll just add a factual footnote here, there's not a lot of gone fishing going on with the current OIRA administrator. The rules now are that, you know, they will record and note any meeting with someone from outside government before OIRA.[36]

JUDGE PLAGER: I should say that if someone insisted on coming to see me despite my position, I said, "Fine. We also will invite the agency in and the three of us would meet." And suddenly everybody lost interest in being involved in these meetings. So there may have been a few occasions—I don't remember exactly—there may have been a few occasions when I met with the agency and the industry representative, and of course it didn't go anywhere, but that worked very well too.

JUDGE WALD: Can I just note one thing? I had my notes from your prior suggested questions, some of which we haven't and won't be able to get to, but I think that—I'm a nontechnologist for sure, but it strikes me I don't have the slightest idea how you're going to handle

35 Office of Management and Budget.

36 *See* Exec. Order No. 12,866 § 6(b)(4), 58 Fed. Reg. at 51,742.

the kind of digital social contact in terms of ex parte communications. And so that's another area. Maybe it's been taken care of.

JUDGE WALKER: What do you mean, the administrative officials reading tweets?

JUDGE WALD: Yeah, well, tweets coming to OIRA.

JUDGE WALD: Well, just in general, if you get—you get that medium on Facebook and that kind of thing, you know, how do you handle the ex parte in that situation?

CHAIRMAN VERKUIL: Well, by the way, we just completed last year a recommendation on the use of social media in rulemaking.[37] And I think Michael Herz is back there and had a role to play. Maybe he'll ask a question or give a statement about it.

Here's the question: What do you do if you're a rulemaker with Facebook and Twitter and all other kinds of things and can you—well, is it really helpful? And indeed, what happens on judicial review? Do you have to put that all in the record, and would the record then grow beyond these thousands of pages? It's a wonderful question which is still ongoing and important.

I'm sure from OIRA's point of view, the best—at least with respect to social media, you can't get the cell phones of many people in OIRA, and I suppose for good reason. It's hard.

JUDGE PLAGER: And as I mentioned earlier, the staff in OIRA will do exactly what they are told. If they're told not to make the—not to accept those kinds of contacts, I never had the slightest indication to believe that they would accept those kinds of contacts.

CHAIRMAN VERKUIL: No. I'm sure. By the way, one of the things I have come to admire as a public official is the quality of the people that are in government in all the agencies I've been exposed to. One of the things our agency does is, as I think you've said, Judge Plager, that we facilitate conversations across agencies. It's a silo effect. I at least think about a university where I used to be—used to run a university, and all the departments—they wouldn't talk to each other. It became very frustrating on a small campus when you realize that they were right next door to each other, maybe sometimes in the same building, but, you know, sociology doesn't talk to economics and so forth, and certainly the humanities don't talk to the sciences.

JUDGE PLAGER: Those are understandable. [LAUGHTER]

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37 ACUS Recommendation 2013-5, Social Media in Rulemaking, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

CHAIRMAN VERKUIL: When you come to agencies, it's the same thing, because everyone is so focused on the mission and the mission being narrowly defined. But again, there's so much going on, so we really have to facilitate these conversations in important ways, the very fact of having committee meetings and in assembly where we now have sixty agency officials representing over 200 agencies coming together in the same room with former agency people who are now in the private sector and other officials and judges, in particular, who come in and offer really good comments.

The other thing we did, and actually this started in the Reagan years, Loren Smith, who had my job then, created this thing called the Council of Independent Regulatory Agencies (CIRA)[38] which I revived when we came back. That is, independents—and there are sixteen of them in our group—they certainly don't want to talk to OMB. So, as you know, the independents don't, but they also don't talk to each other, and so they tend to be isolated even more so really than the executive agencies.

And so we bring them together on a regular basis, four—three or four times a year—to talk about common problems of interest and best practices, and it's a very productive relationship.

Well, maybe it's time for some questions from the audience to this interesting panel. Michael, do you want to say anything about social media while Jeff is lining himself up?

MICHAEL HERZ: So I actually don't have much to say about social media because while I was working on that report the ex parte contact project started, and in anticipation of the ex parte contact projects grappling with the issue of social media and rulemaking, we sort of punted it in the social media report. And then somehow or other when the ex parte contact report came out, it didn't really grapple with the social media aspects either, so that issue remains fully to be grappled with.

But I will say that the underlying report and the ultimate recommendations on social media as well as a couple of earlier reports, including the e-Rulemaking one, tended to find that in fact most concerns about the legality under the APA or other statutes of the use

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38 *See* OFFICE OF THE CHAIRMAN, ADMIN. CONF. U.S., REGULATORY RELIEF AT THE INDEPENDENT REGULATORY AGENCIES (1982), https://www.acus.gov/sites/default/files/documents/CIRA%20Report%20on%20Regulatory%20Relief%20at%20Independent%20Regulatory%20Agencies.pdf.

of modern technologies and the Web are probably overstated, that this is actually a manageable problem.[39]

I'll ask another question if I could—this might be a slight mischaracterization so Paul will correct me if I'm wrong, as he always does—which is, I think that ACUS's most muscular recommendations tend to be aimed directly at the agencies of the executive branch, and that they are somewhat wearier in talking about what Congress should do or might do, and probably most careful in addressing the federal judiciary.

So the ex parte contact recommendation, for example, justly celebrated, was not directed at the courts in any way. It was directed at agencies and then useful to the courts.[40] It's a fairly short list of recommendations that are actually aimed at judges. I think there may be some reluctance in sort of telling a federal judge how she should do her job. And I'm wondering, now that we have a panel of federal judges, (a) does that description ring true, and (b) if it does, if there is some sort of hesitancy to speak directly to the judiciary, is it appropriate or misplaced?

JUDGE WALD: I would be glad to make a stab at that.

CHAIRMAN VERKUIL: Sure, of course.

JUDGE WALD: Since nobody can get to me now that I'm not one of the federal judges.

JUDGE PLAGER: You can never be sure.

JUDGE WALD: There can be no retaliation. I point out first that you have some precedent. The law reviews do not hesitate remotely in telling the judges what they have done right, wrong, or in between.

So I think well-thought-out and considered observations, perhaps not even recommendations but observations, would be very useful to judges, and I think I would have taken them in good stead.

For instance, it strikes me—I don't read every slip opinion anymore, believe it or not. To me it's like quitting smoking for the first six months, you're desperate, but after that . . . okay. But it does seem to me that, in reading many of the opinions that I do read, many cases involve interpretation of statutes more so than the "you didn't do the record right," or "you didn't come to a reasonable conclusion," or even "you didn't pay enough attention to X particular factor." As

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39 *See id.* at 76,270; *see also* ACUS Recommendation 2011-1, Legal Considerations in e-Rulemaking, 76 Fed. Reg. 48,789, 48,790 (Aug. 9, 2011).

40 *See* ACUS Recommendation 2013-5, 78 Fed. Reg. at 76,270.

opposed to types of reasoning, I mean, I think where there is straight statutory interpretation, judges can legitimately be criticized on that basis.

And one thing I have heard off the record from some of my judicial and former judicial colleagues is that sometimes what the judges do, which bothers them some, is deciding a case on a basis that really wasn't raised and argued. I think that's something which I'm not saying necessarily ACUS can recommend to the judge because every case is different, but there may be observations, evaluations of what has happened in the past, better ways to do it, because I think that's one of the practices which bothers not just the law reviewers but even some of the judges themselves.

JUDGE WILLIAMS: And I would second that. And I'm now exposing myself to receiving these recommendations. And for me, given the special characteristics of ACUS that I mentioned in the beginning, they would come to me with extra "umph" that would not be true—would be less true—of an ordinary recommendation.

JUDGE WALKER: I would also agree. I think that ACUS is an impartial agency and has expertise drawn from a spectrum, as we've discussed, and I would want to pay attention to an ACUS recommendation. It might not be couched in terms of "do this judge," but consider the possibilities, and then I would weigh the pros and cons and explain their position. And it seems to me acceptable for its persuasive value, you know, and would get the deference it deserves, which might vary depending upon the recommendation, more or less deference.

CHAIRMAN VERKUIL: Well, we'll take that. That would be great. We would like to try for the—you know, the big one but . . .

JUDGE PLAGER: In the course of this discussion, we have to remember that the judiciary has a rather elaborate system of rulemaking for itself. It has committee structures that look at the procedures. We have a body of rules of how we are to proceed in a variety of different ways. Those of you who get familiar with the Federal Rules of Appellate Procedure and Federal Rules of Evidence understand the elaborateness of all that machinery that's designed to constantly review those processes.

Having said that, however, I'm sensitive to the fact that not much of it focuses directly on the role of federal agency relationships or federal regulatory issues vis-à-vis the judiciary. I think if ACUS had its focus there, it would be hard for any judge to take umbrage at ACUS's participation in that discussion. Judge all actions on what

might make the public news, which is judges who decide they know better than the parties how the case should have been argued, and write an opinion based on issues that neither of the parties even talked about or focused on.

That happens on occasion. And I personally find it rather outside the proper role of the judge. I don't think that's limited, however, to the regulatory.

JUDGE WALD: No, no, no.

JUDGE PLAGER: So I wouldn't recommend that ACUS jump into that particular—

CHAIRMAN VERKUIL: No. No. I think, honestly, if we were to play a role productively, we should stick to things we know and are experts in in order to seek *Chevron*[41] deference, and that would be the APA, and that would also be administrative common law more generally because the APA, we all know, doesn't cover the field. But, you know, *Chevron* itself is administrative common law, so we should be thinking about how we can make statements there that help you in your job. That's how I would view our limits by law. Anyway, Jeff.

JEFF LUBBERS: May it please the Court. I'm Jeff Lubbers. I'm now at American University, but I used to be on the staff at ACUS in the first go-around, and I remember well the very valuable contributions of our judges.

So I have a question about judicial review of rulemaking. It's an issue I've been interested in for a little while, especially after reading an opinion by Judge Williams, and it has to do with the concept of issue exhaustion in rulemaking; namely, whether or not, if someone challenges a rule in court, it can be precluded from raising an issue if they—if it had not raised it itself or maybe someone else had not raised it in the comments in the rulemaking process itself. So if you haven't raised the comment in rulemaking, you can't bring that issue to the court.

And that concept, that requirement, is contained in only one law that I know of. The Clean Air Act has a provision that requires that,[42] but the D.C. Circuit[43] and some other circuits have now been requiring this across the board.[44]

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41 Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

42 *See* 42 U.S.C. § 7607(b) (2012).

43 Koretoff v. Vilsack, 707 F.3d 394 (D.C. Cir. 2013) (per curiam).

44 *See, e.g.*, Universal Health Servs., Inc. v. Thompson, 363 F.3d 1013, 1020–21 (9th Cir. 2004).

My concern is that it might disadvantage lower-resourced participants in rulemaking. They might not able to raise any comments or as many comments in the rulemaking and then would be precluded from bringing those issues to the court.

And Judge Williams, in the *Koretoff v. Vilsack*[45] case, you raise interesting concerns about that which I—which I'm trying to incorporate in my article. And I'm also hoping that ACUS might be interested in this issue as well.

JUDGE WILLIAMS: So I think a lot of people might see it as a serious problem that in the particular instance I cited in that separate opinion, a small company was affected, but had never heard of this regulation coming down the pipe.[46] And there is something troubling about the notion of a system where anybody involved in any kind of enterprise has to spend a significant amount of his or her time keeping an eye on not one but probably several administrative agencies. That's asking a lot.

And of course it's combined with the fact that there are typically heavy hitters within an industry group who are likely to work out a deal with the agency by which they are more or less satisfied, but that may be extremely inconvenient for people in the industry who are not part of that group. So I'm not sure what the solution is, but I certainly felt it should be raised. I hope you'll come out with the answers.

JEFF LUBBERS: I just wondered, does Judge Wald have a comment?

JUDGE WALD: No.

JUDGE PLAGER: A quick comment. We get that problem in cases that come before us from the Veterans Court of Appeals and also through the Merit Systems Protection Board, cases that are personnel cases. Jeff put his finger on exactly where the problem is; and that is, at least, certainly, in the VA[47] benefits cases that come up through that elaborate VA hierarchy process before they even get to the Veterans Court of Appeals before it then gets to us, much of that goes on without lawyering on behalf of the petitioners.

So the petitioners are doing the best they can with a very complex system, and it sometimes isn't until they literally get before us that they are able to get counsel, often pro bono or no counsel—we have a system for that—at which point an issue will be raised that has not

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45 Koretoff v. Vilsack, 707 F.3d 394 (D.C. Cir. 2013) (per curiam).

46 *Id.* at 401 (Williams, J., concurring).

47 Veterans Affairs.

been raised up the road. Most of us have no problem with simply saying there is no waiver of any of those issues. We may have to remand it back for consideration, but we're certainly not going to foreclose the raising of an issue.

On the other hand, if you've got two big law firms in Washington fighting over something for twenty years in district court and finally it comes to us and somebody says "oh, by the way," and we say "no, no by the way."

CHAIRMAN VERKUIL: Judge Braden.

JUDGE SUSAN BRADEN: Chairman Verkuil. I'm Susan Braden. I remember the statute. I was on the Council a number of years ago. I've attended a lot of ACUS meetings. I agree with Paul's view that this is the most important, I think it's the most important section of the American Bar Association for a variety of reasons. The intellectual wealth here cannot be matched in any other section in terms of its breadth and diversity. Now Judge Williams lamented about the plummeting of his docket and this is my observation.

JUDGE WILLIAMS: I wasn't lamenting, just observing.

JUDGE SUSAN BRADEN: I started my life in the Department of Justice's Antitrust Division, and as some of you know, in the 1970s, now-Justice Breyer, on a golf course, dictated the version of guidelines to then the Assistant Attorney General of the United States for antitrust, and the guidelines that have morphed through several variations over time, but I mean they're not the law, and I think the agencies have found a clever way of getting around judicial review, which is, rather than go through rulemaking whenever they can, to issue a guideline.

CHAIRMAN VERKUIL: Another hot topic that we have looked at, and I'm sure will continue to do, and I appreciate you bringing them up. I really like this idea about the participation requirement or not as a topic. We're going to take a close look at that.

And let me say one more thing because we are nearing our closing time. We would welcome from the judiciary, from this group of judges in particular, any time you have an idea which you, I know, are willing to do, send it to us. One project that I know will be of interest: we are beginning a project on the review by district courts of social security disability decisions. It's up on our website, and we're for looking for good consultants.

And generally you should keep an eye on our website for those of you in the academic world and others interested in doing consulting for the Conference. We are very interested in finding new ideas. And

when you talk to Congress and you try and suggest things, talk to us too. We would be grateful. Well, thank you. I think this was a very nice session.