

Opinions on ACUS: The Administrative Conference's Influence on Appellate Administrative Jurisprudence

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INTRODUCTION

The Administrative Conference of the United States ("ACUS" or the "Conference") has been charged by Congress with studying "the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs," as well as with making related "recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States."¹ The Conference regularly exercises this statutory authority and typically issues five to ten such recommendations annually, accompanied by supporting research reports prepared by external consultants or staff.² Recommendations are informed by debate and discussion in meetings of the Conference's committees and are finalized at the semi-annual plenary sessions before the full Assembly of Conference members.³ Over two hundred recommendations have been issued since the open-

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1 Administrative Conference Act, 5 U.S.C. § 594(1) (2012).

2 See generally David Pritzker, *Bibliography of ACUS Publications*, 83 GEO. WASH. L. REV. 1798 (2015).

3 Paul R. Verkuil, *What the Return of the Administrative Conference of the United States Means for Administrative Law*, 1 MICH. J. ENVTL. & ADMIN. L. 17, 21–22 (2012).

ing plenary session in 1968.⁴ The Conference's power is persuasive rather than political; its recommendations are advisory in nature.⁵

In order to evaluate and improve administrative procedure, Congress has also generally authorized the Office of the Chairman (the Chairman and agency staff) to collect and report information and statistics from administrative agencies.⁶ For example, in 2012 the Conference published a *Sourcebook of United States Executive Agencies* that describes the diversity and structural characteristics of agencies in the federal executive establishment.⁷ Congress occasionally tasks ACUS with more specific research requests, such as in 1980 when it directed agencies to consult with the Office of the Chairman of ACUS before adopting regulations to implement the Equal Access to Justice Act.⁸ This important fee-shifting statute provides attorney fees and other expenses to parties that prevail over the federal government in certain administrative and court proceedings.⁹ Similarly, in 1978 the agency issued *An Interpretive Guide to Government in the Sunshine Act*¹⁰ in response to a congressional directive requiring multi-member agencies, boards, or commissions to consult with the Office of the Chairman prior to adopting rules to increase the transparency of meetings in which the Members act on the agency's behalf.¹¹ The Conference has issued dozens of such publications and reports on administrative process and procedure over its fifty-year history.¹²

In 1994, Congress defunded ACUS for a variety of reasons, many of which are explored in an earlier set of symposium contributions by Conference friends and scholars.¹³ In one such piece, former ACUS Chairman Loren Smith (who is also a former chief judge of the United

⁴ David Pritzker, *Recommendations and Statements of the Administrative Conference*, 83 GEO. WASH. L. REV. 1822 (2015).

⁵ See 5 U.S.C. § 594(1) (authorizing ACUS to "study" and "make recommendations").

⁶ See *id.* § 594(3).

⁷ DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2012) [hereinafter LEWIS & SELIN SOURCEBOOK].

⁸ Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified as amended at 5 U.S.C. § 504 (2012)); see ACUS Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings, 1 C.F.R. § 315 (1995); ACUS, Equal Access to Justice Act: Agency Implementation, 46 Fed. Reg. 32,900 (June 25, 1981).

⁹ 5 U.S.C. § 504(a)(1).

¹⁰ RICHARD K. BERG & STEPHEN H. KLITZMAN, ADMIN. CONFERENCE OF THE U.S., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT (1978).

¹¹ Government in the Sunshine Act, 5 U.S.C. § 552b(g) (2012).

¹² See Pritzker, *supra* note 2.

¹³ Symposium, *Administrative Conference of the United States ('ACUS')*, 30 ARIZ. ST. L.J. 1 (1998).

States Court of Federal Claims) praised the Conference for having functioned as a “high-level forum where senior government policy-makers and regulators, administrative law scholars, leading practitioners in the regulatory and administrative law area, and a few judges could look at the regulatory and administrative law system as a whole.”¹⁴ This forum simply did not exist during the fifteen years that the Conference was inoperative.¹⁵

Fortunately, the Conference’s written legacy lived on. On the occasion of the Conference’s fiftieth anniversary, this Article examines the influence of its publications and recommendations on the federal judiciary, as evidenced through discussion or citation of its work in more than 150 published opinions of the Supreme Court of the United States and the United States courts of appeals.¹⁶ An in-depth look at each of these cases is not feasible in this limited space (and indeed might reveal some citations lacking in significant discussion of the Conference’s work). Therefore, the approach of this Article is to examine references to the Conference’s work using select cases as vignettes to illustrate influential Conference scholarship.¹⁷ The article is organized by jurisdiction, focusing first on the Supreme Court of the United States, turning next to the United States Court of Appeals for the District of Columbia Circuit, and finally to other United States courts of appeals.

I. DISCRETION, DUE PROCESS, AND ACUS SCHOLARSHIP AT THE SUPREME COURT

Three current Supreme Court Justices—Justices Scalia, Breyer, and Kagan—are Senior Fellows of ACUS, and each was involved with the Conference prior to joining the Supreme Court. Justice Antonin Scalia chaired the Conference from 1972 to 1974, during which time he oversaw the development and issuance of a number of recommendations.¹⁸ He later served as a Public Member from 1978 to 1982 and has been a Senior Fellow ever since (excepting, of course, the Confer-

¹⁴ Loren A. Smith, *The Aging of Administrative Law: The Administrative Conference Reaches Early Retirement*, 30 ARIZ. ST. L.J. 175, 176–77 (1998).

¹⁵ ACUS was officially reestablished in 2010, when the Senate confirmed the appointment of Chairman Paul Verkuil. See *History*, ADMIN. CONF. U.S., <https://www.acus.gov/history> (last visited June 4, 2015).

¹⁶ The research methodology used herein focused on specific references to ACUS and did not capture all references to consultants’ supporting reports, which are typically published in academic law journals and are also frequently cited.

¹⁷ A full list of the cases citing ACUS work is on file with the author.

¹⁸ *Antonin Scalia*, ADMIN. CONF. U.S., <http://www.acus.gov/contacts/antonin-scalia> (last visited June 4, 2015).

ence's fifteen-year hiatus).¹⁹ Justice Stephen Breyer was a Liaison Representative during his tenure on the First Circuit from 1981 through 1994 and Justice Elena Kagan was a Public Member from 1994 to 1995.²⁰ Both joined the Conference as Senior Fellows after it was reestablished in 2010.²¹

The Conference's scholarship has been cited in ten Supreme Court decisions—including seven opinions for the Court—but never by Justices Scalia, Breyer, or Kagan.²² Between 1963 and 2013, Conference publications and recommendations were referenced in two opinions by Justices Marshall and Rehnquist, and in one opinion each by Chief Justice Roberts and Justices Alito, Douglas, Blackmun, Brennan, Stewart, White, Blackmun, Powell, and O'Connor.²³ Most citations were to Conference works issued prior to its temporary dissolution in 1995, but more recent Conference scholarship was cited in the Chief Justice's dissenting opinion²⁴ in the closely watched October 2012 Term case, *City of Arlington v. FCC*.

In *City of Arlington*, the Supreme Court examined the appropriate level of judicial deference to an administrative agency's interpretation of ambiguous language in the statute conferring the agency's statutory authority.²⁵ Writing for the Court, Justice Scalia deferred to the agency's interpretation under the familiar rule set out in *Chevron*

¹⁹ *Id.*

²⁰ *Stephen G. Breyer*, ADMIN. CONF. U.S., <http://www.acus.gov/contacts/stephen-g-breyer> (last visited Aug. 28, 2015); *Elena Kagan*, ADMIN. CONF. U.S., <http://www.acus.gov/contacts/elena-kagan> (last visited June 4, 2015).

²¹ *Stephen G. Breyer*, *supra* note 20; *Elena Kagan*, *supra*, note 20. The Conference also benefits from nonvoting Liaison Member relationships with representatives from the Administrative Office of the United States Courts and the Judicial Conference of the United States. Senior Fellows and Liaison Members may attend and participate in the Conference's committee meetings and plenary session but they are not voting members and their involvement does not necessarily indicate support for any particular Conference recommendation. See ADMIN. CONFERENCE OF THE U.S., GUIDE FOR MEMBERS 4 (2011), https://www.acus.gov/sites/default/files/documents/Guide_5-9_0.pdf.

²² See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 586 (2008) (Alito, J.); *Darby v. Cisneros*, 509 U.S. 137, 152 n.13 (1993) (Blackmun, J.); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 471 n.10 (1984) (Powell, J.); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 101 (1983) (O'Connor, J.); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 591 (1980) (Stewart, J.); *id.* at 598 n.4 (Rehnquist, J., dissenting); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 31 (1979) (Marshall, J., dissenting in part); *Arnett v. Kennedy*, 416 U.S. 134, 157 n.23 (1974) (Rehnquist, J.); *id.* at 194 (White, J., concurring in part and dissenting in part); *id.* at 213 n.8 (Marshall, J. dissenting); *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 n.17 (1973) (Brennan, J.); *Williams v. Zuckert*, 371 U.S. 531, 535 n.3 (1963) (Douglas, J., dissenting).

²³ See *supra* note 22.

²⁴ *City of Arlington*, 133 S. Ct. at 1877 (Roberts, C.J., dissenting).

²⁵ *Id.* at 1866.

*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁶ Justice Breyer wrote separately to “say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill”²⁷ Justice Breyer cited an article by current Conference Chairman Verkuil, and frequent past Conference consultant, the late Ernest Gellhorn, for the proposition that the subject matter of the statutory provision may also be relevant to deference determinations.²⁸

In an opinion joined by Justices Kennedy and Alito, Chief Justice John Roberts disagreed with the majority holding.²⁹ He began with an exposition on the “significant degree of independence” enjoyed by administrative agencies.³⁰ He then referenced the Conference’s recent *Sourcebook of United States Executive Agencies* for Professors David Lewis and Jennifer Selin’s characterization of independent agencies as the “‘headless fourth branch of government,’ reflecting not only the scope of their authority but their practical independence.”³¹ He asked “whether the authority of administrative agencies should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power.”³² He concluded that it should not.³³ The Chief Justice’s concern with judicial deference to autonomous administrative agencies—shared in *City of Arlington* by Justices Kennedy and Alito, and reiterated by Justices Scalia, Thomas, and Alito in more recent opinions issued in other contexts³⁴—shares an interesting thread of common thought with several

²⁶ *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

²⁷ *City of Arlington*, 133 S. Ct. at 1875 (Breyer, J., concurring).

²⁸ *Id.* at 1875–76 (citing Ernest Gellhorn & Paul Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1007–10 (1999)).

²⁹ *Id.* at 1877 (Roberts, C.J., dissenting)

³⁰ *Id.* at 1878.

³¹ *Id.* The *Sourcebook of United States Executive Agencies* examines structural features of agency independence such as: member protections from removal by the President; exclusion from OMB review of budgets, rules, and legislation; or independent litigating authority. See LEWIS & SELIN SOURCEBOOK, *supra* note 7, at 106–16.

³² *City of Arlington*, 133 S. Ct. at 1879 (Roberts, C.J., dissenting).

³³ See *id.* at 1886.

³⁴ See, e.g., *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1210 (2015) (Alito, J., concurring) (recognizing concerns about “aggrandizement of the power of the administrative agencies,” but rejecting the D.C. Circuit’s judicial solution); *id.* at 1211–12 (Scalia, J., concurring in judgment) (“By supplementing the [Administrative Procedure Act] with judge-made doctrines of deference, we have revolutionized the import of interpretive rules’ exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them.”); *id.* at 1213 (Thomas, J., concurring) (“I write separately because these cases call

earlier Supreme Court references to Conference publications in decisions examining due process protections for individuals whose interests were potentially adversely affected by federal agencies.

Of special interest are two cases—*Arnett v. Kennedy*³⁵ and *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*.³⁶ Both opinions were issued during an important era in the country's history, noted for a rapid expansion in procedural legal protections for private interests affected by state action and heralded by the Supreme Court's 1970 decision in *Goldberg v. Kelly*.³⁷ The seminal *Goldberg* decision rejected a historic "right-privilege" distinction in unambiguously extending due process protections to the "privilege" of government welfare benefits.³⁸ In the years that followed, the Court issued numerous opinions exploring whether particular interests in growing government "largess" (i.e., benefits, services, contracts, franchises, and licenses) merited due process protection.³⁹ In two dissenting opinions issued during this time, Justice Thurgood Marshall relied on Conference scholarship in arguing for procedural protections where the exercise of government authority could adversely affect certain property and liberty interests that did not meet the traditional "right" concept.⁴⁰ These cases raised concerns relating to the exercise of agency discretion, and examined procedures necessary to protect individual interests.

In the 1974 case of *Arnett v. Kennedy*, the Supreme Court heard a due process challenge brought by a nonprobationary federal employee after his removal from the competitive Civil Service without a pretermination hearing.⁴¹ ACUS had previously examined this spe-

into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations.").

³⁵ *Arnett v. Kennedy*, 416 U.S. 134 (1974).

³⁶ *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979).

³⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

³⁸ *Id.* at 262 ("The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'").

³⁹ See *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (conditional sales contracts for goods); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (driver's licenses); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 341–42 (1969) (wages); see also Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734–37 (1964) (discussing forms of "government-created wealth" and importance of "government largess"); Paul R. Verkuil, *An Essay on Due Process and the Endowment Effect*, 22 WM. & MARY BILL RTS. J. 563, 563–69 (2013) (questioning why, under *Goldberg*, those receiving government benefits are favored procedurally over those seeking them); Paul R. Verkuil, *Revisiting the New Property After Twenty-Five Years*, 31 WM. & MARY L. REV. 365, 367–69 (1990) (same).

⁴⁰ See *Greenholtz*, 442 U.S. at 31 (Marshall, J., dissenting); *Arnett*, 416 U.S. at 213 n.8, 214 (Marshall, J., dissenting).

⁴¹ *Arnett*, 416 U.S. at 136–37.

cific issue in a study prepared by Professor Richard A. Merrill and in Recommendation 72-8, *Adverse Actions Against Federal Employees*.⁴² The underlying report (“Merrill Report”) offered an in-depth and data-driven examination of the “adverse action process” in practice, based on a survey of government agencies, as well as a review of agency “adverse action procedures.”⁴³ The Conference’s recommendation urged agencies to provide their employees with a prompt evidentiary hearing before implementing a proposed adverse action.⁴⁴ Notably, the Conference did not frame its argument for procedural protections for federal employees in Constitutional terms.

A highly divided Supreme Court held that a pretermination hearing was not constitutionally required for such adverse actions.⁴⁵ The nine justices issued five separate opinions.⁴⁶ Three of those opinions, including the judgment of the Court, referenced empirical findings in the Merrill Report regarding agency termination hearings.⁴⁷ Throughout his dissent, Justice Marshall relied on the “exhaustive study by the United States Administrative Conference of the problem of agency dismissals” as support for the proposition that the interests of a public employee in a secure government job are as weighty as other interests that the Court found required at least rudimentary due process protections.⁴⁸ Remarkably, Justice Marshall referenced the Merrill Report in fourteen separate footnotes, and twice noted the Conference’s Recommendation 72-8.⁴⁹ He cited Professor Merrill’s finding that almost a fourth of all appeals from adverse agency actions in this area result in reversal as evidence of the “not insignificant” possibility of error, which Justice Marshall felt justified due process protections in

42 ACUS Recommendation 72-8, *Adverse Actions Against Federal Employees*, 38 Fed. Reg. 19,793 (July 23, 1973); RICHARD A. MERRILL, Admin. Conference of the U.S., Report in Support of Recommendation 72-8: Procedures for Adverse Actions against Federal Employees, 1007 (1973) [hereinafter MERRILL REPORT]. A version of the Merrill Report was also published in an issue of the *Virginia Law Review*. See Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 196 n.* (1973). Textual references to the Merrill Report in this Article include court citations to both the ACUS report and the article published in the *Virginia Law Review*.

43 See MERRILL REPORT, *supra* note 42, at 1009, 1013.

44 ACUS Recommendation 72-8, 38 Fed. Reg. at 19,794.

45 See *Arnett*, 416 U.S. at 163.

46 *Id.* at 136.

47 *Id.* at 157 n.23; *id.* at 194 (White, J., concurring in part and dissenting in part); *id.* at 213–14 (Marshall, J., dissenting).

48 *Id.* at 213.

49 *Id.* at 213 n.8, 214 nn.9–10, 217 n.13, 218 n.15, 219 nn.17–19, 224 n.24, 225 nn.26–27, 226 n.29, 229 n.31, 230 n.32 (citing MERRILL REPORT); *id.* at 224 n.25, 225 n.28 (citing ACUS Recommendation 72-8).

the form of the pretermination hearing recommended by the Conference.⁵⁰ However, Justice Rehnquist's opinion for the Court concluded that post-termination hearing procedures, including potential backpay, adequately protected the interests of dismissed federal employees and that therefore no pretermination hearing was necessary.⁵¹

In the 1979 case of *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, the Supreme Court heard a challenge by state inmates alleging that Nebraska statutes and parole board procedures denied them due process.⁵² The majority opinion held that the mere statutory provision for the possibility of parole does not confer a liberty interest sufficient to warrant due process protections, but that some due process protections were appropriate in Nebraska because a state parole statute also created an expectation of release.⁵³ The Court found that the protections provided for by Nebraska law, including an annual informal hearing, were adequate.⁵⁴ It rejected the holding of the Eighth Circuit Court of Appeals, which would have required a formal hearing for each inmate as well as a statement of the evidence relied upon by the state parole board in making its determination.⁵⁵

Justice Marshall dissented, arguing that “*all* prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system.”⁵⁶ In his opinion, Justice Marshall noted the 1973 testimony of Antonin Scalia—then Chairman of ACUS—advising Congress that courts in sentencing anticipate “that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum.”⁵⁷ Then-Chairman Scalia's testimony was the outgrowth of a Conference project examining the hearing procedures that should be afforded to prospective federal parolees by the U.S. Board of Parole.⁵⁸ The Con-

⁵⁰ *Id.* at 214.

⁵¹ *Id.* at 163, 169.

⁵² *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 3–4 (1979).

⁵³ *See id.* at 13, 15–16.

⁵⁴ *Id.* at 4, 16.

⁵⁵ *Id.* at 14–16.

⁵⁶ *Id.* at 22 (Marshall, J., dissenting) (emphasis in original).

⁵⁷ *Id.* at 31 (citing *Parole Reorganization Act: Hearings on H.R. 1598 and Identical Bills Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 163–64, 193 (1973) (statement of Antonin Scalia, Chairman, Administrative Conference of the United States)).

⁵⁸ *See* ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 72-3, PROCEDURES OF THE UNITED STATES BOARD OF PAROLE 3–4 (1972). This recommendation, like so many others, was

ference recommended greater procedural protections for federal inmates than were afforded to Nebraska inmates under the Supreme Court's *Greenholtz* decision—access to the parole file, a right to counsel or representation, and a statement of reasons for deferral or denial of parole in all instances.⁵⁹ The Conference, perhaps intentionally, did not explicitly frame its parole procedure recommendations in terms of due process.⁶⁰

Although the Supreme Court did not adopt the Conference's procedural parole recommendations, Congress largely implemented them in 1976.⁶¹ Along the way, some lower courts were more receptive to the Conference's arguments and at least one lower court affirmed the Conference's recommendations in Constitutional terms. The 1974 decision by the D.C. Circuit briefly discussed the Conference's parole recommendation and report⁶² in holding that due process required the U.S. Board of Parole to furnish prisoners with a written statement of reasons for parole denial.⁶³ Judge Leventhal's concurring opinion in that case agreed that such a statement should be required, but not as a constitutional matter.⁶⁴ His opinion relied on the Seventh Circuit's decision in *King v. United States*,⁶⁵ which mentioned the Conference's recommendation and supporting report as contextual background before finding that the Administrative Procedure Act ("APA") required issuance of a brief statement of reasons for parole denial.⁶⁶ By finding that the statement of reasons for parole denial was statutorily required, the Seventh Circuit avoided the constitutional question.⁶⁷

The Tenth Circuit later agreed with the Seventh Circuit, holding that a statement of reasons for denying parole was "clearly consonant

based on a report also published in a legal academic journal. See Phillip E. Johnson, *Federal Parole Procedures*, 25 ADMIN. L. REV. 459, 459 (1973).

⁵⁹ ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 72-3, *supra* note 58, at 3-4.

⁶⁰ See *id.* at 1-5.

⁶¹ Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified as amended in scattered sections of 18 U.S.C.); see ADMIN. CONFERENCE OF THE U.S., IMPLEMENTATION OF ACUS RECOMMENDATIONS 1968-1995, at 5 (1995).

⁶² Childs v. U.S. Bd. of Parole, 511 F.2d 1270, 1282-83 (D.C. Cir. 1974) (noting discussion of the Conference's recommendation and supporting report in sister circuit precedent, as well as that the Conference did not consider that the potential pitfalls outweighed the need for a statement of reasons).

⁶³ *Id.* at 1283-84.

⁶⁴ *Id.* at 1288 (Leventhal, J., concurring).

⁶⁵ *King v. United States*, 492 F.2d 1337 (7th Cir. 1974); see *Childs*, 511 F.2d at 1286-87 (discussing *King*).

⁶⁶ See *King*, 492 F.2d at 1340, 1345.

⁶⁷ See *id.* at 1344-45.

with the purposes of the [Administrative Procedure] Act and the purposes of the parole system.”⁶⁸ The court continued:

The framers of the [Administrative Procedure] Act were determined to bring the “fourth branch” of government—the administrative agencies—within the rule of law To require the decision-maker to articulate his reasons focuses in him an awareness that his discretion must be exercised in a principled and consistent way.⁶⁹

The Tenth Circuit’s underlying concern with ensuring that agency discretion is exercised in accordance with the APA continues to resonate with at least some of the current justices, as evidenced by the more recent opinions cited above.⁷⁰ Regardless of whether it is “due” in the Constitutional sense, agency process (such as those procedures recommended by the Conference in federal adverse employment and parole proceedings) can help to assuage such concern with agency discretion.

II. ACUS’ HEIGHTENED INFLUENCE IN THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Court of Appeals for the District of Columbia Circuit has primary jurisdiction over a variety of federal actions and is known as “a special court” for administrative law jurisprudence.⁷¹ It is unsurprising then that the Conference has close connections with some of its esteemed jurists. Judge Brett Kavanaugh is currently the court’s Liaison Representative, and Senior Judge Stephen F. Williams is a Senior Fellow and was its Liaison Representative from 1990 to 1995.⁷² He is also a former Conference consultant.⁷³ Former D.C. Circuit Chief Judge Patricia Wald was an ACUS Council Member from 2010

⁶⁸ *Mower v. Britton*, 504 F.2d 396, 398 (10th Cir. 1974).

⁶⁹ *Id.* at 398–99.

⁷⁰ See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877 (2013) (Roberts, C.J., dissenting) (“An agency cannot exercise interpretative authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.”).

⁷¹ See Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J.L. & PUB. POL’Y 131, 142–43 (2013) (citing then-Senator Barack Obama for repeating “the accepted wisdom that the D.C. Circuit is ‘a special court’ that tackles a disproportionate share of thorny administrative and regulatory cases . . .”).

⁷² *Brett M. Kavanaugh*, ADMIN. CONF. U.S., <http://www.acus.gov/contacts/brett-m-kavanaugh> (last visited Aug. 28, 2015); *Stephen F. Williams*, ADMIN. CONF. U.S., <http://www.acus.gov/contacts/stephen-f-williams> (last visited Aug. 28, 2015).

⁷³ *Stephen F. Williams*, *supra* note 72. Judge Williams authored a study for ACUS upon which it based recommendations. See Stephen F. Williams, “Hybrid Rulemaking” under the Administrative Procedure Act: A Legal and Empirical Analysis, 42 U. CHI. L. REV. 401, 401 n.* (1975); see also ACUS Recommendation 76-3, Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking, 41 Fed. Reg. 29,654 (July 19, 1976).

until 2012, and described her service as “among the most satisfactory parts of my public career.”⁷⁴

Twenty-one D.C. Circuit judges have authored thirty-seven opinions citing Conference scholarship,⁷⁵ including one each by then-Judges and now-Justices Antonin Scalia and Ruth Bader Ginsburg.⁷⁶ Judges Carl McGowan, Patricia McGowan Wald, and Harold Leventhal mentioned Conference works in four or more opinions.⁷⁷ Judges Spottswood Robinson, III, Charles Fahy, and A. Raymond Randolph discussed Conference findings in three opinions each.⁷⁸ More than thirty of these references were in the opinion for the court, although Conference works were also occasionally cited in concurrences or dissents.

All D.C. Circuit references were to Conference publications or recommendations issued prior to 1995. This may demonstrate the continued relevance of some of the Conference’s older publications. For example, the Conference’s 1978 sourcebook, *An Interpretive Guide to the Government in the Sunshine Act*, was referenced as recently as 2000 in a dispute over the Nuclear Regulatory Commission’s interpretation of the government-wide statute.⁷⁹ Similarly, the Conference’s 1986 Model Rules for the Implementation of the Equal Access to Justice Act were extensively discussed in a 2002 case holding that the Equal Access to Justice Act applies only to final and unappealable dispositions, in accordance with the Conference’s model.⁸⁰

⁷⁴ Press Release, *Judge Patricia McGowan Wald Steps Down from ACUS Council: Reflects on Time Spent as a Council Member*, ADMIN. CONF. U.S. (Sept. 12, 2012), <http://www.acus.gov/newsroom/news/judge-patricia-mcgowan-wald-steps-down-acus-council>.

⁷⁵ E.g., *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015); *Patchak v. Salazar*, 632 F.3d 702 (D.C. Cir. 2011); *Adams v. SEC*, 287 F.3d 182 (D.C. Cir. 2002). This research is on file with the author and *The George Washington Law Review*.

⁷⁶ See *St. Louis Fuel & Supply Co. v. Fed. Energy Regulatory Comm’n*, 890 F.2d 446, 451 (D.C. Cir. 1989) (Ginsburg, J.); *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (Scalia, J.).

⁷⁷ E.g., *Stewart v. Smith*, 673 F.2d 485, 497 n.39 (D.C. Cir. 1982) (Wald, J.); *Childs v. U.S. Bd. of Parole*, 511 F.2d 1270, 1286–87 (D.C. Cir. 1974) (Leventhal, J., concurring); *Adams v. Laird*, 420 F.2d 230, 234 n.2 (D.C. Cir. 1969) (McGowan, J.).

⁷⁸ E.g., *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1158 (D.C. Cir. 1999) (Randolph, J.); *Humana of S.C., Inc. v. Califano*, 590 F.2d 1070, 1084 n.103 (D.C. Cir. 1978) (Robinson, III, J.); *Robertson v. Butterfield*, 498 F.2d 1031, 1033 n.6 (D.C. Cir. 1974) (Fahy, J.).

⁷⁹ See *NRDC, Inc. v. Nuclear Regulatory Comm’n*, 216 F.3d 1180, 1186–87 (D.C. Cir. 2000). The Supreme Court’s opinion on the same definitional question, issued on review of another agency’s identical approach and explicitly endorsing the Conference’s recommended formulation, was found to be definitive. See *id.* at 1191.

⁸⁰ See *Adams v. SEC*, 287 F.3d 183, 189–92 (D.C. Cir. 2002).

Three particularly well-known administrative law cases issued in the late 1970s and early 1980s—*Home Box Office, Inc. v. FCC*,⁸¹ *Sierra Club v. Costle*,⁸² and *Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System*⁸³—reference the Conference’s Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*.⁸⁴ The consultant for that study was Professor Paul R. Verkuil, the Conference’s current Chairman.⁸⁵ The Conference Chairman at the May 1974 plenary session where Recommendation 74-4 was adopted was Antonin Scalia,⁸⁶ who later cited the recommendation when he authored the D.C. Circuit’s opinion in *Association of Data Processing*.⁸⁷ A central concern of Verkuil’s research was defining the administrative materials that should be included in the “record” on review of agency informal rulemaking, as this concept evolved in the courts.⁸⁸ Both *Home Box Office* and *Sierra Club* acknowledged continued debate in the legal academy over this definitional concern, and examined whether the record, in challenges to informal agency rulemakings, ought to include information about “ex parte” communications with individual members of the public.⁸⁹

The D.C. Circuit’s per curiam opinion in *Home Box Office* is perhaps best known for requiring certain ex parte contacts with agency officials made after the close of the public comment period, but prior to publication of the rule, to be disclosed in the public rulemaking docket of an informal rulemaking proceeding before the Federal

⁸¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (per curiam). The D.C. Circuit designated its opinion in *Home Box Office* as a per curiam opinion “not because [the case] ha[d] received less than full consideration by the court, but because the complexities of the issues raised on appeal made it useful to share the effort to draft [the] opinion among the members of the panel.” *See id.* at 17 n.1.

⁸² *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

⁸³ *Ass’n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677 (D.C. Cir. 1984).

⁸⁴ ACUS Recommendation 74-4, *Preenforcement Judicial Review of Rules of General Applicability*, 39 Fed. Reg. 23,044 (June 26, 1974); *see, e.g., Ass’n of Data Processing Serv. Orgs.*, 745 F.2d at 684–85; *Sierra Club*, 657 F.2d at 407 n.528; *Home Box Office*, 567 F.2d at 54 n.119.

⁸⁵ Paul R. Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 185 n.* (1974).

⁸⁶ *See Antonin Scalia*, *supra* note 18.

⁸⁷ *Ass’n of Data Processing Serv. Orgs.*, 745 F.2d at 684–85.

⁸⁸ *See Verkuil*, *supra* note 85, at 204 (“One can conclude that ‘record’ now means whatever the agency produces on review.”); *see also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (holding that the “whole record” compiled by the agency is the “basis for review required by § 706 of the Administrative Procedure Act”).

⁸⁹ *See Sierra Club*, 657 F.2d at 392–96; *Home Box Office*, 567 F.2d at 53–57, 54 n.119.

Communications Commission.⁹⁰ In *Home Box Office*, the D.C. Circuit concluded that “[e]ven the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable.”⁹¹ The court found that requiring the agency to report certain ex parte contacts in the public rulemaking docket would not be unduly burdensome.⁹² It also observed that agency compliance with a reporting requirement would be consistent with the Conference’s recommendation to include “factual information . . . considered by the authority responsible for the promulgation of the rule or that is proffered by the agency as pertinent to the rule” in the materials before the court for use in evaluating, on preenforcement review, the factual basis for informal rulemakings.⁹³ In a special concurrence, Judge MacKinnon cautioned that the broad language of the case might be applied more generally and urged its limited application to the “precise type of case” before the court.⁹⁴ Subsequent caselaw has clarified that this holding was indeed limited to its facts, rather than generally applicable to all informal rulemaking proceedings.⁹⁵

Sierra Club v. Costle, for example, examined ex parte contacts made during Executive branch review of an informal rulemaking, also after the close of the public comment period but prior to publication of the rule.⁹⁶ Here though, the court found that record disclosures were unnecessary.⁹⁷ Judge Wald’s opinion held that:

The purposes of full-record review which underlie the need for disclosing ex parte conversations in some settings do not require that courts know the details of every White House contact, including a Presidential one, in this informal rulemaking setting. After all, any rule issued here with or without White House assistance must have the requisite *factual support* in the rulemaking record, and under this particu-

⁹⁰ *Home Box Office*, 567 F.2d at 57.

⁹¹ *Id.* at 54.

⁹² *Id.* at 57 n.130.

⁹³ *Id.* (citing ACUS Recommendation 74-4, 39 Fed. Reg. at 23,044).

⁹⁴ *Id.* at 63–64 (MacKinnon, J., concurring).

⁹⁵ *Iowa State Commerce Comm’n v. Office of the Fed. Inspector of the Alaska Natural Gas Transp. Sys.*, 730 F.2d 1566, 1576 (D.C. Circuit 1984) (noting “at the outset that this court has not interpreted *Home Box Office* to apply to all informal rulemaking proceedings”); see also STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 596 (6th ed. 2006) (“[T]he D.C. Circuit, while not overruling *Home Box Office*, has expressly limited it to its facts.”).

⁹⁶ *Sierra Club v. Costle*, 657 F.2d 298, 404–08 (D.C. Cir. 1981).

⁹⁷ *Id.* at 407.

lar statute the Administrator may not base the rule in whole or in part on any “*information or data*” which is not in the record, no matter what the source.⁹⁸

While acknowledging the possibility that contacts among officials within the executive branch during the post-comment period could affect the outcome of a rule in ways that might be difficult for the court to police, the D.C. Circuit declined to find that an agency’s failure to docket one such meeting with the President violated due process requirements or the procedural requirements of the governing statute.⁹⁹

However, the court left open the possibility that “docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process.”¹⁰⁰ Judge Wald, in dicta, cited the Conference’s general suggestions for docketing communications among officials within the executive branch in Recommendation 80-6, *Intragovernmental Communications in Informal Rulemaking*, including its suggestion that executive departments and agencies should docket “*material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule*” received from the President, the Executive Office of the President, or other executive branch agencies.¹⁰¹ The Conference later took up the question of when information about communications with external actors during presidential review of agency rules should be included in the public rulemaking docket in Recommendation 88-9, *Presidential Review of Agency Rulemaking*.¹⁰²

Since the Conference was reestablished in 2010, ACUS has revisited its prior work on both *ex parte* communications and the administrative record in informal rulemakings.¹⁰³ It remains to be seen whether these efforts and the accompanying recommendations will inform the D.C. Circuit’s discourse in future cases at the intersection of these subjects.

⁹⁸ *Id.* at 407–08.

⁹⁹ *Id.* at 408. The Conference’s Recommendation 74-4 was cited as background in the court’s discussion of the statutory procedures. *Id.* at 394 n.469.

¹⁰⁰ *Id.* at 406.

¹⁰¹ *Id.* at 407 n.528 (quoting ACUS Recommendation 80-6, *Intragovernmental Communication in Informal Rulemaking Proceedings*, 45 Fed. Reg. 86,407, 86,408 (Dec. 31, 1980)).

¹⁰² ACUS Recommendation 88-9, *Presidential Review of Agency Rulemaking* 54 Fed. Reg. 5207, 5208 (Feb. 2, 1989).

¹⁰³ See ACUS Recommendation 2014-4, “*Ex Parte*” Communications in Informal Rulemaking, 79 Fed. Reg. 35,993 (June 25, 2014); ACUS Recommendation 2013-4, *The Administrative Record in Informal Rulemaking*, 78 Fed. Reg. 41,358 (July 10, 2013).

III. ACUS SCHOLARSHIP AND THE EQUAL ACCESS TO JUSTICE ACT IN THE U.S. COURTS OF APPEALS

Since the Conference was founded fifty years ago, federal appellate courts other than the D.C. Circuit or Supreme Court have issued nearly one hundred opinions citing its scholarship or recommendations, a considerable number of which were issued by the Second Circuit. The Conference's membership includes the Chief Judge of the Second Circuit, Robert A. Katzmann, who was a Public Member from 1994 to 1995, and Senior Judge John M. Walker, Jr., who was a Special Counsel to the Conference from 1987 to 1992.¹⁰⁴ Both joined the reestablished Conference as Senior Fellows. (While Conference's recommendations or publications have been cited sixteen times in this jurisdiction, the last reference dates to 1980.¹⁰⁵ The Conference's influence on that court, as measured through judicial citations, has not been attributable to its Senior Fellows.)

The Conference's membership also includes a few federal judges on U.S. courts of appeals other than the D.C. and Second Circuit Courts of Appeals, all of whom joined the reestablished Conference as Senior Fellows after prior Conference participation. Senior Judge S. Jay Plager was the Federal Circuit's Liaison Representative to the Conference from 1991 to 1995.¹⁰⁶ Judge Plager's only citation to the Conference's work, in a 1994 challenge to a reconsideration decision of the United States Patent and Trademark Office, offered contextual background on agency adjudications in examining the delegated re-

¹⁰⁴ Robert A. Katzmann, ADMIN. CONF. U.S., <https://www.acus.gov/contacts/robert-katzmann> (last visited Aug. 28, 2015); John M. Walker, Jr., ADMIN. CONF. U.S., <http://www.acus.gov/contacts/john-m-walker-jr> (last visited Aug. 28, 2015).

¹⁰⁵ See *Armstrong v. McAlpin*, 625 F.2d 433, 443 n.20 (2d Cir. 1980) (en banc); *Greene Cnty. Planning Bd. v. Fed. Power Comm'n*, 559 F.2d 1227, 1237 n.3 (2d Cir. 1976) (Van Graafeiland, J., dissenting); *Kahane v. Carlson*, 527 F.2d 492, 498 (2d Cir. 1975); *Cardaropoli v. Norton*, 523 F.2d 990, 998 (2d Cir. 1975); *Econ. Opportunity Comm'n of Nassau Cnty., Inc. v. Weinberger*, 524 F.2d 393, 408 (2d Cir. 1975); *U.S. ex rel Johnson v. Chairman of N.Y. State Bd. of Parole*, 500 F.2d 925, 934 n.7 (2d Cir. 1974), *vacated sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974); *Nat'l Nutritional Foods Ass'n v. FDA*, 504 F.2d 761, 795 (2d Cir. 1974); *Ecology Action v. U.S. Atomic Energy Comm'n*, 492 F.2d 998, 1002 (2d Cir. 1974); *Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor*, 487 F.2d 342, 345 n.2, 354 (2d Cir. 1973); *Grace v. Ludwig*, 484 F.2d 1262, 1271 (2d Cir. 1973); *Aguayo v. Richardson*, 473 F.2d 1090, 1102 (2d Cir. 1973); *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 459 n.1 (2d Cir. 1973); *Greene Cnty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 420, n.21 (2d Cir. 1972); *AT&T Co. v. FCC*, 449 F.2d 439, 454 n.16 (2d Cir. 1971).

¹⁰⁶ S. Jay Plager, ADMIN. CONF. U.S., <https://www.acus.gov/contacts/s-jay-plager> (last visited Aug. 28, 2015).

consideration authority of the agency's Commissioner.¹⁰⁷ Judge Plager referenced the Conference's exhaustive study, the *Federal Administrative Judiciary*, in describing the varied composition of the federal administrative adjudication officer corps.¹⁰⁸ (Stanford Law Professor Michael Asimow is presently updating this study based on a survey conducted by Conference staff under the leadership of Chairman Verkuil.¹⁰⁹ The Conference hopes that this endeavor will serve a similarly informative function for courts and others in the future.)

Early appellate cases citing Conference works often sought to define the rights of individuals and obligations of agencies in agency administrative adjudications, such as whether there was a right to a jury trial in administrative civil penalty cases or to counsel in administrative investigatory proceedings.¹¹⁰ Such questions continue to arise in federal appellate caselaw, and appellate judges continue to be informed by Conference publications.¹¹¹ For example, the Court of Appeals for the First Circuit recently examined the adequacy of a revision to the Nuclear Regulatory Commission's hearing procedures under the APA and in light of the Conference's *Administrative Law Judges Manual*.¹¹²

Remarkably, about a quarter of federal appellate cases citing the Conference's work have examined the availability of attorney's fees for agency proceedings under the Equal Access to Justice Act ("EAJA"). These decisions, in the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and Federal Circuits, have relied on the Conference's model rules for guidance in examining novel questions of EAJA interpretation. In 2003, for example, the Third Circuit joined the D.C. Circuit in adopting the Conference's interpretation of an unappealable "final disposition" for agency administrative proceedings.¹¹³ In doing so, it rejected OSHA's more limiting definition, observing that "the EAJA is a statute of general applicability and

¹⁰⁷ *In re Alappat*, 33 F.3d 1526, 1530 (Fed. Cir. 1994); see *id.* at 1579 n.3 (Plager, J., concurring).

¹⁰⁸ *Id.* (citing PAUL R. VERKUIL ET AL., *THE FEDERAL ADMINISTRATIVE JUDICIARY* 5–7 (1992)).

¹⁰⁹ See *Federal Administrative Adjudication*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/federal-administrative-adjudication> (last visited Aug. 28, 2015).

¹¹⁰ See, e.g., *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n*, 519 F.2d 1200, 1216–17 (3rd Cir. 1975) (en banc); *FCC v. Schreiber*, 329 F.2d 517, 522 (9th Cir. 1964).

¹¹¹ See, e.g., *Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 363 n.15 (1st Cir. 2004).

¹¹² *Id.* at 362–63.

¹¹³ *Scafar Contracting, Inc. v. Sec'y of Labor*, 325 F.3d 422, 428 (3d Cir. 2003).

OSHA's interpretation is not definitive."¹¹⁴ The court was persuaded by the D.C. Circuit's argument that the Conference's interpretation of EAJA offered the more reasonable approach.¹¹⁵

Courts have also looked to the Conference for guidance in determining whether certain types of agency decisions are subject to the EAJA, which applies to adversary adjudications "under section 554" of the APA.¹¹⁶ In *Escobar Ruiz v. INS*,¹¹⁷ the Ninth Circuit held that deportation proceedings did meet this standard (though not technically conducted under the APA's formal proceeding provisions) because they were adversarial and on the record.¹¹⁸ It found the EAJA statute ambiguous, because "under" might include proceedings that were conducted using procedures similar to those required by the APA.¹¹⁹ Given this ambiguity, the Ninth Circuit cited the Conference's commentary to its model EAJA rules (recommending that "questions of [EAJA's] coverage should turn on substance—the fact that a party has endured the burden and expense of a formal hearing—rather than technicalities") to support a broad reading of the statute's applicability.¹²⁰

This interpretation of the Conference's model rules did not go unnoticed by other appellate courts undertaking similar inquiries, several of which agreed that the EAJA provision was ambiguous.¹²¹ In *Owens v. Brock*,¹²² the Sixth Circuit called the *Escobar Ruiz* Court's reliance on the Conference's model rules "misplaced" in holding that benefit determinations under the Federal Employees Compensation Act ("FECA")¹²³ were not subject to EAJA.¹²⁴ It countered the Ninth Circuit's interpretation of the model rules as supporting applicability of EAJA to non-APA formal adjudications by citing the Conference's statement of concern "that the liberal interpretation of the draft

¹¹⁴ *Id.* at 429.

¹¹⁵ *See id.* at 428.

¹¹⁶ *See, e.g., Escobar Ruiz v. INS*, 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc).

¹¹⁷ *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (en banc).

¹¹⁸ *See id.* at 1030.

¹¹⁹ *See id.* at 1023–24.

¹²⁰ *Id.* (noting that "questions of [EAJA's] coverage should turn on substance—the fact that a party has endured the burden and expense of a formal hearing—rather than technicalities") (citing ACUS, Equal Access to Justice Act, 46 Fed. Reg. at 32,901).

¹²¹ *See, e.g., Owens v. Brock*, 860 F.2d 1363, 1366 (6th Cir. 1988) (discussing different interpretations of "defined under" language).

¹²² *Owens*, 860 F.2d 1363.

¹²³ Federal Employees Compensation Act, Pub. L. No. 64-267, 39 Stat. 742 (1916) (codified as amended in scattered sections of 5 U.S.C.).

¹²⁴ *Owens*, 860 F.2d at 1365–67.

model rules may provide for broader applicability than Congress intended.”¹²⁵ In fact, the Conference had eliminated from its model rules a provision suggesting that awards be available when agencies voluntarily use the procedures available under section 554.¹²⁶ The Sixth Circuit also noted the Conference’s call to agencies to specifically identify the proceedings subject to the APA (and hence to EAJA) in their rules.¹²⁷ The court did not, however, comment on the fact that the agency with responsibility for deportation proceedings—the Department of Justice—had done just that in promulgating regulations identifying the types of proceedings subject to the APA.¹²⁸ (It did not include deportation cases.) Soon thereafter, the Third Circuit contributed this insight.¹²⁹ In *Clarke v. INS*,¹³⁰ the Third Circuit discussed the Sixth Circuit’s rejection of the Ninth Circuit’s reasoning in *Escobar Ruiz*, which had relied on the Conference’s model rules as part of its explanation for holding that deportation proceedings were not covered by EAJA.¹³¹

The Fifth and Eleventh Circuits both found the Third Circuit’s regulatory argument persuasive and held that deportation proceedings were not within the ambit of EAJA.¹³² However, the Fifth Circuit disagreed with the *Owens* Court’s interpretation of the Conference’s model rules as unambiguously foreclosing EAJA awards in proceedings not technically governed by section 554.¹³³ It also did not accept the Sixth Circuit’s wholesale rejection of the *Escobar Ruiz* court’s reliance on the Conference’s commentary.¹³⁴ Rather, the Fifth Circuit found that the Conference’s concern for agencies that voluntarily adopt formal procedures like those of section 554 (as in the instant

¹²⁵ *Id.* at 1366 (quoting ACUS, Equal Access to Justice Act, 46 Fed. Reg. at 32,901).

¹²⁶ *See id.* (“The result of [ACUS’s] concern was the elimination of EAJA coverage for agency proceedings that voluntarily use section 554 procedures.”); ACUS, Equal Access to Justice Act, 46 Fed. Reg. at 32,900–15.

¹²⁷ *See Owens*, 860 F.2d at 1366.

¹²⁸ *See* 28 C.F.R. § 24.103 (2014).

¹²⁹ *See Clarke v. INS*, 904 F.2d 172, 177 (3rd Cir. 1990) (“Second, we observe that, in amending and extending the EAJA in 1985, Congress remained silent about EAJA’s application to deportation proceedings despite the Attorney General’s clear 1984 regulations which excluded deportation proceedings from EAJA’s reach.”).

¹³⁰ *Clarke v. INS*, 904 F.2d 172 (3rd Cir. 1990).

¹³¹ *See id.* at 175–76.

¹³² *See Hodge v. U.S. Dep’t of Justice*, 929 F.2d 153, 158–59 (5th Cir. 1991); *Ardestani v. U.S. Dep’t of Justice, INS*, 904 F.2d 1505, 1510–11, 1513 (11th Cir. 1990), *aff’d*, 502 U.S. 129 (1991).

¹³³ *See Hodge*, 929 F.2d at 158–59.

¹³⁴ *See id.*

case) did not necessarily extend to agencies that Congress requires to employ such procedures.¹³⁵

The Eleventh Circuit's decision was appealed to the Supreme Court, which acknowledged and settled the conflict among the U.S. courts of appeals.¹³⁶ The Court found that deportation proceedings were not covered by EAJA because they were not adjudications "under section 554."¹³⁷ It rejected the argument that the statute's definition of "an adjudication under section 554" was ambiguous.¹³⁸ Therefore, it found it "immaterial that the Attorney General in 1983 promulgated regulations that conform deportation hearings more closely to the procedures required for formal adjudication under the APA."¹³⁹ The agency's voluntary adoption of procedures similar to those used in APA adjudications did not subject the deportation proceedings to the APA or to the EAJA.¹⁴⁰ Justice Blackmun, in an opinion joined by Justice Stevens, dissented.¹⁴¹ He argued that the EAJA definition of covered adjudications could fairly be read to support an award of fees in deportation and asylum cases.¹⁴² Though lower courts had treated the Conference's model rules and commentary as indicators of how to resolve the potential ambiguity (albeit reaching different conclusions about which approach the model rules favored), neither Supreme Court opinion mentioned them.

CONCLUSION

The Conference's publications and recommendations are naturally more persuasive where they can aid courts in resolving perceived ambiguities. Opinions on ACUS—in the Supreme Court, the D.C. Circuit, and other U.S. courts of appeals—indicate that the Conference's influence on the federal judiciary is attributable to its unique ability to illuminate agency processes and procedures through applied research and empirical analysis aimed at improving the efficiency, adequacy, and fairness of federal administration.

¹³⁵ See *id.* at 159.

¹³⁶ See *Ardestani v. INS*, 502 U.S. 129, 132, 139 (1991).

¹³⁷ *Id.* at 139.

¹³⁸ *Id.* at 135.

¹³⁹ *Id.* at 134.

¹⁴⁰ See *id.* at 136 ("Although it is conceivable that 'defined under' means that Congress intended adversary adjudications covered by the EAJA to be those 'as defined by' the APA, it could just as easily mean that covered adjudications are 'defined as those conducted under' the APA.").

¹⁴¹ *Id.* at 139 (Blackmun, J., dissenting).

¹⁴² *Id.* at 139–40.