Introduction: The Administrative Conference and the Federal Judiciary

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What follows is a transcript of a discussion moderated by Chairman of the Administrative Conference of the United States ("ACUS" or "Conference") Paul Verkuil among one former and three sitting federal judges of great distinction: S. Jay Plager (United States Court of Appeals for the Federal Circuit), Patricia M. Wald (United States Court of Appeals for the District of Columbia Circuit), John M. Walker, Jr. (United States Court of Appeals for the Second Circuit), and Stephen S. Williams (United States Court of Appeals for the District of Columbia Circuit). The discussion was held before an audience in Washington, D.C., on October 16, 2014, at the Administrative Law Fall Conference, hosted by the American Bar Association's ("ABA") Section of Administrative Law and Regulatory Practice, under the title *The Administrative Conference of the United States: The View from the Federal Bench*. An Addendum to the transcript catalogues the citation of ACUS's work in judicial opinions.[1]

No appraisal of ACUS in its fiftieth year would be complete without the federal judicial perspective, and of the dozen or so judges affiliated with ACUS since its 2010 revival, surely none are better situated to provide it than Judges Plager, Wald, Walker, and Williams. Each of them has played an inestimably important role in the work of ACUS—Judge Wald in the meetings of ACUS's Council, on which she served from 2010 until her appointment in 2013 to the Privacy and Civil Liberties Review Board, and Judges Plager, Walker, and Williams in the plenary-session debates of ACUS's Assembly, in which they have participated as senior fellows since 2010. Each has brought to ACUS substantial service on the courts of appeals, and each considerable pre-judicial experience of enormous value: Judges Plager,

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1 Stephanie Tatham, *Opinions on ACUS: The Administrative Conference's Influence on Appellate Administrative Jurisprudence*, 83 GEO. WASH. L. REV. 1186 (2015).

Wald, and Walker served in the executive branch,[2] and Judge Williams taught administrative law and consulted for ACUS.[3]

Thanks to Chairman Verkuil's skillful moderating, the transcript of their discussion needs little by way of introduction. But two observations may help put their appraisal of ACUS's work in perspective, especially for newcomers to ACUS, and explain why the ABA was so wise to seek it in this, ACUS's fiftieth anniversary year.

The first is that the main output of ACUS—recommendations adopted by its Assembly—has not principally been the work of judges. It has been the work of government lawyers, legal academics and practicing lawyers with expertise in administrative law, and (more recently) a few non-lawyers who work in the fields of regulatory policy or public administration.[4] In fact none of the approximately one hundred voting members who form ACUS's Assembly is a federal judge. The Assembly is comprised of the following: the Chairman;[5] a Council,[6] which in turn consists of the Chairman[7] and "10 other members appointed by the President, of whom not more than one-half shall be employees of Federal regulatory agencies or Executive departments";[8] representatives of federal agencies designated by statute (known as government members), who, by a statutory formula, numerically dominate the Assembly;[9] and up to forty "private citizens" appointed by Chairman with the Council's consent, selected from among members of the "practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative

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2 Judge Plager served as the Associate Director of the Office of Management and Budget ("OMB") and then the Administrator of OMB's Office of Information and Regulatory Affairs. *S. Jay Plager*, ADMIN. CONF. U.S., http://www.acus.gov/s-jay-plager (last visited July 5, 2015). Judge Walker served as the Assistant Secretary of the Treasury with responsibility over regulatory policy. *John M. Walker, Jr.*, ADMIN. CONF. U.S., http://www.acus.gov/contacts/john-m-walker-jr (last visited July 5, 2015). And Judge Wald served as the Assistant Attorney General for Legislative Affairs in the Department of Justice. *Patricia M. Wald*, PRIVACY & C.L. OVERSIGHT BOARD, https://www.pclob.gov/about-us/board/wald.html (last visited July 5, 2015).

3 Stephen F. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 401 n.* (1975).

4 On the expansion of ACUS's membership to include non-lawyers, see Paul R. Verkuil, *Speculating About the Next "Administrative Conference": Connecting Public Management to the Legal Process*, 30 ARIZ. ST. L.J. 187, 200–01 (1998).

5 5 U.S.C. § 593(b)(1) (2012).

6 *Id.* § 595(b).

7 *Id.*

8 *Id.*

9 *See id.* § 593(b)(2)–(3).

procedures" (known as public members).[10] Perhaps the Act will accommodate the appointment of a judge as a public or Council member, but it has never been tried.[11]

The judiciary itself may be responsible for its absence in ACUS's membership. When called upon by Congress in 1949 to attend to problems in administrative procedure, the Judicial Conference of the United States concluded that the "regulatory agencies themselves" would need to "solve" their own "problem[s]."[12] The judiciary had neither the standing nor expertise.[13] So a Judicial Conference advisory committee recommended that the president establish an "Administrative Agency Conference" comprised of "representatives of the administrative agencies having adjudicatory and substantial rulemaking functions."[14]

The resulting conference called by President Eisenhower in 1953—the first of two temporary administrative conferences that preceded ACUS's establishment—was largely constituted in accord with the Judicial Conference's recommendation.[15] Most of its seventy-five members were agency lawyers, private practitioners, or legal academics. But it also included, among others, three federal judges. One of them, E. Barret Prettyman of the Court of Appeals for the District of Columbia Circuit, led the conference as its chairman.[16] The second

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10 *Id.* § 593(b)(6).

11 Betty Fletcher resigned her public membership at the time of her appointment to the United States Court of Appeals for the Ninth Circuit. *See* 1979 ACUS ANN. REP. vii (1980), https://bulk.resource.org/acus.gov/gov.acus.1979.report.pdf. ACUS's membership does include a state-court judge, Justice Mariano-Florentino Cuéllar of the California Supreme Court, who previously served on ACUS's Council. *Mariano-Florentino Cuéllar*, ADMIN. CONF. U.S., https://www.acus.gov/contacts/mariano-florentino-cuéllar (last visited July 5, 2015).

12 *Establishing Administrative Conference: Hearing on S. 1664, H.R. 7200, and H.R. 7201 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 88th Cong. 23 (1964) (statement of the Honorable E. Barrett Prettyman, Senior J., Court of Appeals for the District of Columbia Circuit) [hereinafter *Establishing Administrative Conference*].

13 *See id.* at 23–24 ("The Committee [we established] was troubled by the assignment to it of the administrative agency phase of the general problem. The members of the Committee were of the view that their own limited experience in this field would place a limited value upon their recommendations in the field."); *Administrative Conference of the United States, Hearings on S. 1664 Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 88th Cong. 8 (1963) (prepared statement of the Honorable E. Barret Prettyman, Senior J., Court of Appeals for the District of Columbia Circuit); *see also id.* at 20 (testimony of the Honorable E. Barrett Prettyman, Senior J., Court of Appeals for the District of Columbia Circuit).

14 *Establishing Administrative Conference*, *supra* note 12, at 24 (statement of the Honorable E. Barrett Prettyman, Senior J., Court of Appeals for the District of Columbia Circuit).

15 On the temporary conferences, see Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813, 814–19 (1992).

16 *See* REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 88–92 (1953),

temporary conference, convened by President Kennedy in 1961, was similarly constituted, with Judge Prettyman again appointed as chairman.[17]

When Congress established ACUS by statute in 1964,[18] it made no provision for the inclusion of federal judges as members.[19] The legislative history does not indicate why. It reflects only the prevailing view that the responsibility for procedural reform would have to lie primarily with the agencies themselves. Judge Prettyman was Congress's most emphatic witness on this point.[20]

Federal judges who participate in ACUS today do so as a result of the provisions of its bylaws[21] that allow for the appointment of liaisons and senior fellows. Liasons are representatives of "Congress, the judiciary, federal agencies that are not represented on the Conference, and professional associations."[22] Senior fellows are former "members of or liaisons to the Conference" with at least six years of service, "former members who have served as members of the federal judiciary, or former Chairmen of the Conference."[23] Both enjoy the privilege of debate, but not of voting[24] They are sometimes referred to as "nonvoting members."

Since ACUS's revival in 2010, eight sitting federal judges have been appointed as senior fellows: three Justices of the Supreme Court (Justices Scalia, Breyer, and Kagan), four judges of the United States courts of appeals (Judges Plager, Walker, and Williams, plus Judge Robert Katzmann of the Second Circuit), and one judge of the United

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http://www.acus.gov/sites/default/files/documents/1953_0429_Report%20%of%%20the%20Conference%20on%20Administrative%20Procedure.pdf.

17 S. Doc. No. 88-24, at 2, 31–35 (1963) (Conf. Rep.); *see also* Letter from E. Barrett Prettyman, Chairman, Admin. Conference of the U.S., to John F. Kennedy, President of the U.S. 3 (Dec. 17, 1962) (on file with ACUS) (explaining that the permanent administrative conference should consist "preponderantly" of agency representatives).

18 Administrative Conference Act, Pub. L. No. 88-499, 78 Stat. 615 (1964) (codified as amended at 5 U.S.C. §§ 591–596 (2012)).

19 *See* Breger, *supra* note 15, at 814–19.

20 *See Establishing Administrative Conference*, *supra* note 12, at 37 (testimony of the Honorable E. Barrett Prettyman, Senior J., Court of Appeals for the District of Columbia Circuit) (emphasizing that ACUS "must be an agency conference" through "which the agencies can examine their own procedures"); *see also id.* at 22 (prepared statement of the Honorable E. Barrett Prettyman Senior J., Court of Appeals for the District of Columbia Circuit) (noting the Judicial Conference's long-standing position on this issue).

21 *See* 5 U.S.C. § 595(a)(2) (2012) (authorizing ACUS to establish bylaws).

22 Admin. Conference of the U.S., Bylaws of the Administrative Conference of the United States § 302.4 (2012), https://www.acus.gov/sites/default/files/documents/Administrative%20Conference%20Bylaws.pdf (last updated June 22, 2012).

23 *Id.* § 302.2(e).

24 *Id.* § 302.4 (liaisons); *id.* § 302.2(e) (senior fellows).

States Court of Federal Claims (Judge Loren Smith, a former ACUS Chairman).[25] A ninth judge, Brett Kavanaugh, has been appointed as a liaison representative from the D.C. Circuit.[26] The judges' level of participation varies. Judges Plager, Walker, and Williams are the judiciary's most active participants.[27] Each regularly attends ACUS's plenary sessions.[28]

The second observation concerns the place of judicial review on ACUS's agenda. It is not at all clear what Congress intended it to be. At the risk of parsing the Administrative Conference Act ("Act") more finely than its language may call for: its key provision authorizes ACUS to study and make recommendations concerning, the "efficiency, adequacy, and fairness of administrative procedure *used by administrative agencies in carrying out administrative programs*."[29] The Act mentions judicial review, but only in defining "administrative procedure" to include "the relationship of [agency] operating methods to later judicial review."[30] These provisions, focused as they are on agency procedures, may suggest that Congress intended a less ambitious role for ACUS in the field of judicial review than is sometimes assumed.

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25 *Senior Fellows Roster*, ADMIN. CONF. U.S., https://www.acus.gov/directory/senior-fellow (last visited July 14, 2015).

26 *Liaison Representatives Roster*, ADMIN. CONF. U.S., https://www.acus.gov/directory/liaison-representative (last visited July 14, 2015). ACUS also has a liaison arrangement with the Administrative Office of the United States Courts and the Judicial Conference. Neither of their current representatives is a judge. *Id.* While on the court of appeals, then–Judge Stephen Breyer was the Judicial Conference's liaison. *Administrative Conference of the United States, Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 17 (2010) (prepared statement of the Honorable Stephen G. Breyer, Associate Justice, Supreme Court of the United States).

27 At ACUS's last plenary session, Judge Williams hobbled in on crutches, having had hip-replacement surgery just a few weeks earlier. Would that all of ACUS's members be so dedicated.

28 Some judges participate in other ways. Judge Katzmann, for instance, has helped design a forthcoming program under which ACUS's Office of the Chairman will, among other things, call Congress's attention to judicial decisions that identify problematic statutory provisions involving administrative procedure that may require correction or other consideration. *See infra* text accompanying notes 89–90. The program is inspired by one he and Russell Wheeler, the former Deputy Director of the Administrative Office of the United States Courts, designed for the federal judiciary. *See* ROBERT A. KATZMANN, JUDGING STATUTES 101–02 (2014); Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 693 n.277 (2012).

29 5 U.S.C. § 594(1) (2012) (emphasis added).

30 *Id.* § 592(3); *see also id.* § 594 (authorizing ACUS to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate").

So too may the provision of the Act identifying the specific governmental entities to which ACUS may address itself in its recommendations: namely, the federal agencies, the President, Congress, and the *Judicial Conference of the United States*.[31] That Congress authorized ACUS to speak to the Judicial Conference rather than the judiciary at large *may* suggest a heretofore unrecognized limitation on ACUS's authority when it speaks to the judiciary (but not of course Congress) on matters of judicial review. It may suggest that ACUS should limit itself to matters within the remit of the Judicial Conference, which include (most relevantly) procedural rulemaking but not the formulation of legal doctrine of the kind associated with decisional law.[32] This feature of the Act was put in issue at ACUS's May 1974 plenary session (and apparently never thereafter). Then–Chairman Scalia interpreted it not as a limitation on what ACUS may say to the judiciary (that possibility appears not to have been raised), but only as a requirement that whatever ACUS says be addressed, as a matter of form, to the Judicial Conference.[33] Even that formality has not always been observed.[34]

For what it is worth, the legislative history of the Act says almost nothing about judicial review.[35] What of the work of the two temporary conferences, which forms the essential background against which Congress passed the Act? Neither of the temporary conferences' presidential charters mentioned judicial review.[36] Once constituted, both conferences had committees on judicial review, but overall they

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31 *Id.* § 594.

32 *See* 28 U.S.C. § 331 (2012). If Congress intended doctrinal reform to form an essential part of ACUS's work, Congress might well have provided for the inclusion of judges in ACUS's membership on the model of, say, the American Law Institute, whose main work was then and remains today the restatement of judge-made doctrine.

33 Transcript of 11th Plenary Session of Admin. Conf. of the U.S at 162 (May 31, 1974) (on file with ACUS) (debating what would become ACUS Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, 39 Fed. Reg. 23,033 (June 26, 1974)). The legendary administrative-law scholar Kenneth Culp Davis, then a public member, raised concerns that the proposed recommendation was, on its face, misdirected to the Judicial Conference, since it concerned issues of legal doctrine for the federal courts' resolution. Chairman Scalia responded that it was phrased that way to "track[ ] the language of our governing statute." He added: "So, what we would seek to have the courts do, we are apparently supposed to urge through the Judicial Conference rather than directly." *Id.* No further discussion on this point ensued. *See id.* at 132–33.

34 *See, e.g.*, ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272, 76,272 (Dec. 17, 2013).

35 *See, e.g.*, S. Doc. No. 88-24, at 2, 31–35 (1963) (Conf. Rep.).

36 *See* Memorandum Convening the President's Conference on Administrative Procedure, Pub. Papers 219–21 (Apr. 28, 1953); Exec. Order No. 10,934, 26 Fed. Reg. 3233, 3233 (Apr. 15, 1961).

undertook relatively little work on the subject.[37] All but one of the first conference's recommendations on judicial review concerned the amendment of court rules—clearly within the remit of the Judicial Conference, to which they were directed—governing the record of agency proceedings.[38] The other recommendation asked courts to address the perceived loose evidentiary practices of adjudicating agencies.[39] But that recommendation consisted of no more than a statement that "Courts be urged to encourage hearing officers and agencies in formal administrative proceedings" to tighten up such practices,[40] and then only by giving "occasional words of encouragement . . . to the hearing officer who has correctly excluded evidence."[41]

As for the second temporary conference, only two of its thirty recommendations concerned judicial review. One involved the jurisdiction of the courts to review decisions of the (now-defunct) Interstate Commerce Commission,[42] the other enforcement of National Labor Relations Board orders.[43] Both were necessarily directed to Congress.

All of this, of course, may be beside the point. Whatever exactly Congress anticipated ACUS's agenda would be, it seems deliberatively to have chosen sufficiently capacious language to give ACUS wide discretion to set its own agenda,[44] subject only to congressional oversight.[45] A particularized statutory mandate in a field as dynamic as administrative procedure would have been a serious mistake.[46]

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37 *See* Exec. Order No. 10,934, 26 Fed. Reg. at 3233.

38 *See* REPORT OF THE CONFERENCE ON ADMINISTRATIVE PROCEDURE 6–8, 54–57 (1953), http://www.acus.gov/sites/default/files/documents/1953_0429_Report%20%of%%20the%20Conference%20on%20Administrative%20Procedure.pdf.

39 *Id.* at 3–5, 53–54.

40 *Id.* at 6.

41 *Id.* at 54.

42 S. DOC. NO 88-24, at 40 (1963) (Conf. Rep.) (Recommendation No. 4).

43 *Id.* at 50 (Recommendation No. 18). ACUS returned to that subject in 1969 when it recommended that Congress make unchallenged orders of the Board self-enforcing. ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-2, JUDICIAL ENFORCEMENT OF ORDERS OF THE NATIONAL LABOR RELATIONS BOARD, 1969 ACUS ANN. REP. 41, https://bulk.resource.org/acus.gov/gov.acus.1969.report.pdf.

44 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1874–75 (2013) (holding that an agency is entitled to deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), when interpreting a statutory ambiguity governing the scope of its authority).

45 ACUS does not take its annual congressional appropriation for granted, and, as insiders know, for good reason. *See* Toni M. Fine, *A Legislative Analysis of the Demise of the Administrative Conference of the United States*, 30 ARIZ. ST. L.J. 19, 33 (1988).

46 *See* H.R. REP. NO. 88-1565, at 15–16 (1964); S. REP. NO. 88-621, at 14 (1963). The House Judiciary Committee's report on the bill that became the Administrative Conference Act

So the important question in the end is not whether ACUS *may* address any particular issues of judicial review, but which such issues it *should* address given its unique composition, competencies, executive-branch status, and limited resources, not to mention the changing demands of the administrative state. No doubt ACUS is on safest and surest ground when it addresses questions within the particular expertise of agency officials or aspects of judicial review closely bound up with what the Act calls "agency procedures."[47] Here the obvious example is a still-nagging question that ACUS has twice addressed directly: What constitutes the "agency record" on preenforcement judicial review of a rule adopted under notice-and-comment procedures?[48] There otherwise remains much room for debate as to what place judicial review should occupy on ACUS's agenda.

What place has it actually occupied there? A prominent but by no means dominant one,[49] in part because much administrative procedure, even when prescribed by law, remains outside the purview of the courts.[50] About two dozen of ACUS's 223 recommendations address

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characterized ACUS's charter "as broad" and its "jurisdiction as being "roughly coextensive with that of the Administrative Procedure Act." H.R. REP. NO. 88-1565 at 5. The latter characterization seems unduly narrow today, but perhaps at the time it did not seem as such. It could be claimed more plausibly then than it can today that the APA largely occupied the field of administrative law. *See, e.g.*, Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345, 359 (evaluating claims made for the APA as a comprehensive charter (a "Magna Carta") for administrative procedure). A somewhat more helpful and accurate, albeit imprecise, characterization of ACUS's jurisdiction was that (as one agency put it in a submission to the House Judiciary Committee) it would cover any "matters" of administrative procedure "in which lawyers have traditionally been involved." H.R. REP. NO. 88-1565 at 15. It is not clear that anyone could define ACUS's jurisdiction with any more precision today.

47 *Cf.* Robert Kramer & Arthur Selwyn Miller, *The Task of an Administrative Conference*, 32 GEO. WASH. L. REV. 169, 184 (1963) (noting with respect to judicial review that the conference would need to focus not only on doctrine "but also the practice" of agencies, through "empirical studies into the method by which decisions are made within the public administration").

48 ACUS Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, 1 C.F.R. § 305.74-4 (1993); ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358, 41,359–60 (July 10, 2013).

49 *See* Gillian E. Metzger, *Administrative Law, Public Administration and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517 (2015) (observing that "administration and agency procedures are . . . [ACUS's] dominant concerns"); *see also* Peter L. Strauss, *The Administrative Conference and the Political Thumb*, 83 GEO. WASH. L. REV. 1668 (2015) (crediting ACUS for introducing new subjects, unrelated to judicial review, into administrative-law scholarship); *cf.* HENRY J. FRIENDLY, BENCHMARKS 133 (1967) (noting that administrative law teaching "has been too much concerned with what the courts do with the agencies rather than with what the agencies do with themselves").

50 *See, e.g.*, Metzger, *supra* note 49, at 1519. For a recent discussion of administrative law internal to the executive branch and beyond the reach of the courts, but law nonetheless, see,

judicial review directly.[51] At least as many others address it indirectly.[52] Although concerned with agency procedure, they respond to, are informed by, or otherwise account for judicial decisions interpreting the Administrative Procedure Act ("APA") or other laws.[53] An early notable recommendation, for example, called on agencies to adopt internal procedures to prevent irremediable injury to private interests arising from unreviewable "adverse agency publicity."[54]

One feature of ACUS's recommendations directly addressing judicial review stands out: all but a few have been directed to Congress rather than the Judicial Conference or to the courts.[55] These recommendations break down, roughly, as follows. Two concern court procedures, and at least one of them the Judicial Conference's procedural rulemaking authority.[56] (Parts of ACUS's recommendations on the administrative record in judicial review might well have proposed a

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Neston M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259, 264–65 (2015).

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

52 *See id.*

53 *See, e.g.*, ACUS Recommendation 77-3, Ex Parte Communications in Informal Rulemaking Proceedings, 1 C.F.R. § 305.77-3 (1993); ACUS Recommendation 76-3, Procedures in Addition to Notice and the Opportunity to Comment in Informal Rulemaking, 1 C.F.R. § 305.76-3 (1993). Consider, for example, the preamble to Recommendation 76-3: "The Recommendation grows out of a study of decisions, primarily of the Court of Appeals for the District of Columbia Circuit, in which rulemaking proceedings have been remanded to agencies for additional procedures, and of the responses of the affected agencies. The Recommendation implies no view as to whether those decisions were authorized by the Constitution or the relevant statutes. The Recommendation is premised, however, on the view that one can learn from the insights of judges, who on the basis of their study of records reflecting the 'circumstances of particular proceedings,' perceived a need for procedures in addition to notice and the opportunity for comment, and from the experience of agencies required to provide such additional procedures." 1 C.F.R. § 305.76-3 (citations omitted).

54 *See, e.g.*, ACUS Recommendation 73-1, Adverse Agency Publicity, 1 C.F.R. § 305.73-1 (1993). The connection between the recommended practices and the absence of judicial review is made explicit in the consultant's report. *See* Ernest Gellhorn, *Adverse Publicity by Administrative Agencies*, 86 HARV. L. REV. 1380, 1419–21 (1973). ACUS has taken the subject up again. *See Agency Publicity in the Internet Era*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/agency-publicity-internet-era (last visited July 13, 2015).

55 For a list of ACUS's recommendations, see, Pritzker, *supra* note 51. Professor Siegel identifies the recommendations directed to Congress involving judicial review as among ACUS's most valuable. *See* Jonathan R. Siegel, *ACUS and Suits Against the Government*, 83 GEO. WASH. L. REV. 1642 (2015).

56 *See* ACUS Recommendation 88-6, Judicial Review of Preliminary Challenges to Agency Action, 1 C.F.R. § 305.88-6 (1993); ACUS Recommendation 80-5, Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action, 1 C.F.R. § 305.80-5 (1988). A minor part of another recommendation asked the courts to "utilize existing transfer powers to avoid duplication of proceedings" in reviewing certain agency action taken under two environmental statutes. ACUS Recommendation 76-4, Judicial Review Under the Clean Air Act and Federal

rule change, but for whatever reason did not.)[57] Three (as discussed below) are directed to the courts on some point of judge-made doctrine. All the rest—and arguably the most consequential of them—are directed to Congress. An early example of a recommendation directed to Congress, justly celebrated elsewhere in this Issue, is ACUS Recommendation 69-1,[58] which urged the abolition of outdated sovereign-immunity doctrines that limited effective judicial review of agency action.[59] Others from the early years include ACUS's recommendations that Congress eliminate the jurisdictional minimum required in original-jurisdiction suits challenging official action under federal law,[60] liberalize the rules governing the naming of defendants in suits challenging agency action,[61] and vest the review of orders of the now-defunct Interstate Commerce Commission in the courts of appeals.[62] A more recent example is ACUS's 2013 recommendation that Congress amend a statutory provision divesting the Court of Federal Claims' jurisdiction over a claim if—as sometimes happens given that court's limited jurisdiction—the plaintiff has a claim arising from the same transaction pending in another court.[63] Implementing legislation may be nearing enactment.[64]

Water Pollution Control Act, 1 C.F.R. § 305.76-4 (1988). This recommendation is otherwise entirely directed to Congress.

57 A federal rule of appellate procedure specifies the content of the agency record, albeit not with much specificity, in appeals of agency orders. *See* FED. R. APP. P. 16.

58 *See* Siegel, *supra* note 55.

59 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 69-1, STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE 1969 ACUS ANN. REP. 40, 40, https://bulk.resource.org/acus.gov/gov.acus.1969.report.pdf. The recommendation was implemented by Pub. L. No. 94-574, 90 Stat. 2721 (1976) (codified as amended at 5 U.S.C.§§ 702–703 (2012)).

60 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-7, ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW (1968), https://www.acus.gov/sites/default/files/documents/68-7.no-FR.pdf. This recommendation was also implemented by 90 Stat. at 2721 (codified as amended at 28 U.S.C. § 1331(a) (2012)).

61 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 70-1, PARTIES DEFENDANT, 1970–71 ACUS ANN. REP. 39, https://bulk.resource.org/acus.gov.1971.report.pdf. This was yet a third recommendation implemented by 90 Stat. at 2721 (codified as amended at 5 U.S.C. § 703 (2012)).

62 ADMIN. CONFERENCE OF THE U.S., RECOMMENDATION 68-8, JUDICIAL REVIEW OF INTERSTATE COMMERCE COMMISSION ORDERS (1968), https://www.acus.gov/sites/default/files/documents/68-8.no-FR.pdf. The recommendation was implemented by Pub. L. No. 93-584, 88 Stat. 1917 (1975) (codified as amended at 28 U.S.C. § 2321 (2012). The judicial review provisions of this statute now govern orders of the Surface Transportation Board, which assumed some of the ICC's functions. *See* 28 U.S.C. § 2321 (2012).

63 ACUS Recommendation 2012-6, Reform of 28 U.S.C. 1500, 78 Fed. Reg. 2939, 2939–40 (Jan. 15, 2013). *See generally* Siegel, *supra* note 55, at 1659.

64 Last Congress the House Judiciary Committee favorably reported such legislation. H.R. REP. NO. 113-650, at 2 (2014) (reporting H.R. 5683, 113th Cong. (2014)). The legislation has

One point bears elaboration here for reasons that will become clear. It is often assumed that ACUS regularly seeks to influence the courts in their formulation of doctrine, whether involving the interpretation of the APA or otherwise. But in fact ACUS has rarely done so[65]—no doubt an admirable sign of self-restraint given what some ACUS members in the 1970s would have perceived as the D.C. Circuit's encroachments into procedural matters Congress left to agencies for decision,[66] the related expansion of judicial review of administrative action, the once-dominant, and still outsized, role of judicial review in administrative law scholarship,[67] and the litigation-centered practices of many of ACUS's (non-academic) public members.

As suggested above, on only three occasions of note has ACUS made recommendations to the courts on a matter of doctrine (again, as distinct from a matter of court rulemaking). On only three occasions ACUS made recommendations to the courts themselves. The first was in 1974 when it recommended that, if a litigant challenges a rule adopted under the APA's informal rulemaking procedures[68] as lacking an "adequate foundation," courts consider only whether the rule is "arbitrary, capricious, [or] an abuse of discretion,"[69] and not whether, as some courts had insisted, it is supported by "substantial

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been reintroduced this Congress with only minor changes. *See* H.R. 2329, 114th Cong. (2015); S. 1353, 114th Cong. (2015). The House Judiciary Committee has favorably reported H.R. 2329. *See* H.R. REP. NO. __ (2015) (forthcoming). Due to unforeseen circumstances, the legislation has not actually been reported.

65 *See* Transcript, *The Administrative Conference of the United States: The View from the Federal Bench*, 83 GEO. WASH. L. REV. 1159 (2015) (observation of Michael Herz that "[i]t's a fairly short list of recommendations that are actually aimed at judges").

66 *See, e.g.*, Scalia, *supra* note 46, at 348–52 (discussing the D.C. Circuit's imposition of extra-statutory procedural requirements in informal agency rulemakings). On the recent resurgence of judicial activism on the D.C. Circuit to similar effect, except now in the service of conservative ends, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398–99 (2015). The D.C. Circuit was recently rebuffed by the Supreme Court. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206–07 (2015) (rejecting holding that a change in an interpretive rule is subject to notice-and-comment procedures).

67 *See, e.g.*, William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS., nos. 1 & 2, 2015, at 61, 62 ("[Administrative law] is largely concerned with the role of the courts (1) in policing administrative rulemaking and formal adjudication and (2) in enforcing agency compliance with statutes and their own rules."). Among articles in this Issue, see Strauss, *supra* note 49, at 1668 and Metzger, *supra* note 49, at 1517. The classic text on the centrality of judicial review in administrative law is LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

68 5 U.S.C. § 553 (2012).

69 5 U.S.C. § 706 (2012).

evidence."[70] The second was not until nearly twenty years later when ACUS recommended (among other things) that courts harmonize the deference principle announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[71] and so-called "hard-look review" of agency rules.[72] And the third and most recent was in 2013 when ACUS recommended that courts should sometimes remand but not vacate rules that cannot withstand judicial review, despite a seemingly clear statutory requirement requiring vacatur.[73] ACUS's above-noted recommendations on the administrative record might be added to this list, but, with minor exceptions, they seem more accurately characterized as having been directed to agencies.[74]

Many questions about ACUS's domain have been debated over ACUS's fifty-year history,[75] but seemingly little attention has been given to which issues of judicial review it should encompass. Now that ACUS has gotten securely back on its feet, a discussion of that and related questions may be in order. The Assembly's division at the last plenary session over a proposed recommendation concerning a confounding doctrinal question—whether and when, under the judge-made doctrine of "issue exhaustion," a litigant should be precluded from challenging a rule in a preenforcement review proceeding on the ground that the issue underlying the challenge was not presented to the agency—may suggest uncertainty among ACUS's members over larger issues of what space ACUS should occupy in the area of judicial review.[76] (Members seemed unable to agree even as to where ACUS

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70 ACUS Recommendation 74-4, Preenforcement Judicial Review of Rules of General Applicability, 1 C.F.R. § 305.74-4 (1993). The distinction has turned out to be semantic. *See, e.g.*, Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys., 745 F.2d 677, 684 (D.C. Cir. 1984) (writing for the court was then–Judge Scalia).

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

72 ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670, 4671–72 (Feb. 1, 1994).

73 ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272, 76,273 (Dec. 17, 2013) (addressing 5 U.S.C. § 706(2)).

74 *See supra* note 48 and accompanying text; *see also* ACUS Recommendation 88-6, Judicial Review of Preliminary Challenges to Agency Action, 1 C.F.R. § 305.88-6 (1993), which might be counted as an insignificant fourth instance.

75 *See, e.g.*, Warner W. Gardner, *The Administrative Conference of the United States*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 1972, at 36, 40–44; Ernest Gellhorn, *A Critical Review of the Administrative Conference*, 30 ARIZ. ST. L.J. 117, 117–18 (1998); Ernest Gellhorn & Glen O. Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 794–97 (1975); Glen O. Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 ADMIN. L. REV. 269, 269–70 (1974); Verkuil, *supra* note 4, at 191.

76 *See Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/issue-exhaustion-preenforcement-judicial-review-administrative-rulemaking (last visited July 15, 2015). Debate on the recommenda-

should stand in relation to extant judicial doctrine). So also might Professor Herz's observation in this Issue that judicial review, alone among the main subjects that populated ACUS's agenda during its first life (1968–1995), has largely receded from it in ACUS's second (2010–present).[77]

Among the questions members might ask themselves is whether ACUS's legislative-like process for drafting recommendations and the form its recommendations take lend themselves to coherent doctrinal exposition (at least when a briefly stated principle will not do). ACUS is not, and should not aspire to be, the American Law Institute of administrative law. They might ask whether, when the need arises for ACUS to share its views with the judiciary—say, on the consequences of judicial review for administrative procedure—a less prescriptive statement should take the place of a recommendation.[78] They might ask before speaking to the courts on any issue, whether the courts are likely to listen, and why. They might ask whether, in some circumstances at least, too much is at stake in judicial review to permit consensus among ACUS's members on any matters of real consequence. Litigation interests are not always easy to check at the door of ACUS proceedings. That may be one of the lessons of the issue-exhaustion project. And finally, members might ask whether ACUS can do more to improve the system of judicial review by addressing itself to Congress on matters of statutory reform rather than the courts on matters of doctrinal reform.[79] Numerous problems— resulting from error, in-

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tion stopped when the absence of a quorum was established. *See* Admin. Conference of the U.S., *62nd Plenary Session*, LIVESTREAM, 4:26:00 (June 4, 2015), http://livestream.com/ACUS/62ndPlenary. Its fate remains to be seen.

77 *See* Michael Herz, *ACUS—And Administrative Law—Then and Now*, 83 GEO. WASH. L. REV. 1217, 1241 (2015). Professor's Herz's observation predates ACUS's undertaking of two new projects on judicial review. *See SSA Federal Courts Analysis*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/ssa-federal-courts-analysis (lasted visited June 15, 2015); *Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/issue-exhaustion-preenforcement-judicial-review-administrative-rulemaking (last visited July 15, 2015). In any event, he is certainly correct in observing that ACUS's agenda does not include, as it once prominently did, initiatives to expand judicial review. He attributes the change in part to "some loss of enthusiasm for the benefits of judicial review for the administrative process from the pre-*Vermont Yankee* days of an extremely muscular judicial role." Herz, *supra*, at 1241–42.

78 *See Recommendations*, ADMIN. CONF. U.S., https://www.acus.gov/recommendations (lasted visited July 15, 2015) ("Conference statements are typically the product of the same process that leads to recommendations, but may set forth issues, conclusions from a study, or comments, rather than recommendations.").

79 *Cf.* Siegel, *supra* note 55, at 1665 (arguing that the "role of ACUS in reforming procedures for lawsuits against government is vital, and ACUS should continue its important work in this area").

advertence, or oversight rather than informed choice—beset too many of statutes governing judicial review of agency action, and together they remain, in Judge Friendly's memorable words, an "efflorescence of variety . . . unworthy of an ordered legal system."[80] It would be fanciful to suppose that ACUS could undertake a statutory look-back initative to correct existing problems, but it might very well help Congress avoid such problems in the future. If a recommended set of "judicial-review principles" would be too ambitious an undertaking, a set of guidelines or a still-less-ambitious statutory-drafting checklist might be worth considering. A checklist's first question for drafters would be whether judicial review of an administrative program is desired at all. Too much litigation has continued to surround that question.[81] All of these tentative suggestions are offered, course, with due deference to the prerogatives of ACUS's Chairman and Council to set the agency's agenda.

The discussion transcribed below may at least be a good starting point for debate. Two main points of consensus emerged. First, ACUS is especially well suited, as the courts are not, to attend to the "correction of the many purely technical, apolitical" problems "that bedevil"[82] the statutory law governing the review of administrative action—if not by urging Congress to amend existing statutes, then at least by noting the problems so that Congress does not reproduce them in future statutes.[83] Second, ACUS has the strongest claim on the judiciary's attention not when it makes prescriptive statements about legal doctrine, but when it offers courts the collective insights and perspectives of its members about the actual workings of the administrative process, and does so with the impartiality and authority that no amicus or litigant can claim.[84] ACUS's most valuable offerings to the courts, as Judge Wald suggests, may not even concern judicial

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80 FRIENDLY, *supra* note 49, at 52.

81 *See* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

82 RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 308 (1999).

83 On the absence of any office within the federal government charged with attending to problems in judicial-review statutes that do not implicate partisan interests, see FRIENDLY, *supra* note 49, at 41–64. *See generally* Paul M. Bator, *What is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 675 (1990) ("[T]he well known fact is that Congress has never felt it to be part of its job—and has therefore never organized itself—to undertake the task of maintaining the ordinary rules of the national legal system in good working order."); Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921). Professor Siegel contends that the Justice Department's role as the government's counsel limits its institutional capacity to address statutory impediments to judicial review of agency action. *See* Siegel, *supra* note 55, at 1651–52.

84 *See* Transcript, *supra* note 66, at 1181.

review as such.[85] She offers as an example how ACUS's recommendation on intra-governmental communications during informal rulemaking proceedings, though silent on judicial review,[86] informed her decision as to whether such communications, when made "ex parte," offended the APA.[87]

This perspective explains why the judges see value not only—or even primarily—in ACUS's recommendations, but also in the consultants' studies that underlie them and especially the empirically based reports and special initiatives of its Office of the Chairman. Much of the judges' focus is on those initiatives. Hence, for example, Judge Walker suggests that ACUS identify for Congress technical defects in statutes affecting judicial review (like a missing statute of limitations);[88] Judge Wald that ACUS consider publishing a manual for new law clerks on the courts of appeals to equip them for handling the complex records of rulemakings presented on judicial review;[89] and three of the judges that ACUS take up Judge Katzmann's proposal that ACUS, drawing on the expertise of agency lawyers, identify for Congress problematic statutory provisions involving judicial review of agency action.[90] The last initiative is already in the works.[91] So, too, is a large-scale empirical study commissioned by the Social Security Administration inspired in part by Chairman Verkuil's academic work.[92] That study should at least begin to answer the question why that agency's disability decisions seem to fare so poorly on judicial review—or at least so inconsistently across district courts—and will hopefully help improve the situation,[93] if only by opening a much-needed dialogue between the agency and courts outside the context of particular cases. This, presumably, is exactly the sort of work that all four of the judges would commend to ACUS.

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85 *See id.* at 1173.

86 ACUS Recommendation 80-6, Intragovernmental Communications in Informal Rulemakings Proceedings, 45 Fed. Reg. 86,407 (Dec. 31, 1980). The underlying report was written by then–Professor Verkuil. *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 943 n.* (1980).

87 *See* Transcript, *supra* note 65, at 1173 (discussing *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (writing for the majority was Judge Wald)).

88 *See id.* at 1170.

89 *Id.* at 1163.

90 *Id.* at 1164.

91 *See supra* note 28 and accompanying text.

92 *See* Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 724–30 (2002).

93 *SSA Federal Courts Analysis*, ADMIN. CONF. U.S., https://www.acus.gov/research-projects/ssa-federal-courts-analysis (last visited July 15, 2015).

Stephanie Tatham's findings in the Addendum to the transcript accord with the judges' perspectives. What they show is that the federal judiciary has relied much more on the consultant's reports underlying recommendations, as well as publications, studies, and other output of ACUS's Office of the Chairman, than on the recommendations themselves. Only a few recommendations, in fact, have been cited in federal appellate opinions, in no case with any discernable influence on the outcome. Of ACUS's three recommendations addressed to the courts, none has been cited, except the first (Recommendation 74-4), and then only its first paragraph addressing what agencies should include in the record on review of a rule adopted in an informal rulemaking proceeding.[94] The most far-reaching and arguably important of the three, though now over twenty years old, has not drawn a single citation.[95]

None of this should come as a surprise. To what end a court would rely on such a recommendation—except, perhaps, as a background citation or to bolster a conclusion reached on the weight of other authority—is not at all apparent. Surely no recognized principle of administrative law would entitle it to any formal judicial deference—certainly not *Chevron* deference.[96] And at least on any proper conception of the judicial function, its "power to persuade" (to use familiar administrative-law parlance)[97] will seldom rival a respected scholar's article or treatise. This, to be clear, is no criticism of ACUS. Its recommendations quite properly consist only of concisely stated propositions, unaccompanied by any elaborate exposition of doctrine. Their short preambles usually do no more than announce their purpose and provide necessary context. Contrast the "restatements" and "principles" of the American Law Institute.

A final observation—by way of tribute to Judges Plager, Wald, Walker, and Williams: anyone acquainted with them will not be surprised to see that they address themselves primarily to the question of what ACUS can do for federal judges rather than the question of what they, as federal judges, can do for ACUS.[98] The answer to the second

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94 *See* Tatham, *supra* note 1, at 1197. One of the three recommendations, of course, was adopted only recently.

95 ACUS Recommendation 93-4, Improving the Environment for Agency Rulemaking, 59 Fed. Reg. 4670, 4671–72 (Feb. 1, 1994). Judicial review is one only component of this recommendation.

96 Chairman Verkuil's claim of *Chevron* deference for ACUS's recommendations interpreting the APA was made in jest. *See* Transcript, *supra* note 65, at 1182.

97 Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

98 *See, e.g.*, Transcript, *supra* note 65, at 1163.

question, though, should be self-evident to readers. Indeed, it may be hard for any reader, no matter his or her views of judicial review, to resist the conclusion that ACUS would do well to welcome more Plagers, Walds, Walkers, and Williamses into its ranks even if, as the Judicial Conference recognized many years ago, the problems of administrative procedure are not theirs to solve.