2011

Paul Verkuil's Projects for the Administrative Conference of the U.S. 1974-1992

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Jeffrey S. Lubbers*

INTRODUCTION

I am really happy to be part of this tribute to Paul Verkuil. It may surprise those in the audience to learn that I am bringing some needed diversity to today’s proceedings—I am the only other Dutch American on the program! But perhaps my twenty years at the “Administrative Conference” also qualifies me to say a few words about how thrilled I am that we have it back—“ACUS 2.0” we can call it, complete with a website this time1—and that Paul is at its helm. And I want to thank Paul for bringing me back to the ACUS team as a Special Counsel.

I am not ordinarily a believer in divine intervention, or even karma, but it must have been something like that when just at the time the Administrative Conference finally achieved funding to start up again after a fourteen-year hiatus,2 Paul Verkuil was also just ending his one-year stint as Acting Dean at the University of Miami School of Law and was therefore available for the ACUS Chairmanship. Many of us who followed the long rebirth of ACUS urged the powers-that-be in the White House to consider Paul for that post because he combined such a perfect blend of administrative law scholarship, proven leadership of many great institutions, and a bi-partisan approach to issues that was tailor-made for ACUS. President Obama heard these messages and announced his intent to nominate Paul on November 2, 2009. And it is a testament to his stature that, even in this age of Senate holds and

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2 The first attempt to revive ACUS occurred in 2004 when Congress enacted the Federal Regulatory Improvement Act of 2004, Pub. L. No. 108-401, 118 Stat. 2255, which reauthorized the ACUS. Unfortunately, however, the authorized appropriations were not made for fiscal years 2005-2007. So in 2008, Congress again reauthorized ACUS in the Regulatory Improvement Act of 2007, Pub. L. No. 110-290, 122 Stat. 2914 (2008). This time appropriations were made for fiscal years 2009-2011, but use of these appropriations had to await the nomination and confirmation of the ACUS Chairman.
partisan confirmation fights, Paul was approved by the Judiciary Committee without a hearing, and was unanimously confirmed on the Senate consent calendar on March 3, 2010.

What made this even more appropriate was that Paul was returning to head an agency that he had served at the very beginning of his academic career, and one that had served as a forum for some of his most enduring works of scholarship. I am going to devote my remarks to those works.

His overall body of work covers the core issues of administrative law—adjudication, rulemaking, and judicial review, while also commenting on specific areas of concern in the world of government administration such as immigration, mass adjudication, and outsourcing. His take on administrative procedure is classical—let us try to improve it by focusing on efficiency, fairness, and acceptability—and it is a nice blend of theory and practice.

I will discuss his ACUS works in chronological order. My own first knowledge of Paul's work came when I was a fledgling administrative law instructor at the University of Miami School of Law in the spring of 1975—trying to get a class of night students excited about the Kenneth Culp Davis textbook (which I had learned from myself two years earlier at Chicago). I was having rough sledding (if I can say that about Miami) until I discovered the Problem Supplement for the Gellhorn and Byse casebook co-written by a young assistant professor at the University of North Carolina named Paul Verkuil. The lively problems in that little volume saved the day for me in that class.

I. JUDICIAL REVIEW OF INFORMAL RULEMAKING

Paul had just completed his first project for ACUS about that time. He was recruited by Chairman Scalia to take up the hottest issue of the day in 1973—the “search for the appropriate scope of review of informal rulemaking.” The age of rulemaking was dawning and the courts, especially the high caliber judges on the D.C. Circuit, were wrestling with the appropriate approach for reviewing agency rules in a pre-enforcement context—a practice that had only recently been green-lighted by the Supreme Court’s Abbott Laboratories decision in 1966. Reviewing courts were used to reviewing agency formal adjudications on the basis of whether there was “substantial evidence” in the “administrative record” to support the agency order, but the concept of a

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“record” in rulemaking seemed inapt—especially since “on-the-record rulemaking” connoted the disfavored category of “formal rulemaking” that had just been whittled down by the Court in the Florida East Coast case.6

In its discussions of “informal,” notice-and-comment rulemaking, the Supreme Court seemed to be unsure of itself at this point. In its 1971 Overton Park decision,7 which was a disquisition on the appropriate scope of review of informal adjudication—the arbitrary and capricious test—the Court included what Paul called an “unfortunate dictum suggesting that the substantial evidence test should apply to informal rulemaking,”8 a dictum that was seemingly applied a year later in another rulemaking case, United States v. Midwest Video Corp.9 A year after that, in another informal adjudication case that had just come down, Camp v. Pitts, the Court, in explaining why the arbitrary and capricious test was applicable, used language that seemed to require its application to informal rulemaking too:

"[I]t is also clear that neither the National Bank Act nor the APA requires the Comptroller to hold a hearing or to make formal findings on the hearing record when passing on applications for new banking authorities. Accordingly, the proper standard for judicial review of the Comptroller’s adjudications is not the “substantial evidence” test which is appropriate when reviewing findings made on a hearing record."10

This was already the law in the D.C. Circuit, where since 1968 the court had been applying the arbitrary and capricious test to informal rulemaking—a view that finally was clearly accepted by the Supreme Court in the 1983 State Farm case.11

Another question left open by the caselaw at the time Professor Verkuil was recruited to look into this for ACUS was how exactly the arbitrary and capricious test was to be applied. The Supreme Court again seemed to be debating itself on this issue in Overton Park and Camp v. Pitts. In Overton Park, the Court explained what the APA’s arbitrary and capricious test meant in the context of a challenge to an

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8 Verkuil, supra note 4, at 212.
9 406 U.S. 649, 671 (1972) (“The question remains whether the regulation is supported by substantial evidence that it will promote the public interest.”).
11 Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-41 (1983) (“[W]e do not find the appropriate scope of judicial review to be the ‘most troublesome question’ in the case. . . . [M]otor vehicle safety standards are to be promulgated under the informal rulemaking procedures of § 553 of the Administrative Procedure Act. The agency’s action in promulgating such standards therefore may be set aside if found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” (citing Overton Park and the APA)).
order made in an informal adjudication. It said: “To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” 12 By way of further explanation, it said, somewhat contradictorily: “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” 13 The Supreme Court remanded the case to the district court for an evidentiary hearing, seemingly departing from its famous Morgan IV dictum that it is normally impermissible to “probe the mental processes of the Secretary” 14:

Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision. But since the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if the Secretary acted within the scope of his authority and if the Secretary's action was justifiable under the applicable standard.

The court may require the administrative officials who participated in the decision to give testimony explaining their action. Of course, such inquiry into the mental processes of administrative decisionmakers is usually to be avoided. 15

Two concurring Justices would have sent the case directly back to the agency for a reasoned decision 16—a view that was ultimately borne out when the district court, after twenty-five days of “plenary hearing,” determined that a remand to the agency was required. 17

In Camp v. Pitts, on the other hand, the Court bent over backwards to avoid further evidence-taking by the lower courts. Despite an administrative record that was almost as flimsy as the one provided by the agency in Overton Park, the Supreme Court reversed the Fourth Circuit's order requiring an evidentiary hearing in the district court, which was consistent with the Supreme Court's remand order in Overton Park. In Camp, however, the Supreme Court ruled:

The validity of the Comptroller's action must, therefore, stand or fall on the propriety of [his] finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on

12 Overton Park, 401 U.S. at 416.
13 Id.
15 Overton Park, 401 U.S. at 420 (footnote and citation omitted) (citing Morgan, 313 U.S. 409).
16 Id. at 421 (Black & Brennan, JJ., concurring).
the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration.\textsuperscript{18}

Is it any wonder that Professor Verkuil, writing when these decisions were fresh, wrote: "One questions whether the Court has devised a coherent scheme of review of rules enacted pursuant to informal rulemaking"?\textsuperscript{19}

Congress, for its part, was also clouding up this issue by enacting some major rulemaking statutes with a specification that the substantial evidence test be used on judicial review. And as the locus of most reviews of agency rules, the D.C. Circuit had to figure out how to review these rules.\textsuperscript{20}

This is where some great minds did not think alike—even though politically they were all New Deal Democrats.\textsuperscript{21} On one side there was Chief Judge David Bazelon, who felt that judges were experts on procedure, not on the substance of regulation, and wanted the courts to ensure that agencies used the procedures necessary to make the best decision. On the other side were Judges Harold Leventhal and Skelly Wright, who felt that mandating additional procedures would force agencies to err on the side of over-proceduralization and ultimately slow down the rulemaking process—what we call "ossification" today.\textsuperscript{22} They believed that judges should examine and try to understand the technical matters at issue in order to determine whether the agency has exercised reasoned discretion.

Even before \textit{Overton Park}, Judge Leventhal had used the term "hard look" to describe his approach to review. He wrote in 1970 that "[the judiciary's] supervisory function calls on the court to intervene . . . if the court becomes aware . . . that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."\textsuperscript{23} In his ACUS report, Paul was

\textsuperscript{18} Camp v. Pitts, 411 U.S. 138, 143 (1973).
\textsuperscript{19} Verkuil, \textit{supra} note 4, at 214.
\textsuperscript{21} Schiller points out that: "Judges Bazelon, Wright, and Leventhal were all products of Post-War liberalism. Each graduated from law school during the New Deal, served in the Roosevelt or Truman administration, and was placed on the federal bench by a Democratic president." Schiller, \textit{supra} note 20, at 1185.
\textsuperscript{23} Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970) (licensing case); \textit{see also} Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1016 (D.C. Cir. 1971) (rulemaking case)
one of the first to pick up on the importance of this phrase, when he explained: "This 'hard look' doctrine has been used to examine the record for agency reactions to presentations made by participants in the rulemaking and to eliminate the possibility that the agency has relied upon a 'crystal ball' to resolve tough questions." In that regard he may have been the first to refer to the "hard look doctrine," other than Judge Leventhal himself.

Just as Paul was undertaking his research, Judge Leventhal, who was an active participant in the Administrative Conference Committee on Judicial Review that considered this project, put his views into practice in two 1973 cases involving EPA rulemaking. In *International Harvester Co. v. Ruckelshaus*, Judge Leventhal (along with Judge Tamm) upheld a technical EPA rule concerning auto emission requirements, and in *Portland Cement Ass'n v. Ruckelshaus*, he overturned an EPA rule that limited stationary source emissions by cement plants. In each decision he wrote a lengthy analysis of the scientific and engineering aspects of the rule. He wrote: "While we remain diffident in approaching problems of this technical complexity, the necessity to review agency decisions, if it is to be more than a meaningless exercise, requires enough steeping in technical matters to determine whether the agency has exercised a reasoned discretion."

Judge Bazelon concurred in *International Harvester*, but disagreed with the majority's approach to the review. He said:

> Socrates said that wisdom is the recognition of how much one does not know. I may be wise if that is wisdom, because I recognize that I do not know enough about dynamometer extrapolations, deterioration factor adjustments, and the like to decide whether or not the government's approach to these matters was statistically valid.

Shortly after this, Judges Leventhal, Wright, and Bazelon took to the law reviews to write articles defending their points of view.

("What counts is the reality of an opportunity to submit an effective presentation, to assure that the Secretary and his assistants will take a hard look at the problems in the light of those submissions.")

24 Verkuil, *supra* note 4, at 238.
26 478 F.2d 615 (D.C. Cir. 1973).
27 486 F.2d 375 (D.C. Cir. 1973).
28 Id. at 402 (citing *Int'l Harvester*, 478 F.2d at 647); see also Schiller, *supra* note 20, at 1156-57 (describing these cases).
29 *Int'l Harvester*, 478 F.2d at 650-51 (Bazelon, J., concurring).
We all know what happened next—the *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council, Inc.* decision came down squarely against the Bazelon approach. The case concerned a challenge to a rulemaking by the Nuclear Regulatory Commission that had been designed to help the agency avoid having time-consuming adjudicatory hearings on the environmental impact of nuclear power plants in every licensing proceeding. Environmental groups challenged the rulemaking, and the D.C. Circuit overturned it. Chief Judge Bazelon’s opinion for the court held that the NRC needed to provide opponents of the rule with some opportunity to challenge the testimony of the agency’s experts, and remanded the rule.

The Supreme Court unanimously reversed. In his opinion, Chief Justice Rehnquist, citing Judge Wright’s article, said that the D.C. Circuit’s “Monday morning quarterbacking” of the rulemaking process would cause agencies to err on the side of formal procedures and that “all the inherent advantages of informal rulemaking would be totally lost.” The upshot of course is that after this decision courts may not require agencies to use procedures in rulemaking beyond those required by the APA or other statute. But hard look review of agency fact finding and policy choice under the arbitrary and capricious test survives, as we saw in the 1983 *State Farm* decision, most recently reaffirmed by the *Fox TV Stations* case.

This all seems quite familiar now, but in 1974 it was all new and uncertain. The result of Paul’s work was ACUS Recommendation 74-4, “Preenforcement Judicial Review of Rules of General Applicability,” which made several important clarifying contributions to the developing administrative law doctrine. First, it detailed the appropriate contents of what later became known as the “rulemaking record” in pre-

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33 *Vt. Yankee*, 435 U.S. at 547.
34 *Id.*
35 *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810 (2009) (asserting that while the standard of review under the arbitrary and capricious test is “narrow,” “we insist that an agency examine the relevant data and articulate a satisfactory explanation for its action”). *But see Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Application of the beefed-up arbitrary-and-capricious test is inevitably if not inherently unpredictable—so much so that, on occasion, the courts’ arbitrary-and-capricious review itself appears arbitrary and capricious.”).
enforcement judicial review, while also taking pains to acknowledge that in some cases courts might supplement the record or even exclude certain parts due to confidentiality concerns.

Second, it approved of the use of the arbitrary and capricious test as the appropriate test for judicial review of rules issued after informal rulemaking proceedings and suggested:

The term “substantial evidence on the record as a whole,” or comparable language, in statutes authorizing judicial review should not, in and of itself, be taken by agencies or courts as implying that any particular procedures must be followed by the agency whose actions are subject to the statute and, in particular, should not be taken as a legislative prescription that in rulemaking agencies must follow procedures in addition to those specified in 5 U.S.C. 553.38

I view this as one of ACUS’s foundational recommendations that is as relevant today as it was forward-looking then. One of ACUS’s most exacting members, Warner Gardner, wrote a letter at the time to then-Research Director Robert Hamilton about Paul’s article: “It is a very thoughtful and comprehensive job. He has made more intelligible an area of much difficulty and contradiction, and offers the reader a framework in which to arrange the somewhat chaotic cases.”39 And Bill Allen, Chairman of the ACUS Committee on Judicial Review and another stern taskmaster and stickler for well-written reports, began his introduction of the matter at the May 1974 ACUS Plenary Session with these remarks: “[I]f there is anything of real value in what the Judicial Review Committee brings before you today, it is principally the Verkuil report, which I commend to all of you for careful reading. It is full of intelligent analysis, and insights into this new and fascinating problem.”40 Obviously this was a great launch to Paul’s academic career.

37 ACUS Recommendation No. 74-4, 39 Fed. Reg. at 23,044, ¶ 1 (“(1) The notice of proposed rulemaking and any documents referred to therein; (2) comments and other documents submitted by interested persons; (3) any transcripts of oral presentations made in the course of the rulemaking; (4) factual information not included in the foregoing that was considered by the authority responsible for promulgation of the rule or that is proffered by the agency as pertinent to the rule; (5) reports of any advisory committees; and (6) the agency’s concise general statement or final order and any documents referred to therein.”).
38 Id. ¶ 2.
40 Transcript of ACUS Plenary Session 147 (May 31, 1974).
II. STUDY ON INFORMAL ADJUDICATION

Paul’s second ACUS study, of informal adjudication procedures,\(^4\) did not result in a recommendation, but in my opinion is one of the most useful administrative law articles ever written. Although written thirty-four years ago, I still assign it to my administrative law class, even though I could have hardly imagined reading an article written in 1939 when I was in law school. Why is it so useful? Because it illuminates an area of the law, informal adjudication, that is almost unaddressed in the APA and it ties it in to the caselaw on procedural due process that still reigns today.

Because the APA formal adjudication procedures are only triggered by statutes that require “on-the-record” hearings, and because Congress often, deliberately or not, omits such language in programs that require adjudications, a vast number of informal adjudication programs exist throughout the government.\(^4\) Moreover, because the APA lacks a section on informal adjudication and contains only a smattering of provisions that apply to informal adjudication, agencies are free to design their own procedures subject to the constraints of the Due Process Clause and any restrictions in their own statutes. It is obviously difficult to maintain a perspective on this wide variety of programs and procedures.

What Paul did was hit on an ingenious way of describing them. He first extracted the ten procedural ingredients of the pre-termination hearing required by the Supreme Court in \(Goldberg v. Kelly\) before welfare benefits could be terminated.\(^4\) These ten ingredients basically make up the recipe for a trial-type hearing similar to the APA’s formal adjudication process. He then chose four Cabinet departments (Agriculture, Commerce HUD, and Interior) and catalogued all of the informal adjudication programs in them, amounting to forty-two. Next, he compared the procedural ingredients of each program to the \(Goldberg v. Kelly\) ten. He found a wide range: two had all ten, four had nine, two had eight, four had seven, one had six, one had five, nine had four, thirteen had three, three had two, two had zero.\(^4\)

He also investigated how often each of the procedures were present: Of the forty-two, forty offered timely and adequate notice, ten


\(^{44}\) See Verkuil, \textit{supra} note 41, at 760-71. The totals are summarized \textit{id.} at 760 n.80.
allowed confrontation of adverse witnesses, twenty-one allowed oral presentation of arguments, twelve allowed oral presentation of evidence, nine permitted cross-examination, ten offered disclosure of opposing evidence, sixteen allowed the right to retain an attorney, seven provided a determination on the record of the hearing, thirty-seven provided a statement of reasons for the determination and an indication of the evidence relied on, and thirty-eight had an impartial decision-maker.45

The numbers themselves are interesting, but the framework is what makes the situation understandable to the students. And when the students then read *Mathews v. Eldridge*,46 which substituted the famous three-prong balancing test for determining what process is due under the Due Process Clause in varying situations—a retrenchment from *Goldberg* that had just been handed down as Paul published his article—they can see just how the balancing test might work in various contexts. Moreover, the article also forms a good foundation for discussing whether it would be possible to draft an informal adjudication section of the APA that could cover the multitude of such adjudications.

So as a teaching tool, I find the article invaluable. But along the way Paul provides some useful theoretical underpinnings for these discussions, pointing out that the quest is to find the optimum balance of fairness, efficiency, and satisfaction to the participants (sometimes called “acceptability”) in administrative proceedings. He also signals one of his lifelong themes—encouraging interdisciplinary work concerning government administration. He points out in the introduction to this article that the conflicts among the goals of efficiency and fairness tend to “intensify when the government’s activity takes on critical importance to the individual.”47 In an interesting footnote he explains that part of the reason for this stems from the fact that each discipline of the social sciences is inhibited from relating its own measures of individual behavior to those of other disciplines. Thus, the economist’s maximization principle has not been coordinated with the sociologist’s or psychologist’s satisfaction principle in any effective way. Much interdisciplinary theorizing needs to be done if problems like those addressed in this article are to be solved by the social sciences.48

Paul’s pathbreaking work in this area has not to my knowledge really been updated or supplemented—perhaps because such an endeavor is so arduous. But its searchlight still shines.

45 *Id.*
47 Verkuil, *supra* note 41, at 742.
48 *Id.* at 742-43 n.13.
III. UNIFICATION OF ADMINISTRATIVE PROCEDURE

Two years later in 1978, now the Dean of Tulane Law School, Paul produced another pathbreaking article, *The Emerging Concept of Administrative Procedure*.\(^{49}\) I wish I could claim this was an article for the Administrative Conference. Truth be told, although it has been for years mistakenly included in the ACUS bibliography,\(^{50}\) it was done for the ABA’s Commission on Law and the Economy. But I want to mention it here, not only because of its sweeping attempt to synthesize the APA procedures into a “unitary administrative procedure,”\(^{51}\) but also because it made some specific recommendations on expanding ACUS’s role—a recommendation he may now be in a position to implement.

In this article, he delves into the history of the APA to describe how fears of administrative tyranny led anti-New Deal forces to nearly enact the Walter Logan Act, which “under the guise of reform, would force administrative and departmental agencies having a wide variety of functions into a single mold which is so rigid, so needlessly interfering, as to bring about a widespread crippling of the administrative process.”\(^{52}\) With the help of the 1941 Attorney General’s Committee Report on Administrative Procedure, the compromise APA was eventually enacted after WWII, and as Paul concludes,

the substance of the bill owed relatively little to Walter-Logan. It did not impose a procrustean procedural system on administrative agencies; rather it provided that the formal hearing provisions would be triggered by organic agency legislation. The APA also offered some important procedural innovations, in particular the preferred category of “informal” rulemaking.\(^{53}\)

The enactment of the APA calmed things down for a while—it was twenty years before the APA was amended by the addition of the Freedom of Information Act in 1966. But the APA’s four-part framework of formal and informal adjudication and rulemaking was beginning to fray. In the world of adjudication, as Paul had already illuminated, the hard-fought-over formal adjudication procedures in the APA represented a relatively small proportion of formal adjudication,

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51 Verkuil, *supra* note 49, at 322 (internal quotation marks omitted).
52 *Id.* at 272 (quoting the ASS’N OF THE BAR OF N.Y.C., REPORT OF THE COMMITTEE ON ADMINISTRATIVE LAW AND FEDERAL LEGISLATION, quoted at 86 CONG. REC. 13,943 (1940) (veto message of the President)).
53 *Id.* at 277.
and the much larger world of informal adjudication was essentially ignored by the APA. The Supreme Court too had moved away from the idea that a hearing required by due process meant a trial-type hearing (the Goldberg v. Kelly view) to a sliding scale of procedural requirements based essentially on a cost-benefit balancing analysis (the Mathews v. Eldridge approach). And on the rulemaking side, although pure formal (trial-type) rulemaking was fast disappearing, Congress, the White House, and the courts were all somewhat dissatisfied with the streamlined notice-and-comment rulemaking process, leading to so-called hybrid rulemaking and additional procedures and analytical requirements layered onto the section 553 procedures.

In Paul’s view the formal and informal poles were converging into a middle ground “unitary procedure.” He suggested that the APA itself was not a barrier to this approach, pointing out that in section 556(d)’s limitations on the right to cross examination and its written hearing provisions as well as section 555(e)’s reasons requirement, “the APA presents opportunities for procedural reform that have been underutilized or even ignored since its enactment. These latent opportunities, if realized, could quell, if not rebut, charges of procedural rigidity and irrelevance.” Building on this, he recommended that trial-type procedures should be reserved for “(a) the imposition of a sanction for past conduct; [or] (b) any other cases where such procedures are mandated by the [C]onstitution.”

For all other cases “where a ‘hearing’ of some kind is normally contemplated, whether it be labeled rulemaking or adjudication,” Paul suggested: “A unitary ‘administrative procedure’ should be established which (a) contains the minimum procedural ingredients of APA informal rulemaking (notice, written comment, and reasons); and (b) may be expanded to include oral comment and cross-examination on specific issues as the agency so determines.” He also suggested that “[a]dministrative decisions shall be accompanied by a concise statement of reasons, if request therefor is made, unless the agency determines that for good cause such a requirement should be dispensed with.”

Interestingly, he also proposed that “[b]efore adopting rules of procedure each agency should consult with [ACUS] in an effort to achieve such degree of uniformity as is consistent with the varying

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54 Id. at 311 (“The emergence of an alternative administrative procedure model allows for contraction of formal adjudication and is soundly based in related procedural experience, such as the use of rulemaking in ratemaking. This unitary procedure can effectively resolve most matters that come before agencies, whether they were formerly labelled [sic] rulemaking or adjudication.”).
55 Id. at 313.
56 Id. at 321 (Recommendation 1).
57 Id. at 322 (Recommendation 2).
58 Id. at 324 (Recommendation 3).
nature of the work of the agencies.” This is an approach that Congress had taken in the 1976 Government in the Sunshine Act, and that ACUS adopted later with respect to the Equal Access to Justice Act, but it has not been tried more generally.

Paul also recommended that “[t]he Administrative Conference should conduct ‘procedural audits’ to evaluate agency performance in a systematic manner.” Given Paul’s current position, it is worth quoting in full his reason for this recommendation:

The Administrative Conference has not performed this role in any substantial way, but there is no reason (other than budgetary constraints) why it cannot do so. Indeed, the Conference’s ill-fated ancestor, the proposed Office of Federal Administrative Procedure, was created with exactly this role in mind. Its major function was to have been “to examine critically the procedures and practices of the agencies.” This role should be compatible with the current mission of the Conference. Indeed, when the Conference has undertaken single agency studies (as with its recent Internal Revenue Service procedural reform study), it has achieved notable success.

The Conference’s organization should pose no serious obstacles to this new role. The membership consists in large measure of agency officials, but the additional presence of the chairman’s office, with its professional staff, and respected public members, should rebut any charges that the agencies are simply doing a friendly audit. The Conference’s organization would have to be expanded or restructured to allow for committees that would focus on individual agencies, as its committee structure is presently organized around generic issues (rulemaking, judicial review, and so forth) rather than particular agencies.

The procedural audit role can only be performed effectively if the Conference is given adequate additional funding to do the job. The agency has the experience, stature, and expertise to look closely at agency performance and develop auditing standards that can measure the quality of administrative procedures. These kinds of procedural studies may be the best way ultimately to fix upon workable measures of the procedural values of fairness, efficiency, and satisfaction that can be used to regularize agency procedure in the future.

59 Id. at 326 (Recommendation 7).
61 See id. § 504(e) (requiring that ACUS report to Congress annually on claims and fee awards in administrative cases). While not requiring consultation per se, ACUS did issue “model rules” for as a basis for consulting with agencies on the implementation of the Act in administrative cases. See 51 Fed. Reg. 16,659, 16,665-69 (May 6, 1986) (codified at 1 C.F.R. pt. 315).
62 Verkuil, supra note 49, at 328 (Recommendation 9).
63 Id. at 328-29.
IV. WHITE HOUSE INVOLVEMENT IN AGENCY RULEMAKING

Two years after this magnum opus, Paul took on a hot button issue for ACUS—the increasing importance and controversy concerning White House “jawboning” of agencies in rulemaking through ex parte contacts. In 1977, ACUS had issued a careful recommendation on ex parte communications in rulemaking more generally in response to the D.C. Circuit’s seeming prohibition of them in the Home Box Office case. In that Recommendation, ACUS declined to support an across-the-board prohibition on such comments in informal rulemaking, but urged agencies to promptly place any such comments received after the notice of proposed rulemaking in the public record. But the development of increasing White House involvement in the rulemaking process, evidenced by President Carter’s Executive Order 12,044 and news reports of White House “confrontations with agency policymakers over health, safety, and environmental rules” over the costs of such rules, raised new questions.

Paul’s treatment of the issue is also characteristically measured, but he ultimately comes down in favor of allowing White House ex parte contacts in rulemaking (as long as factual submissions were placed in the record) as an important part of the President’s accountability for “taking” Care that the Laws be faithfully executed.” One year after this, during the even more controlling Administration of Ronald Reagan, Judge Patricia Wald, writing for the D.C. Circuit, echoed these views in Sierra Club v. Costle, with numerous citations to Paul’s article.

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68 Verkuil, supra note 64, at 944.
69 Id. at 952 (citing U.S. CONST. art. II, § 3).
71 657 F.2d 298, 405-06 (D.C. Cir. 1981).

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. . . . The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic
Paul’s article is one of the first to take on this issue—one that became somewhat more politicized when the Reagan Administration converted OMB’s role into one of clearing rules before they could be issued, and when the phenomenon of “conduit communications” between outside groups and OMB became more publicized. But Paul’s article and the ensuing ACUS Recommendation\(^2\) (also quoted in full by Judge Wald\(^3\)) broadly supported intragovernmental communications in rulemaking, subject to the caveat that communications that “contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule” should be promptly made public and conduit communications should be “identified and placed in the public file, regardless of their content.”\(^7\)

The Recommendation was somewhat heatedly debated in the plenary session, and it did occasion a separate dissenting statement from some ACUS members aligned with public interest groups who thought it allowed too much secret communication between the White House and the agencies.\(^7\) But it also laid the foundation for ACUS’s 1988 Recommendation 88-9, “Presidential Review of Agency Rulemaking,”\(^7\) which contained greater detail with respect to the need for transparency and was largely adopted in President Clinton’s Executive Order 12,866.\(^7\)

I should add that Professor Kenneth Culp Davis, an ACUS member who was not shy about skewering a consultant’s report he didn’t like, wrote a letter praising this study: “The Verkuil study is a very impressive one, and I am at least tentatively in agreement with every


\(^3\)657 F.2d at 407 n.528.

\(^4\)ACUS Recommendation No. 80-6, 45 Fed. Reg. at 86,408, ¶ 2.

\(^5\)See id. at 86,408-09 (separate statement of ACUS members William A. Butler et al.).


\(^7\)Exec. Order No. 12,866, 3 C.F.R. § 638 (Oct. 4, 1993). The Conference recommended public disclosure of proposed and final agency rules and final agency agendas submitted to OMB, official written policy guidance from OMB, communications from OMB containing factual information relating to the substance of the rulemaking, and “conduit” communications (that is, communications containing the views, positions, or information from persons outside the government). The recommendation also suggested procedures to be followed by OMB reviewing officials to discourage such “conduit” communications. Finally, the recommendation stated that presidential review “should be completed in a timely fashion” by both the reviewing office and the agencies, “with due regard for statutory and other relevant deadlines,” but a specific time limit on review was not recommended.

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part of his main outline.”

This is high praise when considering the source!

V. THE REGULATORY FLEXIBILITY ACT

Paul stayed in the realm of rulemaking for his next work for ACUS, taking up the just-enacted Regulatory Flexibility Act of 1980, which required agencies to pay special attention to their rules’ impact on small business. His “critical guide” to the new law, which was one of the first efforts to require special analyses in rulemaking, remains to this day one of the most comprehensive and authoritative overviews of the Act and its legislative history. He rightly saw this as a part of the burgeoning “regulatory reform” movement, which added many new requirements to the rulemaking process (and came close to radically transforming the regulatory process). In the end, Paul wrote approvingly of this law:

The RFA is special-interest legislation with a balance: it urges agencies to recognize differences in size when promulgating rules, but it does not undermine the agency’s regulatory authority derived from organic legislation. Thus, while the RFA may not be all the small business community desires, it contains the seeds for producing workable compromises between government and the private sector and it does not pose unreasonable burdens on the administrative process.

Looking back, what is perhaps most interesting are his comments on the Act’s limitations on judicial review. The Act originally precluded any direct review of agency regulatory flexibility analyses or agency compliance or noncompliance with these requirements, opting instead to provide that “[w]hen an action for judicial review of a rule is instituted, any regulatory flexibility analysis for such rule shall constitute part of the whole record of agency action in connection with the review.” Paul’s comment on this “non-reviewability” provision is that

81 Id. at 271.
In effect, Congress subordinated the value of compliance induced by judicial oversight to the values of administrative efficiency and uninterrupted decisionmaking. Even though the non-reviewability of the certification process may frustrate the [Act's] purpose, Congress chose to take this risk rather than embroil the process in the quagmire of litigation.83

In 1996, Congress changed its mind and amended the Act to provide for broad judicial review.84 Whether this change unduly altered the balance against administrative efficiency is a topic for a future study.

VI. CONGRESSIONAL LIMITATIONS ON JUDICIAL REVIEW

A year later, the indefatigable Dean Verkuil provided another report for the Conference that led to a recommendation—this time on the knotty problem of congressional limitations on judicial review of rules.85

One of the interesting developments of the 1970s was the enactment of numerous environmental statutes that contained time limits on seeking review of rules coupled with preclusion of enforcement review if the pre-enforcement time limits were missed. It was only in 1966 that the Supreme Court in Abbott Laboratories86 had legitimated pre-enforcement review of rules, and now Congress was increasingly trying to make it exclusive. Though these statutes were worded broadly and seemed to admit of no exceptions, courts were beginning to carve out exceptions for enforcement review in some types of cases (e.g., criminal enforcement cases) and some types of claims (e.g., constitutional claims). But what was the best approach for the courts and Congress to take? The Conference had previously hired another consultant to categorize the existing preclusion statutes, but that was a purely descriptive study.87 Paul volunteered to add prescription to the description.88 And the Conference accepted his guidance in Recommendation 82-7, "Judicial Review of Rules in Enforcement

83 Verkuil, supra note 80, at 260.
86 Abbott Labs. v. Gardner, 387 U.S. 136 (1967); see also supra text accompanying note 5.
Proceedings.” The result was a carefully balanced and useful set of pointers for the courts and Congress that I believe has stood the test of time very well, as Professor Levin has remarked today. The heart of the Recommendation provides:

When Congress decides to limit the availability of judicial review of rules at the enforcement stage, it should ordinarily preclude review only of issues relating to procedures employed in the rulemaking or the adequacy of factual support for the rule in the administrative record. Judicial review of issues relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant should be permitted when these issues are raised in subsequent suits or as defenses to subsequent enforcement actions (subject to the principles of collateral estoppel and stare decisis). Judicial review of issues relating to the statutory authority for the rule should be precluded at the enforcement stage only where Congress has concluded that there is a compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.

This was not an easy study to undertake, and it is one where Paul actually received some rather critical comments on his first draft, including from Conference founder Walter Gellhorn. But Paul made the fixes, graciously acknowledged Professor Gellhorn and Conference staff members who also critiqued his draft, and produced a well received final report that did the job.

VII. IMMIGRATION AND DUE PROCESS

Paul shifted gears for his next report—perhaps recalling his advice that ACUS should conduct procedural audits, and calling on his experience examining due process in informal adjudication, he took on what he himself called a “procedural audit that determines which procedural ingredients are provided in each immigration function.” The timing of this effort was propitious because it was undertaken as

92 Letter from Walter Gellhorn to Paul R. Verkuil 3 (Aug. 4, 1982) (on file in the closed project file for Recommendation 82-7) (“You may . . . regard me as a book reviewer who, in place of reviewing a volume, describes the volume he wishes has been written instead.”).
93 Verkuil, supra note 85, at 733 n.na.
the Immigration Reform and Control Act of 1986, containing new legalization, employer sanctions, and summary asylum procedures, was being considered. In this article, Paul usefully categorized the six then-existing immigration functions (denaturalization, deportation, asylum, exclusion, parole/detention, and discretionary decisions). He also assessed the decision-making procedures for the legalization and employer sanction provisions that were being proposed at the time.

Of course, later legislation and executive reorganization have changed the landscape of our immigration programs quite extensively, so the specifics of Paul’s analysis may be dated. But the fundamental approach of tailoring procedures to the needs of fairness and efficiency has not changed. I was recently talking to an immigration law expert (who shall remain nameless) who told me that s/he had read Paul’s article at the time and was quite impressed that as a “non-immigration person” he had gotten it “almost all right.” Given the notorious complexity of the immigration laws, that is also pretty high praise. Moreover, it is hard not to credit Paul for the perspicacity of his conclusion:

There can be no doubt that immigration law has been moved to center stage. It will not relinquish that position in the future, no matter what Congress does with the current proposals. The problems those bills address are not going away. Our society must plan for increasing pressures upon our borders from those throughout the world who seek to improve their lives. The pressures to assimilate both legal and illegal aliens will continue to present major social and administrative problems.

The courts’ role in supervising appropriate INS procedures is likely to expand. While it is not yet clear how much judicial supervision will do to change existing procedures for deciding immigration cases, it seems inevitable that constant contact, through habeas corpus petitions as well as ordinary judicial review, will bring the courts closer to the process. In these circumstances, one can expect procedural improvements to occur by administrative initiative also. Fortunately, the level of recommended changes is within the capacity of the INS and the Department of Justice to achieve.

The Immigration and Naturalization Service (INS) has since been renamed and absorbed by the Department of Homeland Security, but otherwise Paul’s comments are spot-on. It remains an area of administrative procedure that is in great need of such analysis.

It will be obvious by now that Paul was an invaluable ACUS consultant. From 1974 to 1984, he took on six ACUS projects plus another major report that made recommendations to ACUS. According

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96 Verkuil, supra note 94, at 1206-07.
to the list of his publications distributed for this program, he also published thirteen other articles and three books during this period! How he was able to do this while serving as a law school dean for many of these years is beyond me. But there was one more major ACUS study to come. When he finished it, perhaps he thought of it as the culmination of his ACUS career. It is an underappreciated work, so much so that it almost became ACUS’s coup de grace.

VIII. THE ADMINISTRATIVE JUDICIARY

In 1991, ACUS received a request from the Office of Personnel Management (OPM) to undertake a broad examination of the current and future role of administrative law judges (ALJs) in the administrative process. The OPM Director requested that the Conference include in its study “a clear delineation of the current ‘landscape’ of administrative adjudication [and] an analysis of the evolving role of the ALJ and other agency adjudicators from 1946 to the present.” 97 The subject of ALJs was something I had been interested in for some time, 98 so I was happy when Paul agreed to lead a team of scholars including Daniel Gifford, Charles Koch, and Richard Pierce to undertake this effort, and when he invited me to be a team member. (I like to tell my administrative law students I was one of the “et al.s” for this report, which is excerpted in the casebook I use. 99)

This august team prepared a 368-page book complete with an empirical survey and an extensive bibliography. 100 It spun off several law review articles 101 and produced a detailed ACUS


100 Verkuil et al., supra note 97. Unfortunately, the volume is out of print and somewhat hard to find. It is, however, available on HeinOnline, as are all the ACUS reports and recommendations from 1968-1995.

Recommendation. It remains the only publication that I know of that gives comprehensive treatment to both ALJs and non-ALJ adjudicators. It traces the history of the evolution of the hearing examiner position into ALJs, and the transformation of their workload from one of largely regulatory cases to one of largely benefit cases. It outlined some of the problems in the selection process, designed to be one of the true merit selection judicial selection processes in the nation, but suffering from agency dissatisfaction and a lack of diversity among the judge corps. It discussed the variety of administrative adjudications and adjudicators across the government. Finally, it discussed the scope and degree of independence for ALJs and non-ALJs, and how there were obvious advantages of independence and not-so-obvious potential adverse consequences of independence in some contexts. An extensive survey of ALJs and non-ALJs bolstered these conclusions.

This is not the forum to go into the details of this report or the ACUS recommendation, other than to say that they both, to varying degrees, recommended a fairly significant shakeup of the existing ALJ program, especially in giving the agencies more flexibility in selecting ALJs from OPM's register of eligible applicants, and in allowing some evaluation of ALJ performance by Chief ALJs. Along the way, the Conference also mildly threw some cold water on the idea of then-pending proposals to establish a centralized corps of ALJs, thus divorcing them from their employing agencies.

These recommendations did not sit well with certain members of the ALJ community—especially those that were pushing the centralized corps proposal. With a change in OPM leadership and some vocal opponents among ALJs, the ACUS recommendations died on the vine. Afterwards, several outspoken opponents bitterly criticized ACUS in correspondence with Congress, while other ALJs strongly defended the agency. An objective observer who wrote a post-mortem on ACUS found that there was at least some evidence that this campaign on the part of some ALJs to discredit ACUS, aided by a hired lobbyist, had some impact on its ultimate defunding.

This is ironic since the recommendations were frankly intended to save ALJs from becoming an endangered species outside of the Social Security Administration (SSA), which in 1992 had 73% and in 2008 had 83% of all ALJs in the government. Indeed, the increasing

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104 Id. at 95-97.
105 As of September 2008, SSA employed 1192 out of 1436 ALJs, or 83%. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES: OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING
number of non-ALJ adjudicators far outstrips the approximately 250 ALJs found in all the agencies other than the SSA.\textsuperscript{106} ACUS itself bemoaned this movement away from ALJs:

The Conference’s general view is that the movement away from the uniformity of qualifications, procedures, and protections of independence that derives from using ALJs in appropriate adjudications is unfortunate. The Conference believes that, to some extent, this movement away from ALJs toward AJs has been fueled by perceptions among agency management of difficulties in selecting and managing ALJs. These recommendations attempt to address these perceived problems.\textsuperscript{107}

At any rate, the problem continues. The Government Accountability Office (GAO) has recently issued another report suggesting continued agency dissatisfaction with the program.\textsuperscript{108} ALJ organizations have welcomed ACUS back, if for no other reason than that adjudication issues will get renewed consideration. So I hope that the volume that Paul organized and put together, \textit{The Federal Administrative Judiciary}, will get the attention and respect that it (in my not unbiased opinion) deserves.

\textbf{CONCLUSION}

When I embarked on this journey through Paul Verkuil’s ACUS-related scholarship, I did not really know exactly what I was getting into. I came out of it highly impressed with the sheer \textit{amount} of work he did for the Conference (without even considering all his other work both during and after the Conference’s operations). But more importantly, I was impressed with its quality. To me it adds up to a microcosm of ACUS’s work as a whole, providing pragmatic and theoretically sound improvements in the core of administrative procedure—adjudication, rulemaking, and judicial review—while also branching out into important specialized areas—social security, immigration, small business impacts, and independent agency structure.


\textsuperscript{107} ACUS Recommendation No. 92-7, 57 Fed. Reg. at 61,760 (preamble). I have made this point more strenuously in Lubbers, \textit{ supra} note 42.

\textsuperscript{108} U.S. Gov’t Accountability Office, \textit{ supra} note 105, at 9-11.
He was a one-man ACUS within ACUS, so it is appropriate that he now has a chance to lead the agency in its second life.