

Administrative Conference of the United States

60<sup>th</sup> Plenary Session

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Comments made by Jim Tozzi, director of the Center for Regulatory Effectiveness

**Time: 2:31:15**

**Moderator:** Are there any further questions or additions? Mr. Tozzi?

**Tozzi:** Jim Tozzi, public member. I compliment (Neil) and the committee for undertaking a very important exercise, and as Gretchen said it's the first time in forty years that the conference has looked at the idea of "Ex Parte". I want to call everyone's attention to the second work order that they gave in doing this, that they had to look particularly at advances in electronic docketing and how that might affect the existing "Ex Parte" rules.

I spent a considerable part of my work day in that space and I wanted to share with you some of the concerns and what's hurting there, and suggest a regulatory nudge in the direction of relaxing some of the "Ex Parte" rules. If you start with what has happened in the last forty years and you look at NPRMs that come out, compared with the ones forty years ago, science plays a huge role. And you'll see NPRM after NPRM that have new scientific theories or scientific theories that inform the basis of rulemaking, whether they're from biotech transmission, to EDS, to endocrine disruptors to bio-transmission of diseases, they form the basis of rulemaking that they didn't before. You also have changes in the economy, if you look at sectorial flows of capital, new capital models come out and they're the basis of rules. And you have a lot of rules coming out that are very technical and based on technology.

So my point is in those cases a lot of professional organizations after a rule comes out have discussion forums. For those of you who follow the Health Care Act these are very prevalent. And these groups meet in professional societies and if the only relief you're going to get is an article in the New England Journal of Medicine or a law review, as a result of that, there's not a big incentive to meet. People want to get that kind of information into the regulatory structure, and they do it by "Ex Parte" contact. In addition to that you also have a group of watchdog and public interest groups that comb the comments made, using social media very heavily, to say "this person made a comment", and that comment just doesn't sell.

This all occurs after the close of the public comment period. These groups too want some kind of relief. Just two days ago there was a very big change, and for those of you who follow the "big data" issue, one of the largest firms in Silicon Valley came out and said they are now mining data for Regulations.gov. They have now put a large portion of Regulations.gov on their server and they're analyzing trends. Now all of that occurs after the close of the public comment period and the question ACUS has to look at is how is that kind of data and that kind of work going to take place.

I understand having spoken to a lot of our regulators that one of the biggest concerns is the fact that they may have to open the comment period and I think that's a real issue. On the other hand there's a lot of people here who are a lot more capable of this than I am, but my reading of the "Portland Cement" rule, is that if there's a precursor antecedent in the docket you can introduce it without it opening up. So where

does this lead me as we come to the conclusion? How pervasive is the concern on “Ex Parte” rules in the CFR?

So the other day I cuddled up to the CFR and I took a walk down “Ex Parte” lane. As I walked through “Ex Parte” lane I came down to the intersection of “Ex Parte” lane and the boulevard of Disbelief. On that corner there was this very oppressive, big building, that said “Ex Parte” for agency X. So I peeked into that building and in there were all these “Ex Parte” rules with a little room on the side. They said “This is where we’re going to explain to you really what our “Ex Parte” meeting is”. So I copied it. Let me read to you what this agency said about “Ex Parte” rules. It says in the “question” area at the end, after all these “Ex Parte” rules they had an explanation for practitioners such as me. One question is “Does our Policy permit “Ex Parte” contacts during the comment period?” I’m not talking about after the comment period but during. Here’s the answer “No. “Ex Parte” contacts are not necessary to collect information the agency needs to make its decision.” That isn’t user friendly. I mean this is during the comment period, this isn’t after. Now I asked another question, so maybe that’s a very broad issue and there’s another portion of it. So what about if you comment during that time and you don’t want to ask about a general “Ex Parte”, you want to ask about the details of what’s in the rule. Here’s the question and answer on the rule. It says, “Are any oral contacts concerning the proposal permitted during the comment period? Answer: If you contact the agency to discuss the proposal you will be told that the proper avenue of communication during the comment period is a written communication to the docket.” Well people that are adding this new science and are approached with this kind of stuff in the CFR think this needs some cleaning.

So what’s my recommendation? It’s not a recommendation to change the good work of the committee, not a recommendation to get rid of “Ex Parte”, but a slight nudge in Mr. Sunstein’s view. It’s a nudge on Recommendation 9. Knowing how we work, I want to be minimally disruptive in any kind of work the committee would do. The only thing I would ask is after Recommendation 9, which I think could easily be taken as not nudging in the direction I want, I would suggest adding after the term “considered” the following language, which to me is just a restatement of existing law: “Giving full consideration to the principals annunciated in *Sierra Club v. Costle*”. Thank-you.

**Moderator:** Ok. That was an interesting journey down “Ex Parte” lane. Any discussion on this? Is this is an amendment Mr. Tozzi?

**Tozzi:** Yes, yes it is.

**Moderator:** Discussion? No. Are we prepared to vote? Do you have a comment?

**ACUS Committee:** I was afraid you were going to call on me. A few points. We do try to nudge a little bit I believe when we say in Recommendation 15 “Consider digital technology in the management and disclosure of “Ex Parte” communications.” We nudge in other places where we suggest that if you have a technical person, who doesn’t know how to write, that you could have public meetings where you could get their views. Even after the comment period has closed, if people raise the need to talk to you, you could have public meetings. I also point out that I’m not sure why, since you made a big issue out of talking to people during the comment period, you want to add this only for “Ex Parte” communications after the comment period.

**Tozzi:** Well because if you look into that big building on the corner of “Ex Parte” lane and Disbelief Boulevard you see it only gets worse. By the way, in terms of the venues I gave you on science, they all take place after the close of the public comment period. So if you want to incorporate any of the data that comes out of those venues it has to be that one.

**ACUS Committee:** Why do they only occur after the close of the comment period?

**Tozzi:** Well because the NPRM will raise these new issues and new science issues and it would be pretty difficult, if not impossible, to get a group together, analyze it and get it done in sixty to ninety days. One particular issues that I'm working on, a scientific issue, had to do with biotech. Getting all the people together to look at it in that period of time might not be impossible, but it's very difficult.

**ACUS Committee:** My response to that, and I think the committee would agree, is that this was a difficult issue and this was the most difficult of the issues: what do you do after the close of the comment period? And when parties have trouble getting their comments written before the end of the comment period, in my experience when I was in the government, I found that it was routine to ask for more time if you can't get your interest group together until you can all study this. So we need you to extend the comment period so we can meet as a group. I'm not sure we have enough of a record to justify that kind of a comment.

**Tozzi:** Well that's why I'm asking it. I would never ask for something to extend the comment period. I want to live by those dates and not, by any means, extend the resources of the government any more than it already does. My comment is just a nudge to say that we comply with existing law

**Moderator:** Do we have further comments on that? Why don't we vote on the amendment which is to add those comments above? All in favor? Aye? Opposed? Nay? Okay, good try Jim. Actually we learned a lot, even if you didn't win.

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