Comment for ACUS Committee on Judicial Review

From: Judge J. Plager

Re: Agency Guidance recommendations—Oct. 11 draft

Date: October 16, 2017

I agree with both points that Ron Levin makes in his extensive discussion memo of October 13.

As to point one regarding agency guidance documents, the former paragraph 1 version provided for an opportunity to seek both modification generally and a specific departure for the case at hand. This recognizes the basic principle that guidance documents are not law, but rather an indication of the agency's intentions concerning implementation of the law. As such, they are subject to challenge for basic errors in their scope, and to equitable considerations in their application. The revised language, which omits this language, only suggests an opportunity to argue for alternative "lawful approaches"…it offers no suggestion that the guidance is not intended to be binding since it implies that the stated guidance is the agency's preferred "lawful approach."

As to point two, regarding interpretive rules involving the same basic principles as policy guidance documents, this same question of "bindingness" runs through this issue as well. Ron notes a key point that should not be lost in the swirls of discussion— as a practical matter, the interpretive rule is important only with respect to interpretations that are *debatable*…if the agency's interpretation is really self-evident—what he calls "a true no-brainer"—the agency would not need to rely on the interpretive rules exemption at all. In that sense, 'interpretive rules' and 'guidance documents' play largely the same role.

From the judicial viewpoint, the question of deference to agency interpretations, whether in something labelled an 'interpretive rule' or a 'guidance document,' is much the same, and equally problematic. Under current understandings of the jurisprudence, courts are supposed to grant deference to agency views utilizing a variety of confused and confusing deference concepts, ranging from *Auer* through *Mead* and *Skidmore*, capped off by *Chevron;* some view *Chevron* deference under the two-step dance as abrogating entirely a court's function of saying what the law is.[1] The courts thus are dealing with a range of deference rules, picking the appropriate one for the case, and trying to determine whether the particular rule at issue appears sufficiently binding to have warranted notice and comment rulemaking. Is it any wonder that the court decisions are hard to reconcile?

[1] Whether current understandings will withstand the frequent criticisms heard remains to be seen.

As an aside, if you want to see in all its glory judicial disagreement about deference to agency decision—deference to what kind of decision, and how much deference-- read the five separate opinions from the eleven judges in the *en banc* decision called *Aqua Products*, just decided this past week by the U.S. Court of Appeals for the Federal Circuit. (Disclosure--I was not part of the *en banc* court in this case, so I take neither credit nor blame.)

That example alone should suggest the importance of the work in which this committee is presently engaged. We need to address directly Congress's mandate in the APA, and the policy behind it, that legally binding rules by the executive branch agencies are to be made through notice and comment rulemaking, with all that entails. And we need to be as clear as possible about what exactly that means.