Comment from Senior Fellow Ronald M. Levin on *Choice of Forum for Judicial Review of Agency Rules*
June 10, 2024

This is a reply to Public Member Jennifer Dickey's comment. As relevant here, she calls for deletion of paragraph # 2 of the proposed recommendation. That paragraph reads: "Congress should amend 28 U.S.C. § 137 to provide that district courts apply district-wide assignment to civil actions seeking to bar or mandate universal enforcement of a federal agency rule or policy."

Joseph Mead's consultant's report to the Conference discusses the background and rationale for this proposal, particularly at pages 39-42. I encourage interested members of the Conference to read that discussion. I will not attempt to cover the same ground here. However, Ms. Dickey makes a few arguments that the report did not discuss. I will offer some brief replies to those points.

1. Ms. Dickey's biggest concern seems to be that "the judge shopping rationale seems to endorse the idea that our judges do not bring to each case their best efforts to apply the law to the facts, but rather a bias toward or against a particular plaintiff." I recall no discussion of bias during the committee meetings that gave rise to the proposed recommendation. I cannot speak to what was in the minds of other committee members, but I responded directly to this argument in a recent article:

> It is difficult to conceive of any public policy that could justify allowing such stark judge-shopping. The practice is somewhat analogous to a hypothetical system in which an appellant at the court of appeals level were permitted to choose which three members of the court should hear its appeal. That procedure would surely be recognized as improper, and that recognition would not depend on an assumption that any of the circuit's judges, considered individually, would render a biased decision. Rather, it would be improper because an element of randomization in the assignment of judges to significant cases tends to promote stability and moderation in the legal system. Similarly, judge-shopping within the divisions of a district court subverts that safeguard.[1]

2. Ms. Dickey suggests that paragraph # 2 would "be at cross-purposes with" paragraph # 1, which urges Congress to provide that certain agency rules should be subject to direct review by a court of appeals. I can discern no sense in which these two measures would actually conflict with one another. It's true that, to the extent that Congress implements #1, the range of rules to which #2 would be relevant would be reduced. However, paragraph #1 would, by its terms, apply only to rules adopted through notice-and-comment procedures, and only to rules adopted under new legislation, not under existing legislation. Paragraph #2 would certainly not be superfluous with regard to other rules.

3. Ms. Dickey objects that "the preamble at line 59 seems to unwittingly take sides in the debate about the meaning of 'vacatur' in the APA (i.e. does it mean universal vacatur or as to the person) by suggesting that universal vacatur is appropriate, contrary to the position the executive branch has taken in the Supreme Court under the last two Administrations." It's not surprising that the Committee would have made this assumption, because ACUS has been on record as recognizing the legality of vacatur under the APA for more than a decade. ACUS

[1] *Vacatur, Nationwide Injunctions, and the Evolving APA*, 98 NOTRE DAME L. REV. 1997, 2033-34 (2023).

Recommendation 2013-6, Remand Without Vacatur. To be more precise, that recommendation maintained that a court should have discretion *not* to vacate, but that proposition would have made no sense unless it assumed that vacatur was also an option. Indeed, the preamble noted that "[t]raditionally, courts have reversed and set aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in violation of an applicable standard of review."

In case anyone wonders why the recommendation did not support the legality of vacatur under the APA more explicitly, the simple explanation is that in 2013 nobody questioned its legality. That's why the preamble, when summarizing the controversy about the legality of remand *without* vacatur, responded only to suggestions that vacatur must be *mandatory*. It's only in recent years that revisionists have called longstanding assumptions about the legality of APA vacatur into question.[2]

4. Finally, Ms. Dickey argues that, if the committee proposal were enacted, "plaintiffs residing in sprawling districts (typically in more rural areas or geographically larger states) will experience significantly increased costs if they (and/or their attorneys) must travel hundreds of miles to appear in front of a far-flung judge for hearings." Although, notoriously, some recent judge-shopping episodes have involved filings in strategically chosen divisions that were convenient to *neither* party, I would agree that in some instances a lottery among divisions in a judicial district would result in assignment of cases to inconvenient divisions. In such a case, however, the regular change of venue statute, 28 U.S.C. § 1404, would allow a party to move for transfer to a different division. The question then is: which judge should adjudicate that motion: The judge in the division in which the plaintiff originally filed (which the plaintiff may have strategically chosen), or the "lottery winner" judge to whom the case gets assigned under the reform proposal? Surely, the latter judge would be in no worse a position to make a disinterested ruling on the motion, and might well be in a better position to do so.

[2] I have responded to the revisionists' APA arguments in the article cited above. *Id*. at 2005-19.