



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

MEMORANDUM

To: ACUS Assembly
From: Reeve T. Bull (Research Director), Jeremy S. Graboyes (Director of Public and Interagency Programs), and Alexandra F. Sybo (Attorney Advisor)
Date: June 3, 2022
Subject: 77th Plenary Session: Discussion of Nationwide Injunctions and Federal Regulatory Programs Project

As reflected on the Plenary Session agenda, there is a segment scheduled from 2:00 pm to 2:45 pm to discuss an ongoing Office of the Chairman project titled *Nationwide Injunctions and Federal Regulatory Programs*. This project undertakes an empirical study of how nationwide injunctions and equivalent or similar equitable remedies (including “universal” vacatur and set-aside, as the Department of Justice has used that term)—together “nationwide injunctive relief”—affect the administration of federal regulatory programs. The study will examine (1) the use, frequency, and characteristics of nationwide injunctive relief in challenges to agency action, with a particular focus on agency rules; (2) how agencies understand the scope of judgments vacating and setting aside agency rules under the Administrative Procedure Act (APA); (3) how agencies respond to nationwide injunctive relief in carrying out their rulemaking activities; and (4) other implications of nationwide injunctive relief for the day-to-day administration of regulatory programs. The report will not offer the consultants’ views as to when, if ever, nationwide injunctions should be used.

Professors Zachary Clopton, Mila Sohoni, and Jed Stiglitz, the consultants for the project, will provide a short presentation on their research. They have identified both questions for which they would like to receive feedback at the Plenary Session (Part A below) and for which they are interested in receiving written feedback after the Plenary Session (Part B below). If you wish to provide written feedback, please send it to Attorney Advisor Alexandra Sybo (asybo@acus.gov).

A. Questions For Discussion at the Plenary Session

1. The consultants are seeking to understand whether the form of relief affects how agencies respond to court decisions related to rules. In the interviews, the consultants have asked agency officials questions such as “Does it matter if a court permanently enjoins the enforcement of a rule nationwide versus vacates the rule? Does it matter if the relief—whether interim or final—applies universally or only to the parties?” If you have any thoughts on how the form of relief might affect how agencies respond to court decisions concerning rules, the consultants would be grateful to hear your thoughts at the session. The consultants would be particularly grateful for concrete examples of instances in which an agency might have responded differently if the form of relief had been different.

2. Some have argued recently that the APA should be understood to authorize courts to set aside rules only “as to the plaintiffs,” as opposed to “universally.” The consultants are interested in your understanding of the scope of relief authorized by the APA. The consultants are also interested in your view of how this plaintiff-specific understanding, if widely adopted by courts, would affect agency operations.
3. The consultants are seeking to understand whether the prospect of nationwide injunctions or universal vacatur affects the manner in which agencies regulate. For example, are agencies proceeding via adjudication rather than rulemaking in order to avoid broad-gauged relief that enjoins, stays, or vacates a rule or a rule-like agency action? If you have any thoughts on whether agencies are doing this, or on how they might do this, the consultants would be grateful to hear your thoughts at the session.

B. Topics for Written Feedback from Plenary Session Attendees

1. The consultants are seeking to learn about instances in which an agency has non-acquiesced, either on an intra-circuit or an inter-circuit basis, to a court decision that “set aside” a rule or a rule-like agency action. The cleanest example the consultants have so far found is an instance in which the EPA apparently continued to enforce regulatory guidance that the Eighth Circuit had earlier vacated because it was procedurally invalid and in excess of the EPA’s statutory authority. See *Iowa League of Cities v. EPA*, 711 F.3d 844, 877 (8th Cir. 2013) (vacating “blending rule” announced in an EPA letter); *Iowa League of Cities v. Env’t Prot. Agency*, 2021 WL 6102534, at *1 (8th Cir. Dec. 22, 2021) (noting EPA’s non-acquiescence outside the Eighth Circuit and granting mandamus limited to the Eighth Circuit). If you are aware of other examples, the consultants would be grateful to know of them.
2. The consultants are seeking instances in which agencies have publicly announced an intention to non-acquiesce in a court decision that stayed, enjoined the enforcement of, or vacated a rule or a rule-like agency action. If you are aware of such instances, the consultants would be grateful to know of them.