Committee on Judicial Review

Minutes

October 30, 2013

Committee Members Attending

Ron Levin, Chair
Boris Bershteyn
Betty Jo Christian
Rebecca Fenneman
Caroline Fredrickson
Paul Kamenar, via telephone
Jeffrey Minear, via telephone*
Alan Morrison
David Shonka
Jill Sayenga, via telephone*
Helgi Walker, via telephone
Allison Zieve

ACUS Staff Attending

Paul Verkuil, Chairman
Matthew Wiener, Executive Director
Gretchen Jacobs, Research Director
Jeffrey Lubbers, Special Counsel, via telephone
Stephanie Tatham, Staff Counsel
Amber Williams, Attorney Advisor
Max Etin, Legal Intern

Other Attendees

Christy Walsh, Public Member
Paul Bangser, EPA, via telephone
Leland Beck

*Please note that Mr. Minear and Ms. Sayenga attended the meeting as liaison representatives of the Judicial Conference and the Administrative Office of the U.S. Courts and did not take part in discussion of the recommendation.

Committee Chair Ron Levin brought the meeting to order and conducted introductions. He welcomed new members, Caroline Fredrickson and Boris Bershteyn, and the committee as did Research Director, Gretchen Jacobs. Chairman Verkuil thanked the committee for their patience with rescheduling during the government shutdown and acknowledged Mr. Levin's earlier academic work in the area, particularly his article *Vacation at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*. Mr. Levin acknowledged his prior work in the area and expressed interest in agency and practitioner perspectives on the remedy.

Ms. Tatham presented her report, The Extraordinary Remedy of Remand Without Vacation as well as an overview of her recommendations to the committee.

Professor Levin asked whether the committee was inclined to take a favorable position towards remand without vacation. He explained that Judge Randolph was opposed to the remedy on both legal and practical grounds, and that Judge Randolph favored the remedy of vacating agency action with a stay of the agency mandate. Ms. Tatham explained that this alternative remedy is more restrictive

than remand without vacatur for two reasons: first, it imposes a timeline on agencies for responsive action and second because the court would retain jurisdiction over the case during the interim period, which it ordinarily would not do in cases remanding without vacating agency action.

Ms. Christian advocated for a presumption in favor of vacation in the case of an ambiguous remand.

Mr. Kamenar inquired whether the rule of prejudicial error could accommodate the remedy. Ms. Tatham replied that she did not think it could because the remedy has been applied where the parties are prejudiced by the agency's error and relief of some sort is due. She explained, however, that courts are given discretion in administering the rule to determine whether errors are harmless, which comports generally with the notion that the Administrative Procedure Act (APA) authorizes discretionary judicial action. Some of the more minor cases where the agencies could rehabilitate its decision on remand might be construed to involve harmless error, but there are other cases where the remedy is employed and flaws are fatal or fundamental so it is clear that agencies will have to take a different course of action on remand. Mr. Levin noted that the proper remedy for harmless error is to affirm.

Ms. Christian returned to ambiguous decisions and whether in such cases there should be a presumption in favor of vacation. Ms. Walsh stated her understanding that the Federal Energy Regulatory Commission (FERC) ordinarily would treat an ambiguous decision as vacated, absent language in the decision to the contrary. Mr. Levin inquired about the justification for the proposal. Ms. Christian explained her expectation the courts will continue to be unclear at times and her concern that agencies might face temptation to find that their actions were not vacated in such cases. Mr. Bangser acknowledged that ambiguous remands occur frequently with the Environmental Protection Agency (EPA), and agreed with Ms. Christian's proposed recommendation that agencies should make cases treated as remanding agency action without vacation clear and transparent.

Ms. Walker returned to the question of the validity of the remedy. She expressed her sympathy, as a private practitioner and litigator against the Federal Communications Commission, for the Judge Randolph view, which entitles prevailing parties to relief from unlawful rules without having to wait for three to five years for responsive agency action on remand. She understood the need for equitable judicial discretion in the unusual case but expressed support for a presumption in favor of vacation where unusual circumstances do not exist.

Mr. Shonka asked whether paragraph eight in the Revised Draft Recommendation

addresses Ms. Christian's concern by placing the burden on the agency to identify its intentions regarding remands without vacation and enforcement.

Mr. Morrison responded to Ms. Walker's concern by explaining that for some parties, vacation doesn't provide relief. He suggested that these cases provide the best argument for remand without vacation and help to explain the remedy's frequency of occurrence with EPA. Ms. Christian inquired whether the language in the Clean Air Act varied from the APA, and Mr. Morrison replied that it did, and also that he was making a policy argument in favor of the remedy in such cases. He argued that the remedy should not be treated as extraordinary where this occurred.

Ms. Walsh provided an example of where vacation would leave a regulated entity without a tariff or rate. In some of those cases, the court has found that further support for the agency action is needed. In one case where additional evidence from parties was required, responsive action took more than a year and the rates remained in effect in the interim period because there were no other rates to charge in that instance.

Ms. Zieve argued that these examples demonstrate the need for judicial discretion, which Ms. Walker acknowledged. Ms. Walker urged support for the recommendation that would ask parties to address remedial issues in briefing.

Ms. Tatham inquired whether a presumption of the nature Ms. Walker suggested would be limited to cases arising under the Administrative Procedure Act, 5 U.S.C. § 706(2). Ms. Walker responded that it would and explained that opinions by Judge Randolph and Judge Sentelle have stressed the language of the APA. She felt that the court's authority to use the remedy was equitable in nature and should be limited to extraordinary circumstances. Ms. Tatham commented that on review of the studied cases involving EPA the court ordinarily observed that review was under the Clean Air Act, which contains different language than the APA.

Mr. Levin discussed the varied approaches one might take to this question, including formulation of a recommendation setting forth potential alternatives to remand without vacation, one of which would be vacation with stay of a mandate in cases where timeliness was important to the prevailing parties. Ms. Walker did not feel that this would satisfy her concern, which was with assuring prevailing parties that where agency action is unlawful or unconstitutional it will be set aside.

Mr. Bershtyn expressed support for a presumption against the remedy. He felt it was impractical to condition the applicability of the presumption on whether there was time sensitivity because this would give parties an additional issue to brief and would be likely to create more rather than less confusion. Mr. Bershteyn explained that when a party is briefing a case it typically is not strategically favorable to brief remedial issues that would occur only if the party did not prevail. He felt a recommendation would make sense if it compelled parties to put as much

information as possible before the court (in their briefing materials) when it is considering the merits of the question about what the remedy ought to be. He felt that the presumption Ms. Walker advocated had the advantage of requiring the agency to put forward its equitable arguments as forcefully as possible, while at the same time compelling the petitioner to request remand without vacation, which he acknowledged it may prefer. He argued that this was the most information-disclosing alternative and also observed that his student note on the remedy advocated presumptive vacation.

Ms. Tatham noted that the literature generally takes the position that there should be a presumption in favor of vacation, and that language in the ABA's Resolution 107B stated that vacation should be the normal course of action unless special circumstances exist.

Mr. Bangser from EPA expressed Ms. Siciliano's regrets for not being able to attend and offered his own staff level view that EPA would likely oppose a presumption against the remedy. From his standpoint, the recommendation endorses the status quo. In practice, when the agency loses there is vacatur of the action or rule but in a small number of cases the court has found vacatur not to be appropriate, for good reasons. To adopt a presumption against the remedy would seem to limit equitable discretion or suggest that non-vacatur is disfavored. He suggested that this rigidity may not be appropriate. He noted that there are quite a few cases under the Clean Air Act where even the prevailing party would not ask that the agency action be vacated. He also noted that even with remand without vacation the agency has to take responsive action. Finally, he pointed out that there is a long history of remand without vacation.

Alan Morrison also expressed opposition to an express presumption because he felt that it was implied and therefore unnecessary. He also felt that adopting preamble language proposed by Carol Ann Siciliano, stating that the remedy may be appropriate in circumstances including but not limited to those identified in the recommendation would make it clear that this is not the normal remedy. He also suggested that courts would act based on the circumstances regardless of the presumption. Mr. Levin suggested that the way courts use the remedy now permits it only with restraint and only from time to time.

Ms. Tatham suggested the possibility of calling the circumstances "special" as the ABA did. Ms. Walker and Mr. Bershteyn expressed support for this possibility. Mr. Bangser expressed preliminary reservations about the term special but would defer to Ms. Siciliano on the point.

Mr. Beck suggested that there is a difference between the APA and Clean Air Act in terms of the acceptability of the remedy because the APA says "shall" and the Clean Air Act says "may." Ms. Walsh noted that the recommendation identifying when the remedy was appropriate as an equitable matter would apply in cases under the APA

or the CAA. Ms. Zieve stated under the Clean Air Act application of the remedy would not need to be a "special" circumstance.

The committee discussed whether the court uses its equitable discretion to employ the remedy under non-APA statutes, where it does not appear that a literal reading of the statute precludes application of the remedy. Mr. Morrison explained that paragraph five expressed a policy position and suggested that it might make sense to remove references to statutory review provisions and instead to state that instead the remedy is justified as a policy matter in the identified circumstances, without getting into the legal arguments. He pointed out that paragraphs one and two spoke to the validity or permissibility of the remedy under varied legal provisions, whereas paragraph five spoke to advisability. Mr. Levin inquired about whether there is a justification for having different policy criteria for when the remedy should be used. No one identified any policy reasons for taking different approaches. Mr. Levin explained that courts don't make this distinction. Ms. Walsh suggested that dividing the policy approach might limit applicability of the recommendation to those instances most discussed by the committee, the Clean Air Act and the APA, and inquired what this would mean for other specific statutory review provisions.

Mr. Shonka suggested that paragraph five should recommend that courts consider the following equitable factors, which would make it clear that the recommendation fits squarely within the equitable account of the remedy. Mr. Morrison raised again Ms. Siciliano's point, that application of the remedy shouldn't be limited to only the three instances identified in the recommendation and the committee agreed on language that would indicate that the identified circumstances were not necessarily exclusive.

The committee returned to whether application of the remedy should be limited to special or distinctive circumstances. After some discussion of the matter the committee voted not to qualify the recommendation with a term such as special.

Discussion moved to question of whether the recommendation should ask Congress to amend the APA to permit the remedy in the event that it was found to be legally impermissible. Mr. Morrison expressed opposition to this idea. Ms. Christian suggested that when an agency recommends to Congress that it clarify the agency's authority, then the courts take that as an indication that the agency did not have the authority. Ms. Walsh stated that the recommendation clearly indicated support for the current limited application of the remedy.

Mr. Levin shifted the subject to judicial implementation. Ms. Walsh suggested that it would be difficult for agencies to request the remedy during briefing. Ms. Tatham asked whom briefing would benefit. She explained that where petitioners request

the remedy they would ordinarily do so in their opening briefs, at least in studied cases involving EPA. If the agency requests the remedy, it is not able to do so in its opening briefs. She thought that if there were going to be any briefing it would need to be bifurcated, such that it occurred after there had already been a merits decision. She also explained that agencies are able to move the court to request the remedy after a merits decision, if they so desire. Ms. Christian clarified that this would be styled as a petition for reconsideration. Mr. Morrison observed that the remedial question is difficult to brief without a merits decision.

Ms. Christian asked if there were examples where courts requested supplemental briefing and suggested citing these in the recommendation. Mr. Levin commented that courts ordinarily impose the remedy as a matter of discretion, without requesting the views of the parties. Mr. Shonka noted that parties sometimes address the issue in oral argument, at the request of the court.

Mr. Morrison stated that it is more difficult to ask the court to reconsider a remedy once it has made up its mind, and that he prefers that the court ask the parties first for their views on the appropriate remedy. The committee agreed to strike the language first from the draft recommendation but to clarify in preamble language that the intent was to ask for application of the remedy after a merits decision.

Mr. Bershteyn asked whether this was routine appellate court behavior and expressed support for putting the party's views as to the appropriate remedy before the court as a matter of course. He questioned whether the current formulation would do that. The committee refined the language of the recommendation and agreed to include preamble text offering further explanation and examples of where this had been done.

The committee turned to discussion of Ms. Sicilano's written comments, in which she had asked the committee to strike the request for briefing on "any other conditions" that should be imposed with the remedy. Mr. Bangser stated that imposition of deadlines for responsive agency action could be difficult for both the court and the agency. He felt that deadlines might wreak havoc within an agency juggling other statutory mandates and deadlines, particularly in a time of limited budgets. Ms. Zieve said that agencies, in her experience, never agree that they can meet deadlines but that they frequently are able to meet those imposed by courts. She also noted that the proposed language did not directly address deadlines. Mr. Morrison noted that courts always had authority to impose deadlines. Mr. Bangser agreed but suggested that this would invite courts to impose conditions on the remedy. Ms. Christian suggested that a remand without a deadline will lead to a natural tendency to put agency action on the back burner. She felt that agencies could always oppose deadlines.

The committee set aside the question of additional conditions for a moment and finalized the remaining language in the recommendation. Ms. Zieve then suggested

that if the court asked about the appropriate remedy she would also discuss timing, regardless of whether she was asked about what conditions would be opposed. The committee agreed to strike the language regarding appropriate conditions and approved the recommendation.

The committee took a vote on whether there should be a presumption in favor of vacation where a remand is ambiguous and agreed that there should not be a presumption.

The committee turned to question of whether agencies should provide public notice of remanded agency actions. Ms. Walsh expressed reservations about any requirement of providing notice, at least for adjudications, in the Federal Register. She also explained that in FERC cases the parties are typically party to the action. Ms. Christian explained that in her experience before the Interstate Commerce Commission (now the Surface Transportation Board) many parties will be party to the agency proceeding but not judicial proceedings. She expressed concern over ambiguous remands. Ms. Walsh agreed that FERC might be a different case because of its small bar and trade press.

Mr. Beck noted that agencies must inform the Federal Register when rules are vacated, and that notice is also important in precedential adjudications. Mr. Morrison stated that the agency should tell the world what it is going to do on remand and when it is going to do it. Ms. Walsh commented that FERC, under its ethics rules, is prohibited from telling the world when it will act. Mr. Morrison suggested that agencies could ethically state where action fits within their regulatory agenda and provide similar notice of this at the same administrative level as the action.

Chairman Verkuil asked what the agency best practice was. Ms. Tatham explained that the best practice was theoretical and is not a regular practice of agencies. It would be to identify a decision vacating or remanding an agency action on the area of the website providing information about the initial (remanded) action. She explained that currently, information about the initial action and subsequent remands is siloed on different parts of agency websites, if it appears at all.

Mr. Levin questioned whether these recommendations belong in a recommendation on remand without vacatur. Mr. Lubbers suggested that it would still be germane to recommend to agencies to immediately remove vacated regulations from the Code of Federal Regulations. With respect to non-vacated rules, he suggested that it might be appropriate for agencies to say what they were doing in the Unified Agenda.

Mr. Levin again asked whether these recommendations are appropriate in the context of a project on remand without vacation. Ms. Christian noted that her recommendation addressed the case of remand without vacation. Ms. Tatham asked

whether an entire project was needed to answer the question of whether agencies should identify vacated decisions for the public and suggested that it was a common sense recommendation. Mr. Levin noted that remand without vacation does not disturb the agency action and asked whether notice is necessary in such cases. Ms. Zieve thought it was. Mr. Morrison thought it important for agencies to inform the public regarding their intentions with respect to the remand.

Mr. Bershteyn expressed support for the Lubbers recommendations.

Ms. Zieve suggested a footnote acknowledging that the vacation-targeted recommendations are outside the scope of the project.

The committee clarified the language of paragraph 8 and discussed and adopted a new paragraph 7, as proposed by Mr. Lubbers, requesting that the Office of Federal Register remove regulations from the Code of Federal Regulations.

The committee clarified that notice of vacated regulations in the public docket and/or on the agency website in paragraph 8 need not be in the Federal Register and that, if appropriate, it need only appear on the website.

The discussion moved to the Morrison proposal that agencies offer an explanation of their expected response on remand. The question arose of whether such an explanation would be legally binding on the agency, and Mr. Morrison thought it would not. Mr. Levin identified two concerns that might be addressed in an agency statement: first, how the agency was going to respond to the substance of the remand and second, how they were going to treat the rule that remained in effect where remand without vacatur was used.

Ms. Walsh explained difficulties staff at multi-member commissions might face with this recommendation, when members would make a decision only after considering (and possibly rejecting) staff proposals. Mr. Morrison understood this point and elaborated that agency changeover, at commissions and at single head agencies, might also result in a course of action different from what was expected. Ms. Tatham reiterated that the variety of measures agencies might engage in on remand warrant discretion. Mr. Morrison understood the need for discretion but still requested that agencies explain their expected response to remands without vacatur and felt that this was important given a judicial finding of erroneous agency action.

Mr. Bershteyn agreed with the difficulties faced by multi-commissioner agencies and raised a concern with executive branch agencies committing themselves to a particular course of action prior to OIRA review. He suggested that agencies could say something specific in terms of setting out a schedule, as in the Unified Agenda (which he said sets out schedules that are not firm and in fact are often not met). Given concerns regarding remand without vacation, he thought it was good practice to inform the public of when the agency intended to act and that this would also give

notice to parties to the litigation.

Mr. Morrison clarified that he was discussing rulemaking only and thought it was a good idea to tie the agency's statement to the Unified Agenda. The committee discussed this point and came to agreement.

Mr. Shonka inquired whether the committee should include a footnote in the preamble regarding retained jurisdiction and reporting requirements would be useful. The committee agreed that it would.

The committee voted on each individual paragraph in the recommendations to agencies and adopted each, leaving room open for stylistic polishing.

The committee discussed whether an additional meeting was necessary and decided that it may not be. It voted to adopt the recommendation as a whole, leaving some edits to the committee on style and with the opportunity for committee objections to the recommendation and a future meeting if needed to respond to any objections.