1-19-2021

# Defending "Universal Vacatur" - Nationwide Injunctions for Administrative Law

Michael E. Herz

# Defending "Universal Vacatur" -- Nationwide Injunctions for Administrative Law

**Author :** Michael E Herz

**Date :** January 19, 2021

Mila Sohoni, *The Power to Vacate a Rule*, 88 **Geo. Wash. L. Rev.** 1121 (2020).

The nationwide injunction has seized the imagination of courts and law professors in recent years. Not surprisingly, JOTWELL's ~~pages~~ screens have given it extensive attention. Recent jots have described important work by Samuel Bray (twice), Amanda Frost (also twice), Russell Weaver, and Alan Trammell that attacks, defends, or theorizes nationwide (or "universal") injunctions. Jack Beermann, in praising Bray and Frost, did have one complaint: "As an administrative law nut, I wish they both grappled more with the meaning of the APA's instruction that reviewing courts should 'hold unlawful and set aside' unlawful agency action." Mila Sohoni has now filled that void. Sohoni convincingly shows that there just can be no question that in the Administrative Procedure Act Congress authorized—indeed, indicated a preference for and established a presumption in favor of—nationwide relief when a court finds a regulation defective. When APA § 706(2) authorizes a reviewing court to "set aside" an agency rule, it means exactly that.

In 2018, Attorney General Jeff Sessions distributed Litigation Guidelines instructing civil litigators in the Department of Justice (DOJ) to oppose universal injunctions always and everywhere. The memo's seven sections gave seven reasons why such relief was beyond the pale, including the assertion that it was unconstitutional. Section VII was headed: "In APA Cases: Universal Vacatur is not Contemplated by the APA." Sohoni's article resoundingly contradicts this assertion.

The term "universal vacatur," used by DOJ and adopted by Sohoni, is a neologism. No court has ever used it, and a Westlaw search of the secondary legal literature reveals only two usages: one in the current article and the other an article by . . . Mila Sohoni. When a court finds an agency regulation unlawful, the order typically "vacates" the rule; that action is "vacatur." There is some dispute about whether and when a court can or should remand a defective rule to an agency *without* vacating it—a practice the Administrative Conference of the U.S. has endorsed though only in limited circumstances—which is known as "remand without vacatur." But there has not been any disagreement about what "vacate" means in this setting: to "vacate" a rule or portion thereof means to set it aside or to invalidate it, period. Therefore "universal vacatur" at least borders on redundancy. Still, Sohoni adopts the term, explaining that while it "is relatively unfamiliar (and perhaps a bit loaded), it does crisply capture the concept of setting aside a rule not just as to the *plaintiffs*, but as to *anyone*." Let it be some solace to DOJ that it has won the (terminological) battle even though it has lost the (substantive) war.

Sohoni begins by situating universal vacatur within the administrative law context. Challenges to *statutes* often arise in the context of the application of the statute to a particular person; to grant the litigating party relief does not require "setting aside" the statute universally. Challenges to regulations *can* arise in that setting, as, for example, when an entity challenges the validity of a regulation as a defense in an enforcement action. When that happens, the obvious and often sufficient relief is to block application of the regulation to the party. But the APA also authorizes a direct challenge to a regulation. Post *Abbott Labs*, that is the norm. And it does so through language that directly authorizes courts to consider the validity of the rule itself, not the validity of its application in particular circumstances. Accordingly, preconceptions about universal relief appropriate to challenges to statutes have to be left at the door.

With that groundwork laid, the article is a familiar and convincing exercise in statutory interpretation.

With regard to text, the APA's grant of authority to "set aside" a regulation reads naturally as authorizing universal vacatur. The obvious synonym, or definition, Sohoni says, is "invalidate." What else could "set aside" mean? DOJ does not deny that "set aside" means "set aside." Instead, it contends that the thing that courts are authorized to set aside is not the regulation itself but only its application to the party challenging it. As Sohoni explains, that is a bizarre way of understanding the standard pre-enforcement challenge to an agency regulation.

Sohoni also offers a lengthy examination of equitable remedies against agencies in the pre-APA period, demonstrating that what we would today call a nationwide or universal injunction was well-established by 1946, so there is no reason not to take the text to mean what it says. The provenance of the phrase "set aside" is not completely clear, but she offers one compelling nugget from the 1941 Attorney General's Report, which noted that a "judgment adverse to a regulation results in *setting it aside*" (emphasis added). That sure sounds like it is the regulation, not its application, that is invalidated. The direct legislative history from Congress's drafting and consideration of the Act five years later is thin on this point, so Sohoni has little to say about it, but she does draw some supportive inferences from the history of § 705, regarding stays during litigation. (Sections 705 and 706 are mutually supportive; if a court can grant universal vacatur under the latter, it surely can grant a nationwide injunction against the enforcement pending litigation under the former, and vice versa.)

Finally, Sohoni describes the consistent post-1946 understanding (at least consistent until the recent brouhaha) that courts that set aside a regulation under § 706 have authority to grant relief in the form of universal vacatur.

This article is not and does not purport to be the last word on the nationwide injunction debate. (Of course, the *last* word is unlikely ever to be uttered, though the Supreme Court may weigh in this Term.) Larger constitutional issues loom in the background, and Sohoni perhaps brushes them off a little quickly. But *The Power to Vacate a Rule* is the definitive statement on the statutory issue of the legitimacy of universal relief in challenges to regulations under the APA.

Cite as: Michael E Herz, *Defending "Universal Vacatur" — Nationwide Injunctions for Administrative Law*, JOTWELL (January 19, 2021) (reviewing Mila Sohoni, *The Power to Vacate a Rule*, 88 **Geo. Wash. L. Rev.** 1121 (2020)), https://adlaw.jotwell.com/defending-universal-vacatur-nationwide-injunctions-for-administrative-law/.