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Robert P. Deyling

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DANGEROUS PRECEDENT: FEDERAL GOVERNMENT ATTEMPTS TO VACATE JUDICIAL DECISIONS UPON SETTLEMENT

ROBERT P. DEYLING*

INTRODUCTION

This Article considers the interests involved when the federal government seeks to vacate a court decision as a condition of settling a lawsuit. The courts have given the question of vacatur upon settlement increasing attention as litigants seek to use the settlement process to avoid unfavorable case law.¹ As a litigant, the government has sought vacatur as a condition of settlement in several recent cases. These cases involve such far-reaching public issues as eligibility for Social Security benefits,² access to secret government information,³ and the Medicare program.⁴ Moreover, in a recent Supreme Court *amicus* brief,⁵ the government expressed its unequivocal support for the notion of vacatur as a condition of settlement.⁶ The government pointedly noted that vacatur allows it to avoid the "preclusive and precedential effects" of unfavorable judgments.⁷

* Staff Attorney, United States Court of Appeals for the District of Columbia Circuit. 1994-95 Federal Judicial Fellow. B.A. 1982, Stanford University; J.D. 1987, New York University.

1. While other commentators have written on the general issue of vacatur in connection with settlement, they have not focused on the question of whether the courts should grant vacatur in cases involving the government. See Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589 (1991); Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233 (1989); William D. Zeller, Note, *Avoiding Issue Preclusion by Settlement Conditioned Upon the Vacatur of Entered Judgments*, YALE L.J. 860 (1987). See also Eva M. Rodriguez, *Vacatur Gets U.S. Endorsement*, LEGAL TIMES, May 31, 1993, at 6; Eva M. Rodriguez, *Don't Like Court Ruling? Make a Deal, Wipe it Out*, LEGAL TIMES, May 10, 1993, at 1.

2. *Hendrickson v. Dep't of Health & Human Servs.*, 765 F.2d 747 (8th Cir. 1985).

3. *In re United States*, 872 F.2d 472 (D.C. Cir. 1989).

4. *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988).

5. Brief for the United States as Amicus Curiae Supporting Respondents, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 113 S. Ct. 1249 (1993) (No. 92-1123), cert. dismissed, 114 S. Ct. 425 (1993).

6. Amicus Curiae Brief at 6, *Izumi* (No. 92-1123).

7. *Id.*

At the appellate level, the courts differ sharply on the issue of vacatur as a condition of settlement, regardless of whether the government is a party. Some courts conclude that lower court rulings should be routinely vacated if the parties request vacatur as a condition of settling their dispute.⁸ Other courts deny motions to vacate in settled cases, concluding that vacatur should not be available if a case becomes moot due to action by the parties.⁹ One court takes a middle ground approach, balancing the parties' interest in vacatur upon settlement on a case by case basis.¹⁰

Part I of this Article discusses situations in which vacatur is required under *United States v. Munsingwear*,¹¹ the leading Supreme Court case on vacatur. Part II of this Article addresses the effects of granting vacatur. Part III reviews the divergent approaches appellate courts have taken in considering motions to vacate. Part IV analyzes the government's position on vacatur in settled cases. Finally, Part V analyzes recent cases in which the government has requested vacatur upon settling a case.

This analysis suggests that vacatur upon settlement may undermine public faith in the judicial process by permitting the federal government to eliminate unfavorable case law. Government requests for vacatur seem out of place in a legal system that is based upon the evolution of the law through precedent. The parties to a lawsuit — in particular the federal government — should not be permitted to eliminate case law by private agreement. For these reasons, this Article proposes that the courts adopt a uniform rule that denies vacatur as a condition of settlement in cases involving the federal government.

I. MOOTNESS AND VACATUR

It is an axiom of American law that courts are creatures of controversy. A court's jurisdiction over a case ends when, for whatever reason, the fight between the parties is over and there is no longer any dispute to resolve.¹² The courts generally dismiss such cases as "moot."¹³ Although the courts have been consistent in dismissing

8. See, e.g., *Long Island Lighting Co. v. Cuomo*, 888 F.2d 230 (2d Cir. 1989); *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277 (Fed. Cir. 1987); *Nestle Co. v. Chester's Mkt., Inc.*, 756 F.2d 280 (2d Cir. 1985).

9. See, e.g., *Clarendon Ltd. v. Nu-West Indus., Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re United States*, 927 F.2d 626 (D.C. Cir. 1991); *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988).

10. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982).

11. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

12. *Id.* at 38.

13. The mootness doctrine limits federal courts to deciding only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). This limitation "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 110 S. Ct. 1249, 1253 (1990).

moot cases, they have not been uniform in dealing with the rulings of the lower courts.

The appellate courts have addressed this issue in one of three ways, depending on the reason for mootness. First, if the parties played no role in rendering the case moot, retaining a lower court's decision seems unfair to the party that is no longer able to challenge it. In this situation, the appellate court will dismiss the appeal and vacate the lower court's opinion.

In the second situation, however, if the case became moot due to an action by one of the parties, the court will dismiss the appeal as moot without vacating prior decisions. In the third situation, the case becomes moot because the parties settle. In this situation, the appellate courts disagree about whether to grant vacatur. These three situations are illustrated in the following hypothetical case.

Suppose a federal law requires all employees in "sensitive" government positions to undergo monthly drug testing. Suppose further that the Internal Revenue Service (IRS) requires employees who give telephone tax advice to take drug tests. The government employees' union sues the IRS, claiming that such positions are not "sensitive" within the meaning of the statute. The district court agrees with the employees' union and writes an opinion concluding that the IRS interpretation of the statute is incorrect. The IRS then files an appeal. While the appeal is pending, however, Congress changes the law to exempt all IRS employees from drug testing.

In this hypothetical, it is clear that the case is moot because there is no longer any controversy to resolve. It is equally clear that the case became moot due to events beyond the parties' control. In this situation, the appellate court must dismiss the appeal and vacate the lower court decision. In fact, this was the Supreme Court's basic message in the landmark case *United States v. Munsingwear*.¹⁴

In *Munsingwear*, the Court held that an appellate court must vacate a lower court's decision if the case becomes moot on appeal due to circumstances beyond the parties' control.¹⁵ The Court ruled that vacatur "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."¹⁶

A different situation arises, however, if a case becomes moot due to an action by one of the litigants. The *Munsingwear* Court held that the case should be dismissed under these circumstances,

14. *Munsingwear*, 340 U.S. at 36.

15. *Id.* at 39-40.

16. *Id.* at 40.

but vacatur is not required.¹⁷ In the above hypothetical, suppose that the IRS had changed its interpretation of the statute while the case was on appeal and made telephone tax advisors exempt from drug tests. The case would be moot, but the IRS would not be entitled to have the district court's decision vacated. Mootness in that situation was not the result of "happenstance," but rather the result of a unilateral action by one of the parties.

This Article addresses cases which became moot because the parties decided to settle their dispute. For example, in the IRS hypothetical, the IRS might have agreed that the affected employees are not subject to drug tests, but only if the union would join in asking the appellate court to vacate the district court's opinion.

II. EFFECTS OF VACATUR

There are several aspects of vacatur that lead courts to pause before granting this relief. First, a vacated judgment is denied its preclusive effect upon the parties. Second, the vacated judgment loses its precedential value. Finally, there are various public policy considerations that should be addressed before a court grants vacatur.

One of the most important results of vacatur is that a vacated decision is deprived of its "preclusive" impact.¹⁸ Under the preclusion doctrine of *res judicata*, also known as claim preclusion, a lower court judgment bars future litigation between the same parties addressing the same claims.¹⁹ The broader doctrine of *collateral estoppel*, or issue preclusion, provides that the losing party may not relitigate an issue in subsequent litigation once the issue has been resolved by prior litigation.²⁰ In order to free the parties to relitigate both claims and issues in moot cases, a vacated judgment loses both types of preclusive effect.²¹

The "precedential" value of a vacated judgment is also greatly reduced.²² A court's decision on a legal issue in one case becomes precedent to be followed in future cases involving the same legal issue.²³ This principle is known as *stare decisis*.²⁴ Decisions by

17. See *Karcher v. May*, 484 U.S. 72, 82-83 (1987) (holding the *Munsingwear* procedure inapplicable when losing party declines to pursue appeal).

18. *Munsingwear*, 340 U.S. at 38.

19. *Id.*

20. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). Collateral estoppel is meant to serve "the dual purpose of protecting litigants from the burden of relitigating" issues previously decided and of "promoting judicial economy by preventing needless litigation." *Id.*

21. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

22. See *County of L.A. v. Davis*, 440 U.S. 625, 634 n.6 (1979) (holding that a judgment which was vacated as moot has no precedential effect).

23. JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 0.401 (2d ed. 1985). "*Stare decisis* . . . makes each judgment a statement of the law, or prece-

courts of appeals must be followed by district courts within the relevant circuit. While one district court judge is not bound by the decisions of another district court judge, judges certainly give weight to prior rulings.²⁵ This is especially true when judges sit within the same district.²⁶ Thus, even district court opinions have a measure of precedential force.

Vacated opinions lose their precedential value simply by virtue of the designation "vacated."²⁷ In the American legal system, reliance on a vacated decision is to invite ridicule at best, disaster at worst. Because the system places a high value on "authority," i.e., prior case law supporting a litigant's position, a vacated opinion carries little weight.²⁸ This is true partly because courts seldom publish opinions explaining why they are vacating a decision.²⁹ Without such an explanation, a litigant or court cannot determine whether the legal underpinnings of the vacated decision remain sound. In addition, many vacated decisions vanish entirely from the law books.³⁰ If a decision is vacated before it appears in a bound volume of a law reporter, only a simple note stating that the opinion has been vacated will await the curious legal researcher.³¹

Vacatur has other less obvious public costs. District court decisions, although they have less direct precedential value than appellate decisions, resolve uncertainty in the law and serve as guideposts for future litigants.³² In cases involving the interpretation of federal statutes, for example, published decisions alert the legislature of statutory ambiguity. This may lead to policy or legislative changes.³³ The resolution of such complex issues through litigation involves costs to society which are wasted if a judicial de-

dent, binding in future cases before the same court or another court owing obedience to its decisions." *Id.*

24. *Id.*

25. See *United States v. Articles of Drug*, 818 F.2d 569, 572 (7th Cir. 1987) (noting that "a single district court decision . . . has little precedential effect"). Nonetheless, district court opinions frequently cite the legal analysis contained in other district court opinions to buttress a ruling, especially if there is little circuit law on the question being decided.

26. *Id.*

27. *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1300 (7th Cir. 1988).

28. *Id.*

29. Fisch, *supra* note 1, at 630.

30. *Id.*

31. *Id.*

32. Of course, as long as a vacated decision remains published and accessible to courts and lawyers, it may still retain a measure of its *persuasive* value. Another court, for example, may conclude that the legal analysis contained in a vacated decision is correct, and adopt it in subsequent cases. See *County of L.A. v. Davis*, 440 U.S. 625, 646 n.10 (1979) (Powell, J., dissenting) (stating that "expressions of the court below on the merits, if not reversed, will continue to have precedential weight").

33. Fisch, *supra* note 1, at 629.

cision is vacated.³⁴ This is particularly true of litigation involving the government since the resources devoted to litigation are obtained through tax revenue.

Vacatur serves a legitimate purpose in cases which become moot due to events beyond the control of the parties. Parties which could not obtain appellate review are relieved of the preclusive effects of a moot decision. Moreover, assuming that the court explains its reason for vacating a decision, third parties will understand why the decision was not subjected to appellate scrutiny.

When courts grant vacatur in connection with settlement, however, one may be left with the impression that the parties were able to bargain over the societal value of a judicial decision. The idea of "here today, gone tomorrow" court decisions based on the will of the parties seems out of place in a judicial system based on incremental development of the law through precedent.³⁵ If the courts routinely grant vacatur regardless of the parties' actions, the public may lose respect for the judiciary and the finality of judgments.³⁶ Public faith in the fairness of judge-made law will likely erode.

Critics of vacatur upon settlement argue that third parties may suffer if courts routinely grant vacatur, even when both parties request vacatur.³⁷ In the private context, for example, a large company may be able to avoid future liability for a defective product by paying off winning plaintiffs to support the vacatur of negative judgments. This would eliminate judgments that third parties might have been able to use against the company in future lawsuits. In lawsuits involving the federal government, vacatur may alter the development of the law affecting major public issues.

Supporters of vacatur as a condition of settlement argue that the courts should agree to vacate a decision to promote settlement. Under this reasoning, a court's refusal to vacate a lower court decision as part of a settlement agreement needlessly prolongs litigation.³⁸

Although the courts should certainly promote settlement, it is not clear that the availability of vacatur does so. It seems more likely that the prospect of vacatur upon settlement prolongs litigation.³⁹ If vacatur is available, parties with weak cases understand

34. *Id.* at 620-21

35. *Id.*

36. *Id.*

37. Fisch, *supra* note 1, at 625.

38. See Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 *FORDHAM L. REV.* 233, 236 (1989). "Refusal to vacate may force parties to continue an appeal, at cost to themselves, their adversaries, the overburdened appellate courts and, by extension, the public." *Id.*

39. See, e.g., Stephen K. Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, 26 *LOY. L.A. L.*

that they may avoid the long term effects of an adverse judgment. Thus, a party concerned with the precedential effect of a decision not in his favor may risk going to trial, appeal if he loses, and then reach a settlement conditioned on vacatur. It is clear in this situation that the prospect of vacatur has not only encouraged the litigants to delay settlement, but also has wasted both public and private resources in the process.

III. APPELLATE COURT VIEWS

The appellate courts are sharply divided over how to address the issue of vacatur upon settlement. At one extreme are those courts that will vacate lower court decisions as a condition of settlement at the parties' request. This approach, represented in decisions of the Second⁴⁰ and Federal Circuits,⁴¹ focuses on the interests of the parties in ending their dispute through settlement. The presumption is that early resolution of lawsuits preserves judicial resources.⁴²

Other courts, emphasizing the public nature of judicial decisions and their potential effects on third parties, decline all requests to vacate lower court decisions upon settlement.⁴³ These courts acknowledge that judicial decisions have inherent public value, and that the precedential value of a decision to third parties

REV. 1033, 1073 (1993). Before the California Supreme Court approved of routine vacatur in settled cases, one court, Division One of the Fourth Appellate District, routinely denied all such motions to vacate. *Id.* Comparing the rates of settlement in that court and the rest of the California appellate courts, Barnett concludes that routine denial of vacatur did not discourage settlement. *Id.* Instead, cases were twice as likely to settle in Division One of the Fourth Appellate District than in the appellate courts that allowed vacatur in connection with settlement. *Id.*

40. See *Long Island Lighting Co. v. Cuomo*, 888 F.2d 230, 234 (2d Cir. 1989) (holding that if a losing party agrees to withdraw its appeal in exchange for concessions from the winning party, including agreements to vacate, the court should not interfere because this would "serve to discourage and hamper settlement negotiations"); *Nestle Co. v. Chester's Mkt. Inc.*, 756 F.2d 280, 282 (2d Cir. 1985) (noting that the public has an interest in the early termination of lawsuits and that vacatur promotes this interest).

41. See *Federal Data Corp. v. SMS Data Prods. Group, Inc.*, 819 F.2d 277, 280 (Fed. Cir. 1987) (noting that if courts disapproved settlement agreements because they call for vacatur, it would be "unjust not only to the parties, but wasteful of the resources of the judiciary").

42. *Id.* at 280.

43. *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127, 128-30 (3d Cir. 1991) (holding that "a stipulation containing the condition of vacating the judgment of the district court does not serve the interests of the litigants or judicial economy or other policies"); *In re United States*, 927 F.2d 626, 627-28 (D.C. Cir. 1991) (noting that vacatur upon settlement is inappropriate because the mooted event is entirely within the parties' control); *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299, 1302 (7th Cir. 1988) (noting that "the judicial system ought not allow the social value of that precedent, created at cost to the public and other litigants, to be a bargaining chip in the process of settlement").

may outweigh the private interests of the litigants.⁴⁴ Judge Easterbrook of the Seventh Circuit summed up this philosophy when he stated that "an opinion is a public act of the government which may not be expunged by private agreement."⁴⁵

The Third Circuit⁴⁶ and the District of Columbia Circuit⁴⁷ have adopted the Seventh Circuit's approach. The District of Columbia Circuit held that the *Munsingwear* rule plainly does not apply to settled cases.⁴⁸ The court concluded that "[w]here the losing party chooses to settle rather than to pursue its appeal, review is not prevented by 'happenstance'; this is no less true where the prevailing party supports the motion to vacate."⁴⁹ The Third Circuit focused on the potential for manipulation of the judicial system inherent in allowing the parties to control the long-term impact of judicial decisions.⁵⁰ The court concluded that "we cannot agree that [promoting settlement] overrides the policy that a losing party with a deep pocket should not be permitted to use a settlement to have an adverse precedent vacated."⁵¹

The Ninth Circuit has taken a middle ground, adopting a balancing test to determine whether to grant a motion to vacate in a settled case.⁵² The Ninth Circuit's approach weighs "the competing values of finality of judgment and the right to re-litigation of unreviewed disputes."⁵³ The court rejected an absolute rule against vacatur in settled cases because it "would raise the cost of settlement too high."⁵⁴ Conversely, the court will not routinely grant motions to vacate.⁵⁵ The court reasoned that in some cases the public interest may outweigh the parties' private interest in settlement.⁵⁶

IV. VACATUR IN LAWSUITS INVOLVING THE GOVERNMENT

Despite the lack of unanimity at the appellate level, the federal government's position on this issue is clear. In a recent Supreme Court *amicus* brief,⁵⁷ the Solicitor General argued that the govern-

44. *Clarendon*, 936 F.2d at 128-30.

45. *In re Memorial Hosp.*, 862 F.2d at 1300.

46. *Clarendon*, 936 F.2d at 130-31.

47. *In re United States*, 927 F.2d 626 (D.C. Cir. 1991).

48. *Id.* at 627-28.

49. *Id.* at 628.

50. *Clarendon*, 936 F.2d at 130-31.

51. *Id.* at 129.

52. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982).

53. *Id.*

54. *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762, 769 (9th Cir. 1989).

55. *Id.*

56. *Id.*

57. Brief for the United States as Amicus Curiae Supporting Respondents, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 113 S. Ct. 1249 (1993) (No. 92-1123), *cert. dismissed*, 114 S. Ct. 425 (1993).

ment depends on the availability of vacatur to promote settlement.⁵⁸ According to the brief, vacatur promotes the “concrete” interests of the parties and the courts in settlement, while “potentially undermining only the more remote and hypothetical interests of future litigants and courts.”⁵⁹

*Izumi v. U.S. Philips Corporation*⁶⁰ is a case involving vacatur in connection with the settlement of a lawsuit between private parties.⁶¹ In settling a complex patent infringement lawsuit, U.S. Philips Corporation and Windmere Corporation successfully moved the court of appeals to vacate the district court’s decision.⁶² Izumi, a Japanese company that did not participate in the underlying lawsuit but paid Windmere’s legal bills as an indemnitor, had relied on the district court’s decision to defend against a similar suit in another court.⁶³ Izumi unsuccessfully tried to intervene to oppose the joint motion to vacate filed by U.S. Philips and Windmere.⁶⁴

The Supreme Court granted certiorari to consider whether appellate courts should be permitted to vacate district court decisions at the parties’ request in connection with settlement.⁶⁵ In an unusual ruling the Court dismissed the petition for certiorari as “improvidently granted.”⁶⁶ The Court decided that in order to reach the merits of the case, it would first need to review the denial of Izumi’s motion to intervene to oppose vacatur.⁶⁷ In its unsigned *per curiam* opinion, the Court ruled that the intervention question was “neither presented in the petition for certiorari nor fairly included in the one question that was presented.”⁶⁸

Justice Stevens, joined by Justice Blackmun, dissented.⁶⁹ They concluded that vacatur is closely related to whether third parties, like Izumi, should be allowed to intervene to object to vacatur.⁷⁰ On the merits, the dissenters concluded that settlement, which they referred to as “mootness achieved by purchase,” does not ordinarily justify vacatur. Instead, they concluded that “[j]udicial precedents . . . should stand unless a court concludes that the public

58. *Id.* at 6.

59. *Id.* at 23.

60. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, cert. granted, 113 S. Ct. 1249, cert. dismissed, 114 S. Ct. 425 (1993) (referred to here as *Izumi v. U.S. Philips Corporation*).

61. *Id.*

62. *Izumi*, 114 S. Ct. at 426.

63. *Id.*

64. *Id.*

65. *Id.* at 425-26.

66. *Izumi*, 114 S. Ct. at 426.

67. *Id.*

68. *Id.* at 425.

69. *Id.* at 428-29.

70. *Id.* at 430.

interest would be served by a vacatur."⁷¹

The government's *amicus* brief in *Izumi* was surprisingly forceful in its advocacy for vacatur upon settlement, especially when the government is a litigant. The government supports the unfettered right of the parties in any lawsuit to negotiate to vacate a judicial decision as a condition of settlement.⁷² The brief asserts that vacatur is extremely important to the government because it is a frequent litigant in the federal courts:

As a party to numerous cases in the federal system that involve recurring issues of public importance, the federal government is vitally interested in the question of whether vacatur is available when parties settle cases on appeal.⁷³

The government points out that a losing party may be unwilling to settle on appeal because of concern over the precedential force of the lower court ruling.⁷⁴ Thus, the brief candidly acknowledges that:

Absent vacatur, settlement will be impossible to achieve in many cases, because the preclusive or precedential effects of the judgment below may be regarded as unacceptable by the losing party. That concern is particularly strong in cases involving the government and other institutional litigants, for whom the preclusive and precedential effects of an adverse judgment may be more significant than the more immediate impact of the judgment or the cost of settlement.⁷⁵

Despite the government's unqualified support for vacatur upon settlement, a close reading of the *amicus* brief reveals that vacatur may be of little practical value to the government as a litigant. A private litigant's ability to preclude the government from relitigating an issue decided in an unrelated case is severely limited.⁷⁶ Indeed, the brief suggests that the availability of issue preclusion should not affect a court's analysis of government motions to vacate, as distinguished from vacatur motions filed by private parties.⁷⁷ Thus, the government argues that considerations of the effect of vacatur on issue preclusion "would have no force in cases in which the government seeks vacatur of an unfavorable judgment."⁷⁸

Why then does the government support vacatur as a condition of settlement? The apparent answer is that the government recognizes the inherent value of judicial decisions within the legal sys-

71. *Izumi*, 114 S. Ct. 425, 431.

72. Brief for the United States as Amicus Curiae Supporting Respondents, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 113 S. Ct. 1249 (1993) (No. 92-1123), *cert. dismissed*, 114 S. Ct. 425 (1993).

73. *Id.* at 1 (citation omitted).

74. *Id.* at 6.

75. *Id.*

76. *United States v. Mendoza*, 464 U.S. 154 (1984).

77. *Amicus Curiae Brief* at 6, *Izumi* (No. 92-1123).

78. *Id.*

tem, and seeks to avoid adverse precedent. If the courts allow vacatur, the government apparently expects to take advantage of its availability to the same extent that private parties may.

It is the government's right as a litigant to take advantage of the law and seek vacatur upon settlement in those courts which allow it. At the same time, government lawyers are surely not required to negotiate settlement agreements which include a provision for vacatur. Some courts, commenting on the higher duty of government lawyers toward the legal system, have suggested that the government is bound to avoid taking positions which tend to undermine respect for that system.⁷⁹ Recent proposals for reform of the civil justice system have focused on the government lawyer's responsibility to avoid such tactics.⁸⁰

The government's current position on vacatur in connection with settlement reveals the danger inherent in allowing any party to a lawsuit, especially the government, to affect the future value of court decisions through vacatur. Vacatur upon settlement is a prime example of an area in which the government should set an example, rather than take advantage of unsettled case law.

V. GOVERNMENT MOTIONS TO VACATE: REPRESENTATIVE CASES

This section presents a representative sample of cases in which the government sought vacatur in connection with settlement. These cases cover a broad range of public issues. What emerges from a review of these cases is a sense of the government's considerable power to shape the development of the law through selective motions to vacate. The government appears to settle cases on condition of vacatur as a way of eliminating unfavorable decisions.

No statistics exist on the frequency of government motions to vacate, or their success rate. This lack of data makes it difficult to conduct research on the issue of settlement and vacatur. Whether granted or not, motions to vacate are unlikely to lead to published opinions.⁸¹ It is possible, however, to review the few published de-

79. See, e.g., *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47-48 (D.C. Cir. 1992). While government lawyers should attempt to settle cases wherever possible, they also have the responsibility to "seek justice," and have "obligations that might sometimes trump the desire to pound an opponent into submission." *Id.*

80. See Executive Order on Civil Justice Reform, 27 WKLY. COMP. PRES. DOC. 1485 (Oct. 29, 1991) (stating government lawyers should set "an example for private litigation by adhering to higher standards than those required by the rules of procedure in the conduct of Government litigation in Federal court").

81. Several appellate courts have published opinions explaining their position on the issue of vacatur as a condition of settlement. Except for such explanatory opinions, however, a court seldom publishes an opinion when it grants vacatur.

cisions on this issue and study the reasons the government has articulated in favor of vacatur in connection with settlement.

The case of *Hendrickson v. Secretary of Health and Human Services*⁸² involved eligibility rules for entitlement to Social Security benefits.⁸³ The plaintiff had worked sporadically for many years as a handyman.⁸⁴ He became disabled and applied for disability insurance benefits through the Social Security Administration.⁸⁵ A hearing officer determined that Hendrickson had not worked a sufficient number of quarter-years to qualify for benefits.⁸⁶ Hendrickson argued that he should receive credit for quarters during which he had worked part-time for a Minneapolis art center.⁸⁷ Hendrickson had worked at the art center as an independent contractor, but had not filed tax returns because his earnings were too low to be taxable.⁸⁸

There was, however, other evidence of Hendrickson's wages. The art center had filed IRS 1099 forms listing Hendrickson's employment and the amount he was paid for each of the disputed years.⁸⁹ Still, the Social Security Administration refused to consider the 1099 forms as evidence of Hendrickson's employment.⁹⁰ The agency claimed that, under its regulations, only personal tax returns could serve as proof of employment.⁹¹

Hendrickson sued the government in district court and lost. The district court upheld the Social Security Administration's position that the 1099 forms could not be used as additional evidence of Hendrickson's entitlement to benefits.⁹² Hendrickson appealed and won. In a published opinion discussing conflicting case law on the issue, the court of appeals decided that the agency's position was untenable, and that evidence of the type Hendrickson presented could be considered in determining whether a person qualified for benefits.⁹³

At this point, as often occurs with vacated decisions, the public record becomes somewhat obscure. A few months after the court of appeals issued its decision, the parties reached a settlement agreement.⁹⁴ Vacatur of both the court of appeals and the district court

82. *Hendrickson v. Secretary of Health & Human Servs.*, 765 F.2d 747 (8th Cir. 1985).

83. *Id.* at 749.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Hendrickson*, 765 F.2d at 749.

88. *Id.*

89. *Id.* at 750.

90. *Id.* at 749.

91. *Id.*

92. *Hendrickson*, 765 F.2d at 749.

93. *Id.* at 752.

94. *Id.*

decision was apparently a condition of settlement. The short published note vacating the earlier decisions states, in its entirety:

The joint motion filed by the parties pursuant to their Settlement Agreement is hereby granted. In accordance therewith, this Court's June 26, 1985 judgment, decision, and opinion are vacated as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), in light of the Settlement Agreement. The case is remanded to the district court for vacation of its decision as moot under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950), in light of the Settlement Agreement. Mandate is to issue forthwith.⁹⁵

The immediate effect of vacating the court of appeals decision in *Hendrickson* is readily apparent. The legal issue resolved in *Hendrickson's* favor — the court's work product — has been erased. Future litigants in *Hendrickson's* position will not be able to rely on the appellate decision, which would otherwise be binding precedent within the Eighth Circuit. In addition, assuming that a similar case arises again, the government will have a second chance to assert the legal argument the Eighth Circuit already rejected. In the meantime, of course, the agency remains free to make benefit determinations based on its possibly flawed view of the law.

Proponents of vacatur would point out that settlement spared *Hendrickson* further litigation and saved judicial resources by ending a case which the government apparently was no longer willing to pursue. This analysis, however, leaves out an important consideration. Even if the government had a weak case and believed it might lose on appeal, there was little incentive to settle on appeal before the decision was issued, since vacatur was available.

Once the appellate court issued its decision, of course, the government was confronted with an "unfavorable" appellate decision involving eligibility for Social Security benefits. The decision would be binding on district court judges within the Eighth Circuit, and might be followed by district courts in other circuits. Other claimants, perhaps hundreds or thousands, attempting to prove their eligibility for benefits were likely to surface. Settling with *Hendrickson*, while assuring that the appellate decision would be vacated, essentially allowed the government a risk-free way of testing the correctness of the district court's decision. Since the court of appeals reversed the district court's decision, vacatur enabled the government to avoid the long term damage that the unfavorable appellate decision might have caused.

The public cannot know what motivated the parties to settle in the *Hendrickson* case. Appeal, settlement, and vacatur apparently satisfied both parties. The broader question, as illustrated above, is

95. *Hendrickson v. Secretary of Health & Human Servs.*, 774 F.2d 1355 (8th Cir. 1985).

whether the possible public cost of vacatur justified the private outcome in that case.

Another case that illustrates the problems inherent in allowing the government to determine which court decisions will be preserved is *In re Memorial Hospital*.⁹⁶ That case involved the federal government's Medicare reimbursement program. Since it often takes months to determine the exact amount the government owes a hospital, the Medicare statute permits the government to make estimated Medicare payments. If it turns out that the hospital has been overpaid, the government may recoup the overpayment by reducing future estimated payments.

The *In re Memorial Hospital* case arose because the hospital filed for bankruptcy after receiving "estimated" Medicare payments. At that point, the hospital had been overpaid \$82,000. The government attempted to recoup that amount by reducing future estimated payments, but the hospital objected, arguing that recoupment would violate the "automatic stay" provisions of the bankruptcy law.⁹⁷ Nonetheless, the government through its intermediary, Blue Cross and Blue Shield United of Wisconsin, reduced the hospital's estimated payments as a way to recoup the overpayment.

The bankruptcy court then concluded that the government's action violated the bankruptcy laws, and held the government in contempt.⁹⁸ The district court affirmed, ordering Blue Cross to restore the funds it had already collected, and to pay the hospital's attorneys' fees.⁹⁹

The Department of Health and Human Services filed a notice of appeal. Before the appeal was decided, however, the parties reached a settlement. The government would keep the \$62,000 already recouped through reduced estimated payments, while the remaining \$20,000 would be forgiven. In addition, the government would pay the hospital \$11,500 in exchange for surrendering its right to obtain attorneys' fees.¹⁰⁰

The settlement agreement stated that the parties would only settle if the court of appeals would agree to vacate the district court's decision.¹⁰¹ The court of appeals denied the motion to va-

96. *In re Memorial Hosp. of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988).

97. Under the automatic stay provision, all claims against an entity which files for bankruptcy are stayed and may not be collected while the bankruptcy court determines which, if any, creditors will be paid. See *In re Memorial Hosp. of Iowa County*, 82 B.R. 478, 480 (Bankr. W.D. Wis. 1988) (citing 11 U.S.C. § 362(a)(3)).

98. *Id.* at 484.

99. See *In re Memorial Hosp.*, 862 F.2d at 1301.

100. *Id.*

101. *Id.*

cate, noting that the government voluntarily decided to forego its right to continue the appeal.¹⁰² The court's reasoning was succinct: "Compliance does not require the judgment to be set aside; compliance in part (the upshot of a settlement) should not be treated differently."¹⁰³

It seems clear why the government wanted to vacate the district court's decision. While other hospitals could not use the decision against the government in future cases, the analysis in the decision, if left on the books, would provide valuable guidance to courts considering similar cases. Thus, the government had an obvious interest in eliminating the district court decision in order to preserve its flexibility to deal with similar Medicare reimbursement cases in the future.

Another case, *In re United States*,¹⁰⁴ illustrates how the specter of vacatur may alter the normal development of the law in such critical areas as public access to "secret" government information. The case involved the embarrassing legacy of the federal government's investigation of citizens as potential Communists. The plaintiff, Lillie Albertson, claimed that her husband, William Albertson, had been the target of an FBI investigation from 1950 to 1964 that led to a government-sponsored scheme to discredit the couple in the eyes of their friends in the Communist party.¹⁰⁵ Mrs. Albertson claimed that in 1964 the FBI planted a fictitious report in a car William used while on Communist party business.¹⁰⁶ When party colleagues discovered the report, the party expelled William.¹⁰⁷ He lost his job at a party bookstore, many of his friends turned against him, and his health began to decline.¹⁰⁸

Mrs. Albertson sued the government in 1984, after she had received documents under the Freedom of Information Act¹⁰⁹ which acknowledged the FBI's activities regarding her and her husband.¹¹⁰ She sought damages for intentional infliction of emotional distress and invasion of privacy.¹¹¹

Before filing an answer to Albertson's complaint, the government moved to dismiss the case. It argued that Mrs. Albertson's claims, and the government's defenses to those claims, involved

102. The court also suggested that the case would not be moot if the court refused to agree to vacatur. *Id.*

103. *Id.* at 1299.

104. 872 F.2d 472 (D.C. Cir. 1989).

105. *Id.* at 473-74.

106. *Id.*

107. *Id.* at 474.

108. *Id.*

109. 5 U.S.C. § 552 (1982).

110. *In re United States*, 872 F.2d at 478.

111. *Id.* at 474.

"state secrets" which would be in jeopardy if the case continued.¹¹² The state secrets privilege is an evidentiary privilege that allows the government to withhold information from public disclosure if releasing it would harm national security.¹¹³

After reviewing *in camera* the government's classified affidavit in support of its motion to dismiss, the district court denied the motion.¹¹⁴ The government then negotiated an extension of time to file an answer to Mrs. Albertson's complaint, and agreed to a discovery schedule.¹¹⁵ Still, the government did not file an answer and refused to proceed with discovery. Instead it filed a second motion to dismiss, asserting that the state secrets doctrine would preclude the government from participating in discovery.¹¹⁶ The district court again denied the motion to dismiss, and directed to government to file its answer.¹¹⁷ The government appealed, but its appeal was dismissed as interlocutory.¹¹⁸

At this point, still refusing to participate in Mrs. Albertson's lawsuit, the government sought a writ of mandamus against the district court judge. The court of appeals directed the judge to explain the ruling, which he did in an unpublished opinion.¹¹⁹ That opinion concluded that the government's security concerns could be addressed, issue by issue, during the course of the lawsuit.¹²⁰

The court of appeals reviewed the government's classified affidavit and, by a two to one vote, decided that the case should proceed despite the government's state secrets claim.¹²¹ In its published opinion denying the government's petition for mandamus, the court observed that the district court exhibited a "perceptive understanding of and a wholesome respect for the state secrets privilege."¹²² The majority noted that much of the information sought by discovery had already been released to Mrs. Albertson under the Freedom of Information Act.¹²³ In sum, the majority was "unpersuaded" that proceeding with the trial would involve any release of state secrets.¹²⁴

112. *Id.* at 475.

113. *See Molerio v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984).

114. *In re United States*, 872 F.2d at 475.

115. *Id.* at 473.

116. *Id.* at 473-74.

117. *Id.*

118. *Id.* at 474.

119. This unpublished opinion is discussed in the court of appeals' published opinion which denied the government's petition for a writ of mandamus. *In re United States*, 872 F.2d at 478.

120. *Id.*

121. *Id.* at 474.

122. *Id.* at 478.

123. *Id.*

124. *In re United States*, 872 F.2d at 479.

The government then petitioned the Supreme Court for a writ of certiorari. While that petition was pending, the parties settled the case and filed a joint motion to vacate the court of appeals decision. The court of appeals, in another published decision, denied the motion to vacate its own prior decision.¹²⁵ The court concluded that the case became moot through the deliberate action of the government.¹²⁶ In that situation, the court reasoned, vacatur must be denied.

While it is impossible to say with certainty why the parties made the agreement they did, it seems clear that the court of appeals decision became a bargaining chip in the settlement negotiations. If Mrs. Albertson had insisted on proceeding to trial, the government faced a potentially embarrassing fight over access to information about its efforts to investigate United States citizens' political activities.

*U.S. v. Garde*¹²⁷ shows how the government seems to use motions to vacate as a way of limiting the long-term impact of unfavorable case law. In the course of representing its clients, the Government Accountability Project (GAP), a non-profit group which represents government whistle-blowers, received information about safety problems at a nuclear power plant.¹²⁸ GAP offered to provide the information to the Nuclear Regulatory Commission on the condition that the Commission would keep the informants' identities confidential.¹²⁹ The Commission refused, and instead issued a subpoena directing Billie Garde, a GAP attorney, to turn over the information about the alleged safety violations, including the sources.¹³⁰ Garde refused to honor the subpoena, invoking the attorney-client privilege.¹³¹

The Commission then attempted to enforce the subpoena against Garde in district court. The district court denied the Commission's petition for enforcement of the subpoena, concluding that it violated the First Amendment rights of both GAP and its clients.¹³² The court directed the Commission to obtain the information through less intrusive methods.¹³³ Having lost in the district court, the Commission agreed to establish a team to review the safety allegations, and to maintain the confidentiality of the whistle-blowers.¹³⁴

125. *In re United States*, 927 F.2d 626 (D.C. Cir. 1991).

126. *Id.* at 627.

127. 848 F.2d 1307 (D.C. Cir. 1988) (per curiam).

128. *Id.* at 1308.

129. *Id.*

130. *Id.*

131. *Id.*

132. See *U.S. v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987).

133. *Id.* at 605.

134. *Garde*, 848 F.2d at 1308.

Ultimately, the Commission obtained the information, but not the identity of the whistle-blowers.¹³⁵ In the meantime, however, the Commission had appealed the district court's denial of its petition to enforce the subpoena against Garde.¹³⁶ Having received the information it wanted, the Commission moved to dismiss the appeal as moot and vacate the district court's decision.¹³⁷ GAP opposed the motion to vacate, arguing that the government had, in essence, settled the case by agreeing to accept less information than it had originally sought through the subpoena.¹³⁸

The District of Columbia Circuit denied the motion to vacate and dismissed the appeal.¹³⁹ The court noted the distinction between "litigants who are and are not responsible for the circumstances that render the case moot."¹⁴⁰ In *In re Garde*, the court noted, the government had "foreclosed the opportunity for review of the adverse decision"¹⁴¹ by its own action, i.e., by accepting the information on safety violations on the condition that the informants' identities be protected.¹⁴² The court further concluded that denying the motion to vacate would "prevent appellant from gaining any unfair advantage by its dismissal of the appeal."¹⁴³

In re Garde bridges the gap between those cases in which the parties' actions make the case moot, and cases of vacatur in connection with settlement. Where the parties deliberately make their dispute moot, the courts agree that vacatur must be denied. *Garde* points out why the result should be the same where mootness flows from settlement, since in both cases the parties control the dispute and dictate its outcome. By pursuing its appeal on the subpoena issue, but agreeing to proceed with less information than the subpoena requested, the government had nothing to lose. If the court granted vacatur, the government would have walked away with the information it needed, but without the stigma of a court of appeals decision branding its behavior as a First Amendment violation.

CONCLUSION

Judge Easterbrook's comments in *In re Memorial Hospital*, sum up the reasons vacatur in settled cases should be avoided:

The opinions written in this case record two judges' solutions to a legal problem. These opinions may be valuable for other litigants and judges; they may also be useful to Memorial itself at another time.

135. *Id.*

136. *Id.* at 1309.

137. *Id.*

138. *Id.*

139. *Garde*, 848 F.2d at 1311.

140. *Id.*

141. *Id.* at 1311, n.9.

142. *Id.*

143. *Id.*

They will be left as they are. The parties may be free to contract about the preclusive *effects* of these decisions *inter se*; . . . they are not free to contract about the existence of these decisions.¹⁴⁴

The courts should be especially hesitant to grant vacatur upon settlement in cases involving the federal government. Vacating lower court decisions in settled cases allows the government to thwart developments in the law that it finds unfavorable. If the courts encourage routine vacatur — especially in cases involving public issues — that may undermine the integrity of the judicial process by allowing the government to buy its way out of negative case law. Vacatur as a condition of settlement also deprives the public of benefits which may flow from judicial decisions interpreting federal statutes.

The appellate courts' lack of a uniform approach to this issue exacerbates the danger inherent in allowing litigants to control the precedential force of lower court rulings. Since vacatur upon settlement is entirely a matter of judicial discretion, and action by Congress in this area is unlikely, the unsettled state of the case law on this issue is cause for concern. Until the case law is settled, litigants may engage in forum-shopping based on their expectations concerning settlement and vacatur. More important, case law on a particular issue of public importance may evolve differently depending on a particular court of appeals' attitude toward vacatur.

An absolute bar to vacatur upon settlement in cases involving government litigants seems necessary. This approach recognizes that it is unseemly to allow parties to erase case law by private agreement. Prohibiting the government from obtaining vacatur in connection with settlement supports the proposition that judicial decisions have inherent public value that should not be disturbed.

144. *In re Memorial Hosp.*, 862 F.2d at 1303 (emphasis in original).

