Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: Oct. 24, 2013
Re: Revised Draft Recommendation – Remand Without Vacation Project

The following revised draft recommendation was initially based on Attorney Advisor Stephanie Tatham’s report, “The Extraordinary Remedy of Remand Without Vacatur.” It now includes revisions proposed by members of the Committee on Judicial Review and other interested parties. This draft is intended to facilitate the Committee’s discussion at its Oct. 30, 2013 public meeting, and not to preempt Committee discussion and consideration of the suggested recommendations. In keeping with Conference practice, a draft preamble has also been included. The Committee should feel free to revise it as appropriate.

Remand Without Vacation

Preamble

Remand without vacation is a judicial remedy that permits agency orders or rules to remain in effect after they are remanded by the reviewing court for further agency proceedings. It is a relatively recent judicial innovation; traditionally, 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. Since 1970, the remedy has been employed with increasing frequency. It has now been applied in more than seventy decisions of the Court of Appeals for the D.C. Circuit involving over twenty federal agencies and encompassing a variety of substantive areas of law including air pollution control, telecommunications, and national security.¹

¹ Stephanie J. Tatham, The Extraordinary Remedy of Remand Without Vacatur, Appendix A (DRAFT report to the Administrative Conference of the United States, forthcoming 2013). It has also been applied, evidently infrequently, on review of agency action in the Federal, First, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals. Id. at 26-28.
The Administrative Conference conducted a study of remand without vacation that examined existing scholarship on the remedy as well as its application by courts in recent years. These recommendations and the supporting Report examine the legality and application of remand without vacation in cases involving judicial review of agency actions. The Conference accepts the principle that remand without vacation is a valid equitable remedial device under the APA and—except where Congress expressly provides otherwise—other statutory review provisions. It recognizes and approves of three general circumstances in which remand without vacation may be appropriate. Finally, it offers advice to courts that are considering employing the remedy and to agencies responding to it on remand.

The remedy has generated substantial debate—which began on the bench and has carried over into the academy—over its advisability and its legality. Those who support remand without vacation point to the benefits that accrue in a variety of situations, such as when application of the device enhances stability in the regulatory regime or in regulated markets, protects reliance interests, avoids regulatory gaps, allows agencies to continue collecting user fees, and ensures continued provision of public benefits (including the benefits of regulation). Remand without vacation has also been said to be appropriate because it defers to the institutional competence of agencies on remand and may reduce agency burdens on remand.

Nonetheless, remand without vacation is not without controversy. Some argue that it can deprive litigants of relief from unlawful or inadequately reasoned agency decisions, reduce incentives to challenge improper or poorly reasoned agency behavior, promote judicial activism, and allow deviation from legislative directives. Critics of the remedy have also suggested that it reduces pressure on agencies to comply with APA obligations and to respond to a judicial remand. Given the relative infrequency of application of the remedy, these prudential and theoretical concerns have generally not been realized and are unlikely to be systemic.
Some judges and scholars argue that remand without vacation contravenes the plain language of the judicial review provisions of the Administrative Procedure Act (APA).\(^2\)

However, despite the occasional dissent or other separate judicial opinion, no cases were identified in which a federal Court of Appeals held that remand without vacation was unlawful under the APA or another statutory standard of review. Rather, courts appear to generally accept the remedy as a lawful exercise of equitable remedial discretion.\(^3\)

The Conference recommends that the remedy be considered a valid exercise of judicial authority on review of cases that arise under the Administrative Procedure Act, 5 U.S.C. § 706(2), as well as under other statutory review provisions unless they contain an express legislative directive to the contrary. In employing remand without vacation, courts are essentially finding that prejudicial agency errors do not justify setting aside the challenged action. This conclusion deviates from customary remedial norms and, therefore, when courts invoke the remedy of remand without vacation they should explain the reasons for doing so.

Equitable considerations that justify leaving the challenged agency action in place on remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C. Circuit supports application of the remedy after a finding that a challenged agency action, while invalid, is not seriously deficient or where vacation would have disruptive consequences.\(^4\)

Courts also employ the remedy when vacation would not serve the interests of the prevailing party that was prejudiced by the agency’s error.\(^5\) Remand without vacation may be

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\(^2\) The APA provides that reviewing courts “shall... hold unlawful and set aside agency action, findings, and conclusions” found to violate one of its standards of review. 5 U.S.C. § 706(2). \(E.g.,\) Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994) (Randolph, J., separate opinion).


\(^4\) \(E.g.,\) N. Air Cargo v. U.S. Postal Service, 674 F.3d 852, 860-61 (D.C. Cir. 2012); Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

\(^5\) \(E.g.,\) Envtl. Def. Fund v. EPA, 898 F.2d 183, 190 (D.C. Cir. 1990) (holding “no party to this litigation asks that the court vacate the EPA’s regulations, and to do so would at least temporarily defeat petitioner’s purpose, the
appropriate in these circumstances. It may also be appropriate in other circumstances not considered here, and on which the Conference presently takes no position.

On review of agency action, the Conference recommends that courts identify whether or not they are vacating the agency action on remand. Research indicates that ambiguous remand orders that do not clearly identify whether agency actions are also vacated occur with some regularity.\(^6\) This is particularly problematic where an agency decision regulates conduct of or permits enforcement actions against individuals or entities not party to the litigation, and who cannot seek direct clarification of the court’s remedial intention.

Because remand without vacation alone does not provide relief for litigants after successful challenges to agency actions, responsive agency action on remand is necessary. Identifying remanded decisions and agency responses can be difficult and hinder oversight. To aid the public in this awareness, the Conference recommends that agencies notice final judicial opinions vacating or remanding agency rules or orders in the applicable online public docket, if any exists. Docket notices should include a short statement specifically identifying the judicial opinion and whether it vacates all or part of the challenged action(s), together with any unique identifiers for the affected agency action (like a Regulation Identifier Number). In proceedings responding to remand without vacation, agencies should identify the initial agency action with any unique identifier, as well as the remanding judicial opinion.

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"enhanced protection of environmental values covered by the [statutory Prevention of Significant Deterioration] provisions"). This reasoning appears to drive a substantial number of cases involving the remedy and that arise under the Clean Air Act, which comprise a sizeable portion of all cases in which it is employed. See also Richard L. Revesz & Michael A. Livermore, Retaking Rationality 160-61 (2008) (describing how the remedy can provide proregulatory plaintiffs with the advantage of a weak rule rather than no rule in the event of a successful challenge).

RECOMMENDATION

Validity of the Remedy

1. Remand without vacation should be considered a valid remedy on review of cases that arise under the Administrative Procedure Act (APA)'s judicial review provision, 5 U.S.C. § 706(2).

2. Absent an express legislative directive to the contrary in the text of the statute providing the basis for review, remand without vacation should be considered a valid remedial approach by federal courts reviewing challenges to agency actions.

Recommendations to Courts

3. On review of agency action, reviewing courts should identify in their judicial opinions whether or not they are vacating remanded agency actions.

4. When a court is considering remand without vacation, it should first ask the parties for their views on whether that remedy is appropriate and what conditions, if any, should be imposed on the agency.

5. Remand without vacation may be an appropriate remedy on review of agency action under the APA or other statutory review provisions where:

   (a) the deficiencies in the agency’s rule or order are not severe, and hence correction is possible on remand;

   (b) the consequences of vacation would be disruptive; or

   (c) the interests of the prevailing parties who were prejudiced by the agency’s error(s) would not be furthered by vacation.

6. Where courts remand but do not vacate agency actions, they should explain the basis for their remedial choice.
Recommendations to Agencies

7. Agencies should identify or post final judicial opinions vacating or remanding agency rules or orders in the applicable public docket, if any, whether on the agency website or on Regulations.gov.

8. When an agency receives a final opinion from a reviewing court that remands but does not vacate the agency’s decision, in addition to identifying or posting the opinion, it should also issue a notice to be placed in the docket and served on all parties explicitly advising that, despite the reversal of the agency decision, the order of the agency has not been vacated, is still in effect, and that all parties must continue to comply with the agency rule or order.

9. In responding to a judicial remand without vacation of an agency action, agencies should identify the initial agency action as well as the remanding judicial opinion.