



Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: Oct. 11, 2013
Re: Draft Recommendation – Remand Without Vacatur Project

The following draft recommendation is based on Attorney Advisor Stephanie Tatham’s report, “The Extraordinary Remedy of Remand Without Vacatur.” This draft is intended to facilitate the Committee’s discussion at its Oct. 22, 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 aim of the preamble is to explain the problem or issue the recommendation is designed to address, and the Committee should feel free to revise it as appropriate.

Remand Without Vacatur

Preamble

1 Remand without vacatur is judicial remedy that permits agency orders or rules to
2 remain in effect after they are remanded by the reviewing court for further agency
3 proceedings. It is a relatively recent judicial innovation; ordinarily, courts have reversed and set
4 aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported by
5 substantial evidence, or otherwise in violation of an applicable standard of review. Since 1970,
6 the remedy has been employed with increasing frequency in more than seventy decisions of
7 the D.C. Circuit Court of Appeals involving over twenty federal agencies and encompassing a
8 variety of substantive areas of law including air pollution control, telecommunications, and
9 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.



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10 The Administrative Conference commissioned a study of remand without vacatur to
11 examine existing scholarship on the remedy as well as its application by courts in recent years.
12 These recommendations and the supporting Report examine the legality and application of
13 remand without vacatur on judicial review of agency actions. The Conference endorses the
14 validity of remand without vacatur as an equitable remedial device under the APA and—except
15 where Congress expressly provides otherwise—other statutory review provisions. It
16 recommends that courts ordinarily vacate remanded agency actions, but it recognizes and
17 sanctions three general circumstances in which courts have found remand without vacatur
18 appropriate. Finally, it offers general advice to courts in employing the remedy and to agencies
19 responding on remand.

20 The remedy has generated substantial debate—which began on the bench and has
21 carried over into the academy—over its advisability and its legality. Those who support remand
22 without vacatur point to the benefits that accrue when application of the device enhances
23 stability in the regulatory regime or in government regulated markets, protects reliance
24 interests, avoids regulatory gaps, allows agencies to continue collecting user fees, and ensures
25 continued provision of public benefits (including the benefits of regulation). Remand without
26 vacatur has also been said to defer to the institutional competence of agencies on remand and
27 to reduce the burden on agencies of reconsideration.

28 Nonetheless, remand without vacatur is not without consequence or critics. Those who
29 are wary of the remedy argue that it deprives litigants of relief from unlawful or inadequately
30 reasoned agency decisions, dissuades agency compliance with waived legal requirements,
31 reduces incentives to challenge improper or poorly reasoned agency behavior, promotes
32 judicial activism, and allows deviation from legislative directives. Given the relative infrequency
33 of application of the remedy, these prudential and theoretical concerns have generally not
34 been realized and are unlikely to be systemic.



35 Some judges and scholars argue that remand without vacatur contravenes the plain
36 language of the judicial review provisions of the Administrative Procedure Act (APA).²
37 However, despite the occasional dissent, no cases were identified in which a federal Court of
38 Appeals held that remand without vacatur was unlawful under the APA or another statutory
39 standard of review. Rather, courts appear to generally accept the remedy as a lawful exercise
40 of equitable remedial discretion.³ The Conference recommends that the remedy be considered
41 a valid exercise of judicial authority on review of cases that arise under the Administrative
42 Procedure Act, 5 U.S.C. § 706(2).⁴ In general, remand without vacatur should be considered a
43 valid exercise of remedial authority by federal courts reviewing challenges to agency actions,
44 absent an express legislative directive to the contrary in the text of the statute providing the
45 basis for review.

46 The Conference recommends that reviewing courts vacate agency actions that are
47 unlawful or otherwise violate a standard of review where vacatur serves the interests of
48 prevailing parties. In employing remand without vacatur, the court is essentially finding that
49 prejudicial agency errors do not justify setting aside the challenged action. This conclusion
50 deviates from established legal norms. Nonetheless, equitable considerations may justify
51 leaving the challenged agency action in place on remand. Longstanding judicial precedent in
52 the D.C. Circuit supports application of the remedy after a finding that a challenged agency
53 action, while invalid, is not seriously deficient or where vacation would have disruptive
54 consequences.⁵ Courts have also employed the remedy when vacatur would not serve the

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).

³ Remand without vacatur fits comfortably within a tradition of equitable judicial remedial discretion. Ronald M. Levin, “*Vacation*” at *Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003).

⁴ If the legality of remand without vacatur under the Administrative Procedure Act, 5 U.S.C. § 706(2), is successfully challenged, the Administrative Procedure Act should be amended to permit the remedy.

⁵ *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).



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55 interests of the prevailing party that were prejudiced by the agency's error, and where vacation
56 would not further the substantive aims of the statute authorizing the agency's challenged
57 action.⁶ Remand without vacatur may be appropriate in these circumstances. It may also be
58 appropriate in other circumstances not considered here, and on which the Conference
59 presently takes no position.

60 On review of agency action, the Conference recommends that courts uniformly and
61 clearly identify whether they are vacating the agency action on remand. Research indicates
62 that ambiguous remand orders that do not clearly identify whether agency actions are also
63 vacated occur with some regularity.⁷ This is particularly problematic where an agency decision
64 regulates conduct of and/or permits enforcement actions against individuals or entities not
65 party to the litigation, and who cannot seek direct clarification of the court's remedial
66 intention. Where courts do deviate from the norm of vacatur, they should consider explaining
67 their remedial choice.

68 Remand without vacatur alone cannot provide relief for litigants after successful
69 challenges to agency actions, responsive agency action on remand is necessary. Identifying
70 remanded decisions and agency responses, and hence oversight, can be difficult. To aid the
71 public in this endeavor, the Conference recommends that agencies notice judicial opinions
72 vacating or remanding agency rules or orders in the applicable public docket, if any exists.
73 Notices should include a short statement specifically identifying the judicial opinion, together
74 with any unique identifiers for the affected agency action (like a Regulation Identifier Number).

⁶ *E.g.*, *Env'tl. 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 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.

⁷ *E.g.*, *PSEG Energy Res. & Trade, LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011); *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).



75 In proceedings responding to remand without vacatur, agencies should clearly identify the
76 initial agency action with any unique identifier, as well as the remanding judicial opinion.

RECOMMENDATION

77 **Validity of the Remedy**

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

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

83 **Recommendations to Courts**

84 3. On review of agency action, reviewing courts should clearly identify in their
85 judicial opinions whether they are vacating remanded agency actions.

86 4. Courts should consider whether remand without vacatur is an appropriate
87 remedy on review of agency action. Agency actions that are unlawful or transgress statutory
88 standards of review should normally be vacated by the reviewing court. However, remand
89 without vacatur may be appropriate where:

90 (a) the deficiencies in the agency's rule or order are not severe, and hence
91 rehabilitation is possible on remand;

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

93 (c) the interests of the prevailing parties who were prejudiced by the agency's
94 error(s), as well as the aims of the substantive statute authorizing the agency action,
95 would not be furthered by vacation.



96 5. Where courts remand but do not vacate agency actions, they should consider
97 explaining the basis for their remedial choice.

98 **Recommendations to Agencies**

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

102 7. In responding to a judicial remand without vacation of an agency action,
103 agencies should clearly identify the initial agency action as well as the remanding judicial
104 opinion.

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