



Remand Without Vacation

Committee on Judicial Review

Proposed Recommendation for Council Meeting | Nov. 19, 2013

1 Remand without vacation is a 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. Traditionally, courts have reversed and set aside agency actions they have found
4 to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in
5 violation of an applicable standard of review. Since 1970, however, the remedy has been
6 employed with increasing frequency. It has now been applied in more than seventy decisions
7 of the Court of Appeals for the District of Columbia Circuit involving over twenty federal
8 agencies and encompassing a variety of substantive areas of law including air pollution control,
9 telecommunications, and national security.¹

10 The Administrative Conference conducted a study of remand without vacation that
11 examined 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 vacation in cases involving judicial review of agency actions. The Conference
14 accepts the principle that remand without vacation is a valid equitable remedial device under
15 the Administrative Procedure Act (APA) and—except where Congress expressly provides
16 otherwise—other statutory review provisions. It recognizes and approves of three general
17 circumstances in which remand without vacation may be appropriate. Finally, it offers advice
18 to courts that are considering employing the remedy and to agencies responding to remands.

¹ Stephanie J. Tatham, *The Unusual Remedy of Remand Without Vacatur*, Appendix A (DRAFT report to the Administrative Conference of the United States, forthcoming 2013) [hereinafter Tatham Report]. It has also been applied, evidently infrequently, on review of agency action in the Courts of Appeals for the Federal, First, Fifth, Eighth, Ninth, and Tenth Circuits. *Id.* at 26-28.



19 The remedy has generated academic and judicial debate over its advisability and
20 legality. Those who support remand without vacation point to the benefits that accrue in a
21 variety of situations, such as when application of the device enhances stability in the regulatory
22 regime or in regulated markets, protects reliance interests, avoids regulatory gaps, allows the
23 government to continue collecting fees or processing reimbursements, and ensures continued
24 provision of public benefits (including the benefits of regulation). Remand without vacation has
25 also been said to be appropriate because it defers to the institutional competence of agencies
26 and may reduce agency burdens on remand.

27 Nonetheless, remand without vacation is not without controversy. Some scholars argue
28 that it can deprive litigants of relief from unlawful or inadequately reasoned agency decisions,
29 reduce incentives to challenge improper or poorly reasoned agency behavior, promote judicial
30 activism, and allow deviation from legislative directives. Critics have also suggested that it
31 reduces pressure on agencies to comply with APA obligations and to respond to a judicial
32 remand. Given the relative infrequency of application of the remedy, these prudential and
33 theoretical concerns, while possible, are unlikely to be systemic.

34 Some judges argue that remand without vacation contravenes the plain language of the
35 judicial review provisions of the APA.² However, despite occasional dissents or other separate
36 judicial opinions, no cases were identified in which a federal court of appeals held that remand
37 without vacation was unlawful under the APA or another statutory standard of review. Rather,
38 courts generally accept the remedy as a lawful exercise of equitable remedial discretion.³

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 vacation 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, 315-44 (2003).



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

46 Equitable considerations that justify leaving the challenged agency action in place on
47 remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C.
48 Circuit supports application of the remedy after a finding that a challenged agency action, while
49 invalid, is not seriously deficient or where vacation would have disruptive consequences.⁴
50 Courts also employ the remedy when vacation would not serve the interests of the prevailing
51 party that was harmed by the agency's error.⁵ Remand without vacation may be appropriate in
52 these circumstances as well as in others not considered here, and on which the Conference
53 takes no position.

54 When a reviewing court has decided to remand an agency's action, it should consider
55 asking the parties for their views on the appropriate remedy in light of this decision.⁶ In its final

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.*, *Env'tl. Def. Fund v. EPA*, 898 F.2d 183, 190 (D.C. Cir. 1990) ("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 be the basis for 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, *RETAKEING RATIONALITY* 160-61 (2008) (describing how the remedy can provide proregulatory plaintiffs with the benefit of continuing a weak rule while the case is on remand, rather than having no rule in the interim in the event of a successful challenge).

⁶ Courts have occasionally requested supplemental briefing on whether to vacate agency rules after they have announced an intention to remand the agency's decision. *E.g.*, *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1057 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Int'l Union, UAW*



56 decision, the court should identify whether or not it is vacating the remanded agency action.
57 Research indicates that ambiguous remand orders that do not clearly identify whether an
58 agency's action is also vacated occur with some regularity.⁷ This is particularly problematic
59 where an agency rule or order regulates conduct of or permits enforcement actions against
60 individuals or entities not party to the litigation, and who cannot seek direct clarification of the
61 court's remedial intention.

62 Because remand without vacation alone does not provide relief for litigants after
63 successful challenges to agency rules or orders, responsive agency action on remand is
64 necessary. Moreover, difficulties in identifying remanded decisions and agency responses can
65 hinder oversight.⁸ Agencies should identify or post final judicial opinions vacating, or
66 remanding without vacation, agency rules or orders in the applicable online public docket, if
67 any exists, and on agency websites, where appropriate. Agencies should include a short
68 statement identifying the judicial opinion and whether it vacates all or part of the challenged
69 rule or order, together with any unique identifiers for the affected agency rule or order (such as
70 a Regulation Identifier Number). Agencies should additionally contact the Office of the Federal
71 Register and issue a rule removing vacated regulations from the Code of Federal Regulations.⁹

72 To further public awareness, the Conference also recommends that agencies provide
73 information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding

v. OSHA, 938 F.2d 1310, 1325-26 (D.C. Cir. 1991). Courts might also consider soliciting the views of the parties at oral argument.

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).

⁸ While the Supporting Report primarily studied remand without vacation, the Conference believes there is value in making limited recommendations to agencies regarding publication of and responsive action to remanded agency actions more generally, regardless of whether they were vacated. *See* Tatham Report, *supra* note 1 at 51-52.

⁹ Anecdotal evidence indicates that occasionally rules that have been vacated are not removed from the Code of Federal Regulations in a timely fashion. *Id.* at 38, n. 241. 1 C.F.R. § 21.6 requires agencies to notice expired codified regulations in the Federal Register. *See e.g.*, Electronic On-Board Recorders for Hours-of-Service Compliance; Removal of Final Rule Vacated by Court 72 Fed. Reg. 28,447 (May 14, 2012).



74 their future plans with respect to rules that are remanded without vacation. In any subsequent
75 proceedings responding to remand without vacation, agencies should identify the initial agency
76 action together with any unique identifier, as well as the remanding judicial opinion.

RECOMMENDATION

77 **Validity of the Remedy**

78 1. Remand without vacation should continue to be considered a valid equitable
79 remedy on review of cases that arise under the Administrative Procedure Act (APA) and its
80 judicial review provision, 5 U.S.C. § 706(2).

81 2. Absent an express legislative directive to the contrary in any other statute
82 providing the basis for review, remand without vacation should be considered a valid remedial
83 approach by federal courts reviewing challenges to agency action pursuant to such a statute.

84 **Recommendations to Courts**

85 3. Where courts remand but do not vacate an agency action, they should explain
86 the basis for their remedial choice.

87 4. In determining whether the remedy of remand without vacation is appropriate,
88 courts should consider equitable factors, including whether:

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

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

92 (c) the interests of the prevailing parties who were subject to the agency's error(s)
93 would not be harmed by vacation.



94 5. When a court has decided to remand an agency action, it should consider asking
95 the parties for their views on the appropriate remedy in light of its ruling.

96 6. On review of agency action, reviewing courts should identify in their judicial
97 opinions whether or not they are vacating a remanded agency action.

98 **Recommendations to Agencies**

99 7. Agencies should specifically identify or post judicial decisions vacating or
100 remanding without vacation agency rules or orders in any applicable public docket, and, if
101 appropriate, on the agency website. When a court remands but does not vacate an agency's
102 rule or order, the agency should include a statement explicitly advising that the rule or order
103 has not been vacated and is still in effect despite the remand.

104 8. When a regulation has been vacated, the promulgating agency should contact
105 the Office of the Federal Register and issue a rule removing the vacated regulation from the
106 Code of Federal Regulations.

107 9. Agencies should provide information in the Unified Agenda of Federal Regulatory
108 and Deregulatory Actions regarding their plans with respect to rules that are remanded without
109 vacation.

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