Remand Without **Vacation Vacatur**

Committee on Judicial Review

**Proposed Recommendation for Council Meeting | Nov. 19, 2013**

Remand without vacaturion 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. 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, however, the remedy of remanding without vacating the agency decision has been employed with increasing frequency. It has now been applied in more than seventy decisions of the Court of Appeals for the District of Columbia Circuit involving over twenty federal agencies and encompassing a variety of substantive areas of law including air pollution control, telecommunications, and national security.¹

The Administrative Conference conducted a study of remand without vacaturion 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 vacaturion in cases involving judicial review of agency actions. The Conference accepts the principle that remand without vacaturion is a valid equitable remedial device under the **Administrative Procedure Act (APA)** and—except where Congress expressly provides otherwise—other statutory review provisions. It recognizes and approves of at least three general circumstances in which remand without vacaturion may be appropriate. Finally,

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it offers advice to courts that are considering employing the remedy and to agencies responding to remands.

The remedy has generated academic and judicial debate over its advisability and legality. Those who support remand without vacation vacatur 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 prevents regulatory gaps, allows the government to continue collecting fees or processing reimbursements, and ensures continued provision of public benefits (including the benefits of regulation). Remand without vacation vacatur has also been said to be appropriate because it defers to the institutional competence of agencies and may reduce agency burdens on remand.

Nonetheless, remand without vacation vacatur is not without controversy. Some scholars 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 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, while possible, do not appear to cause systemic problems.

Some judges argue that remand without vacaturion contravenes the plain language of the judicial review provisions of the APA. However, despite occasional dissents or other separate judicial opinions, no cases were identified in which a federal court of appeals held that remand without vacation vacatur was unlawful under the APA or another statutory standard of

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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).
review. Rather, courts generally accept the remedy as a lawful exercise of equitable remedial discretion.  

The Conference recommends that the remedy continue to 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 vacatur, courts are essentially finding that prejudicial agency errors that are sufficient to require remand may not always justify immediately setting aside the challenged action. Since this conclusion deviates from customary remedial norms, when courts invoke the remedy, they should explain their 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 when vacatur would have disruptive consequences. 

Courts also employ the remedy when vacatur would not serve the interests of the prevailing party that was harmed by the agency’s error. Remand without vacatur may be appropriate in these circumstances as well as in others not considered here.

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3 Remand without vacatur has been described as fitting 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).


5 E.g., Envtl. 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, RETAKING 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).
When a reviewing court has decided to remand an agency’s action, it should consider asking the parties for their views on the appropriate remedy in light of this decision. In its final decision, the court should identify whether or not it is vacating the remanded agency action. Research indicates that ambiguous remand orders that do not clearly identify whether an agency’s action is also vacated occur with some regularity. This is particularly problematic where an agency rule or order 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.

Agencies must correct the deficiency identified by the court because remand without vacatur alone does not provide relief for litigants after successful challenges to agency rules or orders, responsive agency action on remand is necessary. Moreover, difficulties in identifying remanded decisions and agency responses can hinder oversight. While the Supporting Report primarily studied remand without vacatur, 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. Accordingly,

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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 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.


8 Courts have occasionally, although rarely, retained jurisdiction over cases remanded without vacatur to ensure responsive agency action. E.g., Nat’l Ass’n of Regulatory Util. Comm’rs v. DOE, 680 F.3d 819, 820 (D.C. Cir. 2012) (directing compliance within six months and retaining jurisdiction “so that any further review would be expedited”). Courts may also ask agencies to report on their progress on remand. E.g., Chamber of Commerce v. SEC, 443 F.3d 890, 909 (D.C. Cir. 2006) (staying the court’s mandate that would vacate the remanded agency action until further order of the court and requiring the SEC to file a status report within 90 days).

9 See Tatham Report, supra note 1 at 51-52.
Agencies should identify or post final judicial opinions vacating, or remanding without vacatur, agency rules or orders in the applicable online public docket, if any exists, and on agency websites, where appropriate. Agencies should include a short statement identifying the judicial opinion and whether it vacates all or part of the challenged rule or order, together with any unique identifiers for the affected agency rule or order (such as a Regulation Identifier Number). Agencies should additionally contact the Office of the Federal Register and issue a rule removing vacated regulations from the Code of Federal Regulations.  

To further public awareness, the Conference also recommends that agencies provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their future plans with respect to rules that are remanded without vacatur vacatur. In any subsequent proceedings responding to remand without vacatur vacatur, agencies should identify the initial agency action together with any unique identifier, as well as the remanding judicial opinion.

**RECOMMENDATION**

**Validity of the Remedy**

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

2. Absent an express legislative directive to the contrary in any other statute providing the basis for review, remand without vacatur vacatur should be considered a valid

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10 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).
remedial approach by federal courts reviewing challenges to agency action pursuant to such a statute.

Recommendations to Courts

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

3.4. When courts remand but do not vacate an agency action, they should explain the basis for their remedial choice.

4.5. In determining whether the remedy of remand without vacatur is appropriate, courts should consider equitable factors, including whether:

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

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

(c) the interests of the prevailing parties who were subject to the agency’s error(s) would not be harmed by vacatur allowing the agency action to remain in place.

5.6. When a court has decided to remand an agency action, it should consider asking the parties for their views on the appropriate remedy whether or not to vacate the agency action at issue in the case, pending further agency action and on any related issues as to the appropriate remedy in light of its ruling.

1. On review of agency action, reviewing courts should identify in their judicial opinions or orders whether or not they are vacating a remanded agency action.
Recommendations to Agencies

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

7.8. When a regulation has been vacated, the promulgating agency should contact the Office of the Federal Register and work with the Office of the Federal Register to remove the vacated regulation from the Code of Federal Regulations.

8.9. Agencies should provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their plans with respect to rules that are remanded without vacatur.

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