



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**Memorandum**

To: Committee on Judicial Review  
From: Stephanie Tatham, Staff Counsel  
Date: Oct. ~~11~~24, 2013  
Re: Revised Draft Recommendation – Remand Without Vacatur Project

**Comment [COJR1]:** Please note the untracked universal change of “vacatur” to “vacation” as requested by Bill Allen.

The following revised draft recommendation ~~is 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. Non-substantive or stylistic edits are noted in track changes without comment bubbles; substantive comments are identified in track changes together with comment bubbles noting the individual who suggested the change. This draft is intended to facilitate the Committee’s discussion at its Oct. ~~22~~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 ~~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 Vacation**

**Preamble**

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. It is a relatively recent judicial innovation; ~~ordinarily~~traditionally, courts have  
4 | reversed and set aside agency actions they have found to be arbitrary and capricious, unlawful,  
5 | unsupported by substantial evidence, or otherwise in violation of an applicable standard of  
6 | review. Since 1970, the remedy has been employed with increasing frequency. It has now  
7 | been applied in more than seventy decisions of the Court of Appeals for the D.C. Circuit Court



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

8 | ~~of Appeals~~ involving over twenty federal agencies and encompassing a variety of substantive  
9 | areas of law including air pollution control, telecommunications, and national security.<sup>1</sup>

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

Comment [COJR2]: Conforming amendment.

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

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<sup>1</sup> 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

30 | Nonetheless, remand without vacation is not without ~~consequence—~~or  
31 | ~~criticscontroversy~~. ~~Those who are wary of the remedy~~Some argue that it ~~can~~ deprives litigants  
32 | of relief from unlawful or inadequately reasoned agency decisions, ~~dissuades agency~~  
33 | ~~compliance with waived legal requirements~~, reduces incentives to challenge improper or poorly  
34 | reasoned agency behavior, promotes judicial activism, and allows deviation from legislative  
35 | directives. Critics of the remedy have also suggested that it reduces pressure on agencies to  
36 | comply with APA obligations and to respond to a judicial remand. Given the relative  
37 | infrequency of application of the remedy, these prudential and theoretical concerns have  
38 | generally not been realized and are unlikely to be systemic.

39 | Some judges and scholars argue that remand without vacation contravenes the plain  
40 | language of the judicial review provisions of the Administrative Procedure Act (APA).<sup>2</sup>  
41 | However, despite the occasional dissent or other separate judicial opinion, no cases were  
42 | identified in which a federal Court of Appeals held that remand without vacation was unlawful  
43 | under the APA or another statutory standard of review. Rather, courts appear to generally  
44 | accept the remedy as a lawful exercise of equitable remedial discretion.<sup>3</sup>

45 | The Conference recommends that the remedy be considered a valid exercise of judicial  
46 | authority on review of cases that arise under the Administrative Procedure Act, 5 U.S.C. §  
47 | 706(2), as well as under other statutory review provisions unless they contain.<sup>4</sup> In general,  
48 | ~~remand without vacation should be considered a valid exercise of remedial authority by federal~~

Comment [COJR3]: Alan Morrison: Suggest deletion and discussion of the matter.

<sup>2</sup> 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).

<sup>3</sup> 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, 315-44 (2003).

<sup>4</sup> ~~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.~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

49 ~~courts reviewing challenges to agency actions, absent~~ an express legislative directive to the  
50 contrary ~~in the text of the statute providing the basis for review.~~

51 ~~The Conference recommends that reviewing courts vacate agency actions that are~~  
52 ~~unlawful or otherwise violate a standard of review where vacation serves the interests of~~  
53 ~~prevailing parties.~~ In employing remand without vacation, ~~the courts are~~ essentially finding  
54 that prejudicial agency errors do not justify setting aside the challenged action. ~~This conclusion~~  
55 ~~deviates from established customary legal remedial norms and, therefore, when courts invoke~~  
56 ~~the remedy of remand without vacation they should explain the reasons for doing so.~~  
57 ~~Nonetheless, e~~

Comment [COJR4]: Conforming amendment.

Comment [COJR5]: Conforming amendment.

58 Equitable considerations ~~may that~~ justify leaving the challenged agency action in place  
59 on remand ~~may exist in a variety of circumstances.~~ Longstanding judicial precedent in the D.C.  
60 Circuit supports application of the remedy after a finding that a challenged agency action, while  
61 invalid, is not seriously deficient or where vacation would have disruptive consequences.<sup>5</sup>  
62 Courts ~~have also employed~~ the remedy when vacation would not serve the interests of the  
63 prevailing party that ~~were was~~ prejudiced by the agency's error, ~~and where vacation would not~~  
64 ~~further the substantive aims of the statute authorizing the agency's challenged action.~~<sup>6</sup>  
65 Remand without vacation may be appropriate in these circumstances. It may also be  
66 appropriate in other circumstances not considered here, and on which the Conference  
67 presently takes no position.

<sup>5</sup> *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).

<sup>6</sup> *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 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 \(2008\) \(describing how the remedy can provide proregulatory plaintiffs with the advantage of a weak rule rather than no rule in the event of a successful challenge\).](#)



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

68 On review of agency action, the Conference recommends that courts ~~uniformly and~~  
69 ~~clearly~~ identify whether or not they are vacating the agency action on remand. Research  
70 indicates that ambiguous remand orders that do not clearly identify whether agency actions are  
71 also vacated occur with some regularity.<sup>7</sup> This is particularly problematic where an agency  
72 decision regulates conduct of ~~and/or~~ permits enforcement actions against individuals or  
73 entities not party to the litigation, and who cannot seek direct clarification of the court's  
74 remedial intention. ~~Where courts do deviate from the norm of vacation, they should consider~~  
75 ~~explaining their remedial choice.~~

Comment [COJR6]: Conforming amendment.

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

Comment [COJR7]: Conforming amendment.

### RECOMMENDATION

#### 87 **Validity of the Remedy**

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

<sup>7</sup> *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).



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

94 **Recommendations to Courts**

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

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

**Comment [COJR8]:** Alan Morrison: In many cases, there are a variety of grounds for reversal and some may be inappropriate for vacation and others may be appropriate – but the parties can't tell what the court will do in advance and the agency especially will not want to make these arguments when it is hoping to prevail on the merits. Short times to reply will also be necessary, but they can fit easily within the times for rehearing/reconsideration. More on this at the meeting.

100 ~~4.5. Courts should consider whether remand without vacation is an appropriate~~  
101 ~~remedy on review of agency action. Agency actions that are unlawful or transgress statutory~~  
102 ~~standards of review should normally be vacated by the reviewing court. However, r~~  
103 ~~emand~~  
104 without vacation may be an appropriate remedy on review of agency action under the APA or  
other statutory review provisions where:

**Comment [COJR9]:** Alan Morrison: Suggest striking.

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

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

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

**Comment [COJR10]:** Alan Morrison: Seems very open-ended and will lead to non-vacatur often. Consider amending to specify that this covers situations where the objection of plaintiffs is that a rule does not go far enough.

111 ~~5-6.~~ Where courts remand but do not vacate agency actions, they should  
112 explain~~consider explaining~~ the basis for their remedial choice.

Ron Levin: Second clause is unnecessary.

**Comment [COJR11]:** Alan Morrison, Ron Levin



113 **Recommendations to Agencies**

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

**Comment [COJR12]:** Christy Walsh: Consider whether to limit to rulemaking or to instances of general applicability.

117 | ~~6-8.~~ When an agency receives a final opinion from a reviewing court that remands  
118 | but does not vacate the agency's decision, in addition to identifying or posting the opinion, it  
119 | should also issue a notice to be placed in the docket and served on all parties explicitly advising  
120 | that, despite the reversal of the agency decision, the order of the agency has not been vacated,  
121 | is still in effect, and that all parties must continue to comply with the agency rule or order.

**Comment [COJR13]:** Betty Jo Christian: "I believe this is extremely important because many persons who are subject to an agency order will naturally assume that when the agency decision has been reversed by a court, it is no longer in effect and they need no longer comply with its requirements. Simply identifying or posting the opinion is not sufficient, since the court's opinion may not be entirely clear and in any event parties may not parse the language with sufficient care or sophistication to realize that the order is still in effect. This creates an unfair situation for persons or entities who are subject to the agency decision, who may find themselves unintentionally in violation of the decision and perhaps even subject to penalties. Since it is still the norm for courts to vacate agency orders which have been reversed, it seems to me that simple fairness requires that when the order is not vacated, the agency should specifically advise all affected parties of that fact."

122 | 7-9. In responding to a judicial remand without vacation of an agency action,  
123 | agencies should clearly identify the initial agency action as well as the remanding judicial  
124 | opinion.

DRAFT