Memorandum

To: Committee on Judicial Review
From: Stephanie Tatham, Staff Counsel
Date: Oct. 1124, 2013
Re: Revised Draft Recommendation – Remand Without Vacation

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. 2230, 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

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; ordinarily, 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.
of Appeals 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 commissioned a study of remand without vacation to examine 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 endorses the validity principle of remand without vacation as a valid equitable remedial device under the APA and—except where Congress expressly provides otherwise—other statutory review provisions. It recommends that courts ordinarily vacate remanded agency actions, but it recognizes and sanctions three general circumstances in which courts have found remand without vacation may be appropriate. Finally, it offers general advice to courts in 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 government 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 the agency burdens on agencies of reconsideration on remand.

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.
 Nonetheless, remand without vacation is not without consequence or controversy. Those who are wary of the remedy Some argue that it can deprives litigants of relief from unlawful or inadequately reasoned agency decisions, dissuades agency compliance with waived legal requirements, reduces incentives to challenge improper or poorly reasoned agency behavior, promotes judicial activism, and allows 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). 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.

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. In general, remand without vacation should be considered a valid exercise of remedial authority by federal

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Comment [COJ R3]: Alan Morrison: Suggest deletion and discussion of the matter.

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1 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 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.
courts reviewing challenges to agency actions, absent an express legislative directive to the contrary in the text of the statute providing the basis for review.

The Conference recommends that reviewing courts vacate agency actions that are unlawful or otherwise violate a standard of review where vacation serves the interests of prevailing parties. In employing remand without vacation, the courts are essentially finding that prejudicial agency errors do not justify setting aside the challenged action. This conclusion deviates from established customary legal-remedial norms and, therefore, when courts invoke the remedy of remand without vacation they should explain the reasons for doing so. Nonetheless, equitable considerations may justify leaving the challenged agency action in place on remand 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.\(^5\)

Courts have also employed the remedy when vacation would not serve the interests of the prevailing party that were prejudiced by the agency’s error, and where vacation would not further the substantive aims of the statute authorizing the agency’s challenged action.\(^6\) Remand without vacation may be appropriate in these circumstances. It may also be appropriate in other circumstances not considered here, and on which the Conference presently takes no position.


\(^6\) 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).
On review of agency action, the Conference recommends that courts uniformly and clearly 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. This is particularly problematic where an agency decision regulates conduct of and/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. Where courts do deviate from the norm of vacation, they should consider explaining their remedial choice.

Because remand without vacation alone cannot 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 hence hinder oversight, can be difficult. To aid the public in this endeavor, 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 clearly identify the initial agency action with any unique identifier, as well as the remanding judicial opinion.

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).

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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 clearly 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.

4-5. Courts should consider whether remand without vacation is an appropriate remedy on review of agency action. Agency actions that are unlawful or transgress statutory standards of review should normally be vacated by the reviewing court. However, 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 rehabilitation 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), as well as the aims of the substantive statute authorizing the agency action, would not be furthered by vacation.

5-6. 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.

6.8. 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.

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

Comment [CQR12]: Christy Walsh: Consider whether to limit to rulemaking or to instances of general applicability.

Comment [CQR13]: 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.”