



Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | April 25, 2018

Commented [RB1]: Note for Committee: The Chair proposes that the Committee on Judicial Review vote to recommend to the full Assembly of the Conference that the recommendation be retitled "Severability of Agency Rules." The Assembly will vote on any recommended title change at the Plenary Session.

1 In recent years, as administrative rules have become more complex,¹ ~~ertain some~~
2 agencies have ~~started increasingly including included~~ provisions in some of their rules stating
3 that if portions of the rule are declared invalid in court, other portions that were not found by the
4 court to be invalid should be allowed to go into effect.² These provisions ~~have been are~~
5 ~~generally~~ called "administrative severability clauses," by analogy to the severability clauses that
6 Congress includes in legislation. To date, only a handful of agencies have used administrative
7 severability clauses,³ yet many other agencies issue rules that may be good candidates for
8 considering the possibility of severability. The purpose of this Recommendation is to make
9 available to other agencies best practices for dealing with the issue of severability in rulemaking.

10 It is not entirely clear how much weight the courts will give to the agency's expression of
11 its views on severability. The Supreme Court has never addressed the issue,⁴ and the lower

¹ Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, __ YALE L.J. __ (forthcoming 2019).

² A recent article on administrative severability clauses identified fifty-nine instances in which agencies had included severability clauses in their rules as of October 2014. Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2349–52 (2015). Of course, an administrative severability clause does not in any way restrict the power of a court to declare any or all portions of the rule invalid.

³ ~~According to recent academic research, the~~ **The** Federal Trade Commission and Environmental Protection Agency ~~have~~ generated the largest volume of severability clauses. Tyler & Elliott, *supra* note 2, at 2318–19.

⁴ ~~A prominent rule with a severability clause was the~~ EPA's ~~included a severability clause in the preamble to its~~ so-called Clean Power Plan. *See* Environmental Protection Agency: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,662 (October 23, 2015). ~~The final rule set carbon emissions standards for the states based on three "building blocks": (1) increasing the operational efficiency of existing coal-fired power plants; (2) shifting electricity generation from higher emitting fossil fuel-fired power plants to lower emitting natural gas-fired power plants; and (3) relying more heavily on renewable energy resources for electricity generation. Id. at 64,667. In the preamble, EPA noted that it "intended for the individual building blocks to be severable, such that if a court were to deem building block 2 or 3 defective," the emissions target would be based on "the remaining building blocks." Id. at 64,751, 64,758, 64,812–13. In February 2016, the Supreme~~



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12 courts have reached different results in the context of particular rulemakings. **In certain**
13 **instances, courts have declined to defer to administrative severability clauses.**⁵ ~~For~~
14 ~~example, a panel of the D.C. Circuit declined to defer to an administrative severability clause in~~
15 ~~an FCC order, holding that the remaining portions of the rule would not sensibly fulfill the~~
16 ~~agency’s purposes.~~ On the other hand, several other courts have given substantial weight to
17 agencies’ expressions of intent through severability clauses.⁶

18 Administrative severability clauses are more likely to be **followed given effect** by the
19 courts when: (1) they are included in the text of the proposed rule; (2) the agency’s rationale for
20 severability is explained in the preamble and made available for comment by interested parties;
21 (3) the rationale for severability is addressed in the statement of basis and purpose (in the same
22 manner as any other substantive policy issue in the rulemaking); and (4) the agency explains how
23 specific provisions of the rule would operate independently. While courts are often also willing
24 to consider the agency’s view on severability as expressed in agency briefs or at oral argument,⁷

Court stayed the enforcement of the Clean Power Plan pending **a decision on resolution of the rule’s merits.** *Chamber of Commerce v. EPA*, 136 S. Ct. 999 (2016). ~~The Court’s stay order~~ The Court did not address the ~~Clean Power Plan’s~~ severability clause **and, given the rule’s proposed repeal, it is unlikely that the courts will ever have the occasion to pass on the rule’s merits due to its proposed repeal to do so.** See Exec. Order No. 13,783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (proposed Executive Order to repeal the Clean Power Plan).

⁵ See, e.g., *MD/DC/DE Broadcasters v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001) (declining to **follow defer to an agency’s** severability clause because the remaining portion of the rule would not have sensibly served the goals for which the rule was designed).

⁶ See, e.g., *Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 306 n.28 (4th Cir. 2018) (“**It is particularly appropriate to review the Proclamation’s specific restrictions given the Proclamation’s severability clause, to which courts should give effect if possible.**”), **as amended (Feb. 28, 2018)** (“~~It is particularly appropriate to review the Proclamation’s specific restrictions given the Proclamation’s severability clause, to which courts should give effect if possible.~~”); *Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP*, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); *High Country Conservation Advocates v. U.S. Forest Serv.*, No. 13-CV-01723-RBJ, 2014 WL 4470427, at *4 (D. Colo. Sept. 11, 2014) (“I conclude that the severability clause creates a presumption that the North Fork Exception is severable. . . .”); *Consumer Fin. Prot. Bureau v. The Mortg. Law Grp., LLP*, 182 F. Supp. 3d 890, 894–95 (W.D. Wis. 2016) (deferring to severability clause on issue of whether the agency intended for the remainder of the rule to stay in effect); *see also Int’l Refugee Assistance Project v. Trump*, 883 F.3d 233, 306 n.28 (4th Cir. 2018), **as amended (Feb. 28, 2018)** (“**It is particularly appropriate to review the Proclamation’s specific restrictions given the Proclamation’s severability clause, to which courts should give effect if possible.**”).

⁷ *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 72 (D.C. Cir. 2017) (“**If EPA, or any party, wishes to disabuse us of our substantial doubt with a petition for rehearing, we will of course reconsider as necessary.**”), *decision modified*



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25 courts ~~are seem~~ less likely to defer ~~to~~ the agency if the issue of severability comes up for the first
26 time in briefing or oral argument because of “the fundamental principle that agency policy is to
27 be made, in the first instance, by the agency itself—not by courts, and not by agency counsel.”⁸

28 This Recommendation suggests factors for agencies to consider in deciding whether ~~it is~~
29 ~~appropriate~~ to ~~discuss~~ ~~address~~ severability in a particular rulemaking. ~~Discussing~~ ~~Addressing~~
30 severability is not appropriate in every rulemaking, as doing so imposes additional costs on both
31 the agency and commenters. In addition, if agencies include administrative severability clauses
32 routinely without reasoned discussion of the rationale behind them, the courts will be less likely
33 to give them much weight. As with ~~many~~ other aspects of rules, agencies should only include
34 administrative severability clauses ~~only~~ when they conclude that the expected net benefit to the
35 public will exceed the costs. The benefits of discussing the issue of severability in a particular
36 rulemaking may exceed the costs if an agency concludes that its rules are likely to be litigated
37 and that ~~it is important for some~~ portions of the rule should go into effect, even if ~~some parts~~
38 ~~other portions~~ are stuck down. Considering severability can be particularly important when an
39 agency believes that some portions of its proposed rule are likely to be more vulnerable in court
40 than others, but that the less vulnerable portions of the rule can function independently and
41 should go into effect even if the more controversial portions are vacated.

42 If a court finds portions of ~~an administrative~~ rule arbitrary and capricious or not
43 supported by the record, and the agency has been silent about severability, then the default
44 remedy is to vacate the entire rule, including those portions of it that the court did not find

Commented [MJC(2)]: Comment from Lee Otis:
Because at least in a few instances statutes may say don't
worry about cost-benefit with regard to something or other.

~~on reh'g~~, 883 F.3d 918 (D.C. Cir. 2018). (~~“If EPA, or any party, wishes to disabuse us of our substantial doubt with a petition for rehearing, we will of course reconsider as necessary.”~~)

⁸ *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 867 (D.C. Cir. 2006) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989)). This ~~principle is also reflected in an application of the~~ *Chenery* doctrine, ~~which holds that a reviewing court may not affirm an agency decision on different grounds than those adopted by the agency. See~~ *SEC v. Chenery Corp.*, 318 U.S. 80, 92-94 (1943). (~~holding that a reviewing court may not affirm an agency decision on a ground different from that adopted by the agency to justify its action~~); *SEC v. Chenery Corp.*, 318 U.S. 80, 92-94 (1943) (~~same~~).



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45 invalid.⁹ This outcome can impose unnecessary costs on the agency, **which must and the public**
46 **either to** re-promulgate the portions of the rule that the court did not find invalid but struck down
47 nonetheless, **and on the public, which must or to** forego the benefits that would have accrued
48 under those portions of the rule.

49 Sometimes courts have concluded that an agency's intentions **regarding severability are**
50 **are** sufficiently clear **to support severability**, despite the absence of an administrative
51 severability clause or discussion of the issue in the rulemaking.¹⁰ It is more likely, however, that
52 any unnecessary costs from vacating portions of rules that the court did not find invalid will be
53 avoided, if the agency includes a severability clause in the proposed regulatory text, invites
54 comment, and includes a reasoned explanation for why it believes some portions of the rule can
55 and should function independently in its statement of basis and purpose.

56 A separate but related question is how parties to a challenge to an agency rule should
57 address the question of severability during litigation. Litigants may be reluctant to address the
58 issue of severability in their briefs because: (1) it is often not clear in advance which portions of
59 a rule a court may vacate and (2) many agencies fear that addressing severability would convey
60 doubts to the courts about the validity of their rules.¹¹ Courts should therefore invite the parties'
61 views on severability at an appropriate time and manner in litigation, as for example when it
62 appears likely that portions of a rule may be vacated but that other portions of the rule are not in
63 and of themselves invalid and could conceivably remain in effect without the invalid portions.

⁹ Admin. Conf. of the U.S., Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,269, 76,272 (Dec. 5, 2013); Ronald M. Levin, *Judicial Remedies*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 254, 251 (2d ed. 2015).

¹⁰ See *Virginia v. EPA*, 116 F.3d 499, 500-01 (D.C. Cir. 1997); ~~(reinstating part of a rule, despite the lack of a severability clause, in response to EPA's petition for rehearing); *Davis County Solid Waste Mgmt.*, 108 F.3d 1454, 1455-56, 1459-60 (D.C. Cir. 1997) (same); *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 62 (D.D.C. 2012), *aff'd in part, rev'd in part*, 717 F.3d 947 (D.C. Cir. 2013). (concluding that a rule's preamble provided sufficient evidence of NLRB's intent to sever the rule).~~

¹¹ Charles W. Tyler & E. Donald Elliott, Mitigating the Costs of Remediating Legally Infirm Rules, 25 (Feb. 27, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/research-projects/minimizing-cost-judicial-review>. ~~(describing interviews in which agency officials opined that arguing severability at litigation could signal weakness to a reviewing court).~~



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RECOMMENDATION

- 65 1. Early in the process of developing a rule, in addition to other programmatic
66 considerations, agencies that anticipate litigation should consider whether a rule is
67 divisible into segments that function independently.
- 68 2. The agency should first determine whether it intends that portions of the rule should be
69 **separable severable** or whether some parts should function independently even if other
70 parts are struck down as legally invalid. If so, it should draft the rule such that it is
71 divisible into independent segments.
- 72 3. Agencies should address the issue of severability in the regulatory text of the proposed
73 rule and provide a reasoned explanation in the preamble as to why portions of the rule are
74 or are not severable. The agency should identify which segments, if any, should survive
75 if other portions are struck down and explain how they relate to other segments in the
76 event a court holds some portions of the rule invalid.
- 77 4. When severability is a potential issue **on judicial review** and the question has not
78 otherwise been previously briefed, the courts should solicit the parties' views on
79 severability, at the appropriate time.

Commented [RB3]: Note for Committee: At the end of the last meeting, recommendations 1–3 were consolidated in a single recommendation. Given the length and complexity of that recommendation, this version attempts to break it down into logically discrete components.