Remand Without Vacatur

Committee on Judicial Review

Proposed Recommendation for Council Meeting | Nov. 19, 2013

Remand without vacatur 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 vacatur 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 vacatur in cases involving judicial review of agency actions. The Conference accepts the principle that remand without vacatur is a valid equitable remedial device. It recognizes and approves of at least three general circumstances in which remand without vacatur may be appropriate. Finally, it offers advice 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 on review of agency action in the Courts of Appeals for the Federal, First, Fifth, Eighth, Ninth, and Tenth Circuits. *Id*. at 26-28.

The remedy has generated academic and judicial debate over its advisability and legality. Those who support remand without 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, 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 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 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 vacatur contravenes the plain language of the judicial review provisions of the APA.[2] However, despite occasional dissents or other separate judicial opinions, no cases were identified in which a federal court of appeals held that remand without vacatur was unlawful under the APA or another statutory standard of review. Rather, courts generally accept the remedy as a lawful exercise of equitable remedial discretion.[3]

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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).

[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).

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 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.[4] Courts also employ the remedy when vacatur would not serve the interests of the prevailing party that was harmed by the agency's error.[5] Remand without vacatur may be appropriate in these circumstances as well as in others not considered here.

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.[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.*, 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 pro-regulatory 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

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.[7] 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.

~~Responsive agency action on remand is a matter of particular concern because remand~~Remand without vacatur ~~alone~~ does not by itself provide relief for litigants after successful challenges to agency rules or orders. Thus, responsive agency action on remand is a matter of particular concern in such cases.[8] Moreover, difficulties in identifying remanded decisions and agency responses can hinder oversight. Accordingly, 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

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] Courts have occasionally 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).

additionally contact the Office of the Federal Register and issue a rule removing vacated regulations from the Code of Federal Regulations.[9]

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. In any subsequent proceedings responding to remand without 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 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 should be considered a valid 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.

[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).

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

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

(a) correction is reasonably achievable in light of the nature of the deficiencies in the agency's rule or order;

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

(c) the interests of the ~~prevailing~~ parties who prevailed against the agency in the litigation would be served by allowing the agency action to remain in place.

6. When a court has decided to remand an agency action, it should consider asking the parties for their views on whether to vacate the agency action ~~at issue in the case,~~ and on any related remedial issues ~~as to the appropriate remedy~~.

Recommendations to Agencies

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.

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

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.

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.