



Memorandum

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

The following revised draft recommendation 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. This draft is intended to facilitate the Committee’s discussion at its Oct. 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 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; traditionally, courts have reversed and
4 set aside agency actions they have found to be arbitrary and capricious, unlawful, unsupported
5 by substantial evidence, or otherwise in violation of an applicable standard of review. Since
6 1970, the remedy has been employed with increasing frequency. It has now been applied in
7 more than seventy decisions of the Court of Appeals for the D.C. Circuit involving over twenty
8 federal agencies and encompassing a variety of substantive areas of law including air pollution
9 control, telecommunications, and national security.¹

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.



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

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

27 Nonetheless, remand without vacation is not without controversy. Some argue that it
28 can deprive litigants of relief from unlawful or inadequately reasoned agency decisions, reduce
29 incentives to challenge improper or poorly reasoned agency behavior, promote judicial
30 activism, and allow deviation from legislative directives. Critics of the remedy have also
31 suggested that it reduces pressure on agencies to comply with APA obligations and to respond
32 to a judicial remand. Given the relative infrequency of application of the remedy, these
33 prudential and theoretical concerns have generally not been realized and are unlikely to be
34 systemic.



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

41 The Conference recommends that the remedy be considered a valid exercise of judicial
42 authority on review of cases that arise under the Administrative Procedure Act, 5 U.S.C. §
43 706(2), as well as under other statutory review provisions unless they contain an express
44 legislative directive to the contrary. In employing remand without vacation, courts are
45 essentially finding that prejudicial agency errors do not justify setting aside the challenged
46 action. This conclusion deviates from customary remedial norms and, therefore, when courts
47 invoke the remedy of remand without vacation they should explain the reasons for doing so.

48 Equitable considerations that justify leaving the challenged agency action in place on
49 remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C.
50 Circuit supports application of the remedy after a finding that a challenged agency action, while
51 invalid, is not seriously deficient or where vacation would have disruptive consequences.⁴
52 Courts also employ the remedy when vacation would not serve the interests of the prevailing
53 party that was prejudiced by the agency's error.⁵ Remand without vacation may be

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 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).

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) (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



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54 appropriate in these circumstances. It may also be appropriate in other circumstances not
55 considered here, and on which the Conference presently takes no position.

56 On review of agency action, the Conference recommends that courts identify whether
57 or not they are vacating the agency action on remand. Research indicates that ambiguous
58 remand orders that do not clearly identify whether agency actions are also vacated occur with
59 some regularity.⁶ This is particularly problematic where an agency decision regulates conduct
60 of or permits enforcement actions against individuals or entities not party to the litigation, and
61 who cannot seek direct clarification of the court's remedial intention.

62 Because remand without vacation alone does not provide relief for litigants after
63 successful challenges to agency actions, responsive agency action on remand is necessary.
64 Identifying remanded decisions and agency responses can be difficult and hinder oversight. To
65 aid the public in this awareness, the Conference recommends that agencies notice final judicial
66 opinions vacating or remanding agency rules or orders in the applicable online public docket, if
67 any exists. Docket notices should include a short statement specifically identifying the judicial
68 opinion and whether it vacates all or part of the challenged action(s), together with any unique
69 identifiers for the affected agency action (like a Regulation Identifier Number). In proceedings
70 responding to remand without vacation, agencies should identify the initial agency action with
71 any unique identifier, as well as the remanding judicial opinion.

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).

⁶ *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).



RECOMMENDATION

72 **Validity of the Remedy**

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

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

79 **Recommendations to Courts**

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

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

85 5. Remand without vacation may be an appropriate remedy on review of agency
86 action under the APA or other statutory review provisions where:

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

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

90 (c) the interests of the prevailing parties who were prejudiced by the agency's
91 error(s) would not be furthered by vacation.

92 6. Where courts remand but do not vacate agency actions, they should explain the
93 basis for their remedial choice.



94 **Recommendations to Agencies**

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

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

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

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