



Remand Without Vacation

Committee on Judicial Review

Proposed Recommendation for Council Meeting | Nov. 19, 2013

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. Traditionally, courts have reversed and set aside agency actions they have found
4 to be arbitrary and capricious, unlawful, unsupported by substantial evidence, or otherwise in
5 violation of an applicable standard of review. Since 1970, however, the remedy [of remanding](#)
6 [without vacating the agency decision](#) has been employed with increasing frequency. It has now
7 been applied in more than seventy decisions of the Court of Appeals for the District of
8 Columbia Circuit involving over twenty federal agencies and encompassing a variety of
9 substantive areas of law including air pollution control, telecommunications, and national
10 security.¹

Comment [A1]: Alan Morrison

Comment [A2]: Carol Ann Siciliano

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

Comment [A3]: Proposed by Carol Ann Siciliano

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, [evidently infrequently](#), on review of agency action in the Courts of Appeals for the Federal, First, Fifth, Eighth, Ninth, and Tenth Circuits. *Id.* at 26-28.



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19 advice to courts that are considering employing the remedy and to agencies responding to
20 remands.

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

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

Comment [A4]: Alan Morrison

37 Some judges argue that remand without vacation contravenes the plain language of the
38 judicial review provisions of the APA.² However, despite occasional dissents or other separate
39 judicial opinions, no cases were identified in which a federal court of appeals held that remand

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).



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40 without vacation was unlawful under the APA or another statutory standard of review. Rather,
41 courts generally accept the remedy as a lawful exercise of equitable remedial discretion.³

Comment [A5]: Alan Morrison

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

Comment [A6]: Alan Morrison

49 Equitable considerations that justify leaving the challenged agency action in place on
50 remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C.
51 Circuit supports application of the remedy after a finding that a challenged agency action, while
52 invalid, is not seriously deficient or where vacation would have disruptive consequences.⁴
53 Courts also employ the remedy when vacation would not serve the interests of the prevailing
54 party that was harmed by the agency's error.⁵ Remand without vacation may be appropriate in
55 these other circumstances as well as in others not considered here, and on which the
56 Conference takes no position.

Comment [A7]: Alan Morrison

³ Remand without vacation fits 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).

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., *Env'tl. 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 proregulatory 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).



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57 When a reviewing court has decided to remand an agency's action, it should consider
58 asking the parties for their views on the appropriate remedy in light of this decision.⁶ In its final
59 decision, the court should identify whether or not it is vacating the remanded agency action.
60 Research indicates that ambiguous remand orders that do not clearly identify whether an
61 agency's action is also vacated occur with some regularity.⁷ This is particularly problematic
62 where an agency rule or order regulates conduct of, or permits enforcement actions against,
63 individuals or entities not party to the litigation, and who cannot seek direct clarification of the
64 court's remedial intention.

65 Because remand without vacation alone does not provide relief for litigants after
66 successful challenges to agency rules or orders, responsive agency action on remand is
67 necessary.⁸ Moreover, difficulties in identifying remanded decisions and agency responses can
68 hinder oversight. While the Supporting Report primarily studied remand without vacation, the
69 Conference believes there is value in making limited recommendations to agencies regarding publication
70 of and responsive action to remanded agency actions more generally, regardless of whether they were
71 vacated.⁹ Accordingly, agencies should identify or post final judicial opinions vacating, or

Comment [A8]: Agreed to in principle at 10/30 committee meeting but inadvertently omitted from 10/05 draft.

Comment [A9]: Alan Morrison

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 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, although rarely, retained jurisdiction over cases remanded without vacation 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).

⁹ While the Supporting Report primarily studied remand without vacation, the Conference believes there is value in making limited recommendations to agencies regarding publication of and responsive action to remanded agency actions more generally, regardless of whether they were vacated.—See Tatham Report, *supra* note 1 at 51-52.



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72 remanding without vacation, agency rules or orders in the applicable online public docket, if
73 any exists, and on agency websites, where appropriate. Agencies should include a short
74 statement identifying the judicial opinion and whether it vacates all or part of the challenged
75 rule or order, together with any unique identifiers for the affected agency rule or order (such as
76 a Regulation Identifier Number). Agencies should additionally contact the Office of the Federal
77 Register and issue a rule removing vacated regulations from the Code of Federal Regulations.¹⁰

78 To further public awareness, the Conference also recommends that agencies provide
79 information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding
80 their future plans with respect to rules that are remanded without vacation. In any subsequent
81 proceedings responding to remand without vacation, agencies should identify the initial agency
82 action together with any unique identifier, as well as the remanding judicial opinion.

RECOMMENDATION

83 **Validity of the Remedy**

84 1. Remand without vacation should continue to be considered a valid equitable
85 remedy on review of cases that arise under the Administrative Procedure Act (APA) and its
86 judicial review provision, 5 U.S.C. § 706(2).

87 2. Absent an express legislative directive to the contrary in any other statute
88 providing the basis for review, remand without vacation should be considered a valid remedial
89 approach by federal courts reviewing challenges to agency action pursuant to such a statute.

90 **Recommendations to Courts**

¹⁰ 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).



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91 3. Where courts remand but do not vacate an agency action, they should explain
92 the basis for their remedial choice.

93 4. In determining whether the remedy of remand without vacation is appropriate,
94 courts should consider equitable factors, including whether:

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

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

98 (c) the interests of the prevailing parties who were subject to the agency's error(s)
99 would not be harmed by vacation.

100 5. When a court has decided to remand an agency action, it should consider asking

101 the parties for their views in light of its ruling on the appropriate remedy whether or not to
102 vacate the agency action at issue in the case, pending further agency action in light of its ruling.

Comment [A10]: Allison Zieve

103 6. On review of agency action, reviewing courts should identify in their judicial
104 opinions or orders whether or not they are vacating a remanded agency action.

105 **Recommendations to Agencies**

106 7. Agencies should specifically identify or post judicial decisions vacating or
107 remanding without vacation agency rules or orders in any applicable public docket, and, if
108 appropriate, on the agency website. When a court remands but does not vacate an agency's
109 rule or order, the agency should include a statement explicitly advising that the rule or order
110 has not been vacated and is still in effect despite the remand.

111 8. When a regulation has been vacated, the promulgating agency should contact
112 the Office of the Federal Register and issue a rule removing the vacated regulation from the
113 Code of Federal Regulations.



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114 9. Agencies should provide information in the Unified Agenda of Federal Regulatory
115 and Deregulatory Actions regarding their plans with respect to rules that are remanded without
116 vacation.

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

DRAFT