



Remand Without ~~Vacation~~ Vacatur

Committee on Judicial Review

Proposed Recommendation for Council Meeting | Nov. 19, 2013

1 Remand without vacaturion 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

11 The Administrative Conference conducted a study of remand without vacaturion 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 vacaturion in cases involving judicial review of agency actions. The Conference
15 accepts the principle that remand without vacaturion 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~~ vacatur may be appropriate. Finally,

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.



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

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

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

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

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).



40 review. Rather, courts generally accept the remedy as a lawful exercise of equitable remedial
41 discretion.³

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 vacat~~urion~~, courts
46 are essentially finding that ~~prejudicial~~ agency errors that are sufficient to require remand may
47 not always do not justify immediately setting aside the challenged action. Since this conclusion
48 deviates from customary remedial norms, when courts invoke the remedy, they should explain
49 their reasons for doing so.

50 Equitable considerations that justify leaving the challenged agency action in place on
51 remand may exist in a variety of circumstances. Longstanding judicial precedent in the D.C.
52 Circuit supports application of the remedy after a finding that a challenged agency action, while
53 invalid, is not seriously deficient or when~~re~~ vacat~~urion~~ would have disruptive consequences.⁴
54 Courts also employ the remedy when vacat~~urion~~ would not serve the interests of the prevailing
55 party that was harmed by the agency's error.⁵ Remand without vacat~~urion~~ may be appropriate
56 in these circumstances as well as in others not considered here.

³ Remand without ~~vacation~~ ~~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).

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, *RETAKEING 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).



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 ~~Agencies must correct the deficiency identified by the court~~Responsive agency action on
66 remand is a matter of particular concern ~~Because remand without vacatur~~alone does not
67 provide relief for litigants after successful challenges to agency rules or orders, ~~responsive~~
68 ~~agency action on remand is necessary.~~⁸ Moreover, difficulties in identifying remanded
69 decisions and agency responses can hinder oversight. ~~While the Supporting Report primarily~~
70 ~~studied remand without vacation, the Conference believes there is value in making limited~~
71 ~~recommendations to agencies regarding publication of and responsive action to remanded~~
72 ~~agency actions more generally, regardless of whether they were vacated.~~⁹ Accordingly,

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 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).

⁹ ~~See Tatham Report, *supra* note 1 at 51-52.~~



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

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

RECOMMENDATION

86 | **Validity of the Remedy**

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

90 | 2. Absent an express legislative directive to the contrary in any other statute
91 | providing the basis for review, remand without ~~vacation~~vacatur should be considered a valid

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).



92 remedial approach by federal courts reviewing challenges to agency action pursuant to such a
93 statute.

94 **Recommendations to Courts**

95

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

98 ~~3.4.~~ When ~~re~~ courts remand but do not vacate an agency action, they should explain
99 the basis for their remedial choice.

100 4.5. In determining whether the remedy of remand without vacaturion is
101 appropriate, courts should consider equitable factors, including whether:

102 (a) ~~The deficiencies in the agency's rule or order~~ correction is reasonably achievable
103 in light of the nature of the deficiencies in the agency's rule or order ~~are not severe, and~~
104 ~~hence correction is possible on remand;~~

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

106 (c) the interests of the prevailing parties ~~who were subject to the agency's error(s)~~
107 would ~~not be harmed~~ served by ~~vacation~~ keeping ~~allowing the agency action to remain in~~
108 place.

109 ~~5.6.~~ When a court has decided to remand an agency action, it should consider asking
110 the parties for their views on ~~the appropriate remedy~~ whether or not to vacate the agency
111 action at issue in the case, pending further agency action ~~and on any related issues as to the~~
112 appropriate remedy ~~in light of its ruling.~~

113 ~~1. On review of agency action, reviewing courts should identify in their judicial~~
114 ~~opinions or orders whether or not they are vacating a remanded agency action.~~



115 **Recommendations to Agencies**

116 | ~~6-7.~~ Agencies should specifically identify or post judicial decisions vacating or
117 | remanding without ~~vacation~~vacatur agency rules or orders in any applicable public docket, and,
118 | if appropriate, on the agency website. When a court remands but does not vacate an agency's
119 | rule or order, the agency should include a statement explicitly advising that the rule or order
120 | has not been vacated and is still in effect despite the remand.

121 | ~~7-8.~~ When a regulation has been vacated, the promulgating agency should ~~contact~~
122 | ~~the Office of the Federal Register and work with the Office of the Federal Register to~~
123 | ~~remove~~issue a rule removing the vacated regulation from the Code of Federal Regulations.

124 | ~~8-9.~~ Agencies should provide information in the Unified Agenda of Federal Regulatory
125 | and Deregulatory Actions regarding their plans with respect to rules that are remanded without
126 | ~~vacation~~vacatur.

127 | ~~9-10.~~ In responding to a judicial remand without ~~vacation~~vacatur of an agency action,
128 | agencies should identify the initial agency action as well as the remanding judicial opinion.