



Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | April 11, 2018

1 The typical, default judicial remedy for a legally infirm rule is to vacate the entire rule.¹
2 There are many instances in which this remedy is appropriate, particularly when the various parts
3 of a rule are so interrelated that none can function independently. In other instances, an agency
4 may draft a rule so that some provisions are severable and could survive independently if a court
5 invalidates another part of the rule. This recommendation proposes techniques agencies can
6 undertake to draft severable rules. It also recommends reforms to ensure that interested parties
7 and parties to litigation adequately address the question of severability on judicial review.

8 Total vacatur of a rule can create costs for agencies, regulated entities, regulatory
9 beneficiaries, and the public. Regulated entities may want valid provisions of a rule to go into
10 effect even if other portions are struck down, because they have invested significant time, money,
11 and resources in preparing to comply with the rule. Striking down the entire rule, as opposed to
12 only its invalid provisions, may adversely affect the reliance interests of those entities and create
13 instability in regulated markets and the regulatory regime. Likewise, regulatory beneficiaries
14 may be adversely affected by the loss of beneficial valid provisions of a rule. The agency that
15 promulgated the rule and the public also may incur substantial costs because the agency must go
16 back to the drawing board and redo much of its previous work, potentially resulting in wasted
17 taxpayer dollars.² These risks are particularly great when the legal, scientific, and economic
18 bases for agency rules have not been previously tested in court.

¹ Admin. Conf. of the U.S., Recommendation 2013-6, *Remand Without Vacatur*, 78 Fed. Reg. 76,269, 76,272 (Dec. 5, 2013).

² *Id.*

**Commented [MJC(1):
NOTE ON PROPOSED TITLE CHANGE**

The Committee on Judicial Review recommends that this recommendation be re-titled "Rulemaking, Severability, and Judicial Remedies."



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19 Moreover, the question of the proper remedy when only a portion of a rule is invalid
20 raises fundamental issues of the proper relationship between agencies and reviewing courts.
21 Under the *Chenery* doctrine,³ a court should not promulgate a rule different from the rule that the
22 agency intended to adopt, as the rulemaking function is given to the agency and not the courts by
23 Congress.

24 An agency that would prefer for a court to strike down only those parts of a rule found to
25 be invalid can use various techniques⁴ before and after promulgating rules to assist courts as they
26 consider whether it would be appropriate to allow the valid provisions of a rule to remain in
27 place.⁵ An agency can solicit input from stakeholders on whether a rule's provisions would
28 appropriately function independently and incorporate that feedback, as appropriate, into its rule.
29 The agency can also conduct litigation risk assessments early in the rule drafting process, in
30 which policy experts and litigators work together early on to balance the perceived costs and
31 benefits of various regulatory options, including the potential risk of a judicial ruling invalidating
32 aspects of the regulatory program.⁶

33 It may also be helpful for the agency to include a severability clause in the regulatory text
34 of a rule or, when appropriate, in the preamble, when it determines that the rule would be
35 logically divisible.⁷ Courts have generally made severability decisions *de novo* without regard to

³ *SEC v. Chenery Corp.*, 318 U.S. 80, 92-94 (1943) (holding that a reviewing court may not affirm an agency action on a ground different from that adopted by the agency to justify its action).

⁴ Charles W. Tyler and E. Donald Elliott, *Mitigating the Costs of Remediating Legally Infirm Rules* (Feb. 27, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/research-projects/minimizing-cost-judicial-review>.

⁵ For a discussion of the merits of leaving certain provisions of a rule in place, see *Remand Without Vacatur*, Recommendation 2013-6, *supra* note 1.

⁶ Some agencies already engage in this practice. Tyler & Elliott, *supra* note 5, at 23.

⁷ Whether an agency's rule is severable depends on the agency's intent. *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997). The courts consider whether the parts of the rule are intertwined or whether they operate independently. In making this determination, the courts examine the purpose of the agency's rule and whether the remaining portion of the rule reasonably serves the goals for which it was designed without the severed portion. *MD/DC/DE Broadcasters Ass'n v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001); see also *Assoc. of Private Colleges & Universities v. Duncan*, 870 F.Supp.2d 133, 155-57 (D.D.C. 2012). In *Catholic Soc. Serv. v. Shalala*, the D.C. Circuit



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36 the existence of severability clauses because they may view them as throwaway language.⁸
37 However, commentators have argued that courts should generally defer to agency views of
38 which portions of their rules are and are not severable rather than making this decision on their
39 own.⁹ Courts may be more inclined to defer to severability clauses if it appears that the agency
40 has given careful consideration to how the various parts of the rule relate to one another and
41 whether the agency intends that some of them stand on their own.¹⁰ Of course, this does not
42 mean that courts should uphold the remaining portions of an agency rule if the court determines
43 that the rule without the severed portions is not supported by the record, is not a logical extension
44 of the rule as proposed, or suffers from some other legal defect. But similarly, courts should not
45 reflexively invalidate all parts of an agency's rule simply because they have determined that
46 portions of the same rule are invalid.

47 Once an agency promulgates its rules, it has other ways to aid courts as they consider
48 whether valid provisions of a rule may remain in place. Courts may often benefit from briefing

articulated a statutory basis in the APA for courts to sever rules. 12 F.3d 1123, 1128 (D.C. Cir. 1994) (reasoning that section 706(2) (A) of the APA provides that a reviewing court may set aside an "agency action," and that the definition of agency action in section 551(13) "includes the whole *or a part of*" an agency rule) (emphasis added); *see also Wilmina Shipping v. U.S. Dept of Homeland Security*, 75 F. Supp. 3d 163, 171 (D.C. Cir. 2014) (applying holding of *Catholic* to agency orders).

⁸ Tyler & Elliott, *supra* note 5, at 13-14, 19; *see also* Charles W. Tyler, E. Donald Elliott, *Administrative Severability Clauses*, 124 Yale L. J. 2286 (2015).

⁹ *Id.*

¹⁰ Another potential approach is for the agency to include fallback provisions in its rules. When the legality of an agency's preferred regulatory course is not well established, the agency may know what its preferred second-best alternative would be were a reviewing court to determine that the agency's preferred course is unlawful. The agency could approach this scenario by taking both courses of action through the notice-and-comment process, then promulgating a rule that imposes its preferred course of action and specifies that the second-best alternative will take effect if a reviewing court holds its preferred action to be unlawful. Fallback provisions raise a number of novel legal issues, such as how to distinguish between fallback provisions and severability clauses; whether a petitioner may lack standing when challenging a rule with a valid fallback provision; how to perform a cost-benefit analysis of the fallback provision; what is the effective date of the fallback provision; whether the provision would require an alternative CFR section; and what constitutes the administrative record when reviewing fallback provisions. These issues require further research and therefore the use of fallback provisions is beyond the scope of this Recommendation.



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49 regarding appropriate remedies from both agencies and opposing parties.¹¹ Input on whether the
50 provisions of a rule should be severed; whether an infirmity was harmless error; or whether the
51 rule should be remanded without vacatur may be particularly helpful to courts.¹²

52 Agencies and other parties involved in litigation could benefit from a briefing policy that
53 encourages them to submit briefing on remedies. Some agencies have reported that they are
54 concerned that they will signal weakness to courts by raising the issue of remedies in their merits
55 briefs.¹³ Other parties may also be wary of raising remedies in briefing, especially early in the
56 litigation. A briefing policy that would allow parties to submit supplemental briefing on
57 remedies in cases in which courts believe they will likely hold a rule unlawful, or, alternatively,
58 that would require parties to submit all plausible arguments, including those related to remedies,
59 in their opening briefs on the merits, could alleviate these concerns and encourage parties to
60 provide input on remedies to courts.

61 This Recommendation offers best practices and factors for agencies to consider before
62 and after promulgating rules as they seek to avoid the unintended consequences of a court
63 striking down an entire rule when portions of the rule are valid. Not every rule will lend itself to
64 these techniques, but adopting them in appropriate cases may produce significant benefits for
65 agencies, regulated entities, regulatory beneficiaries, and the public.

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¹¹ The courts may desire to solicit the parties' views on remedies, as appropriate, to ensure that they decide the issue on the same grounds as intended by the agency. *See Chenery Corp.*, 318 U.S. at 92-94.

¹² It may be premature for parties to argue that a court should remand a rule without vacating it until the parties know what error the court has found in the rule—particularly when the rule is very complex. One of the factors that bears on a court's decision on whether to remand a rule without vacating it is whether the error that the court has found is fixable. Recommendation 2013-6, *supra* note 1, at 26,272. An agency cannot brief that issue unless it knows which error, out of many possible ones, the court finds to be a problem for the rule. Only once the court identifies the error, can the parties argue whether the rule can be fixed.

¹³ Tyler & Elliott, *supra* note 5, at 25-26, 32.



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RECOMMENDATION

- 68 1. In deciding whether to implement any of these recommendations, an agency should
69 consider programmatic, institutional, legal, and financial constraints on its ability to do
70 so. Agencies should not use these mechanisms in a *pro forma* fashion, but rather
71 consider their preferred outcome and structure their rules accordingly, as a court may
72 only heed an agency's efforts to ensure separable rules if they reflect the agency's intent
73 about how to divide the rules into conceptually distinct components.
- 74 2. Early in the process of developing a rule, the agency should consider whether the rule is
75 appropriately focused to achieve the agency's goals and is logically divisible into
76 segments that function independently. If the agency determines that portions of the rule
77 are separable and that it intends for some parts to function even if other parts are struck
78 down as legally invalid, it should draft the rule such that it is divisible into independent
79 segments. It should also include a severability clause in the regulatory text of the
80 proposed rule, or, when appropriate, in the preamble. The clause should identify which
81 segments should survive if other portions are struck down and explain how they relate to
82 other segments in the event a court holds the rule invalid.
- 83 3. If the agency believes a rule can and should be divided into independent segments, it
84 should solicit public input concerning the divisibility of the rule into independent
85 segments, the benefits and costs associated with those individual segments, the
86 appropriate scope of a severability clause, and whether the rule appropriately focuses on
87 the agency's goals and on a manageable set of issues. This may entail seeking input from
88 stakeholders prior to issuing a proposed rule and soliciting input from the general public
89 in the notice of proposed rulemaking itself. Agencies also should consult with the Office
90 of Information and Regulatory Affairs concerning the economic effects of a proposed
91 rule's individual segments.
- 92 4. In view of the multiple considerations involved in severability decisions, parties involved
93 in litigation should consider whether to address the issues of appropriate remedies in
94 briefing if a court may find that only certain provisions of an agency's rule are valid.



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95 These issues include whether the provisions of a rule should be severed; whether an
96 infirmity was harmless error; or whether the court should remand the rule without
97 vacating it.

98 5. The courts may wish to solicit the parties' views on remedies, as appropriate, to ensure
99 that they decide the issues of remedies on the same grounds as intended by the agency.

100 6. Pursuant to its general rulemaking authority in 28 U.S.C. § 331, the Judicial Conference
101 may wish to study a rules amendment to adopt a briefing policy that would encourage or
102 require agencies and parties involved in a challenge to a rule to address remedies in
103 briefing.