ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Minimizing the Cost of Judicial Review

Committee on Judicial Review

Proposed Recommendation for Committee | ~~March 16~~April 11, 2018

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

Total vacatur of a rule can create costs for agencies, regulated entities, regulatory beneficiaries, and the public. Regulated entities may want valid provisions of a rule to go into effect even if other portions are stuck down, because they have invested significant time, money, and resources in preparing to comply with the rule. Striking down the entire rule, as opposed to only its invalid provisions, may adversely affect the reliance interests of those entities and create instability in regulated markets and the regulatory regime. Likewise, regulatory beneficiaries may be adversely affected by the loss of beneficial valid provisions of a rule. The agency that promulgated the rule and the public also may incur substantial costs ~~and~~ because the agency must go back to the drawing board and redo much of its previous work, potentially resulting in wasted ~~effort by the agency, given that it has likely invested an extraordinary amount of time,~~

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

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

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NOTE ON PROPOSED TITLE CHANGE

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

~~money, and resources in compiling a rulemaking record and establishing a supporting enforcement apparatus, among other things. This risk is~~ taxpayer dollars.[3] These risks are particularly great ~~in those instances where~~when the legal, scientific, and economic bases for ~~the rule may~~ agency rules have not ~~have~~ been previously tested in court.

~~Agencies~~ Moreover, the question of the proper remedy when only a portion of a rule is invalid raises fundamental issues of the proper relationship between agencies and reviewing courts. Under the *Chenery* doctrine,[4] a court should not promulgate a rule different from the rule that the agency intended to adopt, as the rulemaking function is given to the agency and not the courts by Congress.

An agency that would prefer for a court to strike down only those parts of a rule found to be invalid can use various techniques[5] before~~, during, or~~ and after ~~promulgation to mitigate the risk of courts striking down their rules.[6] Employing these techniques may enable agencies to minimize their costs and reduce the likelihood of any wasted effort. For instance, agencies~~promulgating rules to assist courts as they consider whether it would be appropriate to allow the valid provisions of a rule to remain in place.[7] An agency can solicit input from stakeholders on ~~procedural issues and~~whether a rule's provisions would appropriately function independently and incorporate that feedback, as appropriate, into its rule. The agency can also conduct litigation risk assessments early in the rule drafting process~~. They can~~, in which policy experts and litigators work together early on to balance the perceived costs and benefits of

[3] *Id.*

[4] *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).

[5] Charles W. Tyler and E. Donald Elliott, Mitigating the Costs of Remedying 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.

~~[6] Charles W. Tyler and E. Donald Eliot, Mitigating the Costs of Remedying 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.~~

[7] 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.

38 various regulatory options, including the potential risk of a judicial ruling invalidating aspects of
39 the regulatory program.[8]

40 It may also be helpful for the agency to include a severability clause in the regulatory text
41 of a rule or, when appropriate, in the preamble, when it determines that the rule would be
42 logically divisible.[9] Courts have generally made severability decisions *de novo* without regard to
43 the existence of severability clauses in their rules, which will minimize the costs of judicial
44 review insofar as they increase the probability that one part of a rule will survive. Agencies may
45 also wish to divide up their rules based on subject matter, which would further ensure that the
46 various aspects of a regulation are independent. Another approach is to ensure that a rule's text
47 and structure reflect the logical and practical relationships between a rule's provisions, even in
48 the absence of a severability clause. This may increase the likelihood that courts will cleave off
49 the offending portion of the rules while leaving the rest intact, which will avoid many of the
50 costs of total vacaturbecause they may view them as throwaway language.[10] However,
51 commentators have argued that courts should generally defer to agency views of which portions
52 of their rules are and are not severable rather than making this decision on their own.[11] Courts
53 may be more inclined to defer to severability clauses if it appears that the agency has given

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

[9] 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 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).

[10] 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).

[11] *Id.*

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careful consideration to how the various parts of the rule relate to one another and whether the agency intends that some of them stand on their own.[12] Of course, this does not mean that courts should uphold the remaining portions of an agency rule if the court determines that the rule without the severed portions is not supported by the record, is not a logical extension of the rule as proposed, or suffers from some other legal defect. But similarly, courts should not reflexively invalidate all parts of an agency's rule simply because they have determined that portions of the same rule are invalid.

~~Another way that agencies can mitigate the risk of incurring the costs of vacatur is to include fallback provisions in their rules. For example, 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, in the event that a reviewing court determines that its 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. Agencies could also promulgate smaller, less costly rules as test cases in some instances, particularly where agencies wish to regulate in areas where their authority to do so is not well established.~~

~~Once agencies promulgate their rules, they have additional ways to mitigate the risks of courts striking them down. Where appropriate, agencies can proactively argue to courts that they should issue a limited remedy, in the event that a court finds the rule to be invalid. Agencies~~

[12] 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.

~~could argue that the provisions of a rule should be severed; that an infirmity was harmless error; or~~ Once an agency promulgates its rules, it has other ways to aid courts as they consider whether valid provisions of a rule may remain in place. Courts may often benefit from briefing regarding appropriate remedies from both agencies and opposing parties.[13] Input on whether the provisions of a rule should be severed; whether an infirmity was harmless error; or whether the rule should be remanded without vacatur may be particularly helpful to courts.[14]

Agencies and other parties involved in litigation could benefit from a briefing policy that ~~the court should remand the rule without vacating it.~~[~~15~~] ~~Agencies might also benefit from a briefing policy that allows~~encourages them to submit briefing on remedies ~~separately from briefing on the~~ . Some agencies have reported that they are concerned that they will signal weakness to courts by raising the issue of remedies in their merits~~, thus ameliorating the fear that a judge will infer~~ briefs.[16] Other parties may also be wary of raising remedies in briefing, especially early in the litigation. A briefing policy that ~~an agency is uncertain about its positions on the merits. The briefing policy could allow agencies~~would allow parties to submit supplemental briefing on remedies in cases ~~where the~~in which courts believe they will likely hold a rule unlawful, or ~~it could~~, alternatively, that would require ~~agencies~~parties to submit ~~any~~all plausible arguments ~~on~~, including those related to remedies, in their opening briefs on the merits~~.~~, could alleviate these concerns and encourage parties to provide input on remedies to courts.

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[13] 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.

[14] 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.

~~[15] Recommendation 2013-6, *supra* note 1.~~

[16] Tyler & Elliott, *supra* note 5, at 25-26, 32.

This ~~recommendation~~Recommendation offers best practices and factors for agencies to consider before and after promulgating rules as they seek to ~~mitigate~~avoid the ~~risk~~unintended consequences of a court striking down ~~their rules. It is intended to suggest a menu~~an entire rule when portions of ~~available options.~~the rule are valid. Not every rule will lend itself to these ~~sorts of mechanisms. Agencies should not deploy these mechanisms, such as severability clauses,~~techniques, but adopting them in ~~a *pro forma* fashion, as a court~~appropriate cases may ~~only heed agencies' efforts to ensure separable rules if they reflect a conscious effort to divide the rules into conceptually distinct components. This recommendation also recognizes that all~~produce significant benefits for agencies ~~are subject to unique programming and financial constraints, and that the distinctiveness of agencies' respective~~, regulated entities, regulatory ~~schemes limits the development of workable standardized practices. Agencies may not have the resources to employ the suggested options in every case. Nevertheless, to the extent agencies are required to expend additional resources in implementing this recommendation, any upfront costs incurred may be accompanied by offsetting benefits.~~beneficiaries, and the public.

RECOMMENDATION

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~~**Before Promulgation**~~

~~1. Agencies should solicit input from stakeholders on approaches to designing rules that are logically divisible into component parts, such that part of the rule can survive judicial review if another part is held invalid by a court.~~

~~**During Promulgation**~~

~~2. Where appropriate, policy experts, compliance experts, litigators in the Department of Justice (or in the agency itself, if it possesses independent litigating authority), and rule drafters should collaborate while the regulatory text is being drafted to assess litigation~~

116 risk. Agencies should then take this information into account in determiningIn deciding
117 whether to deploy some mechanism for dividing the rule into conceptually distinct parts.
118 3. Agencies implement any of these recommendations, an agency should consider including
119 severability clauses in their rules, particularly where the agency has determined that the
120 rule's provisions would function independently.
121 4. Agencies should consider whether it is appropriate to divide regulations into multiple
122 rules. For example, it may prove usefulprogrammatic, institutional, legal, and financial
123 constraints on its ability to do so based on subject matter.
124 5. . Agencies should ensure thatnot use these mechanisms in a rule's text*pro forma* fashion,
125 but rather consider their preferred outcome and structure reflect the logical and practical
126 relationships between a rule's provisions. It is a best practice for an agency to make clear
127 when it intends for features of a rule to function independently by dividing those features
128 into separate parts and sections and indicating in the rule's text that those features are
129 supported by independent justifications and evidence.
130 6.1.Agencies should consider including fallback provisions in their rules. This option is
131 particularly useful when the legality of accordingly, as a court may only heed an
132 agency's preferred regulatory course is not well established, and the agency may know
133 what its preferred second-best alternative would be, in the event that a reviewing court
134 determines that its preferred course is unlawful.efforts to ensure separable rules if they
135 reflect the agency's intent about how to divide the rules into conceptually distinct
136 components.
137 7. Agencies should consider whether it is appropriate to promulgate a narrower, less costly
138 rule as a form of "test case" — i.e., a rule that will allow the agency to test its legal theory
139 in court without incurring the large costs of a new regulatory program. This approach
140 may be useful when an agency intends to regulate in areas where its authority to do so is
141 not well established. In other cases, however, this approach may not be feasible because
142 the amount of time that it takes for a "test case" to be promulgated and reach final

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~~judgment in court may be too long for an agency to wait before rolling out its intended program.~~

~~**After Promulgation**~~

~~8. When appropriate, agencies involved in ongoing litigation should proactively seek remedies other than total vacatur for rules that may potentially be invalid.~~

~~**Briefing Policies and Local Rules on Remedies**~~

2. ~~The~~ Early in the process of developing a rule, the agency should consider whether the rule is appropriately focused to achieve the agency's goals and is logically divisible into segments that function independently. If the agency determines that portions of the rule are separable and that it intends for some parts to function even if other parts are struck down as legally invalid, it should draft the rule such that it is divisible into independent segments. It should also include a severability clause in the regulatory text of the proposed rule, or, when appropriate, in the preamble. The clause should identify which segments should survive if other portions are struck down and explain how they relate to other segments in the event a court holds the rule invalid.
3. If the agency believes a rule can and should be divided into independent segments, it should solicit public input concerning the divisibility of the rule into independent segments, the benefits and costs associated with those individual segments, the appropriate scope of a severability clause, and whether the rule appropriately focuses on the agency's goals and on a manageable set of issues. This may entail seeking input from stakeholders prior to issuing a proposed rule and soliciting input from the general public in the notice of proposed rulemaking itself. Agencies also should consult with the Office of Information and Regulatory Affairs concerning the economic effects of a proposed rule's individual segments.
4. In view of the multiple considerations involved in severability decisions, parties involved in litigation should consider whether to address the issues of appropriate remedies in briefing if a court may find that only certain provisions of an agency's rule are valid.

170 These issues include whether the provisions of a rule should be severed; whether an
171 infirmity was harmless error; or whether the court should remand the rule without
172 vacating it.
173 5. The courts may wish to solicit the parties' views on remedies, as appropriate, to ensure
174 that they decide the issues of remedies on the same grounds as intended by the agency.
175 ~~9.~~6.Pursuant to its general rulemaking authority in 28 U.S.C. § 331, the Judicial Conference
176 ~~should recommend~~may wish to study a rules amendment to adopt a briefing policy that
177 would encourage or require agencies and parties involved in a challenge to ~~submit~~a rule
178 to address remedies in briefing ~~on remedies.~~.

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