Stephanie Tatham

Subject: Remand w/o Vacatur draft Report/Recommendation

From: Sean Croston
Sent: Friday, October 18, 2013 2:09 PM
To: Stephanie Tatham
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Stephanie,

I just read your draft report and recommendation on Remand without Vacatur on the ACUS website over lunch. Fantastic job! I thought it was really thoughtful, fair, and well-written. I just had a few initial comments and questions at this point:

1. In footnotes in the draft report and recommendation, you suggested that "If the legality of remand without vacatur under the Administrative Procedure Act, 5 U.S.C. § 706(2), is successfully challenged, the Administrative Procedure Act should be amended to permit the remedy." But if there are substantial policy reasons supporting remand without vacatur and there is still notable (and quite plausible) academic/judicial criticism of the concept, isn't it a good idea for Congress to consider amending the APA to explicitly allow this remedy *before* a court is persuaded by those criticisms and holds that remand without vacatur is unlawful in any case? The remedy is often employed in cases where vacatur would cause significant disruption to agency operations, so even one opinion finding that vacatur is required notwithstanding the potential for such disruption could be a big deal. Why risk those impacts, and why not just preemptively call for amending the statute to explicitly provide for this remedy? I don't see the downside there -- just a lot of upside. It would end the debate and reduce the need for complicated legal/mental gymnastics in order to justify this supposedly-beneficial remedy.

2. I understand that one of Judge Griffith's major criticisms, as expressed in his concurring opinion in *In re Core Communications, Inc*., 531 F.3d 849, 862 (D.C. Cir. 2008), is that remand without vacatur can invite agency indifference, as it allows agencies to delay resolving legally-problematic rules because the court decision doesn't effectively hold their feet to the fire and force them to quickly and affirmatively *fix* the problematic actions in question. *See NRDC v. EPA*, 489 F.3d 1250, 1262-64 (D.C.Cir. 2007) (Randolph, J., concurring) ("A remand-only disposition is, in effect, an indefinite stay of the effectiveness of the court's decision and agencies naturally treat it as such."); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U.L. REV. 278, 301-05 (2005) (describing instances of multi-year delay). These delays certainly don't serve the cause of administrative efficiency. In light of this real issue, why not recommend that any court decisions (or statutory amendments) providing for remand without vacatur be accompanied by some relatively brief, concrete time limits that would force agencies to expeditiously address the problems in their initial actions? *See, e.g., A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (remanding without vacatur but ordering a rule "vacated automatically" absent adequate justification from the agency within 90 days); *Rodway v. USDA*, 514 F.2d 809, 817-18 (D.C. Cir. 1975) (remanding without vacatur but ordering "complet[ion of] the new rule-making process within 120 days of the issuance of this opinion"). This step could increase efficiency, provide faster/clearer resolutions for petitioners, and temper the criticism of allegedly open-ended remands without vacatur.

3. Did your research uncover any cases in which a court remanded agency action more than once without vacating it? If so, should there be any practical limits on how many bites an agency gets at the apple before its action must be vacated?

Thanks,
Sean Croston