The Unusual Remedy of Remand Without Vacatur

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EXECUTIVE SUMMARY

I. AN EARLY HISTORY OF REMAND WITHOUT VACATUR 1
- A. Introduction to the Remedy 1
  - The Rise of Remand without Vacatur 2
  - From *Georgetown* to *Allied-Signal*: Increasing Applicability and Application 5
  - *Checkosky* and Dissent in the D.C. Circuit 7
  - Supreme Silence: Declining to Decide 8
- B. Review of the Academic Literature 9
  - ABA Resolution 107B 10
  - Legality of the Remedy 11
  - Levin on Equitable Remedial Discretion 12
  - Constitutional Concerns 13
  - Prudential Considerations and Recommendations of Restraint 15
  - Early Empirical Observations 17

II. REMAND WITHOUT VACATUR IN THE D.C. CIRCUIT 19
- A. Methodology 19
  - Scope of Research 19
  - Research Approach 20
  - Categorical Analysis 21
- B. Research Results 21
  - RWV in the D.C. Circuit 22
  - RWV in Other Circuit Courts 27
- C. Case Law Conclusions 28

III. CASE STUDIES: EPA, FERC, AND THE FCC 30
- A. The Environmental Protection Agency (EPA) 30
  - Is the Clean Air Act Special? 30
  - *Honeywell*: Interpreting the Clean Air Act 32
  - A Changing Climate: Revisiting the Clean Air Act 35
- B. The Federal Communications Commission (FCC) 36
  - Council Tree Communications: Certiorari Denied 39
  - Perspectives from Agency Attorneys 41
- C. The Federal Energy Regulatory Commission (FERC) 42
  - Perspectives from Agency Attorneys 44
- D. Case Study Conclusions 46

IV. CONCLUSIONS AND RECOMMENDATIONS 48
- A. Validity of the Remedy 49
  - Under the Administrative Procedure Act 49
  - On Statutory Review of Agency Action 50
- B. Application of Remand without Vacatur 50
  - Application By Courts 50
  - Agency Responses 51
- C. Recommendations 52
  - Validity of the Remedy 52
  - Recommendations to Courts 53
  - Recommendations to Agencies 53

APPENDIX A: CASES EMPLOYING REMAND WITHOUT VACATUR, 1972-2013 54

APPENDIX B: GENERIC AGENCY QUESTIONNAIRE 59

EXECUTIVE SUMMARY

Judicial remand of an agency decision that permits the action to remain in place is known as remand without vacatur. The legal landscape has changed dramatically since the mid-twentieth century, when "reviewing courts routinely vacated agency actions that they found to have been rendered unlawfully."[1] By the early 2000s, this remedial technique had become a "familiar feature of administrative law practice."[2] This is especially true for the Court of Appeals for the D.C. Circuit, despite strong dissents from some members of the court. Remand without vacatur has now been applied in cases spanning substantive areas of law ranging from regulation of interstate air pollution to telecommunications to alien worker wage and visa rules. It has been used in cases involving more than twenty cabinet level and independent agencies. The remedy has also been employed, evidently infrequently, by the Federal, First, Third, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals.

Part I.A of the report examines early applications of remand without vacatur and traces major developments in the case law employing the remedy. The focus of this analysis was on the D.C. Circuit, where the remedy evolved. Early characterizations of the D.C. Circuit's use of the remedy described it as a "general practice" where agency decisions were inadequately reasoned, but more recently commentators have found that it is applied "fairly selectively."[3] In any event, the D.C. Circuit appears to use the remedy more frequently than other appellate courts. The court's decision of whether to employ remand without vacatur in a given case is usually guided by a two factor analysis. First, the remedy may be employed where agency decisions were inadequately explained or improperly adopted, and where further explanation by the agency could possibly confirm the validity of the initial agency choice. Second, the remedy may be applied in cases where the disruptive consequences of vacation are severe. In some of these cases, the agency decision is capable of rehabilitation; in others, the flaws in the challenged agency action are more serious and may require the agency to revisit its decision entirely.

Part I.B summarizes debate over the remedy, which began on the bench and has carried over into the academy. Arguments for and against remand without vacatur can generally be categorized as legal or prudential in nature. Legal arguments center around whether the remedy is at odds with the plain language of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), which provides in part that reviewing courts "shall. . . hold unlawful and set aside agency action, findings, and conclusions" found to violate one of the APA's specified standards of review. Supporters of the remedy, including the House of Delegates for the American Bar Association (ABA), reject a literal reading of this sentence and argue that the review provision as a whole is sufficiently open-ended to permit the exercise of judicial equitable discretion in choice of remedy. Opponents read Section 706(2) to prohibit remand without vacatur, and argue that the remedy raises separation of powers concerns by ignoring the legal requirements imposed by the APA. These apprehensions share common constitutional roots with claims of judicial activism or toleration of agency action that deviates from statutory directives.

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[1] American Bar Association, Resolution 107B, Sections of Administrative Law and Regulatory Practice and Business Law, Report to the House of Delegates 1 (1997) [hereinafter ABA Resolution 107B and Section Report].
[2] Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L. J. 291, 295 (2003). Professor Levin was heavily involved in the ABA's parallel project.
[3] *Id*. at n.11.

For the most part, the literal reading of the APA has not found favor among judges and academics. Even some scholars who have expressed constitutional concerns regarding the remedy recognize that it can have practical value. Proponents of remand without vacatur point to the benefits that accrue when application of the remedy enhances stability in the regulatory regime or in government regulated markets, protects reliance interests, avoids regulatory gaps, allows agencies to continue collecting user fees, and ensures continued provision of public benefits (including the benefits of regulation). Conversely, even advocates of the remedy support a default of vacating problematic agency actions. A variety of commentators, including the American Bar Association, have recommended limiting application of the remedy to cases involving special circumstances and providing procedural protections where appropriate.

A review of the case law—conducted in accordance with the methodology described at **Part II.A** and generally summarized in **Part II.B** of the report—indicates that the ABA and academic recommendations have had limited practical effects. The D.C. Circuit has continued to apply the remedy using the familiar two factor analysis and has only occasionally provided for additional procedural protections.

Part III presents the results of case studies examining application of the remedy and related developments at the Environmental Protection Agency (EPA), Federal Communications Commission (FCC), and Federal Energy Regulatory Commission (FERC). These agencies were chosen because, in the D.C. Circuit, the remedy is most frequently applied in cases in which they are a party. The remedy is most often used in cases involving the Environmental Protection Agency (EPA) that arise under the Clean Air Act.

Part III.A examines why the remedy appears most frequently in cases reviewing EPA's Clean Air Act regulations and discusses a recent and retracted case calling the legality of the remedy under the Clean Air Act into question. In a rare example of direct consideration of the remedy by Congress, the Clean Air Act was nearly amended to affirmatively permit the device in the Waxman-Markey climate bill, which passed the House of Representatives but not the Senate.

Parts III.B and IIIC describe cases employing the remedy involving the FCC and FERC, as well as present perspectives on the remedy shared by agency attorneys. While these agencies rarely request the remedy, it can be valuable in agency-specific regulatory and adjudicatory contexts as evidenced by the FCC's recent defense of remand without vacatur in response to a petition for certiorari that challenged its legality under the APA. Attorneys at these agencies appear generally comfortable with existing applications of the remedy. Responses to remands at both FCC and FERC can take varied forms, requiring adaptability to the judicial mandate and changed circumstances, as well as procedural flexibility.

Part IV endorses the validity of the remedy under the APA and as an exercise of equitable remedial authority, as well as offers conclusions and recommendations for courts and agencies to consider when employing or responding to remand without vacatur.

I. AN EARLY HISTORY OF REMAND WITHOUT VACATUR

A. INTRODUCTION TO THE REMEDY

Remand without vacatur is an unusual remedy by several measures. Ordinarily, when a court finds that an agency action was arbitrary and capricious, unlawful, or unsupported by substantial evidence, the action is vacated and the agency must try again. In some cases—where an agency action is flawed but could be sustained after reconsideration at the agency level, or where the consequences of vacating the action would be disruptive—courts have instead remanded the agency decision without vacatur. This remedial approach appears to have arisen relatively recently and as a matter of judicial instigation. Empirically, it is uncommon; less than seventy-five D.C. Circuit cases were identified in which the remedy was employed.

Remand without vacatur has been used to avoid severely disruptive consequences of vacatur. In *North Carolina v. EPA*, the D.C. Circuit remanded without vacating EPA's Clean Air Interstate Rule (CAIR) despite a finding of "more than several fatal flaws in the rule."[4] The court had originally vacated the rule after concluding that very little of it "will survive[] remand in anything approaching recognizable form."[5] However, it reconsidered this decision after a petition for rehearing, in which EPA argued that the rule would prevent an estimated 13,000 deaths per year by 2010 and 17,000 premature deaths per year by 2015 by achieving substantial reductions in emissions of air pollution.[6] EPA argued that setting aside the rule would compromise not only those public health benefits that were additional to those provided by prior rules, but also those provided by prior rules that had been rescinded and could not automatically spring back to life.[7] Finally, EPA pointed to price instability in the emissions trading market resulting from the vacation decision and the penalty that reducing the value of emissions allowances would impose on early adopters of pollution control technology.[8] This case is an extreme example, but highlights the potential relief the remedy can offer.

The remedy is also employed in a variety of less disruptive cases, where the court focuses on the agency's ability to retain its action after reconsideration on remand. The remedial device is still remarkable in such cases because it can permit agency decisions to remain in effect despite errors that are prejudicial to the interests of challenging parties.[9] In employing remand without vacatur, the court is essentially finding that prejudicial agency errors do not justify setting aside the challenged action, a conclusion that deviates from long-standing legal norms.

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[4] North Carolina v. EPA, 531 F.3d 896, 901 (D.C. Cir. 2008) (vacating CAIR due to "fatal flaws"), *modified*, 550 F.3d 1176, 1177-78 (D.C. Cir. 2008) (amending judgment to remand CAIR without vacatur).

[5] 531 F.3d at 929 (quotation omitted).

[6] Respondent EPA's Petition for Rehearing or Rehearing En Banc at 10-11, North Carolina v. EPA, No. 05-1244 (D.C. Cir. filed Sept. 24, 2008).

[7] *Id*. at 11.

[8] *Id*. at 11-12.

[9] Remand without vacatur is not a remedy for harmless error, the rule of which normally burdens challengers with proving that alleged errors in agency action are harmful, and of which courts are to take "due account" in deciding whether to set aside agency action under the APA. 5 U.S.C. § 706(2) (providing ". . . due account shall be taken of the rule of prejudicial error.") *See* Shinseki v. Sanders, 129 S. Ct. 1696, 1706, 1718 (D.C. Cir. 2009) (holding—in a case under 38 U.S.C. § 7621(b)(2), which incorporates the APA's prejudicial error language and approach— "the burden of showing that an error is harmful normally falls upon the party attacking the agency's determination" and denying relief for one petitioner after a finding of harmless agency error).

THE RISE OF REMAND WITHOUT VACATUR

According to a report of the ABA Administrative Law Section, routine vacation of agency decisionmaking arose from "a time when most judicial review proceedings involved regulated persons seeking relief from adjudicative orders directed specifically at them."[10] In 1967, the Supreme Court's decision in *Abbott Laboratories, Inc. v. Gardner* authorized legal challenges to agency actions by persons not directly subject to enforcement orders (so called preenforcement review).[11] The remedy of remand without vacatur may have been a partial response to the subsequent rise of preenforcement review of agency rulemaking. Preenforcement review allowed parties to challenge technical aspects of a rule or order prior to coming to terms (and possible acceptance) with the realities of implementation. Preenforcement review also permitted litigants to challenge a rule that they supported but did not feel went far enough. For these challengers, a judicial remand requiring the agency to consider or take a more stringent position may be a preferable remedy to vacation (and reversion to the status quo).[12] An examination of the few early judicial decisions that employed remand without vacatur indicates that courts may have recognized these and other equities in early applications of the remedy, as part of a larger shift in the availability and focus on judicial review "so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies."[13]

The first known case clearly employing the remedy dates to at least the 1970s,[14] though the remedy appears to have been used infrequently in the D.C. Circuit until the early 1990s.[15] It is difficult to generalize from such a small set of decisions, but at least two themes emerge from the pre-1990s case law: first, courts have used remand without vacatur in nationally significant contexts to permit agencies a limited opportunity to revisit procedural improprieties without programmatic disruption; second, courts at other times have treated remand without vacatur as an interim remedy given an expectation of future change. In the first type of case, courts may or may not expect agencies to alter the substance of their decisions on remand; in the latter they may seek to require it.

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[10] ABA Resolution 107B, *supra* note 1 at 1.

[11] 387 U.S. 136 (1967).

[12] Richard L. Revesz and Michael A. Livermore, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 160-61 (2008) (describing how the remedy can provide pro-regulatory plaintiffs with the advantage of a weak regulation rather than no rule in the event of a successful challenge).

[13] Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1712 (1975).

[14] Kennecott Copper Corp v. EPA, 462 F.2d 846 (D.C. Cir. 1972). Earlier remand orders issued by the D.C. Circuit may have had similar effect as remand without vacatur, but the court's use of the remedy was not explicit. For example, in Radio Station KFH Co. v. FCC, the D.C. Circuit remanded for explanation without expressly vacating the FCC's refusal to reopen a request for rehearing of a dispute over broadcasting rights. *See* Radio Station KFH Co. v. FCC, 247 F.2d 570 (D.C. Cir. 1957).

[15] The author's review of the literature identified only four D.C. Circuit decisions employing remand without vacatur in the 1970s, and four examples from the 1980s. Nat'l Treasury Emp's Union v. Horner, 854 F.2d 490 (D.C. Cir. 1988); Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 809 F.2d 875 (D.C. Cir. 1987); Md. People's Counsel v. FERC, 768 F.2d 875 (D.C. Cir. 1985); Am. Fed'n of Gov't Employees, AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981); Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977); Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975); Kennecott Copper Corp v. EPA, 462 F.2d 846 (D.C. Cir. 1972).

Kennecott Copper Corporation v. EPA is the earliest known instance of remand without vacatur in the federal Courts of Appeals.[16] Petitioner challenged EPA's promulgation of national secondary ambient air quality standards (NAAQS) for sulfur oxides (SOx) under the Clean Air Act. EPA had based its secondary standards, which are intended to protect the public welfare including vegetation and property, on air quality criteria adopted by its predecessor Department of Health, Education and Welfare prior to the 1970 Clean Air Act Amendments. However, it chose a secondary standard lower than that at which adverse effects on vegetation were said to be observed in the earlier standard and did not explain the discrepancy. The Kennecott Corporation challenged the secondary standards on these grounds, as well as by arguing that the standards weren't accompanied by a general statement of their basis and purpose as required by the Administrative Procedure Act (APA), 5 U.S.C. § 553(c).

The D.C. Circuit acknowledged procedural problems with the regulations, but also recognized their importance to meeting the congressional directives contained in the Clean Air Act. The D.C. Circuit found that the regulation "as a whole" contained a "sufficient exposition of the purpose and basis" to satisfy the legislative minimum of a "concise general statement" required by the APA.[17] However, it also held that this case involved a special context of "fact, statutory framework and nature of action" which required greater exposition than needed to meet the minimum APA requirements.[18] Congress, the court observed, had provided for informal promulgation of national ambient air quality standards after explicitly considering the need for expedition in establishing clean air protections and also in light of the backstop provided by the statutory requirement that the agency hold hearings on state implementation plans.[19] The court remanded the case to EPA for further explanation but expressly "contemplated that this remand will not halt or delay the ongoing proceedings for state adoption plans to meet and maintain the national standards," and declined to remark on what procedures would be necessary if EPA chose to alter the standard on remand.[20]

The Court of Appeals for the Third Circuit was quick to follow the D.C. Circuit's lead in *Kennecott Copper*, employing its equitable authority in two cases to leave in place challenged air pollution regulations despite claims of procedural error.[21] In *Sharon Steel Corp. v. EPA*, the Third Circuit held:

> In hearing a petition for review, a court of appeals may exercise equitable powers in its choice of a remedy, as long as the court remains within the bounds of statute

[16] 462 F.2d 846 (D.C. Cir. 1972).
[17] *Id*. at 850.
[18] *Id*.
[19] *Id*. at n. 16.
[20] Id. at 850-851. The court also observed that EPA had voluntarily notified state officials that the secondary standard was to be treated as a nonenforceable guideline and given them the opportunity to revise their implementation plan. Judge Leventhal entreated EPA to "use the Facilities of the Federal Register, available for interpretive rulings, to assure widespread notice of administrative steps taken in the interest of clarification." *Id*. at 850 n.19. EPA subsequently reissued an explanation in the Federal Register for its decision, although within a few years the standard was withdrawn in light of internal doubt over scientific validity and allegedly as well as in response to pressure from the Office of Management and Budget. R. Shep Melnick, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 240-241 (1983).
[21] Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir. 1973), *vacated on other grounds*, 427 U.S. 902 (1976) (citing Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972)); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979) (citing Duquesne, 481 F.2d 1 at 10).

> and does not intrude into the administrative province. . . . Although the companies are entitled to relief, we must be careful not to grant relief so broad as to endanger the Congressional scheme for the control of air pollution.[22]

In both Third Circuit cases, the court offered limited interim enforcement relief for plaintiffs while retaining the overall regulatory structure.

The D.C. Circuit's next two remand without vacatur opinions focused on the larger congressional scheme or issues of national significance that might have been disrupted by vacatur of the underlying agency decision while, at the same time, encouraging prompt agency action in response to remand.[23] In *Rodway v. U.S. Department of Agriculture,* the D.C. Circuit held that the U.S. Department of Agriculture (USDA)'s allotment program for food stamps should be upheld despite the agency's failure to promulgate related rules through notice-and-comment rulemaking.[24] The court focused on "the critical importance of the allotment regulations to the functioning of the entire food stamp system, on which over ten million American families are now dependent to supplement their food budgets."[25] The court ordered USDA to complete the new rulemaking process for revising the allotment system within 120 days of its order and made it clear that it expected a different outcome on remand, one that went further in terms of benefits provision than the adopted rule, in accordance with the court's interpretation of the congressional directive.[26] By contrast, in *Concerned About Trident v. Rumsfeld*, a D.C. Circuit panel refused a request for an injunction of the U.S. Navy's decision to proceed with a "strategically important [atomic missile submarine system] project" given, in the panel's view, its good faith but ultimately inadequate attempt to fully comply with the National Environmental Policy Act.[27] Here too, the court set a 120-day deadline for revision of the agency's earlier decision, an Environmental Impact Statement, but in this case the court ultimately did not expect the agency's reconsideration to produce a new course of action.[28]

In the 1980s, some D.C. Circuit opinions employing remand without vacatur as a remedial technique focused on the short-term nature of the regulations at issue in addition to the harm that might result from vacating the challenged agency decisions. In *Maryland People's Counsel v. FERC*, for example, the *per curiam* decision found that FERC's special marketing program orders were discriminatory and "infected by a failure to come to grips with highly relevant considerations urged by petitioners . . . ."[29] Nonetheless, the panel chose to remand rather than vacate the discriminatory orders since they were set to expire in less than three

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[22] Sharon Steel Corp., 597 F.2d at 381 (citations omitted).

[23] These two opinions were the only other cases in which remand without vacatur was clearly identified in the 1970s, although some early cases were identified wherein the court did not expressly vacate or set aside the challenged agency decision. *E.g.*, Nat'l Welfare Rights Org. v. Mathews, 533 F.2d 637 (D.C. Cir. 1975) (remanding to the District Court for declaration of invalidity but not explicitly vacating eligibility rules for aid to families with dependent children; finding an injunction to be unnecessary); Weyerhauser Co. v. Costle, 590 F.2d 1011 (D.C. Cir. 1978) (remanding a water pollution effluent limitation for notice-and-comment proceedings and not explicitly vacating).

[24] 514 F.2d 809, 817 (D.C. Cir. 1975).

[25] *Id*.

[26] *Id*. at 818.

[27] 555 F.2d 817, 830 (D.C. Cir. 1976).

[28] *Id*.

[29] 768 F.2d 450, 452 (D.C. Cir. 1985).

months after the decision.[30] Noting its recent similar action in a FERC case where issuance of the mandate was stayed, the court stated its intention to offer only "limited amnesty" and expressed its trust that FERC would retain the interim standards in future proceedings only upon a showing that petitioner's concerns were unfounded or outweighed.[31]

Subsequent judicial interpretations of *Maryland People's Counsel* characterize the decision as one in which the court considered, in deciding whether to employ remand without vacatur, "the disruptive consequences of an interim change that may itself be changed."[32] Similarly, in *American Federation of Government Employees v. Block*, the D.C. Circuit upheld interim poultry inspection regulations that violated the notice-and-comment requirements of 5 U.S.C. § 553(b) in an "unusual emergency situation," but directed the U.S. Department of Agriculture (USDA) to engage in notice-and-comment rulemaking to issue permanent final regulations.[33] In both of these cases, the court expected the agency to alter its course of action and treated remand without vacatur as only an interim remedy.

FROM *GEORGETOWN* TO *ALLIED-SIGNAL*: INCREASING APPLICABILITY AND APPLICATION

Application of remand without vacatur in the D.C. Circuit spiked in the early 1990s.[35] These early cases were generally challenges to agency rules, with a few disputes over adjudications. Professor Pierce attributes the increased application of remand without vacatur to the Supreme Court's 1988 decision in *Bowen v. Georgetown University Hospital* (hereinafter *Georgetown*).[36] This case prohibited agencies from retroactively applying rules absent clear congressional authorization, which Professor Pierce argues "almost invariably increases the disruptive effects of vacation."[37] The decision raises the stakes for agencies facing judicial review of rulemaking, since they might not be able to fill regulatory gaps in the period between vacation of rules and promulgation of revised rules. As Professors Strauss, Rakoff, and Farina have observed, it also "raises the stakes for courts trying to craft an appropriate remedy."[38]

While use of the remedy did increase in the early 1990s, it wasn't until the D.C. Circuit's 1993 opinion in *Allied-Signal, Inc. v. NRC*, that the D.C. Circuit directly considered *Georgetown's* potential for enhanced disruptiveness in the context of rulemaking.[39] In some cases from this time period, courts focused instead on equitable questions of whether disruption in the regulatory regime from vacation would provide relief for the prevailing parties.[40] In other

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[30] *Id*. at 455.
[31] *Id*.
[32] *E.g.,* Intl. Union, UMWA v. FMSHA, 920 F.2d 960, 967 (D.C. Cir. 1990).
[33] 655 F.2d 1153 (D.C. Cir. 1981). This opinion is a less-than-clear case of remand without vacatur, but it was treated as such due the court's requirement that the agency take follow up action in response to its opinion.
[35] *See* Appendix A.
[36] 488 U.S. 204 (1988).
[37] Richard J. Pierce, Jr. *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 75-78 (1995).
[38] Daniel B. Rodriguez, *Of Gift Horses and Great Expectations*, 36 ARIZ. ST. L.J. 599, 623 (2004) (quoting PETER L. STRAUSS, TODD D. RAKOFF, ROY A. SCHOTLAND, CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 444 (9th ed. 1995)).
[39] 988 F.2d 146 (D.C. Cir. 1993). This case signals that the potential regulatory gap created by the court's choice of remedy is appropriately viewed as an aspect of potential disruption in the regulatory context.
[40] *E.g.*, Envtl. Def. Fund v. EPA, 898 F.2d 183 (D.C. Cir. 1990) (observing that no parties requested vacation and that "to do so would at least temporarily defeat petitioner's purpose"); Fertilizer Inst. v. EPA, 935 F.2d 1303 (D.C.

examples, the court found that remand without vacatur was appropriate not only because of the disruptive consequences of vacation (particularly for parties who had come to rely on an agency's position) but also because the deficiencies of an agency administrator's decision "go to the adequacy of his stated explanation, rather than to the merits of the decision itself."[41] These findings are consistent with Professor Levin's suggestion that employment of the remedy may have grown in response to judicial concerns "in particular cases that a strong remedy like vacation of a rule or order under review is disproportionate to the magnitude of the violation they have found."[42]

Allied-Signal is widely considered to be the leading judicial articulation of the two factors courts consider in determining whether to vacate agency action on remand: (i) the seriousness of the deficiencies in the agency's decision (*i.e.*, the possibility of the agency rehabilitating its decision on remand) and (ii) the disruptive consequences of vacatur.[43] In this case, the D.C. Circuit considered challenges to a cost-recovery rule promulgated by the Nuclear Regulatory Commission (NRC) under congressional mandate that the agency allocate costs for its regulatory services "fairly and equitably" among regulated entities.[44] Petitioners argued that the NRC's failure to consider their inability to recoup fees from customers was inconsistent with this requirement, as well as with the NRC's treatment of certain other licensees.[45] The D.C. Circuit agreed. Nonetheless, the court declined to vacate the rule given the conceivability that the NRC could explain its varied treatment of different licensees and the "quite disruptive" consequences of vacation, which would require a refund of collected fees and—in the wake of *Georgetown*—would prevent the NRC from recovering those fees under a later-enacted rule.[46] Petitioners also alleged that the NRC arbitrarily and capriciously failed to apportion generic costs of low level radioactive waste disposal in accordance with actual waste generation. Here, the court gave "little weight to the possibility that the Commission could pull a reasonable explanation out of the hat" yet refrained from vacating the rule to avoid creating a windfall for licensees during a period where the NRC would be unable to recover fees.[47]

As the decision demonstrates, and consistent with earlier case law, either of the *Allied-Signal* factors is potentially dispositive in a given case and a court need not find that an agency decision is capable of rehabilitation in order to avoid vacating a rule. Writing in 2003, Professor Levin found that:

> [T]he case law does not disclose a consistent pattern regarding the way in which the two prongs of the *Allied-Signal* formula fit together. Sometimes the court allows remand without vacation where it perceives a strong likelihood that the agency can cure its previous error, even if the court thinks that vacating would

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Cir. 1991) (exercising equitable discretion to permit exemption from regulatory reporting requirement to remain in place on remand, remarking that "the only complaint about the exemptions is that they are not broad enough").

[41] UMWA Int'l Union v. MSHA, 935 F.2d 1200, 1203 (D.C. Cir. 1991) (citing prior similar cases). *See* ABA Resolution 107B, *supra* note 1 at 2 (identifying reliance interests of parties in these cases).

[42] Levin at 301, *supra* note 2.

[43] Allied-Signal, 988 F.2d at 151 ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.") (internal quotation marks and and citation omitted).

[44] 42 U.S.C. § 2214(c)(3).

[45] Allied-Signal, 988 F.2d at 148, *supra* note 39.

[46] *Id*. at 151.

[47] *Id*. at 152.

> cause little disruption. Conversely, the court sometimes uses the device to head off the disruptive impact of vacation, even if it discerns no particular indication that the rule can probably be cured.[48]

Thus, *Allied-Signal* should not be treated as establishing a two-factor test for determining whether to employ remand without vacatur. The case is simply an articulation of two categories of equitable factors courts that courts consider, at times together, in determining whether to vacate an agency's decision on remand.

CHECKOSKY AND DISSENT IN THE D.C. CIRCUIT

In the 1994 case *Checkosky v. SEC*, the D.C. Circuit heard a challenge to a rule promulgated by the Securities and Exchange Commission to govern "improper professional conduct."[49] In a fractured per curiam opinion, the court remanded the rules to the Securities and Exchange Commission (SEC) for further explanation.[50] All three panel judges wrote separately. Judges Silberman and Randolph directly engaged questions raised for the first time by Judge Randolph regarding the legality of remand without vacatur under the APA. Judge Randolph's separate opinion argued: "The remand-only disposition… is contrary to law. It rests on thin air. No statute governing judicial review of agency action permits such a disposition and the controlling statute—5 U.S.C. § 706(2)(A)—flatly prohibits it."[51] Judge Randolph contended that the plain language of the APA requires courts to "hold unlawful and set aside" or vacate agency action found to be arbitrary and capricious because of inadequate explanation.[52]

Judge Silberman responded that agency actions requiring further explanation on remand need not be considered arbitrary and capricious.[53] In such settings, the language of the APA is inapposite.[54] Secondarily, he questioned whether the APA requires setting aside agency action deemed to be arbitrary and capricious and cited circuit precedent recognizing the court's remedial discretion not to vacate.[55] Judge Reynolds, concurring in part and dissenting in part, found that the challenged SEC decision should be affirmed, and if remanded, "not vacated until this court overrules it."[56]

Case law research presented later in the report indicates that the majority of judges currently sitting on the D.C. Circuit are comfortable with the remedy of remand without vacatur in limited circumstances. Nonetheless, several decisions have been issued since *Checkosky* in which a minority of the D.C. Circuit judges—Judges Randolph, Sentelle, and most recently Judge Griffith—have expressed continued or new concerns with the remedy. Judge Randolph's campaign against the remedy has been consistent, though he has added to his views as set forth in *Checkosky*. In 2007, he opined that vacatur with a stay of the mandate is a more appropriate judicial response than remand without vacatur in non-APA cases where the court has remedial

[48] Levin at 380, *supra* note 2.
[49] 23 F.3d 452 (D.C. Cir. 1994).
[50] *Id*. at 454.
[51] *Id*. at 490 (Randolph, J., separate opinion).
[52] *Id*. at 491.
[53] *Id*. at 463 (collecting cases) (Silberman, J., separate opinion).
[54] *Id*. at 465.
[55] *Id*.
[56] *Id*. at 496 (Reynolds, J., separate opinion).

discretion.[57] He has also recently criticized the court's practice of employing the remedy in a cursory fashion, without explanation.[58]

Senior Judge Sentelle's history with the remedy is more mixed. In *Milk Train, Inc. v. Veneman*, he wrote a dissenting opinion adopting Judge Randolph's literal interpretation of the APA.[59] In addition to questioning the legality of the remedy under the APA, he argued that it is "often, if not ordinarily, unwise" because it substitutes the court's decision of an appropriate resolution for that of the executive, acting through the departments or independent agencies to whom the proposition was legislatively entrusted.[60] More recently, he authored an opinion for the court in *Honeywell International v. EPA,* which held that the remedy is illegal under the statutory review provisions of Clean Air Act.[61]

Notably, and as discussed in detail later in the report, Judge Sentelle's opinion in *Honeywell* was withdrawn after reconsideration by the panel, on which Judge Randolph also sat.[62] In August 2013, he wrote the opinion for the court in *National Association of Clean Water Agencies v. EPA*, which remanded for further explanation without vacating EPA's maximum achievable control technology regulations for two subcategories of sewage sludge incinerators.[63] This subsequent application of the remedy by Judge Sentelle comports with the D.C. Circuit's precedent applying the remedy under the Clean Air Act. Whether he has also reconsidered his position on the legality of the remedy under the APA remains to be seen.

Additionally, Judge Griffith recently expressed doubts regarding the advisability of employing remand without vacatur without imposing a deadline for the agency to respond. In the 2008 decision, *In Re Core Communications, Inc.,* (discussed further in the case study on the FCC) Judge Griffith wrote a concurring opinion to "urge future panels to consider alternatives to the open-ended remand without vacatur."[64] He expressly declined to take up the question of the legality of the remedy under the APA.[65]

SUPREME SILENCE: DECLINING TO DECIDE

As discussed in depth below, the D.C. Circuit and other appellate courts have continued to use the remedy of remanding without vacating agency decisions despite concerns noted by some of the D.C. Circuit judges. In doing so, they act without direct guidance on or endorsement of the remedy by the Supreme Court. Rather than take up this issue, the Supreme Court has at least twice declined to contribute to the conversation on remand without vacatur.

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[57] NRDC v. EPA, 489 F.3d 1250, 1262 (D.C. Cir. 2007) (Randolph, J., concurring).
[58] Honeywell Int'l Inc. v. EPA, 374 F.3d 1363, 1374 (2004) (Randolph, J., concurring).
[59] Milk Train, Inc. v. Veneman, 310 F.3d 747, 757 (D.C. Cir. 2002) (Sentelle, J., dissenting and expressing agreement with Judge Randolph's argument in Checkosky that the APA requires the court to vacate agency action that is not adequately explained and thus is arbitrary and capricious), *reh'g en banc denied*, 2003 U.S. App. LEXIS 3736 (D.C. Cir. Feb. 27, 2003).
[60] *Id*. at 758.
[61] *See infra* notes 199-214 at accompanying text.
[62] *Id*.
[63] Nat'l Assn of Clean Water Agencies v. EPA, No. 11-1131, slip. op. at 43-44 (D.C. Cir. Aug. 20, 2013).
[64] *In re* Core Communications, Inc., 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring).
[65] *Id*.

Professor Levin's 2003 article on the remedy documents internal correspondence regarding remand without vacatur between Supreme Court Justices during their deliberations on *Georgetown*.[66] This case did not directly address remand without vacatur, however Justice Kennedy's 1988 draft majority opinion in *Georgetown* originally contained language Professor Levin describes as endorsing the ability of courts to, in Justice Kennedy's words, "exercise their equitable discretion to remand to the agency or to stay invalidation of the challenged regulation pending curative rulemaking" in circumstances "where the exigencies of the case or the importance of the policies served by a judicially invalidated regulation create a compelling need for retroactive correction."[67] Justice Scalia drafted a responsive memorandum asking Justice Kennedy to remove that language (which would have been dicta) because of his concern with the potential invitation to agencies "to seek exercise of 'equitable discretion' to let invalid rules stand."[68]

Nearly twenty-five years later, in 2010, the Supreme Court turned down an opportunity to step directly into the debate on remand without vacatur in rejecting a certiorari petition in *Council Tree Communications v. FCC*.[69] This appeal from a decision of the Court of Appeals for the Third Circuit, discussed in detail below, framed the question presented as: "Whether a reviewing court has the discretion under Section 706 of the A.P.A to decline to set aside, or provide any remedy for, unlawful agency action?"[70] Although the Supreme Court declined to take the apparent opportunity offered by petitioners in *Council Tree* to decide whether the APA permits remand without vacatur, for good reasons explained later in the report, academics have embraced the gauntlet gladly while also engaging in prudential conversations regarding the advisability of the remedy.[71]

B. REVIEW OF THE ACADEMIC LITERATURE

In the decade after the *Allied-Signal* court's articulation of two bases for remand without vacatur and the *Checkosky* court's debate regarding the legality of the remedy under the APA, the topic of remand with vacatur generated a small but robust body of academic literature.[72] Academics have offered diverse perspectives on the remedy and covered substantial empirical and theoretical ground, tackling topics ranging from regulatory ossification to legal and prudential concerns to constitutional concerns relating to separation of powers. Notably, nearly every examiner who has endorsed the remedy has offered prescriptions for improving its application as a form of judicial relief. A review of the academic literature on remand without vacatur is presented below (this reductive effort is sure to miss some of the finer points of

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[66] Levin, *supra* note 2.
[67] *Id*. at 351 (quoting Justice Anthony Kennedy, draft op., Bowen v. Georgetown Univ. Hospital 11-12 (Nov. 22, 1988)).
[68] *Id*. (citing letter from Justice Antonin Scalia to Justice Anthony Kennedy 1-2 (Nov. 28, 1988)).
[69] 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 U.S. 1784 (2011).
[70] Brief for Petitioner at i, Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 U.S. 1784 (2011).
[71] *See* text accompanying notes 252-259.
[72] *E.g*., Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005); Boris Bershteyn, Note, *An Article 1, Section 7 Perspective on Administrative Law Remedies*, 114 YALE L.J. 359 (2004); Rodriguez, *supra* note 38; Levin, *supra* note 2.

discourse). This summary is intended to familiarize the reader with the key lines of reasoning in the academic discussion, as well as to identify subjects ripe for further consideration, prior to launching into an assessment of how the remedy has been used in the near-decade that has elapsed since its last thorough examination. The remedy, it would seem, is due for a checkup.

ABA RESOLUTION 107B

In 1997, and in response to the debate over *Checkosky*, the American Bar Association's (ABA's) Judicial Review Committee of the Section of Administrative Law and Regulatory Practice announced it was about to undertake a project on remand without vacatur.[73] The project ultimately produced ABA Resolution 107B, which makes both substantive and procedural suggestions to courts considering the remedy.[74] Substantively, the ABA cautiously endorsed the concept of remand without vacatur and advocated construing or amending the APA to permit its use. The recommendation favored presumptive vacatur, which the ABA viewed as consistent with judicial precedent establishing that "occasional impairments [in agency's functions] are the price we pay to preserve the integrity of the APA."[75]

Resolution 107B takes the position that a court "may exercise discretion in determining whether or not to refrain from vacating the agency's action pending the remand."[76] Thus, while the ABA articulated a number of special circumstances where remand without vacatur might be warranted, these circumstances need not be construed as exhaustive or exclusive. These standards draw upon *Allied-Signal,* other case law, and prior ABA positions on standards for judicial review of agency action. They include:

a) non-preclusion of fair consideration of a central issue or necessary findings,
b) a substantial likelihood of remediation to a similar overall result, and
c) clear outweighing of the challenging party's interest in relief by the harms of vacation to non-governmental persons
    i) with reasonable reliance interests or
    ii) during the interim period on remand,
    and which cannot be remedied after the agency error is corrected.

When remand without vacatur is employed, the ABA's procedural recommendations advise courts to consider: establishing timeframes for responsive agency action; extending statutory or administrative deadlines for compliance; staying or overseeing enforcement actions; and encouraging parties to address remedial issues when before the court or in supplemental briefing if necessary and not unduly delaying. The report notes that these procedural recommendations may not always be advisable, and suggests that the "court's choices should be governed by general equitable principles."[77]

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[73] Ronald M. Levin, "*Vacation" at Sea: Judicial Remands and the APA*, 21 SPG ADMIN. & REG. L. NEWS 4 (Spring 2006) (article by then-Committee Chair Ronald Levin soliciting comments on three questions: Is it Legal? Is it Desirable? When Should It Be Used?).
[74] ABA Resolution 107B, *supra* note 1.
[75] *Id*. at 1, 5 (citing New Jersey v. EPA, 626 F.2d 1038, 1048 (D.C. Cir. 1980)).
[76] *Id*. at 1.
[77] *Id*. at 8 (citing Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982)).

LEGALITY OF THE REMEDY

Debate over the legality of the remedy has been centered on judicial review under the standards set forth in the Administrative Procedure Act at 5 U.S.C. 706(2). Resolution 107B's supporting report squarely tackled the legal status of remand without vacatur under the APA. The report acknowledged but rejected the literal interpretation of the provision offered by Judge Randolph, which would compel courts to set aside action found to transgress 5 U.S.C. § 706(2)'s review standards.

The ABA Administrative Law Section's Report cited as support for this proposition the Supreme Court's 1943 decision in *Hecht v. Bowles*, which rejected legislation compelling courts to enjoin legal violations of price control regulation and required an "unequivocal statement of [legislative] purpose" to override a strong historical tradition of equity practice.[78] For several reasons, the ABA Administrative Law Section's Report found Congress' intent to curb judicial remedial discretion 5 U.S.C. § 706(2) equivocal.[79] These arguments acknowledge the literal directive of the first sentence but point to other language in the text of § 706(2) to support a permissive reading of the provision. First, the last clause of § 706(2) directs courts to take "due account" of the rule of prejudicial error.[80] Second, § 706(2) is constructed of "open-ended phrases such as 'arbitrary and capricious,' 'substantial evidence,' and 'unreasonably delayed' which plainly call for judicial construction and adaptation. . . ."[81]

One commentator, Brian Prestes, responded to these arguments by reiterating the clear statement in first sentence of § 706(2).[82] He engages the claim that the clause's provision for courts to take account of the rule of prejudicial error supports remand without vacatur. Under his theory, this limited direction makes the inference that vacation is otherwise mandatory even stronger. He cites the Supreme Court's opinion in *TVA v. Hill* for the proposition that explicit exceptions to a statutory directive demonstrate the non-existence of other, implicit exceptions.[83] He concludes that, provisional context notwithstanding, actions that violate an APA standard of review must be vacated under § 706(2).

The ABA Administrative Law Section's Report also looked outside the text of the APA's judicial review provision to support its argument that the remedy should be legal. It pointed to 28 U.S.C. § 2106, which gives courts "a free hand" to fashion remedies on review of decisions from lower courts, and to 5 U.S.C. § 705, authorizing similar leeway to decide whether to stay administrative actions while judicial review is pending, as examples of congressional support for discretion.[84] Prestes found these arguments unpersuasive. He argued that judicial discretion to

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[78] *Id*. at 4 (citing Hecht v. Bowles, 321 U.S. 321, 329-30 (1943)). The statutory provision at issue in Hecht provided: "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, . . . he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." 321 U.S. at 321-22.
[79] ABA Resolution 107B and Section Report, *supra* note 1, 4-5.
[80] *Id*. at 4.
[81] *Id*.
[82] Brian S. Prestes, *Remanding without Vacating Agency Action*, 32 SETON HALL L. REV. 108 (2001).
[83] *Id*. at 135-36 (citing TVA v. Hill, 437 U.S. 153 (1978)).
[84] ABA, Resolution 107B, *supra* note 1, 4.

review decisions of "constitutionally equal" courts, a built in function of the judicial process, is distinguishable and should not be used to infer discretion to deviate from congressional directives. Finally, the ABA Administrative Law Section's Report observed that the legislative background of the APA does not specifically indicate congressional intent to curb remedial discretion, while the Attorney General's Manual on the APA indicates that § 706 simply "restat[ed] the present law" of judicial review" (including *Hecht*).[85] Prestes argues that silence should not be relied upon as a way to undercut what he construes as clear statutory language.

Prestes acknowledged but rejects the argument that the APA's literal interpretation can be escaped by a finding of inadequate explanation without also finding an unmet standard of review (*i.e.*, an action is poorly explained so it cannot be determined whether it is supported by substantial evidence). In his view, agency action is arbitrary where the court has to guess about its justification or support. Professor Levin has also expressed skepticism about the semantics of not characterizing an inadequately explained agency decision as arbitrary and capricious.[86] Both observe that this explanation cannot justify all cases where courts have employed remand without vacatur, such as where a rule suffers from clear procedural defects.[87]

In general, scholars and many judges do not favor the literal interpretation of the APA. Professor Levin has criticized it for "failure to give any significant weight to the canon against repeals of equity power . . . [which] rests on a substantial body of precedent – not, as Prestes' argument suggests, the *Hecht* case alone."[88] As discussed in the next section, Levin's own attention to this canon is considerable.

LEVIN ON EQUITABLE REMEDIAL DISCRETION

In 2003, Professor Levin authored an article on remand without vacatur in which a central task was to find support for the remedy given his argument that equities may favor remand without vacatur in circumstances where an agency's action has been held arbitrary and capricious or in procedural error.[89] This endeavor produced an original and substantial exposition on the breadth of the federal judiciary's equitable authority in administrative law. In summary, Professor Levin's article makes the following affirmative arguments:

The Equitable Remedial Tradition in Administrative Law: Equitable principles are of central relevance to administrative law given their historical application by courts to enjoin federal administrative action and given modern "nonstatutory" review authorized in the A.P.A, 5 U.S.C. § 703. In modern statutory review and under relevant Supreme Court case law, courts proceed as if they have equity powers and under equitable principles, even if this is not explicitly provided for by, or is arguably contrary to, statutory directives.

The Modern Prevalence of Remedial Discretion: Courts have employed flexible remedies in a variety of modern administrative or public law contexts, "reflecting a pattern into

[85] *Id*. at 4-5.
[86] Levin, *supra* note 2 at 307.
[87] Prestes, *supra* note 82 at 133 (citing Ronald M. Levin, *Vacation at Sea: Judicial Remands and the APA*, 21 ADMIN. & REG. L. NEWS 4 (Spring 2006)).
[88] *See* Levin, *supra* note 2 at 311 n.83.
[89] Levin, *supra* note 2 at 308.

which remand without vacation can fit comfortably."[90] Examples include: stay of an administrative action while an appeal is pending, allowing some agency actions to stand despite violations of the Federal Advisory Committee Act or impermissible *ex parte* contacts, and allowing agencies extra time to come into compliance with statutory deadlines. Courts have also sometimes denied litigants complete relief despite finding statutory violations, such as under the de facto officer doctrine and in the Supreme Court's stay of the issuance of its mandate—to permit Congressional action—for thirty days in *Buckley v. Valeo* and three months in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[91] Severability, guided in application by legislative intent, offers an additional illustration. Finally, an analogy may be drawn to cases extending under inclusive benefits to classes of individuals not technically covered by a law granting benefits in order to meet due process requirements.

Equitable Discretion to Withhold Injunctive Relief: The Supreme Court has employed equitable balancing tests to withhold injunctive relief despite past statutory violations and even given continuing ones, such as in *Weinberger v. Romolo-Barcelo*, where the court found that withholding injunctive relief better fulfilled the purposes of the underlying statute.[92] Nonetheless, case law suggests that such equitable balancing is not appropriately used to override a clear statutory directive. Administrative law cases may provide greater flexibility because an agency's discretionary action, rather than a statutory breach, is at issue. This is particularly true where remand without vacatur supports the substantive thrust of a statute, against which injunctions may work.

Professor Levin acknowledges that his advocacy for remedial discretion is likely to raise concerns by those who are wary of equitable balancing, judicial encroachment on the executive branch, and the erosion of the rule of law and availability of relief for litigants.[93] Accordingly, his article turns next to an exploration of theoretical legal challenges to the remedy, a discussion that highlights the undercurrent of constitutional tension in case law regarding equitable remedies in general. As set forth below, others have more directly raised constitutional concerns specific to remand without vacatur.

CONSTITUTIONAL CONCERNS

Detractors of remand without vacatur have raised a variety of credible concerns that might loosely be described as constitutional. The "constitutional concerns" characterization is imposed as a framing device, to indicate that after a close examination of these seemingly disparate strands of analysis one will find common roots in core constitutional principles such as separation of powers and original design. The rich scholarship that surrounds these familiar principles, while generally not directly engaged in most of the literature critiquing remand without vacatur, can help us understand the discomfort of some commentators and judges with the remedy.

For those who accept a literal interpretation of the APA, refusals to vacate action found to be arbitrary and capricious under the Administrative Procedure Act "side-step the separation of

[90] Levin, *supra* note 2 at 323.
[91] Buckley v. Valeo, 424 U.S. 1 (1995); Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 459 U.S. 813 (1982).
[92] 456 U.S. 305 (1982).
[93] Levin, *supra* note 2 at 345.

powers by favoring remedies unanchored in the text of the APA."[94] In this view, "[t]he APA's judicial oversight and procedural hurdles are part of an interbranch compromise the terms of which are matters of constitutional, not merely prudential, importance."[95] The equitable response to this argument is somewhat unsatisfactory, in that it presupposes the lack of a clear congressional directive in the APA. Moreover, judicial findings of broad equitable authority are not immune to claims of self-aggrandizement by scholars such as Dean Daniel Rodriguez.[96] To borrow the words of Professor Levin (who was speaking more generally of equitable remedies): "For more than sixty years, courts have drawn upon the traditions of equity to support a broad understanding of the remedial powers in federal courts in administrative law cases – even in the face of arguably contrary statutory directives."[97]

Dean Rodriguez's concerns regarding judicial activism have led him to consider the possibility that courts will use remand without vacatur as a tool for their own ends, to intervene in the minutiae of agency decision-making processes.[98] He posits that the reduced intrusiveness of remand without vacatur, when compared to vacatur, makes "courts feel more liberated to engage in some sort of review at all."[99] This characterization of the remedy stands in stark contrast to that previously presented by commentators such as Professor Sunstein, who called it "administrative law's newest species of minimalism" and concluded that it was democracy-promoting "insofar as [judges] attempt to ensure that agency decisions are based on grounds that are both transparent to the public and sufficient to justify the regulation in light of statutory criteria."[100] Professor Levin's discussion of underenforcement of administrative law values makes a similar claim as well as offers a general defense of discretionary remedial devices that is arguably responsive.[101] Professor Levin posits that concerns over judicial activism are somewhat at odds with advocacy for vigorous judicial review of agency action and concludes "the argument that remand without vacation should be shunned in order to foster greater judicial deference to agencies seems unlikely to command wide support."[102]

Boris Bershteyn's 2004 student note on remand without vacatur focuses not on how courts will behave given their own preferences, but rather on how judicial remedial authority can serve to align agency action with the democratic equilibrium reflected in the process of legislative bicameralism and presentment.[103] Bershteyn's analysis concludes that remand without vacatur is of concern where it permits agencies to use their discretion to enact policies that move away from statutory mandates and instead move towards policy positions favored by the Executive. In light of these concerns, he advocates for a presumption against the remedy, which could be overcome if there is reason to believe the agency would not respond on remand

[94] Prestes, *supra* note 82 at 145-46.
[95] *Id*. at 128.
[96] Rodriguez, *supra* note 38.
[97] Levin, *supra* note 2 at 323.
[98] Rodriguez, *supra* note 38.
[99] *Id*. at 635.
[100] Cass. R. Sunstein, *Is the Clean Air Act Unconstitutional*?, 98 MICH. L. REV 313, 374 (1999).
[101] *See* Levin, *supra* note 2 at 360-62.
[102] *Id*. at 362.
[103] Bershteyn, *supra* note 72.

in a way that strays from results compelled by bicameralism and presentment, such as if the court's order made readoption of the remanded agency policy unlikely.[104]

These varied concerns implicate constitutional values, but it is notable that their proponents do not directly assert that the remedy is unconstitutional. Rather, their apprehensions lead both Rodriguez and Bershteyn to invite courts (and commentators) to consider the ways that "courts articulate and apply their remedial powers."[105] Commentators have done so regarding remand without vacatur, weighing in not only on prudential considerations but also with recommendations for judicial restraint.

PRUDENTIAL CONSIDERATIONS AND RECOMMENDATIONS OF RESTRAINT

Academics debating the advisability of remand without vacatur have made pragmatic arguments in either direction. Those who find at least occasion to support the remedy (the ABA, Daugirdas, Levin, Pierce) point to the benefits that accrue when application of the device enhances stability in the regulatory regime or in government regulated markets, protects reliance interests, avoids regulatory gaps, allows agencies to continue collecting user fees, and ensures continued provision of public benefits (including the benefits of regulation). Further, remand without vacatur has been said to facilitate judicial minimalism and to reduce agency burdens by allowing them to revisit prior decisions rather than start from scratch.[106] Those who are wary of remand without vacatur (Prestes, Rodriguez, Bershteyn) argue that it deprives litigants of relief from improper or inadequately reasoned agency decisions, dissuades agency compliance with waived legal requirements, reduces incentives to challenge improper or poorly reasoned agency behavior, encourages judges to engage in counter-factual speculation regarding potential results on remand, promotes judicial activism, and allows deviation from legislative directives.

It is challenging to identify, *ex ante* and absent a sense of particular interests in a specific case, the relative advantage employment of the remedy might give to agencies, the President, Congress, or allegedly activist courts. The advantages of remand without vacatur can accrue to agencies (continuing collection of user fees), regulated entities (market stability, protection of reliance interests), and the general public (avoidance of regulatory gaps, continued provision of benefits, market stability). The remedy may even provide some minimal benefit to judges who appreciate avoiding the "strong remedy" of vacation where it is "disproportionate to the magnitude of the violation they have found."[107] Harms may accrue to litigants and regulated entities that are subject to flawed agency decisions and the general public due to judicial tolerance of agency shirking. As a general rule, remand without vacatur will almost always benefit agencies that avoid the harsh remedy of vacatur and having to start their decision making processes over. This benefit may be tempered, however, by the increased costs agencies incur in responding to judicial directives to fix errors and more speculative harms that might ensue in the long-term from reduced legal compliance (*i.e.*, a potential increase in the costs of litigation over poorly reasoned rules). Scholars do not uniformly view the benefit of remand without vacatur to agencies as an objective good, since it may come at the expense of legislative compromises (Bershteyn) or administrative law values (Prestes, discussed in Levin).

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[104] *Id*. at 384.
[105] Rodriguez, *supra* note 38 at 637.
[106] Sunstein, *supra* note 100 at 373.
[107] Levin, *supra* note 2 at 301.

It is difficult to synthesize the positions discussed so far into contextual rules to guide judges in application of the remedy. The existing judicial framework, as articulated in *Allied-Signal*, leaves substantial room for judicial discretion. As Professor Pierce says, in a point scholars are fond of repeating, "I am not sure I have ever encountered a case in which a court held that an agency failed to comply with the duty to engage in reasoned decisionmaking in some respect . . . and in which the court could reach a good faith conclusion that there is no "serious possibility that the [agency] will be able to substantiate its decision on remand."[108]

Perhaps because a case-specific inquiry into the advisability of the remedy of remand without vacatur could lead to variable conclusions regarding its favorability in application, even proponents of the remedy have sought to cabin the discretionary exercise of the remedy.[109] Professor Levin writes, speaking generally in context of equitable remedies, "discretion has its hazards as well. Its exercise calls for coherent standards, not just the unguided conscience of the particular reviewing court."[110] Scholars advocating for prudential limitations on remand without vacatur typically identify "special circumstances," to use the ABA's terminology, in which they are comfortable with the remedy. Circumstances identified as potentially appropriate include those where:

- There is a substantial likelihood that the agency will be able to rehabilitate its decision on remand (ABA 107B, Daugirdas, Levin, Sunstein).[111]
- Potential disruption, including to government interests, is serious (ABA 107B, Daugirdas, Levin, Sunstein).
- The interest in obtaining relief by the challenging party is clearly outweighed by harms to non-governmental persons 1) with reasonable reliance interests or 2) during the interim period on remand, and where such harms are not easily abated (ABA 107B).
- Vacation would not further the interests underlying the legislation (Daugirdas, Revesz and Livermore).
- Rules are longstanding or make only minor or incremental changes, rather than adopt a wholesale change in direction (ABA Administrative Law Section's Report).
- Fair consideration of a central issue or necessary findings on the part of the agency is not precluded (ABA 107B).
- It is likely that the agency's response on remand will align with legislation delegating the decision to the agency (Bershteyn).

Procedural protections for which consideration is advised in those situations where remand without vacatur is employed include:

- Requiring an explicit judicial analysis prior to application of the remedy (Daugirdas).
- Imposing the burden of proving the remedy is appropriate on the party requesting relief (ABA Administrative Law Section's Report).

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[108] Pierce, *supra* note 37 at 76.
[109] Daugirdas, *supra* note 72; Bershteyn, *supra* note 72; Levin, *supra* note 2; Sunstein, *supra* note 100; ABA Resolution 107B and Section Report, *supra* note 1.
[110] Levin, *supra* note 2 at 386.
[111] Professor Levin argues that the case for vacation strengthens as rehabilitation becomes less likely. Levin, *supra* note 2 at 379-80.

- Requesting briefing or even a hearing on the appropriateness of the remedy in a particular case (ABA 107B, Daugirdas).
- Bifurcating the decision on the merits from the decision on the remedy (Daugirdas).
- Considering protections for prevailing parties, such as imposing deadlines for responsive agency action, where appropriate (ABA 107B).

The extent to which these suggestions have been adopted is discussed further later in the report.

Notably, the literature on remand without vacatur offers relatively little consideration of prudential alternatives to the remedy, other than simple remand or vacatur. Professor Levin briefly analyzes two potential remedies: vacation of the rule with a stay of the mandate, which he concludes works in simple cases where the decision is quickly reparable but not in complex cases, and interim rulemaking invoking the "good cause" exception to time consuming procedural requirements, which he notes offers only prospective relief and also carries potential risks.[112] The ABA Administrative Law Section's Report too finds the remedy of interim rulemaking to be a "not entirely satisfactory alternative."[113] Professor Sunstein would have courts employ remand without vacatur where rehabilitation of the original rule is possible and agencies engage in interim rulemaking where serious risks to people are likely during the interim period post-remand and prior to agency follow-up action.[114]

EARLY EMPIRICAL OBSERVATIONS

It is worth observing that this paper's next effort adds to an existing set of studies wherein scholars have examined judicial applications of remand in order to better understand their practical effects. One of the earliest examples of this effort was a 1994 "mini-survey" by Judge Wald, who then sat on the bench of the D.C. Circuit, of a year of the court's rulemaking reviews for rules "of nationwide application."[115] She found that the agency's judgment was upheld entirely in more than half of the thirty-six identified rulemaking reviews and that in most of the remaining cases the key portions of a rule were upheld. Judge Wald also identified cases in which the court remanded without vacating the rule.[116] These results led her to conclude that judicial review of agency rulemaking was not "unduly cumbersome."[117]

In 2000, Professor Bill Jordan studied sixty-one D.C. Circuit cases remanding agency legislative rules between 1985 and 1995.[118] Consistent with Judge Wald's findings, his conclusion was that agencies tended to recover fairly quickly in response to remands and that hard look or arbitrary and capricious review "did not significantly impede agencies in the pursuit of their policy goals during the decade on review."[119] He found that the D.C. Circuit explicitly employed remand without vacatur or stayed the mandate vacating a rule in approximately twenty

[112] *Id*. at 303-04.
[113] ABA Resolution 107B and Section Report**,** *supra* note 1 at 3 n. 6.
[114] Sunstein, *supra* note 100 at 372-73.
[115] Patricia M. Wald, *Regulation at Risk: Are Courts Part of the Solution or Most of the Problem?,* 67 S. CAL. L. REV. 621, 632-639 (1994).
[116] Individual cases were not specified. *Id*. at 638.
[117] *Id*. at 639.
[118] William S. Jordan, III, *Ossification Revisited: Does Arbitrary & Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 N.W. U. L. REV. 393 (2000).
[119] *Id*. at 396.

percent of cases.[120] Because of the ability of agencies to recover quickly or retain their rules, Professor Jordan did not support sweeping changes in the structure of reviewing institutions or the standard of review for agency decisions as a response to allegations of regulatory ossification by judicial review. Rather, given the probability with agencies were able to offer successful explanations on remand, he suggested serious consideration of expanded use of remand without vacatur and/or stay of the judicial mandate.[121]

Remarkably, Professor Jordan observed that in twenty-eight of the sixty-one rulemaking remands "the court did not explicitly state whether or not it was vacating the rule at issue."[122] He treated ambiguous remands as if the rule was vacated but also observed that agencies may respond to remedial ambiguity by assuming that the rule remains in effect (even if this has engendered "some hesitation" in enforcement).[123] Empirical research in a 2005 student note by Kristina Daugirdas—examining remand without vacatur in the D.C. Circuit in the decade following *Allied-Signal*—also highlights ambiguous remands.[124] She calls for judges to explain their use of the remedy, and argues that doing so permits evaluation of "whether the courts are using [remand without vacatur] appropriately and effectively."[125]

The empirical study that follows examines the case law not to evaluate the merits of remand without vacatur, but rather to check up on the current state of the remedy. A central purpose of this effort is to diagnose whether early prescriptions for its improved application have actually offered judicial solutions. This inquiry is newly informed by consideration of the remedy in the adjudicatory context, as applied under non-APA standards of review, and in light of the new perspectives offered by agency attorneys.

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[120] *Id*. at 396, 441.
[121] *Id*. at 441.
[122] *Id*. at 410.
[123] *Id*. at 411, 427 (citing as an example the EPA's response to the D.C. Circuit's decision in Solite Corp. v. EPA 952 F.2d 473 (D.C. Cir. 1991)).
[124] Daugirdas, *supra* note 72 at 296-97.
[125] *Id*. at 297.

II. REMAND WITHOUT VACATUR IN THE D.C. CIRCUIT

Having explored the early history of the remedy and reviewed the wealth of literature on remand without vacatur, the report now turns to an examination of more recent federal case law addressing remand without vacatur. Section II.A explains the scope and methodology employed used to develop the dataset of federal cases. Section II.B presents general findings and conclusions from analysis of this dataset.

A. METHODOLOGY

SCOPE OF RESEARCH

Understanding recent applications of remand without vacatur required updating existing empirical research. Given the lack of direct Supreme Court engagement on this issue, research focused on case law from lower courts. Research methodology design required balancing of several considerations, including temporal and geographic scope. The set of cases selected for detailed analysis was limited to decisions issued by the D.C. Circuit in which the remedy of remand without vacatur was discussed or employed from 2000 through 2013.

The starting point for detailed case law research was set, somewhat arbitrarily, at the year 2000, the mid-point in the Daugirdas study. The geographic scope was chosen because existing empirical studies of remand without vacatur focused on the D.C. Circuit, so that this examination could update those studies.[126] Additionally, a review of scholarship on remand without vacatur, some simple case law searches, and other informal observations indicated that the remedy was used or discussed most frequently in the D.C. Circuit.[127] This study employs an approach similar to that undertaken in the Daugirdas study—a survey of case law in the area based on citing references.

Systematic examination of every merits based termination of administrative agency appeals decided in the D.C. Circuit since 2000 was infeasible. First, it is difficult to construct disposition-based queries using commercially available legal databases such as Lexis or Westlaw.[128] Additionally, there is no way to query merits based dispositions of administrative appeals through the Administrative Office's Public Access to Court Electronic Records

[126] Professor Kristina Daugirdas published the most recent empirical study of remand without vacatur in 2005 as a student note. *Id*.

[127] The remedy is also used in U.S. District Courts in the D.C. Circuit, but the appellate court was chosen for consistency with earlier examinations and given the precedential value of appellate case law on the court below. Additionally, a review of cases citing *Allied-Signal* in the U.S. District Court for the District of Columbia identified only a handful of cases employing remand without vacatur.

[128] *See, e.g.*, Jordan, *supra* note 118, 408 n.82. Even if merits based terminations could be queried, the scope of review would be substantial given that some remand without vacatur cases would almost certainly fall into the affirmance/enforcement categorization used by the U.S. Courts (1,080 of 1,950 cases in the D.C. Circuit between Jan. 2000 and July 2013) because it includes merits terminations affirmed in part and reversed in part. Administrative Office of the U.S. Courts, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, Table B-5 (Dec. 31, 2012) (2012 data). These sums were aggregated from Table B-5 of the statistical tables in historical Administrative Office reports dating to 2000. Past reports are available at http://www.uscourts.gov/Statistics/JudicialBusiness/archive.aspx.

(PACER) system[129] or on the Government Printing Office's (GPO's) Federal Digital System (FDSys).[130]

RESEARCH APPROACH

An initial dataset of cases discussing remand without vacatur was prepared as a starting point for subsequent detailed case law research.[131] All case law research was conducted using Lexis® legal databases. The initial dataset of cases included:

- All D.C. Circuit cases cited or discussed in the scholarly literature and that specifically examined remand without vacatur.[132]
- All D.C. Circuit opinions that referenced the relevant scholarly literature, as identified through use of Lexis's® Shepard's® Citations Service (Shepard's).
- Cases identified through a series of text searches that were conducted using relevant language.[133]
- D.C. Circuit cases citing *Allied-Signal, Inc. v. NRC* or *Checkosky v. SEC* for their discussion of remand without vacatur, identified by Shepardizing both cases.[134]
- A few additional cases identified by attorneys at the Federal Communications Commission and the Federal Energy Regulatory Commission.

Each case in the initial dataset that was decided in 2000 or later was then Shepardized and all cases in the D.C. Circuit reviewed.[135] All D.C. Circuit opinions that expressly employed remand without vacatur, as well as all opinions that did not employ the remedy but in which the court discussed whether to employ remand without vacatur were added to the dataset. This process was repeated for all cases the first search identified, and then repeated for each subsequently

[129] PACER, PACER USER MANUAL FOR ECF COURTS 54-62, 86-92 (June 2012), *available at* http://www.pacer.gov/documents/pacermanual.pdf (describing query options and information available from the U.S. Courts of Appeals); PACER, XML Tags, Appellate CM/ECF V.3.1, PACER docket report and case/party searches (Feb. 23, 2010), *available at* http://www.pacer.gov/documents/pacer_xml_apv3.1.pdf.

[130] GPO recently began hosting opinions of many federal courts online, after a successful pilot program, however the GPO site lacks full PACER metadata and similarly cannot be queried for merits based dispositions or administrative appeals. *See* Stephanie J. Tatham, 2013 Brings Increased Public Access to Judicial Branch Opinions, ACUS Administrative Fix Blog (Feb. 14, 2013), *available at* http://www.acus.gov/newsroom/administrative-fix-blog/2013-increased-public-access-to-judicial-branch-opinions; G.P.O., United States Courts Opinions Metadata Fields and Values, *available at* http://www.gpo.gov/help/united_states_courts_opinions_metadata_fields_and_values.htm (accessed Aug. 27, 2013).

[131] Cases were included regardless of the type of agency decision at issue (*i.e.*, rulemaking, adjudication, etc.) or the formality of the agency decision in terms of procedural protections (*i.e.*, formal adjudication versus informal adjudication).

[132] *See* Daugirdas, *supra* note 72; Bershteyn, *supra* note 72; Rodriguez, *supra* note 38; Levin, *supra* note 2; Prestes, *supra* note 82. (Jordan excluded because examined cases pre-2000).

[133] *E.g.*, "remand without vacatur", "without vacatur", "without vacation" in Lexis database USAPP; results from district and bankruptcy courts were not recorded.

[134] Allied-Signal, *supra* note 39; Checkosky, *supra* note 49.

[135] Shepard's research was completed in late July 2013, and thus decisions from Aug. 2013 or later may not be reflected in the survey dataset. With thanks, Christy Walsh, Special Counsel at the Federal Energy Regulatory Commission, and Professor Levin helped identify two post-July 2013 decisions in the D.C. Circuit employing remand without vacatur that were also included in the dataset.

retrieved case that discussed or employed remand without vacatur until all post-1999 cases in the dataset had been Shepardized and all citing references examined.[136]

The methodology identified seventy-three cases employing remand without vacatur in the D.C. Circuit between 1972 and 2013, forty-one of which were decided between 2000 and 2013.[137] These cases are listed in the Appendix A. It is not expected that this research methodology captured every case employing remand without vacatur in the D.C. Circuit during the study time period. Nonetheless, the review identified a broad swath of cases in which remand without vacatur was discussed or employed. Taken together, these cases present a reasonable picture of remand without vacatur in the D.C. Circuit, on which helpful inferences may be based.

CATEGORICAL ANALYSIS

Once a dataset of surveyed cases was compiled, each was analyzed in order to answer several questions:

- Was remand without vacatur employed or discussed or was the remand ambiguous as to vacation?
- Which agency was involved?
- Which judge authored the panel's decision?
- Was there relevant subsequent litigation (*i.e.*, pertaining to mandamus petitions or affirming the agency's action on remand)?

For each case decided after 1994:

- Did the decision cite *Allied-Signal*, and even if not, did it discuss the *Allied-Signal* factors?

For post-1999 cases:

- What was the general subject matter of the agency action at issue?
- Did the case involve a rule or adjudication?
- What statutory provision(s) provided the basis for judicial review?
- Did the decision discuss the factors for consideration suggested in the ABA's Resolution No. 107B?
- Did the court stay compliance deadlines or enforcement actions?
- Did the court impose a timeline on the agency's response to the remand order?

This categorical analysis produced several insights discussed in more detail below.

B. RESEARCH RESULTS

Results of the case law survey are detailed below, by question asked in the categorical analysis. The presentation below reflects the Question (and the set of cases to which the question was applied).

[136] This methodology is similar to of the 2005 Daugirdas study. *See* Daugirdas, *supra* note 72.

[137] Includes two older unpublished cases and some very recent decisions that have not yet been published (and may not be).

RWV IN THE D.C. CIRCUIT

Frequency (all identified cases): The remedy has been employed on average at least once annually since 1993. Identified use has averaged three times per year since 2000. The highest annual observed incidence was six, in 1991 and again in 2002. In comparison, merits based terminations of administrative appeals in the D.C. Circuit averaged 150 per year between 2000 and 2012.[138] Even while accounting for potential under inclusiveness in the studied dataset this indicates that remand without vacatur is an occasional rather than a common remedy.

More than twenty additional cases were identified in which the court discussed but declined to remand without vacatur, instead choosing to vacate the challenged agency action.[139] Over twenty cases were identified, twelve of which were decided after 2000, in which an agency's decision was remanded without specifying whether it was vacated.[140] This finding is consistent with earlier similar findings by Professor Jordan and Kristina Daugirdas.[141] Cases with ambiguous remands were not specifically sought out, however, and this figure is almost certainly under representative of the total set of cases lacking specificity on remand.

Use by Agency (all identified cases): Remand without vacatur has been employed in cases involving more than twenty federal agencies, but for most agencies it does not occur frequently.[142] Less than half of these agencies (eight of twenty) were subject to the remedy in the D.C. Circuit more than once over the entire time period. Observed uses of the remedy by agency were: EPA (28); FERC (7); FCC (7); Department of Agriculture (4); Department of Health & Human Services (4); Department of Labor (all in the Mine Safety Health Administration) (4); Securities and Exchange Commission (3); Nuclear Regulatory Commission (2); and Food and Drug Administration (2).[143]

As evident from these figures, EPA—by far—is the federal agency most commonly subject to remedial orders from the D.C. Circuit that employ remand without vacatur. Between 1972 and 2013, the remedy was used four times as frequently with EPA as with any other agency. The remedy was observed in an average one to two EPA cases per year, and a total of eighteen EPA cases (nearly half of the all agency total) since 2000. EPA was also the most common agency in the set of cases in which the court considered but declined to employ the remedy (ten of twenty-three cases). FERC and FCC are the only two other agencies that were subject to the remedy in the D.C. Circuit more than five times total: seven times for FCC (four times since 2000) and seven times for FERC (three times since 2000). Taken together, these agencies were involved in forty-two of the seventy-three cases identified as employing remand without vacatur, and twenty-five of the forty-one post-1999 decisions.

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[138] *Supra* note 128.
[139] *E.g.*, NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).
[140] *E.g.,* Lone Mountain Processing, Inc. v. Sec'y of Labor, 709 F.3d 1161 (D.C. Cir. 2013).
[141] *See* Jordan, *supra* note 118; Daugirdas, *supra* note 72.
[142] NLRB remands, which are typically not vacated and for which enforcement is denied, and remands under the Regulatory Flexibility Act, which permits remand without vacatur, were excluded. *E.g.*, United States Telecom Ass'n v. FCC, 400 F.3d 29 (D.C. Cir. 2005) (remanding without vacatur under the Regulatory Flexibility Act).
[143] Several agencies (FMSHA, DEA, MSHA, NRC, OPM, OSHA) have not been subject the remedy since the 1990s or earlier.

Use by Judge (all cases): A majority of sitting D.C. Circuit judges (ten) have written precedential opinions employing remand without vacatur.[144] The court has employed the remedy in at least nine decisions by Judge Williams; nine by Judge D. Ginsburg, five by Judge Rogers, five by Judge Silberman, three by Judge Edwards, two by Chief Judge Garland and Judges Kavanaugh, Tatel and Sentelle, and once by Judge Griffith. The remedy has been used most frequently—twenty-three times—in per curiam decisions of the court, over occasional dissents. Panels in these decisions have naturally involved varied configurations of the D.C. Circuit judges. Judge Brown has never authored a signed opinion employing the remedy. However, it has been used in five per curiam decisions issued while she was on the panel. In one of these cases, she wrote a separate concurrence that expressed full support for the per curiam opinion, but took issue with an earlier decided precedential case issued by the Circuit.[145] Judges Sentelle, Randolph and Griffith are the only sitting judges that have expressed reservations about the remedy in their opinions. These decisions are discussed in more detail in the next section.

Type of Agency Decisions (post-1999 decisions): Since 1999, remand without vacation has been used more than twice as often in cases challenging agency rules (twenty-nine) than those challenging adjudicatory decisions (twelve).[146] The case law does not distinguish between these two categories of agency decisions in deciding whether to employ remand without vacatur. Challenged agency actions varied in nature, spanning subjects ranging from environmental air quality regulations, to agency cost recovery or fee schedules, to telecommunications, to agricultural subsidies, to foreign terrorist organization designations. Consistent with agency observations, environmental and energy market decisions were most frequently remanded without vacatur. Telecommunications was the next most common subject matter in remand without vacatur cases.

Statutory Basis for Review (post-1999 decisions): All forty-one post-1999 remand without vacatur cases were examined to determine the statutory basis for judicial review. The purpose of this inquiry was to determine whether the remedy has applicability outside of cases reviewed under the Administrative Procedure Act's judicial review provisions at 5 U.S.C. § 706(2). In all eighteen EPA cases judicial review was under the Clean Air Act, 42 U.S.C. § 7607(d). Sixteen cases were subject to review under the Administrative Procedure Act, 5 U.S.C. § 706(2). All three post-1999 FERC cases were reviewed under specific statutory provisions in the Natural Gas Act, 15 U.S.C. § 717r(b), or the Federal Power Act, 16 U.S.C. § 825(b). Two other cases were reviewed under specific statutory provisions other than the APA, one agency action was exempt from review under the APA but was reviewed by the court to determine whether it was in excess of the agency's statutory authority, and in one other case the statutory basis for review could not be identified.

These results indicate that any analysis of the legality of the remedy should consider the statutory basis for review, rather than focus exclusively on the Administrative Procedure Act. Nonetheless, this analysis is rarely undertaken in judicial opinions, which appear to endorse the

[144] Judge Sri Srinivasan ascended to the bench only in September 2013, and no recent cases were identified in which he employed remand without vacatur.
[145] Portland Cement Ass'n v. EPA, 665 F.3d 177 (D.C. Cir. 2011).
[146] Over the entire time period, the remedy was about twice as likely to be applied in rulemaking cases (48) than in adjudication cases (23).

remedy as a general equitable exercise of discretionary remedial authority. The case law offers one notable exception in the D.C. Circuit, discussed in depth below in the EPA case study.[147]

Application of Allied-Signal (post-1993 decisions): *Allied-Signal* was referenced or discussed in twenty-six of fifty-four decisions employing remand without vacatur and decided post-*Allied-Signal*, including four EPA cases. At least one and usually both *Allied-Signal* factors were discussed in nearly all cases citing the decision. *Allied-Signal* was also discussed in thirteen opinions for the court and one dissenting opinion in cases where remand without vacatur was considered but not employed. In five cases where remand without vacatur was discussed but not employed the court did not consider its precedent in *Allied-Signal*, all of these cases involved EPA.

Twenty-eight remand without vacatur cases decided post-*Allied-Signal* did not explicitly reference or discuss *Allied-Signal*, including the majority of cases involving EPA and arising under the Clean Air Act. This should not, however, be taken as a clear lack of consideration of the two decisional factors articulated in *Allied-Signal*. While several EPA cases did not discuss either of the two *Allied-Signal* factors, these cases were in the minority.[148] The same is true for non-EPA cases, including six cases reviewed by the court under the Administrative Procedure Act, 5 U.S.C. § 706(2), and four that were reviewed under specific statutory review provisions. As with EPA, many (but not all) of these six cases included consideration of one or both of the *Allied-Signal* factors.[149]

A key point is that those cases that did not expressly analyze the Allied-Signal factors contained little to no analysis of the decision to employ the remedy. It does not appear that the court has articulated new factors for consideration in lieu of those identified in *Allied-Signal*. Rather, the court occasionally employs the remedy summarily, without meaningful explanation. This finding is somewhat supportive of earlier similar findings by Kristina Daugirdas, although it appears that this is not the normal course of action.[150]

ABA Factors (post-1999 decisions): The ABA's Resolution 107B is rarely referenced by the D.C. Circuit.[151] None of the forty-one post-1999 cases employing remand without vacatur discussed the ABA's recommendation. One case in the D.C. Circuit noted the existence of the ABA recommendation in analyzing, in dicta, whether a lower court had remanded without vacating an earlier administrative action.[152] Another D.C. Circuit case in which the court

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[147] *See infra* notes 199-214 and accompanying text.

[148] Review for consideration of Allied-Signal factors limited to post-1999 cases. *E.g.*, Catawba County v. EPA, 571 F.3d 20 (D.C. Cir. 2009); New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005); Bluewater Network v. EPA, 370 F.3d 1 (D.C. Cir. 2004).

[149] *Compare* AT&T Inc. v. FCC, 452 F.3d 380 (D.C. Cir. 2006) (remand contemplating possibility of reexplanation) *and* MCI Telecomm. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998) (vacation would leave payphone service providers uncompensated, disrupting their business plans) *with* Air Trans. Ass'n of Can. V. FAA, 276 F.3d 599 (D.C. Cir. 2001) (no discussion of reasons for imposing remedy) *and* United Distrib. Cos v. FERC, 88 F.3d 1105 (D.C. Cir. 1996) (citation to earlier remand without vacatur decisions without discussion).

[150] *See generally* Daugirdas, *supra* note 72.

[151] A cursory Lexis search indicates that the recommendation has been cited in one or two district courts but not in the Courts of Appeals.

[152] Heartland Reg'l Med. Ctr. v. Sebelius, 566 F.3d 193, 197 (D.C. Cir. 2009).

declined to employ remand without vacatur cited the ABA's resolution for its identification of factors to guide courts considering the remedy.[153]

Discussion of special circumstances identified in the ABA Resolution was limited to the extent that those circumstances overlap with *Allied-Signal*. The author's review of the case law did not identify any cases in which the court specifically discussed preclusion of "fair public consideration of a central issue in a rulemaking or a fair hearing on the necessary findings" in the context of determining whether to vacate an agency action. Rather, in a number of cases it was clear that public consideration or a fair hearing of the agency decision, or an aspect thereof, *was* precluded by the way the agency had proceeded.[154]

Nor has the D.C. Circuit explicitly adopted a presumption against remand without vacatur. Nonetheless, the rarity of this remedial technique in the run of cases may indicate that one exists, if only by default.

Procedural Protections (post-1999 decisions): Imposition of timeframes within which the agency must respond is the exception rather than the rule. The court is more likely to compel (or encourage) a timely agency response on remand using general language ordering the agency to "act expeditiously," "promptly," or "without undue delay." In some cases, the court expressly declined to impose a timeline on agency action on remand and instead reminded petitioner's that the appropriate course of action if the agency did nothing was to petition the court for a writ of mandamus.[155]

D.C. Circuit opinions employing remand without vacatur have rarely stayed the underlying agency action on remand or extended statutory or administrative compliance deadlines. In one identified post-1999 case, which involved review under the Clean Air Act, the court declined to stay EPA's national emissions standards for hazardous air pollutants (NESHAP) rule for Portland cement facilities, finding that it was unlikely to change on remand. However, it did stay enforcement of a portion of the rule that had been inadequately noticed.[156] The court found that as a result of comments, the rule could "likely change substantially," and so "industry should not have to build expensive new containment structures until the standard is finally determined."[157] In another case, also involving EPA and arising under the Clean Air Act, the Court remanded a rule to EPA for reconsideration of cost effectiveness and continued an earlier adopted stay [158]

Post-remand judicial review (all decisions): Shepardizing all cases in the dataset indicates that follow-up judicial proceedings are rare; review of post-remand judicial

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[153] Illinois Pub. Telecomms. Ass'n v. FCC, 123 F.3d 693, 693 (D.C. Cir. 1997).
[154] *E.g.*, Elec. Privacy Info. Ctr. v. Dep't of Homeland Security, 653 F.3d 1 (D.C. Cir. 2011) (remanding without vacating DHS action that should have been subject to notice and comment as a rulemaking under the APA, 5 U.S.C. § 553, or excepted from notice and comment for "good cause" under 5 U.S.C. 553(b)(3)(B)); Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000) (remanding a portion of a rule in which the EPA had significantly altered the definition of a term two months after the term was issued; expressly vacating application of the rule only as to three states on unrelated grounds).
[155] *E.g.*, North Carolina v. EPA, 550 F.3d 1176, 1178 (D.C. Cir. 2008).
[156] Portland Cement Ass'n v. EPA, 665 F.3d 177, 189 (D.C. Cir. 2011).
[157] *Id*.
[158] Arteva Specialities S.A.R.L. v. EPA, 323 F.3d 1088 (D.C. Cir. 2003).

proceedings revealed relevant subsequent history for only fourteen of seventy-three cases.[159] This methodology has some limitations, however, and may not have identified subsequent proceedings that were not published[160] or that were filed as separate legal challenges to newly promulgated agency orders or rules.[161]

The few follow-up cases identified were weighted slightly more towards vacatur of the agency's subsequent decision, but are likely underrepresentative of subsequent proceedings. Three cases were identified in which the post-remand agency decision or explanation was affirmed.[162] Six cases were identified in which the subsequent judicial review led to vacation of the underlying action.[163]

The remedy of a writ of mandamus appears to be extraordinary; only three cases were identified in which a writ issued to require agencies to take action on an earlier order remanding without vacating an agency decision.[164] One case was identified denying a mandamus petition.[165]

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[159] Not all subsequent history was responsive to initial application of the remedy—only those twelve that were are discussed below.

[160] For example, an internet search indicated that several mandamus petitions were filed in response to EPA inaction after remand in Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512 (D.C. Cir. 2009). *E.g.*, American Farm Bureau Fed'n v. EPA, No. 06-1410, Petition by American Lung Association et al. for Writ to Enforce the Court's Mandate (D.C. Cir. filed Nov. 15, 2011); American Farm Bureau Fed'n v. EPA, No. 06-1410, Petition by State Attorneys General for Writ to Enforce the Court's Mandate (D.C. Cir. filed Nov. 15, 2011). These requests were denied given EPA's declaration that it would take final action by June 2013. American Farm Bureau Fed'n v. EPA, No. 06-1410, Per Curiam Order (D.C. Cir. filed Feb. 16, 2012).

[161] For example, EME Homer City Generation v. EPA, 696 F.3d 7 (D.C. Cir. 2012), and North Carolina v. EPA, *supra* note 4, might logically be viewed as related actions, given that the rule challenged in EME Homer was promulgated in response to the remand in North Carolina. However because all citing references were checked for post-1999 cases, a few such subsequent proceedings were identified.

[162] TransCanada PipeLines Ltd. v. FERC, 24 F.3d 305 (D.C. Cir. 1994) (orders on remand substantially affirmed at Southeastern Mich. Gas. Co. v. FERC, 133 F.3d 34 (D.C. Cir. 1998)); City of Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153 (D.C. Cir. 1987) (not included in Appendix A because of ambiguity regarding vacatur, subsequent FCC order affirmed in ICORE v. FCC, 985 F.2d 1075 (D.C. Cir. 1993)); Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 809 F.2d 875 (D.C. Cir. 1987) (EPA response on remand affirmed in Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 815 F.2d 1579 (D.C. Cir. 1987)).

[163] Air Trans. Ass'n of Canada v. FCC, 323 F.3d 1093 (D.C. Cir. 2003) (vacating regulations earlier remanded without vacatur); Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (writ of mandamus ordering FCC to vacate challenged regulations); Checkosky v. SEC, 139 F.3d 221 (D.C. Cir. 1998) (ordering the SEC to dismiss challenged enforcement action); Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005) *remanded and vacated with a stay of the mandate*, 443 F.39 890 (D.C. Cir. 2006); Tex Tin Corp. v. EPA, 992 F.2d 353 (D.C. Cir. 1993) (finding EPA explanation issued in response to earlier remand without vacatur to be arbitrary and capricious); Greyhound Corp v. ICC, 668 F.2d 1354 (D.C. Cir. 1981) (setting aside Interstate Commerce Commission order issued in response to earlier remand).

[164] *E.g.*, *In re* People's Mojahedin Org. of Iran, 680 F.3d 832 (D.C. Cir. 2012) (issuing a writ of mandamus ordering the Secretary to act on a petition for reconsideration within four months, but leaving the underlying agency decision in place); *In re* Core Commc'ns, Inc., 531 F.3d 849 (D.C. Cir. 2008) (issuing a writ of mandamus to the FCC to compel it to take action within four months after six years of inaction in response to remand without vacatur); Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (writ of mandamus issued one year after remand without vacatur of rules raising constitutional concerns).

[165] *Supra* note 160.

RWV IN OTHER CIRCUIT COURTS

The central focus of the author's inquiry was use of remand without vacatur in the D.C. Circuit. Nonetheless, the literature and some basic case law research identified at least one opinion employing the remedy in each of the First, Third, Fifth, Eighth, Ninth, Tenth, and Federal Circuits.[166] With the caveat that this search was not systematic or comprehensive, only ten such cases were identified. In these cases, the discussion of whether to employ remand without vacatur expressly considered precedent on remand without vacatur from the D.C. Circuit.[167]

The Third Circuit recently declined to employ the remedy in *Council Tree Communications v. FCC*, finding that it was "inappropriate on the facts of the case."[168] In its certiorari petition in *Council Tree*, Council Tree Communications framed the question presented to the Supreme Court as one of the legality of remand without vacatur under the Administrative Procedure Act, 5 U.S.C. § 706(2) and argued that there was a Circuit split regarding the appropriateness of the remedy.[169] The petitioners in *Council Tree* identified two cases it argued supported this finding of a Circuit Split. The bases for this claim are discussed below.

First, the petitioners in *Council Tree* argued that the Tenth Circuit had rejected remand without vacatur under the APA. As evidence for this claim, petitioners identified the Tenth Circuit's 1999 decision in *Forest Guardians v. Babbitt*.[170] As the FCC pointed out in its responsive brief, *Forest Guardians* arose under 5 U.S.C. § 706(1) rather than § 706(2).[171] This provision of the Administrative Procedure Act provides that court "shall compel agency action . . . unreasonably delayed."[172] This case dealt with a request for injunctive relief from the Secretary of Interior's failure to issue a critical habitat designation, a non-discretionary duty under the Endangered Species Act. The court found that the Department of the Interior had failed to act and ordered the Secretary to issue a final habitat designation "as soon as possible."[173] If anything, the Court's decision not to impose a specific deadline on the Secretary for responsive action could be construed as one in which the Secretary's underlying decision (not to issue a

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[166] *See* Qwest Corp. v. FCC, 258 F.3d 1191, 1205, 1207 (2001) (intention to remand without vacating clarified in subsequent order at Qwest Corp. v. FCC, No. 99-9546, Order of Clarification 4 (10th Cir. filed Aug. 27, 2001)); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380-81 (Fed. Cir. 2001); Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001); Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995); Chem. Mfrs. Ass'n v. EPA, 870 F.2d 177 (5th Cir. 1989); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981); W. Oil and Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980); Sharon Steel Corp. v. EPA, 597 F.2d 377 (3d Cir. 1979).

[167] *E.g.,* Cent. Me. Power Co. v. FERC, 252 F.3d 34, 48 (1st Cir. 2001) (citing Allied-Signal, *supra* note 39, review under the Federal Power Act); Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380-81 (Fed. Cir. 2001) (citing Allied-Signal, *supra* note 39, and Checkosky, *supra* note 49); Cent. & S.W. Servs., Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000) (citing Allied-Signal); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) (citing D.C. Circuit's precedent in Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991)); United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981) (citing several early D.C. Circuit opinions); W. Oil and Gas Ass'n v. EPA, 633 F.2d 803, 813 (9th Cir. 1980) (citing several early D.C. Circuit opinions).

[168] 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 U.S. 1784 (2011).

[169] Brief for Petitioner at 15-23, Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010).

[170] *Id*. (citing Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999)).

[171] Brief for the Federal Respondents at 15-23, Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010).

[172] 5 U.S.C. § 706(1).

[173] Forest Guardians v. Babbitt, 174 F.3d at 1193.

designation) effectively remained in place on remand.[174] The Tenth Circuit vacated only the lower court's issuance of a stay order.[175] More recently, the Tenth Circuit responded favorably to a request by the FCC that it clarify an opinion to make clear that it had remanded without vacating the agency's underlying decision.[176]

Next, petitioners argued that the Federal Circuit shared the views on the remedy attributed to the Tenth Circuit. For this argument, petitioners relied on the Court of Appeals for the Federal Circuit's decision in *PGBA, LLC v. United States*.[177] Petitioners argued that the Federal Circuit in this case did not dispute the plaintiff's claims that the Administrative Procedure Act, 5 U.S.C. § 706(2), required the court to set aside arbitrary or capricious actions.[178] The Federal Circuit holding in *PGBA, LLC* was that the Administrative Procedure Act's allegedly applicable remedial provisions in § 706(2) did not displace those of the statute that was the basis for review, the Administrative Dispute Resolution Act of 1996, which provides that "the courts may award any relief the court considers proper."[179] The Federal Circuit found that remand without vacatur was a proper remedy under this statutory provision, and remanded without vacating the challenged agency action.[180] (The court did not address the plaintiffs' APA claim.) Notably, the Federal Circuit has employed remand without vacatur in at least one challenge to agency action under 5 U.S.C. § 706(2).[181] Thus, the claim of a Circuit split on the question of legality of the remedy appears, based on a limited review, to be unfounded.

No Court of Appeals cases were identified employing remand without vacatur in the Second, Fourth, Sixth, Seventh, or Eleventh Circuits. The Seventh Circuit has at least once declined to employ remand without vacatur, but did so without dispute from the parties regarding its authority to employ the remedy and because it did not believe the agency would act expeditiously on remand given prior delays.[182] Without further research, little can be inferred from this silence except that it supports the conclusion that the remedy is unusual.

C. CASE LAW CONCLUSIONS

Despite the early debate over the legality of remand without vacatur under the APA in *Checkosky,* no panel (majority) opinion issued by the D.C. Circuit since 2000 has held the remedy invalid under the APA or any other statutory scheme. Rather, the remedy has continued to be employed, albeit sparingly, in diverse substantive contexts and debate has continued in

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[174] *Id*.
[175] *Id*.
[176] *See* Motion of FCC for Clarification, or Alternatively, for Stay of Mandate at 4-5, Qwest Corp. v. FCC, No. 99-9546 (10th Cir. filed Aug. 21, 2001); Order of Clarification at 4, Qwest Corp. v. FCC, No. 99-9546 (10th Cir. filed Aug. 27, 2001) (clarifying remand without vacatur in Qwest Corp. v. FCC, 258 F.3d 1191 (10th Cir. 2001)).
[177] Brief for Petitioner at 20-21, Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010) (citing PGBA, LLC v. United States, 389 F. 3d 1219 (Fed. Cir. 2004)).
[178] *Id*. at 21.
[179] 28 U.S.C. § 1491(b)(2).
[180] PGBA, LLC v. United States, 389 F. 3d at 1225-1228.
[181] Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1380 (Fed. Cir. 2001) (pertaining to review under APA, and quoting Allied-Signal as stating "an inadequately supported rule. . . need not necessarily be vacated").
[182] Schurz Communications v. FCC, 982 F.2d 1043 (7th Cir. 1992).

separate opinions. As a general matter, the D.C. Circuit has retained the formula set forth in *Allied-Signal* to guide its consideration of whether to employ the remedy. Occasionally, and seemingly more frequently in cases involving the EPA, the court will issue a decision that remands a challenged administrative action back to the agency without vacatur but does not state the basis for its decision.

Early academic concerns that remand without vacatur would become the default remedy in review of agency action have not been borne out. Case law in the D.C. Circuit suggests that the remedy is generally used only a few times a year, most frequently in cases involving challenges to actions by EPA and reviewed under the Clean Air Act, 42 U.S.C. § 7607(d). Perhaps because the remedy is used so rarely, the A.B.A.'s recommendations in Resolution 107B appears to have had limited practical effect (or more generously, perhaps the remedy is used rarely because the ABA has expressed reservations about employing it).

For example, the D.C. Circuit has occasionally used the remedy where opportunity for public comment on some or all of the agency decision was not available, a special situation in which the ABA Administrative Law Section's Report advised against remand without vacatur. It also appears that the court has not made much use of the procedural protections the A.B.A. advised courts to consider. The D.C. Circuit rarely stays the underlying agency action on remand. This makes sense given application of the *Allied-Signal* factors. Where the rule is unlikely to change a stay is unlikely to be needed. Where the risks of disruption are serious a stay would not prevent disruption either. Courts also appear to be reluctant to require agencies to act within a particular timeframe, and have instead pointed to the availability of mandamus relief if agency action is not forthcoming. Recently, however, Judge Griffith has expressed his reservations regarding the advisability of open-ended remands without vacatur. Rarely, the courts have issued a writ of mandamus to compel the agency to act on an earlier remand.

In deciding whether to employ the remedy, the D.C. Circuit has rarely considered the underlying statutory provision providing for judicial review (and relief). The only identified opinion questioning the legality of the remedy under the Clean Air Act's statutory review provision was withdrawn after reconsideration.[183] The court has subsequently employed the remedy in reviewing cases under the Clean Air Act and other statutory review provisions, apparently as a general exercise of its equitable remedial discretionary authority. Ten years ago, the Federal Circuit did consider the legality of the remedy under the Administrative Dispute Resolution Act of 1996, 28 U.S.C. § 1491(b) (2), and held that it was permissible in this statutory context.[184] The Federal Circuit has also employed the remedy in a case arising under the Administrative Procedure Act. The Federal, First, Third, Fifth, Eighth, Ninth, and Tenth Circuit Courts of Appeals have infrequently employed the remedy in cases reviewed under the APA or environmental statutes.

[183] Checkosky, *supra* note 49 (examining the remedy under the APA); s*ee infra* notes 194-214 at accompanying text.
[184] PGBA, *supra* note 177.

III. CASE STUDIES: EPA, FERC, AND THE FCC

Having generally examined application of the remedy of remand without vacatur, the report next offers case studies exploring use of the remedy with three agencies: EPA, FCC, and FERC. These agencies were chosen because the remedy appears to have been used more often in their cases than those involving other agencies, at least five times each. The purpose of this inquiry was twofold: first, to determine why the remedy is used more frequently with these agencies; second, to understand the agency's perspectives on and responses to the remedy.

In order to better understand the agency's perspective on remand without vacatur each agency was sent a questionnaire tailored to their agency. A generic version of this questionnaire, containing questions asked of each of the agencies, is included as Appendix B. The author met with attorneys for the FCC and FERC to discuss their responses to these questions. These discussions were informal in nature, and any summary thereof should not be taken as establishing a formal position for the agency.

A. THE ENVIRONMENTAL PROTECTION AGENCY (EPA)

As noted previously, EPA has, in recent years, been a party to significantly more litigation employing (or discussing) remand without vacatur as compared with other federal agencies.[185] For example, analysis of the studied D.C. Circuit dataset reveals that this circuit has employed remand without vacatur in eighteen EPA cases since 1999. All eighteen of these cases involved challenges to EPA regulations promulgated under a variety of air pollution control programs and subject to review under the Clean Air Act, 42 U.S.C. § 7607(d).[186] The remedy is also discussed in cases declining to employ the remedy. In these types of cases too, EPA is involved more than other agencies and the Clean Air predominates the statutory bases for review.

IS THE CLEAN AIR ACT SPECIAL?

It is striking that every observed example of remand without vacatur involving EPA in the D.C. Circuit after 1999 arose under the Clean Air Act. This may point to limitations in the methodology.[187] On the other hand, it may be that the Clean Air Act is special, even relative to

[185] *See* Appendix A.

[186] In one of these cases, the court ordered remand without vacatur by way of an unpublished, per curiam decision in response to a motion for voluntary remand filed by EPA. *See* Sierra Club v. EPA, No. 03-1205, 2010 U.S. App. LEXIS 12020 (June 10, 2010) (granting EPA's partially unopposed motion for voluntary remand without vacatur, EPA's Partially Unopposed Motion for Voluntary Remand Without Vacatur, No. 03-1205 (D.C. Cir. filed Feb. 19, 2010)).

[187] It is possible that remand without vacatur has been employed in D.C. Circuit cases arising under other environmental or public health statues but that the research methodology did not identify them because they did not cite circuit precedent in deciding whether to employ the remedy. A number of Clean Air Act cases were identified that contained little to no explanation of the decision to employ the remedy and that did not reference *Allied-Signal* or *Checkosky*—these cases were identified because they referenced earlier Clean Air Act decisions that had employed the remedy and did discuss *Allied-Signal* or other case in the initial dataset.

other statutes that protect environmental or public health. Several factors may help to explain the unique prevalence of the remedy in cases involving the control of air pollution.

First, legal challenges to EPA regulatory actions under the Clean Air Act comprise the most common type of environmental litigation heard in federal courts. According to a recent GAO study of about 2,500 environmental cases brought against EPA from fiscal years 1995 through 2010, Clean Air Act litigation is more than twice as common (at 59%) as compared to the second most frequent type of litigation arising under the Clean Water Act (20%).[188] Given that Clean Air Act litigation represents the bulk of the agency's environmental litigation since the mid-1990s, it stands to reason that remand without vacatur would also be more prevalent in these cases over this time period.

Second, the Clean Air Act's judicial review provisions tend to make the D.C. Circuit the most common forum for challenges to EPA action arising under this statute. Judicial review under 42 U.S.C. § 7607(d) Act must be brought in the U.S. Circuit Courts of Appeals and the law contains special provision for challenges to rules of nationwide applicability to be brought in the D.C. Circuit exclusively.[189] It may be that challenges to EPA rules promulgated under other statutes are brought in district courts or other Courts of Appeals.[190]

Further, EPA has a long history with the remedy in Clean Air Act litigation. Several of the early cases employing the remedy arose as the newly formed agency worked to implement major amendments to the law. More recently, the D.C. Circuit has used remand without vacatur in a number of decisions involving litigation over the agency's revisions to the Act's fundamental regulatory standards (NAAQS) or pollutant trading programs, which form the basis for implementing programs and regulations (*e.g.*, standards for new source review or prevention of significant deterioration in air quality). In deciding not to vacate EPA clean air rules, the court has continued to consider whether vacation would adequately protect public health while the agency worked to revise rules on remand. Of course, not all cases explicitly discuss this rationale—indeed, several do not discuss the remedial choice at all—and other cases examine more specific regulatory issues. Nonetheless, because all Clean Air Act regulatory programs work in some fashion toward the common goal of improving air quality, it stands to reason that public health considerations play a significant role in the remedial calculus regardless of whether or not they are expressly discussed by the reviewing court.

In a similar vein, environmental or state petitioners have asked the court to employ the remedy in their briefs when they are challenging a rule on the grounds that it is not sufficiently stringent. The remedy can operate to the benefit of varied interest groups. On at least one occasion, remand without vacatur was requested by industry petitioners seeking to retain permitting exemptions for *de minimis* sources contained in the challenged regulations.[191] In

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[188] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 15-16 (2011).
[189] 42 U.S.C. § 7607(b).
[190] *E.g.*, 15 U.S.C. § 2618(a)(1) (Toxic Substances Control Act challenges to regulations in District Court); 33 U.S.C. § 1369(b)(1) (direct challenge to some Clean Water Act rules in Courts of Appeals, not limited to D.C. Circuit). *But see* 42 U.S.C. § 6976 (review of Resource Conservation Recovery Act regulations in D.C. Circuit).
[191] Brief of Intervenor-Respondent Utility Air Regulatory Group, Sierra Club v. EPA at 9, 14-19, No. 10-1413 (D.C. Cir. filed Apr. 27, 2012) (requesting affirmance, or at least non-vacatur).

recent years, environmental petitioners, state petitioners, intervenors, and EPA itself have all asked that the D.C. Circuit remand agency regulations without vacatur.[192]

Lastly, and perhaps more speculatively, it may be that the remedy is simply more familiar in the context of Clean Air Act litigation—where several environmental groups, state Attorney General offices, and industry challengers have been involved in similar cases for many years. In a number of cases, the D.C. Circuit employed the remedy in a cursory fashion, without real discussion of the underlying equitable considerations or the *Allied-Signal* factors.[193] This may signal that the court does not view the remedy as particularly controversial in Clean Air Act cases, and that repeat players in Clean Air Act litigation have accepted it.

One final possible answer is that the plain language of the Clean Air Act's statutory review provision makes remand without vacatur more likely in this context. The D.C. Circuit's initial (but subsequently withdrawn) opinion in *Honeywell International v. EPA* presents a challenge to this theory.[194] Judge Sentelle's opinion for the court in that case directly challenged the legality of the remedy under the Act. However, as discussed below, the opinion was reconsidered, and courts have continued to employ the remedy in Clean Air Act cases.

HONEYWELL: INTERPRETING THE CLEAN AIR ACT

In 2004, a D.C. Circuit panel (which consisted of Judges Sentelle, Randolph, and Rogers) issued a per curiam decision upholding Petitioner Honeywell International's challenge to EPA's final rules designating acceptable substitutes for ozone-depleting substances.[195] Had it not been withdrawn, the court's opinion in this case could have ended application of the remedy under the Clean Air Act in the D.C. Circuit.

Under the relevant provision of the Clean Air Act, EPA was forbidden from accepting substitutes for ozone-depleting substances with potential harms to human health or the environment when other, less harmful substitutes were currently or potentially available.[196] Honeywell challenged EPA's approval of two substitutes for new uses (which allowed new entrants into the market in which Honeywell competed) by arguing that EPA impermissibly considered economic factors in the approval process. The *Honeywell* court agreed, finding unanimously that EPA's consideration of economic costs exceeded its authority under the Clean Air Act, and vacated EPA's rule. The panel, however, split on the appropriate remedy.

Judge Sentelle, writing for the panel majority (along with Judge Randolph) found that the Clean Air Act did not authorize the remedy of remand without vacatur. Judge Sentelle stated: "We read the judicial review provisions of the [Clean Air Act] to authorize us only to vacate,

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[192] *E.g.,* Sierra Club v. EPA, No. 03-1205 2010 U.S. App. LEXIS 12020 (unpublished) (June 10, 2010) (granting EPA's partially unopposed motion for voluntary remand without vacatur); New York v. EPA, No. 06-1148 with 06-1149, 2009 U.S. App. LEXIS 20050 (unpublished) (Sept. 4, 2009) (voluntary remand without vacatur motion by EPA unopposed); Nat'l Lime Ass'n v. EPA, 233 F.3d 625 (D.C. Cir. 2000) (Sierra Club requested, EPA requested in part, petitioner opposed).
[193] *E.g.*, Catawba County v. EPA, 571 F.3d 20 (D.C. Cir. 2009); New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005); Bluewater Network v. EPA, 370 F.3d 1 (D.C. Cir. 2004).
[194] 374 F.3d 1363 (D.C. Cir. 2004).
[195] *Id*.
[196] 42 U.S.C. § 7671q.

rather than remand, for the sort of challenge at issue here."[197] He also noted that the judicial review provisions of the Clean Air Act, rather than those of the Administrative Procedure Act, governed review. The Clean Air Act's review provision provides:

> In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or
> (D) without observance of procedure required by law, if
> (i) such failure to observe such procedure is arbitrary or capricious,
> (ii) the requirement of paragraph (7)(B) has been met, and
> (iii) the condition of the last sentence of paragraph (8) is met.[198]

Judge Sentelle examined dictionary definitions of the term "reverse" and concluded that the court's authority under the Act was limited to vacating EPA's actions when it found a violation of the standard of review.[199] He distinguished its earlier precedent authorizing remand without vacatur in the context of the Clean Air Act by its failure to explicitly consider the remedy of remand without vacatur under the text of the statutory review provision, and determined that this precedent was not binding on the court.[200]

Judge Randolph, while joining this majority opinion, wrote a separate concurrence (which Judge Sentelle also joined) to express his view that vacating unlawful agency action was always preferable to remanding without vacatur.[201] He argued that vacatur preserves the adversary process, requiring parties on both sides to brief the appropriateness of a stay of the mandate if this relief is requested by the agency or intervenors in the case.[202] This process, he wrote, allows "the court to act with its eyes open," gives the agency the proper incentive to respond in a timely fashion, and allows the court to consider long-standing precedent in determining whether to issue a stay.[203] He criticized the court's practice of employing the remedy in a cursory fashion, without explanation.

Judge Randolph's concurrence also noted his preference for the multiple factors articulated in *Virginia Petroleum Jobbers v. FPC* and its progeny—rather than the two factors set forth in *Allied-Signal*—for determining the availability of a stay or an injunction pending appeal. These factors, as set forth in his concurring opinion, "include the likelihood that the agency's position will prevail on remand; the likelihood that there will be irreparable harm without the stay; the prospect that others will be harmed if the court grants the stay; and the

[197] Honeywell, *supra* note 194 at 1373 (Sentelle, J., for the court).
[198] 42 U.S.C. § 7607(d)(9)
[199] Honeywell, *supra* note 194 at 1373-74.
[200] *Id*. at 1374.
[201] *Id.* (Randolph, J., concurring).
[202] *Id*. at 1375.
[203] *Id*.

public interest in granting the stay."[204] His concurring opinion did not, however, substantively analyze the difference between these two standards.

Judge Rogers, on the other hand, dissented from the Honeywell panel majority's remedial holding. She opined that remand without vacatur was the appropriate remedy under the court's long-standing precedent, including *Allied-Signal*. Judge Rogers also concluded that remand without vacatur was proper under the circumstances of the case because, in her view, EPA might be able to support its decision on remand and the consequences of vacatur could be disruptive.[205]

EPA subsequently moved for panel rehearing or rehearing en banc of the panel majority's ruling in *Honeywell* with respect to the legality of remand without vacatur under the Clean Air Act.[206] The agency made three principle claims in support of reconsideration: (1) the panel majority's reading of the Clean Air Act's judicial review provision as foreclosing remand without vacatur conflicted with decades of D.C. Circuit precedent; (2) such a reading would also undermine the purposes of the Clean Air Act; and (3) federal courts have inherent authority to fashion appropriate equitable remedies.[207] EPA argued that use of the term "reverse" in Clean Air Act's judicial review provision no more required the court to vacate agency action than the Administrative Procedure Act's command that reviewing courts must "set aside" impermissible or unlawful agency action, and cited to substantial circuit court precedent authorizing remand without vacatur under the APA.[208] The agency reasoned that this precedent demonstrated that there was no "clear statement" from Congress displacing equitable remedial authority under the APA or the Clean Air Act.[209]

In 2005, the *Honeywell* panel granted in part and denied in part EPA's request for rehearing.[210] The per curiam grant of reconsideration found it "unnecessary to decide" whether the Clean Air Act's judicial review provision required vacation and held that vacation was still the appropriate remedy for the reasons set forth in Judge Randolph's opinion.[211] Judge Rogers wrote separately to support withdrawal of the court's holding on the legality of the remedy under the Clean Air Act but to dissent from the decision to vacate the rule.[212]

EPA again petitioned for rehearing *en banc*, this time asking the court to reconsider Judge Randolph's statement that vacatur "should always be the preferred course."[213] The D.C. Circuit denied this request in a summary per curiam order, without an opinion, issued after a vote

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[204] *Id*. (citing Virginia Petroleum Jobbers v. FPC, 259 F.2d 921 (D.C. Cir. 1958) and its progeny).
[205] *Id*. at 1379-80 (Rogers, J., concurring in part and dissenting in part).
[206] *See* Motion of Environmental Protection Agency for Panel Rehearing or Rehearing *En Banc*, Honeywell Int'l Inc. v. EPA, No. 02-1294 (D.C. Cir. filed Oct. 7, 2004).
[207] It is surprising that this analysis did not consider the full operative sentence, which says that courts "may reverse any. . . action" violating the standard of review, and arguably needs not be read as requiring reversal. 42 U.S.C. § 7607(d)(9).
[208] Motion for Rehearing, *supra* note 206 at 8-9.
[209] *Id*. at 10-12 (citing United States v. Oakland Cannabis Buyer's Coop., 532 U.S. 483, 496 (2001) for the proposition that courts "have discretion unless a statute clearly provides otherwise").
[210] Honeywell Int'l Inc. v. EPA, 393 F.3d 1315 (D.C. Cir. 2005).
[211] *Id*. at 1316.
[212] *Id*. (Rogers, J., concurring in part and dissenting in part).
[213] 374 F.3d 1363, 1375 (D.C. Cir. 2004) (Randolph, J., concurring).

on the petition.[214] It does not appear, however, that the D.C. Circuit has adopted Judge Randolph's views on the remedy in practice. The D.C. Circuit has subsequently employed the remedy in a number of cases involving the EPA.[215]

A CHANGING CLIMATE: REVISITING THE CLEAN AIR ACT

Although the legality of remand without vacatur under the Clean Air Act no longer appears to be in question, a legislative endorsement of the remedy was quietly passed by the House of Representatives in a 2009 bill that would have updated the Clean Air Act to create a cap-and-trade program for greenhouse gases had it not been rejected by the Senate.[216]

In 2007, the U.S. Supreme Court found that carbon dioxide and other greenhouse gases fit within the Clean Air Act's definition of an air pollutant.[217] Since that time, EPA has made the endangerment finding required for regulation of these greenhouse gas emissions under the Clean Air Act.[218] One difficulty the agency has faced is the rigid statutory language establishing regulatory thresholds for emissions, which could be construed to require regulation of a significant number of new entities.[219] With the support of President Obama, Congress has recently considered legislation that would revamp the Clean Air Act to establish a cap-and-trade program for greenhouse gas pollution.

The American Clean Energy and Security Act of 2009, which would have created a climate trading program, was adopted by the U.S. House of Representatives in June 2009.[220] The bill contained a provision that would have amended the judicial review provision of the Clean Air Act, 42 U.S.C. § 7607(d), to add a new clause expressly permitting remand without vacatur "if vacatur would impair or delay protection of the environment or public health or otherwise undermine the timely achievement of the purposes of this Act."[221] A second clause would have required the Administrator to respond to the remand within one year.[222] The new provisions were not limited in application to judicial review of regulations governing greenhouse gas pollution but rather would have expressly sanctioned remand without vacatur in any review under 42 U.S.C. § 7607(d), where the appropriate conditions were met.

Both the proposal to expressly authorize remand without vacatur of agency decisions and the proposal to require the agency to respond within one year were contained in the bill as

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[214] Honeywell Int'l, Inc. v. EPA, 02-1294, 2005 U.S. App. LEXIS 6550 (D.C. Cir. Apr. 15, 2005) (per curiam). Judge Henderson did not participate in the decision and Judge Rogers and Tatel would have granted the petition. *Id*.
[215] *E.g*., National Ass'n of Clean Water Agencies v. EPA, No. 11-1131 (D.C. Cir. Aug. 20, 2013) (opinion by Judge Sentelle); Mississippi v. EPA, No 08-1200, 2013 U.S. App. LEXIS 14885 (D.C. Cir. July 23, 2013); Portland Cement Ass'n v. EPA, 665 F.3d 177 (D.C. Cir. 2011); Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512 (D.C. Cir. 2009).
[216] H.R. 2454, 111th Cong. (as passed by the House June 7, 2009).
[217] Massachusetts v. EPA, 549 U.S. 497 (2007).
[218] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
[219] *See* Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule: Final Rule, 75 Fed. Reg. 31514 (June 3, 2010); EPA, Office of Air Quality Planning and Standards, Operating Permits Burden Reductions (Apr. 13, 2010), *available at* http://www.epa.gov/nsr/documents/20100413piecharts.pdf (last accessed Sept. 10, 2013).
[220] H.R. 2454, *supra* note 216.
[221] *Id*. at § 336(a)
[222] *Id*.

introduced in the House of Representatives.[223] H.R. 2454 was nearly 1,500 pages in length and received considerable attention and debate on the floor of the House and in committee hearings. However, review of the legislative history indicates that there was no substantive discussion of this provision or why it was included in the proposal. One possible explanation for the provisions is that Congress or EPA anticipated substantial litigation over regulation of greenhouse gas emissions and sought to ensure that the cap-and-trade program would move forward in spite of successful legal challenges that would require legal alterations to the new regulatory regime.

On a related note, and as a concluding aside, Congress has generally has paid very little attention to the remedy or its use by the courts, except one identified authorization of the remedy in particular statutory review contexts.[224] The only notable discourse on the remedy identified in a review of the Congressional Record was in a resolution by Senator Rand Paul disapproving of regulations implementing EPA's Clean Air Interstate Rule after it had been remanded without vacatur.[225] This resolution (which was not enacted) noted the judicial remand without vacatur, but did not comment directly on the appropriateness of the remedy.[226]

B. THE FEDERAL COMMUNICATIONS COMMISSION (FCC)

The D.C. Circuit has employed the remedy of remand without vacatur seven times in cases involving the FCC since 1998.[227] Occasionally, the D.C. Circuit has remanded FCC decisions without specifying whether they were also vacated.[228] The D.C. Circuit has also expressly declined to employ the remedy in at least one case involving the agency, where the challenged agency action failed to adequately account for competition in accordance with the court's precedent in separate litigation on predecessor rules.[229] Review of the case law and informal discussions with agency attorneys did not reveal any particular pattern in the case law subject matter or factual context that might drive judicial application of the remedy in FCC cases. Rather, the cases in which the remedy was used appear to center around a judicial desire to give the agency an opportunity to articulate reasoning for the decisions that were challenged.

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[223] H.R. 2454, 111th Cong. (as introduced in the House May 15, 2009).

[224] *E.g.*, 5 U.S.C. § 611(a)(4) (Under the Regulatory Flexibility Act where corrective action is required the court is to remand the rule to the agency but may permit continued enforcement where it "is in the public interest").

[225] 157 Cong. Rec. 172, p. S7326 (Nov. 10, 2011) (statement of Sen. Rand Paul in support of Disapproving a Rule Submitted By the Environmental Protection Agency Relating To the Mitigation by States of Cross-Border Air Pollution under the Clean Air Act).

[226] *Id*.

[227] Review in each of these cases was under the Administrative Procedure Act, 5 U.S.C. § 706(2). ATT Inc. v. FCC, 452 F.3d 830 (D.C. Cir. 2006); Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1048 (D.C. Cir. 2002); Sinclair Broad Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002); WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002); Sprint Commc'ns Co., L.P. v. FCC, 274 F.3d 549 (D.C. Cir. 2001); Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999); MCI Telecomm. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998); *see also* 47 U.S.C. § 402(g) ("The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.").

[228] *E.g.,* Am. Radio League, Inc. v. FCC, 524 F.3d 227 (D.C. Cir. 2008) (remanding without specifically setting aside or vacating agency action); Starpower Commc'ns, LLC v. FCC, 334 F.3d 1150 (D.C. Cir. 2003) (same).

[229] Comcast Corp. v. FCC, 579 F.3d 1 (D.C. Cir. 2009) (citing FCC's failure to follow earlier precedent in Time Warner Entertainment Co., LP v. FCC, 240 F.3d 1126 (D.C. Cir. 2001)).

Remand without vacatur cases involving the Commission only occasionally turn on the potential disruptiveness vacation could bring.

Arguably, the most significant remand without vacatur case involving the FCC was in the Third Circuit, in *Council Tree Communications v. FCC*, and in which the court declined to employ the remedy.[230] This case is discussed in further detail below; it is notable because it required the FCC to affirmatively defend the legality of the remedy under the Administrative Procedure Act in response to a petition for certiorari. The FCC has a strong institutional interest in defending the remedy, which has been applied in agency cases involving either of the two *Allied-Signal* factors, and which it occasionally asks courts to employ in the event of a finding of agency error.[231] The agency supports judicial application of both factors set forth in *Allied-Signal* for determinations of whether to remand without vacatur.[232]

Of the studied D.C. Circuit cases employing the remedy and in which the FCC was a party, only one focused on the potential disruption that would result from vacation of the agency's action. In *MCI Telecommunications Corp. v. FCC*, the court remanded without vacating an FCC order setting compensation rates for payphone service providers for calls made on their payphones.[233] The court found the Commission's explanation of the rate it had chosen "plainly inadequate" but chose to remand without vacating the order because vacation would have left the service providers "all but uncompensated" and thus would "disrupt the business plans they have made on the basis of their expected compensation."[234]

In practice, the remedy has been used most often in FCC cases when there is a possibility that it will be able to rehabilitate its decision on remand. One opinion frankly acknowledged that, as applied to the facts in that case, the disruption factor of the *Allied-Signal* considerations was "only barely relevant," and called the potential disruptive consequences of vacation "not great."[235] It appears that the threshold for a finding of potential rehabilitation may also be low in some cases involving the FCC. The D.C. Circuit's various articulations of the probability have ranged from "cannot say with confidence that the [agency action] is likely irredeemable"[236] to

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[230] 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 U.S. 1784 (2011).

[231] Brief for Respondents at 28-29, Council Tree Commc'ns, Inc. v. FCC, No. 07-1454 (D.C. Cir. filed Feb. 17, 2009) (case dismissed for lack of jurisdiction); Motion of Federal Communications Commission for Clarification, or Alternatively for Stay of Mandate at 4-5, Qwest Corp. v. FCC, No. 99-9549 (10th Cir. filed, Aug. 21, 2001) (clarification that court had remanded without vacatur); Supplemental Brief of Federal Communications Commission at 2, 8-9, Schurz Communications, Inc. v. FCC, No. 91-2350 (7th Cir. filed Nov. 20, 1992) (request denied after discussion of prior agency delay).

[232] Brief for Respondents, *supra* note 231 at 28-30, Council Tree Commc'ns, Inc. v. FCC, No. 07-1454 (D.C. Cir. filed Feb. 17, 2009) (asking court to apply Allied-Signal factors and remand without vacatur in the event it finds agency error); Brief for Respondents at 51-52 Council Tree Commc'ns, Inc. v. FCC, No. 06-2943 (3rd Cir. filed Oct. 13, 2006) (same).

[233] 143 F.3d 606 (D.C. Cir. 1998).

[234] *Id*. at 609.

[235] Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1049 (D.C. Cir. 2002).

[236] AT&T Inc. v. FCC, 452 F.3d 830 (D.C. Cir. 2006) (citing Fox Television Stations, Inc. v. FCC, *supra* note 235 at 1048 (D.C. Cir. 2002)). Notably, Judge Randolph concurred in this opinion but wrote separately to indicate that he did so only because he found no practical difference between remanding on the one hand, and vacating and remanding on the other. *Id*. at 839 (Randolph, J., concurring).

"conceivably may determine"[237] to the more concrete finding of a "nontrivial likelihood" of potential rehabilitation.[238]

In two cases involving remand without vacatur, the Court focused on the need for the agency to determine whether to vacate its own rules, in accordance with regulatory review required by Section 202(h) of the 1996 Telecommunications Act. This law required the FCC to undertake a retrospective review of its ownership regulations every four years, and to rescind regulations that are not in the public interest.[239] Both of the following cases involved challenges to the FCC's decision not to rescind national television and ownership rules and local broadcast rules. In each, the court held that the agency had not shown that the retained rules were "necessary in the public interest" but remanded rather than vacated the regulations in order to give the agency the option to make this showing.[240]

In *Fox Television Stations, Inc. v. FCC*, the court heard a challenge to two FCC rules, acknowledged its authority to order the FCC to vacate rules to redress violations of Section 202(h), and did vacate the cable/broadcast cross-ownership rule.[241] However, it remanded without vacatur the national television station ownership rule to the FCC after consideration of the *Allied-Signal* factors and concluding that it could not "say with confidence that the Rule is likely irredeemable . . . ."[242] The court's subsequent decision in *Sinclair Broad Group, Inc. v. FCC* issued despite a dissent from Judge Sentelle, in which he argued that vacatur was required in light of the presumption imposed by Congress upon the agency by Section 202(h) "in favor of repealing or modifying the ownership rules" and given the agency's failure to affirmatively justify its rules.[243]

On at least two occasions the D.C. Circuit has, after remands without vacatur, vacated the FCC's underlying decision through a writ of mandamus issued in response to the agency's failure to respond in a timely fashion to the court's remand without vacatur. This frequency is notable given that only seven cases were identified remanding without vacating agency decisions, and given the extraordinary nature of the mandamus remedy. *Radio-Television News Directors Association v. FCC* involved a challenge to long-standing broadcast rules that required broadcasters to provide opportunities for response to personal attacks or political opinions.[244] The court found there was a possibility that the agency "may uphold" the rules on remand, and ordered the agency to act expeditiously.[245] When it did not, which may have been because the Commission was divided on the appropriate course of action, the court vacated the rules.[246] Remarkably, only one year passed between the initial decision and the issuance of a writ of

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[237] Sinclair Broad Group, Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002)
[238] WorldCom, Inc., 288 F.3d 429, 434 (D.C. Cir. 2002).
[239] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act).
[240] Sinclair , *supra* note 237 at 165 (D.C. Cir. 2002); Fox Television Stations, Inc. v. FCC, *supra* note 235 at 1048.
[241] Fox Television Stations, *supra* note 235 at 1033.
[242] *Id*. at 1048-49.
[243] Sinclair, *supra* note 237 at 171 (Sentelle, J., dissenting).
[244] Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999), *writ of mandamus subsequently issued in* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).
[245] *Id*. at 888.
[246] *Id.* at 878 (noting deadlock); Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269 (D.C. Cir. 2000).

mandamus vacating the agency rules.[247] Two factors likely contributed to the short-time frame. First, there was a long history of agency inaction on the request to repeal the rules.[248] Second, the D.C. Circuit found that the rules chilled free speech and burdened First Amendment rights.

In the D.C. Circuit's 2008 mandamus decision in *In re Core Communications,* the court gave the agency more time to respond to a 2002 remand without vacatur, but there was not a long history of agency action prior to the initial challenge and no constitutional concerns were raised. After six years of agency inaction, the court granted a writ of mandamus and directed the FCC to explain the legal basis for an order establishing intercarrier ISP compensation rules within six months from the date of oral argument, or have the rules vacated.[249] The court had remained involved in the case in the intervening years since its 2002 decision in *WorldCom, Inc.* remanding without vacating the rules, and had twice previously declined the petitioner's request for a writ of mandamus to give the agency the opportunity to respond.[250] In its 2008 decision, the D.C. Circuit again reiterated its desire to avoid interfering in the agency decision-making process.[251] Both the amount of time given to the FCC and the court's explanation of its actions indicate the deference the court afforded to the FCC in this case.

COUNCIL TREE COMMUNICATIONS: CERTIORARI DENIED

Council Tree Communications v. FCC is a rare example of the agency requesting remand without vacatur.[252] In this case, Council Tree sought review in the Third Circuit of Federal Communication Commission orders revising rules governing eligibility for "designated entity" credits, which permit small businesses to obtain discounts in auctions for certain wireless licenses. The Commission held two spectrum auctions under the revised rules, which together netted nearly $ 33 billion in winning bids. Both auctions were held while Council Tree's petition for reconsideration of the order was pending before the Commission.

Council Tree previously sought judicial review on its petition for reconsideration before the agency acted on it, and the Third Circuit dismissed this request because it was "incurably premature."[253] In their subsequent challenge to the rules, brought after the FCC denied its petition for reconsideration, Council Tree asked the Third Circuit not only to vacate the rules but also to use its equitable authority to rescind the two auctions that had been conducted while they

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[247] Remarkably, it appears that the FCC issued an order vacating the regulations in the same year, but that the rules were not removed from the Code of Federal Regulations for over a decade. *See* Letter from Representatives Fred Upton and Greg Walden, House Committee on Energy and Commerce to the Hon. Julius Genachowski, Chairman, Federal Communications Commission (May 31, 2011), *available at* http://archives.republicans.energycommerce.house.gov/Media/file/Letters/112th/053111fccfairnessdoctrine.pdf.

[248] Plaintiffs had sought repeal of the rules two decades prior to the court's decision, but the agency failed to take final responsive action on the petition for rulemaking until 1998. When the case came before the D.C. Circuit, the Commission was deadlocked as to the appropriate response and thus the rules remained in effect. Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d at 877-78.

[249] WorldCom, Inc. v. FCC, *supra* note 238, *writ of mandamus issued in In Re* Core Commc'ns, Inc, 531 F.3d 849, 859 (D.C. Cir. 2008).

[250] *In Re* Core Commc'ns, Inc., *supra* note 249 at 853.

[251] *Id*. at 859.

[252] Brief for the Federal Respondents at 15-23, Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235 (3d Cir. 2010), *cert. denied*, 131 U.S. 1784 (2011).

[253] Council Tree Commc'ns, Inc. v. FCC, 503 F.3d 284, 288 (3d Cir. 2007).

were in place. It argued that the rules were flawed and that they had been adopted without proper provision for notice-and-comment rulemaking.

The Federal Communications Commission in its reply brief affirmatively defended its regulations but also asked the court to consider remanding without vacating the rules if it found that they had been adopted in error.[254] The agency argued that Council Tree had not demonstrated that the agency could not readopt the standards upon reconsideration. Further, the FCC contended that even if the rules were vacated there would be no basis for undoing its auction. Finally, they argued that undoing the auction would be seriously disruptive, and that "less disruptive remedies, such as providing petitioners with access to alternative spectrum are available."[255]

The Court of Appeals for the Third Circuit found that two portions of the designated entity rules had been adopted without adequate notice and comment. However, the court expressly declined to remand without vacating the rules; it determined that vacation was unlikely to produce serious disruption since the FCC would still have some regulations in place to govern auction participation.[256] The Third Circuit also declined to use its equitable authority to rescind the auctions:

> [S]ince it would involve unwinding transactions worth more than $30 billion, upsetting what are likely billions of dollars of additional investments made in reliance on the results, and seriously disrupting existing or planned wireless service for untold numbers of customers. Moreover, the possibility of such large-scale disruption in wireless communications would have broad negative implications for the public interest in general.[257]

The court offered no equitable relief to Council Tree, despite the FCC's apparent concession that such was within the court's equitable authority.

Council Tree sought Supreme Court review of the Third Circuit's decision. As discussed above, the petition for certiorari characterized the Third Circuit's decision as remanding without vacating unlawful agency action under 5 U.S.C. § 706(2). It would be foolhardy to speculate on the Supreme Court's reasons for declining to review this claim, but it is worth noting a few problems with the petitioner's certiorari petition.

First, as discussed above, petitioner's claim that there was a spilt among the Courts of Appeals regarding the legality of the remedy under the APA was unfounded.[258] Second, Council Tree was using a challenge to the FCC's regulations to mount a collateral attack on auctions conducted under those regulations. The regulations themselves were vacated. Council Tree argued that the decision not to rescind the auction results was effectively remand without vacatur. However, the Third Circuit never found that the FCC's auctions violated the standards of review set forth 5 U.S.C. § 706(2) and had declined Council Tree's request stay the auctions before they took place.[259] The Supreme Court would have had to first determine that the auctions were unlawful and in violation of 5 U.S.C. § 706(2) before it could turn to question the

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[254] Brief for Respondents at 50-51, Council Tree Commc'ns, Inc. v. FCC, No. 06-2943 (3d Cir. filed Oct. 13, 2006).
[255] *Id*. at 53-54.
[256] Council Tree Commc'ns, Inc. v. FCC, 619 F.3d 235, 258 (3d Cir. 2010).
[257] *Id*. at 257.
[258] *See supra* notes 168-182 and accompanying text.
[259] Council Tree Commc'ns, Inc. v. FCC, *supra* note 256 at 248.

petitioner presented. Even if the court had a desire to answer the question presented regarding the legality of the remedy under the APA, the facts were not well suited to a disposition on this point.

PERSPECTIVES FROM AGENCY ATTORNEYS

The author met informally with attorneys at the FCC to discuss the remedy of remand without vacatur. This conversation is summarized below and reflects the personal viewpoints of the attorneys given their individual experiences with the remedy, rather than the formal position of the Federal Communications Commission.

The FCC, according to agency attorneys, rarely requests remand without vacatur, preferring instead to ask the court to affirm the challenged decision. They also noted that, while the agency has occasionally asked for a voluntary remand of a challenged decision, it would not typically ask for vacation in the interim under the theory that some rule is better than no rule.

When asked about academic views suggesting that vacatur is the appropriate remedy where an agency decision cannot be rehabilitated on remand, agency attorneys expressed support for the flexible equitable approach embodied in the two prongs of *Allied-Signal*.[260] Jacob Lewis, Associate General Counsel and Chief of the FCC's Litigation Division, suggested that a more rigid application of remand without vacatur could hinder the court's efforts to avoid the inflexibility and potential disruption of a rule permitting vacation only. It might also restrict the ability of agencies to identify cases where disruption from vacatur would be a real problem.

Joel Kaufman, Associate General Counsel and Chief of the Agency's Administrative Law Division, explained challenges he thought the agency might face if asked to brief the court on whether the remedy should be employed and on the appropriate timeframe for the agency's post-remand regulatory response. First, he thought it would be difficult to know, prior to reading the court's decision to determine the basis for remand, whether the decision could be rehabilitated based on the existing record. Second, the Commission on remand examines changed circumstances and the need to refresh the record by providing for further notice and comment. Further, he felt that the agency needs discretion to balance limited resources and its regulatory priorities.

According to attorneys at the agency, the FCC's Office of General Counsel tracks remands in judicial decisions but primary responsibility for responsive action rests with the relevant operating bureau, which would draft the agency's response. The oversight process on remand is relatively informal, but interested parties can follow-up with bureau staff to encourage prompt action. Parties also have the option to pursue a writ of mandamus to compel agency action.

Agency attorneys explained that the agency responds to ambiguous remands on a case-by-case basis. Where a decision is sufficiently opaque, the agency has the option to seek clarification from the court. At least once, the agency has filed a motion for clarification—or

[260] 988 F.2d 146 (D.C. Cir. 1993).

alternatively, for stay of the mandate—to determine whether the remanded regulations had been vacated.[261] In another case, opposing parties asked the court for clarification.[262]

Agency decisions that are vacated are removed from the Code of Federal Regulations after final disposition, providing formal notice to regulated entities that they are no longer in effect. Additionally, FCC references remands it is responding to in subsequent Commission decisions.[263] The Commission has also made affirmative efforts to ensure that the public has access to information about court cases involving the agency. The FCC's Office of General Counsel posts recent FCC litigation filings, court opinions, and occasionally all briefs in significant cases on its website.[264] The website also identifies major court cases involving the agency and any pending appellate cases.[265] This voluntary undertaking is commendable.

A separate area of the agency's website provides public access to information about the Commission's regulatory activity and adjudicatory orders. Information about these actions is not, as a matter of standard practice, relationally linked to the portion of the website containing judicial opinions affecting those decisions. Attorneys at the agency felt that it could be challenging, as a practical matter, to provide such connections.

C. THE FEDERAL ENERGY REGULATORY COMMISSION (FERC)

The D.C. Circuit has employed the remedy of remand without vacatur seven times in cases involving FERC since 1985. On more than five other occasions, the D.C. Circuit has remanded FERC orders without specifying whether they were also vacated. All of the cases employing the remedy involved challenges to adjudicatory decisions. Six cases were brought under the judicial review provisions of the Natural Gas Act and one case was reviewed under the Federal Power Act's judicial review provisions.[266] All related to terms of service in energy markets. The orders at issue ranged in scale from major actions imposing nationwide obligations to orders affecting a segment of a regional market to approvals of contract or rate changes affecting individual customers.

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[261] Motion of Federal Communications Commission for Clarification, or Alternatively for Stay of Mandate at 4-5, Qwest Corp. v. FCC, No. 99-9549 (10th Cir. filed, Aug. 21, 2001).

[262] Illinois Pub. Telecomm. Ass'n v. FCC, *supra* note 153 (clarifying the court's intention to vacate remanded FCC rules).

[263] *E.g.*, Federal - State Joint Board on Universal Service; High - Cost Universal Service Support, WC Docket No. 05 - 337, CC Docket No. 96 - 45, Order on Remand and Memorandum Opinion and Order, 25 FCC Rcd 4072, 4073, ¶ 1 (2010) (identifying remand order in first paragraph and footnote and stating "[t]he scope of this Order on Remand and Memorandum Opinion and Order is narrow; it responds to the Tenth Circuit's remand.")

[264] FCC, The FCC and Courts, *available at* http://www.fcc.gov/encyclopedia/fcc-and-courts#pending (last accessed Sept. 20, 2013).

[265] *Id*.

[266] In general, most cases involving FERC arise under the judicial review provisions of the Federal Power Act, 16 U.S.C. § 825(l)(b), or the Natural Gas Act, 15 U.S.C. § 717r(b). Both statutes provide the reviewing court, upon filing of the administrative record, with exclusive jurisdiction "to affirm, modify, or set aside. . . in whole or in part" an order of the Commission in a proceeding in which the challenging party was aggrieved.

Approximately thirty FERC appeals are decided each year, few of which are remanded and no more than one or two of which would involve remand without vacatur.[267] As a practical matter, vacation of the underlying order is the typical remedy on remand. In general, the vast majority of FERC's cases pertain to adjudication and address ongoing rate terms or conditions or the rules governing service in electric and natural gas markets. Sometimes vacation in these contexts can create questions for the parties about what rates or terms and conditions govern the service being provided.[268] It could be unsettling to ongoing service, and the consequences are not always as simple as money changing hands. For example, vacation can lead to gaps in payment or in provision of service or to changes in earlier-negotiated terms and conditions.

Given the regulatory context, one might expect a number of remand without vacatur cases involving the agency to hinge on *Allied-Signal*'s disruption factor. However, only three examples turning on the substantial disruption potential of vacation were identified, including one that dates to 1985.[269] Attorneys at FERC identified the D.C. Circuit's 2013 remand without vacatur opinion in *Black Oak Energy, LLC v. FERC* as a good example of the complications and disruptions that can be caused if rates are settled prematurely.[270] In this case, the D.C. Circuit heard a challenge to a surplus distribution system for the PJM market (covering the East Coast, Appalachia, and parts of the Midwest) by virtual marketers, because the program tied refunds to payment of fixed grid costs. The virtual marketers had previously shared fixed grid costs but received no share of the surplus. A 2009 FERC order required PJM to refund the cost-based share of the surplus to the virtual marketers.[271] A 2011 FERC order revisited the issue, this time ordering PJM to recoup the refunds paid to the virtual marketers, and the agency subsequently reaffirmed this finding.[272] The D.C. Circuit determined that FERC's change in position from 2009, requiring recoupment of refunds from the virtual marketers, was arbitrary and capricious because the agency had failed to sufficiently justify its decision in light of the difference between denying refunds and recouping them in its decision.[273] Citing the disruption that would be created by forcing the non-profit PJM to pay out refunds (which it would have to impose on market participants) and the transaction costs potentially associated with a subsequent change in FERC's position, if one were to occur, the court opted to remand without vacating the FERC's recoupment order pending final resolution of the dispute at the agency level.[274]

As in *Black Oak, LLC v. FERC*, nearly all remand without vacatur decisions involving FERC have turned on the need for further explanation of the agency's decision rationale. For example, in *TransCanada Pipeline, Ltd. v. FERC*, the court remanded a FERC order without

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[267] Telephone interview with Robert Solomon, Solicitor; Lawrence Greenfield, Associate General Counsel, Energy Markets-1; Christy Walsh, Special Counsel, Office of the General Counsel (Aug. 29, 2013).
[268] *Id*.
[269] Apache Corp. v. FERC, 627 F.3d 1220 (D.C. Cir. 2010) (finding both that the agency could justify its decision on remand and that the disruptive consequences of vacating would be substantial); Md. People's Counsel v. FERC, 768, F.2d 450 (D.C. Cir. 1985) (finding serious flaws in interim rules but also that vacation may do more harm than good).
[270] No. 08-1386 (D.C. Cir. Aug. 6, 2013).
[271] *Id*., slip. op. at 19 (citing Black Oak Energy, LLC v. PJM Interconnection, LLC, 128 FERC ¶ 61,262, 62,222 (2009)).
[272] *Id*. at 20 (citing Black Oak Energy, LLC v. PJM Interconnection, LLC, 136 FERC ¶ 61,040, 61,162-64 (2011) and Black Oak Energy, LLC v. PJM Interconnection, LLC, 139 FERC ¶ 61,111, 61,870-82 (2012)).
[273] *Id*. at 23.
[274] *Id*. at 25.

reaching the substance of the decision "in order to secure an official explanation" of the agency's reasoning.[275] Earlier cases focused less on the possibility of rehabilitation in employing the remedy, and more on the need for explication.[276] More recently, the court has employed the remedy after analysis consistent with *Allied-Signal*, finding the possibility of rehabilitation of the agency's decision after explanation to be "serious" or "significant," or (in a case where potential disruption was substantial) "plausible."[277]

PERSPECTIVES FROM AGENCY ATTORNEYS

The author spoke with attorneys at FERC to discuss the remedy of remand without vacatur. This conversation is summarized below and reflects personal perspectives, rather than the formal position of the Federal Energy Regulatory Commission.[278]

Although remand without vacatur is used occasionally with FERC, the agency rarely if ever requests it. Attorneys from the agency were not aware of any examples of FERC requests for the remedy. Rather, it appears the remedy is employed at the court's own instigation. When this happens, agency attorneys typically view it as a positive development. Vacatur may limit the agency's discretion on remand, whereas remand without vacatur may provide the agency with more flexibility in responding to the court's mandate. In some cases, remand without vacatur signals to agency attorneys that FERC can take the same action on remand, albeit with a better justification. In other cases, it demonstrates an effort by the court to avoid any disruptive effects and maintain the status quo. Remand without vacatur can avoid uncertainty for the industry, particularly when rules for ongoing services are at issue.

Agency attorneys explained that the Solicitor's office initially interprets the scope of the court's mandate on remand. They did not view ambiguous remands as a problem. The court's use of the term "vacate" clearly signals to the agency that it must vacate the challenged action, but is normally only one or two words in an opinion. Attorneys at the agency explained that they examine the actual substance of the decision for guidance on how to proceed on remand. If necessary, they felt that the agency could seek clarification where an opinion did not specify whether the challenged agency action was vacated, and would be able to do so in the time period before the mandate issues.[279]

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[275] 24 F.3d 305, 310 (D.C. Cir. 1994); *see also* Phil. Gas Works & Lighting Co. v. FERC, 989 F.2d 1246 (D.C. Cir. 1993) (remanding for a fuller explanation).

[276] *E.g.,* United Dist. Co. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996) (holding that "[t]his is not to say, however, that it is impossible, or even improbable that the Commission on remand can establish a convincing rationale for exempting pipelines").

[277] Black Oak Energy, LLC v. FERC, No. 08-1386, slip. op. at 25 (D.C. Cir. Aug. 6, 2013) (plausible); Apache Corp. v. FERC, 627 F.3d 1220, 1223 (D.C. Cir. 2010) (serious); Williston Basin Interstate Pipeline Co. v. FERC, 519 F.3d 497, 504 (D.C. Cir. 2008) (significant).

[278] Telephone interview with Robert Solomon, Solicitor; Lawrence Greenfield, Associate General Counsel, Energy Markets-1; Christy Walsh, Special Counsel, Office of the General Counsel (Aug. 29, 2013).

[279] In general, FERC attorneys felt that many concerns with the remedy can be dealt with in motion practice. The agency could move for remand without vacatur where it was concerned about the disruptive effects of vacatur; conversely, parties could move for vacation in light of an order remanding without vacatur. *E.g.*, in Texas Pipeline Ass'n v. FERC, No. 10-60066 (5th Cir. 2011), FERC requested that the court narrow the scope of vacatur. The court granted that request. Telephone interview with Robert Solomon, Solicitor; Lawrence Greenfield, Associate General Counsel, Energy Markets-1; Christy Walsh, Special Counsel, Office of the General Counsel (Aug. 29, 2013).

When asked about academic concerns that the remedy can reduce agency incentives to engage in reasoned decision-making or respond to a remand, attorneys at the agency stated that they do not feel this is a problem. They explained that FERC's orders on remand are the most likely orders to receive appellate review, and that the desire to avoid continued litigation generally provides the agency with an incentive to do a good job. Further, they felt that highly regulated industries hold the agency to account.

Agency attorneys explained that FERC always has a responsibility to make a reasonable decision after consideration of the record evidence. On remand, the Commission may decide to offer a better justification for a choice it made, it may want to change the challenged decision, or it may need to reconsider the issue before making a decision. FERC has three general procedural options for responding to a remand decision: issue a new order without further proceedings, have a paper hearing, or hold a full evidentiary hearing before an Administrative Law Judge. While the agency will take notice of earlier comments in subsequent proceedings, it may also rely on newly gathered evidence in making a decision, particularly where there are changed circumstances or it is necessary to respond to the court's mandate or intervening events.

The timeframe for agency response will naturally vary depending on the procedures used, ranging from a period of several months to two or three years. For example, if the agency holds a hearing on the issue remanded it will not produce an immediate final decision. Nonetheless, attorneys at the agency felt that hearings or further proceedings can be a useful tool and provide good information with which to make better decisions. Where the court instructs the agency to act in a timely or expeditious manner the agency will follow these, or any other, instructions. For example, the agency complies with any judicial opinions that request progress reports to the court. Internally, the agency maintains a computer database that tracks remands, individual teams are responsible for follow-up, and the Solicitor's Office will follow that progress. Attorneys at the agency thought it had been many years since a writ of mandamus had been requested from a court because of failure to act in response to a judicial remand.

In responding to a remand, FERC in its orders uniformly identifies the judicial decision remanding the prior agency action. Agency orders are posted on the FERC website.[280] Most judicial opinions are also posted online after briefing and a decision on the merits.[281] Appellate briefs are also posted on FERC's website in an effort to provide value to the public and be helpful to the regulated industry. The agency would not normally issue a Federal Register notice of a judicial remand, but might issue notices in the course of responding to remands.[282] For example, the agency would normally publish Notices of Inquiry, Notices of Proposed Rulemaking, etc. in the Federal Register. Attorneys at the agency commented that industry has a small but active trade press that is attentive to remands of FERC decisions.

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[280] FERC Decisions and Notices, *available at* https://www.ferc.gov/docs-filing/dec-not.asp.

[281] The agency might not, for example, include a dismissal of an appeal or some non-public enforcement order. Legal Resources are available on FERC's website, *available at* https://www.ferc.gov/legal/court-cases.asp.

[282] *E.g.*, 2010 Quadrennial Regulatory Review: Proposed Rule, 77 Fed. Reg. 2868 (Jan. 19, 2012) (seeking comment on certain aspects of an agency order remanded in a decision by the Court of Appeals for the Third Circuit, decision cited in first paragraph of synopsis).

D. CASE STUDY CONCLUSIONS

The case studies above confirm many of the findings from a more general review of the case law. Use of the remedy has increased since 2000, but not dramatically; courts occasionally issue remand orders that do not specify whether agency action has been vacated; the remedy has been applied, without discussion of any distinction, to agency adjudicatory and rulemaking decisions; the statutory basis for judicial review can vary; each *Allied-Signal* factor continues to have independent relevance, and sometimes both are relevant to a particular case; where the *Allied-Signal* factors were not discussed the remedy was employed summarily; courts seldom imposed deadlines for agency reconsideration or stayed compliance deadlines, and writs of mandamus were issued only rarely in response to agency inaction on remand.

However, the more in-depth examination of remand without vacatur cases involving EPA, FERC, and FCC also produced some new insights, presented below under the same category headings used to examine the larger set of cases.

Type of Agency Decisions: Remand without vacatur can serve important agency interests, for example by allowing agencies to continue to carry out statutory mandates even where their initial approach was flawed. Based on informal discussions with attorneys at FERC and the FCC, as well as a limited review of available briefs, it appears that the remedy is ordinarily employed *sua sponte* by the court in cases involving these two agencies. Attorneys at the three agencies view the remedy favorably, and the FCC occasionally requests its application. Parties to Clean Air Act litigation—including EPA—also sometimes request the remedy.

Notably, EPA, FERC, and the FCC each oversee or operate markets: FCC for wireless communications spectrum, FERC for physical gas and electric power, and EPA for air pollution. In theory, vacation of agency orders or rules governing market participation may be particularly disruptive—EPA pointed to market disruption caused by vacation of the Clean Air Interstate Rule in requesting reconsideration and remand without vacatur; and the court also considered market disruption and transaction costs in a case involving FERC.[283] Employment of remand without vacatur is not, however, limited to cases involving EPA, FCC, and FERC that have market-wide implications. The remedy has also been applied to more discrete decisions by these agencies, such as actions promulgating technology-based emissions standards for particular industries or decisions regarding the terms of individual customer contracts.

Statutory Basis for Review: Only the FCC's cases were reviewed under the Administrative Procedure Act, 5 U.S.C. §706(2), which provides that the court "shall hold unlawful and set aside agency action, findings, or conclusions" that violate its standards of review. The Federal Power Act, 16 U.S.C. § 825(l)(b) and the Natural Gas Act, 15 U.S.C. § 717r(b), authorize the court to "affirm, modify, or set aside. . . in whole or in part" orders of the Federal Energy Regulatory Commission. Courts reviewing EPA actions under the Clean Air Act's standard for review, 42 U.S.C. § 7607(d), "may reverse any such action" when the standard of review is not met.

[283] Few D.C. circuit cases were identified employing the remedy to other agencies that regulate markets, such as the Commodity Future Trading Commission or the Securities Exchange Commission. The remedy may provide similar theoretical benefits in these other settings, even if it has not been employed in practice.

Put simply, the literal reading of the APA (which some argue forbids remand without vacatur) does not translate perfectly to these other statutory contexts. The varied bases for statutory review (FCC decisions under the APA, EPA decisions under the Clean Air Act, and FERC decisions under the Federal Power Act and the Natural Gas Act) were not explicitly part of the remedial calculus in cases involving these agencies, with the notable and subsequently withdrawn exception of *Honeywell*. In that case EPA defended the legality of the remedy under the Clean Air Act's judicial review provisions. No decisions were identified addressing the scope of the court's remedial authority to remand without vacating agency action under either the Federal Power Act or the Natural Gas Act.

In some cases, courts analyzed their choice of whether to employ the remedy by examining the statutory context in which the agency's decision was made. For example, in Clean Air Act litigation courts often examined the statutory goal of improving air quality in allowing regulations to remain in place. Similarly, the reviewing court in *Fox Television Stations, Inc. v. FCC*, examined the retrospective review provision of Section 202(h) of the Telecommunications Act in discussing its remedial authority to vacate regulations the FCC had not determined met Section 202(h)'s public interest standard.[284]

Allied-Signal: Many remand without vacatur decisions, including those that do not explain why the remedy is employed, focus on the need for agencies to better explain nuances of their decisions. The standard for the possibility of rehabilitation of agency action after explanation on remand is not always high, even where potential disruption of vacatur is not discussed. This finding makes some sense given that courts ordinarily permit (and sometimes even encourage) agencies to alter their position on remand, but is more troubling where the possibility of rehabilitation is the only stated basis for employing the remedy.

Procedural Protections: In general, it appears that motion practice is able to provide those involved in litigation with relief respecting application of the remedy. Agencies, other parties, or intervenors in litigation can ask the court to remand without vacating agency action, move for clarification of whether the agency action was vacated if a judicial opinion is unclear, request reconsideration of the judicial remedy, or petition the court for a writ of mandamus ordering the agency to take responsive action.

Responses to remands at FERC and FCC can take varied forms, and attorneys at these agencies expressed their view that procedural flexibility may be required to permit the agency to tailor an appropriate response to the judicial mandate that also accounts for changed circumstances and ensures adequate procedural protections (such as time for notice-and-comment) at the agency level. Both agencies provides copies of judicial opinions, including those remanding without vacating agency action, and some related briefs on their websites as well as identify prior legal history in written responses to remand.

[284] 280 F.3d at 1033.

IV. CONCLUSIONS AND RECOMMENDATIONS

Remand without vacatur is relatively recent and an unusual judicial remedy that permits agency actions to remain in place after a judicial remand requires further agency response. The remedy has broad applicability and has been employed in substantive areas of law from regulation of interstate air pollution to telecommunications to alien worker wage and visa rules. Use of the remedy in the D.C. Circuit has increased over time but not dramatically. Though the remedy was employed by this Circuit in cases involving administrative actions by more than twenty federal agencies, for most agencies—with the notable exception of EPA—it occurred infrequently. As a descriptive matter, there appears to be a presumption against the remedy that is consistent with a long history of routine vacation of unlawful agency actions.

Remand without vacatur, when employed appropriately, affords courts the equitable flexibility to fashion remedies that serve the best interests of litigants, regulated entities, or other institutional interests. Its potential benefits are not in real dispute. It can avoid gaps caused by vacation of agency rules or orders as well as resultant disruption in provision of government benefits, the regulatory environment, or in regulated markets. It can sustain agencies that rely on user fees, ensure that those who rely on government determined rates or reimbursement rules know what they should be paid, and protect reasonable reliance interests in the agency's action, while also requiring agencies to respond to concerns underlying successful challenges.

Nonetheless, remand without vacatur is not without consequence or critics. It alone cannot provide relief for litigants after successful challenges to agency actions, responsive agency action is necessary. Critics of the remedy argue that not vacating remanded agency actions reduces incentives for agencies to respond and to comply with waived legal requirements in future proceedings. In practice, however, it appears that these prudential concerns have not been realized, perhaps in large part due to the relative infrequency with which the remedy is used. Similarly, concerns that the remedy tolerates agency deviations from congressional directives and permits activist judges to assert their own interests in contravention of constitutional values are unlikely to present a systemic problem. Remand without vacatur is employed in cases involving a wide assortment of agencies but, with the exception of EPA, most agencies experience the remedy only occasionally. In the D.C. Circuit, the court has most often used the remedy in per curium opinions and without significant dissent; it has been employed by a majority of sitting judges. Even if the court were prone towards self-aggrandizement, there may be a tension between theorized judicial and agency activism, just as there may be variation between agency and congressional preferences or judicial and congressional preferences under our Constitutional structure with its checks and balances.

An important measure of the remedy's success is the degree to which disputes are finally resolved on remand. It appears that this is the normal occurrence, though as described below this can be difficult to ascertain. Subsequent case history following remand without vacatur was rare. Only three D.C. Circuit cases were identified where the court issued a writ of mandamus in response to agency inaction after remand without vacatur. The remedy is likely achieving its intended results.

A. VALIDITY OF THE REMEDY

UNDER THE ADMINISTRATIVE PROCEDURE ACT

"It is perhaps the wonder, or maybe the impossible mission, of a single tersely worded law like the APA's section 706 that it remains the source of all this activity and the changing hue of judicial review."[285] *— Judge Patricia M. Wald, writing fifty years after passage of the APA.*

The nature of administrative law has changed fundamentally since the 1946 adoption of the Administrative Procedure Act.[286] An important aspect of this evolution has been an increase in availability of judicial review for particular plaintiffs (such as public interest groups not subject to enforcement under the challenged agency action), in specific settings (such as preenforcement review), and to permit suits against the government (through relaxation of sovereign immunity). Remand without vacatur is a natural response to these advancements.

Some judges and scholars argue that remand without vacatur contravenes the plain language of the judicial review provisions of the Administrative Procedure Act (APA).[287] However, despite the occasional dissent, no cases were identified in which a federal Court of Appeals held that remand without vacatur was unlawful under the APA or another statutory standard of review. Rather, courts appear to generally accept the remedy as a lawful exercise of equitable remedial discretion.[288] Those who believe Congress clearly prescribed vacatur for actions found to transgress one of the APA's several standards of review, and who hence reject the application of *Hecht* and progeny to support a tradition of equitable judicial discretion, are left with inflexible remedies. Vacatur will not always provide relief for successful challengers of agency action—even where the agency's errors were not clearly harmless.

The remedy should be considered valid under the Administrative Procedure Act, 5 U.S.C. § 706(2).[289] It fits naturally with the APA's judicial review provision when viewed as a whole. The provision requires judges to interpret and apply the broad language in its standards of review. It also incorporates the rule of prejudicial error, which tasks courts with deciding when agency error is harmless and when it warrants relief. Interpreting the same judicial review provision that entrusts these determinative choices to judges as depriving courts of the flexibility needed to craft actual relief for litigants makes little sense in the context of the modern administrative state.

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[285] Patricia M. Wald, *Judicial Review in Mid-passage: The Uneasy Partnership Between Courts and Agencies Plays On,* 32 TULSA. L.J. 221, 230 (1996).

[286] *See* Richard B. Stewart, *Reformation of American Administrative* Law, 88 HARV. L. REV. 1669, 1712 (1975); Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 439-44 (2003) (describing evolution from common administrative law to the "interest representation" model).

[287] *E.g.*, Checkosky v. SEC, *supra* note 49 (Randolph, J., separate opinion).

[288] Remand without vacatur fits comfortably within a tradition of equitable judicial remedial discretion. Levin, *supra* note 2.

[289] 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.

ON STATUTORY REVIEW OF AGENCY ACTION

Congress may authorize judicial review of and relief from agency action under specific statutory provisions. Some statutory review provisions may permit remand without vacatur or clearly state that they are not intended to displace remedial authority.[290] Others do not mention remand without vacatur, but arguably leave the court with sufficient discretion to employ the remedy.[291] Some are silent altogether as to remedy.[292] Although no examples were identified, statutes could also expressly forbid application of remand without vacatur. Absent such an express congressional directive, and consistent with equitable traditions and existing judicial precedent, the remedy should be considered valid under statutory provisions authorizing judicial review of agency actions.

B. APPLICATION OF REMAND WITHOUT VACATUR

APPLICATION BY COURTS

Courts have long exercised equitable discretion in crafting remedies on review of agency action, except where remedial options are constrained by clear congressional directives.[293] In exercising this discretion, they appear to have generally adopted a default of vacating agency actions that are unlawful or transgress statutory standards of review. Where vacatur serves the interests of prevailing parties challenging the agency's action it is and should be the ordinary remedy.

Nonetheless, equitable considerations occasionally justify the unusual remedy of remand without vacatur. Longstanding judicial precedent in the D.C. Circuit, to which other Courts of Appeals have looked for guidance, supports application of the remedy in appropriate cases. Generally, judicial application of the remedy has found favor in cases in which the challenged agency action, while invalid, is not otherwise seriously deficient and in cases where vacation would have disruptive consequences.[294] Courts have also employed the remedy when vacatur would not serve the interests of the prevailing party that were prejudiced by the agency's error, and where vacation would not further the substantive aims of the statute authorizing the agency's challenged action.[295] This reasoning appears to drive a substantial number of decisions

[290] E.g., Regulatory Flexibility Act, 5 U.S.C. § 611(a)(4) (providing that where corrective action is required, the court is to remand the rule to the agency but may permit continued enforcement where it "is in the public interest."); Energy Policy and Conservation Act, 42 U.S.C. § 4306(b) (providing "remedies provided for in this subsection shall be in addition to, and not in substitution for, any other remedies provided by law").

[291] For example, the Federal Power Act and the Natural Gas Act both provide the reviewing court, upon filing of the administrative record, with exclusive jurisdiction "to affirm, modify, or set aside. . . in whole or in part" orders of the Federal Energy Regulatory Commission. Federal Power Act, 16 U.S.C. § 825(l)(b); Natural Gas Act, 15 U.S.C. § 717r(b).

[292] *See, e.g.*, 30 U.S.C. § 811(d).

[293] *See* Levin, *supra* note 2.

[294] 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).

[295] *E.g.*, Envtl. Def. Fund v. EPA, 898 F.2d 183, 190 (D.C. Cir. 1990) (holding "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

involving the remedy and arising under the Clean Air Act, which comprise a sizeable portion of its overall use. Remand without vacatur may also be appropriate in other circumstances not considered in the cases identified in this report or in the following recommendations.

On review of agency action, courts should uniformly and clearly identify whether they are vacating the agency action. Research indicates that ambiguous remand orders—*i.e.*, orders that do not clearly identify whether agency actions are also vacated—occur with some regularity. Such remedial ambiguity may lead to confusion among the parties and the public generally. Parties to the action, including agencies, may need to resort to motion practice to clarify the court's remedial intention. Where they do not, the general public—as well as individuals or entities whose legal rights or obligations are affected by the judicial decision—may be left in a state of uncertainty as to the legal status of the challenged agency action. This is particularly problematic where an agency decision regulates conduct and/or permits enforcement actions against individuals or entities.

When courts remand but do not vacate challenged agency actions, they should clearly say so. Many judicial opinions conclude with a summary of the nature of the order (*i.e.*, "the petition for review is dismissed," "vacated and remanded," "affirmed"). This is a commendable practice and should be extended to include language specific to remand without vacatur in cases where the remedy is employed. For example, the court might close its opinion with a simple statement that the case is "remanded but not vacated" or "remanded without vacatur."

Further, courts should consider explaining why remand without vacatur is appropriate in a particular case. D.C. Circuit opinions employing the remedy appear to uniformly identify the problems with the remanded agency decision, but they do not always explain the rationale supporting the court's remedial choice. This can create confusion about the appropriate response on remand because the remedy is sometimes applied to allow agencies to retain their decision while revisiting limited improprieties, but it may also be applied where a fundamental flaw in the agency's reasoning requires a new course of agency action and where the initial agency approach was not set aside simply as a matter of practical concern over disruption that would result.

If agency actions are not seriously deficient, it may be that less explanation of the decision to remand without vacatur is necessary. Less explanation may also be appropriate where the disruptive consequences of vacatur are easily understood. Relatively greater explication may be prudent where agency actions are clearly deficient but are nevertheless allowed to remain in place on remand.

AGENCY RESPONSES

Determining whether an agency has responded to a judicial remand can be a challenging endeavor, even for those familiar with the nuances of administrative law and especially for the more general public or those who lack access to commercial legal databases.[296] At a minimum,

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enhanced protection of environmental values covered by the [statutory Prevention of Significant Deterioration] provisions").

[296] Associate Dean and Professor Emily Meazell has called the task of identifying recurring litigation after an initial judicial remand "extraordinarily difficult" and has documented agency actions issued in response to remands that do not identify the remanding judicial opinion. Emily Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1786 (2011).

agencies should identify or post judicial opinions vacating or remanding agency regulations in the applicable rulemaking docket, whether on the agency website or on Regulations.gov. Agencies should also consider posting informational notices of vacated regulations on the agency's website. Finally, they should provide official notice of vacated regulations in the Federal Register.[297] Any such notices or postings should include a short statement specifically identifying the judicial opinion as well as the affected agency action, together with any unique identifiers for the action (like a Regulation Identifier Number or RIN).[298]

Ambitious agencies could go a great deal further to inform the public about their responses to judicial remands with or without vacatur. Several data elements may be needed to get a full picture, including: (1) information about the underlying decision, (2) information about the remand (*i.e.*, the judicial opinion), (3) documentation of the agency response on remand, and (4) records of any subsequent judicial (and sometimes (5) agency) proceedings.[299] While agencies may provide each of these data elements on their websites—a commendable practice—they rarely present them together with explicit or virtual connections. Rather, individual data elements, such as judicial opinions or agency orders or rules, tend to be siloed on different areas of agency websites. Agencies should strive to bridge these informational gaps, though doing so may require overcoming technological, resource, and bureaucratic barriers.

Prospectively, when responding to a judicial remand without vacation of an agency rule, agencies should provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their future plans. In any responsive agency action (rulemaking or otherwise), agencies should clearly identify the initial agency action together with any unique identifiers, as well as the remanding judicial opinion.

C. RECOMMENDATIONS

VALIDITY OF THE REMEDY

1. Remand without vacatur should be considered a valid remedy under the Administrative Procedure Act's judicial review provision, 5 U.S.C. § 706(2).
2. Absent an express legislative directive to the contrary in the text of the statute providing the basis for review, remand without vacatur should be considered a valid remedial approach by federal courts reviewing challenges to agency actions.

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[297] Anecdotal evidence indicates that occasionally the Code of Federal Regulations contains dated information. *See supra* note 247. Agencies must provide official notice of rescinded regulations through issuance of a final rule in the Federal Register, which they would normally do through the good cause exemption to the APA's notice-and-comment rulemaking requirements. 1 C.F.R. § 21.6; *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) (invoking the good cause exemption in 5 U.S.C. § 553(b)(B)).

[298] Dean Meazell suggests that agencies go so far as "to adopt uniform identifiers for responses to remands that enable valid and reliable searches in the Unified Agenda." Meazell, *supra* note 296.

[299] Commercial legal databases can help connect subsequent and prior judicial history, but they may not capture challenges to agency action that is responsive to a remand but adopted through an independent agency process (*i.e.*, a legal challenge to the promulgation of a new rule may not identify an earlier challenge to the prior distinct rule).

RECOMMENDATIONS TO COURTS

3. On review of agency action, reviewing courts should clearly identify in their judicial opinions whether they are vacating remanded agency actions.

4. Courts should consider whether remand without vacatur is an appropriate remedy on review of agency action. Agency actions that are unlawful or transgress statutory standards of review should normally be vacated by the reviewing court. Remand without vacatur may be appropriate where:

    a. The deficiencies in the agency's decision are not severe, and hence rehabilitation of the decision is possible;

    b. The consequences of vacation would be disruptive; or

    c. The interests of the prevailing parties who were prejudiced by the agency's error(s) would not be furthered by vacation.

5. Where courts remand but do not vacate agency actions, they should consider explaining the basis for their remedial choice.

RECOMMENDATIONS TO AGENCIES

6. Agencies should identify or post judicial opinions vacating or remanding agency regulations in the applicable public docket, whether on the agency website or on Regulations.gov. When a court remands but does not vacate an agency's rule or order, the agency should include a statement explicitly advising that the rule or order has not been vacated and is still in effect despite the remand.

7. When a regulation has been vacated, the promulgating agency should work with the Office of the Federal Register to remove the vacated regulation from the Code of Federal Regulations.

8. Agencies should provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their plans with respect to rules that are remanded without vacatur.

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

APPENDIX A: CASES EMPLOYING REMAND WITHOUT VACATUR, 1972-2013

Case Citation	Allied-Signal	Basis of review	Judge	Separate Opinion	Rulemaking or Adjudication
Nat'l Ass'n of Clean Water Agencies v. EPA, No. 11-1131 (D.C. Cir. Aug. 20, 2013).	No	42 U.S.C. 7607(d).	Sentelle, J.		Rulemaking
Black Oak Energy, LLC v. FERC, No. 08-1386 (D.C. Cir. Aug. 6, 2013).	Yes	16 U.S.C. 825l(b).	Griffith, J.		Adjudication
Mississippi v. EPA, No. 08-1200, 2013 U.S. App. LEXIS 14885 (July 23, 2013) (D.C. Cir. July 23, 2013).	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Delta Air Lines, Inc. v. Export-Import Bank of the U.S., 718 F.3d 974 (D.C. Cir. 2013).	Yes	5 U.S.C. 706(2).	Per Curiam		Adjudication
EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 2857 (2013).	Yes	42 U.S.C. 7607(d).	Kavanaugh, J.	Rogers, J. (dissenting)	Rulemaking
N. Air Cargo v. U.S. Postal Service, 674 F.3d 852 (D.C. Cir. 2012).	Yes	Exempt from APA, "in excess of statutory authority"	Silberman, J.	Sentelle, J. (concurring)	Adjudication
Nat'l Ass'n of Regulatory Util. Comm'rs v. DOE, 680 F.3d 819 (D.C. Cir. 2012).	No	5 U.S.C. 706(2).	Silberman, J.		Adjudication
In re People's Mojahedin Org. of Iran, 680 F.3d 832 (D.C. Cir. 2012).	No	8 U.S.C. 1189(c)(1).	Per Curiam		Adjudication
Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1 (D.C. Cir. 2011).	Yes	5 U.S.C. 706(2).	Ginsburg, J.		Rulemaking
Portland Cement Ass'n v. EPA, 665 F.3d 177 (D.C. Cir. 2011).	No	42 U.S.C. 7607(d).	Per Curiam	Brown, J. (concurring)	Rulemaking
Apache Corp. v. FERC, 627 F.3d 1220 (D.C. Cir. 2010).	Yes	15 U.S.C. 717r(b).	Kavanaugh, J.		Adjudication
Int'l Union v. MSHA, 626 F.3d 84 (D.C. Cir. 2010).	Yes	5 U.S.C. 706(2).	Rogers, J.		Rulemaking
Sierra Club v. EPA, No. 03-1205 2010 U.S. App. LEXIS 12020 (Unpublished) (June 10, 2010) (D.C. Cir. 40339).	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Am. Farm Bureau Fed'n v. EPA, 559 F.3d 512 (D.C. Cir. 2009).	Yes	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Catawba County v. EPA, 571 F.3d 20 (D.C. Cir. 2009).	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking

Case Citation	Allied-Signal	Basis of review	Judge	Separate Opinion	Rulemaking or Adjudication
NRDC v. EPA, 571 F.3d 1245 (D.C. Cir. 2009).	Yes	42 U.S.C. 7607(d).	Per Curiam	Rogers, J. (concurring in part, dissenting in part)	Rulemaking
Southeast Ala. Med. Ctr. v. Sebelius, 572 F.3d 912 (D.C. Cir. 2009).	Yes	5 U.S.C. 706(2).	Garland, J.		Rulemaking
New York v. EPA, No. 06-1148 with 06-1149, 2009 U.S. App. LEXIS 20050 (unpublished) (Sept. 4, 2009) (D.C. Cir. 2009).	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
North Carolina v. EPA, 550 F.3d 1176 (D.C. Cir. 2008).	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Williston Basin Interstate Pipeline Co. v. FERC, 519 F.3d 497 (D.C. Cir. 2008).	Yes	15 U.S.C. 717r(b).	Williams, J.		Adjudication
Alpharma, Inc. v. Leavitt, 460 F.3d 1 (D.C. Cir. 2006).	Yes	5 U.S.C. 706(2).	Garland, J.		Adjudication
AT&T Inc. v. FCC, 452 F.3d 830 (D.C. Cir. 2006).	No	5 U.S.C. 706(2).	Tatel, J.		Adjudication
New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005), *mandamus held in abeyance*, 2007 U.S. App. LEXIS 465 (D.C. Cir. Jan. 9, 2007) (ordering EPA to file status reports in two and nine months).	No	42 U.S.C. 7607(d).	Per Curiam	Williams, J. (concurring)	Rulemaking
Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005), *remanded and vacated*, 443 F.39 890 (D.C. Cir. 2006) (with retained jurisdiction and a stay of the mandate).	Yes	5 U.S.C. 706(2).	Ginsburg, C.J.		Rulemaking
Advocates for Highway & Auto Safety v. FMCSA, 429 F.3d 1136 (D.C. Cir. 2005).	Yes	5 U.S.C. 706(2).	Edwards, J.		Rulemaking
Bluewater Network v. EPA, 370 F.3d 1 (D.C. Cir. 2004).	No	42 U.S.C. 7607(d).	Edwards, J.		Rulemaking
Ne. Md. Waste Disposal Auth. v. EPA, 358 F.3d 936 (D.C. Cir. 2004).	Yes	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Arteva Specialties S.A.R.L. v. EPA, 323 F.3d 1088 (D.C. Cir. 2003).	No	42 U.S.C. 7607(d).	Henderson, J.		Rulemaking
La. Fed. Land Bank Ass'n v. Farm Credit Admin., 336 F.3d 1075 (D.C. Cir. 2003).	Yes	5 U.S.C. 706(2).	Ginsburg, C.J.		Rulemaking
Am. Corn Growers Ass'n v. EPA, 291 F.3d 1 (D.C. Cir. 2002).	No	42 U.S.C. 7607(d).	Per Curiam	Garland, J. (concurring in part, dissenting in part)	Rulemaking

Case Citation	Allied-Signal	Basis of review	Judge	Separate Opinion	Rulemaking or Adjudication
U.S. Telecom Ass'n v. FBI, 276 F.3d 620 (D.C. Cir. 2002).	Yes	Not identified.	Williams, J.		Rulemaking
WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002).	Yes	5 U.S.C. 706(2).	Williams, J.		Adjudication
Sugar Cane Growers Coop. of Fla., Inc. v. Veneman, 289 F.3d 89 (D.C. Cir. 2002).	Yes	5 U.S.C. 706(2).	Silberman, J.		Rulemaking
Milk Train, Inc. v. Veneman, 310 F.3d 747 (D.C. Cir. 2002), *reh'g en banc denied*, 2003 U.S. App. LEXIS 3736 (D.C. Cir. Feb. 27, 2003).	Yes	5 U.S.C. 706(2).	Rogers, J.	Sentelle, J. (dissenting)	Rulemaking
Sinclair Broad Group v. FCC, 284 F.3d 148 (D.C. Cir. 2002), *reh'g en banc denied*, 2002 U.S. App. LEXIS 16619 (D.C. Cir. Aug. 12, 2002).	No	5 U.S.C. 706(2).	Rogers, J.	Sentelle, J. (concurring in part, dissenting in part)	Rulemaking
Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002).	Yes	5 U.S.C. 706(2).	Ginsburg, C.J.		Adjudication
Appalachian Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001), *petition for review denied,* West Virginia v. EPA, 362 F.3d 861, 864 (D.C. Cir. 2002) (finding that "EPA satisfied its obligation on remand to engage in reasoned decisionmaking and explain its choice of methodology").	No	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
Sprint Commuc'ns Co., L.P. v. FCC, 274 F.3d 549 (D.C. Cir. 2001).	Yes	5 U.S.C. 706(2).	Williams, J.		Adjudication
Air Trans. Ass'n of Can. v. FAA, 276 F.3d 599 (D.C. Cir. 2001), *subsequent history at* Air Transp. Ass'n of Canada v. FCC, 323 F.3d 1093 (D.C. Cir. 2003) (vacating regulations earlier remanded without vacatur).	No	49 U.S.C. 46110(a).	Per Curiam		Rulemaking
Nat'l Lime Ass'n v. EPA, 233 F.3d 625 (D.C. Cir. 2000), *amended on other grounds,* 2001 U.S. App. LEXIS 3037 (D.C. Cir. Feb. 14, 2001).	No	42 U.S.C. 7607(d).	Tatel, and Ginsburg, J.J.		Rulemaking
Michigan v. EPA, 213 F.3d 663 (D.C. Cir. 2000).	No	42 U.S.C. 7607(d).	Per Curiam	Sentelle, J. (dissenting)	Rulemaking
Am. Trucking Ass'ns v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), *aff'd in part, rev'd in part*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).	No	42 U.S.C. 7607(d).	Per Curiam	Tatel, J. (dissenting in part)	Rulemaking
Sierra Club v. EPA, 167 F.3d 658 (D.C. Cir. 1999).	No	42 U.S.C. 7607(d).	Williams, J.		Rulemaking

Case Citation	Allied-Signal	Basis of review	Judge	Separate Opinion	Rulemaking or Adjudication
Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999), *mandamus granted*, 229 F.3d 269 (D.C. Cir. 2000).	Yes	5 U.S.C. 706(2).	Rogers, J.		Adjudication
County of L.A. v. Shalala, 192 F.3d 1005 (D.C. Cir. 1999).	No	5 U.S.C. 706(2).	Wald, J.		Interpretive rulemaking
MCI Telecomm. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998).	No	5 U.S.C. 706(2).	Per Curiam		Adjudication
Davis Cty Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454 (D.C. Cir. 1997).	Yes	42 U.S.C. 7607(d).	Per Curiam		Rulemaking
United Distrib. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996).	No	15 U.S.C. 717r(b).	Per Curiam		Rulemaking
Am. Medical Ass'n v. Reno, 57 F.3d 1129 (D.C. Cir. 1995).	No	5 U.S.C. 706(2).	Wald, J.		Rulemaking
A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484 (D.C. Cir. 1995).	Yes	5 U.S.C. 706(2).	Buckley, J.		Adjudication
Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994), *vacated*, 139 F.3d 221 (D.C. Cir. 1998) (ordering the SEC to dismiss challenged enforcement action).	No	5 U.S.C. 706(2).	Silberman, J.	Randolph, J. (dissenting); Reynolds, J. (concurring in part and dissenting in part)	Adjudication
TransCanada PipeLines Ltd. v. FERC, 24 F.3d 305 (D.C. Cir. 1994) (orders on remand substantially affirmed at Southeastern Mich. Gas. Co. v. FERC, 133 F.3d 34 (D.C. Cir. 1998).	No		Sentelle, J.		Adjudication
Engine Mfrs. Ass'n v. EPA, 20 F.3d 1177 (D.C. Cir. 1994).	No		Ginsburg, J.		Rulemaking
Am. Water Works Ass'n v. EPA, 40 F.3d 1266 (D.C. Cir. 1994).	Yes		Ginsburg, J.		Rulemaking
Phil. Gas Works & Lighting Co. v. FERC, 989 F.2d 1246 (D.C. Cir. 1993).	N/A		Silberman, J.	Randolph, J. (dissenting)	Adjudication
Allied-Signal, Inc. v. USNRC, 988 F.2d 146 (D.C. Cir. 1993).	N/A		Williams, J.		Rulemaking
Timpinaro v. SEC, 2 F.3d 453 (D.C. Cir. 1993), *amended by* 1993 U.S. App. LEXIS 35819 (D.C. Cir. Nov. 9, 1993) (denying request to vacate but amending so as to retain jurisdiction and to order, *sua sponte*, SEC to report in 90 days).	N/A		Ginsburg, J.		Rulemaking
Fertilizer Inst. v. EPA, 935 F.2d 1303 (D.C. Cir. 1991).	N/A		Henderson, J.		Rulemaking

Case Citation	Allied-Signal	Basis of review	Judge	Separate Opinion	Rulemaking or Adjudication
Tex Tin Corp. v. EPA, 935 F.2d 1321 (D.C. Cir. 1991), *subsequent proceedings at* Tex Tin Corp. v. EPA, 992 F.2d 353 (D.C. Cir. 1993) (finding EPA explanation issued in response to earlier remand without vacatur to be arbitrary and capricious).	N/A		Per Curiam		Rulemaking
Int'l Union, UMWA v. FMSHA, 924 F.2d 340 (D.C. Cir. 1991).	N/A		Henderson, J.		Adjudication
UMWA Int'l Union v. FMSHA, 928 F.2d 1200 (D.C. Cir. 1991).	N/A		Edwards, J.		Adjudication
Massachusetts v. NRC, 924 F.2d 311 (D.C. Cir. 1991).	N/A		Buckley, J.		Adjudication
UAW v. Dole, 938 F.2d 1310 (D.C. Cir. 1991).	N/A		Williams, J.	Williams, J. (concurring); Henderson, J. (concurring)	Rulemaking
Envtl. Def. v. EPA, 898 F.2d 183 (D.C. Cir. 1990).	N/A		Williams, J.		Rulemaking
Int'l Union, UMWA v. FMSHA, 920 F.2d 960 (D.C. Cir. 1990).	N/A		Williams, J.		Adjudication
Nat'l Treasury Emp's Union v. Horner, 854 F.2d 490 (D.C. Cir. 1988).	N/A		Ginsburg, J.		Rulemaking
Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 809 F.2d 875 (D.C. Cir. 1987) (EPA response on remand affirmed at Nat'l Coal. Against the Misuse of Pesticides v. Thomas, 815 F.2d 1579 (D.C. Cir. 1987)).	N/A		Starr, J.		Rulemaking
Md. People's Counsel v. FERC, 768 F.2d 450 (D.C. Cir. 1985).	N/A		Per Curiam		Rulemaking
Am. Fed'n of Gov't Employees, AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981).	N/A		Tamm, J.		Rulemaking
Concerned about Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977).	N/A		Tamm, J.	Leventhal, J. (also for the court)	NEPA
Greyhound Corp. v. ICC, 551 F.2d 414 (D.C. Cir. 1977), *subsequent proceedings at* Greyhound Corp. v. ICC, 215 U.S. App. D.C. 322, 668 F.2d 1354, 1364 (D.C. Cir. 1981) (setting aside Interstate Commerce Commission order issued in response to earlier remand).	N/A		Per Curiam		Adjudication
Rodway v. USDA, 514 F.2d 809 (D.C. Cir. 1975).	N/A		Skelly Wright, J.		Rulemaking
Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972).	N/A		Leventhal, J.		Rulemaking

APPENDIX B: GENERIC AGENCY QUESTIONNAIRE

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

REMAND WITHOUT VACATUR

QUESTIONS FOR AGENCIES

The Administrative Conference is currently studying the judicial remedy of remand without vacatur, wherein a court remands an agency decision for reconsideration while allowing it to remain in place. The Conference's research is focused on several major areas, including: empirics, legality and advisability, and implementation practicalities. An important component of this study is examining how this remedy affects federal agencies. We appreciate your assistance in responding to the following related questions.

Empirics

- Conference staff examined judicial opinions in the D.C. Circuit Court of Appeals employing remand without vacatur and identified a number of cases in which the agency was subject to this remedy. We welcome any additional examples you can provide of agency cases employing this remedy in the D.C. Circuit or otherwise notable for discussion of the remedy.
- Excepting the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 706, are you aware of any statutes providing for judicial review of actions by the agency that authorize or permit remand without vacatur? If so, which statutes?
- Does the agency ever request remand without vacatur in judicial proceedings?
    - If yes, does the agency have any policies or criteria to determine whether and when to make such a request (*e.g.*, reasons for request, timing of request, etc.)?
    - If you have requested remand without vacatur in legal proceedings, are there any related briefs or pleadings that you can provide (if possible with responses thereto)?
- If remand without vacatur has ever been imposed on the agency at the request of another party has the agency ever opposed this request? If so, on what basis?
    - If so, or in other cases of remand without vacatur, has the agency taken subsequent steps to rescind or stay the agency decision pending reconsideration? Please provide specific examples, if possible.

Legality and advisability

- Does the agency have a position on the legality or advisability of remand without vacatur?
- Has your agency (including through representation by the Department of Justice) defended the legality of remand without vacatur under the A.P.A., 5 U.S.C. 706(2), in a judicial proceeding? If so, what was the legal basis for your support?
- Do the agency's views on remand without vacatur vary depending on the basis of judicial review (*i.e.*, under a judicial review statutory provision specific to an agency action or under the general judicial review provisions of the A.P.A., 5 U.S.C. § 706)?

- What are the general benefits and costs to the agency of remand without vacatur?
- Does the agency view the remedies of vacatur with a stay of the judicial mandate and remand without vacatur as comparable? How does the agency experience the difference, if any, between these two remedies?
- Critics of remand without vacatur have argued that the remedy can create *ex ante* incentives for agencies to engage in cost-saving reasoning in writing regulations, resulting in insufficient analysis during rulemaking.[1] How would you respond to these concerns?

Implementation Practicalities.

- How does the agency treat judicial opinions that remand an agency rule or decision without specifying whether or not it has been vacated? Does enforcement continue?[2]
- Does the agency have procedures or protocols—for example, relating to tracking, timeframes, or enforcement—in place to guide agency staff in responding to judicial remands generally and remands without vacatur specifically?
- Agencies have been criticized in the academic literature for alleged failures to respond expeditiously to judicial remands of agency decisions. How does your agency ensure a timely response to judicial remands?
    - Are there any examples where the agency was not able to respond expeditiously to a judicial remand without vacatur? If so, what impeded the agency's progress?
- Some have recommended that courts remanding without vacating agency decisions should regularly put the agencies under a deadline for curing the deficiency. How would such a judicial policy work out, from the agency's point of view?
- Does the agency notify the public that an agency rule or action has been remanded? If so, how and where does notification occur (*i.e.*, *Federal Register*, online, etc.)? Please provide relevant examples, if possible.
    - Are remanded agency regulations included in the Unified Agenda of Regulatory or Deregulatory Actions or in agency specific regulatory agendas?
- In taking action(s) in response to a remand, including publication of prospective actions, does the agency identify the judicial decision remanding the prior agency action (*e.g.*, always, sometimes, or never)? Please provide relevant examples, if possible.
- Does the agency have any suggestions for agency best practices in handling cases that are remanded without vacatur? For judicial best practices in remanding cases without vacatur?

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[1] Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 124 (2001).

[2] For example, in Solite Corp v. EPA, 952 F.2d 473 (D.C. Cir. 1991), the D.C. Circuit Court of Appeals upheld most of a set of EPA's rules governing handling of varied hazardous wastes, remanding only with respect to the treatment of one particular waste. Professor Bill Jordan, in his article *Ossification Revisited*, 94 N.W. L. REV. 393, 427 (2000), reported based on interviews with EPA employees that EPA's legal position was that the rule had not been vacated, but that the court's remand may have led to some agency hesitation in taking enforcement action with respect to the rule.