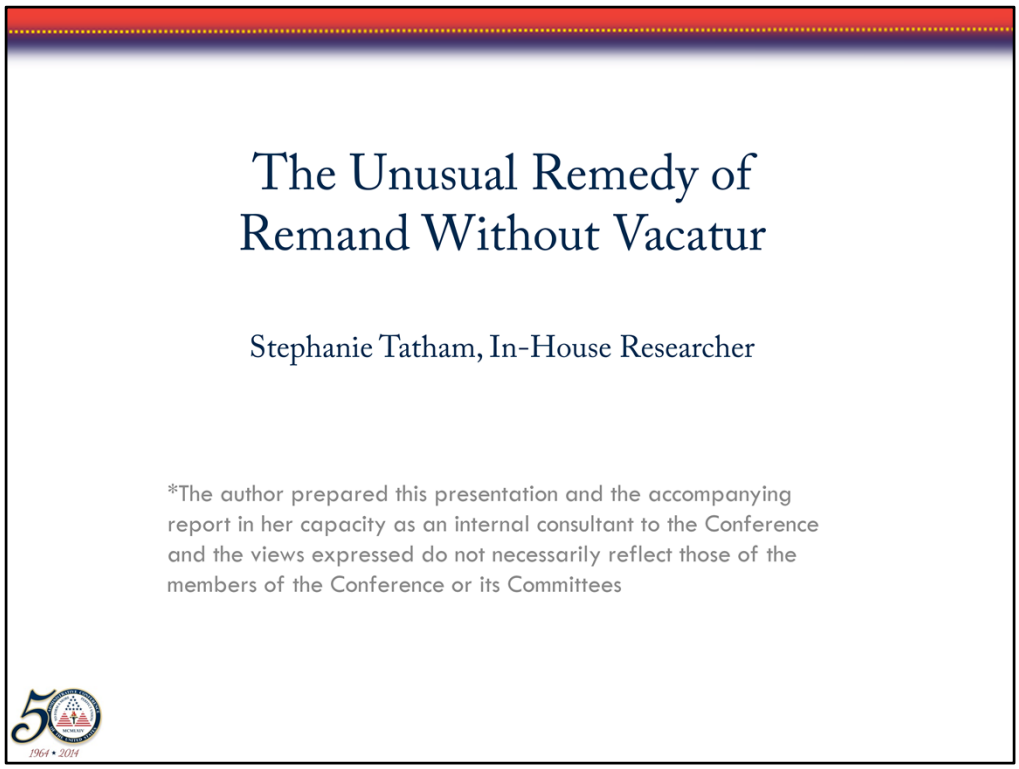
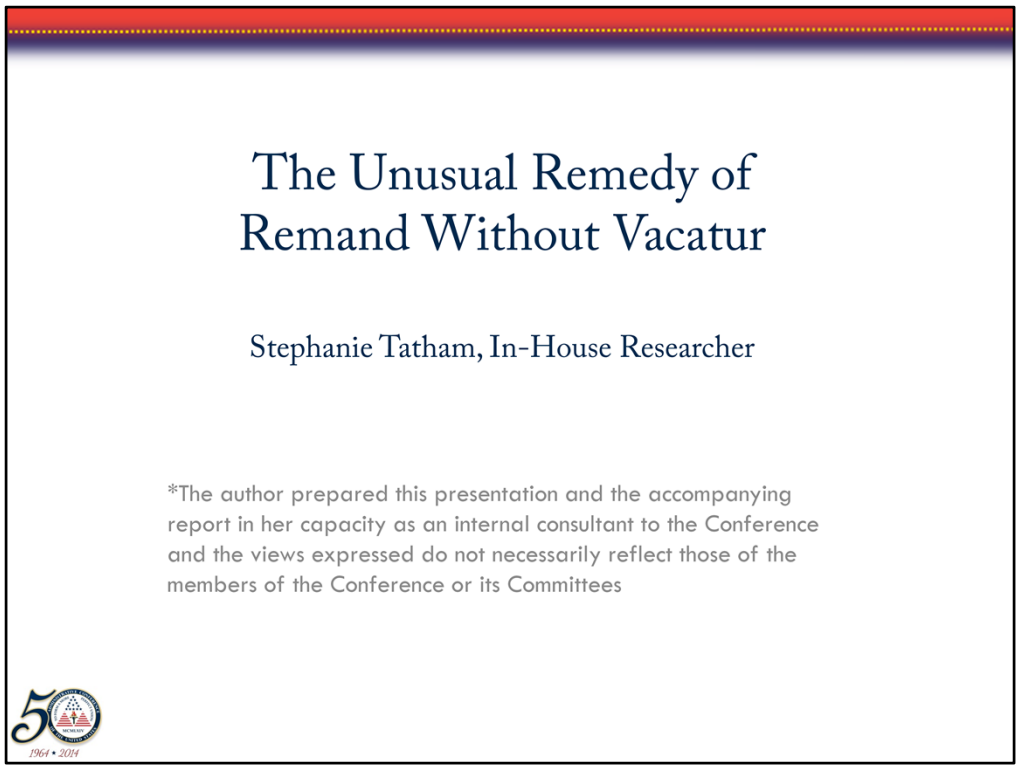


Thanks very much Gretchen, and thank you also to the agency attorneys and ACUS members with whom I spoke while researching my report, especially those from the Federal Communications Commission, the Federal Energy Regulatory Commission, and the Environmental Protection Agency. Their perspectives were invaluable to understanding how agencies experience remand without vacatur and in crafting the Committee's recommendations.

My report is called "The Unusual Remedy of Remand Without Vacatur." This title went through several iterations, thanks to Alan Morrison, who objected strenuously to my calling the remedy "extraordinary" and who kindly offered a variety of alternative formulations, including the possibility of omitting a descriptor entirely, which would have left us with simply "The Remedy of Remand Without Vacatur." I considered that approach, but settled on "unusual" for **four** reasons. **0:50**

First, remand without vacatur is, as an empirical matter, not the ordinary remedy employed by courts reviewing agency actions. I studied the remedy in the DC Circuit and found that since 2000 it has been applied, on average, only about three times per year. By way of comparison, merits based terminations of administrative appeals in the DC Circuit averaged 150 per year between 2000 and 2012. While it remains a rarity, remand without vacatur has been employed with increasing average frequency since it was first used in the 1970s. It is applied most often to cases involving the EPA and in the DC Circuit. **1:40 [KEEP SLIDE]**



Although my research focused on the DC Circuit, I also found that remand without vacatur has been occasionally employed in the Courts of Appeals for the Federal, First, Third, Fifth, Eighth, Ninth and Tenth Circuits. But only 10 such cases were identified, in an admittedly non-comprehensive review. No cases were identified in which a federal Court of Appeals held that the remedy was unlawful under the Administrative Procedure Act or another statutory standard of review. **2:00**

The **second** reason remand without vacatur is unusual is that it may be employed to avoid severely disruptive consequences of vacation. For example, in *North Carolina versus EPA*, the DC Circuit had originally vacated EPA's Clean Air Interstate Rule, but it reconsidered this decision after EPA argued that the rule would prevent an estimated 13,000 deaths per year in 2010 and 17,000 premature deaths by 2014. This case is an extreme example, but it highlights the potential benefits the remedy can offer when vacating an agency rule or order would have immediately harmful consequences.

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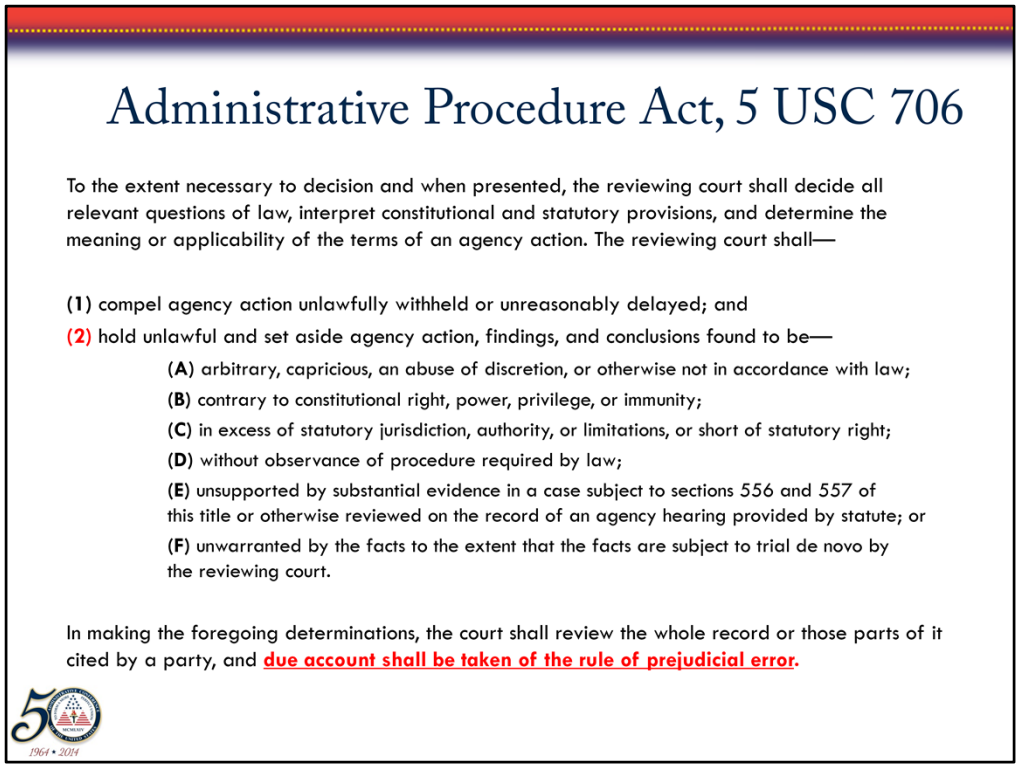

Third, the remedy is unusual because it permits an agency's decision to remain in place despite a finding of harmful agency error. Section 706 of the APA directs courts to take due account of the rule of prejudicial error. The Supreme Court (including in a 2009 veteran's benefits case litigated by Chris Meade, our Public Member from the Treasury Department) has interpreted this to mean that an agency's actions will be affirmed where its errors are found to be harmless or non-prejudicial. Usually, if an agency's error is harmful or prejudicial to the interests of the challenging party, then the agency's decision is set aside, in whole or in part. With remand without vacatur however, the agency's decision remains in effect. Remarkably, the remedy has been employed even where there are serious, possibly insurmountable, errors or flaws in the agency's reasoning, choice of action, or administrative processes. **3:30**

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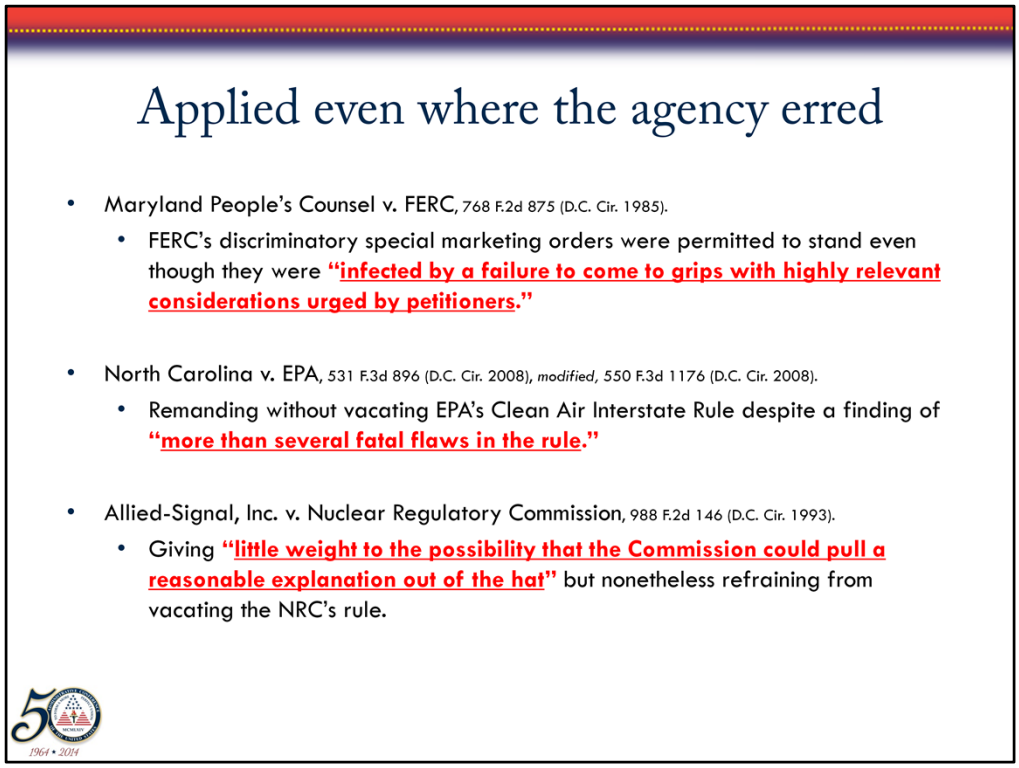

For example, in *Maryland People's Counsel*, the court found that the agency's orders were "infected by a failure to come to grips with highly relevant considerations urged by petitioners." In *North Carolina*, the D.C. Circuit remanded without vacating the Clean Air Interstate Rule despite a finding of "more than several fatal flaws in the rule." In *Allied-Signal*, the court gave "little weight to the possibility that the Commission could pull a reasonable explanation out of the hat," but nonetheless refrained from vacating its rule. Of course, remand without vacatur is also used in cases where the errors are less serious, and the court found disruption to be unnecessary because the agency's decision could be readily corrected. **4:15**

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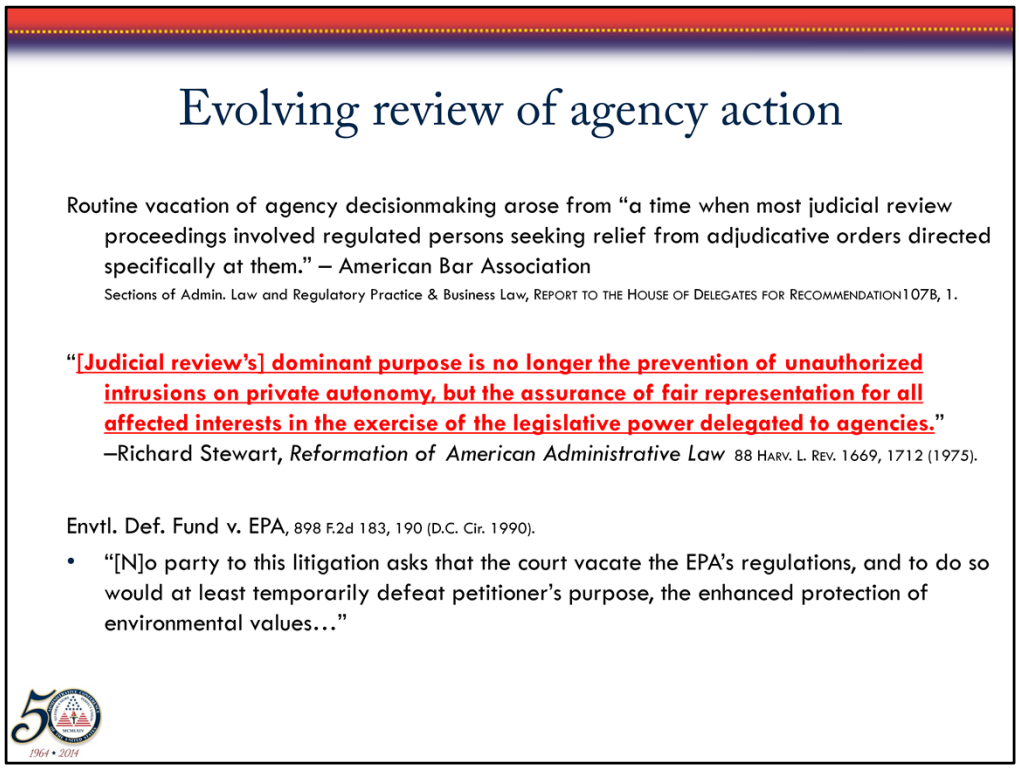

A **fourth** and final reason remand without vacatur is an unusual remedy is that its application deviates from long-standing legal norms (just as my pronunciation of vacatur evidently deviates from the classical and ecclesiastical Latin), and for good reason. According to the ABA, routine vacation of agency decisionmaking arose from "a time when most judicial review proceedings involved regulated persons seeking relief from adjudicative orders directed specifically at them." Judicial review of agency action has evolved since the APA was adopted in 1946. It no longer focuses exclusively on "the prevention of unauthorized intrusions on private autonomy." Instead, the "dominant focus" is "the assurance of fair representation for all interests" who are affected by the exercise of agency power. **~5:00**

For example, the Supreme Court's 1967 decision in *Abbott Laboratories* authorized legal challenges to agency actions by persons not subject to enforcement orders. Preenforcement review and the post-1968 liberalization of standing doctrine, permitted litigants for the first time to challenge rules or orders they support but would prefer to strengthen. For these plaintiffs, a judicial remand without vacatur that orders the agency to consider a more stringent position may be the only path to relief after a finding of prejudicial agency error. The same might be said for deregulatory plaintiffs seeking expanded exemptions from an agency rule or order. **5:40**

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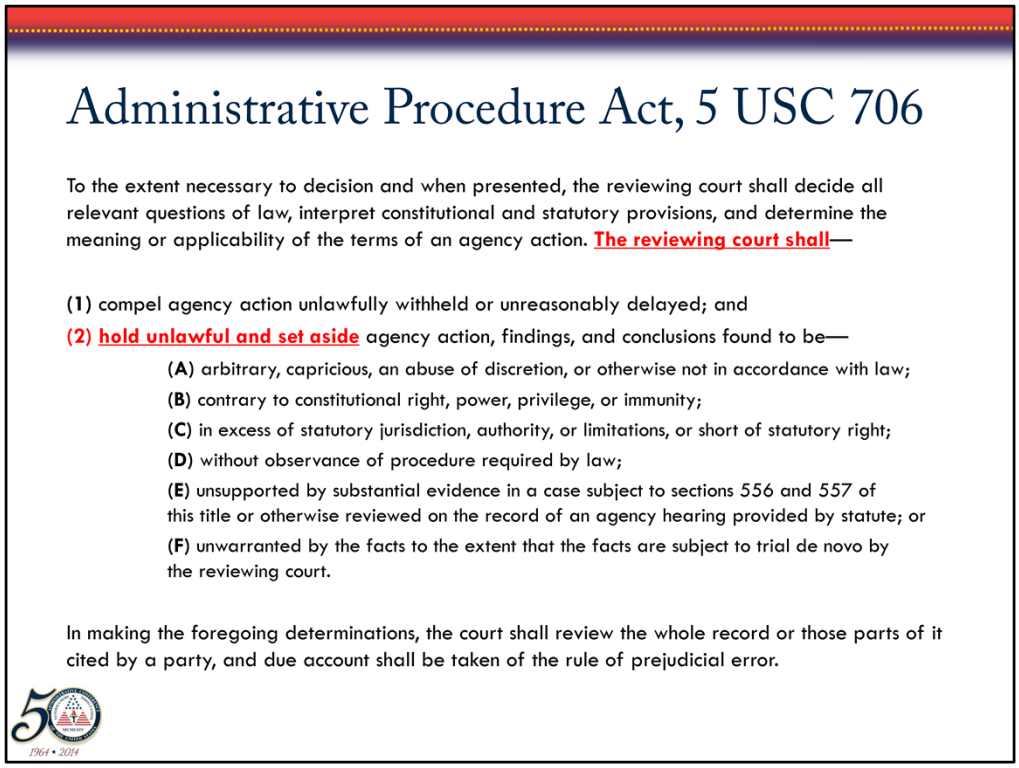

Despite the evolution in judicial review, the DC Circuit's Judge Randolph and Senior Judge Sentelle have questioned the legality of the remedy under the plain language of the APA, which provides that "The reviewing court shall… hold unlawful and set aside agency action, findings, and conclusions" found to violate its standards of review. However, textualist opposition to application of the remedy under a literal construction of the APA represents a minority perspective both on the bench and in the academic literature. **6:15**

Professor Levin's work has helped us to understand that remand without vacatur fits comfortably within a long tradition of judicial equitable remedial discretion and the American Bar Association recommends that the "Administrative Procedure Act should be construed, or if necessary amended, to permit [the] exercise of such discretion." I hope that any debate today will be similarly settled in favor of judicial authority to use the remedy of remand without vacatur under the APA. **6:40**

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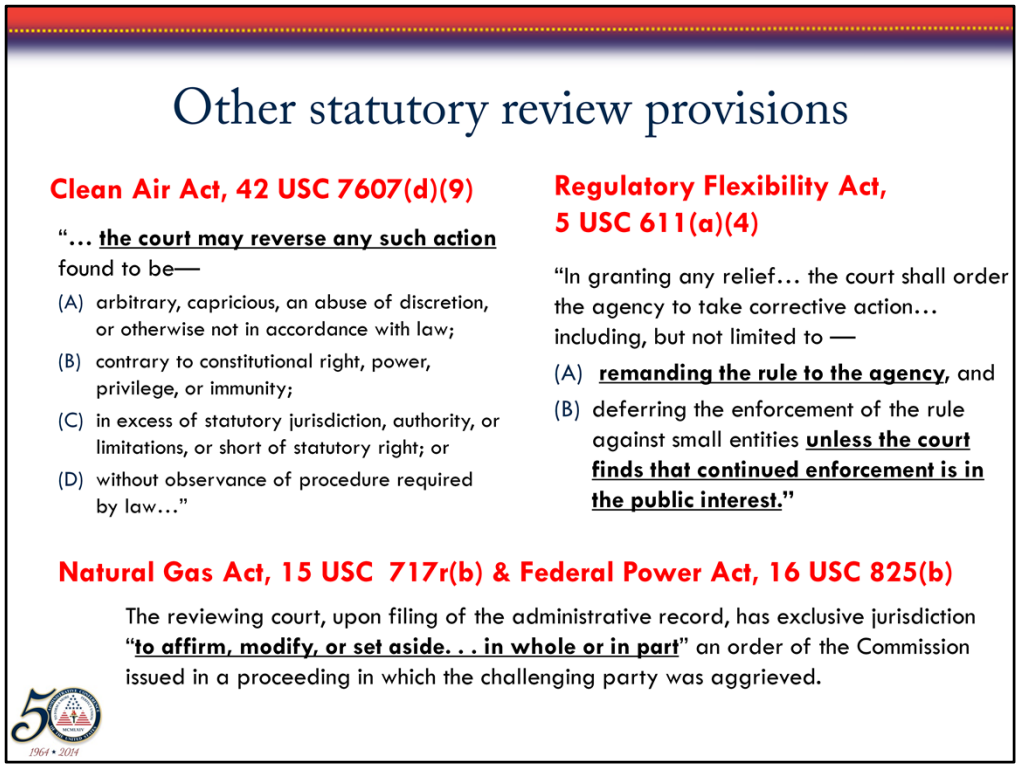

And if there are any supporters of textualism in the audience, you may be interested in my finding that the remedy is applied more frequently on review of agency action under special statutory review provisions, such as those of the Clean Air, Natural Gas, or Federal Power Acts. Less than half of cases employing the remedy since 1999, 16 of 41, were APA challenges. Special statutory review provisions may naturally differ from the APA, and those that I studied lack the clear statutory directive the Supreme Court requires for a finding of Congressional intent to displace judicial equitable authority. In these cases as well, I hope that you will recognize remand without vacatur as an authorized, if unusual, remedy.

Thank you very much, I'll now turn the microphone over to the Chair of the Committee on Judicial Review, Ron Levin. **7:30**

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