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## AGENCY BEHAVIOR AND DISCRETION ON REMAND

Robert L. Glicksman\* & Emily Hammond\*\*

The concept of discretion pervades both administrative law and the on-the-ground work of administrative agencies. Despite the prevailing focus of administrative law on judicial review of agency discretion,<sup>1</sup> scholars are increasingly asking what we can learn about agency discretion in the absence of judicial review.<sup>2</sup> Indeed, such work prompts a reexamination of administrative law and our assumptions about agencies' legitimacy.

When a court invalidates an agency action, the agency's response on remand is often left open to the agency's discretion. That is, agencies frequently have significant latitude in whether, how, and when (if ever) to remedy the initial flaw. In the absence of a court's retaining jurisdiction or issuing a mandamus,<sup>3</sup> the agency action must fit back into a long list of agency priorities, and may also be the victim of new presidential policies or changes in funding. Although a subsequent final agency action will likely be subject to review, our focus here is on the "in-between": agency behavior following remand.<sup>4</sup>

Compare the following examples. In the 2015 decision *Michigan v. EPA*, the Supreme Court held that EPA had improperly interpreted language in the Clean Air Act (CAA) to preclude the agency from considering costs in determining whether it was "appropriate and necessary" to regulate hazardous air emissions from power plants.<sup>5</sup> With this holding in place, the D.C. Circuit considered the matter of disposition on remand: should the rule be remanded with or without vacatur? In an unusual twist, most of the electric utilities that had challenged the rule asked the court to remand without vacatur, because they had already made investments in

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<sup>1</sup> E.g., M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1413 (2004) ("The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power.").

<sup>2</sup> This Symposium provides a much-needed variety of perspectives on precisely this issue. For other works engaging the topic, see, e.g., Robert L. Glicksman & David L. Markell, *Dynamic Governance in Theory and Application Part I*, 58 ARIZ. L. REV. 563 (2016); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313 (2013); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577 (2011). Other scholars have explored agency aversion to the existence of discretion, which may increase the time and expense of pre-decisional procedures. See J.B. Ruhl & Kyle Robisch, *Agencies Running from Discretion*, 58 WM. & MARY L. REV. 97 (2016).

<sup>3</sup> Cf. *Solenex LLC v. Jewell*, 156 F. Supp. 3d 83 (D.D.C. 2015) (finding that the Bureau of Land Management (BLM) had engaged in unreasonable delay for purposes of 5 U.S.C. § 706(1) (2012), in failing to rule on a request to renew a natural gas exploration permit for 29 years, and ordering the agency within three weeks "to submit, and to stick to, an accelerated and fixed schedule" for doing so).

<sup>4</sup> During this Symposium's discussion, Professor Mark Seidenfeld noted that our topic *requires* judicial review, which seems contrary to the Symposium's focus on agency action in the absence of judicial review. He is correct, of course, that the predicate of our topic is judicial review. Still, we see parallels between agency discretion on remand and agency discretion in the absence of review.

<sup>5</sup> 135 S. Ct. 2699 (2015).

pollution control equipment for which they were obtaining cost recovery.<sup>6</sup> On remand—indeed without vacatur<sup>7</sup>—EPA quickly reissued the rule in early 2016, relying on the already-existing record, which included significant cost/benefit data assembled following the decision to regulate.<sup>8</sup> EPA published the new rule just before the anticipated cut-off date for the Congressional Review Act,<sup>9</sup> in the final year of President Obama’s second term.

That quick response stands in contrast to stories like that of EPA’s years-long failure to address an interest group’s petition to ban the pesticide chlorpyrifos. The saga began with the 2000 petition, and by 2007, the interest group filed a mandamus action against EPA to force a response to the petition.<sup>10</sup> The court refused to grant relief, noting that EPA had a “concrete timeline” for issuing a final response by February 2014.<sup>11</sup> When EPA failed to issue a final response to the administrative petition in February 2014 as promised, the interest group filed a renewed petition for a writ of mandamus in September 2014. While that petition was pending, EPA issued a preliminary final denial of the administrative petition.<sup>12</sup> Thereafter, EPA continued to backtrack on its deadlines for itself, moving them from summer 2015 to April 2016 and beyond, until a court ultimately ordered EPA to issue its final decision by March 2017.<sup>13</sup> Perhaps notably, this story spans several presidential administrations, and will include President Trump’s term beginning in January 2017.<sup>14</sup>

What is the extent of agency discretion following a remand, and how do agencies use that discretion? There are likely many variables relevant to those questions. In this Essay, we sketch the interplay of four variables in order to form some preliminary hypotheses and lay a foundation

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<sup>6</sup> Oral Argument at 36:12 to 36:58, *White Stallion Energy Ctr. v. EPA*, 748 F.3d 1222 (D.C. Cir. Dec. 4, 2015) (No. 12-1100).

<sup>7</sup> *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015).

<sup>8</sup> Much of this data is summarized in Justice Kagan’s dissenting opinion. *Michigan v. EPA*, 135 S. Ct. at 1719-22 (Kagan, J., dissenting). See also Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units, 81 Fed. Reg. 24,420 (Apr. 25, 2016).

<sup>9</sup> The Congressional Review Act, 5 U.S.C. §§ 801-802 (2012), though rarely invoked, can create delays for administrative regulations—particularly in conjunction with a new presidential term. See Timothy Noah, *Obama rushes out rules to guarantee legacy*, POLITICO, May 18, 2016 (describing interplay with presidential changes), at <http://www.politico.com/story/2016/05/obama-rushes-out-rules-to-guarantee-legacy-223301>. More generally, the Act may induce strategic behavior by agencies. See Note, *OIRA Avoidance*, 124 HARV. L. REV. 994, 1005 (2011).

<sup>10</sup> *In re Pesticide Action Network N. Am.*, 532 Fed. Appx. 649 (9th Cir. 2013).

<sup>11</sup> *Id.* at 651.

<sup>12</sup> Chlorpyrifos Registration Review; Revised Human Health Risk Assessment; Notice of Availability, 80 Fed. Reg. 1909 (Jan. 14, 2015).

<sup>13</sup> *In re Pesticide Action Network*, 840 F.3d 1014 (9th Cir. 2016); *In re Pesticide Action Network*, 798 F.3d 809 (9th Cir. 2015).

<sup>14</sup> See generally Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011) (chronicling other examples of long agency delays following remand) [hereinafter Hammond, *Dialogue*]. Other examples, such as that of EPA’s actions involving greenhouse gas emissions from new motor vehicles following the decision *Massachusetts v. EPA*, 549 U.S. 497 (2007), are similarly rich. Compare Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,654 (July 30, 2008) (Bush administration) (providing reasons not to regulate greenhouse gas emissions under CAA following *Massachusetts v. EPA* remand), with Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Obama administration) (finding greenhouse gases cause or contribute to endangerment of public health and welfare pursuant to CAA).

for future empirical work. First, there is the question of the judicial remedy: whether a decision is remanded with or without vacatur, whether there is an injunction, and what the scope of the remedy is all shape how an agency might behave. Second is the matter of time—both how much freedom the agency has in crafting a timeline, and the actual amounts of time the agency takes following the remand to reach initial, intermediate, and final responsive agency actions (if any). Third is the valence of the agency action, that is, whether it is more, or less, aligned with the interests of the group winning the remand and with the then-current presidential administration. Finally, we consider the timing of the presidential administration, paying particular attention to changes that occur or are anticipated to occur over the timeframe at issue.

We suspect that, barring a specific and enforceable judicial directive, agencies have almost as much discretion as they would in the first instance, when deciding whether and how to regulate after a judicial remand. Moreover, we hypothesize that whether agencies act with haste or stall is at least somewhat dependent on the alignment of the agency’s policy position with the incumbent President and any anticipated uncertainty regarding a future President. Of course, the vigilance of the original litigants, budgetary constraints, newly created statutory deadlines, and a variety of other factors will influence what happens on remand. But for present purposes, we hope that this initial exploration will yield a useful set of testable hypotheses that can inform more detailed future work.

This Essay proceeds as follows. In Part I’s background section below, we briefly describe the nature of judicial review before elaborating our four variables. Next, in Part II we present three case studies to illustrate how our variables interact. Following this exercise, in Part III we propose a set of hypotheses for future empirical work. We conclude with some observations about what this initial look says about agency behavior, discretion, and ultimately, legitimacy.

## **I. BACKGROUND: AGENCY DISCRETION, JUDICIAL REVIEW, AND THE FOUR VARIABLES**

As noted above, we focus on four variables that may hold predictive value as to agencies’ exercise of discretion following judicial remand: the nature of the remedy; the timeline; the valence of the decision; and the presidential administration. To give those variables context, a brief review of some of the principles of judicial review—and their interplay with agency discretion—may be helpful.

Agencies regularly exercise discretion in implementing delegated statutory authority. Indeed, many of their statutory mandates are broadly worded, requiring regulation “in the public interest” or for “just and reasonable” purposes.<sup>15</sup> Judicial review of the exercise of that discretion tends to be deferential.<sup>16</sup> Sometimes, however, judicial review of discretionary agency

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<sup>15</sup> See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 473-76 (2001) (providing further examples).

<sup>16</sup> Too deferential, some would say—at least in certain contexts. See, e.g., Emily Hammond, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733 (2011); Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372-77 (1986) (taking issue with excessive deference to agency statutory interpretations). Review of discretionary actions should be distinguished from review of nondiscretionary actions, the latter of which are afforded far less judicial deference. E.g., *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (citing Attorney General’s Manual on the Administrative Procedure Act as supporting conclusion that courts are empowered “only to compel an agency

decisionmaking is not available at all. For example, the Administrative Procedure Act (APA) exempts certain actions from review,<sup>17</sup> and establishes reviewability requirements like finality.<sup>18</sup> The Constitution limits reviewability as well, most often through the standing requirement.<sup>19</sup> And of course, the vast majority of agency behaviors are never challenged in court, whether because they are too insubstantial or because would-be challengers must pick and choose how to spend limited resources.<sup>20</sup>

Many of the reviewability limitations are structured around separation-of-powers values and reflect judicial hesitation at dictating agency resource allocation or interfering with agencies' priority-setting decisions.<sup>21</sup> Left without the structural check of judicial review, however, agencies' legitimacy<sup>22</sup> must be left to some other external<sup>23</sup> or internal<sup>24</sup> oversight. External

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'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing *how* it shall act'').

<sup>17</sup> See 5 U.S.C. § 701(a) (2012) (precluding review of actions made unreviewable by statute or committed to agency discretion by law). These exemptions are interpreted narrowly. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 26 (1945)) (concluding that agency discretion exemption is confined to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'").

<sup>18</sup> 5 U.S.C. § 704 (2012) (making final agency actions reviewable); *Darby v. Cisneros*, 509 U.S. 137 (1993) (interpreting scope of § 704's exhaustion provision); cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (recognizing presumption of reviewability); see also *FTC v. Standard Oil Co.*, 449 U.S. 232, 249 n.5 (1980) (concluding that agency action was reviewable unless the agency was able, by "clear and convincing evidence," to "overcome the strong presumption against a determination that its action is 'committed to agency discretion' under 5 U.S.C. § 701(a)(2)").

<sup>19</sup> E.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>20</sup> *Hammond & Markell*, *supra* note 2, at 314-15.

<sup>21</sup> E.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (referring to need for agency to engage in "a complicated balancing of factors which are peculiarly within its expertise," including "whether agency resources are best spent on this violation"); *Allen v. Wright*, 468 U.S. 737, 750 (1984) (explaining that "the law of Art. III standing is built on a single idea—the idea of separation of powers"). See also *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 67 (2004) (describing purpose "to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve"). For criticism of *Norton*, see Robert L. Glicksman, *Securing Judicial Review of Agency Inaction (and Action) in the Wake of Norton v. Southern Utah Wilderness Alliance* in *STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE* (M. Wolf ed., ELI Press) (2005); see also *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (noting that final agency action "must mark the 'consummation' of the agency's decisionmaking process"); *Franklin v. Massachusetts*, 505 U.S. 788, 796-97 (1992) (explaining that the "core question" in assessing whether an agency action is final "is whether the agency has completed its decisionmaking process, and whether that process is one that will directly affect the parties").

<sup>22</sup> Legitimacy may refer to constitutional, statutory, democratic, or procedural legitimacy. See *Hammond & Markell*, *supra* note 2, at 316-17 (collecting varieties). For purposes of our project, compliance with a remand order most strongly reinforces statutory and procedural legitimacy.

<sup>23</sup> External checks include congressional and presidential oversight, as well as oversight such as may come from the media, interest groups, or the public. See, e.g., Mariano-Florentino Cuellar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (participation during rulemaking); McNollGast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) (fire-alarm model of congressional oversight); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (describing presidential control); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (civic republicanism); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300 (2016) (interest groups).

<sup>24</sup> The public administration literature offers perspectives on internal oversight. See Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 597-603 (2011) (collecting sources).

oversight might include congressional actions like hearings, budgetary decisions, and even amendments to statutory mandates. It is our experience that major rulemakings and related judicial decisions—like those culminating in Clean Water Rule that is the subject of our first case study below—attract significant legislative attention but nevertheless are difficult for Congress to police.<sup>25</sup> For both major rules and run-of-the-mill agency actions, the President seems to have far more impact as a matter of external oversight.<sup>26</sup> The role of the media, public engagement, and other democratic and participatory forms of oversight is widely acknowledged in the literature even while its effectiveness is a matter of debate.<sup>27</sup> Internal means of agency self-policing are somewhat elusive in the legal literature, having attracted more attention in the field of public administration.<sup>28</sup> Still, agency flexibility, agency culture, entrenchment, and design all impact how an agency behaves outside the limelight of judicial review.

These sources of oversight are important not just in the absence of judicial review, but on remand. Suppose an agency action *is* reviewed, and remanded to the agency due to some flaw in the action’s procedure or substance. Under many circumstances, the remanded action becomes simply one of many possible priorities that must compete for scarce resources. In other words, as a practical matter the remanded action is akin to general matters of agency discretion that are not (or not yet) reviewable. Owing to the procedural posture of the remanded action, however, there is a record that helps illuminate agency behavior more generally. Below, we consider some of the factors bearing on how remanded actions might fare once they are returned to the general mix of agency priorities and discretion. In so doing, we build a universe of remands from which empirical work could be developed, delineate the contours of potential variables, and note tentative hypotheses with respect to those variables.

### A. Judicial Remedy

The judicial remedy most clearly drives the amount of discretion an agency has on remand and delineates the set of remands for which an empirical project would be relevant. The APA provides a variety of reasons for which a court might set aside an agency action: procedural defects, arbitrary decisionmaking or actions unsupported by substantial evidence, failure to conform to statute, and unconstitutional agency action.<sup>29</sup> Depending on the type and seriousness

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<sup>25</sup> See Hearing on Congressional Overreach (considering Clean Water Rule, Clean Power Plan, and other executive actions). Efforts to amend the CAA to strip EPA’s authority to regulate greenhouse gases have failed as of this writing, although it seems possible Congress may have the votes and presidential support necessary to do that in the Trump administration.

<sup>26</sup> This expectation is constitutionally grounded, U.S. CONST. art II, § 3 (vesting in the President the duty to “take Care that the Laws be faithfully executed”). It is also descriptively apt, see Ming Hsu Han, *Administrator-in-Chief*, - (forthcoming 2017) (describing administrative mechanisms applied by President Obama regarding immigration matters), and judicially accepted, see *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (“The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisers surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered.”).

<sup>27</sup> E.g., Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076-98 (2005) (arguing electoral accountability is a myth that cannot legitimize the administrative state); Seifter, *supra* note 23, at 1333-52 (describing myth of representativeness of public interest groups).

<sup>28</sup> Shapiro & Wright, *supra* note 2, at 595-603 (making this point and providing overview of public administration literature).

<sup>29</sup> 5 U.S.C. § 706(2) (2012).

of the flaw, the court might vacate the action and remand,<sup>30</sup> remand without vacatur,<sup>31</sup> issue a mandamus<sup>32</sup> or injunction,<sup>33</sup> and/or retain jurisdiction until some flaw is remedied.<sup>34</sup>

Of these, mandatory or injunctive relief coupled with retaining jurisdiction would most confine agency discretion. Both action's priority for the agency, and the external check of judicial oversight are retained, so it is unlikely that cases involving such relief would be appropriate to include in an empirical study focused on discretion. Even so, injunctions can take many forms, ranging from a complete prohibition to an authorization if the agency adheres to conditions specified in the injunction.<sup>35</sup> A remand order may enjoin some aspects of an agency's decision but allow others to proceed.<sup>36</sup> Even if a court issues a conditional or partial injunction, the specificity with which it describes the conditions can vary. The more specifically the court describes the nature of the agency's required response, the less flexibility the agency has in how it chooses to respond (and perhaps in whether it responds at all). A generally worded injunction to halt the adverse effects of an agency's action may afford it great leeway in determining the

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<sup>30</sup> Some scholars insist this remedy is the only one consistent with the text of the APA, which provides that a court "shall set aside" agency action having the flaws listed in § 702. See Hammond, *supra* note 14, at 1738 (collecting sources).

<sup>31</sup> Most scholars and courts view this remedy as within judicial discretion, notwithstanding the contrary text of the APA noted above. E.g., Ronald M. Levin, "Vacation" at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291 (2003). Furthermore, if one views the hard look doctrine as too hard, this remedy offers a means of tempering judicial power in the substantive standard. *Id.* at 361; Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599, 617-18 (2004) (noting that remanding without vacatur is designed to give the agency the chance to improve its reasoning, maintain the stability of a regulatory program pending an agency's response to a judicial remand, and protect the "reliance interests" of those affected by regulation.); Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look,"* 92 NOTRE DAME L. REV. 331, 369-71 (2016) (justifying remand without vacatur as a sensible way of allowing a court to conclude that, notwithstanding curable flaws, a rule is not arbitrary if the agency adopts post hoc fixes for the defects). According to the D.C. Circuit, "[t]he 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.'" *Allied-Signal, Inc. v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150 (D.C. Cir. 1993) (quoting *Int'l Union, United Mine Workers v. Federal Mine Safety and Health Adm'n*, 920 F.2d 960, 966-67 (D.C. Cir. 1990)).

<sup>32</sup> These are rare. See *Telecomm'n Research & Action Control Ctr. v. FCC ("TRAC")*, 750 F.2d 70, 79 (D.C. Cir. 1984) (in unreasonable delay case, stating that agency's delay must be "egregious" in order to justify mandamus).

<sup>33</sup> E.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194-95 (1978) (affirming court of appeals' grant of injunctive relief in landmark Endangered Species Act case).

<sup>34</sup> *TRAC*, 750 F.2d at 80 (concluding agency delay was serious enough to justify retaining jurisdiction). Settlement is also a possibility following judicial review, but we do not address it here. Cf. Hammond, *Dialogue*, *supra* note 14, at 1740 & n.83 (describing empirical evidence suggesting "remanded actions settle 40% to 50% of the time").

<sup>35</sup> See, e.g., *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1139-43 (N.D. Cal. 2003) (crafting "carefully tailored" injunction restricting use of low frequency sonar in areas rich in marine life, but allowing its use for military testing and training under certain conditions). For a typology of different kinds of injunctions, see Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 539-41 (1984) (discussing enforcement, compliance, ancillary, and freestanding injunctions).

<sup>36</sup> See, e.g., *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-82 (9<sup>th</sup> Cir. 2010) (upholding district court's remand order requiring the Bureau of Land Management to reconsider its decision to extend term of a geothermal lease, but not requiring it to invalidate the existing lease or to hold a new bidding process); *Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 877 (9<sup>th</sup> Cir. 2004) (affirming district court's decision to allow portions of record of decision to be implemented while invalidating others).

best method for doing so.<sup>37</sup> Injunctions also can vary in their geographic scope, ranging from site-specific<sup>38</sup> to nationwide<sup>39</sup> in application. Were we to construct a full dataset that eliminated remands that retained jurisdiction and mandated particular action, therefore, we would need to acknowledge that such a dataset could be under-inclusive.

By contrast, in the context of rulemaking actions, vacating a rule in its entirety arguably gives the agency the most discretion on remand because it must start a rulemaking anew if it wishes to continue to pursue the issue.<sup>40</sup> Barring some other mandatory oversight like a presidential or congressional directive, the agency might simply move onto other issues. Thus, one way to construct a dataset would be to limit its contents to cases with this type of disposition.

Although that approach would be straightforward, it would miss the richness of detail provided by another common remedy: quite often, courts remand rules without vacating them. Evaluating agencies' exercises of their discretion in such circumstances requires a fact-intensive look at the reason for the remand and the relationship of the flaw to the action as a whole. Indeed, this point is true for nearly every case holding that an agency decision is flawed in some way, regardless of whether there is a vacatur. The Supreme Court has explained the judicial preference for not dictating agency responses on remand, at least in cases in which an agency decision is invalidated as arbitrary and capricious as a result of a flawed or missing explanation. Failure to allow the agency to determine whether it can justify reaching the same result with a different or better explanation "erroneously deprive[s] the agency of its usual administrative avenue for explaining and reconciling the arguably contradictory rationales that sometimes appear in the course of lengthy and complex administrative decisions."<sup>41</sup> It is only in "rare circumstances" that it would be appropriate for a court to direct a specific result on remand, such as when the agency has delayed action and further delay would risk irreparable harm to litigants' or statutory interests.<sup>42</sup>

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<sup>37</sup>The difference between an injunction that requires a particular end result and one that dictates the means of achieving it is analogous to the well-known distinction between performance and design specification standards in environmental law. "A performance standard sets an emission limitation by reference to the pollution level that would be attained through the use of the best available technology, but does not actually mandate the use of any particular technology. In contrast, a design standard requires an actor to use a particular technology." Richard L. Revesz & Allison L. Westfall Kong, *Regulatory Change and Optimal Transition Relief*, 105 NW. U. L. REV. 1581, 1597 (2011); cf. Cary Coglianese, Jennifer Nash & Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection*, 55 ADMIN. L. REV. 705, 713 (2003) (suggesting that "the two approaches can be better thought of as end points along a spectrum of regulatory approaches").

<sup>38</sup> See, e.g., *Defenders of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1099 (E.D. Wash. 2006) (enjoining snowmobiling in national forest pending consultation under the Endangered Species Act).

<sup>39</sup> See, e.g., *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999 (9<sup>th</sup> Cir. 2009) (upholding nationwide injunction prohibiting Forest Service from violating regulatory restrictions on activities in roadless areas of the national forests as necessary to avoid degradation of those areas); *National Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1408-10 (D.C. Cir. 1998) (nationwide injunction against implementation of Clean Water Act regulation); *Sequoia Forestkeeper v. Tidwell*, 847 F. Supp. 2d 1244 (E.D. Cal. 2012) (nationwide injunction against implementation of Forest Service regulations concerning administrative appeals).

<sup>40</sup> Hammond, *Deference and Dialogue*, *supra* note 14, at 1738.

<sup>41</sup> *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

<sup>42</sup> See, e.g., *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1226 (10<sup>th</sup> Cir. 2002) (ordering agency to prepare EIS in face of lengthy delay and overwhelming evidence of significant environmental impacts); cf.

As a straightforward illustration of the way discretion can be channeled in the wake of a judicial remand, consider again the example of *Michigan v. EPA*<sup>43</sup> mentioned in the Introduction.<sup>44</sup> According to the Supreme Court, the agency’s flaw was refusing to consider the costs of regulating hazardous air emissions in its initial decision to regulate under the CAA. Writing for the majority, Justice Scalia reasoned that the word “appropriate” in the relevant portion of the CAA did not permit the agency to refuse to consider costs.<sup>45</sup> As noted, the D.C. Circuit remanded the rule without vacating it. Agencies do not always remedy flaws under these circumstances as quickly as EPA did here,<sup>46</sup> but note that EPA’s discretion on remand was channeled: it was *required* to consider costs.<sup>47</sup> Still, its decision *how* to consider costs was left open to the agency’s discretion.<sup>48</sup> This short example illustrates how the black-and-white remedy and the reason for it interact to produce something less than full discretion on remand. For this reason, empirical work must consider both the easily<sup>49</sup> code-able remedy and the reasoning behind it. The latter, of course, is much more difficult to code;<sup>50</sup> conceiving of it as an ordinal variable may be a possible approach for ranking the amount of discretion available on remand.<sup>51</sup>

One final point is important with respect to the remedy. As our case studies demonstrate, it is common that agency actions on a given issue will be challenged and remanded multiple times, in what one of us has called serial litigation.<sup>52</sup> It seems likely that the history of a court’s and agency’s interaction on a particular issue will flavor the nature of the dialogue between them

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Nelson v. United States, 64 F. Supp. 2d 1318, 1326 (N.D. Ga. 1999) (issuing mandatory injunction without remand in face of agency’s “erroneous decision”).

<sup>43</sup> 135 S. Ct. 2699 (2015).

<sup>44</sup> *Supra* text accompanying notes 5-9.

<sup>45</sup> *Michigan*, 135 S. Ct. at 2711 (“The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary.”).

<sup>46</sup> *See, e.g.*, discussion *infra* Part I.B (describing time variable).

<sup>47</sup> This judicial approach has been dubbed “*Brand X* avoidance” for its impact on agencies’ interpretive discretion on remand. Emily Hammond & Richard J. Pierce, Jr., *The Clean Power Plan: Testing the Limits of Administrative Law and the Electric Grid*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 1, 8 (2016). However, it is also a feature of the landscape any time a court rejects an agency interpretation at *Chevron* step one. For further details, see Emily Hammond et al., *Judicial Review of Statutory Issues Under the Chevron Doctrine*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 93–100 (collecting examples)..

<sup>48</sup> 135 S. Ct. at 2711 (“The Agency must consider cost—including, most importantly, cost of compliance—before deciding whether regulation is appropriate and necessary. . . . It will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost.”). EPA also had a litigation history regarding its failure to regulate hazardous air pollutants from power plants, recounted in the lower court’s decision. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229-30 (D.C. Cir. 2014), *rev’d*, 135 S. Ct. 2699 (2015)..

<sup>49</sup> Usually. Sometimes it can be difficult to determine the nature of a court’s remedy. But it is objectively verifiable and we would expect little variation among coders.

<sup>50</sup> Coders would be required to read opinions, assess the nature of the reasoning, and translate that into a discrete coded value. Readers often interpret such reasoning differently, so we could expect a higher rate of disagreement among coders. The task is further complicated given that judicial review of major administrative actions does not often focus on a single issue; results and reasoning may be mixed. For an example of how such matters were handled for a study of the attitudinal model of judicial review, see Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 310 n.19 – 313 n.34 (2004) (describing coding methodology).

<sup>51</sup> Ordinal variables can be ordered or ranked. For an example, see Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 212-13 (1997) (conceptualizing law schools’ prestige as an ordinal variable).

<sup>52</sup> Hammond, *Dialogue*, *supra* note 14, at 1723.

and impact the remedy as well.<sup>53</sup> For grappling with this possibility empirically, we would want to document the facts of the serial litigation in our coding. Of interest, serial litigation may provide the best window into agency behavior on remand simply because the fact of later judicial review helps document what the agency actually did on remand. This point speaks to the need for greater transparency in matters of agency discretion, but it also suggests there may be selection effects in any comprehensive empirical analysis.<sup>54</sup>

## B. Timeline

The degree of discretion a judicial remand affords an agency is also affected by the amount of time the court gives the agency to fashion its response. A specific timetable for the agency's response constrains it in ways that an open-ended remand order does not. The absence of such a timetable affects not only when, but whether an agency will respond. The halting manner in which EPA responded to a petition to ban the pesticide discussed in the Introduction,<sup>55</sup> for example, reflects initial judicial accommodation of—but eventual frustration with—agency regulatory discretion with respect to timing.<sup>56</sup>

In building an empirical study, therefore, we would code whether the court provided a timetable, the length of that timetable, and the length of time to agency action. These variables would likely interact with the nature of the remedy, discussed above, in the following ways. First, a vacatur coupled with no timetable truly puts the issue back into the generalized mix of potential agency actions subject to priority-setting and resource-allocation decisions. The universe of potential actions on the issue, of course, would be confined by the reasoning of the opinion. For example, a judicial holding that an agency clearly lacks statutory authority to regulate a type of behavior closes the door to such regulation in the future. But a procedural flaw, flaw of reasoning, or unreasonable interpretation of an ambiguous statute leave open the possibility of the agency reaching the same substantive result, or something very different from it, in the future. Moreover, we expect significant interaction with the presidential timeframe, as discussed in more detail below. With those major caveats, therefore, this combination maximizes discretion on remand.

Second, a remand without vacatur, coupled with no timetable or a very long timetable, may have a similar result as a practical matter.<sup>57</sup> Although the agency ought to remedy the flaw

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<sup>53</sup> *Id.* at 1742-43.

<sup>54</sup> Moreover, in such circumstances we are admittedly further away from the concept of agency behavior without courts.

<sup>55</sup> See *supra* notes 10-14 and accompanying text.

<sup>56</sup> One of us has distinguished between an agency's "regulatory discretion," which involves a decision whether to regulate, and its "legislative discretion," which affects how it chooses to regulate. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 822.

<sup>57</sup> For an example in which vague remand instructions afforded the BLM ample discretion in deciding when and how to respond to a finding that it had committed NEPA violations in its initial effort to amend its resource management plan to facilitate oil and gas leasing, see (in chronological order) *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683 (10<sup>th</sup> Cir. 2009) (affirming district court's finding of a flaw and stating that further site-specific analysis was required); Notice of Availability of the Draft Tri-County Resource Management Plan and Draft Environmental Impact Statement for the Las Cruces District Office, New Mexico, 78 Fed. Reg. 21,965 (Apr. 12, 2013) (providing draft plan, and failing to mention Tenth Circuit decision); Notice of Intent To Prepare a Supplement to the Tri-County Draft Resource Management Plan and Environmental Impact Statement, New Mexico, 78 Fed. Reg. 76,582, 76,582 (Dec. 19, 2013) (explaining plan to prepare supplemental EIS); Bureau of

identified by the court, it might be able to “drag its feet” without consequence because the costs of monitoring and enforcing the judicial decision may be high for the winning party. Further, there is comparatively little benefit to an expeditious response to the remand order because the complained-of agency action remains in effect. For regulated entities, inertia favors compliance; for public interest groups, resources may be better spent elsewhere.<sup>58</sup> Thus, we predict that the lack of a timetable,<sup>59</sup> or a very long timetable, would increase the chance of the agency taking no further action on the matter, regardless of the flaw that generated the remand.<sup>60</sup>

Of course, the ultimate time until an agency takes action is also dependent on the valence and presidential variables, to which we turn next.

### C. Valence and Alignment of Policy Interests

Agency actions are regularly challenged by both regulated entities and public interest groups, often in the same proceeding.<sup>61</sup> With “valence” and “alignment” of policy interests, we want to capture the extent to which an agency’s policy inclination aligns with that of the party winning the remand and the presidential administration. For “valence” we might code whether the litigants’, presidential, and agency’s interests are “regulatory,”<sup>62</sup> meaning tending toward more or stricter regulations, and “deregulatory,” meaning tending toward fewer or laxer regulations.<sup>63</sup> For agreement, it would be necessary to code for eight potential combinations.<sup>64</sup> Notably, the “valence” determination is better suited to substantive outcomes than procedural ones. When remands are for procedural defects, further work would be needed to assign a valence to the parties’ procedural interests.

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Land Mgmt., Las Cruces Dist. Office, Newsletter 5, TriCounty RMP/EIS (Apr. 2014), [http://www.blm.gov/style/medialib/blm/nm/field\\_offices/las\\_cruces/las\\_cruces\\_planning/tricounty\\_rmp.Par.87669.File.dat/Public\\_Newsletter\\_5.pdf](http://www.blm.gov/style/medialib/blm/nm/field_offices/las_cruces/las_cruces_planning/tricounty_rmp.Par.87669.File.dat/Public_Newsletter_5.pdf) (announcing delay). As of this writing, no plan has been issued, leaving the matter to the next presidential administration.

<sup>58</sup> See, e.g., Hammond, *Dialogue*, *supra* note 14, at 1769-72 (recounting agency failure to act following remand without vacatur and without timetable).

<sup>59</sup> Several commentators have insisted that a timetable is the best practice. See, e.g. Farber, *supra* note 35, at 127 (suggesting that a rule should be vacated after the timetable for responding to a remand without vacatur has expired); Hammond, *Dialogue*, *supra* note 14, at (suggesting that timetables are necessary to avoid constitutional concerns); Rodriguez, *supra* note 31, at 621 (“There is no clear incentive, save for a timetable that the court establishes—and my reading of the cases suggest that such timetables are quite rare—for the agency to diligently redesign its decision and rationale and to return to the court for its approval. Hence, the regulatory process bears costs while the process slowly unfolds.”).

<sup>60</sup> In one case, for example, EPA delayed for fifteen years in reissuing regulations under the CAA that the D.C. Circuit remanded without vacatur without imposing a deadline for a response. *Envtl. Def. v. EPA*, 489 F.3d 1320 (D.C. Cir. 2007) (upholding EPA regulations issued on remand).

<sup>61</sup> See, e.g., *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (various challenges to EPA’s regulation of greenhouse gas emissions from stationary sources under the CAA); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 794 F. Supp. 2d 65 (D.D.C. 2011), *aff’d*, 709 F.3d 1 (D.C. Cir. 2013) (various challenges to agency’s decision to list polar bears as threatened but not endangered species).

<sup>62</sup> We use the term a “regulatory” matter broadly to include anything that qualifies as “agency action” under the APA, 5 U.S.C. § 551(13) (2012), not just regulations adopted after rulemaking proceedings.

<sup>63</sup> Admittedly, this could be a challenging task in cases with multiple challengers with opposing interests, and judicial holdings that reach mixed results. Specifying the action on remand as precisely as possible, and tailoring that to the particular remand reasoning and advocate, would be critical.

<sup>64</sup> These are full alignment/regulatory; full alignment/deregulatory; agency/president alignment/regulatory; agency/president alignment/deregulatory; agency/litigant alignment/regulatory; agency/litigant alignment deregulatory; litigant/president alignment/regulatory; and litigant/president alignment/deregulatory.

All else being equal, we predict that when an agency's and president's valence are out of alignment with that of the winning litigant, we could expect on remand inaction, delay, or exercises of discretion that are contrary to the court's expressed interests.<sup>65</sup> When all valences align, however, we predict relatively expeditious exercises of discretion that reinforce the interest alignment. Complications may arise in making observations. For example, imagine that a winning litigant obtained a remand for an agency's flawed support of a rule aimed at regulating toxics; here the litigant would have argued that the rule was not stringent enough. If on remand the agency adopts a slightly more restrictive rule, it would be coded as regulatory in nature. But if the agency's (and president's) usual valences were deregulatory, one would expect that the agency chose the least restrictive of increased regulatory options within the zone of reasonableness. A subsequent legal challenge might help tease the matter out, and enable a coder to characterize the remand action as deregulatory. But coding this way would require significant judgment and could introduce errors into the dataset.

Further, the agency's or presidential valence may well change over the course of the time period under observation. Among other things, our final variable is meant to capture such circumstances.

#### **D. Presidential Administration Over Time**

Normatively, presidential control of agency behavior has both proponents and adversaries in the literature.<sup>66</sup> As a positive matter, however, presidential control of agencies is well documented.<sup>67</sup> And even in the absence of direct presidential control, presidents set policy

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<sup>65</sup> Of course, this measurement will always be more complicated in mixed judicial outcomes. Moreover, general judicial attention to this concern may alleviate the possibility of foot-dragging. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (emphasizing need for agency to act to remedy flaw on remand); *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 127 (D.C. Cir. 2015) (urging agency to act promptly on remand).

<sup>66</sup> *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 *TEX. L. REV.* 1137, 1162-67 (2014) (describing drift in OIRA's role away from presidential mandates in executive orders); Kagan, *supra* note 23, at 2372 (describing and arguing for enhanced judicial deference); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 *DUKE L.J.* 1763, 1800-02 (2012) (criticizing); Thomas O. McGarity, *EPA at Helm's Deep: Surviving the Fourth Attack on Environmental Law*, 24 *FORDHAM ENVTL. L. REV.* 205 (2012-2013) (criticizing); Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 *HARV. L. REV.* 1838, 1840-41 (2013) (supporting); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2 (2009) (arguing for enhanced consideration of presidential control during judicial review). *See also* Cynthia Farina et al., *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 *WAKE FOREST L. REV.* 1185, 1225-26 (2012) (stating that, in theory, centralized executive review can help "transcend[ ] disciplinary boundaries by involving different kinds of experts").

<sup>67</sup> *E.g.*, Letter from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, to Lisa P. Jackson, Administrator, EPA, Sept. 2, 2011 (returning rule on 2008 ozone primary and secondary ambient air quality standards); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 *MICH. L. REV.* 1127 (2010) (documenting impact of OIRA regulatory review and arguing for greater transparency). The history of the Forest Service's land use planning rule in the early twenty-first century provides a strong example of a course of agency action on remand that is strewn with policy reversals driven by the politics and policies of multiple administrations. *See* (in chronological order) National Forest System Land and Resource Management Planning, 44 *Fed. Reg.* 53,928 (Sept. 17, 1979) (initial set of plans); National Forest System Land and Resource Management Planning, 47 *Fed. Reg.* 43,026 (Sept. 30, 1982) (revisions); National Forest System Land and Resource Management Planning, 65 *Fed. Reg.* 67,514 (Nov. 9, 2000) (overhaul by outgoing Clinton administration); National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 66 *Fed. Reg.* 27,552 (May

agendas through their constitutional powers.<sup>68</sup> The valence variables above are meant to capture policy preferences. By examining the presidential administration over time, we can test the prediction that agencies behave strategically in anticipation of administrative entrenchment or change. In the *Michigan* case discussed in the Introduction, for example, the upcoming presidential election and accompanying Congressional Review Act deadline may have played a role in spurring EPA to remedy the cost flaw quickly, notwithstanding the lack of valence alignment between the agency and president on the one hand, and the winning litigants on the other. Even though the remand in that case was without vacatur, by issuing a rule quickly EPA could make it more difficult for a future (and then uncertain) presidential administration to undo the rule.<sup>69</sup> By contrast, when a remand comes at the very beginning of a President’s second term, the agency has less incentive to act quickly, especially when its and the administration’s valences do not align with the winning litigants. Of course, presidential administration interacts with the other variables as well. For example, the less a judicial remand order micromanages the agency’s response, the greater the room is for policy differences across administrations to affect the nature of the agency’s response.

We can roughly account for these variations with several observations. First, we can identify the political party of the President at the time of the rule’s finalization as well as at the time of remand. Relatedly, we can identify whether the Presidential administration changed hands within that timeframe. Third, we can code the time remaining in a presidential term following a remand. Although a rough measure, we can also tie these observations to the regulatory or deregulatory valence of the presidential administration to enable comparisons between the explanatory power of variables coded here as opposed to the valence variables coded under Part C above.

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17, 2001) (delay with incoming George W. Bush administration); National Forest System Land Management Planning, 70 Fed. Reg. 1023 (Jan. 5, 2005) (new rule under George W. Bush administration); Citizens for Better Forestry v. U.S. Dep’t of Agric., 481 F. Supp. 2d 1059, 1100-01 (N.D. Cal. 2007) (invalidating Bush rule); National Forest System Land Management Planning, 73 Fed. Reg. 21,468 (Apr. 21, 2008) (essentially reviving 2005 rule); Citizens for Better Forestry v. U.S. Dep’t of Agric., 632 F. Supp. 2d 968 (N.D. Cal. 2009) (rejecting 2008 rule); National Forest System Land and Resource Management Planning, 74 Fed. Reg. 67,059 (Dec. 18, 2009) (under Obama administration’s first term, reviving 1982 rule under then-effective 2000 rule); National Forest System Land Management Planning, 77 Fed. Reg. 21,162 (Apr. 2012) (revamped rule at end of Obama’s first term).

<sup>68</sup> Faithfully execute clause; appointments clause; *see also* Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981):

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. . . .

. . . Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.

<sup>69</sup> This hypothesis is consistent with the phenomenon of midnight regulations, a term that “describes the dramatic spike of new regulations promulgated at the end of presidential terms, especially during transitions to an administration of the opposite party.” Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 163-64 (2009). For an empirical survey of the issuance of midnight regulations at the end of the Bush I and Clinton Administrations, see Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of the “Midnight” Regulations Passed by the Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005).

## II. CASE STUDIES: AGENCY BEHAVIOR ON REMAND

As is likely evident from our discussion of the variables related to agency behavior on remand, their interplay can become quite complicated. In this section, we provide three case studies.<sup>70</sup> The case studies either help reinforce our predictions above, or suggest areas where one might find counter-intuitive results. Ultimately, this work sheds light on both the pragmatic workability of empirical analyses of agency behavior on remand, and on further research needs. In and of themselves, however, these case studies illuminate the richness of agency discretion and behavior on remand.

The three case studies consist of the following. First, the Clean Water Act and “Waters of the United States” saga reveals how remand orders can leave significant substantive and procedural discretion to agencies, permitting them to maximize their flexibility over the course of multiple presidential administrations. Second, a story involving the Wild and Scenic Rivers Act and Yosemite National Park illustrates a long series of litigation, spanning presidential administrations and involving differing approaches to the judicial remedy. Finally, we use an Endangered Species Act decision to illustrate how an agency might persist in a policy valence notwithstanding an opposing valence alignment of both the reviewing court and presidential administration.

### A. The Clean Water Act and “Waters of the United States”

Remand orders may afford agencies sufficient discretion to allow a range of substantive and procedural choices in their responses. Further, these choices may shift over time in response to factors such as changes in presidential administration and yet remain consistent with those orders. This dynamic is well illustrated by agency efforts to define the scope of the Clean Water Act (CWA)’s jurisdictional language “waters of the United States.”<sup>71</sup> In the infamous decision *Rapanos v. United States*, the Supreme Court invalidated the Army Corps of Engineers’ determination (made during the George H.W. Bush administration in 1989) that development of private property that allegedly contained jurisdictional wetlands violated the statute’s prohibition on the unpermitted discharge of dredged or fill material.<sup>72</sup>

The Court splintered 4-1-4, producing no majority opinion. Although five justices agreed that the Corps of Engineers had misconstrued the scope of the “waters of the United States” to which the permit requirement applies, Justice Kennedy, the fifth vote for remand of the challenged agency decisions, disagreed with the plurality on the proper approach to addressing that mistake. The plurality vacated the judgments of the appellate court, which had upheld the federal government’s enforcement actions against two sets of property owners, and remanded “for further proceedings.”<sup>73</sup> Chief Justice Roberts, who joined the plurality opinion, wrote separately. He chastised the Corps and EPA, which jointly administer the dredge-and-fill permit

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<sup>70</sup> There is no special distinction directing our choice of case studies. In fact, numerous examples reflect similar dynamics, some of which we highlight in the notes.

<sup>71</sup> The CWA prohibits the unpermitted discharge of any pollutant, including dredged or fill material. 33 U.S.C. §§ 1311(a), 1344(a) (2012). It defines such a discharge as the addition of a pollutant by a point source to navigable waters. *Id.* § 1362(12). The Act defines “navigable waters” to mean “waters of the United States, including the territorial seas.” *Id.* §1362(7).

<sup>72</sup> *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>73</sup> *Id.* at 757.

program, for failing to issue regulations clearly specifying the program’s jurisdictional bounds in the face of an earlier determination by the Court<sup>74</sup> that their approach was excessively broad.<sup>75</sup> But the Court provided little guidance on the substantive approach the agencies should take on remand and none on the procedural mechanism for doing so.<sup>76</sup> Further, the district court’s mandate on remand was amorphous at best. The district court remanded to the Corps “for further proceedings consistent with the Supreme Court’s decision” in *Rapanos/Carabell*.<sup>77</sup> Given the mass confusion generated by the Court’s splintered decision in *Rapanos*,<sup>78</sup> these instructions were singularly unilluminating and appeared to leave considerable interpretive discretion to the Corps.

Ultimately, Rapanos reached a million-dollar settlement with the Corps.<sup>79</sup> Because the particular matters were resolved, the agency might have continued to develop its approach through adjudications, notwithstanding Justice Roberts’s strong admonishment. Almost exactly a year after the Court’s decision and during the second term of the George W. Bush Administration, however, EPA and the Corps issued a joint memorandum providing nonbinding guidance to EPA regions and Corps districts on how to respond to *Rapanos* in future permit proceedings.<sup>80</sup> A year and a half later, as the Bush Administration neared its end, the two agencies issued additional guidance, which superseded the earlier guidance.<sup>81</sup> The Obama Administration took a different approach, both substantively and procedurally. Choosing to clarify the definition of “waters of the United States” through a legislative rule rather than through a nonbinding guidance document, EPA and the Corps issued a notice of proposed rulemaking in 2014<sup>82</sup> and final regulations a little more than a year later.<sup>83</sup> Whether the final

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<sup>74</sup> *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159 (2001).

<sup>75</sup> *Rapanos*, 547 U.S. at 757-58 (Roberts, C.J., concurring).

<sup>76</sup> On remand, the Court of Appeals remanded “to the district court with instructions to remand to the Army Corps of Engineers for further proceedings consistent with the Supreme Court’s decision in *Rapanos*.” *Carabell v. U.S. Army Corps of Eng’rs*, 217 F. App’x 431, 431 (6th Cir. 2007).

<sup>77</sup> *Carabell v. U.S. Army Corps of Eng’rs*, No. 01-CV-72797-PDB-WC (E.D. Mich. Mar. 6, 2007).

<sup>78</sup> *See, e.g., United States v. Cundiff*, 555 F.3d 200, 207 (6th Cir. 2009) (“Parsing any one of *Rapanos*’s lengthy and technical statutory exegeses is taxing, but the real difficulty comes in determining which—if any—of the three main opinions lower courts should look to for guidance.”).

<sup>79</sup> EPA, Press Release, *John Rapanos Agrees to Pay for Clean Water Act Violations*, Dec. 29, 2008, at <https://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/b029ab82bf92cd5f8525752e0072fc60!OpenDocument>. The outcome of *Carabell* is unknown to the authors, despite searches of the Corps’ website, Westlaw, and even Wikipedia.

<sup>80</sup> Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & United States v. Carabell* (June 2007), [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf). The guidance provided:

The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. It does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances. Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law.

*Id.* at 4 n.17.

<sup>81</sup> Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States*. [https://www.epa.gov/sites/production/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).

<sup>82</sup> Definition of “Waters of the United States” Under the Clean Water Act, 79 Fed. Reg. 22,188 (Apr. 21, 2014).

<sup>83</sup> Clean Water Act Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37,054 (June 29, 2015).

regulations expand the scope of regulatory coverage reflected in the earlier guidance documents is a matter of dispute. Many parties challenged the regulations in multiple courts.<sup>84</sup>

The interplay of variables in this example is complex. First, the decisions in *Rapanos* spoke broadly to the meaning of the term “waters of the United States” and suggested that rulemaking would be a preferable means of exercising agency discretion. But the decision did not mandate that procedural vehicle or even any particular response by the agency. Given that the case involved adjudications, only those discrete matters were left open for further action on remand. Were we to attempt to code the result, the dispositions of the adjudicatory appeals alone would have not provided this full picture.

The timing of agency response to the remand was short—about a year. If one is worried about remanded matters losing their place among agency priorities—especially when a concrete mandate is lacking—this quick response might be reassuring. It also runs counter to our predictions regarding agency behavior as a general matter when there are open-ended remedies. Here the other variables may be useful. Prior to judicial review, the Corps’ initial valence was regulatory in the sense that it determined that a section 404 permit was required for Rapanos.<sup>85</sup> This valence differed from that predicted by the presidential administration (Republican), but given that the Corps’ action was adjudicatory (rather than a major rule), this lack of alignment is not particularly remarkable. The winning litigants’ valence was deregulatory in the sense that a majority of the Court would have cabined the jurisdictional reach of the CWA, though only slightly given the splintered opinions and reasoning. In other words, the remand’s valence was out of alignment with the Corps’ original adjudicatory valence.

Yet somewhat counter-intuitively, the agencies’ behavior on remand reinforced a deregulatory valence alignment consistent with that of both the President and the winning litigants. Although issuing a rule seems, on its face, to be a regulatory action, here the response was a nonlegislative rule—a guidance document lacking the force of law. Moreover, the guidance itself retained the fact-specific nature of the jurisdictional waters inquiry, ensuring that policy may continue to develop through adjudication. Of course, the use of a guidance document carried a risk for the policy’s longevity—it left open the possibility that a later administration could reverse course.<sup>86</sup> Years later, the Obama administration took a more regulatory *procedural* approach by issuing a legislative rule.<sup>87</sup> That rule also entails fact-specific inquiries. The bottom line is that all of these events created an environment that allowed great discretion for the agency in crafting its response on remand. Notably, although the procedural mechanisms chosen by each

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<sup>84</sup> In re U.S. Dep’t of Defense U.S. and Env’tl. Prot. Agency Final Rule: Clean Water Rule: Definition of “Waters of United States,” 817 F.3d 261, 264 (6th Cir. 2016), *petition for certiorari docketed* (Sept. 7, 2016) (agreeing to exercise jurisdiction over the consolidated petitions for review of the regulations). See also Christopher D. Thomas, *Judicial challenges to the Clean Water Rule: A brief and relatively painless guide for the procrastinator*, 47 TRENDS No. 4 (Mar./Apr. 2016), [http://www.americanbar.org/publications/trends/2015-2016/march-april-2016/judicial\\_challenges\\_to\\_the\\_clean\\_water\\_rule\\_a\\_brief\\_and\\_relatively\\_painless\\_guide\\_for\\_the\\_procrastinator.html](http://www.americanbar.org/publications/trends/2015-2016/march-april-2016/judicial_challenges_to_the_clean_water_rule_a_brief_and_relatively_painless_guide_for_the_procrastinator.html).

<sup>85</sup> Carabell was denied his permit, but the Corps determined his activity came within the jurisdictional reach of the CWA. *Rapanos*, 547 U.S. at 730.

<sup>86</sup> Had the Bush agencies issued a legislative rule, the later Obama administration would have had to explain any shift in course. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016) (citations omitted).

<sup>87</sup> See *supra* notes 82-83 and accompanying text.

administration differ in their valence, both administrations’ substantive rules maximize agency discretion by retaining fact-specific approaches.<sup>88</sup>

## **B. Wild and Scenic Rivers Act and Yosemite National Park**

The fate of a land use plan issued by the National Park Service (NPS) for Yosemite National Park illustrates a variety of remand orders, agency reactions, and behaviors across administrations. Environmental groups brought suit to enjoin the NPS from continuing a highway reconstruction project in Yosemite until the agency complied with the Wild and Scenic Rivers Act (WSRA).<sup>89</sup> The district court held that the NPS’s planning for the project was arbitrary and capricious because of its failure to develop a comprehensive management plan (CMP) for the area under the WSRA.<sup>90</sup> The court enjoined further work on one segment of the road and provided that the NPS “SHALL prepare and adopt a valid Comprehensive Management Plan . . . in regard to the Merced River as designated under the Wild and Scenic Rivers Act no later than twelve months after the entry of this decision.”<sup>91</sup>

Here the winning policy valence—emphasizing the protective aspects of the WSRA—aligned with that of the Clinton administration on remand. And the remand itself was strictly crafted, limiting the NPS’s discretion both in timing and in substance. The NPS issued a record of decision quickly (little more than a year after the district court’s decision), in late 2000 at the end of the Clinton Administration.<sup>92</sup> When the groups challenged that action as well, the district court rejected most of their challenges, suggesting that the agency action was at least partly more aligned with the administration’s and winning litigants’ valence. On the other hand, the court held that the agency failed to amend the general management plan for Yosemite to ensure its consistency with the WSRA.<sup>93</sup> On appeal, the Ninth Circuit found a wider range of violations than the district court had—suggesting a lack of valence alignment between the agency’s action on remand and that of the winning litigants.<sup>94</sup> Although the court found no violation of the National Environmental Policy Act (NEPA), as the plaintiffs had alleged, it held that the NPS violated the WSRA by failing to adequately assess user capacities on the Merced River, which runs through the Park, and by defining too narrowly the boundaries of one portion of the River protected by the WSRA. The court remanded to the district court

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<sup>88</sup> For a similar chain of events following the Ninth Circuit’s invalidation of six biological opinions issued by the Fish and Wildlife Service under the Endangered Species Act on proposed timber harvests, see *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004) (striking down biological opinions because they were based on an invalid regulatory definition; the regulation had not been challenged and so remained in place). See also FWS Acting Director Marshall Jones Memo to Regional Directors, Application of the “Destruction or Adverse Modification” Standard under Section 7(a)(2) of the Endangered Species Act (Dec. 9, 2004), <http://www.endangeredspecieslawandpolicy.com/files/2011/01/Adverse-Modification-Guidance.pdf> (guidance document); Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016) (legislative rule revising regulation deemed invalid in *Gifford Pinchot*).

<sup>89</sup> 16 U.S.C. §§ 1271-1284 (2012).

<sup>90</sup> *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202 (E.D. Cal. 1999).

<sup>91</sup> *Id.* at 1263-64 (emphasis in original).

<sup>92</sup> *Friend of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066, 1071 (E.D. Cal. 2002), *aff’d in part, rev’d in part*, 348 F.3d 789 (9<sup>th</sup> Cir. 2003), *opinion clarified*, 366 F.3d 731 (9<sup>th</sup> Cir. 2004).

<sup>93</sup> *Id.* at 1113-14.

<sup>94</sup> *Friends of Yosemite Valley v. Norton*, 348 F.3d 789 (9<sup>th</sup> Cir. 2003), *opinion clarified*, 366 F.3d 731 (9<sup>th</sup> Cir. 2004).

to enter an appropriate order requiring the NPS to remedy these deficiencies in the CMP in a timely manner. Inasmuch as the NPS was supposed to have completed a CMP for the Merced River some twelve years ago, we would also expect that the NPS would implement, as soon as is practicable, temporary or provisional measures designed to avoid environmental degradation pending the completion of its task.<sup>95</sup>

On remand and now under a deregulatory presidential administration (George W. Bush's first term), the NPS advised the court that it planned to proceed with several projects in the Yosemite Valley segment of the Merced River corridor, but the plaintiffs moved to enjoin it from doing so. The district court entered an order finding that the Ninth Circuit had not invalidated the plan as a whole and denied the injunction.<sup>96</sup> On further appeal, the Ninth Circuit clarified that it had indeed invalidated the entire Merced River plan and enjoined the NPS from implementing any projects developed in reliance on the plan.<sup>97</sup> The district court then issued an order requiring the NPS to "remedy[] in a timely manner the deficiencies found in the 2000 [plan]" and prepare a supplemental environmental impact statement (EIS), and enjoining some of the projects pending completion of a revised plan.<sup>98</sup> A year later, in 2005, the NPS issued a supplemental EIS and revised plan.<sup>99</sup> The environmental groups sued again. The district court found that the agency had remedied the problems with the River boundaries, but not the defective user analysis problem.<sup>100</sup> It also held that the NPS violated NEPA by failing to consider an adequate range of alternatives.<sup>101</sup> This time, the district court did not specify a schedule for the agency's response. The Ninth Circuit affirmed on both grounds, finding in addition that the NPS violated the WSRA by failing to adopt a single comprehensive plan for the Merced River.<sup>102</sup> It remanded back to the district court "for further action consistent with this opinion."<sup>103</sup>

About 15 months later, now during the first year of President Obama's first term, the NPS issued a notice that it was reopening public scoping for planning and NEPA analysis for a new Merced River CMP and EIS in response to the Ninth Circuit's latest opinion.<sup>104</sup> Early the next year, it announced that it was extending the comment period due to "continuing public interest."<sup>105</sup> Three years later, it announced the availability of a draft EIS and proposed CMP.<sup>106</sup> A year later, it published a notice of the availability of a final EIS on the proposed CMP and indicated that it would execute a ROD no sooner than thirty days after the date that EPA

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<sup>95</sup> *Id.* at 803-04.

<sup>96</sup> *Friends of Yosemite Valley v. Scarlett*, 439 F. Supp. 2d 1074, 1081 (E.D. Cal. 2006), *aff'd*, 520 F.3d 1024 (9th Cir. 2008).

<sup>97</sup> *Friends of Yosemite Valley v. Norton*, 366 F.3d 731 (9th Cir. 2004). This confusion could easily have been avoided if the Ninth Circuit's initial remand order had been clearer.

<sup>98</sup> *Scarlett*, 439 F. Supp. 2d at 1081.

<sup>99</sup> *Id.* at 1082.

<sup>100</sup> *Id.* at 1095-1100.

<sup>101</sup> *Id.* at 1103-08.

<sup>102</sup> *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1036-37 (9th Cir. 2008).

<sup>103</sup> *Id.* at 1039.

<sup>104</sup> New Merced Wild and Scenic River Comprehensive Management Plan; Yosemite National Park; Mariposa and Madera Counties, CA; Notice of Intent To Prepare Environmental Impact Statement, 74 Fed. Reg. 31,305 (June 30, 2009).

<sup>105</sup> Intent To Prepare an Environmental Impact Statement for the New Merced Wild and Scenic River Comprehensive Management Plan Yosemite National Park, Mariposa and Madera Counties, CA, 75 Fed. Reg. 5803 (Feb. 4, 2010).

<sup>106</sup> Draft Environmental Impact Statement for Merced Wild and Scenic River Comprehensive Management Plan, Yosemite National Park, Madera and Mariposa Counties, CA, 78 Fed. Reg. 5492 (Jan. 25, 2013).

published its notice of the filing of a final EIS for the CMP.<sup>107</sup> Finally, in May 2014, fifteen years after adoption of the initial revisions to the Yosemite and Merced plans, and six years after the Ninth Circuit’s final remand order, the NPS published notice of the availability of a ROD and final EIS and approval of the revised CMP.<sup>108</sup>

The extended back-and-forth between the courts and the NPS included remand orders with and without deadlines for action. On one hand, the agency responded much more quickly when it was required or strongly urged to do so, as we predicted above.<sup>109</sup> On the other hand, it persisted in its errors and made new ones when it acted quickly, although there is no way to know whether haste was responsible. After all, during much of this time period there was a lack of valence alignment between the agency and administration and the winning litigants: although the NPS continued to make efforts toward regulatory compliance, its valence tracked the presidential administration. Two things changed by May 2014. Most obviously, the presidential and litigants’ valences came into alignment, and—if meaning can be read into the lack of judicial challenge by environmental groups<sup>110</sup>—the agency’s valence aligned with these institutional valences as well. But note in addition that the NPS’s final action took place over a longer span of time than its earlier responses. The lesson here may be that courts should balance the desire to foster quick responses on remand in order to avoid delays that may frustrate statutory objectives with the recognition that it may take considerable time and care for agencies to respond conscientiously to remand orders.<sup>111</sup>

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<sup>107</sup> Final Environmental Impact Statement for the Merced Wild and Scenic River Comprehensive Management Plan, Yosemite National Park, Madera and Mariposa Counties, California, 79 Fed. Reg. 10,836 (Feb. 26, 2014).

<sup>108</sup> Notice of Availability of Record of Decision for Merced River Comprehensive Management Plan, Yosemite National Park, California, 79 Fed. Reg. 25,880 (May 6, 2014).

<sup>109</sup> For another case in which an agency provided a remarkably rapid response to a remand order with a short deadline, see *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 833 F.3d 1274 (11<sup>th</sup> Cir. 2016) (suggesting a remand without vacatur and a one-year timeline). The agency reaffirmed its original position, albeit with updated analysis, within six weeks, and both reviewing courts upheld the action. *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs*, 2015 WL 6152898, \*2 (N.D. Ala. 2015), *aff’d*, 833 F.3d 1274 (11<sup>th</sup> Cir. 2016). The rapidity of the agency’s response to the remand order was likely influenced by the fact that it responded by reaffirming its initial decision to issue the permit.

<sup>110</sup> As mentioned in Part I, a litigant’s persistence is surely also a factor in cabining agency discretion on remand. The pesticide example in the Introduction provides another example, in which the litigants challenging the agency refused to take no for an answer. *In re Pesticide Action Network N. Am.*, 840 F.3d 1014 (9<sup>th</sup> Cir. 2016); *In re Pesticide Action Network N. Am.*, 798 F.3d 809 (9<sup>th</sup> Cir. 2015); *In re Pesticide Action Network N. Am.*, 532 Fed. Appx. 649 (9<sup>th</sup> Cir. 2013). By contrast, an agency defeated a challenge to its long-delayed response to a judicial remand order in *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012). There, we posit that the agency’s more than decade-long delay in responding to the court’s order may have been hastened by more persistence by the litigants—though administration changes were also surely to blame. *See also* *Env’tl. Def. Fund, Inc. v. EPA*, 898 F.3d 123 (D.C. Cir. 1990) (invalidating EPA regulations under the CAA setting increments of permissible deterioration of clean air quality for oxides of nitrogen); *Env’tl. Def. v. EPA*, 489 F.3d 1320 (D.C. Cir. 2007) (upholding EPA regulations issued on remand *fifteen years* after the D.C. Circuit’s initial decision). The environmental petitioners in the *EDF* case requested that the court order that EPA respond to its decision within two years, but the court refused to do so. *EDF*, 898 F.2d at 190.

<sup>111</sup> For an example of a case in which the agency defeated a challenge to its long-delayed response to a judicial remand order, see *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012). EPA decided that revisions to the primary national ambient air quality standard (NAAQS) for SO<sub>2</sub> under the Clean Air Act (CAA) were not necessary to control exposure to high-level, short-term SO<sub>2</sub> bursts. The D.C. Circuit remanded for lack of an adequate explanation. It found that EPA did not justify its conclusion that short-term SO<sub>2</sub> exposures do not constitute a public health problem for asthmatics, noting that the agency had failed to explain the link between its finding that repeated short-term exposures were significant, and that there would be tens to hundreds of thousands of

### C. The Endangered Species Act and Agency Persistence

Despite the power of administrations' and litigants' valence alignments, agencies sometimes remain committed to their original course of action, persisting even across multiple presidential administrations. Although we have not identified agency persistence as a discrete variable, it is important to illustrate how that fact can produce outcomes that may be contrary to those hypothesized. Several Endangered Species Act (ESA) cases demonstrate this dynamic; we highlight one here involving efforts to delist the Greater Yellowstone grizzly bear.<sup>112</sup>

The FWS listed the grizzly bear as threatened in the lower forty-eight states in 1975, three years after the ESA's adoption.<sup>113</sup> The FWS's efforts to spur growth in the Yellowstone grizzly population culminated in the agency's 2007 Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area.<sup>114</sup> Shortly thereafter, the FWS, during the second term of the George W. Bush Administration, issued a final rule designating the Yellowstone grizzly as a distinct population segment (DPS)<sup>115</sup> and removing it from the list of threatened species.<sup>116</sup> A local environmental group brought suit, alleging that the delisting decision violated the ESA on four grounds. The district court agreed with two of those arguments, and it vacated the delisting and remanded back to the FWS for further consideration. It concluded that the agency failed to justify its finding that adequate regulatory mechanisms were in place to protect the bear after its

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such exposures annually to a susceptible subpopulation. *Am. Lung Ass'n v. EPA*, 134 F.3d 388 (D.C. Cir. 1998). The court remanded "for further elucidation" without specifying a time limit for the agency's response. *Id.* at 232, 237. Nearly twelve years later, EPA proposed revisions to its NAAQS for SO<sub>2</sub>, Primary National Ambient Air Quality Standard for Sulfur Dioxide, 74 Fed. Reg. 64,810 (Dec. 8, 2009), which it finalized six months later. Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010). The final standards included a short-term (one-hour averaging time) standard for SO<sub>2</sub>. *Id.* at 35,538. Seven months after that, EPA denied a petition for reconsideration filed by several states and industrial interests that was based on alleged procedural and substantive errors. Denial of the Petitions to Reconsider the Final Rule Promulgating the Primary National Ambient Air Quality Standard for Sulfur Dioxide, 76 Fed. Reg. 4780 (Jan. 26, 2011). The D.C. Circuit upheld the standards, rejecting the procedural and substantive claims raised by the states and industrial interests that had sought reconsideration. *Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 686 F.3d 803.

<sup>112</sup> See also Decision Not to Regulate Forest Road Discharges Under the Clean Water Act; Notice of Decision, 81 Fed. Reg. 43,492 (July 5, 2016) (deciding not to require CWA permits for stormwater discharges from forest roads, 13 years after a remand instructing EPA to reconsider the same decision, *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832 (9<sup>th</sup> Cir. 2003), notwithstanding a change from a deregulatory to a regulatory presidential administration); the saga of the flat-tailed horned lizard, recounted in Hammond, *Dialogue, supra* note 14, at 1747-53. An update, showing a still-persistent agency, is provided at Endangered and Threatened Wildlife and Plants; Withdrawal of Proposed Rule to List the Flat-Tailed Horned Lizard as Threatened, 76 Fed. Reg. 14,210 (Mar. 15, 2011). For another example involving the polar bear, see *In re Polar Bear Endangered Species Act Listing and Section 4(d) Litig.*, 709 F.3d 1 (D.C. Cir. 2013) (upholding listing of polar bear following protracted persistence by agency).

<sup>113</sup> *Greater Yellowstone Coal, Inc. v. Servheen*, 665 F.3d 1015, 1019 (9<sup>th</sup> Cir. 2011).

<sup>114</sup> Final Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Area, [http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Final\\_Conservation\\_Strategy.pdf](http://www.fws.gov/mountain-prairie/species/mammals/grizzly/Final_Conservation_Strategy.pdf) (Mar. 2007).

<sup>115</sup> The ESA defines a species to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16) (2012). For discussion of agency and judicial treatment of DPSs, see 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 29:4 (2d ed. 2007).

<sup>116</sup> Endangered and Threatened Wildlife and Plants; Final Rule Designating the Greater Yellowstone Area Population of Grizzly Bears as a Distinct Population Segment; Removing the Yellowstone Distinct Population Segment of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife; 90-Day Finding on a Petition to List as Endangered the Yellowstone Distinct Population Segment of Grizzly Bears, 72 Fed. Reg. 14,866 (Mar. 29, 2007).

delisting,<sup>117</sup> and that the science relied on by the FWS did not support its conclusion that declines in the abundance of whitebark pines would not negatively affect grizzly bears.<sup>118</sup> It vacated the final rule and enjoined the FWS from removing the Yellowstone DPS from the list of threatened species.<sup>119</sup>

The agency appealed, but the Ninth Circuit affirmed.<sup>120</sup> It disagreed with the district court regarding adequate regulatory mechanisms to protect the bear after delisting, but agreed that the agency failed to justify its finding that the decline in whitebark pines, which provide a significant food source for the bears, was not likely to threaten the bear.<sup>121</sup> The court affirmed the district court’s judgment vacating and remanding the rule.<sup>122</sup>

By the time of the remand, President Obama was in power and the agency’s and litigants’ valences might well have been considered to be in alignment and regulatory. But four and a half years after remand, in the final full year of the Obama Administration’s first term, the FWS issued a proposed rule to delist the Yellowstone DPS.<sup>123</sup> The agency based that proposal on its determination that the Yellowstone grizzly population “has increased in size and more than tripled its occupied range since being listed as threatened under the Act in 1975 and that threats to the population are sufficiently minimized.”<sup>124</sup> It noted that if the delisting were finalized, grizzlies would be classified by Wyoming, Montana, and Idaho as game animals throughout the DPS boundaries, a status which “provides legal protection to grizzly bears by prohibiting unlimited or unwarranted killing of grizzly bears by the public.”<sup>125</sup> It explained its expectation that wildlife commissions in the three states would adopt regulations with commitments to coordinate hunting limits consistent with annually calculated mortality limits, and that the regulations, which “would constitute legally enforceable regulatory mechanisms,” had to be “adopted and in place before the Service goes forward with a final delisting rule.”<sup>126</sup>

In conversations with one of the authors, a former FWS official involved in decisions relating to the Yellowstone DPS offered the view that the FWS had examined the science carefully before it delisted the grizzly in 2007 and determined that it solidly supported the a finding that the Yellowstone DPS was no longer threatened.<sup>127</sup> This official viewed the Ninth Circuit’s decision as insufficiently deferential to the agency’s expertise and based on a misunderstanding of the science. The official added that the agency responded to the court’s remand order by diligently reexamining the science, and, after doing so, reached the same conclusion as it had done initially as to the bear’s legal status. Hence, it proposed a second time

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<sup>117</sup> *Greater Yellowstone Coal., Inc. v. Servheen*, 672 F. Supp. 2d 1105, 1113-18 (D. Mont. 2009), *aff’d in part, rev’d in part, and remanded*, 665 F.3d 1015 (9<sup>th</sup> Cir. 2011).

<sup>118</sup> *Id.* at 1118-20.

<sup>119</sup> *Id.* at 1126-27.

<sup>120</sup> *Servheen*, 665 F.3d 1105.

<sup>121</sup> *Id.* at 1024-30.

<sup>122</sup> *Id.* at 1032.

<sup>123</sup> *Endangered and Threatened Wildlife and Plants; Removing the Greater Yellowstone Ecosystem Population of Grizzly Bears From the Federal List of Endangered and Threatened Wildlife*, 81 Fed. Reg. 13,174 (Mar. 11, 2016).

<sup>124</sup> *Id.* at 13,174.

<sup>125</sup> *Id.* at 13,210.

<sup>126</sup> *Id.* at 13,211.

<sup>127</sup> Christopher Servheen, Adjunct Research Associate Professor of Wildlife Conservation, University of Montana, W.A. Franke College of Forestry & Conservation, and Robert Glicksman, Sept. 6, 2016.

to delist the bear. As of this writing, the FWS still lists the grizzly bear as threatened, but has indicated that its proposal to delist the Greater Yellowstone DPS is under review.<sup>128</sup>

### III. FUTURE RESEARCH QUESTIONS

The examples above reveal a nuanced picture of agency behavior on remand, involving not simply our four variables—the nature of the remand order, timing, valence alignment, and presidential administration—but certainly others as well. In this Part, we offer some preliminary observations about how our initial predictions are borne out in the case studies, and how future empirical work might be crafted to develop a more complete picture.

First, the specificity of the remand order matters significantly, as we predicted. The *Rapanos* decision’s indeterminacy, for example, created significant discretion for the agencies involved to respond according to presidential preferences while retaining flexibility across those administrations. By contrast, the Ninth Circuit’s persistent specificity in its remand orders for Yosemite did not leave nearly so much discretion as to timing or substance; still, the overall time to a resolution of the matter was long, perhaps as a result of disagreement among agency, presidential, and judicial policy valences. And the grizzly bear example demonstrates that notwithstanding a presidential and judicial valence alignment, an agency may have other reasons to persist in adhering to its position even throughout numerous challenges.<sup>129</sup>

The Yosemite example raises an important consideration for assessing remand orders as a normative matter. Although we generally appreciate swift agency corrections to flawed actions, it is important that courts be realistic in setting time limits. Too short a time—which is a strict cabining of discretion—may be to the detriment of the rule’s long-term success. Our case studies do not permit assessment of another of our timing predictions: that agencies may act quickly on remand to preserve the incumbent administration’s policy preferences. Other examples, however, may bear out that prediction.<sup>130</sup>

The presidential administration’s policy preferences do seem to have strong predictive value—perhaps an obvious point.<sup>131</sup> By contrast, agency decisions that appear regulatory, but are remanded for not going far enough, introduce subtleties that may prove difficult to sort out in a large dataset. Moreover, the Yosemite example—in which the agency persisted in its position despite presidential and winning litigants’ valence alignment—helps show the limits of our variables, which do not look deeply into the agency’s own culture, structure, or other “internal” means of decisionmaking. Although our variables help focus a critical examination of agency behavior on remand, the Yosemite example demonstrates that other approaches would usefully complement this work and help show the full picture of agency discretion on remand.

### CONCLUSION

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<sup>128</sup> Grizzly bear (*Ursus arctos horribilis*), <http://ecos.fws.gov/ecp0/profile/speciesProfile?sId=7642>.

<sup>129</sup> This interplay involved competing institutional competencies regarding scientific uncertainty, which is likely a further variable and is discussed in Hammond, *Dialogue*, *supra* note 14, at 1753 n.191.

<sup>130</sup> For example, the Obama administration responded quickly to the MACT remand in *Michigan v. EPA* discussed in the Introduction. The George W. Bush Administration hastily reissued its national forest planning rule (repeating the same mistakes that led to invalidation and remand of an earlier, virtually identical rule) less than a year before

<sup>131</sup> On public choice generally, see George C. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON & MGMT. SCI. 3 (1971).

In this Essay, we have characterized agency behavior on remand as a unique space for agency discretion, at least in some circumstances. How agencies behave in this space, we propose, might be predicted at least in part by four types of variables: the nature of the remand order; the timing of the agency's action; the valence alignments as between the administration, agency, and winning litigants; and the timing of presidential administrations. These variables admittedly present some coding difficulties, but our case studies suggest their usefulness in understanding and explaining agency behavior. In addition, the richness of the case studies points once again to a need for better of understanding agency behavior from within.