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The "Directive" Prong: Adding to the Allied-Signal Framework for Remand Without Vacatur

T. Alex B. Folkerth
University of Michigan Law School

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THE "DIRECTIVE" PRONG: ADDING TO THE *ALLIED-SIGNAL* FRAMEWORK FOR REMAND WITHOUT VACATUR

*T. Alex B. Folkerth**

"Remand without vacatur" is an administrative law remedy that allows courts reviewing agency actions with minor legal defects to leave the action in place while the agency fixes the defect. Courts use a two-prong test from the 1993 D.C. Circuit case Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission *to determine whether or not to vacate the action pending remand.* Allied-Signal*'s "deficiency" prong directs the court to consider how bad the defect is. The "disruption" prong directs the court to consider how much havoc will be wreaked by the vacation of the action while the agency is fixing the defect. But as the test has been applied in diverse contexts over the years, ambiguity in its application—particularly regarding the disruption prong—has created problems for courts and litigants. This Note proposes the addition of a third prong, the "directive" prong: courts should consider the purpose of the statutory scheme at issue. This will bring remand without vacatur more in line with an analogous Supreme Court doctrine and also address the problematic ambiguity courts have encountered when applying the* Allied-Signal *test.*

TABLE OF CONTENTS

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I. INTRODUCTION

A court reviewing an administrative agency's action will typically, upon finding that the action is unlawful, both vacate the action and remand the matter to the agency.[1] But within the last thirty or so years, it has become more common for reviewing courts to remand agency actions that are found to be unlawful *without* vacating them.[2] This practice is (perhaps uncreatively) called "remand without vacatur."[3] In determining whether to apply remand without vacatur, courts currently consider two factors: the "seriousness of the order's deficiencies" and the "disruptive consequences of an interim change that may itself be changed."[4] In this Note, I argue that courts should additionally consider the purposes of the statutory scheme at issue. As Part II explains, this buoys the doctrine's formal legitimacy by fitting it more comfortably within existing Supreme Court jurisprudence. As Part III explains, adding to the test will also make it more functional by providing additional guidance to aid courts in making this often-fraught decision.

A. *Background*

Remand without vacatur has been applied or considered in many high-profile cases, including, within the last two years alone, actions involving the Dakota Access Pipeline,[5] Deferred Access for Childhood Arrivals,[6] the addition of a citizen-

1. *E.g.*, Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 294 (2003); STEPHANIE J. TATHAM, ADMIN. CONFERENCE OF U.S., THE UNUSUAL REMEDY OF REMAND WITHOUT VACATUR 1 (2014).

2. *See* TATHAM, *supra* note 1, at 2-8.

3. Professor Levin refers to the remedy as "remand without vacation" "because it is conducive to a livelier title for [his] Article." Levin, *supra* note 1, at 295 & n.10. Although his levity is appreciated, he seems to be taking his "vacation" alone as most commentators and courts have opted to use the term "vacatur." *See, e.g.*, TATHAM, *supra* note 1, at 1; Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 297 (2005); Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253, 307 (2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91 (D.D.C. 2017).

4. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F. 2d 146, 150-51 (D.C. Cir. 1993).

5. *Standing Rock Sioux Tribe*, 282 F. Supp. 3d at 94.

ship question to the national census,[7] changes to federal student loan programs,[8] federal elections regulations,[9] and dozens of environmental cases.[10] Such widespread application demonstrates the importance of remand without vacatur for countless events, both significant and mundane, in all of our lives. Furthermore, courts reviewing agency action appear to be considering remand without vacatur as a remedy with increasing frequency.[11]

Why, and when, have courts—notably the D.C. Circuit, the court to which most commentators have attributed the remedy[12]—deviated from the traditional remedy of remand and vacatur? This question is especially important given the significant controversy that remand without vacatur has provoked among commentators and judges, some of whom argue that it is contrary to the text of the Administrative Procedure Act.[13] Professors Levin[14] and Bagley,[15] however, set out arguments that the APA's "set aside" language should not be interpreted to require mechanical vacatur. I am inclined to agree. The legality of remand without vacatur is therefore assumed for purposes of this Note.

Broadly, courts typically deviate from the traditional remedy of remand and vacatur in favor of remand without vacatur when they feel that vacatur would do more harm than good. For example, imagine that the EPA has adopted a regulation under the Clean Air Act, but a group of environmental plaintiffs feels that the agency failed to properly respond to plaintiffs' comments urging a more stringent standard. The plaintiffs challenge the regulation under the APA and win. The EPA must now correct the error by properly responding to plaintiffs' comments,

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6. NAACP v. Trump, 315 F. Supp. 3d 457, 460-61 (D.D.C. 2018).

7. New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502, 673-75 (S.D.N.Y. 2019), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019).

8. Bauer v. DeVos, 332 F. Supp. 3d 183 (D.D.C. 2018).

9. Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n, 316 F. Supp. 3d 349, 356-57 (D.D.C. 2018).

10. *E.g.*, Sierra Club v. U.S. Army Corps of Eng'rs, 909 F.3d 635, 654-55 (4th Cir. 2018); Oceana, Inc. v. Ross, No. 16-CV-06784-LHK, 2019 WL 266517, at *1 (N.D. Cal. Jan. 18, 2019).

11. Professor Bagley recently wrote that "remand without vacatur has become a routine part of administrative law." Bagley, *supra* note 3, at 308. Professor Levin noted more than fifteen years ago that "[o]ver the past decade, judicial resort to the device has become a familiar feature of administrative law practice." Levin, *supra* note 1, at 295.

12. *See, e.g.*, Bagley, *supra* note 3, at 307. Over half of the other circuits have also adopted the remedy in at least one case. TATHAM, *supra* note 1, at 27.

13. The remedy is typically attacked for being contrary to the Administrative Procedure Act's "set aside" language. 5 U.S.C. § 706(2) (2018); Checkosky v. SEC, 23 F.3d 452, 491 (D.C Cir. 1994) (Randolph, J., dissenting) ("Setting aside means vacating; no other meaning is apparent."); Brian Prestes, *Remanding Without Vacating Agency Action*, 32 SETON HALL L. REV. 108, 129-36 (2001). A variety of what Stephanie Tatham labels "constitutional concerns," mostly involving separation of powers arguments, have also been leveled at the remedy in the academic literature. TATHAM, *supra* note 1, at 13-15.

14. Levin, *supra* note 1, at 309-16.

15. Bagley, *supra* note 3, at 307-09.

but in the meantime, the plaintiffs (and, as will be relevant to my argument, the purpose of the Clean Air Act)[16] would prefer that at least some regulation stay on the books. Remand without vacatur allows a court in such a situation to remand the matter to the agency while letting the regulation stand until the procedural problem has been addressed. It permits the court to avoid making the perfect the enemy of the good.

B. *The Current Test (*Allied-Signal*'s Deficiency and Disruption Prongs)*

It is up to the court's discretion to decide whether, in a given situation, the agency action at issue should be vacated.[17] As Professor Levin has sagely pointed out, "discretion has its hazards . . . . Its exercise calls for coherent standards, not just the unguided conscience of the particular reviewing court."[18] Because of this, courts have developed a two-pronged test to guide application of the remedy. The leading case articulating this test is *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*.[19] *Allied-Signal*'s formulation of the test is as follows: "[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."[20] Professor Daugirdas has described the two prongs of the test as "the deficiency prong" and "the disruption prong."[21] The deficiency prong counsels courts to consider how procedurally deficient the agency action was and thus how likely the agency will be to issue a very similar action, with dotted i's and crossed t's, on remand. The disruption prong counsels courts to consider how much havoc vacating the action will wreak in the meantime. The test does not specify which particular disruptions—administrative, environmental, economic, etc.—courts should be concerned with.

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16. Professor Levin notes that "[a]n additional, and compelling, justification for circumspection in the APA context is that [vacatur] will often work against the thrust of the substantive statute." Levin, *supra* note 1, at 344.

17. Levin, *supra* note 1, at 386.

18. *Id.*; *accord* TATHAM, *supra* note 1, at 16.

19. 988 F.2d 146 (D.C. Cir. 1993).

20. *Id.* at 150-51 (quoting Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin., 920 F.2d 960, 967 (D.C. Cir. 1990)). Interestingly, the common law evolution of the remand without vacatur standard significantly parallels the development of the preliminary injunction standard, the most recent articulation of which was made by the Supreme Court in Winter v. NRDC, 555 U.S. 7, 20 (2008); *see also* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525 (1978). The similarities between the remand without vacatur and preliminary injunction standards are not accidental. *International Union*, the case from which *Allied-Signal* derives its articulation of the remand without vacatur test, itself cites an earlier case describing "analogous factors to be considered in deciding whether to grant preliminary injunction." 920 F.2d at 967 (citing Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977)). While a full discussion of the parallels between the remand without vacatur and preliminary injunction doctrines is beyond the scope of this Note, further discussion can be found in Levin, *supra* note 1, at 378.

21. Daugirdas, *supra* note 3, at 293.

C. *Courts Should Add a "Directive" Prong*

In this Note, I argue that courts deciding whether or not to vacate agency action on remand should consider, in addition to the deficiency and disruption prongs, a third prong. Specifically, courts should consider the purposes of the statutory scheme at issue. If an agency failed to live up to its procedural obligations under the APA, the reviewing court should consider the purpose of the substantive statute authorizing the agency action at issue. If the agency violated a separate statute that has policy goals of its own, such as NEPA, courts should balance the purpose of that statute against the purpose of the statute authorizing the agency action.[22]

In keeping with the alliteration in the current literature, I term this prong the "directive" prong, because it asks courts to take into account the statutory directive that the agency was attempting to effectuate. I present both formal (in Part II) and functional (in Part III) arguments for this suggestion. Part II demonstrates the close relationship between remand without vacatur and Supreme Court jurisprudence regarding the use of equitable discretion to withhold injunctive relief despite federal actors' statutory violations, stemming from *Weinberger v. Romero-Barcelo*.[23] This similarity supports the application of the *Weinberger* doctrine's concern for the purpose behind the statutory scheme at issue in the remand without vacatur context. Part III illustrates the problematic ambiguity in the *Allied-Signal* test's disruption prong, and it argues that the addition of the directive prong can provide needed clarity to the analysis of when to vacate an infirm agency action.

I note at the outset that, because remand without vacatur is an entirely judicial creation, courts could implement this suggestion immediately and without legislative intervention. Part II suggests that such a change would be wholly in keeping with relevant Supreme Court jurisprudence; thus, lower courts should find themselves on firm precedential ground for using the directive prong. In fact, a short run of cases, starting with 1994's *Endangered Species Committee of Building Industry Association of Southern California v. Babbitt*,[24] does consider the purposes of the statutory scheme at issue in the remand without vacatur context. I examine the support that that case lends to both my formal and functional arguments below.

II. THE FORMAL ARGUMENT

The close relationship between remand without vacatur and injunctive relief for statutory violations in other contexts supports my argument that the purpose of the underlying statute should be considered in the remand without vacatur context.

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22. *See infra* note 89.

23. 456 U.S. 305, 313 (1982).

24. 852 F. Supp. 32, 41 (D.D.C. 1994).

In a line of cases dating from 1982's *Weinberger v. Romero-Barcelo*,[25] the Supreme Court held that courts considering remedies for statutory violations by federal actors should apply judicial discretion to the question of whether to enjoin the federal action. According to the Court's jurisprudence in *Weinberger* and its progeny, one important consideration is whether an injunction would frustrate the purpose of the statute being violated.[26] The Supreme Court has not yet commented on the legality or proper application of remand without vacatur.[27] But the *Weinberger* doctrine is sufficiently analogous that it not only lends support to the legality of remand without vacatur but also suggests that courts considering remand without vacatur should import the *Weinberger* doctrine's concern for the underlying statute's purpose. To accomplish this, I propose the addition of a third prong to the *Allied-Signal* test: the directive prong.

A. *The* Weinberger *Doctrine Requires Consideration of Remand Without Vacatur*

The Supreme Court supports courts' discretion to withhold injunctive relief for federal actors' statutory violations based on equitable balancing. Despite the Supreme Court's initial reluctance to apply equitable balancing in the context of statutory violations, notably demonstrated in 1978's *TVA v. Hill*, the Court has since embraced the practice in a line of cases stemming from *Weinberger*.[28] There is now a fairly robust vein of Supreme Court jurisprudence regarding judicial discretion "to withhold injunctive relief despite past statutory violations and even given continuing ones . . . where the court found that withholding injunctive relief better fulfilled the purposes of the underlying statute."[29]

In *Weinberger*, a group of Puerto Rican plaintiffs sued the Navy to enjoin them from carrying out certain training operations that the plaintiffs alleged violated the Federal Water Pollution Control Act (FWPCA).[30] Specifically, the FWPCA required parties to obtain a permit before making discharges into the water such as

25. 456 U.S. 305 (1982). The doctrine could be traced back to Hecht Co. v. Bowles, 321 U.S. 321, 322 (1944).

26. *See, e.g.*, *Weinberger*, 456 U.S. at 314-15 (noting that in *TVA. v. Hill*, 437 U.S. 153 (1978), "the purpose and language of the statute under consideration . . . compelled [an injunction]," while in *Weinberger* the district court could decline to issue an injunction because this did not "undercut the purpose and function of the [FWCPA]").

27. *See, e.g.*, Bagley *supra* note 3, at 262 ("The Court . . . has never passed on the validity of the D.C. Circuit's practice of remand without vacatur, despite opportunities to do so."). Professor Levin notes that Justice Kennedy's first draft of the *Bowen v. Georgetown* opinion included language that could have been read to support the practice but the passage was removed at the suggestion of Justice Scalia. Levin, *supra* note 1, at 352.

28. Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 508-10 (2010).

29. TATHAM, *supra* note 1, at 13.

30. *Weinberger*, 456 U.S. at 307.

those produced by the Navy's activities.[31] The Supreme Court affirmed the district court's withholding of an injunction—even though this allowed the Navy to continue violating the statute while it obtained the requisite permit—as an acceptable application of the district court's equitable discretion. Importantly, the Court pointed out several times that the district court's exercise of discretion was acceptable because it considered and promoted the purposes of the FWPCA.[32] The Court "read the FWPCA as permitting the exercise of a court's equitable discretion . . . to order relief that will achieve *compliance* with the Act."[33]

Goldstein argues that the *Weinberger* holding "establishes a strong presumption that all federal statutes authorizing injunctive relief should be read to require equitable balancing."[34] This is so because the *Weinberger* court grounded its application of equitable balancing for statutory violations in the precedential canon of *Hecht Co. v. Bowles*.[35] *Hecht* established a presumption that Congress does not mean to curb judicial remedial discretion unless it clearly indicates that it is doing so.[36] As the *Weinberger* court put it, "[o]f course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles."[37] Goldstein notes that "since [*Weinberger*], the Court has construed every federal statute that it has examined to require equitable balancing."[38]

Goldstein specifically acknowledges that one plausible implication of his argument is that courts should construe APA violations by agencies as calling for the application of equitable balancing.[39] This is, if not in name, then certainly in function, exactly what the practice of remand without vacatur sees courts doing.[40] Moreover, Goldstein's reasoning may even go so far as to suggest that courts *must* consider remand without vacatur every time they find an agency action violates the APA, rather than merely mechanically vacating the action. Goldstein argues that cases like *Weinberger* and *Winter v. NRDC* "mandat[e] that federal courts can enjoin the government's statutory violations only when an injunction is supported by the

31. *Id.* at 305.

32. *See id.* at 314 ("[Plaintiffs] suggest that failure to enjoin the Navy will undermine the integrity of the permit process by allowing the statutory violation to continue. The integrity of the Nation's waters, however, not the permit process, is the purpose of the FWPCA.").

33. *Id.* at 318.

34. Goldstein, *supra* note 28, at 510-11.

35. Hecht Co. v. Bowles, 321 U.S. 321 (1944).

36. Levin, *supra* note 1, at 310.

37. *Weinberger*, 456 U.S. at 313.

38. Goldstein, *supra* note 28, at 510.

39. Goldstein, *supra* note 28, at 516 n.131.

40. When courts perform the "disruptive consequences" analysis in the second prong of the *Allied-Signal* test, they are essentially balancing equities, such as between environmental harms and costs to industry.

balance of equities."[41] If agency violations of the APA can be considered statutory violations, as Goldstein suggests they should be, then federal courts should enjoin agency actions only when doing so is supported by the balance of equities. In other words, courts must consider remand without vacatur.

B. *The* Weinberger *Doctrine Informs Consideration of Remand Without Vacatur*

The *Weinberger* doctrine is closely analogous to remand without vacatur. Professor Levin, in his seminal article, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, recognizes that courts' equitable discretion to withhold injunctive relief despite statutory violations (i.e., the *Weinberger* doctrine) is "probably the closest analog to remand without vacation in the remedies case law."[42] This framing understands courts' responsibility under the APA to "hold unlawful and set aside"[43] infirm agency actions as, if not a species of injunction, at least closely related. Levin is explicit on this front, noting that "in the APA context . . . a court's use of the section 706 'set aside' remedy [is] in effect, if not in form, an 'injunction' rectifying the APA violation."[44] Levin is certainly not alone in this understanding; for example, in *National Mining Association v. Army Corps of Engineers*, the D.C. Circuit (notably, in an opinion by the same judge who authored *Allied-Signal*, Stephen F. Williams), affirmed the district court's granting of an "injunction" against the agency under the court's authority to review and, if necessary, "hold unlawful and set aside" the agency action under the APA.[45] Through this lens, the remedy of remand without vacatur is properly understood as a court withholding an injunction for equitable reasons.

Professor Levin goes a step beyond pointing out the similarities between remand without vacatur and the *Weinberger* doctrine; he argues that "one can easily extrapolate the teachings of those cases to fit the context of judicial review of agency action . . . . [The *Weinberger*] doctrine carries strong implications concerning the proper dimensions of remand without vacation."[46] In cases where a statute flatly forbids the federal action in question, for example, a court has no business applying its discretion to override the statute.[47] Remand without vacatur doctrine corre-

41. Goldstein, *supra* note 28, at 514.

42. Levin, *supra* note 1, at 334.

43. 5 U.S.C. § 706(2) (1966). Courts traditionally interpret the "set aside" language to mean vacating the agency action. *See* Checkosky v. SEC, 23 F.3d 452, 491 (D.C Cir. 1994) (Randolph, J., dissenting) ("Setting aside means vacating; no other meaning is apparent.").

44. Levin, *supra* note 1, 344; *accord* Goldstein, *supra* note 28, at 516 n.131 ("[T]he Administrative Procedure Act . . . empowers courts to enjoin agencies from taking actions contrary to law.").

45. Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998).

46. Levin, *supra* note 1, at 341-42.

47. Levin, *supra* note 1 at 342, 379-80. This is an application of the logic of *TVA v. Hill*, in which the Supreme Court found that Congress had essentially already balanced the equities between

spondingly accounts for this in the deficiency prong of the *Allied-Signal* test; it does so by directing courts to vacate agency action that is seriously deficient in meeting the requirements of the statute providing the authority for the agency action. Inversely, Levin argues that in cases where "the agency might be able to justify its action . . . by following a better procedure or giving better reasons for its decision"—i.e., where the deficiency prong of the *Allied-Signal* test supports remand without vacatur—"[*Weinberger* and subsequent cases] imply that . . . a reviewing court might allow temporary continuation of an agency action that does not comply with the APA, especially where the balance of practical hardships favors such a disposition."[48] These doctrinal similarities demonstrate *Weinberger*'s implications for the scope of remand without vacatur. They reflect what we can learn from the Supreme Court's *Weinberger* jurisprudence and usefully apply to remand without vacatur.

C. *The* Allied-Signal *Test Should Adopt* Weinberger*'s Concern With Statutory Purpose*

The *Weinberger* doctrine's concern with the purpose of the statute at issue should be imported to remand without vacatur. Levin makes a strong case for the *Weinberger* doctrine's support of remand without vacatur, and concomitantly for the conveyance of its teachings into remand without vacatur. What he mentions several times yet fails to import to remand without vacatur, however, is *Weinberger*'s concern with the purpose of the statute at issue. For example, Levin notes both that "[e]ven though [the *Weinberger* result] would allow the Navy's statutory violation to continue in the short run, it would fulfill the purpose of the [FWPCA],"[49] and that a court's mechanical vacatur of an agency action, especially for relatively trivial procedural reasons, "will often work against the thrust of the substantive statute"[50] (the "substantive statute" being the statute authorizing the agency action). Nonetheless, he does not specifically remark upon this particular overlap or its potential value for the practice of remand without vacatur.

But the Supreme Court's cognizance that injunctions as a remedy for statutory violations have the potential to work against Congress' purposes is a useful consideration that potentially fits even better into the remand without vacatur context. Goldstein points out that the Court has not always been true to this value from the

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federal "action" and endangered species (in favor of the species) in the Endangered Species Act. The *Weinberger* court took pains to distinguish this situation from circumstances where the *Hecht* presumption could aptly apply. *Weinberger*, 456 U.S. at 313-14.

48. Levin, *supra* note 1, at 342.

49. Levin, *supra* note 1, at 337. Goldstein characterizes the Court's promulgation of this doctrine somewhat glibly: "the Court sought a doctrine under which it could avoid enjoining violations of federal statutes when the Court perceived that an injunction would do more harm than good." Goldstein, *supra* note 28, at 505.

50. Levin, *supra* note 1, at 344.

Weinberger opinion; the problem for courts in the more general context is that they are almost always "choosing between competing statutory interests."[51] For example, Goldstein portrays the balancing in *Weinberger* as one between statutorily protected national security interests on the Navy's side and statutorily protected environmental interests on the plaintiff's side. He argues that the Court's insertion of itself into this policy space represents an aggrandizement of judicial authority that presents separation of powers problems.[52] The *Weinberger* court could perhaps more charitably be described as striking a compromise; the denial of the injunction accommodates the Navy's national security interest while also allowing the court to "order relief that will achieve compliance with the [FWPCA]," particularly given that the district court also ordered the Navy to obtain a permit as required by the FWPCA.[53]

In the remand without vacatur context, there may not even be a policy conflict between two substantive statutes. Where, as in *Weinberger*, a court considers enjoining a federal actor from violating a statute, the statute being violated is the one whose purposes are being considered in the equitable balancing. But the federal actor is usually acting under a different, conflicting statute, whose purposes should also (at least implicitly) be considered.[54] In remand without vacatur, however, there's typically only one substantive statute in the mix: the statute authorizing the agency's action. The APA might technically be the statute violated, but it is simply a procedural directive whose purpose is to improve rulemaking, rather than to push agency actions substantively in one direction or another. Thus, the APA does not provide a conflicting policy prerogative, and its purpose need not be considered. It's more useful to think of the substantive statute as the one violated. Congress directed the agency through the substantive statute, and courts use the APA to determine whether the agency took appropriate procedural and substantive steps to fulfill this responsibility, or whether they violated Congress's command by failing to do so.

This distinction may place some strain on the analogy insofar as it points out a structural difference between remand without vacatur and the more general context of courts exercising remedial discretion for statutory violations by federal actors. But more importantly, it ameliorates Goldstein's concern with courts being put in a position to choose between statutory interests. For example, in cases like *Weinberger*, where federal actors are sued for violations of environmental statutes,

51. Goldstein, *supra* note 28, at 523.

52. *See id.* at 521-22.

53. Weinberger v. Romero-Barcelo, 456 U.S. 305, 318 (1982).

54. In *Weinberger*, the Court acknowledged that the Navy had violated the FWPCA but held that, given the balance between the purpose of the FWPCA and the Navy's statutorily protected interest in carrying out its training activities, the best result was to allow the Navy to continue its activities while they obtained a permit. *See Weinberger*, 456 U.S. at 310-11. Goldstein, too, points out that although the environmental interests are obviously protected by the FWPCA, the Navy's interests are also derived from a statute. Goldstein, *supra* note 28, at 521 n.155.

there's almost an inevitable policy conflict because the federal actors themselves are operating based on congressional authority from a different statute. In the remand without vacatur context, however, there is only one statute whose purpose should be considered: the substantive statute giving the agency the authority to act in the first place. Judicial discretion can thus usually be used in the remand without vacatur context to further one statutory directive without undermining another (at the very least the probability of *policy* conflicts between statutory directives is reduced in the remand without vacatur context).[55] Therefore, the consideration of statutory purpose works even better for remand without vacatur, where it's notably absent from the *Allied-Signal* test, than it does in the more general context.

D. *Some Courts Have Already Applied a "Directive" Prong*

Extant case law sourcing the application of remand without vacatur to *Weinberger* supports the consideration of statutory purpose. In *Endangered Species Committee of Building Industry Association of Southern California v. Babbitt*, the court actually cited the *Weinberger* line of cases instead of *Allied-Signal* for its application of remand without vacatur.[56] The first factor the *Babbitt* case sourced from the *Weinberger* doctrine was the purpose of the substantive statute. In 1994, only one year after the *Allied-Signal* decision (it is, in fact, very interesting that the *Babbitt* court did not cite *Allied-Signal*) Judge Sporkin of the District Court for the District of Columbia fashioned his own test for considering when to remand agency action without vacatur:

> In determining whether an agency's action should be vacated or not pending rectification of a procedural flaw, the Court must consider (1) the purposes of the substantive statute under which the agency was acting, (2) the consequences of invalidating or enjoining the agency action, and (3) and [sic] potential prejudice to those who will be affected by maintaining the status quo . . . . In addition, the Court must consider the

55. It could be argued that a court's decision not to "set aside" agency action by vacating it represents a court choosing between the statutory purpose of the substantive statute and the remedial instructions in § 706 of the APA, but this argument leads quickly to a well-trod argument over the legality of the remedy with which this Note is not concerned (i.e., that APA § 706(2), which demands that courts "set aside" erroneous agency actions, does not leave room for courts' discretion to remand without vacating). *See* Levin, *supra* note 1, at 309-16; Bagley, *supra* note 3, at 307-09. But if we trust Professors Levin and Bagley's arguments and assume the legality of the remedy, a court declining to vacate an action that violates the APA does not frustrate the purposes of the APA. Additionally, the implications of the directive prong can better allow remand without vacatur to weather the "constitutional concerns" leveled against it, (*see* TATHAM, *supra* note 1, at 13), because the directive prong can enhance remand without vacatur's ability to "augment congressional influence" by making consideration of congressional purposes a criteria for the application of the remedy in the first place. Levin, *supra* note 1, at 343-44. Such an argument is, however, beyond the scope of this Note.

56. 852 F. Supp. 32, 41 (D.D.C. 1994).

> magnitude of the administrative error and how extensive and substantive it was.[57]

The court cited *Weinberger* and a succeeding case, *Amoco Production Co. v. Village of Gambell*[58] for the first three factors. No precedent was cited for the additional factor.

The overlap between the *Babbitt* test and the *Allied-Signal* test is clear. The unenumerated, additional factor is essentially the *Allied-Signal* deficiency prong. Factors (2) and (3) seem to be a more prescriptive version of *Allied-Signal*'s disruption prong; the two factors separate the balancing that occurs under the umbrella of the disruption prong in *Allied-Signal*. For example, as Professor Daugirdas notes, *Allied-Signal*'s own consideration of the disruption prong considered both "disruptions to the regulating agency"—*Babbitt*'s second factor—and "some concern for disruption to the regulated entities"[59]—*Babbitt*'s third factor.

Several district courts around the country later adopted the *Babbitt* test, or at least its factors, often in conjunction with *Allied-Signal*.[60] These courts quickly stripped it of its limitation to "rectification of a *procedural* flaw,"[61] applying it more generally to statutory violations by agencies.[62] As I explore in Part III, these cases also provide support for my functional argument for adopting the directive prong.

III. THE FUNCTIONAL ARGUMENT

A functional argument also counsels in favor of expanding the *Allied-Signal* test: by considering the purpose of the statute that provided the agency with the authority for the action at issue, courts can add needed clarity to the analysis of when to vacate an infirm agency action. Some courts applying the *Allied-Signal* test have experienced a practical problem. The test does not adequately guide the exercise of courts' remedial discretion with respect to the disruption prong, because it does not provide any direction as to which of multiple potentially conflicting

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57. *Id.* Judge Sporkin did not affirmatively decline to apply *Allied-Signal* or mention it at all, nor did he refer to the remedy he ordered as "remand without vacatur." I suspect that because *Allied-Signal* was then only one year old and remand without vacatur was still a very young doctrine, Judge Sporkin didn't realize there was a circuit test for what he was doing and felt more like he was just applying equitable discretion to the issue of remedy for a statutory violation, as I describe in Part II.

58. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987).

59. Daugirdas, *supra* note 3, at 294.

60. *See, e.g.*, Nat'l Ass'n of Home Builders v. Norton, No. CIV 00-0903-PHX-SRB, 2004 WL 3740765, at *3 (D. Ariz. June 28, 2004); NRDC v. U.S. Dep't of Interior, 275 F. Supp. 2d 1136, 1139 (C.D. Cal. 2002); Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Salazar, No. 07-CV-00876 JEC/WPL, 2009 WL 8691098, at *3 (D.N.M. May 4, 2009) (citing *Babbitt*, 852 F. Supp. at 41).

61. *Babbitt*, 852 F. Supp. at 41 (emphasis added).

62. *See NRDC v. DOI*, 275 F. Supp. 2d at 1144 ("The procedural or substantive nature of the error causing a rule to violate the APA does not itself limit the court's equitable powers to enforce a regulation during a remand period.").

harms should be avoided. As a corollary, the test also fails to provide litigants with sufficient guidance as to which disruptions the court may prioritize, making it difficult for litigants to tailor remedial arguments to the legal standard.

Allied-Signal's disruption prong directs courts to consider "the disruptive consequences of an interim change that may itself be changed."[63] But administrative cases run an impressive gamut of consequences, and not every kind of disruptive consequence produced by vacatur has the same relevance to every type of case. For example, should a court hearing a case brought by environmental plaintiffs care about whether allowing an animal to stay on the endangered species list would have drastic consequences for non-party industry players? Should a court hearing a case about labor issues consider whether vacatur of an NLRB adjudication would drive up prices for consumers? The directive prong is an additional signpost to guide judicial discretion, which could help address such ambiguity. In other words, the answer to the implicit question left open by the *Allied-Signal* test—i.e., "which disruptive consequences matter in this context?"—can best be answered by reference to the purpose of the statute under which the agency is acting.

A. *The "Directive" Prong Works with the Existing* Allied-Signal *Factors*

The examples discussed below in Part III.B are a practical demonstration of the problematic ambiguity in the *Allied-Signal* test. But first, there's a conceptual issue: would a third prong fit into the test, or would it disturb the operation of the other two factors? Professor Levin notes that "the case law does not disclose a consistent pattern regarding the way in which the two prongs of the *Allied-Signal* formula fit together."[64] Tatham, writing for the Administrative Conference of the United States, echoed this assessment, describing the test as "simply an articulation of two categories of equitable factors that courts consider, at times together, in determining whether to vacate an agency's decision on remand."[65]

Moreover, the two *Allied-Signal* prongs already overlap somewhat. The directive prong would also partially overlap with the other prongs, especially the disruptive consequences prong. Regarding the overlap of the current prongs, the precise articulation of the disruption prong is: "the disruptive consequences of an interim change that may itself be changed."[66] This requires some consideration of the probability that the interim change will, in fact, be changed. That probability is, of course, the deficiency prong: "the seriousness of the order's deficiencies"[67] or the existence of "a serious possibility that the [agency] will be able to substantiate

63. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151-52 (D.C. Cir. 1993) (internal citations omitted).

64. Levin, *supra* note 1, at 380.

65. TATHAM, *supra* note 1, at 7.

66. *Allied-Signal*, 988 F.2d at 151-52.

67. *Id.* at 150.

its decision on remand."[68] Fortunately, these explanations describe a test that is sufficiently malleable to support the addition of another equitable factor for courts to consider: the directive prong.

Tatham's point about how the prongs can be considered together supports the notion that the addition of a third prong can only help guide courts' discretion without disturbing the operation of the two existing prongs. Ambiguity regarding the disruption prong, in particular, can best be addressed by reference to the directive prong. The disruptions that most matter are those that most interfere with the purpose of the underlying statute. The addition of the directive prong to the court's equitable analysis needn't be dispositive, but it should address a category of concerns relevant to the remand without vacatur analysis that is ignored by the current test.

B. *Ambiguity in the Disruption Prong of the* Allied-Signal *Test*

Judges in several recent opinions have gone so far as to point out the lack of clarity in the application of *Allied-Signal*'s disruption prong. In *Public Employees for Environmental Responsibility v. U.S. Fish & Wildlife* (*PEER*), for example, a group of environmental plaintiffs brought suit against the U.S. Fish and Wildlife Service arguing that the agency's authorization for certain industry actors to kill double-crested cormorants violated NEPA.[69] The court had previously held that the agency's action violated the statute, so it was only considering whether or not to vacate the action based on the *Allied-Signal* test.[70] The agency argued that vacatur would "cause 'substantial disruption to the regulated community and the Service,' as well as 'significant impacts to recreational fisheries and aquaculture industry.'"[71] The court—which did vacate the rule—rather than taking these concerns into account in its equitable analysis and finding them wanting, expressed doubt regarding the relevance of such consequences to the analysis at all. The opinion noted that "[c]ourts do consider disruptive impacts to the regulated industry in non-environmental cases. . . . But it is not clear that economic concerns are as relevant in an environmental case like this one."[72] The court cited for this proposition a 2010 case from the Northern District of California "expressing doubt over the propriety of considering 'economic consequences . . . in environmental cases.'"[73]

Similarly, in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, a number of Native American tribes and other plaintiffs challenged the agency's granting of an easement to build the Dakota Access Pipeline based on the agency's finding

68. *Id.* at 151.

69. 189 F. Supp. 3d 1, 1 (D.D.C. 2016).

70. *Id.*

71. *Id.* at 3 (quoting the Defendant's Memorandum opposing vacatur).

72. *Id.* (internal citations omitted).

73. *Id.* (citing Ctr. for Food Safety v. Vilsack, 734 F. Supp. 2d 948, 953 (N.D. Cal. 2010)).

that the project would not have a significant environmental impact under NEPA.[74] The court agreed with the plaintiffs and remanded certain issues to the agency that had not been sufficiently addressed.[75] Much like in *PEER*, the court held a separate hearing and wrote a separate opinion on the issue of vacatur, again applying the *Allied-Signal* test. The court decided remand without vacatur was appropriate, but mainly based its conclusion on the deficiency prong, partly because it recognized the significant ambiguity regarding the relevance of certain kinds of disruptive consequences under the disruption prong.[76] The court mentioned this ambiguity several times, noting that "the Tribes question whether 'financial impacts' carry 'much or even any weight' when evaluating the second *Allied-Signal* factor [*i.e.*, the disruption prong]],"[77] and striking somewhat of a compromise position regarding the relevance of such consequences. It acknowledged that they were relevant but assigned them less weight; the court "decline[d] to rely heavily on economic impact as a justification for issuing vacatur."[78] Given its "reluctan[ce] to rely on economic disruption in denying vacatur," the court seemed somewhat relieved to be able to decide the case based on the deficiency prong.[79]

In a very different context, the district court in *New York v. U.S. Department of Commerce* considered the Trump Administration's request for remand without vacatur following the court's earlier holding that the addition of a citizenship question to the 2020 census was unlawful.[80] The question of remedy was not of central importance in the case, as the court unequivocally decided that both remand and vacatur were appropriate.[81] But the court did note, in considering the agency's arguments regarding the disruption prong of the *Allied-Signal* test, that "the disruptions Defendants assert all involve Defendants' own internal processes. The Court is not so sure that additional burdens on governmental resources are the type of disruption with which the remand-without-vacatur remedy is concerned, at least insofar as those burdens do not seriously harm the public interest."[82] The court was likely being a bit sarcastic here in saying "not so sure," but the issue is nonetheless very similar; the *Allied-Signal* test failed to provide sufficient guidance to both the court and to litigants as to which disruptive consequences of vacatur are relevant.

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74. 282 F. Supp. 3d 91, 94 (D.D.C. 2017).

75. *Id.* at 96.

76. *Id.* at 108 ("The Court therefore need not rely upon disruption in deciding that vacatur is not the appropriate outcome.").

77. *Id.* at 104.

78. *Id.* at 105.

79. *Id.* (internal citations omitted).

80. 351 F. Supp. 3d 502, 514-17 (S.D.N.Y. 2019).

81. *Id.* at 673.

82. *Id.* at 674 n.85.

C. *The "Directive" Prong Can Resolve Ambiguity in the Disruption Prong*

In this Section, I test the usefulness of the directive prong by applying it to the cases described above as exemplars of the problems with the current *Allied-Signal* test. First, however, I note that the treatment of the disruptive consequences prong by the *Allied-Signal* court itself is sufficiently consistent with my argument to imply some unconscious consideration of the statutory scheme at issue in that case. *Allied-Signal* involved a challenge by a "uranium hexafluoride . . . converter" to the U.S. Nuclear Regulatory Commission's rule charging regulated entities such as the plaintiff licensing fees in order to finance the agency's budget.[83] The agency's action was grounded in a statutory scheme designed to provide financing for federal agencies through such licensing arrangements: the Independent Offices Appropriation Act of 1952 and subsequent budget acts, culminating in the 1990 Omnibus Reconciliation Act.[84] The *Allied-Signal* court describes the subsequent statutes as essentially enlarging the amount of the agency's budget that it should finance through fees and allowing it to charge regulated entities, not just for a "service or thing of value," but also for "*generic* costs of operation."[85] The 1952 Act provides a statement of Congress' purpose in enacting this scheme, which is consistent through the subsequent enactments under which the agency promulgated the challenged rule. The Act's stated purpose is that "each service or thing of value provided by an agency . . . is to be self-sustaining to the extent possible."[86] In other words, the purpose of the statute under which the agency was acting is for the agency to collect sufficient funds to finance its own operation.

When the court considered the disruptive consequences of vacating this rule, it focused on the consequences to the agency, writing:

> [T]he consequences of vacating may be quite disruptive. Even assuming that we could merely vacate the rule insofar as it denies an exemption for . . . converters [similar to plaintiff], the Commission would need to refund all 1990 OBRA fees collected from those converters; in addition it evidently would be unable to recover those fees under a later enacted rule.[87]

Thus vacatur, by gutting the agency's budget and forcing it to rely on further appropriations from Congress, would frustrate the purpose of the statutory scheme giving rise to the agency's rule in the first place.

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83. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 148 (D.C. Cir. 1993).

84. *Id.*

85. *Id.*

86. 31 U.S.C. § 9701 (2018).

87. *Allied-Signal*, 988 F.2d at 151. The court here cites *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988); other commentators have discussed the influence this case had on the development of remand without vacatur. Daugirdas, *supra* note 3, at 287; TATHAM, *supra* note 1, at 5.

It could fairly be argued that there may not have been any other disruptive consequences for the court to consider in *Allied-Signal*, and thus the relationship between the statutory purpose and those consequences is little more than coincidence. I now, therefore, turn to the cases discussed above to illustrate how a more conscious application of the statutory purpose to the analysis can provide clarity to the standard.

The *PEER* case is a great example because the court actually did turn to statutory purpose to resolve the ambiguity.[88] Immediately after noting its uncertainty regarding the relevance of economic concerns in an environmental case, the court highlighted that "NEPA's focus is on 'requiring agencies to undertake analyses of the *environmental impact* of their proposals and actions.'"[89] Thus, the court reasoned it should not place much weight on economic interests unless they have some relation to the environmental impacts NEPA is concerned with, like "aquaculture or recreational fishing" (presumably because environmental harms would concomitantly harm these economic activities).[90] This consideration of statutory purpose demonstrates the clarity that the directive prong can bring to the analysis and also the relative ease with which courts can identify and apply the statutory purpose, especially as related to ambiguity in the application of the disruption prong.

Standing Rock Sioux Tribes also involved plaintiffs' challenge to an agency's fulfillment of its procedural obligations under NEPA, which allows application of the formulation of NEPA's purpose articulated in *PEER*. Consideration of NEPA's purpose under the directive prong in *Standing Rock Sioux Tribes* would likely produce the same result as the one the court ultimately reached but would give the court more guidance in adjudicating the plaintiffs' challenge to the relevance of disruptive economic impacts. Instead of the equivocal approach the court took towards economic impacts, it could have cited the statute's purpose for the proposition that such consequences were not of great relevance to its decision. Rather than merely "declin[ing] to rely heavily on economic impact,"[91] the court could have instead provided a principled explanation for why such disruptions are not the kind it considers in NEPA cases, in that the statutory purpose counsels for the primacy

88. Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv., 189 F. Supp. 3d. 1, 3 (D.D.C. 2016).

89. *Id.* (quoting Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1310 (D.C. Cir. 2014)). Here, NEPA is actually the statute that was violated, not the APA; thus Goldstein's critique does apply to this situation, *see supra* text accompanying note 52, because this is analytically closer to the court's role in *Weinberger*. As in the *Weinberger* doctrine, the court applying the directive prong here should balance the policy goals of the statute violated (NEPA) against the policy goals of the statute authorizing the agency action (the court may not simply force the agency to prioritize NEPA's policy goals, *see* Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980)). In a situation where the agency simply violated the APA, the court should seek to further the purpose of the statute authorizing the agency action. *See supra* text accompanying notes 54-55.

90. *Id.*

91. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91, 105 (D.D.C. 2017).

of environmental disruptions. The more cogent standard provided by the directive prong would also give future litigants a better argument for which disruptive consequences should matter in a given case. Such a standard would replace the directionless jumble of precedent supplied by the litigants here: plaintiffs pointed to environmental cases in which economic impacts were not considered, while defendants countered with a presentation of environmental cases in which they were.[92]

Finally, the arguments regarding disruptive consequences in *New York v. U.S. Department of Commerce* could also benefit from reference to the purpose of the statutory scheme at issue. The court notes early in its opinion that the census has multiple purposes: "to apportion Representatives among the states," "to draw political districts and allocate power within them," and "to collect demographic data about the population of the United States."[93] Thus, on the remedial issue in that case, the court could have held that the disruptive consequences of vacatur to the agency were not relevant because the statutory (and constitutional) purposes of the census do not reference the amount of work created for the government in its administration.[94] In fact, the court sarcastically asserted that the consequence of the agency having to do more work wasn't that important.[95]

D. *The "Directive" Prong Has Worked Well for Courts That Have Used It*

Endangered Species Committee v. Babbitt, discussed at the end of Part II, was able to avoid equivocation between competing sets of disruptive consequences by explicitly considering the statutory purpose and prioritizing among the competing disruptions accordingly. *Babbitt* involved the Department of the Interior's listing of the coastal California Gnatcatcher on the threatened species list under the Endangered Species Act.[96] The plaintiffs, "a group representing property owners, homebuilders and others" filed suit arguing that because "the bird isn't rare, developers should be allowed to build on land that's currently off-limits."[97] More specifically, the legal problem was that the agency failed to make certain scientific data available for public inspection during their rulemaking process.[98]

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92. *Id.* at 104.

93. New York v. U.S. Dep't of Commerce, 351 F. Supp. 3d 502, 514-15 (S.D.N.Y. 2019), *aff'd in part, rev'd in part*, 139 S. Ct. 2551 (2019). The opinion meticulously accounts the statutory scheme delegating responsibility for the census. *Id.* at 521-24. I cabin my treatment of this extraordinarily complex case to the census purposes identified by the court and cited herein for practical reasons.

94. *Id.* at 521-24.

95. *Id.* at 674 n.85.

96. Endangered Species Comm. v. Babbitt, 852 F. Supp. 32, 33 (D.D.C. 1994).

97. Jim Steinberg, *Is the California Gnatcatcher Truly Endangered? Lawsuit Wants Feds to Take Another Look*, PRESS-ENTERPRISE, (Nov. 2, 2017), https://www.pe.com/2017/11/02/group-asks-feds-to-take-second-look-at-california-gnatcatcher-protections/.

98. *Babbitt*, 852 F. Supp. at 37.

On the question of remedy, it's illuminating to fit the court's discussion into the *Allied-Signal* framework. On the deficiency prong, the court found that "the Secretary is well on his way to completing his obligations under law."[99] In other words, the deficiency is not serious and "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand."[100] On the disruption prong, the balance before the court was the economic disruption caused by leaving the species on the list, which the plaintiffs argued "would [delay] their economic development and transportation construction plans" and the possibility that "landowners fearful of an imminent relisting of the [Gnatcatcher] may well destroy the remaining coastal sage scrub habitat on their property, in order to preemptively free themselves from potential limits on development that may come if the bird is listed permanently."[101] The court, rather than "declin[ing] to rely heavily on economic impact,"[102] balanced "the competing claims of injury, considering the underlying purposes of the statute at issue" and found that "the equities weigh in favor of continued listing."[103]

Without consideration of the statutory purpose, the court may have been rudderless in weighing the economic disruption against the environmental disruption, like courts using the *Allied-Signal* test have been. In other words, the directive prong can do some very useful work in clarifying the analysis and guiding courts to a principled, predictable decision.

IV. CONCLUSION

Courts considering remand without vacatur can, and should, start using the directive prong immediately. This additional factor can be cited to the *Weinberger* line of cases, as in *Babbitt*, analogously lending the Supreme Court's imprimatur to the remedy and prioritizing congressional purpose over unfettered judicial discretion. And the added guidance of the directive prong can replace the ambiguity created by *Allied-Signal*'s disruption prong with predictability for both courts and litigants. As Professor Levin remarked, "discretion has its hazards . . . . Its exercise calls for coherent standards, not just the unguided conscience of the particular reviewing court."[104] The directive prong provides the coherent standard so sorely needed in the remand without vacatur doctrine.

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99. *Id.* at 42.

100. Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-51 (D.C. Cir. 1993).

101. *Babbitt*, 852 F. Supp. at 42.

102. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 282 F. Supp. 3d 91, 105 (D.D.C. 2017).

103. *Babbitt*, 852 F. Supp. at 42.

104. Levin, *supra* note 1, at 386.