

VOLUNTARY REMANDS: A CRITICAL REASSESSMENT

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ABSTRACT

This Article explores and critiques the administrative law doctrine of voluntary remand. When petitioners challenge an agency policy, the agency may ask the reviewing court to return the policy to the agency for reconsideration—effectively terminating the court’s role in the case. Voluntary-remand motions risk agency opportunism and political manipulation but are nevertheless routinely and uncritically granted by courts. The Article explores the theory and history of voluntary-remand doctrine, observing that modern administrative law developments negate many of the doctrine’s core assumptions. Accordingly, the Article calls for reassessing courts’ willingness to grant voluntary remands.

| | |
|--|-----|
| Introduction | 362 |
| I. Defining Voluntary Remands | 366 |
| II. A Continuum of Voluntary-Remand Cases | 369 |
| A. Avoiding Litigation Loss | 369 |
| B. Error Correction | 374 |
| C. Policy Overhaul | 376 |
| III. Tracing Voluntary-Remand Doctrine..... | 380 |
| A. Doctrinal Origins | 381 |
| B. Modern Doctrine Takes Shape | 384 |
| 1. The <i>SKF</i> Decision..... | 385 |
| 2. <i>SKF</i> 's Legacy | 387 |
| 3. Lingering Ambiguities: Vacatur and Other Remedies .. | 389 |
| 4. Lingering Ambiguities: Interadministration Remands .. | 391 |
| IV. Reforming Voluntary-Remand Law | 393 |

* Yale Law School, J.D. 2017. An earlier version of this Article won the Benjamin Scharps Prize for Best Paper by a Third-Year Student at Yale Law School. Many thanks to Nicholas Parrillo for his generous mentorship of this project, and to Vicki Been, David Fontana, Meredith Foster, Hilary Ledwell, Isaac Park, and Richard Revesz for helpful comments and suggestions. Thanks also to Sanjana Biswas and the editors of the *Administrative Law Review* for thoughtful editing.

| | |
|--|-----|
| A. Abandoning the Agencies-as-Courts Myth..... | 395 |
| B. Cabining Agency Expertise, Preserving Judicial Resources | 397 |
| C. Taking Seriously Private Parties' Rightful Positions..... | 400 |
| D. Beyond the <i>SKF</i> Framework | 402 |
| V. Alternatives to Voluntary Remands..... | 404 |
| Conclusion | 407 |

INTRODUCTION

On January 20, 2017, Donald Trump inherited the White House, the nuclear codes, and the world's most difficult job—as well as over 30,000 federal cases filed against the U.S. government.¹ Those cases would soon be renamed, substituting the new President and his appointees for their predecessors.² Handling them would mark an early test for the President and his Department of Justice (DOJ).

For many of those cases, the change in administration was irrelevant. Over 10,000 prisoners file suits against the United States each year;³ the government's response to those cases presumably does not vary by its ideology. But other cases put the new President in a challenging position. When Trump took office, federal agencies were defending numerous federal regulations promulgated by Barack Obama's administration—the precise same regulations that Trump had pledged to roll back on “Day One.”⁴ Pending cases included a challenge to two major Environmental Protection Agency (EPA) policies: the Waters of the United States Rule, which Trump called “unconstitutional” during his campaign,⁵ and the Clean Power Plan, which he had pledged to “scrap.”⁶

Trump could not defend those regulations consistently with his policy

1. *Table C-2, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2014 and 2015*, U.S. DIST. COURTS, www.uscourts.gov/sites/default/files/data_tables/C02Sep15.pdf (last visited May 9, 2018).

2. FED. R. CIV. P. 25(d) (“The officer’s successor is automatically substituted as a party.”); accord FED. R. APP. P. 43(c)(2); SUP. CT. R. 35.3.

3. *Table C-2, supra* note 1.

4. Tal Kopan, *Could a President Trump Reverse Obama's Regulations on “Day One”?*, CNN (Sept. 28, 2016, 6:03 AM), <http://www.cnn.com/2016/09/28/politics/trump-executive-action-obama>.

5. Clinton, *Trump Split Over WOTUS*, CAPITAL PRESS (Sept. 29, 2016, 10:47 AM), <http://www.capitalpress.com/20160929/clinton-trump-split-over-wotus>.

6. Robert Walton, *Trump Vows to Scrap Clean Power Plan*, UTILITY DIVE (Sept. 23, 2016), <http://www.utilitydive.com/news/trump-vows-to-scrap-clean-power-plan/426905>.

preferences. But nor could his administration walk away from the suits.⁷ So conservative lawyers settled on a third solution: The Trump Administration could ask the courts to make these cases go away.⁸ Rather than litigating the Clean Power Plan case on its merits, for example, the Administration could tell the reviewing court that it intended to reconsider the rule. It could therefore ask the court to dismiss the case and remand the challenge back to the agency. On remand, the Administration would be free to rework or rescind the challenged regulation, free from the interference of a pending lawsuit.

This Article is about these so-called “voluntary remands”: requests by the agency to the reviewing court to send the matter back to the agency. They are a powerful weapon in the federal agency toolkit and have obvious appeal for incoming administrations. But not all remand motions arise in such politically charged circumstances. Agencies have requested voluntary remands to correct arithmetic or other minor errors,⁹ or because new facts or law have made their position less tenable.¹⁰ Other times, agencies have simply stated that they desire to reconsider their policies, without providing much of a reason why.¹¹

In each of these scenarios, the government won its remand motion, and the reviewing court shed oversight of the case.¹² Those results are typical in the doctrine: administrative agencies will typically receive voluntary remands except in unusual circumstances. At the same time, though, courts’ solicitude toward voluntary remands is not calcified into well-crafted doc-

7. See *infra* notes 99–101 and accompanying text.

8. Amanda Reilly, *Clean Power Plan: Rule’s Demise Looms, but How Trump Will Ax It Remains Unclear*, E&E NEWS (Nov. 9, 2016), <http://www.eenews.net/stories/1060045517> (quoting Jeff Holmstead, a former Assistant Administrator at the Environmental Protection Agency (EPA)).

9. See, e.g., Joint Motion Involving Settlement Agreement of All Parties for Partial Vacatur, *Lennox Int’l, Inc. v. DOE*, No. 14-60535, 2015 WL 1777862 (5th Cir. Apr. 9, 2015) (seeking an unopposed voluntary remand after a series of Department of Energy calculation errors).

10. See, e.g., *Cissell Mfg. Co. v. DOL*, 101 F.3d 1132, 1136 (6th Cir. 1996) (granting a voluntary remand after a change in law); Defendants’ Motion for Voluntary Remand of the Pancake Complex Gather Decision at 1, *Am. Wild Horse Pres. Campaign v. Salazar*, 859 F. Supp. 2d 33 (D.D.C. May 9, 2012) (No. 1:11-cv-2222-BAH) (seeking a voluntary remand to consider new “declarations from horse specialists”).

11. See, e.g., *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317, 323 (2d Cir. 2010) (recounting a voluntary remand “so that [the Federal Communications Commission (FCC)] could have the opportunity to address petitioners’ arguments”).

12. See *id.* at 323; *Cissell Mfg. Co.*, 101 F.3d at 1136; Order, *Lennox Int’l*, 2015 WL 1777862 (No. 14-60535); Order, *Am. Wild Horse Pres. Campaign*, 115 F. Supp. 3d 1 (No. 1:11-cv-2222-BAH).

trine: most voluntary-remand decisions are unpublished and unreasoned,¹³ and courts cannot agree on basic questions surrounding the doctrine.

This Article suggests that the presumption in favor of voluntary remands is a mistake.¹⁴ The doctrine is an anachronism: it has evolved asynchronously with other administrative law principles, and no longer reflects the legal relationship between agencies and courts. Specifically, it is based on a set of inaccurate assumptions about why agencies might seek voluntary remands, and what the effect of those remands would be. Those assumptions, in turn, cause the doctrine to ignore important administrative law developments—most importantly, the Supreme Court’s decision in *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*,¹⁵ which requires courts to closely scrutinize agencies’ changes in policy. Incorporating those developments into voluntary-remand doctrine requires cabining the presumption in favor of remands.

No paper written in the last twenty years has explored the law of voluntary remands.¹⁶ But it is ripe for examination, particularly as administrative law scholars turn their focus to the remedies that follow from challenges to agency action.¹⁷ Understanding those remedies, they suggest, is essential to determining agencies’ incentives during the policymaking process, as well as private parties’ incentives to challenge those policies.¹⁸ Accordingly, academics have explored a host of remedies questions, including nationwide injunctions,¹⁹ stays,²⁰ remands without vacatur,²¹ and contempt.²²

13. See, e.g., *Pac. Gas & Elec. Co. v. Fed. Energy Regulatory Comm’n*, No. 04-1122, 2004 WL 2672300 (D.C. Cir. Nov. 22, 2004); *Gen. Signal Corp. v. EPA*, No. 90-1560, 1993 WL 183999 (D.C. Cir. Apr. 16, 1993).

14. For a discussion of the formal presumption in favor of voluntary remands, see *infra* notes 185–186 and accompanying text.

15. 463 U.S. 29, 42 (1983).

16. Indeed, only one scholar has previously written on the general law of voluntary remands. Toni M. Fine, *Agency Requests for “Voluntary” Remand: A Proposal for the Development of Judicial Standards*, 28 ARIZ. ST. L.J. 1079, 1080 (1996). For a discussion of her work, see *infra* notes 67–69, 75, 154–156.

17. See, e.g., Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 COLUM. L. REV. 253 (2017); Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018).

18. See Bagley, *supra* note 17 (manuscript at 5–6).

19. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(B)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 611 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Getzel Berger, Note, *Nationwide Injunctions Against the Federal Government: A Structural Approach*, 92 N.Y.U. L. REV. 1068 (2017).

20. See Portia Pedro, *Stays*, 106 CALIF. L. REV. (forthcoming 2018); Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State* (George Ma-

This scholarship has ignored voluntary remands entirely. Yet voluntary remands are important, both as an administrative law remedy and as a political tool. They merit attention because they are so powerful and so unusual, given their ability to terminate judicial review in cases that agencies may lose on the merits. Indeed, voluntary remands—which give agencies *carte blanche* to proceed without judicial supervision—are an administrative law remedy uniquely at risk of abuse.

To explore the theory and doctrine of voluntary remands, this Article proceeds in four parts. Part I defines and introduces voluntary remands. It notes the unusual nature of voluntary remands: no other remedy allows a defendant to dodge a court challenge without plaintiffs' consent and without winning a ruling on the merits. Part II, therefore, probes the reasons why an agency might request a voluntary remand. It presents a continuum of agency motivations to seek remand—at one extreme, an agency might seek a voluntary remand without any intention to change policy, but solely to make a case temporarily disappear; at the other, an agency might request a remand because it seeks to entirely overhaul its policy. Both poles present their own doctrinal and theoretical difficulties; in between, however, lies a set of cases where agencies request remands to make minor changes to policy.

Part III then turns to doctrine. It exposes the history of voluntary-remand law, beginning with its 1940s origins. It traces the D.C. Circuit's creation of a voluntary-remand presumption and reviews the 2001 Federal Circuit decision that reinforced that presumption while formalizing the doctrine.

Part III then discusses two areas where voluntary-remand law remains ambiguous. The first concerns whether it is lawful for a court issuing a voluntary remand to vacate an agency's policy. Federal courts regularly grant such motions to vacate along with voluntary remands. But doing so is contrary to core Administrative Procedure Act (APA) principles, because vacatur allows agencies to repeal a potentially lawful rule without notice-and-comment.

The second ambiguity arises in the particularly difficult case of inter-administration voluntary remands. Remands in those circumstances raise the risk that agencies will use voluntary remands to mask agency reversals motivated by politics, not policy. The Obama Administration frequently employed this tactic to avoid judicial scrutiny of Bush-era regulations with

son Univ. Legal Studies Research, Paper No. LS 16-32, 2016), <http://ssrn.com/abstract=2837849>.

21. See *infra* note 89.

22. See Parrillo, *supra* note 17; Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235 (2004).

which it disagreed. Nevertheless, courts have avoided determining whether a new administration should be entitled to a voluntary remand solely because it disagrees with the merits of the underlying policy.

Part IV then points to the analytic holes in voluntary-remand doctrine. It contrasts the doctrine's history with the contemporary incentives surrounding voluntary remands. By doing so, it observes that three key assumptions of voluntary-remand doctrine no longer hold. First, voluntary-remand doctrine pictures agencies as akin to courts—now, however, we conceive of agencies as policy-driven actors and can no longer justify voluntary remands solely as a matter of intrajudicial respect. Second, the doctrine asserts that voluntary remands are granted to save judicial resources and gain the advantage of an agency's views on matters where it is entitled to deference. However, modern cases frequently grant remands to agencies in cases where their actions are entitled to no deference, and where remanding only complicates judicial review. Third, voluntary-remand law assumes that remands are harmless to private parties—however, in modern contexts, remands can prevent policies' challengers from obtaining the relief they seek. Each of these observations weakens the case for courts' willingness to remand and suggests that the tendency to remand should be limited to certain contexts, including in litigation under the arbitrary-and-capricious standard and in statutory challenges where the statute in question is unambiguous.

Finally, Part V explores alternatives to voluntary remands. It maps a set of less drastic remedies that a court might consider where it believes voluntary remand is inappropriate. Those remedies preserve, to varying degrees, the benefits of voluntary remand to the agency, while making it easier for private parties and courts to monitor agency behavior. Accordingly, they may better balance the theoretical concerns that voluntary remands present.

I. DEFINING VOLUNTARY REMANDS

Voluntary remands are easy to define. They arise after petitioners seek judicial review of federal agency action, and are requests by those agencies to the reviewing court that the court send the challenged action back to the agency for further consideration.²³ They differ from “typical” remands in that they precede resolution on the merits—a court may grant a voluntary-remand motion without deciding whether the challenged policy is lawful.²⁴

It is important to clarify one point at the outset. As a district judge has recently observed, the word “remand” in this context is “imprecise and

23. Fine, *supra* note 16, at 1080.

24. *Id.*

even misleading.”²⁵ Ordinarily, a remand returns a case from one tribunal to another. A federal court of appeals may remand a case to a district court for further proceedings;²⁶ a federal district court must remand a case to a state court when the federal court lacks subject-matter jurisdiction over the action.²⁷

Administrative law literature commonly discusses remands from courts to administrative agencies.²⁸ But only some of those decisions resemble traditional remands among courts. When a federal court remands a social-security determination, for example, it returns the case to a quasi-judicial body within the Social Security Administration.²⁹ The adversarial nature of the proceeding is preserved; if the individual seeking benefits is again denied, she may again seek review in federal court.³⁰

By contrast, when a federal court “remands” an agency rulemaking, it terminates the current action. The agency must reconsider its policy, but may do so in its “quasi-legislative” capacity, not as part of the adversarial process.³¹ If the rule’s challengers wish to seek additional judicial oversight, they must file a new petition for review³² or writ of mandamus.³³ These sorts of decisions hardly fit the court-centric model of remands—they are, in practically every respect, more akin to grants of motions to dismiss. This Article, following the field’s convention, will use the term “voluntary remand” to encompass remands of both adjudications and rulemakings.

As a remedy, the voluntary remand is unique in American law. No other motion allows a defendant to rid itself of a lawsuit without refuting its opponent’s legal contentions (as in a motion to dismiss) or without the opposing party’s consent (as in a settlement).³⁴ Moreover, voluntary remands rarely come with strings attached—when an agency wins a remand motion, the reviewing court generally ceases to apply any oversight at all.³⁵

25. *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 135 (D.D.C. 2007).

26. 28 U.S.C. § 2106 (2012).

27. *Id.* § 1447(c)–(d).

28. See, e.g., Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011).

29. See 42 U.S.C. § 405(g) (2012).

30. *Id.*

31. See Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except When They’re Not*, 59 ADMIN. L. REV. 79, 88 (2007).

32. See *Ala. Envtl. Council v. EPA*, 711 F.3d 1277, 1279 (11th Cir. 2013).

33. See *Inmate Calling Servs. Providers Coal. v. FCC*, No. 97-1046, 1998 WL 65655 (D.C. Cir. Jan. 30, 1998) (per curiam).

34. Of course, opposing parties can consent to voluntary-remand motions. See *infra* text accompanying note 266.

35. See *infra* Section II.B.3. This Article focuses on voluntary remands of *cases*. An

To be sure, agencies must supply reasons for seeking voluntary remands. Those reasons, though usually terse, can be probative of the agency's intentions. But the court has no formal mechanism for holding agencies accountable for following through on remand (except, perhaps, the "extraordinary" remedy of mandamus).³⁶ Decisions to grant voluntary remands create no substantive precedent, and therefore restrict the agency far less than a ruling on the merits.

On remand, therefore, agencies have a range of options. They may formulate new policy or withdraw existing policy.³⁷ They may aim to correct procedural defects with the prior process.³⁸ Where appropriate, they may settle with challengers.³⁹ Or they can reaffirm the challenged action, perhaps prompting a subsequent lawsuit.⁴⁰

But agency action on remand is constrained by the same administrative procedures that always govern agency behavior. A voluntary remand is not a license to skirt the requirements of the APA. If an agency wishes to reconsider a rulemaking on voluntary remand, therefore, it must undergo notice-and-comment.⁴¹ If it wishes to reconsider an adjudication, it must comply with whatever statutory requirements apply to that process.⁴² Additionally, of course, voluntary remands do not insulate agencies from subsequent judicial review. So, an agency's decision to seek a voluntary remand (and what to do after it receives one) is heavily shaped by background principles of administrative law. In the next Part, I shall consider how those principles affect the incentives surrounding voluntary remands.

agency may also seek a voluntary remand of the *administrative record*. *E.g.*, *S. Cal. Edison Co. v. Fed. Energy Regulatory Comm'n*, No. 02-1374, 2004 WL 326225 (D.C. Cir. Feb. 12, 2004). Remanding the record allows the agency time to gather additional facts before the court acts. But the court does not lose jurisdiction to hear the case on the merits. *Id.* at *1; *see* Fine, *supra* note 16, at 1087 & n.33.

36. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 78 (D.C. Cir. 1984).

37. *E.g.*, *Withdrawal of Approval and Disapproval of Air Quality Implementation Plans; California; San Joaquin Valley; Contingency Measures for the 1997 PM*, 80 Fed. Reg. 49,190 (Aug. 17, 2015) (proposing to withdraw agency action after voluntary remand).

38. *E.g.*, *Imposition of Special Measure Against FBME Bank Ltd., Formerly Known as the Federal Bank of the Middle East Ltd., as a Financial Institution of Primary Money Laundering Concern*, 80 Fed. Reg. 74,064 (Nov. 27, 2015) (reopening rulemaking to provide for additional comments after voluntary remand).

39. *See* Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015 (2001).

40. *E.g.*, *Approval and Promulgation of Implementation Plans; State of Colorado; Regional Haze State Implementation Plan*, 80 Fed. Reg. 29,953 (May 26, 2015) (to be codified at 40 C.F.R. pt. 52) ("re-finalizing" a rule).

41. *See* 5 U.S.C. § 553 (2012).

42. *E.g.*, *id.* § 554.

II. A CONTINUUM OF VOLUNTARY-REMAND CASES

Agencies are different than courts. They are created by the legislature to implement statutory directives;⁴³ in the classic model, they serve as faithful agents to the wishes of Congress.⁴⁴ Unlike the judiciary, which prides itself on possessing “no direction either of the strength or the wealth of the society,”⁴⁵ agencies perceive themselves as strategic actors⁴⁶—and so agency decisions to seek voluntary remands should be understood as self-interested, not merely altruistic.

Understanding voluntary remands therefore requires understanding why agencies might seek those remands. At some level, these benefits are obvious. Whenever an agency wins a voluntary-remand motion, its policy dodges judicial scrutiny and reenters friendlier terrain. Nevertheless, it is important to understand *why* agencies might not desire to defend their policies in court, because the strength of those reasons determines the strength of the case for voluntary-remand practice. This Part, therefore, charts the reasons why an agency might desire a voluntary remand.

Those rationales vary considerably: At one extreme, an agency might seek a remand when it does not desire to make any changes to the rule, solely to avoid potential litigation loss. At the other, an agency might move for a remand when it desires to completely overhaul a policy; in some cases, that desire will be driven by the pressures of partisan politics. Each pole presents a set of administrative law problems that illuminate the costs and consequences of voluntary-remand grants. Between them lies the heartland of voluntary-remand cases: remands to correct minor substantive or procedural errors. Those cases present fewer doctrinal difficulties, and better align the interests of the government, private parties, and the courts.

A. Avoiding Litigation Loss

Nobody likes to lose.⁴⁷ Administrative agencies are no different: on one view of government lawyering, federal lawyers seek to achieve victory for the federal government at any cost.⁴⁸ On this account, voluntary remands

43. See Yoon-Ho Alex Lee, *Beyond Agency Core Mission*, 68 ADMIN. L. REV. 551, 553 (2016).

44. Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal-Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147, 150 (1984).

45. *United States v. Hatter*, 532 U.S. 557, 568 (2001) (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

46. See M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1398 (2004).

47. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943 (2011).

48. See Bruce A. Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9

are useful because they snatch a temporary victory from the jaws of potential defeat. Government litigators are well known for raising a panoply of procedural barriers to avoid litigating cases on the merits⁴⁹—a voluntary-remand motion is just another way to live to fight another day.

The vaguer a voluntary-remand request is, the more likely it is that an agency is driven by a desire to avoid litigation rather than by a genuine urge to change policy. In one recent case, for example, an agency requested a remand to “respond in greater detail” to the “concerns” of private parties⁵⁰—but those concerns had already been raised and responded to during the rulemaking notice-and-comment process.⁵¹ In other instances, agencies request remands with almost no explanation of why the remand is sought.⁵²

Each of these motions fails to announce what the agency intends to *do* on voluntary remand. They therefore raise suspicions that the agency intends to do very little and seeks the remand solely to redo an earlier decision outside of the judiciary’s glare. The risk, in those cases, is that an agency is attempting to forestall litigation without any substantive reconsideration.

But an agency’s responsibilities do not end after voluntary remand. The premise—and promise—of a voluntary remand is that an agency will consider changing a policy that would otherwise be “final.”⁵³ The costs of reconsideration can be “enormous”:⁵⁴ as then-Judge Stephen Breyer observed in 1986, remands can involve “several years of additional proceedings, with mounting costs.”⁵⁵ In a 1990 empirical study of (involuntary) remands, Peter Schuck and E. Donald Elliott found that the costs were so high that, in over forty percent of cases, the agency simply dropped the challenged ac-

WIDENER J. PUB. L. 235, 242 (2000); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 964 (1991).

49. Lanctot, *supra* note 48, at 983 (“[F]ederal government lawyers routinely raise procedural and technical defenses on behalf of their agency clients.”); *see also* Michael Herz & Neal Devins, *The Consequences of DOJ Control of Litigation on Agencies’ Programs*, 52 ADMIN. L. REV. 1345, 1363 (2000) (arguing that Department of Justice (DOJ) lawyers are more likely than agency lawyers to raise procedural defenses).

50. Nat’l Parks Conservation Ass’n v. EPA, 803 F.3d 151, 157 (3d Cir. 2015).

51. *See* United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 35 (1952).

52. *See, e.g.*, Miss. River Transmission Corp. v. Fed. Energy Regulatory Comm’n, 969 F.2d 1215 (D.C. Cir. 1992).

53. Under the Administrative Procedure Act (APA), only final agency action may be challenged in federal court. 5 U.S.C. § 704 (2012).

54. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1784 (1975).

55. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 383 (1986).

tion (typically, an adjudication) rather than incurring the costs of remand.⁵⁶ That option may be especially attractive to an agency that seeks merely to make a case go away.

If the agency does not settle, though, the policy's challengers suffer from the grant of voluntary remand. They will be required to comply with the challenged policy for the duration of the remand⁵⁷—and remands, as Schuck and Elliott show, can take years to complete.⁵⁸ Moreover, they will be forced to monitor the agency as it proceeds on remand and may be required to return to the courts after a potentially lengthy delay.⁵⁹

Conversely, agencies can gain significant advantages from voluntary remands. First, delay itself may inure to the agency's benefit. The APA allows for pre-enforcement review of agency action partly because regulated entities must incur substantial costs to comply with a policy that may ultimately be found unlawful.⁶⁰ The longer agencies can postpone judicial review, the more likely private parties are to invest in whatever infrastructure is required to comply with the new policy. That investment can benefit an agency even if its policy is ultimately struck down: as an EPA spokeswoman explained after the Supreme Court struck down an air-pollutant rule, "this rule was issued more than three years ago, investments have been made and most plants are already well on their way to compliance" with the rule that was held unlawful.⁶¹

Because a voluntary remand postpones judicial review, it may drive private parties to comply with the challenged policy while the remand pends. By doing so, the remand gives the agency almost all of what it wants: compliance with the policy. (Of course, the calculus is different if enforcement of an agency's policy has been stayed by the courts⁶²—then, the agency will not benefit from private parties coming into compliance with the chal-

56. Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984, 1044–45. Writing ten years later, William Jordan found that it took ten months for a typical agency to reformulate a policy after remand. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 424 (2000).

57. For exceptions, see *infra* Section II.B.

58. Schuck & Elliott, *supra* note 56, at 1050–51.

59. *See id.* at 1046 & n.145.

60. *See* *Abbott Labs. v. Gardner*, 387 U.S. 136, 152–53 (1967); Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules*, 58 OHIO ST. L.J. 85, 121–22 (1997).

61. Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THE HILL (June 29, 2015, 10:38 AM), <http://thehill.com/policy/energy-environment/246423-supreme-court-overturns-epa-air-pollution-rule>.

62. *See supra* note 20.

lenged action.) Particularly for agency actions that are “technology-forcing,” such that the initial costs of compliance with the rule are very high,⁶³ the delay engendered by voluntary remands may greatly lower the stakes of subsequent litigation.

Forum shopping is a frequently noted problem in administrative law,⁶⁴ as generous venue provisions often allow private litigants to sue in any court.⁶⁵ Scholars have described how agency action often provokes a “race to the court house”—in some cases, private parties who support more stringent litigation rush to file challenges in one court, while challengers who favor deregulation hasten to file in another.⁶⁶ Agencies might have a preference between those forums—and, when they secure remands, they reset the race and may produce a more favorable result.⁶⁷

For challenges to agency action that necessarily end up in the same court (as where statutes require review in the D.C. Circuit),⁶⁸ the agency may similarly reap advantages from panel shopping. Because voluntary remands do not preserve courts’ jurisdiction, cases that are remanded and subsequently challenged again may be reassigned to a different—and potentially more agency-friendly—set of judges.⁶⁹ The benefits of panel shopping are compounded by the fact that, over the course of a President’s term, new judicial appointments tend to make courts more solicitous to the executive branch’s agenda.⁷⁰

In addition, the agency that promulgated the challenged policy is not the only governmental actor that stands to gain from voluntary remands. In general, agencies may not represent themselves in court; their cases are handled instead by DOJ attorneys.⁷¹ Those attorneys would file and sign any voluntary-remand motion, and presumably are influential in the decision to seek voluntary remand. As Neal Devins and Michael Herz have

63. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 62–65 (1990).

64. See, e.g., Harold H. Bruff, *Coordinating Judicial Review in Administrative Law*, 39 *UCLA L. REV.* 1193 (1992); Thomas O. McGarity, *Multi-Party Forum Shopping for Appellate Review of Agency Action*, 129 *U. PA. L. REV.* 302 (1980).

65. Bruff, *supra* note 64, at 1201.

66. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 *HARV. L. REV.* 542, 598–99 (1969).

67. See Fine, *supra* note 16, at 1115–16.

68. See Patricia M. Wald et al., *The Contribution of the D.C. Circuit to Administrative Law*, 40 *ADMIN. L. REV.* 507, 509, 515 (1988).

69. Fine, *supra* note 16, at 1116 n.151.

70. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* 7 (2007).

71. 5 *U.S.C.* § 3106 (2012); 28 *U.S.C.* § 516 (2012). Some agencies are able to litigate independently from the DOJ. See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 770, 800 tbl.5 (2013).

demonstrated in a series of articles, there are important consequences to DOJ's litigation authority. DOJ lawyers rarely participate in the drafting of agency policy, and so see the challenged action for the first time during litigation.⁷² In addition, DOJ tends to be more risk-averse in litigation than the agencies it represents.⁷³ Devins and Herz explain this discrepancy by suggesting that DOJ measures success "solely by winning percentage in the courts," while agencies care instead about advancing a particular policy agenda.⁷⁴

Each of these strategic considerations advances the government's interest. But none relate to the merits of the agency's policy, nor do they serve the interests of the judicial system.⁷⁵ Accordingly, courts should treat voluntary-remand motions with skepticism whenever the government fails to provide a substantive reason for the remand: in those cases, courts should fear gamesmanship and foot-dragging, with resulting unfairness to private parties.

72. Herz & Devins, *supra* note 49, at 1373.

73. Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 587 (2003).

74. *Id.* at 588.

75. For this reason, Toni Fine has argued that voluntary remands may raise concerns under the *Chenery* doctrine, which prohibits an agency from winning a case based on factors that were not considered at the time its action was promulgated. Fine, *supra* note 16, at 1112–14; see *SEC v. Chenery Corp.*, 318 U.S. 80, 93 (1943). Fine reasons that voluntary remands violate the spirit of the *Chenery* doctrine because "the agency's reconsideration undoubtedly will have been prompted and informed by counsel," and, therefore, "the agency will be reacting to counsel's concerns . . . rather than to any rationale genuinely invoked by the agency." Fine, *supra* note 16, at 1113. Her reading is supported by work by Elizabeth Magill and Adrian Vermeule, who contend that *Chenery* should be understood to allocate responsibility away from agency lawyers, preserving the power of policy experts. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1043 (2011).

It is difficult, however, to cabin Fine's argument to the voluntary-remand context. After all, agencies may regroup after other forms of remand without raising any *Chenery* concerns. To the extent Fine has a *Chenery* objection, therefore, the objection applies to court-agency dialogue more broadly. Cf. Meazell, *supra* note 28, at 1772 (suggesting that, taken to an extreme, "partnership between courts and agencies . . . stands in tension with the *Chenery I* principle"). Yet the D.C. Circuit has rejected the argument that an agency violates *Chenery* when it acts after remand, see *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006), and a district court has similarly brushed aside a *Chenery* challenge to agency revisions made after a voluntary remand. See *Delta Air Lines, Inc. v. Export-Import Bank*, 85 F. Supp. 3d 387, 402 (D.D.C. 2015).

B. Error Correction

Yet the reasons for voluntary remands need not be so cynical. An agency might also seek remand to preserve its policies, not merely to forestall court defeat. After all, if an agency fails to escape judicial scrutiny and then loses its case, the typical remedy is for the court to invalidate the challenged policy.⁷⁶ Invalidation can be extremely damaging to an agency's agenda.⁷⁷ Particularly in the rulemaking context, an agency might have spent years of effort and millions of dollars working on the now-invalidated policy.⁷⁸ Administrative law scholars have contended that demanding judicial review "ossifies" rulemaking, making it harder for agencies to accomplish their missions⁷⁹—viewed from this lens, it is clear why an agency might seek a voluntary remand to avoid losing hard work.⁸⁰

Moreover, the costs to agencies might go beyond the resources expended on a particular policy. Losing cases may generate adverse precedent that makes it more difficult for an agency to reimplement the vacated policy, or—worse yet—to implement other policies relating to its mission.⁸¹ In the agency's bleakest scenario, the reviewing court could strike down the agency's action as unambiguously contrary to statute;⁸² in that case, the agency would be unable to promulgate any version of its desired policy.⁸³ And even if the reviewing court leaves the agency with flexibility, it has inserted itself into the agency's principal-agent relationship with Congress; that ad-

76. 5 U.S.C. § 706(2) (providing that a court shall "hold unlawful and set aside" agency action that suffers from one of six enumerated defects).

77. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 45 (1988) ("[S]trict judicial scrutiny of agency decisions may frustrate the agency's ability to carry out its mission effectively.").

78. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992); Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1456 (2012).

79. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995).

80. See JOHN M. MENDELOFF, *THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA 121* (noting that losing a case "deflate[s] the morale of the [agency] staff").

81. See, e.g., Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations Before the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1651 (1986).

82. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

83. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

ditional oversight may make the agency's job considerably more difficult.⁸⁴

These risks can lead agencies to seek voluntary remands. Typically, voluntary-remand requests in this vein are relatively specific, but minor in scope—an agency will request remand to take account of new legal or factual developments,⁸⁵ or to correct procedural or clerical errors.⁸⁶ As Ronald Levin documents, a “relatively minor error in the agency’s reasoning, or a procedural error concerning a single issue, can lead to nullification of a rule that underpins a major regulatory program”⁸⁷—hence, why agencies might seek remands whenever small chinks are discovered in their armor.

Voluntary remands to correct these minor errors are less harmful to private parties. Those parties will often be able to participate as the agency attempts to correct procedural flaws.⁸⁸ Minor errors can generally be corrected quickly. And when an agency pledges to consider some change of fact or law, private parties can more easily monitor the agency’s progress than in the capacious voluntary remands discussed above.

Remands of this nature are also symbiotic with other administrative law doctrines. The D.C. Circuit has developed a practice of “remand without vacatur”: in certain conditions, it will find a rule unlawful but remand it to the agency, rather than vacating it entirely.⁸⁹ The more minor an agency’s error, the more likely the court is to remand without vacating⁹⁰—that way, the courts can minimize undue disruption to the administrative process.⁹¹ Error-corrective voluntary remands serve the same purpose, only at an earlier stage of litigation. They therefore are the variety of voluntary remand best supported by general precepts of administrative law.

84. See Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1241 (1989).

85. See, e.g., *Li v. Keisler*, 505 F.3d 913, 920 (9th Cir. 2007).

86. See, e.g., *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 75 (D.D.C. 2015).

87. Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298–99 (2003).

88. See *supra* note 38.

89. See *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm’n*, 988 F.2d 146 (D.C. Cir. 1993). This practice has attracted substantial scholarly attention. See, e.g., Levin, *supra* note 87, at 299; Daniel B. Rodriguez, *Of Gift Horses and Great Expectations: Remands Without Vacatur in Administrative Law*, 36 ARIZ. ST. L.J. 599 (2004); Kristina Daugirdas, Note, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278 (2005); see also ACUS Recommendation 2013-6, Remand Without Vacatur, 78 Fed. Reg. 76,272 (Dec. 17, 2013) (presenting a recommendation from the Administrative Conference of the United States that courts continue to grant remands without vacatur).

90. *Allied Signal*, 988 F.2d at 150.

91. Daugirdas, *supra* note 89, at 285–86.

C. Policy Overhaul

The above analysis rests on a major assumption: that the agency desires to leave its challenged policy largely intact, except when necessary to avoid defeat. But sometimes, an agency will desire to change its policy. In those cases, the incentives surrounding voluntary remands differ sharply from those previously discussed.

Agencies might seek to change their minds after their policies are challenged for a panoply of reasons.⁹² Litigation might convince an agency that its policy is unworkable or unfair.⁹³ It might expose to the agency a legal mistake that necessitates reconsideration.⁹⁴ During times of administration change or other ideological tumult,⁹⁵ though, the government might seek policy change simply because it disagrees with the substance of its prior positions. Those cases present the most difficult questions surrounding voluntary-remand law because they disrupt a key assumption of litigation: in this scenario, the agency-in-court no longer loyally represents the agency-as-policymaker.⁹⁶

As the Obama-Trump transition suggests, agency priorities will often shift sharply when a new administration arrives.⁹⁷ Newly elected administrations have a variety of tools at their disposal to begin to roll back policies with which they disagree.⁹⁸ But things get trickier when judicial review is underway concerning the policy in question. In those cases, the agency can decline to defend the policy,⁹⁹ or it can seek to settle the case.¹⁰⁰ But

92. For a comprehensive treatment of agency reconsideration, see Daniel Bress, Note, *Administrative Reconsideration*, 91 VA. L. REV. 1737 (2005).

93. Cf. Lanctot, *supra* note 48, at 957 (quoting the DOJ's maxim that "[t]he United States wins its point whenever Justice is done its citizens in the courts").

94. See Bress, *supra* note 92, at 1752–56.

95. Not all policy shifts within agencies occur during times of administrative change. For example, independent multi-member commissioners may shift policy positions well after an administration begins, once the President appoints a majority of the commissioners. See Charles T. Goodsell & Ceferina C. Gayo, *Appointive Control of Federal Regulatory Commissions*, 23 ADMIN. L. REV. 291 (2003). And even executive agencies may experience stark policy shifts during a single presidency. See W. KIP VISCUSI, *FATAL TRADEOFFS* 282–84 (1992) (detailing the shift in policy that occurred after Ronald Reagan replaced his first EPA Administrator, Anne Gorsuch). For simplicity's sake, though, this Article assumes that most changes of agency policy positions will happen during administration shifts.

96. See William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOWARD L.J. 539 (1986).

97. See *supra* notes 4–8 and accompanying text.

98. For recently enacted rules, the President may partner with Congress to invoke the Congressional Review Act (CRA) and void the policies. See 5 U.S.C. § 802 (2012). But most agency action will fall outside the CRA's scope.

99. Alexander L. Merritt, Note, *Confession of Error by Administrative Agencies*, 67 WASH. &

neither course of action is a sure bet: administrative law is a polycentric field, and a private party can step in to defend rules that the federal government now opposes.¹⁰¹ Accordingly, an agency confession of error may be insufficient to persuade the court to take the agency's newfound view.¹⁰²

Hence, the attractiveness of voluntary remands. Remands ensure that an agency maintains control over the policy it wishes to change, rather than risking court interference. Without judicial supervision, agencies have more flexibility to craft new policy: as Wendy Wagner has argued, litigation “opens the doors to a second round of negotiations that . . . can involve secret deals over details, interpretations, and related features of a rule with only a narrow slice of the affected interests.”¹⁰³ After a court intervenes with a formal opinion, though, the agency has less flexibility to rework its policies.¹⁰⁴

Moreover, a voluntary remand neutralizes the worst-case scenario for an incoming administration: that a policy it seeks to change will be *upheld* in court.¹⁰⁵ (In times of policy continuity, agencies seek remands to avoid the costs of court defeat—this role reversal is part of what makes voluntary-remand doctrine so puzzling.) If a policy is upheld with which the newly staffed agency disagrees, the agency may find it more difficult to revise that policy.¹⁰⁶ The bleakest outcome for an agency that seeks to disclaim its existing policy? That the policy will be upheld as *required by* a substantive statute, thereby preventing the agency from ever revising it.¹⁰⁷

Finally, voluntary remands serve a useful political purpose for newly

LEE L. REV. 1197, 1215–16 (2010).

100. See Rossi, *supra* note 39, at 1041–43.

101. See Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 355 (1978).

102. See, e.g., *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 557–58 (D.C. Cir. 2015) (upholding a policy on which the EPA had confessed error because “[i]f an agency could engage in rescission by concession, the doctrine requiring agencies to give reasons before they rescind rules would be a dead letter”).

103. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1369 (2010).

104. *Id.* at 1369 n.188.

105. Of course, an agency in this situation might decline to seek a voluntary remand if it thinks the policy it seeks to change will be invalidated. The decision to seek a voluntary remand is thus a complex calculus, based partly on the agency's assessment of success on the merits (which might, in turn, depend on the ideology of the reviewing court or of the assigned judge or panel, if known).

106. See Anne Joseph O'Connell, *Agency Rulemaking and Political Transitions*, 105 NW. L. REV. 471, 486–87 (2011).

107. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

elected administrations. They allow agencies to say that they are reconsidering rules in response to legal challenges, cloaking a policy change in the guise of litigation concerns. Shortly after his confirmation, EPA Administrator Scott Pruitt announced that his agency would revise two major Obama-era regulations because “the courts have seriously called into question the legality of those rules.”¹⁰⁸ At the time Pruitt made that statement, no court had ruled against either policy on the merits¹⁰⁹—but the specter that a court might do so was politically useful to the new administration. A voluntary remand preserves that threat, allowing the EPA and any similarly-situated agency to couch its policy change in the language of legal necessity.

Voluntary-remand requests of this nature are usually explicit about their goals. When administrations change, agencies will request remands to “reconsider” their predecessors’ decision.¹¹⁰ On occasion, they will go further and “confess error” concerning the prior administration’s policy.¹¹¹ These sorts of proposals telegraph the agency’s intention on remand—and thereby raise a difficult set of concerns for reviewing courts.

First, these sorts of voluntary remands complicate the relationship between agencies and their litigation adversaries. Administrations’ shifting policy preferences can make strange litigation bedfellows. Foes of an agency’s policy may find themselves in agreement with the agency’s new position,¹¹² and may welcome a voluntary remand. But, in those cases, other private parties may loom large: in APA challenges, courts generally allow supporters of agency action to intervene and help defend the agency;¹¹³ those intervenors may stand to lose from voluntary-remand motions and

108. Kimberly A. Strassel, *Scott Pruitt’s Back-to-Basics Agenda for the EPA*, WALL ST. J. (Feb. 17, 2017, 6:57 PM), <http://www.wsj.com/articles/scott-pruitts-back-to-basics-agenda-for-the-epa-1487375872>.

109. The first rule Pruitt discussed, the Clean Power Plan, had been stayed by the Supreme Court. *Basic Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016) (mem.). The second, the Waters of the United States Rule, had been stayed by the Sixth Circuit. *In re EPA*, 803 F.3d 804 (6th Cir. 2015).

110. *See Nat. Res. Def. Council v. U.S. Dep’t of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002).

111. *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 131 (D.D.C. 2010).

112. *See, e.g., Alexa Ura, Trump Administration Rescinds Protections for Transgender Students*, TEX. TRIB. (Feb. 22, 2017, 7:00 PM), <http://www.texastribune.org/2017/02/22/trump-expected-rescind-protections-transgender-students> (quoting Texas officials, who had sued over Obama-era transgender education policies, praising the new administration’s decision to withdraw them).

113. *See Michael Ray Harris, Intervention of Right in Judicial Proceedings to Review Informal Federal Rulemakings*, 40 HOFSTRA L. REV. 879, 884 (2012).

may petition the court to reject them.¹¹⁴

In addition, interadministration remands implicate the Supreme Court's 1983 decision in *State Farm*,¹¹⁵ which has produced a fundamental debate within administrative law. *State Farm* instantiates the Court's approach to arbitrary-and-capricious review of agency action, also known as "hard-look review."¹¹⁶ Under that approach, which the Court has described as "thorough, probing, in-depth review,"¹¹⁷ reviewing courts should set aside agency action whenever they fail to supply reasoned bases for their actions.¹¹⁸

Importantly, *State Farm* expands hard-look review into cases of rule rescissions. The case clarifies that an agency that wishes to change an earlier decision must explain, to the court's satisfaction, why the change is warranted.¹¹⁹ In these rescission cases, an agency must explain itself more thoroughly than in cases where it crafts policy on a clean slate.¹²⁰ In the wake of *State Farm*, Merrick Garland (then an attorney who represented State Farm in the case) observed that the ruling requires agencies to take a series of "quasi-procedural" steps, including a duty to consider various policy alternatives, whenever they seek to reconsider a decision.¹²¹

Under *State Farm*, agencies cannot change their policies simply to avoid litigation.¹²² Nor can they do so if the change is motivated by political pressure, rather than technocratic expertise.¹²³ That rule is controversial: scholars and jurists have proposed allowing agencies to forthrightly claim that they seek to change policies because of a new administration's different political preferences.¹²⁴ Were their view to prevail, incoming administrations would feel less pressure to seek remands, secure in the knowledge that

114. See, e.g., *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

115. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

116. E.g., Kagan, *supra* note 79, at 2380.

117. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

118. *State Farm*, 463 U.S. at 43.

119. *Id.* at 42.

120. *Id.* at 41–42.

121. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 543–44 (1985).

122. See *Cheyenne-Arapaho Tribes of Okla. v. United States*, 966 F.2d 583, 590 (10th Cir. 1992) ("The threat of litigation may be intimidating, but careful analysis of relevant factors takes precedence over avoiding a lawsuit.").

123. See Kagan, *supra* note 79, at 2380–81.

124. *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."); Kagan, *supra* note 79, at 2372–85; Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009).

their proposals would be easier to implement. But that view remains contested in the legal academy,¹²⁵ and has fared poorly in the courts¹²⁶—as Jody Freeman and Adrian Vermeule describe, the Supreme Court’s 2007 decision in *Massachusetts v. EPA*¹²⁷ “hearkens back” to the *State Farm* vision in which “independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which political influence over agencies by the White House is seen as a problem rather than a solution.”¹²⁸

The rule against political reconsiderations greatly complicates the role of the reviewing court. Because agencies cannot change policies based on ideological reasons, a court should not ordinarily grant a voluntary remand when the request appears motivated by politics—if it does, it merely postpones judicial review on an agency policy shift that it will probably find unlawful in the end. Accordingly, the rule of *State Farm* implies that courts should turn a more probing eye toward voluntary-remand motions to enable policy overhaul. In the next Part, however, I will suggest that courts have adjudicated voluntary-remand requests without regard to these sorts of considerations.

III. TRACING VOLUNTARY-REMAND DOCTRINE

The story of voluntary-remand doctrine is both straightforward and twisting. On the one hand, the law has evolved considerably from its 1940s origins—it has come to apply to a broader set of circumstances and has developed a set of doctrinal complexities that interact with other parts of administrative law. Yet, at the same time, the core law of voluntary remands is largely unchanged: for sixty years, agencies have enjoyed a strong presumption in favor of voluntary remand, absent some sort of litigation error or other unusual circumstance. That presumption does not vary based on the nature of the remand request.

This Part traces the history of the doctrinal solicitude to voluntary remands, from their creation to the Federal Circuit’s attempt to impose order onto this area of law. It then discusses the current state of voluntary-remand doctrine, noting contemporary courts’ typical approach. Finally, it observes two areas in which voluntary-remand law is less settled: the first concerns the relationship between voluntary remands and vacatur; the se-

125. See, e.g., Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012).

126. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 547 (2009) (Breyer, J., dissenting); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

127. 549 U.S. 497 (2007).

128. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87 (2007).

cond arises in the special case of interadministration voluntary remands.

A. Doctrinal Origins

The story of voluntary-remand doctrine stretches back to the 1940s, when courts began to return matters to agencies rather than adjudicating them directly. Many of the theoretical motivations for voluntary remands were developed during this period. Yet, until the 1990s, private parties rarely opposed voluntary remand.¹²⁹ As a result, voluntary remand's doctrinal premises were uncontested for much of its early history. That lack of contestation led courts to see voluntary remands as an unequivocal good—and, by the time parties began to oppose voluntary remands, those premises were already engrained in doctrine.

A 1941 decision by the Third Circuit serves as the root of voluntary-remand doctrine.¹³⁰ In *Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB*¹³¹ a knitting mill and its employees challenged an adverse decision by the National Labor Relations Board (NLRB). They pointed to numerous defects with the NLRB's decisional process, the most serious of which was that one NLRB board member had allegedly asked a friend of his to foment a boycott of the mill's goods.¹³²

In response, the court equivocated. On the one hand, it acknowledged that such charges of partiality, if substantiated, went “beyond the line of fair dealing.”¹³³ But it hesitated to void the NLRB's action,¹³⁴ explaining that courts and agencies were sufficiently different that reviewing courts must be “exceedingly careful not to jump to hasty conclusions.”¹³⁵ Accordingly, it took a novel middle ground: it *sua sponte* remanded the case back to the NLRB, ordering it to “receive the evidence and determine for itself whether, if the facts are established, one of its members is not disqualified from further participation in this case.”¹³⁶

Federal agencies must have taken note of *Berkshire Employees*, because they soon began to request such remands when an agency head's impartiality was challenged. In a series of cases challenging Federal Communications

129. For an exception, see *Central Light & Power Co. v. United States*, 634 F.2d 137, 145 (5th Cir. 1980).

130. *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235 (3d Cir. 1941).

131. 121 F.2d 235, 236 (3d Cir. 1941).

132. *Id.* at 238.

133. *Id.* at 239.

134. *Id.* at 238 (“Assuming the alleged facts are established, what is the duty of this court with regard thereto? That is the most difficult problem involved in this case.”).

135. *Id.*

136. *Id.* at 239.

Commission (FCC or Commission) decisions to award or deny television channel licenses,¹³⁷ the Commission moved for remands to consider claims of commissioner bias. In each case, the court granted the motion to remand.¹³⁸ One typical panel explained its decision to remand in highly deferential terms, writing that “improper influence, if established . . . is certainly critical,” but that such matters are best left to the agency to decide: “We should have the benefit of the Commission’s determination in such matters before deciding ultimately what disposition should be made of this case. We recognize the primary responsibility and function of the Commission itself in these particulars.”¹³⁹

The idea that an agency should solve its own problems runs through the earliest voluntary-remand cases. In another foundational case, *Fleming v. FCC*,¹⁴⁰ the D.C. Circuit remanded a case to the FCC for additional factual development. This case, decided in 1955, did not concern political interference—rather, the Commission declined to give one broadcasting corporation a license because it worried about giving its co-owner, who also controlled substantial stock in the local newspaper, too much control; the co-owner died during litigation.¹⁴¹ Judge Bazelon, writing for the court, batted aside an intervenor’s claim that the court lacked the power to remand without reversal, explaining that it is “not unusual for an appellate body to ‘remand causes for further proceedings without deciding the merits.’”¹⁴² Judge Bazelon’s language admits of no difference between remands to district courts and remands to administrative agencies. That view seemed to be common in this era: as Justice Reed wrote in a D.C. Circuit case on which he sat by designation,

Like our courts, our administrative agencies are founded on the principle of trust reposed in not only expert but trustworthy hands. Concern for the independence of our regulatory agencies demands our according them more, hardly less, deference than that we accord our brothers on other courts

. . . .

While we have no inclination to relinquish our responsibility to review agency action in cases properly before us, we do not intend at this stage of the proceeding to usurp

137. Cf. Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1555 (2008) (describing the history of FCC regulation as “one of convoluted political accommodations rather than theorized regulation”).

138. *WORZ, Inc. v. FCC*, 268 F.2d 889, 890 (D.C. Cir. 1959); *Mass. Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 67 (D.C. Cir. 1958); *WKAT, Inc. v. FCC*, 258 F.2d 418, 420 (D.C. Cir. 1958) (per curiam).

139. *Mass. Bay Telecasters*, 261 F.2d at 67.

140. 225 F.2d 523 (D.C. Cir. 1955).

141. *Id.* at 525.

142. *Id.* at 526 (quoting *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939)).

the functions of the agency, which are not only to regulate the industry but also to regulate itself.¹⁴³

In other words, judges of this era seemed to believe that voluntary remands were necessary to avoid overstepping the boundaries of judicial review.

That theme would run through the early doctrine, even as it expanded into different contexts. As early as 1962, Judge Bazelon suggested that an agency should be permitted a voluntary remand whenever it wanted to change its mind, regardless of the reason.¹⁴⁴ In the 1980s, the D.C. Circuit began to permit voluntary remands to allow an agency to reconsider legal, not factual, determinations.¹⁴⁵ And by 1993, the court suggested in *Ethyl Corp. v. Browner*¹⁴⁶ that all remand motions—regardless of their motivation—were “commonly grant[ed],” reasoning that courts prefer “to allow agencies to cure their own mistakes rather than wasting the courts’ and the parties’ resources reviewing a record that both sides acknowledge to be incorrect or incomplete.”¹⁴⁷

The D.C. Circuit took seriously *Ethyl Corp.*’s dictate to grant remands routinely. Almost every voluntary-remand request filed in the 1990s succeeded.¹⁴⁸ There are two notable exceptions, both of which seem to turn on the untimely nature of the voluntary-remand request: in a 1992 case involving the Federal Energy Regulatory Commission (FERC), the D.C. Cir-

143. *Neisloss v. Bush*, 293 F.2d 873, 880 (D.C. Cir. 1961). *Neisloss* was not a voluntary-remand case (although it quoted *Massachusetts Bay Telecasters* in advancing this argument). Rather, the case held that plaintiffs had not exhausted their administrative remedies before the Interstate Commerce Commission. *Id.* at 881.

144. *Anchor Line Ltd. v. Fed. Mar. Comm’n*, 299 F.2d 124, 125 (D.C. Cir. 1962) (“It is true that when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency.”).

145. *Wilkett v. Interstate Commerce Comm’n*, 710 F.2d 861, 865 (D.C. Cir. 1983) (per curiam); see also *Lamprecht v. FCC*, 958 F.2d 382, 385 (D.C. Cir. 1992) (describing the D.C. Circuit’s 1985 decision to grant a voluntary remand to the FCC when it “acknowledged that it thought its race-and sex-preference policies contrary to both the Communications Act and the Constitution”).

146. 989 F.2d 522 (D.C. Cir. 1993).

147. *Id.* at 524. The opinion cited four cases in support of this proposition: *Lamprecht* and *Wilkett*, which discussed voluntary remands to agencies to correct errors of law, *Anchor Line*, which discussed voluntary remands only in dicta, and *WKAT*, the earliest of the FCC interference cases. See *id.* at 524 n.3.

148. See, e.g., *Bos. Edison Co. v. Fed. Energy Regulatory Comm’n*, No. 98-1458, 1999 WL 325446 (D.C. Cir. Apr. 16, 1999); *Inmate Calling Servs. Providers Coal. v. FCC*, No. 97-1046, 1998 WL 65655 (D.C. Cir. Jan. 30, 1998); *Williston Basin Interstate Pipeline v. Fed. Energy Regulatory Comm’n*, 976 F.2d 47 (D.C. Cir. 1992) (per curiam) (unpublished table decision).

cuit denied a voluntary-remand motion filed two days before oral argument was scheduled;¹⁴⁹ and in a 1998 case against the FCC, the court rebuffed a “novel, last second motion to remand.”¹⁵⁰ In both cases, the court went on to accuse the agency of dishonest intentions in seeking remand. In the FCC case, the court complained that “the Commission has on occasion employed some rather unusual legal tactics when it wished to avoid judicial review, but this ploy may well take the prize.”¹⁵¹ And in the FERC case, the court blasted the agency for failing to explain what it intended to do on remand and asserting only that it sought to “reconsider its ruling in this case in light of its developing policies regarding gas transportation.”¹⁵² The panel, in response, accused FERC of “obfuscation” and announced that “repeat performance [would] be subject to sanctions.”¹⁵³

B. Modern Doctrine Takes Shape

Ethyl Corp.'s lack of a clear doctrinal test merited academic criticism. In a 1996 article, Toni Fine disparaged the “seemingly ad hoc,” “seemingly random approach” that courts had taken in assessing voluntary remands.¹⁵⁴ To bring order to this doctrine, Fine proposed a multipart balancing test, weighing the interests of private challengers and intervenors along with the government's interests.¹⁵⁵ She also suggested that voluntary remands should be granted only when an agency points to intervening changes of law or the discovery of new facts—in addition to a nebulous category, “other grounds as the court might find appropriate.”¹⁵⁶

Fine's article, the sole scholarly treatment of voluntary remands, turned out to be influential. Four years later, the Federal Circuit issued a much-cited opinion that tracked (although it did not cite) parts of Fine's argument.¹⁵⁷ Because that opinion is the only court case that aims to establish a general doctrine of voluntary remands, this Section begins by considering it in depth.

149. *Miss. River Transmission Corp. v. Fed. Energy Regulatory Comm'n*, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992).

150. *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998).

151. *Id.*

152. *Miss. River Transmission Corp.*, 969 F.2d at 1217 n.2 (quoting the Federal Energy Regulatory Commission's (FERC's) motion).

153. *Id.*

154. Fine, *supra* note 16, at 1085, 1091.

155. *Id.* at 1118–21.

156. *Id.* at 1121.

157. *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001).

1. *The SKF Decision*

The facts of *SKF USA Inc. v. United States*¹⁵⁸ are typical in the voluntary-remand context. The Department of Commerce imposed a duty on a foreign company's imported antifriction bearings; in calculating that duty, the Department considered the company's recent losses from sale of a Korean subsidiary.¹⁵⁹ The company challenged the decision in the Court of International Trade,¹⁶⁰ arguing that the losses should not be included—at which point the Department reversed course. The company's briefing before the Court of International Trade stated that, “upon review” of the company's argument, “it now agree[d] that the loss should not be included.”¹⁶¹ It consequently sought a remand to remove the loss from the calculation. But the Court of International Trade rejected the motion: it determined that the decision to include the loss was “reasonable,” and refused to “rely on the post-hoc position advanced by Commerce in its brief.”¹⁶²

The Federal Circuit reversed the refusal to remand. Its opinion, written by Judge Timothy Dyk, is the most sustained discussion of voluntary-remand doctrine in the case law. It has been cited approvingly in voluntary-remand opinions throughout the country, including by four courts of appeals¹⁶³ and by numerous district courts.¹⁶⁴

The opinion's main attraction is a comprehensive typology of litigation positions an agency might take when its policy is challenged.¹⁶⁵ Three of them are voluntary-remand situations;¹⁶⁶ they vary depending on the rea-

158. 254 F.3d 1022 (Fed. Cir. 2001).

159. *Id.* at 1025–26.

160. Voluntary-remand motions are extraordinarily common in the Court of International Trade. There is no statutory explanation for their prevalence in this context, but they likely arise so often because of the complexity of the Commerce Department's duty regulations combined with the Department's willingness to seek such remands. See Michele D. Lynch, *Remands Are a Consequence of Administrative Law, So Why Are We All So Frustrated?*, 23 TUL. J. INT'L & COMP. L. 383, 383 (2015) (“Mention the word ‘remand’ in a room of trade practitioners and let the fun begin.”); Elizabeth C. Seastrum & Matthew D. Walden, *Adjudicating International Trade Cases at the U.S. Commerce Department: Endless Remand or Balanced Resolve?*, 39 J. MARSHALL L. REV. 59 (2005).

161. *SKF*, 254 F.3d at 1026.

162. *SKF USA Inc. v. United States*, 77 F. Supp. 2d 1335, 1346, 1345 n.3 (Ct. Int'l Trade 1999).

163. *Cal. Cmty. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 215 (4th Cir. 2009); *Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006); *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416–17 (6th Cir. 2004).

164. See *infra* note 184 and accompanying text.

165. *SKF*, 254 F.3d at 1027–28.

166. The first two positions are unrelated to voluntary remands. In the first situation,

sons that the agency requests the remand. In the first of these, an agency seeks a voluntary-remand motion based on “intervening events outside of the agency’s control, for example, a new legal decision or the passage of new legislation.”¹⁶⁷ In this category, the Federal Circuit adopted an argument made in Fine’s article,¹⁶⁸ holding the case for remand is “generally required if the intervening event may affect the validity of agency action.”¹⁶⁹

The court’s analysis of the second voluntary-remand category produces a more pronounced doctrinal shift. Remand motions fall into that category whenever the agency requests a remand, *without* confessing error, “in order to reconsider its previous position.”¹⁷⁰ In this case, the Federal Circuit (again exclusively citing the D.C. Circuit law discussed above)¹⁷¹ equivocated. It acknowledged that “the reviewing court has discretion over whether to remand,” and that “[a] remand may be refused if the agency’s request is frivolous or in bad faith.”¹⁷² But it concluded—without citation or analysis—that, “if the agency’s concern is substantial and legitimate, a remand is usually appropriate.”¹⁷³

Finally, the Federal Circuit considered what should happen when the agency “request[s] a remand because it believes that its original decision is incorrect on the merits and wishes to change the result.”¹⁷⁴ On this point, the court distinguished between remands to correct simple errors (which should generally be granted) and “remand request[s] associated with a change in agency policy or interpretation.”¹⁷⁵ How a court should approach the latter set of issues, the Federal Circuit explained, depends on whether the policy is challenged under the first step articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷⁶ (that is, the challenger claims that the statute unambiguously prohibits the agency from imple-

an agency defends its policy, and the “obligation of the court is clear.” It must review the policy in question under the APA and other relevant law. *Id.* at 1028. In the second, where “the agency seeks to defend its decision on grounds not previously articulated by the agency,” the court’s duty is also “well-settled”: it must refuse to consider the agency’s post-hoc explanation and decide the case on the original grounds articulated. *Id.* (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

167. *Id.*

168. Fine, *supra* note 16, at 1121.

169. *SKF*, 254 F.3d at 1028.

170. *Id.* at 1029.

171. The *SKF* opinion cites every case cited in Section III.A. *See supra* notes 144–147.

172. *SKF*, 254 F.3d at 1029.

173. *Id.*

174. *Id.*

175. *Id.*

176. 467 U.S. 837 (1984).

menting the policy).¹⁷⁷ If so, “the reviewing court again has considerable discretion”: it may “decide the statutory issue, or it may order a remand.”¹⁷⁸ But again, the Federal Circuit signaled that courts should generally take the latter path, writing that “remand may conserve judicial resources, or the agency’s views on the statutory question, though not dispositive, may be useful to the reviewing court.”¹⁷⁹

When *Chevron*’s first step is not implicated, though, *SKF* strips courts of their discretion. In those cases, the Federal Circuit explains, voluntary remand is “required, absent the most unusual circumstances verging on bad faith.”¹⁸⁰ Such a strong presumption is necessary to effect *Chevron*’s goal of allowing each agency to assess “the wisdom of its policy on a continuing basis.”¹⁸¹ Because the Commerce Department remand motion at issue in *SKF* fell within this last category, the court of appeals held that a voluntary remand was required, reversing the Court of International Trade.¹⁸²

2. *SKF*’s Legacy

The *SKF* decision opened the floodgates of voluntary remands. Three hundred sixteen of the 386 published cases discussing voluntary remands came after the Federal Circuit’s decision.¹⁸³ And of the cases that cited *SKF*, all but four granted voluntary-remand motions.¹⁸⁴ Indeed, after *SKF*, the presumption in favor of voluntary remands moved from informal practice to black-letter doctrine: the Sixth Circuit, for example, stated that “courts should permit [voluntary remands] in the absence of apparent or clearly articulated countervailing reasons,”¹⁸⁵ while the District of D.C. simply explained that voluntary-remand motions are “usually granted.”¹⁸⁶

177. *See id.* at 842–43.

178. *SKF*, 254 F.3d at 1029.

179. *Id.*

180. *Id.* at 1030.

181. *Id.* (quoting *Chevron*, 467 U.S. at 864).

182. *Id.*

183. WestlawNext search for “Voluntary Remand.”

184. WestlawNext search for cases citing *SKF*, omitting cases from the Court of International Trade. Of the four cases that deny voluntary-remand motions, one arose in an unusual posture: the district court had already ruled against the agency, and the agency sought a remand under the demanding standard to alter a judgment under Federal Rule of Civil Procedure 59(e). *See Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 4057101, at *1, *10–11 (W.D.N.Y. Aug. 26, 2008). The others are discussed *infra* notes 191, 193, 226.

185. *Citizens Against Pellissippi Parkline, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004).

186. *Edward W. Sparrow Hosp. Ass’n v. Sebelius*, 796 F. Supp. 2d 104, 107 (D.D.C.

Moreover, courts after *SKF* continued to expand voluntary-remand doctrine into new contexts. District courts rely on *SKF* in cases challenging rulemakings,¹⁸⁷ and well as in arbitrary-and-capricious challenges to adjudications where the agency should receive no deference.¹⁸⁸ Courts of appeals began to follow *SKF*'s lead and overturn district courts' refusal to grant voluntary remands as abuses of discretion.¹⁸⁹ Even the Supreme Court entered into the world of voluntary remands—the major administrative law case *FCC v. Fox Television Stations, Inc.*¹⁹⁰ tersely mentions that the FCC received a voluntary remand “so that parties could air their objections.”

A handful of modern cases declined to grant voluntary-remand motions. Typically, those cases turned on the same timing concerns that motivated the *Ethyl Corp.*-era courts. A 2007 voluntary-remand motion was denied, for example, because the case had been pending for over five years.¹⁹¹ (That motion was filed as part of the infamous *Cobell* litigation, which spanned over a decade and resulted in numerous federal officials being held in contempt of court.)¹⁹² These concerns largely track the same rationale the D.C. Circuit gave for denying voluntary-remand motions in the 1990s.

In other words, doctrinal evolution has largely stopped after *SKF*. But there is some reason to believe that the doctrine is beginning to change again. In a May 2017 decision, the D.C. Circuit imposed an important new limitation on voluntary remands, holding that voluntary remands are inappropriate whenever the agency seeking the remand does not “profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge.”¹⁹³ Accordingly, it reversed the decision of the district court, which granted a voluntary remand to the Department of Energy after it promised to act differently in the *future* (but not as regarded the challenged policy).¹⁹⁴ Although the precise factual circum-

2011).

187. *E.g.*, *Basinkeeper v. U.S. Army Corps of Eng'rs*, No. 15-6982, 2016 WL 3180643, at *5 (E.D. La. June 8, 2016).

188. *E.g.*, *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015).

189. *Citizens Against Pellissippi Parkline, Inc.*, 375 F.3d at 417.

190. 556 U.S. 502, 511 (2009). This case and its successor, *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307 (2012), are the only two Supreme Court cases to discuss voluntary remands at all.

191. *Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 136 (D.D.C. 2007).

192. *See Pierce*, *supra* note 22. For a sharp response, see Jamie B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 ADMIN. L. REV. 229 (2005).

193. *Limnia, Inc. v. DOE*, No. 16-5279, 2017 WL 2192943, at *6 (D.C. Cir. May 19, 2017).

194. *Id.* at *7.

stances of this case are unlikely to arise in the future, it is nevertheless significant because it marks the first time that a court of appeals has reversed a district court's decision to grant a voluntary remand, suggesting increased skepticism of voluntary-remand practice.

3. *Lingering Ambiguities: Vacatur and Other Remedies*

The state of voluntary-remand law has remained uncertain in one respect. Even after the Federal Circuit's attempt to comprehensively sketch the contours of voluntary-remand law, courts divide on a fundamental question: when a voluntary remand is granted, ought the underlying policy be vacated? The lingering confusion over this issue is puzzling, given that—as I discuss below—it appears to have a clear doctrinal answer. It relates, though, to a broader disarray in voluntary-remand doctrine—courts have attempted to layer additional remedies on top of voluntary remands, a practice that has produced substantial legal uncertainty.

The foundational voluntary-remand cases split on the question of vacatur: in two otherwise identical 1958 and 1959 cases, the D.C. Circuit granted a voluntary remand with vacatur in one television-permit challenge,¹⁹⁵ but granted a voluntary remand without vacatur in the other.¹⁹⁶ In the 1990s and 2000s, the D.C. Circuit occasionally vacated cases after voluntary remands;¹⁹⁷ indeed, that court denied a voluntary remand in one environmental case because “EPA made no offer to vacate the rule; thus EPA’s proposal would have left petitioners subject to a rule [the challengers] claimed was invalid.”¹⁹⁸

That ruling, like all others vacating a rule upon voluntary remand, rests on an error of law. After the Supreme Court’s decision in *State Farm*, agencies may not vacate their policies unilaterally—rather, they must rescind agency action through the same procedures used to institute it in the first place.¹⁹⁹ To void the EPA rule in question, for example, the agency would have had to reopen notice-and-comment, then publish a new rule in the Federal Register announcing the rescission.²⁰⁰ Of course, these procedures are not required when a court strikes down a rule on the merits. But, under the APA, a court may vacate only agency action that it “hold[s] unlaw-

195. *WORZ, Inc. v. FCC*, 268 F.2d 889, 890 (D.C. Cir. 1959).

196. *WKAT, Inc. v. FCC*, 258 F.2d 418, 420 (D.C. Cir. 1958).

197. *See Pac. Gas & Elec. Co. v. Fed. Energy Regulatory Comm’n*, No. 04-1122, 2004 WL 2672300, at *1 (D.C. Cir. Nov. 22, 2004); *Gen. Signal Corp. v. EPA*, No. 90-1560, 1993 WL 183999, at *1 (D.C. Cir. Apr. 16, 1993).

198. *Chlorine Chemistry Council v. EPA*, 206 F.3d 1286, 1288 (D.C. Cir. 2000).

199. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983).

200. O’Connell, *supra* note 106, at 477.

ful,”²⁰¹ which does not occur in the voluntary-remand context.

For this reason, some modern courts have realized that voluntary remand precludes vacatur. As a District of D.C. judge put it in a 2009 opinion, granting remand with vacatur “allow[s] the Federal defendants to do what they cannot do under the APA, repeal a rule without public notice and comment, without judicial consideration of the merits.”²⁰² Nevertheless, other courts continue to grant voluntary remands with vacatur.²⁰³ And private parties continue to press for vacatur in their briefing concerning voluntary remands.²⁰⁴

The confusion about voluntary remands and vacatur is part of a larger doctrinal ambiguity: when a court grants a voluntary remand, what else should it do? Some courts, having avoided vacatur but seeking to remain involved in the case, have turned to monitoring arrangements. For example, a court might grant a remand but require the agency to file status reports every thirty days;²⁰⁵ alternatively, it may grant a remand but require parties to file a joint status report setting forth a mutually agreeable timetable for future agency action.²⁰⁶ These orders are of dubious legality: once a case is remanded, a court typically does not retain jurisdiction.²⁰⁷ As a result, a court requesting status reports after granting a voluntary remand is taking action in a case that is no longer before the court.²⁰⁸ However, the issue is unlikely to be litigated, as they impose relatively minor burdens, and are unlikely to be challenged by an agency that has just won its remand.

A related confusion concerns the relationship between voluntary remands and stays. A court has the power to stay (that is, to preliminarily enjoin) agency action while litigation is pending.²⁰⁹ But it is unclear how that power should relate to voluntary remands. One court has held that a stay

201. 5 U.S.C. § 706(2) (2012).

202. *Nat'l Parks Conservation Ass'n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

203. *E.g.*, *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009); *ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1065 (C.D. Cal. 2016).

204. *E.g.*, *Petitioners' Opposition to EPA's Motion for Voluntary Remand at 10–14, Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (No. 09-1017).

205. *E.g.*, *S. Cal. Edison Co. v. Fed. Energy Regulatory Comm'n*, No. 02-1374, 2004 WL 326225, at *1 (D.C. Cir. Feb. 12, 2004).

206. *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126, 137–38 (D.D.C. 2010).

207. *See, e.g., Handbook of Practice and Internal Procedures*, U.S. CT. OF APPEALS FOR THE D.C. CIRCUIT 1, 35 (2018), [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/\\$FILE/HandbookMarch2018WithTOCLinks.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/HandbookMarch2018WithTOCLinks.pdf).

208. *See Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) (“Article III, of course, gives the federal courts jurisdiction over only ‘cases and controversies’ . . .”).

209. *Cass, supra* note 20, at 24.

of a rule militates in favor of voluntary remand, because the stay means that a remand would not leave a private party “subject to a rule it claims is invalid.”²¹⁰ By contrast, another court has held that a voluntary remand is inappropriate when the underlying policy is enjoined.²¹¹ Here, there is no question that both approaches are legally permissible. But this difference of opinion speaks to the broader uncertainty about the propriety of coupling voluntary remands with other remedies.

4. *Lingering Ambiguities: Interadministration Remands*

The doctrinal complexities of voluntary remands come to a head when administrations change policy preferences. As discussed above, those cases have the most complicated mix of costs and benefits.²¹² They also present some of the most complex doctrinal questions because they raise the risk of abuse: that an agency will seek voluntary remands strategically, using them to mask politically driven policy changes. The Supreme Court, writing outside the voluntary-remand context, has recognized this threat, observing that agencies must not be allowed to use “the power to correct inadvertent ministerial errors . . . as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in light of changing policies.”²¹³

Yet interadministration cases regularly feature these sorts of pretextual voluntary-remand requests. Barack Obama’s EPA, for example, sought a voluntary remand in one Clean Air Act case because of “legal, technical and policy issues that warrant additional review”;²¹⁴ in another case, the EPA requested a voluntary remand allegedly in light of a Supreme Court decision that *upheld* the policy on which the EPA sought remand.²¹⁵ Only occasionally does an agency admit that it seeks to change its policy based on a new administration’s policy preferences; it always does so alongside other reasons for voluntary remands.²¹⁶

Interadministration voluntary remands, like all voluntary remands, are almost always granted. After the 2008 election, it appears that the Obama Administration won practically every voluntary-remand motion its agencies

210. *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 75 (D.D.C. 2015).

211. *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 417–18 (6th Cir. 2004) (describing then reversing the district court’s decision).

212. *See supra* Section II.C.

213. *Am. Trucking Ass’ns v. Frisco Transp. Co.*, 358 U.S. 133, 146 (1958).

214. *Ala. Envtl. Council v. Adm’r*, 711 F.3d 1277, 1284 (11th Cir. 2013).

215. *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 824 (10th Cir. 2010).

216. *See, e.g., EPA’s Motion for Voluntary Remand at 4, Waterkeeper All. v. EPA*, 853 F.3d 527 (D.C. Cir. 2017) (No. 09-1017) (“EPA is under a new Administration and is reconsidering the policy choices that were initially made in promulgation of the Final Rule.”).

filed.²¹⁷ The frequency of voluntary remands in the environmental context led three industry lawyers to complain of the “mystery of the disappearing air regulations.”²¹⁸

The only exception to courts’ tendency to remand appears to be a consequence of litigation error. There, the Department of the Interior asked only for a voluntary remand with vacatur; the district court, believing it lacked the power to vacate, denied the motion.²¹⁹ Later, the court suggested that it would have granted a voluntary remand without vacatur, had the agency requested one.²²⁰

In these cases, courts strive valiantly to avoid answering the core question posed by these remands: Is a change in administration alone a sufficient reason to return the case to the agency? In one 2010 case, a district court engaged in creative acrobatics to dodge the issue: there, the Obama Administration sought a voluntary remand, claiming that the Bush-era decisionmaker had improperly ignored scientific findings in crafting a habitat plan for the northern spotted owl.²²¹ The district court granted the remand over a private party’s complaint that the Administration’s argument was driven solely by politics, finding it “unpersuasive in light of the fact that the *prior administration’s* investigation” revealed the decisional flaws in question.²²² But that point is a non sequitur: although the investigation was conducted by an inspector general during the Bush Administration,²²³ only the Obama Administration decided that the problem was serious enough to justify remanding the rule.

Thus far, the Trump Administration has declined to file voluntary-remand motions on politically salient policies.²²⁴ But should it seek more, the law of voluntary remands may change. Some have suggested that Trump’s incendiary rhetoric will erode the deference that his Administra-

217. In addition to the cases cited above, see *Coal. for Responsible Waste Incinerators v. EPA*, No. 08-1396 (D.C. Cir. Aug. 14, 2009); *Sierra Club v. EPA*, No. 07-1200 (D.C. Cir. Apr. 29, 2009); *Carpenters Indus. Council v. Salazar*, 734 F. Supp. 2d 126 (D.D.C. 2010); *Friends of Dereef Park v. Nat’l Park Serv.*, No. 2:13-cv-03453-DCN, 2014 WL 6969680 1, 4 (D.S.C. Dec. 9, 2014).

218. Stephen Gidiere et al., *The Mystery of the Disappearing Air Regulations*, 24 NAT. RESOURCES & ENV’T 3 (2010).

219. *Nat’l Parks Conservation Ass’n v. Salazar*, 660 F. Supp. 2d 3, 5 (D.D.C. 2009).

220. *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7, 14 (D.D.C. 2014).

221. *Carpenters Indus. Council*, 734 F. Supp. 2d at 133–34.

222. *Id.* at 134 n.8.

223. See Juliet Eilperin, *Bush Appointee Said to Reject Advice on Endangered Species*, WASH. POST (Oct. 30, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/29/AR2006102900776.html>.

224. Instead, the Trump Administration has moved to hold various high-profile cases in abeyance. See *infra* Part V.

tion might otherwise receive from courts.²²⁵ If that prediction holds across administrative law, then agencies may begin to lose interadministration voluntary-remand motions.²²⁶ If so, courts will have to reckon with the relationship between politically motivated policy decisions and voluntary remands.

As courts do so, they might consider that interadministration voluntary remands have often produced lengthy follow-on litigation. Cases where a new administration has sought remand often return to court. The northern spotted owl's habitat continues to vex the judiciary,²²⁷ and the Eleventh Circuit struck down the Obama EPA's actions years after it granted an interadministration voluntary remand.²²⁸ George W. Bush's administration, which sought few voluntary remands at its outset, likewise fared poorly. After receiving a voluntary remand in a 2001 case concerning solid waste incinerators, Bush's EPA spent four years in additional rulemaking, then reissued the rule largely unchanged.²²⁹ Two years after that, the D.C. Circuit struck down the rule;²³⁰ the Bush Administration ended before curing the rule's legal defects.

The point of these cases is not that incoming administrations were wrong to seek voluntary remands. Rather, it is that there are drawbacks as well as benefits to a court's decision to grant them. Throughout the doctrine I have sketched above, courts have generally been reluctant to recognize the causes and costs of remand motions. In the next Part, I shall consider the assumptions that drive courts to grant voluntary remands so indiscriminately.

IV. REFORMING VOLUNTARY-REMAND LAW

Shortly before his nomination to the Supreme Court, Benjamin Cardozo remarked that the "repetition of a catchword can hold analysis in fetters for

225. See Benjamin Wittes & Quinta Jurecic, *The Revolt of the Judges: What Happens When the Judiciary Doesn't Trust the President's Oath*, LAWFARE (Mar. 16, 2017, 9:24 PM), <http://www.lawfareblog.com/revolt-judges-what-happens-when-judiciary-doesnt-trust-presidents-oath> ("In this scenario . . . the normal rules of deference and presumption of regularity in presidential conduct . . . simply don't apply to Trump.").

226. Indeed, the only published decision on a voluntary-remand motion filed during the Trump Administration denied the motion. See *Bayshore Cmty. Hosp. v. Hargan*, No. 16-cv-2353-APM, 2017 WL 4857426, at *3-4 (D.D.C. Oct. 25, 2017).

227. *Carpenters Indus. Council v. Jewell*, 139 F. Supp. 3d 7, 9 (D.D.C. 2015) ("This case is one of three separate actions currently before the Court . . . involving . . . habitat for the northern spotted owl.").

228. *Ala. Env'tl. Council v. Adm'r*, 711 F.3d 1277, 1293 (11th Cir. 2013).

229. *Nat. Res. Def. Council v. EPA*, 489 F.3d 1250, 1256 (D.C. Cir. 2007).

230. *Id.* at 1262.

fifty years and more.”²³¹ Such is the story of voluntary-remand doctrine. Since the 1950s, courts almost always issue voluntary remands to government agencies; that presumption has been reaffirmed in new context after new context. But—perhaps because voluntary-remand decisions are so often terse and unpublished—no court has challenged the assumptions that run through the doctrine. As a result, they have simply carried forward a set of ideological commitments latent in the early case law. But probing those commitments makes clear that the law of voluntary remands now diverges sharply from a contemporary understanding of why agencies seek remands.

This Part therefore returns to the continuum of voluntary remands introduced in Part I. It argues that voluntary-remand doctrine insufficiently considers the nature of an agency’s remand request. The doctrine additionally does not take account of modern administrative law developments—including the rise of informal rulemaking, and the subsequent decision of *State Farm*—that might drive agencies to seek voluntary remands, and that might counsel courts against granting those requests. Accordingly, voluntary remand now contains three important analytic flaws. In this Part, I discuss those three flaws. I also suggest course corrections that aim to reconcile the law and theory of voluntary remands.

First, courts have taken too credulously the idea that agencies should receive voluntary remands regardless of their motivation. This uncritical approach allows agencies to garner remands solely to avoid litigation loss. Moreover, it allows agencies to obscure the true motives of their voluntary remand requests, making it difficult for the courts to properly assess the benefits and costs of remand. Courts can mitigate this risk by requiring agencies to be explicit about what they propose to do on voluntary remand, and by rejecting remand motions that fail to commit to anything.

Second, courts have remained overly committed to the idea that voluntary remands optimally allocate responsibilities between agencies and courts. They remain wedded to the notion that remands are necessary to acquire agency expertise and to preserve judicial resources—yet neither claim holds true when agencies seek to overhaul policies. Courts should thus forbear from granting remands when an agency’s change of heart would subject its action to more exacting scrutiny than review of the initial challenge.

Third, reviewing courts are inattentive to the costs of remand for private parties. They assume, based on a set of factual conditions that no longer hold true universally, that private parties lose nothing from voluntary remands other than temporary delays. Now, those parties have much to lose from voluntary remands. In the rulemaking context, plaintiffs whose cases

231. Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 689 (1931).

are remanded lose the possibility that the rule will be expunged entirely; even in adjudications, delay may substantially prejudice the party suing the government.

Together, these observations reveal the defects in the *SKF* framework. The Federal Circuit's approach—now followed by every court to discuss voluntary remands—insufficiently attends to the concerns that should animate voluntary-remand requests. Rather than unquestioningly granting such motions, courts should ask three questions: Is the remand request driven by an agency's legitimate and permissible desire to change policy? Will granting a remand actually preserve the resources of the judicial system? And would a remand appropriately balance the interest of private parties with the interest of the government? Answering these questions suggests that the *SKF* presumption is overgenerous to voluntary-remand motions in a variety of circumstances, particularly for challenges arising under *Chevron's* first step and under the arbitrary-and-capricious standard.

A. Abandoning the Agencies-as-Courts Myth

One risk of voluntary-remand doctrine is of opportunism: that agencies will use voluntary remands to dodge difficult court cases and avoid defeats. To the extent that this desire drives voluntary-remand requests, the doctrine serves little social good.²³² Indeed, it runs contrary to the principle developed in *SEC v. Chenery Corp.*²³³ that agencies should make policy based on factors other than litigation victory.

Yet early voluntary-remand cases seem to view this loss-aversion as a feature, not a bug. Time after time, they authorized remands where returning a case to the agency serves no policy-based purpose. Rather, the early courts granted remands merely so agencies can “cure their own mistakes.”²³⁴

A central premise of voluntary-remand doctrine, therefore, is that agencies should be treated akin to lower courts. That premise is latent even in the name “voluntary remand;”²³⁵ Judge Bazelon's 1958 opinion in *Fleming* makes this claim explicit.²³⁶ The Federal Circuit's *SKF* decision doubles down on this claim: in support of its analysis, it relies heavily on the Supreme Court's decision in *Lawrence v. Chater*,²³⁷ which it claimed contained a “comprehensive discussion of many of these issues.”²³⁸ *Lawrence* concerns

232. See *supra* Section I.A.

233. 318 U.S. 80, 93 (1943).

234. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).

235. See *supra* notes 25–33 and accompanying text.

236. See *supra* notes 137–142 and accompanying text.

237. 516 U.S. 163 (1996) (per curiam).

238. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001).

the Supreme Court's decision to grant certiorari, vacate the judgment below, and remand the case to the court of appeals for additional factual development²³⁹—it nowhere discusses remands to administrative agencies.

This agency-court analogy makes sense in the context in which it arose. *Fleming*, along with all other 1950s-era cases, concerned a challenge to an agency's formal adjudication. In formal adjudications, an agency behaves much like a court: it has a duty to act as a "neutral arbitrator" with respect to facts,²⁴⁰ and the APA's procedural requirements for formal adjudications limit an agency's ability to take policy concerns into account.²⁴¹ Agencies are still permitted to craft new policies through adjudication,²⁴² but may do so only by considering facts entered into a quasi-judicial record.²⁴³

Outside the formal adjudication context, though, the similarities between agencies and courts break down. As Justice Frankfurter recognized in 1940, administrative agencies are invested with "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims."²⁴⁴ When exercising that power, agencies pursue programmatic agendas and are not required to be impartial in advancing those agendas.²⁴⁵ They are loyal not only to reviewing courts, but also to their own, the President, and Congress, which may disagree with the courts' views.²⁴⁶ Unlike lower courts, they litigate cases within the adversarial system.²⁴⁷ Thus, when agencies seek remands, they do so to serve their own ends, not merely in the interest of justice.

This observation suggests that voluntary-remand doctrine overstates the amount of deference due to agencies. Part of the logic of remands is (as the Supreme Court put it in *Lawrence*) that higher courts "fulfill [their] judicial responsibility by instructing the lower courts" how to apply the law.²⁴⁸ But agencies, unlike lower courts, are not faithful agents of the remanding tribunal. Accordingly, the tendency to remand is in tension with the doc-

239. 516 U.S. at 166.

240. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 155 (1991).

241. *See, e.g.*, 5 U.S.C. § 554(d) (2012).

242. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

243. *Magill*, *supra* note 46, at 1391.

244. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940).

245. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 624 (1984).

246. Indeed, agencies will sometimes refuse to follow the decisions of the courts of appeals—something that lower courts cannot do. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989).

247. *Schuck & Elliott*, *supra* note 56, at 1011 n.69.

248. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)).

trine's modern development—now that it has evolved out of the world of formal adjudication, this central claim must be cast away.

At a minimum, therefore, courts can improve remand doctrine by requiring policy-based explanations for remand requests. When an agency files a voluntary-remand motion that is either superficial or pretextual (recall the agency that requested a remand to “respond in greater detail” to comments it had already answered),²⁴⁹ it is impossible to know whether a remand serves broader administrative law goals. By requiring specificity, too, the reviewing court can better discern the nature of an agency's policy motivations. Forcing those details would allow courts to more easily determine whether remands serve the interests of the judicial system, rather than merely advancing an agency's litigation or political strategy.

B. Cabining Agency Expertise, Preserving Judicial Resources

As courts consider whether voluntary remands advance the interests of the judicial system writ large, they should cast aside two blanket claims that greatly inflate the theoretical underpinnings of voluntary-remand law. The first, that voluntary remands are necessary to gain the benefit of agencies' expertise, holds true only in a limited set of circumstances, and does not follow in the age of hard-look review. The second, that voluntary remands are appropriate to preserve judicial resources, similarly lacks factual support in the context of hard-look review.

As the early case law suggests, courts turned to voluntary remands to gain the benefit of agency expertise. That claim, like the agencies-as-courts premise, follows from the early doctrinal context: those cases involved political interference claims, an area of administrative law where courts continue to be extremely deferential to agencies.²⁵⁰ Moreover, they involved remands to permit the agencies to further develop the factual record, not to reassess issues of law. The courts have traditionally viewed agencies as superior finders of fact²⁵¹—particularly given that challenges to agency action are often lodged directly in the courts of appeal, which have limited fact-finding capabilities.²⁵² Indeed, the idea that agencies should be allowed to

249. See *supra* notes 50–51 and accompanying text.

250. See *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) (“Given the roles that agency officials must play in the give-and-take of sometimes rough-and-tumble policy debates, courts must tread lightly when presented with this kind of challenge.”).

251. *Crowell v. Benson*, 285 U.S. 22, 46 (1932) (“[Q]uestions of fact . . . are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.”).

252. See Daniel Egger, Note, *Court of Appeals Review of Agency Action: The Problem of En Banc Ties*, 100 YALE L.J. 471, 483–86 (1990).

gather additional facts during litigation was well accepted at the time this doctrine developed: judicial-review language in some contemporaneous statutes permits the courts to grant agency (or private-party) requests to “adduce additional evidence.”²⁵³ The agency-expertise claim therefore relies on the premise that the information gained by voluntary remands is within the special competence of the agency. On this account, the logic of voluntary remands turns on the fact that agencies, not courts, are better positioned to undertake the inquiry requested by the remand.

In modern practice, though, this assumption does not hold true. To be sure, agencies often seek voluntary remands in contexts where their decisions deserve deference: for example, when interpreting their own substantive statutes (*Chevron* deference) or rules (*Auer* deference).²⁵⁴ The Federal Circuit in *SKF* had these situations in mind when setting forth its voluntary-remand typology: it divided the category of cases where an agency seeks to correct its decision into cases of “simple errors” and cases concerning a “change in agency policy or interpretation,” where *Chevron* deference applies.²⁵⁵ The court then relied on this deference as a principal reason for the voluntary-remand presumption.²⁵⁶

But *SKF*'s typology is notably incomplete. The Federal Circuit was wrong to assume that every change in agency policy is entitled to deferential review. *Chevron* applies only when an agency's policy is challenged as contrary to a substantive statute;²⁵⁷ it does not govern challenges that allege only that agency action is arbitrary and capricious.²⁵⁸ In the latter set of

253. See *Fleming v. FCC*, 225 F.2d 523, 526 n.6 (D.C. Cir. 1955). *Fleming* quotes three statutes: the Federal Trade Commission Act, 15 U.S.C. § 45(c) (1952); the Public Utility Holding Company Act, 15 U.S.C. § 79x(a) (1952); and the Natural Gas Act, 15 U.S.C. § 717r (1952). Each uses the same language:

If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

254. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also *Auer v. Robbins*, 519 U.S. 452 (1997).

255. See *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001).

256. *Id.* at 1029–30. In fact, *SKF* at one point suggests that the Commerce Department is entitled to more deference than in a typical *Chevron* situation due to the “special expertise” of the agency and the importance of factual determinations in tariff litigation. *Id.* at 1027 (quoting *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997)).

257. *Chevron*, 467 U.S. at 842–43.

258. See Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 336 (1996) (“Further, if the agency reaches its interpre-

cases, agencies must survive the rigors of hard-look review,²⁵⁹ a form of review that scholars contrast with deference.²⁶⁰

Plenty of voluntary-remand motions, contrary to *SKF*'s typology, fall into this hard-look review category.²⁶¹ In other words, voluntary remands no longer arise solely in contexts where courts desire agencies' views on matters in which the agency is entitled to deference. Now, agencies often seek voluntary remands to reconsider decisions to which courts do not defer.

This lack of deference is particularly important in the context of inter-administration voluntary remands. Courts engaging in hard-look review refuse to credit agency decisions based on political preferences.²⁶² When agencies seek remands that are grounded in political considerations rather than technocratic ones, therefore, they are entitled to no deference and may indeed invoke suspicion.²⁶³ The early voluntary-remand cases, which predate the polarization of the administrative state, could not have considered this worry.²⁶⁴ But these circumstances particularly erode the presumption of agency expertise.

For the same reasons, voluntary remands to allow major changes to a policy do not serve the doctrine's overarching goal: preserving "the resources of the court."²⁶⁵ When an agency seeks to overhaul the substance of a rule, *State Farm* requires an agency to provide a reasoned defense of that change. And that defense is subject to the same hard-look review discussed

tation through a decisionmaking process that is 'arbitrary' or 'capricious,' the agency decision cannot stand even if the interpretation itself is substantively reasonable under *Chevron*.").

259. See *supra* notes 116–121.

260. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 395 (1998). Recent scholarship by Jacob Gersen and Adrian Vermeule casts doubt on the rigorousness of hard-look review, suggesting that agencies "almost always" win arbitrary-and-capricious challenges, at least at the Supreme Court. Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1362 (2016). But Gersen and Vermeule acknowledge that, in the courts of appeals, "the record . . . is more mixed." *Id.* at 1364. Moreover, their study does not distinguish between cases where an agency acts against a blank slate and those where it acts against a backdrop of prior inconsistent agency action—the latter cases, most relevant to voluntary remands, may be especially likely to provoke courts' searching gaze.

261. *E.g.*, *Code v. McHugh*, 139 F. Supp. 3d 465, 468 (D.D.C. 2015).

262. See *supra* notes 124–125 and accompanying text.

263. See *supra* Section II.B.4.

264. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015); see also *Burlington Res. Oil & Gas. Co. v. Fed. Energy Regulatory Comm'n*, No. 96-1285, 1997 WL 150072, at *1 (D.C. Cir. Feb. 7, 1997) ("Although FERC's belated decision to reconsider the rehearing request is troubling, a remand is appropriate to avoid needless expenditure of judicial resources.").

265. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993).

above.

Accordingly, courts may not preserve judicial resources when they remand policies that agencies intend to overhaul. Especially when it comes to high-profile, politically salient challenges, voluntary remands may only postpone inevitable judicial review, prolonging the period of court-created uncertainty.

Nevertheless, voluntary remands in these circumstances might initially appear to save courts resources: they guarantee only one challenge, rather than two. But that appeal may be superficial: these remands may ultimately tax the judiciary's resources more by muddying the waters of courts' eventual review. When a policy is overhauled and challenged, a court must assess the agency's change against an unclear legal background. The agency will claim that change was necessary because the initial policy was unlawful or irrational; the challengers will disagree; and the court—having punted resolution of that question—will find itself in a quagmire it could have avoided by denying remand. Thus, a judge granting a voluntary remand in these circumstances deprives her future colleagues of a clear backdrop against which to assess an agency's policy overhaul—thereby complicating judicial review dramatically.

Accordingly, policy-overhaul remands—at least when hard-look review governs the agency's action—do not serve either the agency-expertise or judicial-economy justifications for voluntary remands. In those cases, granting remands risks debasing agencies' processes rather than strengthening them; approving remand motions further threatens the efficacy of the judicial system. Voluntary-remand doctrine, which focuses exclusively on cases where an agency deserves deference, hardly takes those problems into account.

C. Taking Seriously Private Parties' Rightful Positions

The final premise of voluntary-remand doctrine is perhaps the most anachronistic and applies to the fewest contemporary cases. That assumption is that voluntary remands do not erode the rights of private parties to the litigation, but rather save those parties time and resources. As with the other doctrinal premises, this argument follows in the circumstances from which it sprang. After all, the earliest voluntary-remand cases do not note any opposition to the remand motions.²⁶⁶ That makes sense, given that those cases were challenges to adjudications. In those circumstances, a remand is inevitable *regardless* of whether a voluntary remand is granted: if a court resolves the case on the merits and finds that the agency acted unlawfully, the proper remedy is to remand the case to the agency to adjudicate

266. See *supra* notes 138–139 and accompanying text.

the case again.²⁶⁷ Thus, the distinction between a court-ordered remand and an agency-initiated remand is not one of outcome, but of time: a voluntary remand simply returns the case to the agency faster than a court-initiated remand would.

In *Ethyl Corp.*, the D.C. Circuit dealt for the first time with an opposed voluntary-remand motion. But in that adjudication context, too, the court viewed remand as inevitable,²⁶⁸ and therefore opined that the “parties’ resources” as well as courts’ would be preserved by remand.²⁶⁹ The *Ethyl Corp.* court therefore viewed the voluntary-remand decision solely as a question of effective management,²⁷⁰ without considering potential harms to plaintiffs. Indeed, although voluntary remand is an equitable remedy,²⁷¹ no twentieth-century voluntary remand seems to be denied based on traditional equitable principles like fairness to regulated parties.²⁷²

Now, though, many administrative law challenges do not require remands to the agency. Since the 1970s, agencies have largely shifted to making policy by rulemaking, rather than by adjudication.²⁷³ And in rulemaking cases, unlike in adjudication challenges, a court that finds a flaw in the agency’s process will typically vacate the challenged rules;²⁷⁴ under

267. See *XP Vehicles v. DOE*, 156 F. Supp. 3d 185, 189 (D.D.C. 2016) (“Defendants make a convincing argument that the costly and time-consuming litigation pathway and the requested voluntary remand route *both lead to the same result* under the circumstances presented here.”).

268. The Ethyl Corporation disagreed. Its legal theory was that the EPA’s unlawful waiver denial was a “nullity,” and thus that a statutory provision kicked in requiring EPA to issue a waiver whenever it failed to act within 180 days. *Ethyl Corp.*, 989 F.2d at 524; see 42 U.S.C. § 7545(f)(4) (2012). Had the corporation prevailed on this theory, a remand to the agency would not have been necessary—hence, why it took the then-unusual step of opposing a voluntary remand.

269. *Ethyl Corp.*, 989 F.2d at 524.

270. In the decades before *Ethyl Corp.*, scholars began to criticize courts’ managerial turn. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). Voluntary-remand doctrine, as transformed by *Ethyl Corp.*, may be viewed as an example of courts’ tendency to prioritize judicial efficiency over fairness to litigants.

271. See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939) (“The jurisdiction to review the orders [of an agency] is vested in a court with equity powers.”).

272. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 919 (1987).

273. McGarity, *supra* note 78, at 1385.

274. See *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) (explaining that “vacatur is the normal remedy” for an agency’s failure to meet the APA’s notice-and-comment requirements).

those circumstances, no remand to the agency is required. Successful challenges to guidance documents, too, result in the documents' vacatur.²⁷⁵ In addition, some courts of appeals decline to remand certain adjudications to agencies if, on remand, the agency would have only one lawful course of action.²⁷⁶

In each of these cases, the choice between voluntary remand and litigating on the merits is not merely a question of timing—it is a question of what remedy a policy's challenger will receive. Accordingly, voluntary-remand doctrine should be considerably more attentive to private parties' rightful position than it is now. The doctrine's lack of solicitude toward those private parties has forced courts to layer inapposite remedies like vacatur atop the voluntary-remand remedy.²⁷⁷

But those solutions are legally untenable and distort the nature of voluntary remands. Instead, courts should simply balance the hardships to agencies and private parties, just as they do with motions to stay.²⁷⁸ In doing so, they should recognize that private parties are likely to be harmed when agencies seek comprehensive overhauls of their policies, or otherwise propose remands that will greatly delay resolving the ultimate question of legality.

D. Beyond the SKF Framework

This Part, so far, has advanced three propositions, each of which follows from the theoretical roots of voluntary-remand doctrine. First, agencies should receive voluntary remands only when those remand requests enable them to make legitimate policy changes. By "legitimate," I mean both actual (as the D.C. Circuit's recent *Limnia* opinion holds, an agency cannot receive a voluntary remand for doing nothing)²⁷⁹ and lawful: remand requests motivated by politics or other factors that an agency is forbidden to consider should not be granted.²⁸⁰ Second, I suggest that agencies should receive voluntary remands only when doing so will likely preserve judicial resources, rather than simply kicking the can down the road. Third, I note that voluntary remands can cause injuries to private parties, and that the

275. *E.g.*, *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 385 (D.C. Cir. 2002).

276. *See Navas v. Immigration & Naturalization Serv.*, 217 F.3d 646, 662 (9th Cir. 2000). In *Immigration & Naturalization Service v. Ventura*, 537 U.S. 12, 18 (2002), the Supreme Court reversed a decision of the Ninth Circuit refusing to remand a case on this ground. But the Ninth Circuit has limited *Ventura* to its facts. *See Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132–34 (9th Cir. 2006) (en banc).

277. *See supra* Section III.B.3.

278. *See Pedro, supra* note 20 (manuscript at 43–45).

279. *Limnia, Inc. v. DOE*, 857 F.3d 379, 388 (D.C. Cir. 2017).

280. *See supra* Section III.B.3.

doctrine should take account of those harms.

Each of those observations clashes with the doctrine developed in *SKF*.²⁸¹ To be sure, *SKF* does imply that the strength of an agency's explanation should bear on whether a remand request is granted.²⁸² But courts have not taken that responsibility seriously, instead permitting practically every remand.²⁸³

That unquestioning solicitude, this Part suggests, is misguided. In plenty of circumstances, voluntary remands do not advance the doctrine's foundational goals, and should be rejected. Those circumstances include whenever the agency fails to offer a plausible account of its proposed action on remand, whenever the agency's proposed action after remand would likely be unlawful, whenever a remand simply delays resolution of the merits of a rule, and whenever a remand would harm private parties more than is fair under the circumstances.

These suggestions are schematic. The Article does not call for another multifactor balancing test that many judges love to hate.²⁸⁴ After all, voluntary-remand proceedings already take place in equity, where balancing is inherent:²⁸⁵ no need to layer an additional test. The general takeaway, though, is this: judges should approach voluntary-remand requests with additional skepticism and should place the burden on the agency to submit a voluntary-remand proposal that accords with these observations.

These prescriptions, too, indicate that portions of the *SKF* opinion should be overturned as a matter of formal doctrine. For example, *SKF* is wrong to hold that agencies should often be entitled to voluntary remands in cases that arise under *Chevron's* first step²⁸⁶—in such circumstances, it wastes resources not to decide the case.²⁸⁷ *SKF's* view that voluntary remands are appropriate in cases arising under *Chevron's* second step is more defensible.²⁸⁸ But it does not make sense, as lower courts have done, to extend that holding to challenges arising in the arbitrary-and-capricious context.²⁸⁹ In those challenges, an agency should receive a voluntary remand only if

281. See *supra* Section III.B.1.

282. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1027–28 (Fed. Cir. 2001).

283. See *supra* Section III.B.2.

284. See, e.g., *Palmer v. City of Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986) (Posner, J.) (“[S]o many multi-‘pronged’ legal tests . . . manage[] to be at once redundant, incomplete, and unclear.”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

285. See Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 490–91 (2010); *supra* notes 271–272.

286. *SKF*, 254 F.3d at 1029.

287. See *supra* Section IV.B.

288. See *SKF*, 254 F.3d at 1029–30.

289. See *supra* notes 187–188 and accompanying text.

the agency's request suggests that it will be able to justify any policy change on the basis of legitimate factors—when the court doubts that guarantee, the remand should be denied. And finally, courts should replace *SKF*'s naïveté about the need for an agency to reassess “the wisdom of its policy on an ongoing basis”²⁹⁰ with a realist approach that seeks to understand why the agency really seeks remand, and whether that decision is guided by factors that it cannot lawfully consider.

V. ALTERNATIVES TO VOLUNTARY REMANDS

Were courts to shed some of the outdated theoretical assumptions that animate voluntary-remand law, private parties would better be able to resist remands that are motivated by impermissible factors or that create needless and unfair delay. Nevertheless, there would still be circumstances where a court might seek to forbear from adjudicating a case immediately. In some of those circumstances (for example, when an agency seeks to correct a minor error), voluntary remand might be the most appropriate remedy.²⁹¹ But in others, a court might be tempted to grant a more limited remedy, one that delays resolving the case without abdicating judicial oversight altogether. In this Part, I discuss three alternatives that courts have turned to in lieu of voluntary remands and assess whether they better reflect the theoretical concerns discussed above.

The most prominent alternative to voluntary remand is for a court to maintain jurisdiction but postpone any further action on the case. That remedy, which courts have called both “holding in abeyance” and “staying litigation,”²⁹² has many of the same features as voluntary remand: most notably, an agency will not be forced to litigate (or await a judicial decision) while it reconsiders its policy. Accordingly, abeyance grants agencies similar benefits as voluntary remands do—it gives agencies flexibility to make policy and avoids forcing them to defend agency action that may be legally unsupportable in its current form.

Yet abeyance differs from voluntary remand in other respects. Unlike voluntary remand, it does not terminate a court's jurisdiction over the case.²⁹³ As a result, a court could revive a case held in abeyance at any

290. *SKF*, 254 F.3d at 1030.

291. See *supra* Section II.B.

292. Compare, e.g., *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 196 (D.D.C. 2017), with *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 73 (D.D.C. 2015). The difference appears to be entirely terminological; the term “held in abeyance” is somewhat more precise, as “stays” may also refer to stays of agency orders or to stays by higher courts of lower-court judgments. See *Pedro*, *supra* note 20 (manuscript at 15, 54).

293. *Granholtm ex rel. Mich. Dep't Nat. Res. v. Fed. Energy Regulatory Comm'n*, 180 F.3d 278, 281 n.3 (D.C. Cir. 1999).

time—*sua sponte* or on the motion of a party.²⁹⁴ Typically, orders holding cases in abeyance warn agencies that they may have to appear in court again—either the order grants abeyance only for a limited time,²⁹⁵ or it requires periodic status updates from the agency.²⁹⁶ (These status updates, unlike the ones in the voluntary-remand context, are plainly lawful because the court has retained jurisdiction over a live case.)²⁹⁷ Accordingly, an agency that dawdles in its reconsideration can find itself back before a court, without a private party having to file a new petition for review.

Holding cases in abeyance may therefore have several advantages over granting voluntary remands. First, abeyance decreases the monitoring and litigation costs of private parties—it is easier for them to ascertain what an agency is doing, and to hail it back into court if there is a delay. Second, abeyance lessens or eliminates the risk of forum shopping that inheres in voluntary remands, because the case will either be mooted or argued before the same tribunal that granted the abeyance.²⁹⁸ And third, abeyance preserves judicial resources if the case must be revived, because any completed briefing need not be duplicated.

Agencies have requested abeyance as a fallback after losing voluntary-remand motions,²⁹⁹ and have sometimes sought to pause litigation as a prelude to voluntary remands.³⁰⁰ And since President Trump signed an executive order targeting Obama-era environmental regulations,³⁰¹ the EPA has been aggressive in seeking to hold various Clean Air Act cases—most prominently, the Clean Power Plan challenge—in abeyance.³⁰² This new practice may generate the first case law on the relationship between abeyance and voluntary remand: on April 28, 2017, the D.C. Circuit granted

294. *E.g.*, *Al Odah v. United States*, 559 F.3d 539, 541 (D.C. Cir. 2009).

295. *E.g.*, *Brick Indus. Ass'n v. EPA*, No. 03-1203, 2004 WL 223231, at *1 (D.C. Cir. Jan. 21, 2004).

296. *E.g.*, *Wheaton Coll. v. Sebelius*, 703 F.3d 551, 553 (D.C. Cir. 2012).

297. *Cf. supra* notes 207–208 and accompanying text (casting doubt on the legality of status updates after voluntary remands).

298. *See Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997).

299. *See, e.g.*, *Allina Health Servs. v. Burwell*, 201 F. Supp. 3d 94, 100 (D.D.C. 2016).

300. *See, e.g.*, *Sierra Club v. EPA*, No. 05-1441 (D.C. Cir. Apr. 21, 2006) (unpublished clerk's order).

301. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,095 (Mar. 31, 2017).

302. *See, e.g.*, *Motion to Hold Cases in Abeyance*, *W. Va. Coal Ass'n v. EPA*, No. 15-1422 (D.C. Cir. Mar. 28, 2017). Most likely, EPA preferred abeyance to a voluntary remand in the Clean Power Plan context because the plan had been stayed by the Supreme Court “pending disposition” of the litigation; hence, a voluntary remand would vitiate the litigation and thus the stay. *See Basic Elec. Power Coop. v. EPA*, 136 S. Ct. 998 (2016) (mem.).

EPA's motion to hold the Clean Power Plan in abeyance for sixty days, but also ordered parties to brief "whether [the case] should be remanded to the agency rather than held in abeyance."³⁰³ Thus far, the court continues to keep the case in abeyance, despite a concurring opinion by two judges suggesting that perpetual abeyance is problematic.³⁰⁴

But not all alternatives to voluntary remands need pause litigation so emphatically. Courts can also proceed with a case, but temporarily postpone briefing or argument to allow the agency additional time to reformulate its policy.³⁰⁵ More than abeyance, this approach puts the onus on the agency to keep the court informed of a timeline for agency reconsideration. Postponing briefing thus imposes a sort of judicial deadline on agency action. And Jacob Gersen and Anne Joseph O'Connell have found that agencies under judicial deadlines "produce faster regulatory action" than agencies that do not face deadlines.³⁰⁶ Thus, if a court is tempted to give an agency some time to reconsider its policy, but wants to ensure that the agency acts quickly, it might be tempted to deny a voluntary-remand motion and instead give the agency slightly more time to defend the policy. By doing so, it can create a dialogue among the court, the agency, and private parties about the timing of the agency's reconsideration.

Even more drastically, a court facing a voluntary remand motion can simply instruct the agency to plow ahead with both litigation and reconsideration. As one district court put it, "[n]either a remand nor a stay . . . is necessary to enable the federal defendants to review and reconsider the determination."³⁰⁷ In other words, courts that are disinclined to grant voluntary remands can dare the agency to reassess its policy (and potentially moot the court case) before the court hears and decides the challenge. This sort of ruling may be harsh medicine to an agency, particularly if lengthy notice-and-comment proceedings ensure that the agency cannot finalize a new policy in time to stave off a court ruling.³⁰⁸ But it may be appropriate

303. *W. Va. Coal Ass'n v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017) (per curiam order) (en banc).

304. *W. Va. Coal Ass'n v. EPA*, No. 15-1363 (D.C. Cir. Aug. 8, 2017) (per curiam order) (en banc) (Tatel, J., joined by Millett, J., concurring in the order granting further abeyance) ("As this court has held in abeyance, the Supreme Court's stay now operates to postpone application of the Clean Power Plan indefinitely while the agency reconsiders and perhaps repeals the Rule.").

305. *See, e.g.,* *Keepseagle v. Vilsack*, 118 F. Supp. 3d 98, 106 (D.D.C. 2015).

306. Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 949 & n.84 (2008).

307. *Confederated Tribes v. Salazar*, No. 11-284, 2012 WL 3757655, at *1 (D.D.C. Aug. 29, 2012).

308. It takes many agencies almost two years after issuing a notice of proposed rulemaking to complete a final rule. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An*

when an agency could reassess its policy relatively speedily, or when the court is doubtful that an agency sincerely intends to reconsider its action.

CONCLUSION

This Article has therefore sought to illuminate the law of voluntary remands. By doing so, it has exposed the doctrine as antiquated, based largely on a set of suppositions that no longer hold in modern administrative law. Modern doctrine misstates the costs and benefits of voluntary remand and fails to heed the reasons why agencies might seek those remands. By exposing the mismatch between voluntary-remand theory and practice, I have sought to cast doubt on courts' willingness to grant voluntary remands. By showing that the logic behind this doctrine is limited to a set of circumstances that no longer span the full range of agency action, it has aimed to suggest that courts should hesitate to grant remands whenever an agency fails to sufficiently explain the impetus for remand, whenever an agency's reconsideration would be subject to hard-look review, and whenever an agency's actions suggest that its reconsideration is driven by forbidden political motives. Denying remands in those cases—and, perhaps, turning to alternative remedies—would better balance private parties' interests, preserve courts' resources, and bring voluntary-remand doctrine into alignment with broader administrative law principles.