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## CHENERY REVISITED: REFLECTIONS ON REVERSAL AND REMAND OF ADMINISTRATIVE ORDERS

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*In Securities and Exchange Commission v. Chenery (Chenery I) the Supreme Court established the proposition that when an agency gives the wrong reason for a decision of policy or law, the reviewing court will send the case back for reconsideration, even though the court might have upheld the order if a different reason had been assigned. In this article Judge Friendly examines the scope that courts have attributed to Chenery, concludes that there are in fact three separate principles of review, and illuminates their applicability and utility as tools of judicial discretion.*

THE SUBJECT for discussion stems from the well-known decision in *Securities and Exchange Commission v. Chenery Corp.*, in which the Supreme Court, in an opinion by Mr. Justice Frankfurter, concluded that an administrative order cannot be upheld "unless the ground upon which the agency acted in exercising its powers were those upon which its action can be sustained."<sup>1</sup>

The topic has achieved unexpected timeliness from the Court's very recent decision in *NLRB v. Wyman-Gordon Co.*<sup>2</sup> Although, when I began my labors, I had the hope of discovering a bright shaft of light that would furnish a sure guide to decision in every case, the grail has eluded me; indeed I have come to doubt that it exists.

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<sup>1</sup> 318 U.S. 80, 95 (1943)

Determination when to reverse and remand a decision that an administrative agency had power to make, and sufficient evidence to support, is, I fear, perhaps more an art than a science. My interest in revisiting the *Chenery* case was sparked by having presided for the past several years over a three-judge district court concerned with the merger of the Pennsylvania and New York Central railroads, and such related matters as the inclusion of three smaller roads in the Norfolk & Western System, and Penn Central's unwilling take-over of the New Haven. It was piqued particularly by two footnotes to the opinion affirming our refusal to disturb the orders of the Interstate Commerce Commission which authorized the merger and set fair and reasonable terms for Norfolk & Western's payment for the smaller lines. In the first of these, footnote ten, which appears in that portion of the opinion dealing with the Penn Central merger, the Court stated simply: "And appellants' attack upon the District Court's opinion on the basis of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), totally misconceives the limited office of that decision. See note 14 *infra*."<sup>3</sup> The second, note 14, in the part of the opinion dealing with inclusion of the three roads in the Norfolk & Western, read in relevant part:

We reject N & W's argument that the District Court was guilty of a violation of the rule of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). N & W attempts to extend the principle of that case far beyond its limits. But even if we were to accept N & W's construction of the case, N & W's conclusion would not follow. . . . [T]he District Court appears to have agreed in substance with all the major findings of the Commission. To the Commission's analysis it added several points that it believed would *also* support the Commission's conclusions. . . .<sup>4</sup>

I am not usually one to look a gift horse in the mouth, especially when it comes from the Supreme Court. When seven of eight Justices say that an attack on one of my opinions is "totally misconceived" and "reject" the appellant's arguments, I like it—especially since the Court has not invariably vouchsafed me

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<sup>2</sup> \_\_\_\_ U.S. \_\_\_\_, decided April 23, 1969. See note 46 *infra*.

<sup>3</sup> Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 518-19 n.10 (1968).

<sup>4</sup> 389 U.S. at 526-27 n.14.

that pleasure. But I cannot refrain from wishing that Justice Fortas had been less cryptic. *How* is the office of *Chenery* "limited?" Does it mean less than Mr. Justice Frankfurter said it meant, or just less than the Norfolk & Western claimed it meant? Was the Court simply warning against overenthusiasm about *Chenery* or was it backtracking? Or, was it perhaps saying that this was not a true *Chenery* situation at all?

The *Chenery* case concerned the reorganization of the Federal Water Service Corporation under sections 7 and 11 of the Public Utility Holding Company Act of 1935.<sup>5</sup> Some 95 percent of the equity of the new company was to go to the preferred stockholders of the old. During a two and a half year period in which various plans were successively submitted to and rejected by the SEC, persons who had controlled Federal through ownership of common stock bought approximately eight percent of the company's preferred on the over-the-counter market at prices substantially lower than the book value of the new common into which the preferred, pursuant to the plan, would be converted.<sup>6</sup> The SEC held that it could not approve the proposed plan if the preferred stock thus acquired was permitted to share on a parity with other preferred stock. This decision was not based on fraud or lack of required disclosure; instead, the Commission expressly stipulated that it had found no evidence of managerial indiscretion.<sup>7</sup> Federal's managers were said to be under a "duty of fair dealing" not to trade in the securities of the corporation while plans for its reorganization were pending before the Commission. Consequently the SEC ordered the plan amended to provide that the preferred stock acquired by management was to be surrendered at cost plus four percent interest.

Speaking for the Supreme Court, Mr. Justice Frankfurter read the report as resting on a belief that the Commission was acting "only as it assumed a court of equity would have acted in a similar case."<sup>8</sup> However, the Court concluded that equity courts had not gone that far, and since "[t]he grounds upon which an administrative order must be judged are those upon which the record

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<sup>5</sup> 15 U.S.C. §§ 79 to 79z-6 (1964).

<sup>6</sup> See 318 U.S. at 82-84.

<sup>7</sup> *Id.* at 86.

<sup>8</sup> *Id.* at 87.

discloses that its action was based,"<sup>9</sup> the Commission's order could not stand. Nevertheless, Mr. Justice Frankfurter made clear that the Commission was not limited to the principles developed by courts of equity and that "Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law."<sup>10</sup> Reflecting on its experience in administering the Act, the Commission contended that a need existed for placing sharp limits on those in control of reorganizations and urged affirmance on that ground. While not disputing that the Commission could lawfully utilize such experience to come to the same conclusion it had reached on an erroneous ground, the Court found an insuperable difficulty to affirmance in the point "that the considerations urged here in support of the Commission's order were not those upon which its action was based."<sup>12</sup> Since the Commission had professed to decide the case according to settled judicial doctrines, it was according to those "invoked standards" that its decision would be judged. Consequently the case was remanded to the Commission "for such further proceedings, not inconsistent with this opinion, as may be appropriate."<sup>13</sup>

Mr. Justice Black, joined by Justices Reed and Murphy, dissented with usual vigor.<sup>14</sup> Although disagreeing with the

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<sup>9</sup> *Id.* The Court added: "If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress had exclusively entrusted to an administrative agency." *Id.* at 88.

<sup>10</sup> *Id.* at 89.

<sup>11</sup> *Id.* at 90.

<sup>12</sup> *Id.* at 92.

<sup>13</sup> *Id.* at 95.

<sup>14</sup> *Id.* A recent biography of Mr. Justice Murphy affords an interesting sidelight:

That feelings were intense behind the technical facade of the first *Chenery* case can be inferred from Frankfurter's reaction when Reed joined the minority. "Dear Stanley," he wrote, "Were I at Cambridge I would be saddened to note that you underwrote an opinion like Black's in the *Chenery* case. I don't think I should be less saddened because I am your colleague. I hate to see you 'bogged down in the quagmire' of Populist rhetoric unrelated to fact." Frankfurter to Reed, Jan. 29, 1943, Box 32, Frankfurter Papers, Manuscript Division, Library of Congress. J. HOWARD, MR. JUSTICE MURPHY— A POLITICAL BIOGRAPHY 416 n. g (1968).

majority's conclusion that decisions in equity did not support the Commission, he further argued that he would "not suppose, as the Court does, that the Commission's rule is not fully based on Commission experience."<sup>15</sup> Contending that the Commission merely intended to announce for its own jurisdiction an obvious rule of honest dealing closely related to common law standards, Mr. Justice Black commended the Commission for "not unduly [parading] fact data across the pages of their reports." Although acknowledging that the Court could require the Commission to use "more words," the dissenters found it difficult "to imagine how more words or different words could further illuminate [the Commission's] purpose or its determination."<sup>16</sup>

The reorganization managers, on reading these opinions, must have wondered whether the game had been worth the candle. Any lawyer worth his salt would have placed a rather large bet that the SEC would avail itself of the invitation the Supreme Court had extended; and so, of course, it did.<sup>17</sup> The surprising elements of this second round of litigation are first, that this action met reversal in the District of Columbia Court of Appeals;<sup>18</sup> and, second, that the reversal of the circuit court's decision<sup>19</sup> elicited one of the sharpest dissents in the Supreme Court's history.<sup>20</sup> With that controversy, whether the Commission could proclaim its new principle by adjudication rather than rule-making, this article is not concerned. For purposes of this discussion the only importance of the second *Chenery* decision is its reformulation of *Chenery* I: "We held no more and no less than that the Commission's first order was unsupportable for the reason supplied by that agency."<sup>21</sup>

In examining the bearing of the two footnotes in the Penn Central opinion on the *Chenery* decision, this article will concentrate on the question that led to the second footnote, since that presented a closer problem. The issue was the price the Norfolk & Western

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<sup>15</sup> *Id.* at 98.

<sup>16</sup> *Id.* at 99.

<sup>17</sup> Holding Company Act Release No. 5584 (1945).

<sup>18</sup> 154 F.2d 6 (1946).

<sup>19</sup> 332 U.S. 194 (1947).

<sup>20</sup> *Id.* at 209 (Jackson, J., surprisingly joined by Mr. Justice Frankfurter, the author of *Chenery* I).

<sup>21</sup> *Id.* at 200. For some reason not clear to me, the Court frequently cites this passage in *Chenery* II rather than *Chenery* I as embodying the doctrine of the latter. See, e.g., the two footnotes, Penn-Central Merger and N & W Inclusion Cases, 389 U.S. 486, 518-19 n.10, 526-27 n.14 (1968).

should be required to pay for three roads—the Erie-Lackawanna, the Delaware & Hudson, and the Boston & Maine. In resolving this problem the I.C.C. had first compared N & W's per share earnings for the year ending June 30, 1966, adjusted upward for yet unrealized savings from its own merger, with normalized earnings for the smaller roads. The Commission then increased the latter figure by the net income realizable on the business which these three roads would gain from traffic then being handled by them or N & W on which there would be a longer haul as a result of their being part of the N & W's own system. This left one other variable which became the largest single source of controversy—the adverse effect which the Penn Central merger would have on the three roads and the degree to which their acquisition would diminish N & W's own losses. The Commission handled this by satisfying itself that, as our court's opinion put it, "any traffic losses the three roads would suffer to Penn Central would be offset by other benefits to N & W not already taken into account."<sup>22</sup>

Although the Commission appeared properly satisfied on this point, the court had to recognize that one calculation alternatively relied on in determining the effect of the Penn Central merger, a calculation the Commission had developed without benefit of testimony or argument, made extraordinarily little sense,<sup>23</sup> and that another seemed decidedly liberal toward the three roads.<sup>24</sup> As against this, we believed the Commission's whole approach had been more favorable to N & W than the law required and, more pertinently, that other elements mentioned by the Commission but not thrown into its calculation of the effect of the Penn Central merger compensated for any errors in the latter.

Norfolk & Western argued that respect for the purity of the administrative process required remand so that the I.C.C. could revise its calculation to include those which we were ready to approve. The court could not see why. The Commission said it was satisfied, and figures giving ample basis for satisfaction were there even though not every one of the Commission's computations was solid. In strict theory, of course, there was a possibility that if the Commission knew that the district court thought nothing of

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<sup>22</sup> 279 F. Supp. 316, 340 (S.D.N.Y. 1967).

<sup>23</sup> *Id.* at 345 n.32.

<sup>24</sup> *Id.* at 344-45.

one of its subsidiary calculations and considered another to be on the high side, it might come out with a different ultimate result even though the court's decision upheld its right to come out just where it had. But no one who read the Commission's report could fairly believe there was the slightest chance it would do anything of the sort. Therefore, the court declined to engage in what seemed a certain exercise in futility. It stated at one point: "[W]hat is demanded is substantial evidence to support the agency's ultimate findings, not logical perfection in every step."<sup>25</sup> Similarly, at another point in the opinion *Chenery I*, so heavily relied upon by N & W, was characterized as "[intending] only to establish the important point that a reviewing court could not affirm an agency on a principle the agency might not embrace—not to require the tedious process of administrative adjudication and judicial review to be needlessly dragged out while court and agency engage in a nigh endless game of battledore and shuttlecock with respect to subsidiary findings."<sup>26</sup>

Reflection has led me to wonder whether Mr. Justice Fortas meant only that *Penn Central* did not present a true *Chenery* problem at all. If so, I now think he would have been correct. *Chenery* involved administrative reliance on a wrong *reason*, whereas *Penn Central* raised a claim of erroneous *findings* made in the course of applying a correct governing standard.<sup>27</sup> A true *Chenery* problem would have been presented if, for example, the I.C.C. had fixed the exchange ratios for the three roads on the basis that the effect of the Penn Central merger should be disregarded, and the court had considered that to be wrong as a matter of law but believed the ratios could have been justified had the Commission given proper reasons. In that event *Chenery* would have required the district court to reverse and remand, since it could not know whether the Commission acting on a proper view of the law might not have arrived at lower prices even though not required to do so.<sup>28</sup> In contrast to *Chenery*, however, there was no

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<sup>25</sup> *Id.* at 345.

<sup>26</sup> *Id.* at 354-55.

<sup>27</sup> The distinction between *reasons* and *findings* is made clear in K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE § 16.12 (1958) [hereinafter cited as DAVIS]. To the extent here noted I confess error in a talk I prepared as a preliminary to this article, Friendly, *The "Limited Office" of the Chenery Decision*, 21 AD. L. REV. 1 (1968).

<sup>28</sup> A somewhat different, although related, problem was later presented in regard to the inclusion of the New Haven in *Penn Central*. The Commission had found, 331 I.C.C. 643 (1967), that the price agreed on by Penn Central and the New Haven Trustees was equivalent

claim in *Penn Central* that the I.C.C. had misapprehended the law with respect to the issue here under discussion. Rather, the contention was that it had not dealt properly with the facts—a problem of erroneous *findings*. I do not mean to deny that the doctrines are closely related. Indeed, it is this very similarity which has often led courts to sweep carelessly what are in fact three separate principles under the same *Chenery* tent. However, these bases of judicial reversal of administrative decisions—that I will designate as inadequate explanation of reasons, erroneous or insufficient findings, and the *Chenery* doctrine itself—are different; and it is to an investigation of their applicability and utility as tools of judicial discretion that I now turn.

### *Inadequate Explanation of Reasons*

The proposition that a reviewing court may reverse and remand if an agency has not adequately explained the reasons for its conclusions, a principle sometimes misconstrued as included within the “*Chenery* doctrine,” was first formulated in unmistakable terms, though perhaps incorrectly applied, by Mr. Justice Frankfurter in *Phelps Dodge Corp. v. NLRB*<sup>29</sup> some two years prior to *Chenery*. Dislike of this decision on its facts may lie at the root of Professor Davis’ rather unenthusiastic characterization of *Chenery* as upholding “the proposition that when an agency gives the wrong reasons for a decision of policy or law, the reviewing court will send the case back for a new determination, even though the court *might have upheld* the order if no reasons had been assigned.”<sup>30</sup> He further states that “[i]f the Commission had merely announced the finding and the conclusion, without writing a supporting opinion, *presumably* the Court *would have held* the findings and the reason adequate, for the FTC for several decades customarily

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to the New Haven’s liquidation value and that it was thus unnecessary to consider whether the New Haven could be required to accept less. We held the figure to be considerably short of liquidation value. 289 F. Supp. 418, 440 (S.D.N.Y. 1968). Whether or not we believed that something less than liquidation value might suffice, we were obliged to reverse and remand since the Commission might decide in favor of liquidation value. See Friendly, note 27 *supra* at 6-7. For the Commission’s report on remand, see 334 I.C.C. 25 (1968). The issue is now *sub judice*.

<sup>29</sup> 313 U.S. 177 (1941).

<sup>30</sup> 2 DAVIS § 16.12, at 480 (emphasis added).



did no more and yet its orders were usually upheld.’<sup>31</sup> The properly professorial “might have” in the first quotation seems more accurate than the bolder “presumably . . . would have” in the second. If after conceding the absence of fraud or required disclosure the SEC had simply said, “we find that the provisions for participation by the preferred stock held by the management result in the terms of issuance of the new securities being detrimental to the interests of investors and the plan being unfair and inequitable,”<sup>32</sup> it would have exposed itself to likely reversal and remand for inadequate explanation of reasons.<sup>33</sup> Once this principle of review is recognized, reversal because of reliance on a legally inadmissible reason, i.e., the *Chenery* doctrine, is an a fortiori case.

Professor Davis might answer that remand for inadequate explanation of reasons is itself wrong. It is indeed difficult to believe that a judge so sensitive to the realities of labor controversies as Mr. Justice Frankfurter needed elucidation why the Labor Board thought in *Phelps Dodge* that requiring a company to reinstate employees unlawfully discharged for union activities would effectuate the policies of the National Labor Relations Act even though the men had secured equivalent employment elsewhere.<sup>34</sup> But this proves only that the principle of reversal for inadequate explanations of reasons was applied in a case not truly calling for its use, not that the principle is wrong.<sup>35</sup> If the requirement for reasoned decision now embodied in section 8(b) of the Administrative Procedure Act is an important tool for curbing arbitrary action, the rule permitting reversal and remand for inadequate explanation is a sound one, though, like other sound principles, subject to abuse.

Indeed, the rule serves an additional, and sometimes quite useful, purpose in that it permits a court in effect to say to an

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<sup>31</sup> *Id.* at 481 (emphasis added).

<sup>32</sup> 8 S.E.C. 893, 921 (1941).

<sup>33</sup> *See, e.g., Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

<sup>34</sup> As Professor Davis points out, 2 DAVIS § 16.12, at 478-79, the NLRB supplied the altogether obvious rationale in another case decided only a few weeks later, *Ford Motor Co.*, 31 N.L.R.B. 994, 1099-1100 (1941).

<sup>35</sup> Professor Davis appears to recognize this in his discussion of *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954). 2 DAVIS § 16.12, at 479-80.

agency, "Do you really mean it?" A recent decision from the Second Circuit will serve to illustrate this function.<sup>36</sup> While this case lay in the vexed area of union attempts to force an employer to bargain by display of authorization cards from a majority of the employees, the district court was not concerned with some of the larger questions on which enlightenment from the Supreme Court is awaited.<sup>37</sup> Rather, the question presented was whether the Board's rule should be applied when the union had used methods so coercive that a rupture seemed fairly certain. Organizers had gone to the office of a branch warehouse, accosted the local manager, and insisted under threat of strike on almost immediate recognition. When telephone calls to a superior did not immediately produce the necessary authority the employees were called out. In declining to enforce a bargaining order and remanding, the court was saying to the NLRB in practical effect: "We do not question your position that a union that has obtained majority status is entitled to recognition by an employer in the absence of good faith doubt, without having to await an election. But did you really consider whether sanctioning the conduct of a union in forcing a split-second decision is consistent with the basic objective of the National Labor Relations Act to secure industrial peace?" Conceivably the Board will take the hint and re-think the bases of its decision; if not, the court will at least have the benefit of an explicated decision.

The Supreme Court's opinion in *Burlington Truck Lines, Inc. v. United States*<sup>38</sup> admirably illustrates the virtues of this requirement of reasoned decision. In order to effect unionization of shortline truckers in Nebraska, the unions engaged in a secondary boycott of trunk-line carriers on whom the shortlines depended for connections. The shortlines organized a corporation of their own which sought certification for operations between certain Nebraska and Iowa points and many other states. Conceding without

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<sup>36</sup> NLRB v. World Carpets of New York, Inc., 403 F.2d 408 (2d Cir. 1968).

<sup>37</sup> See NLRB v. Gissel Packing Co., 398 F.2d 336 (4th Cir.), cert. granted, 393 U.S. 997 (1968); NLRB v. Sinclair Co., 397 F.2d 157 (1st Cir.), cert. granted, 393 U.S. 997 (1968).

<sup>38</sup> 371 U.S. 156 (1962). The Court rightly relied on its earlier decision in *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613-14 (1946). See also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-44 (1965), and Mr. Justice Goldberg's dissent in *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 382 (1965).

discussion that there were other weapons for handling the situation, the Commission granted the certificate. The Supreme Court held that the Commission had not adequately explained its choice of certification as against other remedies, and remanded for the agency to "act with a discriminating awareness of the consequences of its action."<sup>39</sup> To the argument of Commission counsel that other remedies would be ineffective, the Court made a two-fold response: The Commission had not so found, and there was no substantial evidence to support such a finding. While the Court obviously thought the I.C.C. had made a poor choice and several Justices were willing to strike down the certification altogether, such a ruling might needlessly have impaired the freedom of the Commission in future cases. It was wiser to say, "Think it over."

### *Unsustainable Reasons—The Chenery Doctrine*

The *Chenery* rule, applicable when an agency has relied on a wrong reason, likewise serves the "think-it-over" function. As was remarked in a perceptive contemporary comment, "judicial compulsion on the SEC and other commissions to indicate by their language that they are performing their proper function . . . directs administrative commissions' attention to the nature of their function and to the type of analysis which proper performance of that function requires."<sup>40</sup> Thus the *Chenery* Court was saying to the SEC: "Here, instead of doing something traditional, as you wrongly believed, you are venturing into *terra incognita*. Principles of equity do not compel the ruling you made, although the statute permits you to make it. Have you given enough thought to your choice? Are you entirely sure the evil calls for any remedy, let alone the drastic one you have chosen? Would compulsory disclosure of dealings be a preferable alternative to forfeiture of profits? Have you sufficiently considered the propriety of applying the rule to parties who acted without knowledge that you would impose it, as against using your rule-making authority?" These were questions worth asking. Even if the *Chenery* Court had scant doubt how they would be answered in the instant case, such a declaration

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<sup>39</sup> 371 U.S. at 174.

<sup>40</sup> Note, *The Chenery Corporation Case: A New Landmark in the Law of Administrative Procedure*, 56 HARV. L. REV. 1002, 1005 (1943).

to the agencies, indicating that decisions based on a wrong reason generally cannot be expected to stand even though a reviewing court can discern the possibility of a right one, should improve the administrative process in general.

It should be noted that the foregoing rephrases *Chenery I*. Mr. Justice Frankfurter said "cannot stand"; I have changed this to "generally cannot be expected to stand," a reformulation which accords better with the case law as it has developed and with good sense.

Mr. Justice Frankfurter would not have been at all disturbed by the first decision on which I rely for this qualification; rather, as proved by his concurrence, he would have regarded it as wholly consistent with *Chenery*. The case<sup>41</sup> stands for the scarcely questionable principle that when agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality. Despite the distinctions drawn by *Chenery* in comparing the review of lower courts with that of administrative agencies,<sup>42</sup> the differences cease when the result is compelled. It is solely when "an order is valid *only* as a determination of policy or judgment which the agency alone is authorized to make and which it has not made" that "a judicial judgment cannot be made to do service for an administrative judgment."<sup>43</sup>

While another Supreme Court decision, *Massachusetts Trustees v. United States*, might be regarded as a true indentation of

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<sup>41</sup> *Milk Transport, Inc. v. ICC*, 190 F. Supp. 350 (D. Minn. 1960), *aff'd per curiam*, 368 U.S. 5 (1961). A citrus juice carrier argued that, before passage of clarifying amendments in 1958, it had been exempted from the certificate requirements of the Interstate Commerce Act by § 203(b)(6) which granted a dispensation to trucks carrying "agricultural (including horticultural) commodities (not including manufactured products thereof)." Since it was less than clear whether a given commodity was "agricultural" (and therefore exempt) or "manufactured" (and therefore subject to certification), the question was much litigated until Congress passed the amendments of 1958. At the same time, it enacted a grandfather clause which, the trucker argued, granted rights to all those that had already been carrying formerly exempt goods. The Commission denied the certificates because it believed that carriers of fruit juices had not been exempt even before 1958. Not reaching that point, which was extremely questionable, the Court affirmed the denial of an injunction on the ground that the grandfather provision granted rights in the carriage only of eleven commodities that were specifically listed, not including citrus juices.

<sup>42</sup> 318 U.S. at 88.

<sup>43</sup> *Id.* (emphasis added).

*Chenery*, it is an altogether sound one. The case concerned action by the Maritime Commission in fixing charter hire which the Court found authorized by one section of the governing statute and not forbidden by a second. The problem arose from the Commission's belief that the second section rather than the first was the source of its authority. The district court had determined there was not "the slightest ground for assuming that if the Commission had been apprized of the correct source of its authority"<sup>44</sup> it would have acted otherwise, and the Supreme Court concurred. It is impossible to disagree with Mr. Justice Harlan's distinction of *Chenery*:

These cases are aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner; when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached, . . . the sought extension of the cases cited would not advance the purpose they were intended to serve.<sup>45</sup>

In other words *Chenery* does not mean that any assignment of a wrong reason calls for reversal and remand; this is necessary only when the reviewing court concludes there is a significant chance that but for the error the agency might have reached a different result.<sup>46</sup> In the absence of such a possibility, affirmance entails neither an improper judicial invasion of the administrative province nor a dispensation of the agency from its normal responsibility.

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<sup>44</sup> 202 F. Supp. 297, 305 (D. Mass. 1962).

<sup>45</sup> 377 U.S. 235, 248 (1964).

<sup>46</sup> *NLRB v. Wyman-Gordon Co.*, \_\_\_\_ U.S. \_\_\_\_ (1969), the text of which was not available when this lecture was delivered, presented a close issue on this score. Six Justices had there held that the NLRB's formulation in an adjudicated case and solely on a prospective basis, of a requirement that employers must furnish lists of employees in contested elections, *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), constituted rule-making which was invalid for lack of compliance with the Administrative Procedure Act. 5 U.S.C. § 553 (1964). The Court nevertheless sustained a subpoena, issued pursuant to a Board order, directing *Wyman-Gordon* to furnish such a list. The majority was made up of three Justices who rejected the procedural challenge to the *Excelsior* rule and four, speaking through Mr. Justice Fortas, who upheld the challenge but sustained the subpoena because the order to *Wyman-Gordon* had been made in an adjudicatory proceeding. Noting the *Chenery* objection in Mr. Justice Harlan's dissent, the plurality opinion stated, \_\_\_\_ U.S. at \_\_\_\_ n.6:

To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game . . . . There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand.

In contrast, the earlier decision in *Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co.*<sup>47</sup> seems, at first blush, an overruling *sub silentio* of *Chenery I*. The old antagonists were cast in their familiar roles, but this time Justice Black wrote for the majority and Justice Frankfurter in dissent. Summarized briefly, the issue was whether an order requiring the Union Pacific to establish through routes and joint rates with the Denver & Rio Grande on certain commodities transported through the Ogden, Utah, gateway violated the prohibition against short-hauling in section 15(4) of the Interstate Commerce Act. Justice Frankfurter read the Commission's report as flouting the prohibition—an understandable reaction since the Commission for years had been unsuccessfully recommending repeal of the clause. Justice Black sought to rescue the order on one ground, suggested in the Commission's report, which Justice Frankfurter agreed would have supported a more limited order if the Commission had clearly relied upon it,<sup>48</sup> and another which Frankfurter thought less acceptable and not sufficiently broad to support the order *in toto* even if the I.C.C. had adequately found and announced it. Assuming *arguendo* that the two grounds would have sufficed to support the entire order, we still appear to have a situation where, although the agency could lawfully have arrived at the result it did, its decision was primarily rested on an impermissible ground. Yet the Court affirmed, and *Chenery* was not even mentioned by the majority of seven, although pertinently cited in the dissent.

A decision of this sort, and particularly the majority's failure to meet what at least was a fair point of the dissenters, inevitably gives rise to cynical suspicion that *Chenery* has become a tool permitting a reviewing court to do whatever it pleases. When the court

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Mr. Justice Harlan could "perceive no justification whatever for this assertion." He thought that "since the *Excelsior* rule was invalidly promulgated, it is clear that, at a minimum, the Board is obliged on remand to recanvass all of the competing considerations before it may properly announce the decision in this case."

Both Justices seem to have been right—Mr. Justice Harlan philosophically, Mr. Justice Fortas practically. The strength of Mr. Justice Harlan's position, shared by Mr. Justice Douglas, is that, by affording an effective sanction for a serious procedural breach, it would serve to prevent such violations in the future.

<sup>47</sup> 351 U.S. 321 (1956).

<sup>48</sup> *Id.* at 333, 342. Mr. Justice Harlan, who was in general agreement with Justice Frankfurter, thought the Commission had sufficiently articulated this ground. *Id.* at 344.

does not like an agency decision, it pulls *Chenery* out of the hat and remands; when it likes the decision, as Mr. Justice Black did in the *Denver* case, *Chenery* is conveniently forgotten. Yet I am not certain that the *Chenery* and *Denver & Rio Grande* cases are irreconcilable. As previously observed, the Court in *Chenery* was concerned with an agency's venture into a new area; granted there could be little doubt what the SEC would do on remand, it was important to put the agency through the paces, both for the case itself and as an example for the future. In *Denver & Rio Grande*, however, the I.C.C. was working over familiar territory. The Commission could not really have believed it had the freedom of action limned in the passage from its report<sup>49</sup> which Justice Frankfurter correctly deemed inconsistent with the statute. Why not then consider this to be an opinion writer's overenthusiasm and, particularly in light of the Commission's known tendency to give the prohibition against short-hauling the narrowest allowable interpretation, sustain the order on grounds indicated in the report if these were legally tenable though they were not fully developed?

Against this background a recent case may be cited in which *Chenery* was applied with what proved to be excellent results. One of the less noted but nevertheless important problems arising from the inclusion of the New Haven in the Penn Central system was its effect on a through route from the west into New England that had been a significant competitor of both the New York Central and the Pennsylvania. Smaller carriers linked at Maybrook, N.Y., with a line of the New Haven which extended over the Poughkeepsie bridge and thence to yards at New Haven and points east and north. The Commission had imposed special conditions protecting the Maybrook interchange with the Central Railroad of New Jersey and its connecting lines, the Reading and the Western Maryland, pending decision on their application for inclusion in a proposed system combining the Norfolk & Western and the Chesapeake & Ohio.<sup>50</sup> But it had denied a request for similar conditions by the other, more important interchange partner at Maybrook, the Erie-Lackawanna.<sup>51</sup> The Commission gave no less than eight reasons for

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<sup>49</sup> *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 287 I.C.C. 611, 655-56 (1953).

<sup>50</sup> *Pennsylvania R.R.—Merger—New York Cent. R.R.*, 331 I.C.C. 643, 752-53 (1967).

<sup>51</sup> *Id.* at 738; *Pennsylvania R.R.—Merger—New York Cent. R.R.*, 331 I.C.C. 754, 754, 757-59 (1968).

this different treatment.<sup>52</sup> The district court thought seven of these bases were invalid, some because they were insufficient on their face, while others, including a promise to keep watch of the situation, were deemed inconsistent with the Commission's action concerning the CNJ and, therefore, capricious. The one possibly meritorious reason was that Eric-Lackawanna, already a part of the Norfolk & Western System, was in far more severe competition with Penn Central than the Central of New Jersey and its connections, despite the latter's affiliation with B & O - C & O. Although believing that this might justify less stringent conditions in favor of Eric-Lackawanna, we questioned whether it would justify none at all. More important from a *Chenery* standpoint, should the court even consider that question without knowing what the Commission would do when it learned that seven of its eight reasons were found unsupported? The court thought not and remanded.

The Commission's response refutes the claim that such a remand will inevitably lead only to "the mechanical regurgitation of 'canned' findings on a subject as to which nobody can entertain any reasonable doubts . . . ." <sup>53</sup> It began by stating:

The three-judge court did not sustain us, pointing out weaknesses in our reasons and concluding that our report offered "neither an analysis of the anti-competitive effect of inclusion without protective conditions nor convincing evidence that the pre-existing coordination with E-L will be maintained." It noted that the policies of the antitrust laws should be conscientiously applied, and included in its remand the admonition that E-L's request be reconsidered.<sup>54</sup>

The I.C.C. did exactly that. Supplying eight pages of detailed analysis, it concluded that it had erred and made inclusion of the New Haven in Penn Central subject to elaborate and effective conditions to protect the Eric-Lackawanna at Maybrook.<sup>55</sup>

A still more significant example of the virtues of *Chenery* is furnished by a Supreme Court opinion, *FCC v. RCA Communications, Inc.*,<sup>56</sup> which, although written by Mr. Justice

<sup>52</sup>See *New York, N.H. & H.R.R. Bondholders Committee v. United States*, 289 F. Supp. 418, 446 (S.D.N.Y. 1968).

<sup>53</sup>Timberg, *Administrative Findings of Fact*, 27 WASH. U.L.Q. 62, 69-70 (1941), quoted in 2 DAVIS § 16.12, at 479.

<sup>54</sup>334 I.C.C. 25, 78 (1968).

<sup>55</sup>*Id.* at 78-86, 123-25.

<sup>56</sup>346 U.S. 86 (1953). Not unexpectedly, Mr. Justice Black dissented.



Frankfurter, curiously did not cite his brain-child. The Communications Commission had granted a competing license for radiotelegraph service on the basis that "the maintenance of competition is in itself a sufficient goal of federal communications policy so as to make it in the public interest to authorize a license merely because competition, i.e., duplication of existing facilities, was 'reasonably feasible.'"<sup>57</sup> The Court found no such mandate in the Communications Act; rather the statute left it to the Commission to determine whether and when competitive service was to be authorized. While it would not be "inadmissible for the Commission, when it makes manifest that in so doing it is conscientiously exercising the discretion given it by Congress, to reach a conclusion whereby authorizations would be granted whenever competition is reasonably feasible,"<sup>58</sup> the Commission must do this through the exercise of its own judgment. "It must at least warrant, as it were, that competition would serve some beneficial purpose"<sup>59</sup> rather than bow to a nonexistent statutory command. Once the Court had concluded that the statute imposed no inexorable mandate, clearly an issue for judicial determination, to affirm on the basis that the applicant had nevertheless made a sufficient showing of benefit would be to take over the agency's function and relieve the latter of its responsibility to formulate standards. While the result was to delay the establishment of competitive service for several years, the precedential value of the agency's careful opinion on remand was worth the price.<sup>60</sup> As indicated by Professor Jaffe, "the effectiveness of judicial supervision should be judged not only in terms of the case in which the correction was administered, but in its effect on doctrine in the long run."<sup>61</sup>

*Chenery* has had a new field of application in a case relating to individual rights. *Vitarelli v. Seaton*<sup>62</sup> concerned an employee who for alleged disloyalty had been dismissed from his job as a government educational expert in the South Pacific Trust Territories. The Government argued that since Vitarelli served at

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<sup>57</sup> *Id.* at 91.

<sup>58</sup> *Id.* at 96.

<sup>59</sup> *Id.* at 97.

<sup>60</sup> *In re Mackey Radio & Tel. Co.*, 19 F.C.C. 1321 (1955), *aff'd sub nom.* RCA Communications, Inc. v. FCC, 238 F.2d 24 (D.C. Cir. 1956).

-- <sup>61</sup> L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965).

<sup>62</sup> 359 U.S. 535 (1959).

the pleasure of the Secretary of the Interior, who was not obliged to give any reasons for the discharge, any defects in the loyalty proceedings were irrelevant. All the Justices agreed that since the agency had given disloyalty as its reason, the discharge had to stand or fall on that basis; and, for failure to observe prescribed procedures, the initial discharge fell.<sup>63</sup> The bone of contention was a letter sent by the Secretary two years later, informing Vitarelli that the earlier notice had been modified to omit all reference to the ground of dismissal. Because the letter was cast in terms of a modification of the old discharge rather than a "new notification . . . of summary dismissal power,"<sup>64</sup> a majority of five found it did not operate to discharge Vitarelli as of the time of its receipt—a result which Justice Frankfurter with three of his brothers thought—correctly, in my view—to ignore "the actualities in the conduct of a Department concerned with terminating the services of an undesired employee as completely and by whatever means that may legally be accomplished."<sup>65</sup>

While the main thrust of the opinion was not surprising, it deserves mention because of the prospect that administrative law of the 1970's will be increasingly concerned about decisions dealing with individuals, often made hurriedly, on nonexistent or inadequate records, and by administrators unequipped with opinion-writing staffs.<sup>66</sup> Such a prospect makes one wonder whether the application of *Chenery* to such cases will be a blessing or a curse. Although this area may especially need judicial enforcement of the requirement of reasoned decision,<sup>67</sup> the prolonged process of reversal and remand for failure to state reasons adequately and correctly would be peculiarly painful to individuals needing quick relief and lacking the funds for protracted proceedings. A partial answer may lie in the fact that cases of this sort generally arise only between individual and agency, in contrast to the controversies between individuals typical of the regulatory commissions.<sup>68</sup> The

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<sup>63</sup> The majority did not cite *Chenery*; Mr. Justice Frankfurter did. *Id.* at 546-47 (dissenting opinion).

<sup>64</sup> *Id.* at 545.

<sup>65</sup> *Id.* at 548.

<sup>66</sup> See DAVIS, DISCRETIONARY JUSTICE 5-9, 155-61 and *passim* (1968).

<sup>67</sup> *Id.* at 103-06.

<sup>68</sup> Of course the conflicts between individuals are sometimes masked, as in *Chenery I* itself. I do not mean to deny that the regulatory agencies deal with merely "personal" problems, such as disciplinary proceedings by the SEC.

importance of this distinction is that the courts will be invoked only when the agency has denied relief to an individual or has proceeded against him for a wrong reason, and not when it may have erred in doing what he wanted.

### *Insufficient or Erroneous Findings*

A doctrine closely allied to *Chenery* is that of reversal for insufficient or erroneous findings.

We can begin with cases, often cited under this rubric but not truly belonging there, where the findings on which the agency relied to support its action reflected a misunderstanding of the statute being applied.<sup>69</sup> *Schaffer Transportation Co. v. United States*<sup>70</sup> is a fine example. A trucker sought certificates to transport granite from South Dakota and Vermont to various other points. The I.C.C. denied the application because there was no showing that the rail service was inadequate, with the exceptions—evidently deemed to be of minor importance—that it was too slow and too dear. Not surprisingly, the Court reversed:

To reject a motor carrier's application on the bare conclusion that existing rail service can move the available traffic, without regard to the inherent advantages of the proposed service, would give one mode of transportation unwarranted protection from competition from others. . . . [A] rate benefit attributable to differences between the two modes of transportation is an "inherent advantage" of the competing type of carrier and cannot be ignored by the Commission.<sup>71</sup>

It is needlessly confusing to think of such a decision as resting on inadequate findings. What the Commission had done, in effect, was to read the statute as saying, "Do not issue a certificate for motor transportation if the goods can be moved by rail." On that theory its findings adequately supported the decision. But the erroneous construction of the statute called for reversal as a matter of law.<sup>72</sup>

In contrast, one of Mr. Justice Cardozo's few Supreme Court opinions on administrative law, *United States v. Chicago, M.*,

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<sup>69</sup> 2 DAVIS § 16.09.

<sup>70</sup> 355 U.S. 83 (1957).

<sup>71</sup> *Id.* at 90-92.

<sup>72</sup> *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942), *ICC v. Mechling*, 330 U.S. 567 (1947), and *Chicago, M., St. P. & P.R.R. v. Illinois*, 355 U.S. 300 (1958), likewise fall under this rubric.

*St. P. & P.R.R.*,<sup>73</sup> is a true instance of reversal for inadequate findings. The Commission had held that certain proposed rail rates, although concededly compensatory, would be unreasonably low. However, apart from using some pejorative expressions, the Commission had done nothing to indicate why. Reversal was demanded, although on a ground quite different from that in the *Schaffer* decision. Whereas there the Commission had been wrong on the law, here it may have been right both on the law and on the facts but had made no findings adequate to demonstrate this.<sup>74</sup>

A third type of rather easy case, this time for affirmance rather than reversal, is where adequate findings can be discerned, at least with a modicum of judicial benevolence, even though the ribbons have not been neatly tied. For example, in *United States v. Pierce Auto Freight Lines*<sup>75</sup> the I.C.C. permitted each of two truckers to begin through service on the West Coast. Other carriers protested on the ground that while the agency had declared that individually each of the proposed operations was in the public interest, it had not analyzed the cumulative impact of both and thus could not properly have concluded that the public interest would be served by its decision. The Court in brushing this contention aside stated:

Apart from the fact that . . . there can be no presumption that the Commission disregarded the public or any other interest, there are two obvious answers. One is that the Commission, in making the separately stated findings, could not have been oblivious to the competitive consequences of its order or the relation of those consequences to the public interest. The other is that those findings, read in the light of the report, adequately and expressly cover the element of public convenience and necessity, including the competitive factors which the Commission inescapably had in mind.<sup>76</sup>

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<sup>73</sup> *United States v. Chicago, M., St. P. & P.R.R.*, 294 U.S. 499 (1935).

<sup>74</sup> After finding nothing in the report to substantiate the Commission's fear that the proposed rates would unduly "disturb" established rate structures and differentials, the Court continued: "At the very least the findings should inform us, if only approximately, of the extent of the expected loss; they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Nothing of the kind is shown. The schedules are to be congealed as they exist, because if not congealed they will be fluid, fluidity is change, and change has the potency, if not the promise, of disturbance. As to conditions in Indiana, this and hardly more is the teaching of the report." *Id.* at 508.

*Florida v. United States*, 282 U.S. 194 (1931), and *North Carolina v. United States*, 325 U.S. 507 (1945), also illustrate this principle.

<sup>75</sup> 327 U.S. 515 (1946).

<sup>76</sup> *Id.* at 531-32.

It would indeed have been sheer formalism to remand in order for the Commission to announce that one hand had really known what the other was doing.<sup>77</sup>

The troublesome cases arise where one or more of the agency's findings are based on insubstantial evidence, or are otherwise wrong, whereas other findings, adequate to support the order, are proper and correct—the situation the court encountered with respect to the price the Norfolk & Western had been ordered to pay for the three smaller roads.<sup>78</sup> A good take-off point is the famous, if somewhat inscrutable decision in *FPC v. Hope Natural Gas Co.*<sup>79</sup> In attempting to set reasonable rates for a natural gas company, the Power Commission first delineated an appropriate rate base using the “prudent investment” theory, and then determined Hope's fair rate of return. I am not here concerned with the issue that gave rise to Mr. Justice Jackson's brilliant dissent denouncing a rate-base approach to the fixing of prices for natural gas,<sup>80</sup> but with a different question. One of Hope's complaints was that the agency had excluded from the rate base some \$17,000,000, the bulk of this representing the cost of well drilling prior to the beginning of state regulation in 1923, which Hope had charged to operating expenses in line with then industry practice. The Court of Appeals for the District of Columbia thought the company was right,<sup>81</sup> as did Mr. Justice Reed.<sup>82</sup> The majority, however, upheld the Power Commission without passing on the point at all, saying:

In view of this disposition of the controversy we need not stop to inquire whether the failure of the Commission to add the \$17,000,000 of well-drilling and other costs to the rate base was consistent with the prudent investment theory as developed and applied in particular cases.<sup>83</sup>

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<sup>77</sup> See also *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173 (1959). Contrast *ABC Air Freight Co. v. CAB*, 391 F.2d 295 (2d Cir. 1968), reversing an order construed as calling for the licensing of any trucker to be an air freight forwarder, although the findings with respect to impact on the industry were limited to four applicants. See my discussion of this case in 21 *AD. L. REV.*, at 7-8.

<sup>78</sup> See text accompanying note 50 *supra*.

<sup>79</sup> 320 U.S. 591 (1944).

<sup>80</sup> *Id.* at 628.

<sup>81</sup> 134 F.2d 287, 300 (1943).

<sup>82</sup> 320 U.S. at 624.

<sup>83</sup> *Id.* at 605-06.

It is not altogether easy to see why the Court did not have to "stop to inquire" about this. Granted that the annual earnings of \$2,191,314 which the rates were expected to produce might be constitutionally sufficient, the Commission had purported to use a prudent investment theory in reaching its conclusion. How then could the Court know the Commission would not have allowed more if made aware that its exclusion of \$17,000,000 from the rate base was wrong under that theory, particularly since the Commission had arrived at its earnings figure by a computation applying a 6 1/2 percent rate of return to a rate base of \$33,712,526?<sup>84</sup> That question was scarcely answered by making light of Hope's exaggerated arguments based on combining a reproduction cost rate base with an 8 percent rate of return.<sup>85</sup>

If there is an answer, it must be cast in the form of a conclusion reached by the Court and drawn from the Commission's opinion as a whole that earnings of \$2,191,314 were all that Hope required under the statute, no matter what the correct rate base might be under the theory the Commission was using.<sup>86</sup> One can hardly doubt the Court was right in thinking that even if it should disagree about the propriety of the excision from the rate base under standard prudent investment principles, the Power Commission would have found some way to avoid giving Hope earnings half again as high as those it had allowed. Whether the Commission might not have given somewhat more is less certain. The *Hope* case thus stands for the principle that, at least in rate making, an error in a subsidiary finding does not demand reversal if the court is reasonably satisfied that the agency, apprised of its error, would come to the same conclusion and this would be legally tenable.<sup>87</sup>

The problem was more explicitly considered in a later case far removed from rate-making, *Communist Party v. Subversive Activities Control Board*.<sup>88</sup> The court of appeals had invalidated a

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<sup>84</sup> *Id.* at 599.

<sup>85</sup> *Id.* at 599, 605.

<sup>86</sup> *Id.* at 602-06.

<sup>87</sup> The *Hope* case may well be regarded as making an extreme boundary of leniency. For a case where the Court, on the basis of an unusually detailed scrutiny of the record, was not so satisfied, see *Colorado-Wyoming Gas Co. v. FPC*, 324 U.S. 626 (1945).

<sup>88</sup> 367 U.S. 1, 66-67 (1961).

subsidiary finding that the purpose of certain secret practices was to promote the objectives of the Communist Party. It held, on the other hand, that the whole record supported the Board's ultimate conclusion that the Party was substantially controlled by the Soviet Union and refused to reverse because of the one erroneous finding on which the Board, in the summaries of its modified reports, had not relied at all.<sup>89</sup> The Supreme Court affirmed, again speaking through Mr. Justice Frankfurter:

Where a Court of Appeals strikes as not sustained by the evidence a subsidiary administrative finding upon which the agency itself does not purport to rely, it would be an unwarranted exercise of reviewing power to remand for further proceedings. Remand would be called for only if there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive.<sup>90</sup>

The Chief Justice dissented, ironically citing *Chenery* to its author.<sup>91</sup> The majority opinion, however, seems to be a sensible relaxation of the reversal-for-erroneous-findings rule, somewhat akin to the easing of the true *Chenery* rule in *Massachusetts Trustees v. United States*.<sup>92</sup>

*NLRB v. Virginia Electric & Power Co.*<sup>93</sup> is a datum on the other side—in some ways a rather curious one. At issue was an order of the Labor Board condemning an employer for speaking against an independent union and in favor of a company dominated one. The Court thought the order was unjustified if based on the speech alone but would be supportable if grounded on the employer's whole course of conduct. Professing uncertainty concerning the basis of the order, it remanded for clarification. Unsurprisingly, the Board came back with the right answer and the Court dutifully enforced.<sup>94</sup> Such a performance strikes a decided note of futility. If it has any justification, it must be on the ground that the subject lay so close to the first amendment as to make clarity peculiarly desirable. A greater exercise in futility was indulged in by the author of the *Hope* opinion in a decision handed

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<sup>89</sup> *Id.* at 67.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 133-35.

<sup>92</sup> See text accompanying notes 44-46 *supra*.

<sup>93</sup> 314 U.S. 469 (1941).

<sup>94</sup> 319 U.S. 533 (1943).

down on the very same day. That decision remanded a case to the I.C.C. to find whether a carrier to which the I.C.C. had granted a certificate of abandonment was "operated as a part or parts of a general steam railroad system of transportation"—as it had to be to make the order valid—when, as noted by Mr. Justice Frankfurter in dissent, this was never questioned before the Commission and the facts "are spread at large upon the record and are not in controversy."<sup>95</sup>

#### CONCLUSION

The lessons concerning *Chenery I* and its relatives that can be drawn from this *tour d'horizon* are several, the most noteworthy being the realization that we are dealing not with one principle but with three. The first principle—that even when an agency has acted on an admissible construction of the statute and has made sufficient factual findings, a reviewing court may still reverse and remand if the agency has not adequately explained why it chose to do what it did—is notably illustrated by the *Burlington* case.<sup>96</sup> On the other hand, courts should not be obtuse to reasons implicit in the determination itself and thereby cause needless expense and delay. If it be charged that this is hardly a precise rule for decision, an answer is that no one has yet devised a satisfactory substitute for good sense.

Closely allied with this principle is the *Chenery* doctrine *proprement dit*. Where the agency has rested decision on an unsustainable reason, the court should generally reverse and remand even though it discerns a possibility, even a strong one, that by another course of reasoning the agency might come to the same result. This is true whether the wrong reason is an erroneous view of the law, as in *Chenery* itself and in *RCA Communications*,

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<sup>95</sup> *Yonkers v. United States*, 320 U.S. 685, 696-97 (1944). The *Yonkers* decision seems basically inconsistent with *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946), and *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173 (1959). The Commission speedily made the predictable finding, the District Court again affirmed, and the Supreme Court affirmed per curiam. 323 U.S. 675 (1944).

A fairly recent decision, *Chicago & Eastern Illinois R.R. v. United States*, 375 U.S. 150 (1963), casts Mr. Justice Black in the unfamiliar role of advocating reversal for lack of adequate findings. Appraisal is rendered difficult by the majority's summary affirmance and the absence of a published opinion in the district court. Simply on a reading of Justice Black's dissent, there would seem to have been a strong case both that the findings were erroneous and that, once the necessary corrections were made, the order could not stand.

\* See particularly note 38 *supra* and accompanying text.



or simply a rationale within the area of the agency's supposed expertise that is logically untenable, as were seven of the eight reasons in the *Maybrook* interchange decision<sup>97</sup>—although in the latter case a court should be more respectful to the agency than when it has detected an error of law. Particularly as revealed by the *RCA Communications* decision,<sup>98</sup> the process, even though it may appear wasteful as regards the case in hand, is important for the proper execution of the legislative will, since proceeding on the right path may require or at least permit the agency to make qualifications and exceptions that the wrong one would not.

This leaves the third principle, reversal for inadequate or erroneous findings—doubtless the most frequently encountered of the trinity. Within this principle, however, it is necessary to make distinctions. There are those cases where, although the court speaks of inadequate findings, the real trouble is that the agency has misconstrued the statute. Here there must be reversal and usually a direction rather than a discretionary remand.<sup>99</sup> A different type of case is presented where, although the agency's action may be justified, it has not demonstrated this by findings on the basic issue sufficiently detailed to meet the statute's requirements.<sup>100</sup> Here also reversal is inevitable, both to preserve the meaningful quality of judicial review and to force the agencies to do their homework. Further along the spectrum are the cases where the only error is in a finding relied on in greater or less degree, along with other solid ones, as a predicate for the ultimate conclusion.<sup>101</sup> This is where the purists and the realists lock horns. The purists insist that any guessing by a court about what the agency might do when apprised of such an error is an unlawful intrusion into the sanctity of the administrative process, and once such an error is detected, the case must go back so that the agency, as the sole repository of authority, can decide it right. The realists answer that neither the Constitution nor the Administrative Procedure Act forbids judges to exercise common sense. I am an enthusiastic member of the latter school, which maintains that reversal for factual error should be

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<sup>97</sup> See note 51 *supra* and accompanying text.

<sup>98</sup> See note 56 *supra* and accompanying text.

<sup>99</sup> See note 70 *supra* and accompanying text.

<sup>100</sup> See notes 73-74 *supra* and accompanying text.

<sup>101</sup> See notes 79-95 *supra* and accompanying text.

dispensed with the same practicality that the courts have exercised in applying *Chenery* itself.<sup>102</sup> Support for this position may be derived from opinions for the Court by Mr. Justice Douglas in *Hope*,<sup>103</sup> Mr. Justice Frankfurter in *Subversive Activities Control Board*,<sup>104</sup> and now Mr. Justice Fortas in the *Penn Central* case.<sup>105</sup> Finally there is the case where the agency has simply failed to make a finding that the record compelled.<sup>106</sup> Reversal in such a case would be an outrage; despite the language in *Chenery* concerning the difference between review of an agency and of a lower court,<sup>107</sup> I perceive no reason why the court should not make, or regard as made, a finding that the agency could not lawfully have refused.

While I insist on the importance and value of such distinctions, I am not so naive as to think that all cases can be neatly pigeonholed and the proper result predetermined so that judges can be replaced by computers. Intuitions arising from a feel of the case and a knowledge of the administrative process will avoid expensive and time-consuming remands that rigid adherence to doctrine might require. I am not bothered overmuch by the undoubted truth that a reviewing court is more likely to take a charitable view toward error in subsidiary findings when it sympathizes with the agency's end result, than when it does not.<sup>108</sup> Refusal to reverse on the basis of a judicial belief that the agency is certain to come to the same conclusion is rarely objectionable to the agency, however painful it may be to a litigant who would profit by the delay incident to even a fruitless remand. On the other hand, if the courts suspect that an agency is not truly carrying out the purpose of a statute, no matter what its professions, reversals for inadequate or erroneous subsidiary findings will require the agency to rethink the problem and, if it adheres to the previous decision, to state its position in a manner that may provoke a ruling on an issue of law.<sup>109</sup>

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<sup>102</sup> See *e.g.*, text accompanying notes 91-92 *supra*.

<sup>103</sup> See note 79 *supra* and accompanying text.

<sup>104</sup> See note 88 *supra* and accompanying text.

<sup>105</sup> See note 4 *supra* and accompanying text.

<sup>106</sup> *Yonkers v. United States*, 320 U.S. 685 (1944).

<sup>107</sup> 318 U.S. at 88.

<sup>108</sup> See 2 DAVIS § 16.10.

<sup>109</sup> Thus, the extraordinarily high percentage of reversals of denials of disability pensions by the Department of Health, Education and Welfare doubtless reflects judicial belief that the agency has failed to display the benevolent approach that Congress intended, even though it has appropriately parroted the statutory test. See L. JAFFE, JUDICIAL CONTROL OF

In sum, while judges must be respectful of the policy-making and fact-finding functions of the agencies, they need not—indeed, should not—regard themselves and the agencies as working in completely water-tight compartments. As Mr. Justice Frankfurter remarked, although in a somewhat different context:

Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. *United States v. Morgan*, 307 U.S. 183; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134. Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.<sup>110</sup>

To the extent that the broad language of *Chenery* implied otherwise, it has indeed been eroded, by its author as much as anyone. But when sensibly applied it and its related principles continue to be vital and useful doctrines of administrative law.

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ADMINISTRATIVE ACTION 608-09 (1965). I am proud to have helped initiate this trend in *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960). See the comment in 2 DAVIS § 14.14 (Supp. 1965).

<sup>110</sup> *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942).

