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NOTES

TAKING IT ON THE *CHENERY*: SHOULD THE PRINCIPLES OF *CHENERY I* APPLY IN SOCIAL SECURITY DISABILITY CASES?

*Bryan C. Bond**

INTRODUCTION

Facing an increasing caseload,¹ federal courts must review thousands of Social Security disability cases each year, with most ending in reversal of the agency's decision.² Judges have grown frustrated with the process, believing that the Social Security Administration often wrongfully denies claims.³ Indeed, a few courts have even threatened sanctions against the agency for ignoring precedent and thereby "forcing claimant after claimant to file lawsuits in order to

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1 See CAROLYN A. KUBITSCHKEK, SOCIAL SECURITY DISABILITY § 1:1, at 2–3 (2009 ed.) (noting that more than 335,000 cases were filed in federal district courts in 2007, marking a twenty-five percent increase over a fifteen-year period); JOHN ROBERTS, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 10–12 (2010), available at <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> (showing that more than 360,000 cases were filed in federal district courts in 2010).

2 See KUBITSCHKEK, *supra* note 1, § 1:1, at 4.

3 See *id.* § 1:1, at 6.

obtain deserved benefits.”⁴ As Congress put it, there is an “increasing number and intensity of confrontations between the agency and the courts as [the agency] refuses to apply circuit court opinions.”⁵

The principles of *SEC v. Chenery Corp.* (*Chenery I*),⁶ as applied, exacerbate these issues by preventing courts from directly enforcing their precedents. In *Chenery*, the Supreme Court established the “simple but fundamental rule of administrative law. . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”⁷ One important corollary of this rule is that a court generally must remand to an agency if it finds the agency has committed legal error or has failed to address a material issue.⁸

4 *Id.* § 1:1, at 7 (citing *Valdez v. Schweiker*, 575 F. Supp. 1203, 1205 (D. Colo. 1983); *see Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring specially)).

5 H.R. REP. NO. 98-618, at 25 (1984); *see KUBITSCHKEK, supra* note 1, § 1:1, at 7 n.29.

6 318 U.S. 80 (1943).

7 *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 196 (1947) (summarizing the holding of *Chenery I*).

8 *See ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 291 (1987) (Stevens, J., concurring in the judgment) (“If the court of appeals finds legal error, it must remand the case to the agency, which may then consider whether to exercise its discretion This is the lesson of *Chenery* and its progeny”); KUBITSCHKEK, *supra* note 1, § 9:49, at 899 (“The United States Supreme Court has held that if an administrative agency has committed an error of law and has decided a case using an improper legal standard, the court may not affirm the decision by applying the proper legal standard. The court must reverse and remand, directing the agency to apply the proper legal standard.”); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 364 (5th ed. 2009) (“[An] important corollar[y] of the *Chenery* principal. . . . concerns the appropriate remedy when an agency decision cannot be supported on the grounds advanced by the agency. The usual remedy is to remand the case back to the agency for further consideration rather than to reverse the agency outright.”); Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L.J. 199, 205 (“*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 [a different result] even though not required to do so.”); Patrick J. Glen, “*To Remand, or Not to Remand*”: *Ventura’s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1, 8 (2010) (“The ‘remand rule’ of the *Chenery* cases seems absolute in scope. If the agency has not yet rendered a decision on the relevant issue, or has committed an error in reaching its disposition, a reviewing court cannot affirm or deny the appeal and must remand for an agency decision in the first instance, or an agency decision freed of the underlying error.”).

The Supreme Court has reaffirmed these principles in a variety of settings.⁹ And, as one would expect, federal courts uniformly apply *Chenery* when reviewing agency decisions—including Social Security disability determinations.¹⁰ In fact, each circuit court of appeals¹¹ has invoked *Chenery* in a Social Security disability case without discussing its applicability.¹² But the Supreme Court has not spoken as to

9 See, e.g., *INS v. Orlando Ventura*, 537 U.S. 12, 16–17 (2002) (invoking *Chenery* in a case involving the Immigration and Naturalization Service); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721, 722 n.3 (2001) (invoking *Chenery* in a case involving the National Labor Relations Board); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (invoking *Chenery* in a case involving the National Highway Traffic Safety Administration); *Fed. Energy Regulatory Comm'n v. Pennzoil Producing Co.*, 439 U.S. 508, 520 (1979) (invoking *Chenery* in a case involving the Federal Energy Regulatory Commission); *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974) (invoking *Chenery* in a case involving the Interstate Commerce Commission); *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974) (invoking *Chenery* in a case involving the Federal Power Commission); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 249–50 (1972) (invoking *Chenery* in a case involving the Federal Trade Commission).

10 See, e.g., *McClesky v. Astrue*, 606 F.3d 351, 354 (7th Cir. 2010); *Simpson v. Comm'r of Social Sec.*, 344 F. App'x 181, 192 (6th Cir. 2009); *Cortes v. Comm'r of Social Sec.*, 255 F. App'x 646, 653 n.6 (3d Cir. 2007); *Hackett v. Barnhart*, 475 F.3d 1166, 1174–75 (10th Cir. 2007); *Barbera v. Barnhart*, 151 F. App'x 31, 33 (2d Cir. 2005); *Brun v. Barnhart*, 126 F. App'x 495 (1st Cir. 2005) (per curiam); *Butler v. Barnhart*, 353 F.3d 992, 1002 & n.5 (D.C. Cir. 2004); *Allen v. Barnhart*, 357 F.3d 1140, 1145 (10th Cir. 2004); *Fargnoli v. Massanari*, 247 F.3d 34, 44 n.7 (3d Cir. 2001); *Banks v. Massanari*, 258 F.3d 820, 824 (8th Cir. 2001); *Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999); *Scott v. Shalala*, 30 F.3d 33, 35 (5th Cir. 1994); *Berryhill v. Shalala*, 4 F.3d 993, 1993 WL 361792, at *6–7 (6th Cir. 1993) (unpublished table decision); *Gonzalez Maldonado v. Sec'y of Health & Human Servs.*, 996 F.2d 1209, 1993 WL 243350, at *4 (1st Cir. 1993) (per curiam) (unpublished table decision); *Ceguerra v. Sec'y of Health & Human Servs.*, 933 F.2d 735, 738 (9th Cir. 1991); *Brown v. Bowen*, 794 F.2d 703, 708 n.7 (D.C. Cir. 1986); *Mem'l Hosp. of Carbondale v. Heckler*, 760 F.2d 771, 778 (7th Cir. 1985); *Owens v. Heckler*, 748 F.2d 1511, 1516 (11th Cir. 1984); *Cunningham v. Harris*, 658 F.2d 239, 244 n.3 (4th Cir. 1981); *Combs v. Weinberger*, 501 F.2d 1361, 1363 n.2 (4th Cir. 1974) (per curiam); *Celebrezze v. Wifstad*, 314 F.2d 208, 218 (8th Cir. 1963).

11 Except the Federal Circuit, which does not hear Social Security cases. See 28 U.S.C. § 1295 (2006).

12 See *supra* note 10. In an unpublished decision, a panel of the United States Court of Appeals for the Tenth Circuit—without significant discussion—raised the issue of whether *Chenery* should apply in the Social Security disability context. See *Powell v. Barnhart*, 69 F. App'x 405, 411 (10th Cir. 2003); see also *infra* Part III (discussing the issues raised in *Powell*). But the court declined to decide the issue after finding that *Chenery* had not been implicated in the case. *Powell*, 69 F. App'x at 411. The Tenth Circuit subsequently applied *Chenery* in Social Security disability cases without discussing *Powell* or *Chenery's* applicability. See, e.g., *Cobb v. Astrue*, 364 F. App'x 445, 450 (10th Cir. 2010) (applying *Chenery*); *Haga v. Astrue*, 482 F.3d 1205, 1207–08

whether these principles extend to the Social Security disability setting,¹³ and careful examination of the Social Security Act's judicial review provisions¹⁴ indicates these principles may not apply in that context.

42 U.S.C. § 405(g) grants a reviewing court the "power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, *with or without remanding* the cause for a rehearing."¹⁵ Thus, the plain language of the statute appears to contradict *Chenery's* remand requirement.¹⁶ Moreover, § 405(g) takes the courts outside of "their accustomed role as external overseers of the administrative process,"¹⁷ and instead makes them "virtual[] . . . coparticipants in the process, exercising ground-level discretion of the same order as that exercised by [administrative law judges] and the Appeals Council."¹⁸ It follows, then, that a Social Security decision may not be a "determination or judgment which an administrative agency *alone* is authorized to make."¹⁹

The remand process places a burden on both the agency and the courts by forcing each to reconsider cases where the eventual outcome should be clear. Therefore, if *Chenery* does not apply in Social

(10th Cir. 2007) (same); *Maynard v. Astrue*, 276 F. App'x 726, 732 (10th Cir. 2007) (same); *Hackett*, 475 F.3d at 1175 (same); *Dye v. Barnhart*, 180 F. App'x 27, 31 (10th Cir. 2006) (same); *Grogan v. Barnhart*, 399 F.3d 1257, 1263 (10th Cir. 2005) (same); *Allen*, 357 F.3d at 1145 (same).

13 Justice Rehnquist, acting as a Circuit Justice, authored an in-chambers opinion granting a stay in which he indicated that he would observe the *Chenery* principles in the social security setting. See *Heckler v. Lopez*, 463 U.S. 1328, 1333 (1983) (Rehnquist, J., in-chambers opinion) ("[I]n the absence of substantial justification for doing otherwise, a reviewing court may not after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.'" (alterations in original) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), which in turn quoted *Chenery II*, 332 U.S. 194, 196 (1947))). Although Justice Rehnquist did not speak on behalf of the full Court, this appears to be the closest the Court has come to applying *Chenery* in the Social Security disability setting.

14 42 U.S.C. § 405(g) (2006).

15 *Id.* (emphasis added). For the full text of 42 U.S.C. § 405(g), see *infra* App. A.

16 See *supra* note 8 and accompanying text.

17 *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989) (quoting JERRY L. MASHAW ET AL., SOCIAL SECURITY HEARINGS AND APPEALS 133 (1978)).

18 *Id.*

19 *Chenery II*, 332 U.S. 194, 196 (1947) (emphasis added).

Security disability cases, wasteful remands can be avoided. This would alleviate congestion in the federal courts and reduce the tension between the courts and the Social Security Administration, as courts could enforce their precedents directly.

This Note explores *Chenery's* applicability in Social Security disability cases. Part I tracks the development of *Chenery* and its progeny. Part II analyzes the Social Security Act's judicial review provisions and compares them with those typically found in other statutes underlying *Chenery's* application. Part III explores the legal arguments for and against applying *Chenery* in Social Security disability cases. It begins with the implicit arguments raised in dicta by the Tenth Circuit in *Powell v. Barnhart*,²⁰ before moving on to analyze § 405(g)'s "with or without remanding" clause. Finally, the Note concludes by suggesting courts should confront the text of § 405(g), rather than "mechanically import[ing the principles of *Chenery* and its progeny] into the particular context of social security disability proceedings."²¹

I. CHENERY AND ITS PROGENY

A. Chenery I

Chenery I involved a group of corporate "officers, directors, and controlling stockholders"²² (Directors) who purchased preferred stock²³ in a controlled subsidiary while that subsidiary's reorganization was pending before the SEC.²⁴ Although the Commission found no fraud or failure to disclose on the part of the Directors, it concluded that they "were fiduciaries and hence under a 'duty of fair dealing' not to trade in the securities of the corporation while plans for its reorganization were before the Commission."²⁵

On appeal, the Supreme Court agreed that the Directors occupied positions of trust, but it disagreed with the Commission's interpretation of fiduciary law.²⁶ And because the Commission based its decision solely on the laws of equity, the laws of equity were the only

20 69 F. App'x 405, 411 (10th Cir. 2003).

21 *See id.*

22 *Chenery I*, 318 U.S. 80, 81 (1943).

23 Preferred stock is "[a] class of stock giving its holder a preferential claim to dividends and to corporate assets upon liquidation but that [usually] carries no voting rights." BLACK'S LAW DICTIONARY 1553 (9th ed. 2009).

24 *See Chenery I*, 318 U.S. at 81–85. The subsidiary company was organized under the Public Utility Act of 1935, ch. 687, 49 Stat. 803 (repealed 2005). *See Chenery I*, 318 U.S. at 81.

25 *Chenery I*, 318 U.S. at 81.

26 *See id.* at 85–90.

basis upon which the Commission's decision could be judged.²⁷ Thus, the *Chenery* doctrine was born: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."²⁸

The Court explained this rule by analogizing to judicial review of lower court decisions.²⁹ A reviewing court must affirm a lower court's decision if it reaches the correct result, even if "the lower court relied upon a wrong ground or gave a wrong reason."³⁰ This rule makes sense because "[i]t would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate."³¹ If, however, the lower court's decision rests "upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."³²

Similarly, if an administrative order relies on "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."³³ Thus, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."³⁴

Applying this rule, the SEC's order could not stand.³⁵ The Directors were under no fiduciary duty to avoid buying and selling the corporation's stock simply because they were officers and directors of the corporation.³⁶ This did not mean, however, that the Commission could not prevent the transactions. Congress gave the SEC broad power to protect the public interest.³⁷ Therefore, "[h]ad the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order . . . was a particular application, the problem for [the Court's] consideration would be very different."³⁸ Because the SEC chose not to rely on its statutory

27 *See id.* at 87.

28 *See id.*

29 *See id.* at 88.

30 *Id.* (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937)).

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *See id.*

36 *Id.*

37 *See id.* at 90.

38 *Id.* at 92.

authority—and instead relied on an incorrect interpretation of the laws of equity—the Court remanded the case so the agency could exercise its delegated discretion.³⁹

B. SEC v. Chenery Corp. (Chenery II)⁴⁰

On remand, the SEC again refused to allow the Directors to benefit from the transactions.⁴¹ This time, however, the agency took the Court's hint⁴² and grounded its decision in statutory authority.⁴³ As the Court noted on appeal, "[t]he latest order of the Commission definitely avoids the fatal error of relying on judicial precedents which do not sustain it. This time . . . the Commission has concluded that the proposed transaction is inconsistent with the standards of . . . the [Public Utility Holding Company] Act."⁴⁴ Moreover, "[i]t has drawn heavily upon its accumulated experience in dealing with utility reorganizations. And it has expressed its reasons with a clarity and thoroughness that admit of no doubt as to the underlying basis of its order."⁴⁵ For those reasons, the Court upheld the Commission's order.⁴⁶

The second *Chenery* opinion is a landmark in administrative law because of its holding that an agency may choose between rulemaking and adjudication when announcing its policies.⁴⁷ For purposes of this Note, though, it is notable mostly for its explication of *Chenery I*:⁴⁸

When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would

39 See *id.* at 92–95.

40 332 U.S. 194 (1947).

41 See *id.* at 198–99.

42 See *id.* at 199; see also Friendly, *supra* note 8, at 203 (“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.”).

43 See *Chenery II*, 332 U.S. at 199.

44 *Id.*

45 *Id.*

46 See *id.* at 209.

47 See *id.* at 199–204; WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 6.03, at 144 (5th ed. 2008).

48 See Friendly, *supra* note 8, at 203.

propel the court into the domain which Congress has set aside exclusively for the administrative agency.⁴⁹

C. *Chenery's Progeny*

The Court has refined *Chenery's* principles since handing down its original decisions in the 1940s. In *Burlington Truck Lines, Inc. v. United States*,⁵⁰ the Court faced what has become the typical situation involving *Chenery*; government counsel argued on appeal that the agency's decision should be affirmed on grounds not set forth in its order.⁵¹ The Court refused the invitation, stating that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."⁵² To substitute a court's discretion for an agency's would undermine the orderly function of judicial review.⁵³

These principles were further explained in *ICC v. Brotherhood of Locomotive Engineers*.⁵⁴ There, the concurrence argued that *Chenery* required a remand because the ICC erred in explaining its decision.⁵⁵ The majority, however, found that *Chenery* did not apply because the agency's decision was unreviewable under the relevant statute:⁵⁶ "*Chenery* has nothing whatever to do with *whether agency action is reviewable*. It does not establish . . . the principle that if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable."⁵⁷ Rather, *Chenery* stands for the notion that a court "may not affirm on a basis containing any element of discretion—including discretion to find facts and interpret statutory ambiguities—that is not the basis the agency used, since that would remove the discretionary judgment from the agency to the court."⁵⁸

49 *Chenery II*, 332 U.S. at 196.

50 371 U.S. 156 (1962).

51 *See id.* at 168.

52 *Id.* at 168–69.

53 *Id.* at 169.

54 482 U.S. 270 (1987).

55 *See id.* at 291 (Stevens, J., concurring in judgment).

56 *See id.* at 282–83 (majority opinion).

57 *Id.* at 283.

58 *Id.*

1. Futility and Harmless Error

Perhaps the biggest source of uncertainty surrounding *Chenery's* applicability lies in the area of futility and harmless error analysis.⁵⁹ In *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*,⁶⁰ the Court reviewed a Maritime Commission decision that did not clearly identify its source of statutory authority.⁶¹ The petitioners argued that the Commission's failure to state its basis of authority rendered its decision invalid under *Chenery*.⁶² But the Court was not persuaded. It agreed with the district court that there was "not 'the slightest ground for assuming'" that the result would have been any different had the Commission been clear on its authority.⁶³ Moreover,

[*Chenery* and its progeny were] 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, as in this instance (assuming there was such a mistake), the sought extension of the cases cited would not advance the purpose they were intended to serve.⁶⁴

A reviewing court, therefore, is not required to remand every time an agency makes a mistake. Rather, a remand is required only when there is a strong possibility the agency would have reached a different conclusion without the error.⁶⁵

A plurality of the Court reasserted this principle a few years later in *NLRB v. Wyman-Gordon Co.*⁶⁶ There, the Court upheld a NLRB order even though the order relied upon a rule improperly promulgated under the Administrative Procedure Act (APA).⁶⁷ Justice Harlan, in dissent, argued that *Chenery* required the Court to remand.⁶⁸ Justice Fortas, however, responded that remanding "would

59 See generally Friendly, *supra* note 8 (analyzing *Chenery* and its progeny along with futility considerations); Glen, *supra* note 8 (analyzing *Chenery* and its progeny with a focus on the developing jurisprudence of futility).

60 377 U.S. 235 (1964).

61 See *id.* at 245-46.

62 See *id.* at 246.

63 See *id.* at 247 (quoting *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 202 F. Supp. 297, 305 (D. Mass. 1962), *amended by* 210 F. Supp. 822 (D. Mass. 1962), *aff'd*, 312 F.2d 214 (1st Cir. 1963), *aff'd*, 377 U.S. 235 (1964)).

64 *Id.* at 248.

65 See Friendly, *supra* note 8, at 211.

66 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

67 See *id.* at 762-66.

68 See *id.* at 783 (Harlan, J., dissenting).

be an idle and useless formality.”⁶⁹ Indeed, “*Chenery* does not require [the Court to] convert judicial review of agency action into a ping-pong game. . . . [T]he substance of the Board’s command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board”⁷⁰ Thus, “[i]t would be meaningless to remand.”⁷¹

After *Wyman-Gordon*, there could be little doubt about the existence of a futility exception to the *Chenery* doctrine. But such an exception, based on a court’s relative level of certainty regarding the outcome of a potential remand, invites difficulty in defining the circumstances that warrant a futility determination. The Court confronted this issue—albeit not explicitly—in *INS v. Orlando Ventura*.⁷²

2. The Ordinary Remand Rule

Ventura involved review of an INS decision to deny asylum based on “persecution or a well-founded fear of persecution on account of . . . [a] political opinion.”⁷³ The immigration judge ruled that conditions in the applicant’s home country had improved “to the point where no realistic threat of persecution currently existed.”⁷⁴ But the Board of Immigration Appeals (BIA) did not consider this argument in reaching its decision.⁷⁵ Instead, it denied the application because any persecution the applicant suffered was not “*on account of a political opinion*.”⁷⁶

On appeal, the Ninth Circuit acknowledged that the BIA had not determined whether changed circumstances had precluded a reasonable fear of persecution.⁷⁷ And it admitted that a reviewing court generally should remand so the agency can make such a determination in the first instance.⁷⁸ Nevertheless, it believed remand was unnecessary if “it [was] clear that [the court] would be compelled to reverse the BIA’s decision if the BIA decided the matter against the applicant.”⁷⁹

69 See *id.* at 766 n.6 (plurality opinion).

70 *Id.*

71 *Id.*

72 537 U.S. 12 (2002) (per curiam).

73 *Id.* at 13 (alteration in original) (quoting 8 U.S.C. § 1101(a)(42)(A) (Supp. V 2000) (current version at 8 U.S.C. § 1101(a)(42)(A) (2006))).

74 *Id.*

75 *Id.*

76 *Id.* (internal quotation marks omitted).

77 *Ventura v. INS*, 264 F.3d 1150, 1153, 1157 (9th Cir. 2001), *rev’d in part*, 537 U.S. 12 (2002).

78 See *Ventura*, 537 U.S. at 15; *Ventura*, 264 F.3d at 1157.

79 *Ventura*, 264 F.3d at 1157.

After concluding the record evidence was insufficient to rebut “the presumption of a well-founded fear of future persecution,” the court decided not to remand.⁸⁰

The Supreme Court began its review by reiterating *Chenery*’s command that courts must refrain from “intrud[ing] upon the domain which Congress has exclusively entrusted to an administrative agency.”⁸¹ It also stressed that a reviewing court “is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.”⁸² Thus, “the proper course, except in rare circumstances, is to remand to the agency”⁸³ so the agency can “bring its expertise to bear upon the matter.”⁸⁴

With these principles in mind, the Court provided two ways in which the Ninth Circuit had “committed clear error.”⁸⁵ First, the Ninth Circuit incorrectly concluded there was insufficient evidence to find that changed circumstances had precluded a reasonable fear of political persecution.⁸⁶ Second, by failing to remand, the Ninth Circuit foreclosed the compilation of additional evidence that may have helped determine the changed circumstances issue. In other words, the process would have benefitted from allowing the BIA to “bring its expertise to bear upon the matter” of collecting and evaluating the evidence.⁸⁷ The Ninth Circuit, therefore, “should have applied the ordinary ‘remand’ rule.”⁸⁸

80 *Id.*

81 *See Ventura*, 537 U.S. at 16 (quoting *Chenery I*, 318 U.S. 80, 88 (1943)).

82 *See id.* (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

83 *Id.* (quoting *Fla. Power & Light Co.*, 470 U.S. at 744).

84 *Id.* at 17.

85 *See id.* at 16–17.

86 *See id.* at 17–18.

87 *See id.*

88 *Id.* at 18. The Court revisited this issue four years later in *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam). Once again, the Ninth Circuit acknowledged that the agency had not adequately addressed a material question—whether a family could constitute a “particular social group” under refugee statutes. *See Thomas v. Gonzales*, 409 F.3d 1177, 1181–82 (9th Cir. 2005) (en banc), *vacated*, 547 U.S. 183 (2006); *Thomas v. Ashcroft*, 359 F.3d 1169, 1177 (9th Cir. 2004), *aff’d en banc sub nom. Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005), *vacated*, 547 U.S. 183 (2006). But instead of remanding the question to the BIA, the court ruled that a family can be a “particular social group” and that the respondent’s family was targeted for abuse because they were members of such a group. *See Thomas*, 409 F.3d at 1187–89.

The Supreme Court vacated the Ninth Circuit’s decision, stating that “[t]he Ninth Circuit’s failure to remand is legally erroneous, and that error is ‘obvious in light of *Ventura*,’ itself a summary reversal.” *Thomas*, 547 U.S. at 185 (citing *Petition for Writ of Certiorari* at 29, *Thomas*, 547 U.S. 183 (No. 05-552)). After comparing the

3. Current Rule of *Chenery* and its Progeny

After *Ventura*, the principles of *Chenery I* and its progeny may fairly be summarized as follows: "[E]xcept in rare circumstances,"⁸⁹ those where there can be no doubt about the outcome of an agency's decision upon remand,⁹⁰ a reviewing court may not make a discretionary determination⁹¹ that an "agency alone [has been] authorized to make."⁹² Rather, a court must ordinarily remand⁹³ to an agency if the agency has erred in reaching its decision⁹⁴ or has failed to make a material determination.⁹⁵

II. 42 U.S.C. § 405(g) AND JUDICIAL REVIEW STATUTES

To understand how § 405(g) might affect the application of *Chenery* and its progeny, one must understand how the statute's provisions govern judicial review in Social Security disability cases. Although it is beyond the scope of this Note to provide a comprehensive explanation of the relationship between statutes and administrative judicial review, a brief overview is in order.

A. Special Statutory Review Provisions

Congress enacted the APA⁹⁶ in 1946 in order "to systematize administrative law on a government-wide basis."⁹⁷ And under the

facts to those in *Ventura*, the Court found "no special circumstance[s] . . . that might have justified the Ninth Circuit's determination of the matter in the first instance." *Id.* at 185-87. Thus, the Court held that "as in *Ventura*, the Court of Appeals should have applied the 'ordinary "remand" rule.'" *Id.* at 187 (quoting *Ventura*, 537 U.S. at 18).

⁸⁹ *Ventura*, 537 U.S. at 16 (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

⁹⁰ See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion).

⁹¹ See *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987).

⁹² *Chenery II*, 332 U.S. 194, 196 (1947); *Chenery I*, 318 U.S. 80, 88 (1943).

⁹³ See *Ventura*, 537 U.S. at 16, 18.

⁹⁴ See *Chenery II*, 332 U.S. at 196; *Chenery I*, 318 U.S. at 94-95; Glen, *supra* note 8, at 8 ("If the agency has not yet rendered a decision on the relevant issue, or has committed an error in reaching its disposition, a reviewing court cannot affirm or deny the appeal and must remand for an agency decision in the first instance, or an agency decision freed of the underlying error.").

⁹⁵ See *Ventura*, 537 U.S. at 16 (citing *Fla. Power & Light Co. v. Lorian*, 470 U.S. 729, 744 (1985)); *Chenery I*, 318 U.S. at 88.

⁹⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

⁹⁷ LAWSON, *supra* note 8, at 202.

APA, agency actions are presumed to be reviewable by the courts.⁹⁸ The judicial review provisions of the APA, codified at 5 U.S.C. §§ 701–706, set forth the default conditions and procedures governing review of agency actions.⁹⁹ The term “default,” however, is used because these provisions apply only to the extent judicial review is not governed by other statutes; if Congress has provided for judicial review in another statute, that “statutory road to review becomes the only road.”¹⁰⁰ Most organic statutes,¹⁰¹ in fact, contain “special statutory review” provisions that specify how and when one may obtain judicial review of agency actions.¹⁰²

Typically, these special statutory review provisions are modeled after the Federal Trade Commission Act of 1914,¹⁰³ which provided judicial review by way of actions brought directly in the circuit courts of appeals.¹⁰⁴ It also outlined the process by which the parties could petition for review, and gave courts the “power to make and enter upon the pleadings, testimony, and proceedings set forth in [the transcript of the record] a decree affirming, modifying, or setting aside the order of the commission.”¹⁰⁵ The Commission’s findings of fact were to be conclusive if supported by the evidence.¹⁰⁶ And the court possessed the power, upon application by either party, to order the

98 See *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (“[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,’ so long as no statute precludes such relief or the action is not one committed by law to agency discretion.” (citation omitted) (quoting 5 U.S.C. § 702 (Supp. II 1967)) (citing 5 U.S.C. § 701(a)); see also 3 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 17.6 (4th ed. 2002) (discussing the presumption of reviewability of agency decisions).

99 See 5 U.S.C. §§ 701–706 (2006).

100 See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 8.3, at 439 (2d ed. 1984); see also 5 U.S.C. § 703 (“The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action . . . in a court of competent jurisdiction.”); *Whitney Nat’l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (“[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive.”).

101 An organic statute is “[a] law that establishes an administrative agency or local government.” BLACK’S LAW DICTIONARY, *supra* note 23, at 1544 (9th ed. 2009).

102 See LAWSON, *supra* note 8, at 814.

103 Ch. 311, § 5, 38 Stat. 717, 720–21 (current version at 15 U.S.C. § 45(c) (2006)).

104 See *id.*; SCHWARTZ, *supra* note 100, § 8.2, at 438.

105 See § 5, 38 Stat. at 720.

106 See *id.*

Commission to gather additional evidence.¹⁰⁷ The Commission, then, could modify its findings and recommend how the court should rule on its original order.¹⁰⁸ Finally, the court's judgment was to be conclusive absent a grant of certiorari by the Supreme Court.¹⁰⁹

Before 1950, a number of agency statutes provided for judicial review by three-judge panels in the district courts.¹¹⁰ The Judicial Review Act of 1950,¹¹¹ however, replaced that practice with Federal Trade Commission (FTC)-style review for all of those agencies but the ICC; and the ICC was given FTC-style review by 1975.¹¹² Although most agency statutes now provide judicial review by way of the circuit courts, at least one notable exception exists;¹¹³ the Social Security Act provides judicial review by way of civil actions filed in the district courts.¹¹⁴

B. 42 U.S.C. § 405(g)

The special statutory review provisions of the Social Security Act, codified at 42 U.S.C. § 405(g), differ from typical FTC-style review provisions in four subtle ways.¹¹⁵ First, as noted above, judicial review of a Social Security determination takes place via a civil action filed initially in the district court, which provides an additional layer of judicial review.¹¹⁶ Second, § 405(g) adds the clause "with or without remanding the cause for a rehearing"¹¹⁷ to the typical description of a

107 *See id.*

108 *See id.*

109 *See id.*

110 *See* SCHWARTZ, *supra* note 100, § 8.2, at 438.

111 Ch. 1189, 64 Stat. 1129 (codified as amended in scattered sections of 28, 50 U.S.C.).

112 *See* Act of Jan. 2, 1975, Pub. L. No. 93-584, § 5, 88 Stat. 1917 (current version at 28 U.S.C. § 2321 (2006)); SCHWARTZ, *supra* note 100, § 8.2, at 438.

113 *See* SCHWARTZ, *supra* note 100, § 8.2, at 438.

114 *See* 42 U.S.C. § 405(g) (2006); SCHWARTZ, *supra* note 100, § 8.2, at 438.

115 This section focuses on identifying the differences between the statutory provisions contained in § 405(g) and those contained in typical statutes providing FTC-style review. The significance of these differences will be probed further *infra* in Parts III and IV.

116 *See* 42 U.S.C. § 405(g) ("Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.").

117 *See id.* ("The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.").

court's power to affirm, modify, or reverse an agency's decision.¹¹⁸ Third, the Social Security Act gives the court the discretion to remand to the agency "on motion of the Commissioner of Social Security made for good cause shown," at any point before the agency files its answer.¹¹⁹ Finally, § 405(g) allows the court, on its own motion, to order that "additional evidence . . . be taken before the Commissioner";¹²⁰ whereas, typical FTC-style statutes allow such remands only upon motion of a party.¹²¹

Unfortunately, Congress did not explain its decision to vary the Social Security Act's provisions in this manner. Originally enacted in 1935,¹²² the Act did not contain any provisions for judicial review.¹²³ The Social Security Act Amendments of 1939 (SSAA),¹²⁴ however, remedied this deficiency by introducing the provisions now embodied in § 405(g).¹²⁵ Although the legislative history of the SSAA does not

118 *See, e.g.*, 15 U.S.C. § 45(c) (2006) ("Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors *pendente lite*.").

119 *See* 42 U.S.C. § 405(g) ("The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security . . .").

120 *See id.*

121 *See, e.g.*, 15 U.S.C. § 45(c) (FTC) ("If either party shall apply to the court for leave to adduce additional evidence . . . the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing . . ."); 15 U.S.C. § 78y(a)(5) (SEC) ("If either party applies to the court for leave to adduce additional evidence . . . the court may remand the case to the Commission for further proceedings . . ."); 15 U.S.C. § 717r(b) (Fed. Power Comm'n (FPC)) ("If any party shall apply to the court for leave to adduce additional evidence . . . the court may order such additional evidence to be taken before the Commission . . ."); 29 U.S.C. § 160(e) (2006) (NLRB) ("If either party shall apply to the court for leave to adduce additional evidence . . . the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record.").

122 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397).

123 *See id.*

124 Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (codified as amended in scattered sections of 12, 26, 42, 45 U.S.C.).

125 *See id.* § 205(g), 53 Stat. at 1370-71 (current version at 42 U.S.C. § 405(g)).

reveal the meaning of specific provisions, it does provide general background information about the language adopted:

The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim to benefits is denied by the Board. The [proposed judicial review provisions] are similar to those made for the review of decisions of many administrative bodies. The Board's decisions on questions of law will be reviewable, but its findings of fact, if supported by substantial evidence, will be conclusive. . . . Provision is made for remanding of proceedings to the Board for further action, or for additional evidence.¹²⁶

Some of the SSAA's provisions were, in fact, "similar to those made for the review of decisions of many administrative bodies."¹²⁷ But the provisions outlined above are unusual. Indeed, it appears that only three statutes in force when Congress adopted the SSAA included a "with or without remanding" clause.¹²⁸ Of the three, only two have the potential to provide insight into why Congress included the clause in the SSAA.¹²⁹

126 H.R. REP. NO. 76-728, at 43 (1939); S. REP. NO. 76-734, at 52 (1939). The utility of examining legislative history in matters of statutory interpretation is, of course, the subject of great debate. See 4 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE* § 11:33, at 153 (3d ed. 2010). Legislative history is presented here for the benefit of those who find such evidence persuasive.

127 S. REP. NO. 76-734, at 52.

128 See Railroad Unemployment Insurance Act, ch. 680, § 5(f), 52 Stat. 1094, 1100-01 (1938) (current version at 45 U.S.C. § 355(f) (2006)) ("[The court] shall have power to enter upon the pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing."); Revenue Act of 1936, ch. 690, § 906(g), 49 Stat. 1648, 1750 (current version at 26 U.S.C. § 7482(c)(1) (2006)) (giving courts reviewing IRS decisions the power to "affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require"); Act of Aug. 21, 1935, ch. 597, § 3, 49 Stat. 670, 671 (providing that courts reviewing Secretary of War decisions regarding the regulation of tolls on bridges of navigable waterways had the "power to affirm or, if the order its [sic] not in accordance with law, to modify or to reverse the order, with or without remanding the case for a rehearing as justice may require" (footnote omitted explaining that mistake was in the original)). These statutes were identified using an advanced U.S. Code search on Hein Online looking for all code provisions containing the language "with or without remanding" from 1936 to 1940. The identified code provisions were then traced back to their enacting statutes.

129 Although section 906(g) of the Revenue Act of 1936, 49 Stat. at 1750, contains no useful legislative history, the "with or without remanding" language in that statute appears to have been taken from section 1003(b) of the Revenue Act of 1926, ch. 27, 44 Stat. 9, 110, which does have relevant legislative history. Section 3 of the Act of Aug. 21, 1935, 49 Stat. at 670, does not have legislative history explaining its "with or

C. Section 906(g) of the Revenue Act of 1936¹³⁰

Section 906(g) of the Revenue Act of 1936 has no legislative history explaining its “with or without remanding” provision. Nevertheless, its provision is remarkably similar to—and is almost certainly derived from—the “with or without remanding” provision in section 1003(b) of the Revenue Act of 1926,¹³¹ which does have relevant legislative history. Section 1003(b) provides that “courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.”¹³² The original draft language of section 1003(b), however, stated that

courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, or if there has been prejudicial error by the Board in ruling upon the admissibility of evidence, to remand the case to the Board for rehearing; but on no other ground shall a case be remanded for the taking of further evidence.¹³³

Although the 1926 Act’s legislative history is not a model of clarity, it indicates that Congress intended the provision to limit the scope of a court’s review to matters of law, thus giving deference to agency findings of fact and evidentiary rulings.¹³⁴ The Senate, however, objected to the limiting nature of the remand provision.¹³⁵ So it

without remanding” provision. And unlike section 5(f) of the Railroad Unemployment Insurance Act, 52 Stat. at 1100–01, section 3 of the Act of Aug. 21, 1935 is no more similar to § 405(g) of the Social Security Act than is section 1003(b) of the Revenue Act of 1926. Thus, the Act of Aug. 21, 1935 is not particularly useful to this analysis.

130 § 906(g), 49 Stat. at 1750 (current version at 26 U.S.C. § 7482(c)(1)).

131 *Compare id.* (“[S]uch court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the cause for a rehearing, as justice may require.”), with § 1003(b), 44 Stat. at 110 (“[S]uch courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.”).

132 § 1003(b), 44 Stat. at 110.

133 See J.S. SEIDMAN, SEIDMAN’S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS, 1938–1861, at 663 (1938).

134 See S. REP. NO. 69-52, at 36–37 (1926) (“In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, [this section] limits the review on appeal to what are commonly known as questions of law.”); SEIDMAN, *supra* note 133, at 663–64.

135 See H.R. REP. NO. 69-356, at 1, 54–55 (1926); SEIDMAN, *supra* note 133, at 663–64. Given the language the Senate replaced, and what it replaced that language

introduced Amendment 155, striking the language dealing with evidence, and replacing it with the clause “with or without remanding the case for a rehearing, as justice may require.”¹³⁶ The House ultimately agreed, and the phrase “with or without remanding” was incorporated into the final version of the Act.¹³⁷

It is difficult to draw any conclusions about the intended meaning of the “with or without remanding” clause in the SSAA based on the Revenue Act of 1926’s legislative history. The 1926 Act’s clause appears to address the Senate’s concern that a reviewing court would not have the flexibility to remand for additional evidence.¹³⁸ But the SSAA’s evidentiary remand provisions specifically addressed that concern. Thus, one cannot assume Congress intended the SSAA’s “with or without remanding” provision to serve the same function it served in the Revenue Act of 1926.

*D. Section 5(f) of the Railroad Unemployment Insurance Act (RUIA)*¹³⁹

After two unsuccessful attempts to create a benefits system for railroad workers,¹⁴⁰ Congress enacted the Railroad Retirement Act of 1937¹⁴¹ and the RUIA in 1938.¹⁴² The Supreme Court has described the Railroad Retirement Act as “a Social Security Act for employees of common carriers.”¹⁴³ And given the statutory schemes’ similar purposes, it is unsurprising that the SSAA’s judicial review provisions bear a striking resemblance to those adopted in the RUIA.¹⁴⁴ Indeed, all but one of the unique features of § 405(g) outlined above is also pre-

with, it is fair to infer that the Senate was concerned with limiting the court’s flexibility to remand for the taking of further evidence.

136 See H.R. REP. NO. 69-356, at 54–55; SEIDMAN, *supra* note 133, at 663–64.

137 See H.R. REP. NO. 69-356, at 1, 54–55.

138 See *supra* note 135.

139 Railroad Unemployment Insurance Act, ch. 680, § 5(f), 52 Stat. 1094, 1100–01 (1938) (current version at 45 U.S.C. § 355(f) (2006)).

140 See Railroad Retirement Act of 1935, ch. 812, 49 Stat. 967 (amended 1937); Railroad Retirement Act, ch. 868, 48 Stat. 1283 (1934), *invalidated by* R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 374 (1935).

141 Railroad Retirement Act of 1937, ch. 382, 50 Stat. 307 (current version at 45 U.S.C. §§ 231–231v (2006)).

142 52 Stat. 1094 (current version at 45 U.S.C. §§ 355–369).

143 *Eichel v. N.Y. Cent. R.R. Co.*, 375 U.S. 253, 254 (1963) (*per curiam*) (quoting *N.Y., New Haven & Hartford R. Co. v. Leary*, 204 F.2d 461, 468 (1st Cir. 1953)).

144 Compare Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 205(g), 53 Stat. 1360, 1370–71 (current version at 42 U.S.C. § 405(g) (2006)) (providing review in the district courts; granting the power to affirm, modify, or reverse, “with or without remanding”; and allowing the court to remand for further evidence on its own motion), *with* § 5(f), 52 Stat. at 1100–01 (same).

sent in the RUIA; the only exception being that there are no RUIA provisions allowing the agency to request remand before filing its answer.¹⁴⁵ Unfortunately, the RUIA's legislative history is just as silent as the SSAA's as to why Congress chose to stray from typical FTC-style agency review.¹⁴⁶ This leaves us back where we began—knowing that § 405(g) is unusual among special statutory review provisions, but not knowing why.

III. SECTION 405(g)'S EFFECT ON THE APPLICATION OF *CHENERY* AND ITS PROGENY

Thus far, it has been established that (1) *Chenery* imposes a remand rule on courts conducting judicial review of agency action;¹⁴⁷ (2) Congress ultimately determines the procedures courts must follow when conducting such judicial review;¹⁴⁸ and (3) § 405(g) is unusual among the special statutory review provisions governing such judicial review.¹⁴⁹ This Note now turns to exploring whether § 405(g) alters *Chenery*'s application in Social Security disability cases. It begins by discussing the implicit arguments raised in dicta by the Tenth Circuit in *Powell v. Barnhart*,¹⁵⁰ before moving on to analyze § 405(g)'s "with or without remanding" clause.

A. *Powell v. Barnhart*

In 2003, the Tenth Circuit questioned in dicta whether *Chenery* should apply in Social Security disability cases: "[W]e have no occasion to decide whether the principles of *Chenery* and its progeny, developed in other administrative review settings, should be mechanically imported into the particular context of social security disability

145 See § 5(f), 52 Stat. at 1100–01.

146 There are only two references to the judicial review provisions in the available committee reports, and neither is helpful. See *Railroad Unemployment Insurance System: Hearings on H.R. 10127 Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 75th Cong. 196 (1938) ("[T]he determinations of the Board with respect to any claim for benefits or refund shall be binding upon all persons, including the Comptroller General and any other administrative or accounting officer, employee or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this section (which relates to appeals to the courts from decisions of the Board)."); H.R. REP. NO. 75-2668, § 5, at 7 (1938) ("Subsection (f) sets forth the procedure for appeal to the courts from final decisions of the Board.").

147 See *supra* Part I.

148 See *supra* Part II.A.

149 See *supra* Part II.B.

150 69 F. App'x 405 (10th Cir. 2003).

proceedings.”¹⁵¹ Citing two Supreme Court decisions, the Tenth Circuit chose not to flesh out its argument questioning *Chenery’s* application. This section, then, discusses the cases cited in *Powell* and attempts to draw out its implicit argument against *Chenery’s* application.

1. *Sullivan v. Hudson*¹⁵²

In *Hudson*, the Court decided whether a Social Security claimant could be awarded attorney’s fees¹⁵³ after prevailing on remand from the district court.¹⁵⁴ *Hudson’s* facts and holding are not relevant to this analysis, but its discussion of § 405(g) is instructive. After quoting the pertinent provisions of § 405(g), the Court offered this observation:

As provisions for judicial review of agency action go, § 405(g) is somewhat unusual. The detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary’s subsequent findings with the court suggest a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act.¹⁵⁵

The Court then quoted this description of § 405(g)’s effect:

“The remand power places the courts, not in their accustomed role as external overseers of the administrative process, making sure that it stays within legal bounds, but virtually as coparticipants in the process, exercising ground-level discretion of the same order as that exercised by [administrative law judges] and the Appeals Council when they act upon a request to reopen a decision on the basis of new and material evidence.”¹⁵⁶

Finally, the court discussed the extent of the interaction between the courts and the agency on remand.¹⁵⁷ It stated, for example, that “[w]here a court finds that the Secretary has committed a legal or factual error in evaluating a particular claim, the district court’s

151 *See id.* at 411 (10th Cir. 2003) (“[A]s we have reached this conclusion within the analytical confines of the [administrative law judge’s] rationale of decision, the concerns [the claimant] raises about post hoc justification of administrative action are not implicated by our disposition.” (citation to *Chenery I*, 318 U.S. 80 (1943) omitted)).

152 490 U.S. 877 (1989).

153 *See* Equal Access to Justice Act, 28 U.S.C. § 2412 (2006).

154 *Hudson*, 490 U.S. at 879.

155 *Id.* at 885.

156 *Id.* (quoting *MASHAW ET AL.*, *supra* note 17, at 133).

157 *See id.* at 885–86.

remand order will often include detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed.”¹⁵⁸ And deviating from the court’s remand order would itself be legal error, which might subject the agency’s decision to reversal on further review.¹⁵⁹ Thus, a court frequently retains jurisdiction on remand in order to ensure that the agency follows its instructions.¹⁶⁰

2. *Sims v. Apfel*¹⁶¹

In *Sims*, the Court determined that the administrative issue exhaustion rule does not apply in Social Security disability cases.¹⁶² It began by noting that there are no issue exhaustion requirements in either the Social Security Act or the Social Security Administration’s regulations.¹⁶³ It also noted that the reasons why courts generally impose issue exhaustion in the absence of a statutory or regulatory mandate do not apply in Social Security disability cases.¹⁶⁴ This is because the necessity for administrative issue exhaustion relates directly to how much an administrative adjudication resembles an adversarial adjudication in a trial court: “Where the parties are expected to develop the issues in an adversarial administrative proceeding, . . . the rationale for requiring issue exhaustion is at its greatest.”¹⁶⁵ But when “an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker.”¹⁶⁶

The Court went on to explain that “[t]he differences between courts and agencies are nowhere more pronounced than in Social Security proceedings.”¹⁶⁷ Unlike other agency adjudicative processes, Social Security proceedings do not follow the typical adversarial model of judicial decision making.¹⁶⁸ Rather, these proceedings are inquisitorial in nature.¹⁶⁹ The administrative law judge (ALJ) has a “duty to investigate the facts and develop the arguments both for and

158 *Id.* at 885.

159 *Id.* at 886.

160 *See id.*

161 530 U.S. 103 (2000).

162 *See id.* at 104–05.

163 *See id.* at 107–08.

164 *See id.* at 109–10.

165 *Id.* at 110.

166 *Id.*

167 *Id.* (plurality opinion).

168 *See id.*

169 *See id.* at 110–11.

against granting benefits, and the Council's review is similarly broad."¹⁷⁰ Further, the Social Security Commissioner does not have representation at the proceedings to argue against awarding benefits.¹⁷¹ Because the proceedings do not rely on the parties to develop the issues, it makes no sense to require claimants to administratively exhaust all issues before obtaining judicial review.¹⁷²

3. *Powell's* Implicit Argument Against *Chenery's* Application

The potential *Chenery* implications of the Court's description of § 405(g) in *Hudson* are apparent. If § 405(g) alters the traditional role of the courts "as external overseers of the administrative process," and essentially makes them "coparticipants in the process,"¹⁷³ then Social Security disability decisions may not be "determination[s] or judgment[s] which an administrative agency *alone* is authorized to make."¹⁷⁴ Instead, Social Security decisions may be seen as determinations or judgments that the court and agency *together* are empowered to make. If that's true, *Chenery's* warning that a reviewing court must avoid entering "the domain which Congress has *exclusively* entrusted to an administrative agency"¹⁷⁵ would not be implicated.

While some might view this as a formalistic approach to interpreting the language of *Chenery* and *Hudson*, it is consistent with the functional goals of *Chenery*. The Court in *Chenery* feared judicial intrusion upon decisions Congress entrusted solely to agencies. But this concern, likely grounded in separation of powers, applies only if Congress does not intend for an agency to share its legal decision-making discretion with the courts. If § 405(g)—properly understood—allows the courts to "exercis[e] ground-level discretion of the same order as that exercised by ALJs and the Appeals Council,"¹⁷⁶ then judicial review under § 405(g) should be seen as just another layer in a shared decision-making process.

Sims bolsters this view. Judicial review provides the only opportunity for Social Security parties to develop the issues in an adversarial proceeding. Thus, Congress appears to be using the courts as an adversarial counter to the agency's inquisitorial process. This explains why Congress placed judicial review initially with the district courts. If

170 *Id.* at 111 (citation omitted).

171 *Id.*

172 *See id.* at 112.

173 *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989) (quoting *MASHAW ET AL.*, *supra* note 17, at 133).

174 *Chenery II*, 332 U.S. 194, 196 (1947) (emphasis added).

175 *Chenery I*, 318 U.S. 80, 88 (1943) (emphasis added).

176 *Hudson*, 490 U.S. at 885 (quoting *MASHAW ET AL.*, *supra* note 17, at 133).

the district courts act as part of the decision-making process, rather than acting as “external overseers of the administrative process,”¹⁷⁷ then the circuit courts serve the traditional function of judicial review. Whereas, under a more orthodox understanding of § 405(g), the district courts simply provide an extra—and some might argue redundant—layer of judicial review.

Based on *Hudson* and *Sims*, then, the separation of functions within the Social Security disability process can best be understood as follows: the agency functions as an inquisitorial fact finder and preliminary legal decision maker, the district courts serve as adversarial issue developers and final legal decision makers, and the circuit courts provide external review of the entire process.

4. Counterargument

Of course, it is not necessary to take such an expansive view of judicial discretion under § 405(g). Although the Court in *Hudson* described the district courts as having “ground-level discretion of the same order as that exercised by ALJs and the Appeals Council,”¹⁷⁸ it did not say that the courts possessed the same *type* of discretion. Indeed, a district court may require the agency to follow its “detailed instructions concerning the scope of the remand, the evidence to be adduced, and the legal or factual issues to be addressed,”¹⁷⁹ but that does not mean the district court is empowered to substitute its judgment for the agency’s on the ultimate question of disability.

Moreover, there is evidence counseling against such a broad view of congressional intent. In section 307 of the Social Security Disability Amendments of 1980 (SSDA)¹⁸⁰—titled “Limitation on Court Remands”—Congress significantly amended § 405(g).¹⁸¹ The SSDA placed a “good cause” limitation on the Secretary’s ability to request a remand before filing an answer.¹⁸² And although a court may still order an evidentiary remand on its own motion at any time, the SSDA limits this discretion by requiring “a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.”¹⁸³

177 *Id.* (quoting MASHAW ET AL., *supra* note 17, at 133).

178 *Id.* (quoting MASHAW ET AL., *supra* note 17, at 133).

179 *Id.*

180 Pub. L. No. 96-265, § 307, 94 Stat. 441, 458 (codified at 42 U.S.C. § 405(g) (2006)).

181 *See id.*

182 *See id.*

183 *See* 42 U.S.C. § 405(g); § 307, 94 Stat. at 458.

This brings the courts' broad evidentiary remand powers closer to those typically granted under FTC-style review statutes.¹⁸⁴

It should be noted, of course, that the SSDA was enacted before the Supreme Court's description of § 405(g) in *Hudson*.¹⁸⁵ So it is fair to say that *Hudson*'s broad description is instructive, even after the limitations imposed by the SSDA. But expanding the view of judicial power granted by § 405(g)—based on the Court's description of the remand power in *Hudson*—may go against Congress's clear intention to limit the remand power in the SSDA.

Sims does nothing to alter this analysis. The Court in *Sims* merely held that it is unnecessary to require a party to exhaust all issues at the administrative level, if that party is not responsible for developing the issues at that level. In the absence of stronger evidence that Congress intended to vest decision-making authority with the district courts, the presumption should be that the agency is solely responsible for making disability determinations. If that is true, there is no reason to think the inquisitorial nature of Social Security disability proceedings has any effect on *Chenery*'s relevance. It is still inappropriate for a court to intrude upon a "domain which Congress has set aside exclusively for the administrative agency."¹⁸⁶

B. "[W]ith or without remanding the cause for a rehearing"

Notwithstanding the force of these arguments, there is strong evidence that Congress intended to give the courts shared decision-making authority in the Social Security context. Section 405(g) provides that "[t]he court shall have power to enter, upon the pleadings and

184 Compare Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 205(g), 53 Stat. 1360, 1370-71 (current version at 42 U.S.C. § 405(g)) ("The court shall, on motion of the Board made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board . . ."), with 15 U.S.C. § 45(c) (2006) (FTC) ("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 . . ."), and § 307, 94 Stat. at 458 ("The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.").

185 See § 307, 94 Stat. at 458; *Sullivan v. Hudson*, 490 U.S. 877, 884-86 (1989).

186 See *Chenery II*, 332 U.S. 194, 196 (1947).

transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, *with or without remanding the cause for a rehearing.*¹⁸⁷ Whether the *Chenery* principles apply in Social Security disability cases, in the end, depends on how this clause is interpreted. This section of the Note analyses the “with or without remanding” clause by breaking it into two parts: (1) “with or without remanding the cause,” and (2) “for a rehearing.” It is important to note that Congress adopted the provisions in § 405(g) almost four years before the Supreme Court handed down *Chenery I*. Thus, whatever interpretation is deemed the most plausible, the *Chenery* opinions were certainly not a factor in Congress’s decision making. One should therefore be mindful not to stretch an interpretation to conform with—nor to contradict—*Chenery*’s principles.

1. “[W]ith or without remanding the cause”

There are four readily identifiable interpretations of § 405(g)’s “with or without remanding” clause.

a. The Truism Interpretation

One possible interpretation conforming with *Chenery* and its progeny is that the “with or without remanding” clause merely states a truism. Obviously, a reviewing court must be able to affirm the decision of the Commissioner without remanding for a rehearing. Similarly, a reviewing court must have the power to remand to an agency so that the agency may make a determination Congress has given it the sole authority to make. In other words, one could read the clause as stating nothing more than the obvious.

But this interpretation is not plausible. Nothing from a grammatical standpoint indicates that the “with” in the “with or without remanding” clause was intended to modify only the phrase “modifying, or reversing.” Nor is there anything to indicate that “without” should modify only the term “affirming.”

Beyond that, however, most judicial review provisions in existence when the SSAA was adopted—including those within contemporaneously enacted statutes—gave courts the power to affirm, modify, or reverse agency decisions without including a “with or without remanding” clause.¹⁸⁸ Indeed, most of the statutes adopted since have not

187 42 U.S.C. § 405(g) (emphasis added).

188 See, e.g., Federal Food, Drug, and Cosmetic Act, ch. 675, § 505(h), 52 Stat. 1040, 1053 (1938) (current version at 21 U.S.C. § 355(h) (2006)) (FDA) (“[S]uch court shall have exclusive jurisdiction to affirm or set aside such order.”); Natural Gas Act, ch. 556, § 19(b), 52 Stat. 821, 831–32 (1938) (current version at 15 U.S.C.

included such a clause, and only a handful of statutes currently contain such a provision.¹⁸⁹ Yet courts have never been found lacking the statutory power to either affirm without remanding, or to remand if necessary. One must conclude that Congress knew it did not need to include the phrase “with or without remanding” to provide courts this power. It is unlikely Congress knowingly adopted superfluous language in these statutes, and standard canons of statutory construction prevent us from assuming it did so accidentally.¹⁹⁰ Thus, we cannot presume the clause states nothing more than the obvious.

b. The Futility Interpretation

Another possible interpretation that conforms with *Chenery* and its progeny is that the clause allows a court to avoid remanding only in those instances where doing so would be futile. But nothing in the plain language of the statute limits the force of the “with or without remanding” provision in this fashion. It is difficult to understand why Congress would choose to exempt only a handful of statutes from futile remand orders. Moreover, it is unlikely that it would so limit the

717r(b) (2006)) (FPC) (“[The] court shall have exclusive jurisdiction to affirm, modify, or set aside [the] order in whole or in part.”); Federal Trade Commission Act, Amendments, ch. 49, § 3, 52 Stat. 111, 111–14 (1938) (current version at 15 U.S.C. § 45(c)) (“[T]he court . . . shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in [the] transcript a decree affirming, modifying, or setting aside the order of the Commission”); Public Utility Act of 1935, ch. 687, § 24(a), 49 Stat. 803, 834–35 (repealed 2005) (governing judicial review of the SEC action at issue in *Chenery* and stating that the “court shall have exclusive jurisdiction to affirm, modify, or set aside [the] order, in whole or in part”).

189 There appear to be only five statutes, including the Social Security Act, currently in force containing a “with or without remanding” provision. See 5 U.S.C. § 8902a(h)(2) (2006) (providing review of Office of Personnel Management decisions regarding government health care plans); 26 U.S.C. § 7482(c)(1) (2006) (providing review of Tax Court decisions); 33 U.S.C. § 520 (2006) (providing review of Department of Transportation decisions regarding bridges over navigable waters); 42 U.S.C. § 405(g) (providing review of Social Security Administration decisions); 45 U.S.C. § 355(f) (2006) (providing review of Railroad Retirement Board decisions). These statutes—none of which appear to have provided review in a case where the Supreme Court invoked *Chenery*—were identified using a U.S.C.A. search for the term “with or without remanding” on Westlaw.

190 See *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (“It is . . . ‘a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) (internal quotation marks omitted)); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute’” (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883))).

“with or without remanding” clause without providing any textual or contextual indication of its desire to do so. This interpretation, then, seems like an implausible attempt to harmonize the language of the statute with *Chenery* and its progeny.

c. The Reversal Interpretation

The next interpretation—that a court may avoid remanding if it is reversing the agency’s decision, but not if it is modifying or affirming that decision—also faces plausibility objections. From a grammatical standpoint, it is unlikely that the “with or without remanding” clause was intended to modify only the immediately preceding phrase “reversing the decision of the Commissioner of Social Security.” Rather, the comma inserted before the clause indicates that Congress intended the clause to modify all that preceded it within the sentence, going back to “[t]he court shall have the power to enter.”

But even if this interpretation were the most grammatically plausible, it conflicts with the principles of *Chenery*: “For purposes of affirming *no less than reversing* its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.”¹⁹¹ An outright reversal of an agency’s decision no less intrudes upon the agency’s power to make that decision than does affirming on grounds not stated by the agency. In each instance, the court makes the ultimate determination rather than the agency.

d. The Broad Interpretation

This leaves us with the most natural interpretation of § 405(g): a court has the power to affirm, modify, or reverse the decision of the agency, and it may do so “with or without remanding.” That this is the most natural reading of the clause should not be controversial. This reading does, however, call into question the application of *Chenery* and its progeny.

Under this interpretation, § 405(g) seems to conflict with *Chenery*’s remand requirement. If Congress wanted courts to remand every time they encountered an agency error, it would not have given them the power to avoid remanding. Assuming, therefore, that the “with or without remanding” clause grants the district courts at least *some* discretion to avoid remanding, the question becomes how much discretion Congress intended to confer.

191 See *Chenery I*, 318 U.S. 80, 88 (1943) (emphasis added).

Based on the legislative history and structure of § 405(g), it is clear Congress wanted the courts to defer to agency factual determinations.¹⁹² It is also clear, especially in light of the SSDA, that courts do not have unlimited discretion to remand for additional evidence. But Congress has not imposed any limit on a court's discretion to determine whether remand is necessary when facing erroneous or insufficient legal conclusions. Certainly, there is nothing in the text of § 405(g) that explicitly limits any discretion conferred by the "with or without remanding" clause. Perhaps, then, Congress intended for the district courts to determine whether to remand on a case-by-case basis. Such a regime would simply work outside the domain of *Chenery* and its progeny.

On this reading, § 405(g) would permit a district court to affirm an agency's determination that a claimant is not disabled if the evidence strongly supports that conclusion—even if the agency's reasoning is legally deficient. Or perhaps it would allow a district court to avoid remanding if an agency has not considered a material issue, but where the evidence strongly favors a particular outcome. Both of these scenarios clearly conflict with the principles of *Chenery*. But the most natural reading of the "with or without remanding" clause may contemplate this kind of discretion.

Alternatively, § 405(g) can be construed to work within *Chenery* when courts are presented with material issues not addressed by the agency, while permitting courts to avoid remanding in cases where the agency has addressed all such issues. This seems to be the approach taken by the D.C. Circuit in *Rossello ex rel. Rossello v. Astrue*.¹⁹³ There, the claimant urged the court to reverse the agency's decision outright and award disability benefits. The court stated that "Section 405 of Title 42 expressly provides that a district court may reverse the Social Security Administration's decision rather than remand it for further proceedings."¹⁹⁴ But the court, citing *Chenery*, declined to do so because the agency had not addressed a material issue.¹⁹⁵ It seems, then, that the court believed § 405(g) allowed a district court to avoid remanding for legal error, but that it nevertheless should be bound by *Chenery*'s other principles.

192 See 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . ."); *supra* note 126 and accompanying text.

193 529 F.3d 1181 (D.C. Cir. 2008).

194 See *id.* at 1186 (citing 42 U.S.C. § 405(g)).

195 *Id.*

2. “[F]or a rehearing”

Finally, whatever force the “with or without remanding” clause may have, the phrase “for a rehearing” may limit its application. Although there does not seem to be any statutory or judicial definition of the term “rehearing” within the meaning of § 405(g),¹⁹⁶ its definition could significantly alter the application of the statute. For example, if a court were to determine that “rehearing” literally means “brand new administrative adjudication,” the statute would not be implicated by any remand demanding less than a full-blown administrative do-over. Of course, this would be an absurd interpretation of the term “rehearing.”¹⁹⁷ It would allow a court to avoid remanding in only those instances where remand is most appropriate—those where a full rehearing is necessary.

It seems a court could define “rehearing” under the statute to mean “any reconsideration on remand,” “full-blown administrative do-over,” or anything in between. Therefore, a discussion of possible interpretations would be voluminous and unhelpful. For purposes of this Note, however, it is enough to acknowledge that a court’s interpretation of the term “rehearing” can significantly affect whatever implications § 405(g) may have on the application of *Chenery* and its progeny. Thus, any court looking to determine § 405(g)’s meaning will have to wrestle with the definition of “rehearing” under the statute.

196 The best available guide appears to come from a Court of Claims opinion interpreting “rehearing” as used in the Revenue Act of 1926, ch. 27, § 274(e), 44 Stat. 9, 56. See *Olds & Whipple, Inc. v. United States*, 22 F. Supp. 809, 818 (Ct. Cl. 1938) (“The filing of the recomputation pursuant to the order of the Board of February 27, 1935, and the submission of the cases thereon to the Board for final decision was a rehearing within the meaning of sections 274 (e) and 272 (e) of the Revenue Acts of 1926 and 1928.”). Oddly enough, this statute also uses the phrase “with or without remanding the case for a rehearing.” See § 1003(b), 44 Stat. at 110 (current version at 26 U.S.C. § 7482(c)(1) (2006)) (giving courts reviewing IRS decisions the power to “affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require”).

197 See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (“It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”); *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 542–43 (1940) (“When [the plain] meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.”); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (“All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose.”).

CONCLUSION

One cannot question that the principles of *Chenery I* are well-established doctrine. We should presume, then, that *Chenery* and its progeny apply in Social Security disability cases. But Congress determines the process by which courts conduct judicial review of agency decisions.¹⁹⁸ And although 42 U.S.C. § 405(g) is ambiguous, the most natural reading of the statute conflicts with at least some of *Chenery's* principles. When paired with the implicit arguments raised in *Powell*, a legitimate claim can be made that the presumption of *Chenery's* applicability in Social Security disability cases has been rebutted. Adopting such an understanding would help ease congestion in the federal courts caused by wasteful remands. It might also alleviate some of the tension between the courts and the Social Security Administration.

Reviewing courts should not ignore these arguments. They should confront the text of § 405(g) and determine what, if any, discretion it confers to the district courts to avoid remanding to the agency. If they determine that the most plausible reading of the statute conflicts with the principles of *Chenery* and its progeny, they should determine the extent to which these principles might nevertheless influence decisions to remand. They should consider issues of judicial economy and the burden placed on the federal courts by wasteful remands. And they should weigh these considerations against concerns of administrative competency and the extent to which disability determinations might benefit from allowing the agency to "bring its expertise to bear upon the matter."¹⁹⁹ In short, they should not unquestioningly apply the principles of *Chenery* to the Social Security disability review process.

198 See SCHWARTZ, *supra* note 100, § 8.2, at 438.

199 See *INS v. Orlando Ventura*, 537 U.S. 12, 17 (2002) (per curiam).

APPENDIX A

42 U.S.C. § 405(g) (2006)

§ 405. Evidence, procedure, and certification for payments

. . . .

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the

Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.