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THE USES AND LIMITS OF REMAND IN ADMINISTRATIVE LAW: STALENESS OF THE RECORD

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During the late nineteenth century, before "administrative law" had become a part of the profession's working vocabulary, judges, lawyers, and scholars were concerned with finding adequate rationalizations for the existence of administrative agencies. What could justify the delegation of legislative authority to groups that quite clearly were not the legislature?

The justifications, of course, were found and have long since carried the day. One justification stressed an agency's superior institutional ability to respond promptly to changes in the conditions being regulated. "What are reasonable [rates] one month may not be so the next," a Minnesota court said in 1888. "For a popular legislature that meets only once in two years, and then only for 60 days, to attempt to fix rates, would result only in the most ill-advised and haphazard action, productive of the greatest inconvenience and injustice alike to the railways and the public. If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, . . . who can change or modify these rates to suit the ever-varying conditions of traffic." [1]

The court's rationale has not always been reflected in practice; administrative agencies often respond hesitantly, "too late, or not at

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[1] Minnesota *ex rel.* Railroad & Warehouse Comm'n v. Chicago, M., & St. P. Ry., 38 Minn. 281, 301, 37 N.W. 782, 788 (1888), *rev'd*, 134 U.S. 418 (1890).

all" [2] to the "ever-varying conditions" under their jurisdiction. Even when they respond promptly, however, they are not always able to prevent further changes from outrunning them. "Time runs out on the Labor Board, as on other persons," [3] the Second Circuit has said, and, as it might have added, on other administrative agencies as well.

It could hardly be otherwise. The administrative process does not exist in Eliot's "still point in time." That point—"the point of intersection of the timeless/With time"—is not of this world; the administrative process is. As Mr. Justice Jackson once remarked, "Administrative consideration of evidence—particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful." [4] It is inevitable that changes in the record facts will sometimes occur during this time "gap." Further changes may occur before judicial review is had.[5] This means that a court will sometimes be asked to enforce an administrative order based upon a record that does not fully reflect the conditions existing at the time it was entered or, in other cases, at the time that judicial review is had.[6]

How should a court respond when it is asked to enforce such an order? Professor Jaffe has said that changed circumstances "present the strongest case for agency reconsideration," [7] particularly if they would render enforcement "inequitable," offensive, or inappropriate,[8] but that "the normal or standard rule is that events subsequent to the issue of the order are immaterial." [9] Courts have not been more

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[2] FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 160 (1962); see BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 177 (1955); LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 22-24 (1960) (printed for the use of the Senate Committee on the Judiciary, 86th Cong., 2d Sess.).

[3] NLRB v. Cosmopolitan Studios, Inc., 291 F.2d 110, 112 (2d Cir. 1961).

[4] ICC v. City of Jersey City, 322 U.S. 503, 514 (1944).

[5] See Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 9 (1942) ("No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do.").

[6] Sometimes a court will be asked to enforce an administrative order entered before a relevant change has been made in the law by statute, see Whitney Nat'l Bank v. Bank of New Orleans, 379 U.S. 411, 424 (1965); Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 171-72 (1962), or by judicial decision. See Klissas v. Immigration & Naturalization Serv., 361 F.2d 529 (D.C. Cir. 1966). The question of the appropriate judicial response to such eventualities is beyond the scope of this article. See Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 912-15 (1962).

[7] JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 715 n.35 (1965) [hereinafter cited as JAFFE].

[8] *Id.* at 264, 272.

[9] JAFFE & NATHANSON, CASES ON ADMINISTRATIVE LAW 772 (2d ed. 1961).

explicit. Remand must be had, said one court, "where, even without fault of the agency, the state of the record may preclude a 'just result.' " [10] Other courts have invoked "the general equity powers which a court exercises in reviewing administrative action"; the order, so runs the repeatedly recited phrase, must be "appropriate for present enforcement," even as an equity order must.[11]

These generalized formulations leave open all of the important questions. When will a change in circumstances render enforcement of an administrative order inequitable, offensive, or inappropriate? What events occurring subsequent to the closing of the administrative record or the issuance of an administrative order should be regarded as material? When will the state of the record preclude a just result? What conditions must exist before an administrative order is appropriate for present enforcement in an equity sense?

The subject is an important one because it asks, in one context, the persistent question of the proper relationship between an administrative agency and a reviewing court.[12] And the answer which I think the question requires—that a court's response must be rooted primarily in considerations made relevant by the statute of the agency which seeks enforcement of its order—supplies a commentary on the hazardous enterprise of framing generalized rules of administrative law.[13]

I

Two recent Supreme Court decisions are a convenient starting point. In both the Court relied upon the staleness of the administrative record as the basis for remand. The cases presented attempts by the Subversive Activities Control Board to enforce orders,[14] affirmed by the

[10] Fleming v. FCC, 225 F.2d 523, 526 (D.C. Cir. 1955). See also LANDIS, THE ADMINISTRATIVE PROCESS 39 (1938).

[11] See, *e.g.*, Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939); New Standard Pub. Co. v. FTC, 194 F.2d 181, 183 (4th Cir. 1952); NLRB v. Norfolk Shipbuilding & Drydock Corp., 172 F.2d 813, 816 (4th Cir. 1949); *cf.* Tuscarora Indian Nation v. FPC, 265 F.2d 338 (D.C. Cir. 1958), *rev'd on other grounds*, 362 U.S. 99 (1960).

[12] This article is concerned only with federal administrative agencies. At least some parts of the present analysis may not be relevant to state administrative agencies, *e.g.*, the discussion premised on the desirability of avoiding decision of constitutional questions.

[13] *Compare* Frankfurter & Nathanson, *Forbidden Dialogue: Standards of Judicial Review of Administrative Action*, in 1963 SUPREME COURT REVIEW 206 (Kurland ed. 1963), *and* Westwood, *The Davis Treatise: Meaning to the Practitioner*, 43 MINN. L. REV. 607, 609 (1959), *with* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 923 (1965), *and* GELLHORN & BYSE, ADMINISTRATIVE LAW ix (4th ed. 1960).

[14] Rogers v. American Comm. for Protection of Foreign Born, 2 S.A.C.B. 375 (1960), *reaff'd sub nom.* Kennedy v. American Comm. for Protection of Foreign Born, 2 S.A.C.B. 439 (1962); Brownell v. Veterans of the Abraham Lincoln Brigade, 2 S.A.C.B. 26 (1955).

court of appeals,[15] that two organizations register as "Communist fronts" under the Subversive Activities Control Act of 1950.[16] Although it may be thought that the cases should be regarded as *sui generis*, perhaps even as sports, they deserve and repay attention. They are among a small number of Supreme Court decisions involving the problem of staleness of an administrative record.[17] In addition, they provide a useful basis for the development of an analysis that has relevance to other administrative agencies, to other regulatory statutes, and to the problem of remand in general.[18]

Both cases were decided by per curiam opinions. In *American Committee for Protection of Foreign Born v. SACB*, the longer of the two opinions, the Court outlined the facts underlying its decision to remand the case to the Board:

> In the present case the Board's findings that petitioner is a "Communist front" were based primarily upon evidence taken at a hearing which was concluded in 1955. The findings which support the conclusion that the petitioner is controlled by and primarily operated for the purpose of giving aid and support to the Communist Party rest in substantial measure upon evidence of the activities of Abner Green, found to be a party member expressly assigned in 1941 to be petitioner's executive secretary. Green died in 1959. The Board's order was filed on June 27, 1960, but the record discloses no findings or evidence concerning petitioner's activities after Green's death. In the circumstances we think that the record should be brought up to date to take account of supervening events. Since a registration order operates prospectively, it is apparent that reasonably current aid and control must be established to justify a registration order. Our *Communist Party* decision on the Communist-action provisions did not necessarily foreclose petitioner's constitutional questions bearing on the Communist-front provisions. Since petitioner's current status is not clear on this record, decision of the serious constitutional questions raised by the order is neither necessary nor appropriate.[19]

In *Veterans of the Abraham Lincoln Brigade v. SACB* the Court gave its reasons in shorter compass:

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[15] American Comm. for Protection of Foreign Born v. SACB, 331 F.2d 53 (D.C. Cir. 1963); Veterans of the Abraham Lincoln Brigade v. SACB, 331 F.2d 64 (D.C. Cir. 1963).

[16] 64 Stat. 987 (1950), as amended, 50 U.S.C. §§ 781-98 (1964). The Act is Title I of the Internal Security Act.

[17] See also DeGregory v. Attorney General, 383 U.S. 825 (1966) (staleness of state's basis for investigation into subversive activities).

[18] The present analysis has implications, I think, for other grounds of remand such as inconsistency and failure to state adequate reasons. I hope to explore some of these implications in a subsequent article.

[19] 380 U.S. 503, 504-05 (1965). A more detailed chronology appears in the dissenting opinion of Mr. Justice Douglas. *Id.* at 506 n.1.

> In this case, the order to register was based almost exclusively on events before 1950, and very largely on events before 1940. The hearings themselves were concluded in November 1954, more than 10 years ago. On so stale a record we do not think it is either necessary or appropriate that we decide the serious constitutional questions raised by the order. See *American Committee for Protection of Foreign Born v. Subversive Activities Control Board.*[20]

The decisions turned upon a requirement that an order of the Subversive Activities Control Board be based on a record reflecting the "current status" of the organization being proceeded against. The key sentence reads, "Since a registration order operates prospectively, it is apparent that reasonably current aid and control must be established to justify a registration order." [21] The Court went no further; it did not supply authority or argument to support its choice of staleness as the basis for remand.

It is understandable that the Court was not eager to decide the merits. These were unusual cases. One need not be perspicacious to believe that a majority of the Court shared the liberal consensus that the legislative preferences embodied in the Act were profoundly unwise. Had the Court taken up the merits, it might have been led to sustain the "Communist-front" provisions of the Act, to hold, that is, that they were not unconstitutional. By such a decision the Court would have run the serious risk of being read as having said much more—as having bestowed "the vital quality of legitimacy" [22] on the legislative preferences of the Act. Of course, it is not at all clear that the Court would have found itself compelled in a decision on the merits to sustain the "Communist-front" provisions. A few Terms earlier, in *Communist Party v. SACB*,[23] the Court had upheld the sections of the Act that were the most defensible—those directed at "Communist-action" groups such as the Communist Party—by only a narrow margin. And during the previous Term, in *Aptheker v. Secretary of State*,[24] the Court had held unconstitutional a section of the Act relating to passport denials. The Court did not overstate when it said that these cases presented

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[20] 380 U.S. 513, 514 (1965). The Brigade's activities during the Spanish Civil War are discussed in BROME, THE INTERNATIONAL BRIGADES 105-18 (1966).

[21] 380 U.S. at 505.

[22] BLACK, THE PEOPLE AND THE COURT 117 (1960).

[23] 367 U.S. 1 (1961). The Court in the *Communist Party* case carefully limited its holding to cases involving foreign-dominated organizations having the objective of overthrowing the government and establishing a totalitarian regime. See also American Comm. for Protection of Foreign Born v. SACB, 331 F.2d 53, 62 (D.C. Cir. 1963) (Bazelon, C.J., dissenting).

[24] 378 U.S. 500 (1964). See also Albertson v. SACB, 382 U.S. 70 (1965).

"serious constitutional questions." [25] Either decision on the merits would have had uneasy consequences: by the one the Court would have run the risk of being read as having "legitimated" a statute that it almost surely regarded as unwise in policy, by the other it would have held unconstitutional a statute passed (over a presidential veto) by a coordinate branch of government.

The Court avoided deciding the merits by remanding on the ground of staleness. It did not, it is true, locate the staleness rationale explicitly in the statute. It is also true that "the Court's omission of a particular known and available ground" [26] of decision is sometimes significant. Is the significance here that the Court regarded staleness as an undifferentiated ground of general application in cases arising from administrative agencies? There is reason to think not.

The meaning of the "Communist-front" registration provisions of the Act had been explored carefully by the court of appeals. The court had found, in both the language and the policy of the statute, an evidentiary requirement that the Attorney General's proof of status be "timely." In *National Council of American-Soviet Friendship, Inc. v. SACB*, the opinion in which the subject is discussed most extensively, the court said:

> First, the provisions of the statute are phrased in the present tense. The statutory definition of a Communist front is cast in the present tense. A Communist-front organization is one which *is* (not was or has been) substantially directed, etc., and *is* primarily operated, etc. The restrictions are upon those who are members when the organization is registered or the order requiring registration becomes final. And this would seem to be designedly so, because the public interest is in the activities of such organizations in the present and the potential future. This is not a punitive statute for past affairs. The question on this record and under the statute is whether this Council was a Communist-front organization at the time of the inquiry by the Board. This is an important factor in the case.[27]

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[25] See, *e.g.*, Chafee, *The Registration of "Communist-Front" Organizations in the Mundt-Nixon Bill*, 63 HARV. L. REV. 1382 (1950); Sutherland, *Freedom and Internal Security*, 64 HARV. L. REV. 383 (1951); Note, *The Registration of Communist-Front Organizations: The Statutory Framework and the Constitutional Issue*, 113 U. PA. L. REV. 1270, 1283-94 (1965).

President Truman's veto message relied heavily on the view that "the application of the registration requirements to so-called Communist-front organizations can be the greatest danger to freedom of speech, press, and assembly, since the Alien and Sedition Laws of 1798." 96 CONG. REC. 15630 (1950). The unconstitutionality of the statute was also argued in Congress. See, *e.g.*, 96 CONG. REC. 15701 (1950) (remarks of Senator Kefauver); 96 CONG. REC. 13745 (1950) (remarks of Representative Doyle). *But see* McCarran, *The Internal Security Act of 1950*, 12 U. PITT. L. REV. 481, 489-95 (1951).

[26] Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 97 (1965).

[27] 322 F.2d 375, 379 (D.C. Cir. 1963) (emphasis in original).

In *American Committee* the court of appeals alluded to this discussion in order to incorporate it by reference.[28] In *Veterans of the Abraham Lincoln Brigade* it restated a part of it: "The statute is cast in the present tense. It is not designed to produce historical treatises. It is designed to compel the public registration of organizations which, subsequent to the passage of the Act, operate to aid the aims of the Communist movement. This time element is not a technicality, or a happenstance, or a matter of semantics. It is a basic concept." [29] The concept of what the Supreme Court came to call a "current status" record was basic exactly because the "1930's, '40's and '50's, *i.e.*, the years before, during and after World War II, witnessed three different policy periods in the relationships between the Soviet Union and the United States." [30] Activity during these periods, although telling when raised in political debate, was not relevant to a statute that, as a control device, sought "to prevent by exposure and sanction the accomplishment of defined Communist aims in this country." [31]

The statutory basis for the requirement of a "current status" record, then, was strong. The Subversive Activities Control Act was not "designed to produce historical treatises" or "to exhume skeletons and condemn them to perpetual infamy." [32] Enforcement of an order based upon a stale record could have just those results.[33] The Supreme Court's statement that "since a registration order operates prospectively, it is apparent that reasonably current aid and control must be established to justify a registration order," might well be read as a shorthand summary of the statutory purpose argument worked out by the court of appeals.[34]

The facts in *American Committee* make clear precisely how stale the record was. The Board's findings that the Committee was a "Communist front" were based, as the Court said, "primarily upon evidence taken at a hearing which was concluded in 1955." [35] The Board's order was not issued until 1960. And although the Board's

[28] 331 F.2d at 55.

[29] 331 F.2d at 67-68. See also *id.* at 69 n.10. Although the court of appeals sustained the Board's order, Judge Bazelon dissented on the ground that the record "was stale when the Board made its findings." *Id.* at 74.

[30] *Id.* at 68.

[31] Note, 74 YALE L.J. 738, 743 (1965).

[32] *Id.* at 743; see Labor Youth League v. SACB, 322 F.2d 364, 371 (D.C. Cir. 1963) ("We do not perceive that the registers are designed either as history books or as fiction.").

[33] The existence of a final order—finalized by this court—would appear to establish the present existence of the organization and its Communist-front nature. The appearance of actuality thus created would be a reasonable inference.
Labor Youth League v. SACB, 322 F.2d 364, 372 (D.C. Cir. 1963).

[34] See International Union of Mine Workers v. SACB, 353 F.2d 848, 849 n.2 (D.C. Cir. 1965).

[35] 380 U.S. at 504. See also 331 F.2d at 70 ("Almost startling is the fact that so little of the evidence relates to 1950 or years thereafter.").

findings rested "in substantial measure upon evidence of the activities of Abner Green," [36] the record disclosed no evidence or findings with respect to the Committee's activities after his death in 1959. Thus, in sum, the Board in 1965 was asking the Court to enforce an order entered in 1960, based upon a five-year old record that did not take into account (whether or not it should have changed the administrative result) the death of the Committee's "top functionary" and "most influential official" [37] the year before. In a universe governed by a statute limiting administrative action to prospective impact, the fact of Abner Green's death four years after the closing of the record makes a persuasive case for remand.

There were, to be sure, elements in the cases that might have counseled against remand or at least have suggested limitations on the offices that remand could perform.

The immediate effect of the Supreme Court's decisions to remand was to avoid a decision on the validity of the Board's orders, which is to say a decision on the "serious constitutional questions" presented. The staleness rationale was the Court's basis of avoidance. As such, it shares some of the qualities of the Court's more conventional devices for avoiding constitutional adjudication on the merits—the doctrines of ripeness and exhaustion of administrative remedies, for example, that Professor Bickel celebrates as "passive virtues." [38] By using the rationale of staleness, the Court did not refuse for all time to pass upon the Board's orders; it merely put off passing upon them until the records had been developed further. More highly developed records, assuming that the constitutional questions persisted after action on remand, would at least provide an enlarged factual context in which to explore the reach of the questions and might well cast them in a different light. By so doing, remand might supply the Court with a greater sense of confidence that the constitutional questions had been structured in as many dimensions and presented in as much depth as might be thought useful to wise adjudication.

The persuasiveness of this rationale depends upon one's estimate of how useful additional factual information might be. If the questions that *American Committee* and *Veterans of the Abraham Lincoln Brigade* presented can properly be regarded as relating primarily to

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[36] 380 U.S. at 504.

[37] *Id.* at 508-09 (Douglas, J., dissenting); see 331 F.2d at 55-56.

[38] Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), in SELECTED ESSAYS ON CONSTITUTIONAL LAW 1938-62, at 24 (1963); BICKEL, THE LEAST DANGEROUS BRANCH ch. 4 (1962) [hereinafter cited as BICKEL]. Compare Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

the constitutionality of the statute as applied, additional factual information plainly would be helpful. Mr. Justice Douglas, dissenting in opinions joined by two other members of the Court, may have believed that the cases presented questions of the constitutionality of the statute on its face; he wrote, "All of the relevant facts one needs to know to resolve the constitutional question are exposed in the present record." [39] If this is the proper characterization of the questions, additional factual information would be less helpful, although in particular cases the actual operation of a statute can be critical to a determination of its constitutionality on its face. The Court's orders to remand, then, conceivably could serve the purpose of improving the quality of the decision of the constitutional questions presented, however they are characterized.

Often, however, in remanding a case to an agency, a court may hope to achieve more than just an enlargement of the range and particularity of the record. It may hope to provide the agency with an opportunity to consider—once the court has announced its assessment that the agency's action raises serious questions of validity—whether regulatory exigencies finally require that the questions be pressed.[40] Until the court has spoken, the agency may not be sensitive to the possibility that its decision threatens constitutional values. Remand has the capacity for inviting a dialogue with an agency on the "preliminary question how importunately the occasion demands" [41] that *this* course of action be followed, to the rejection of other, perhaps less effective, courses that have the simple virtue of being clearly constitutional. As such, remand can be a device for moderating the inadvertent or precipitous presentation of questions of basic legality.

The Supreme Court's decision in *Kent v. Dulles*,[42] although it did not result in an order to remand, provides a provocative illustration when juxtaposed with the decisions in *American Committee* and *Veterans of the Abraham Lincoln Brigade*. The issue in *Kent* was the validity of regulations promulgated by the Secretary of State pursuant to a general statutory authorization to "grant and issue passports . . . under such rules as the President shall designate and prescribe . . . ." [43] The regulations required passport applicants to "subscribe, under oath or affirmation, to a statement with respect

[39] 380 U.S. at 514.

[40] See, *e.g.*, Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946). The Commission's response on remand appears in Jacob Siegel Co., 43 F.T.C. 256 (1946).

[41] HAND, THE BILL OF RIGHTS 15 (1958).

[42] 357 U.S. 116 (1958).

[43] 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1964). The Court quotes the relevant sections of the statute in its opinion. 357 U.S. at 123.

to present or past membership in the Communist Party." [44] Kent challenged the constitutionality of this requirement. The Court found that it "would be faced with important constitutional questions" [45] if the statute authorized the regulations; by granting the Secretary "authority to withhold passports to citizens because of their beliefs or associations," [46] Congress at least would have approached and might have trenched upon the right to travel guaranteed by the fifth amendment.

The Court did not accept Kent's challenge in his terms. Instead, it held as a matter of statutory construction that Congress had not delegated to the Secretary the authority to condition the issuance of passports upon an applicant's beliefs or associations. At least "Congress has made no such provision in explicit terms," [47] the Court said, and that, taken with a century of historical practice, was enough to support a narrow reading.[48] One effect of the Supreme Court's decision was to avoid a decision on the "important constitutional questions" presented. Another effect, and a more significant one, was to create conditions conducive to reconsideration of the requirement in question.

The Court's decision in *Kent* held that the regulations issued by the Secretary were invalid because Congress had not authorized the Secretary to issue them. Quite obviously, it would have been supererogatory for the Court then to have asked the Secretary to develop the record more fully or to reconsider whether he wanted to issue these particular regulations. The Court, by its decision, was not speaking to the Secretary. But it was, clearly enough, speaking to Congress.

The Court, in an important sense, was instructing Congress that a policy choice to require that passport applicants supply a statement as to their past or present membership in Communist organizations would invite searching constitutional inquiry. The Court did not tell Congress to make that choice or to avoid making it; but it did give Congress the chance—whether Congress would choose to take it is another question—to reconsider the choice with an awareness that it would implicate fundamental values. "This," as Professor Bickel

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[44] 17 Fed. Reg. 8014 (1952). See 357 U.S. at 118 n.2.

[45] 357 U.S. at 130.

[46] *Ibid.*

[47] *Ibid.*

[48] The Court's reading of the prior historical practice was sharply disputed by the dissenting opinion and elsewhere has been characterized as "fictive." BICKEL 201; see Zemel v. Rusk, 381 U.S. 1 (1965); Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 22-23 (1956); *cf.* Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER: THE JUDGE 30, 44 (Mendelson ed. 1964).

has written, "was remanding to Congress for a second look—not for the necessary initial decision, but for orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made backhandedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance." [49] The Court's decision in *Kent*, by interpreting the statute narrowly, created the opportunity for a "sober second thought" [50] by Congress: Was it necessary or useful or wise to grant the Secretary the authority he had thought he possessed if to do so would be to press constitutional questions? The initiative lay with Congress.[51]

By comparison with the disposition in *Kent*, the Court in *American Committee* and *Veterans of the Abraham Lincoln Brigade* was not speaking to Congress.[52] It is true that Congress could have responded to the Court's assertion of constitutional doubts by repealing or modifying the Act to remove them, but political realities would surely have made that an unlikely eventuality. The Court, instead, was speaking to the Board. But this does not necessarily mean that proceedings on remand will result in consideration of the "serious constitutional questions" that troubled the Court.

The reason lies in the institutional limitations of the Board. The Board does not have the freedom, as Congress does, to repeal or modify a statute under the pressure of constitutional doubts. It is hornbook law that "we do not commit to administrative agencies the power to determine constitutionality of legislation" [53] when the challenge is to the face of the statute. If the challenge that *American Committee* and *Veterans of the Abraham Lincoln Brigade* present is properly spoken of as directed at the statute on its face, the Board "can hardly be expected to entertain" [54] the questions which it raises; in short, the constitutional questions would not receive consideration

[49] BICKEL 165-66. Compare DOWLING & GUNTHER, CASES ON CONSTITUTIONAL LAW 161-62 (7th ed. 1965). My reading of the decision in *Kent* quite obviously relies upon Professor Bickel's analysis. The question of "remanding to Congress for a second look" is explored in Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, in 1961 SUPREME COURT REVIEW 49 (Kurland ed. 1961).

[50] Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936). Compare WYZANSKI, WHEREAS—A JUDGE'S PREMISES 162 (1965); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 475 (1954).

[51] Compare Greene v. McElroy, 360 U.S. 474, 509 (1959) (Harlan, J., concurring specially). For the estimate that in *Kent* the "Court's action in remanding the issue to Congress bore some fruit," see BICKEL 166.

[52] The possibility that the Court might have been able to speak to Congress by granting the statute a narrow construction is discussed in Note, 74 YALE L.J. 738, 747-51 (1965). Compare Note, *The Internal Security Act of 1950*, 51 COLUM. L. REV. 606, 609-13 (1951).

[53] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958).

[54] Public Util. Comm'n v. United States, 355 U.S. 534, 539 (1958).

on remand.[55] The system does, it is true, commit to administrative agencies the power to determine the "constitutional applicability of legislation to particular facts";[56] when questions of this kind are presented, remand can result in fruitful consideration.[57] Although the Court has not been clear or consistent in fashioning a distinguishing rule,[58] these cases almost certainly should be regarded as presenting

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[55] Of course, the Board could avoid pressing the constitutional questions by deciding to drop the proceedings, or the Attorney General could so petition the Board. But this course, if it rested on no further reasons than a desire to escape a declaration on the constitutional issues, would render enforcement of the statute a dead letter. The Board is more likely to take the course of pressing the constitutional questions in carefully selected cases in which it believes that its chances of prevailing are best.

[56] 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958).

An administrative agency also has the power "initially [to] apply a broad statutory term to a particular situation." Atlantic Ref. Co. v. FTC, 381 U.S. 357, 367 (1965); see NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944); Gray v. Powell, 314 U.S. 402, 411-13 (1941); Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470 (1950); Nathanson, *Mr. Justice Frankfurter and Administrative Law*, 67 YALE L.J. 240, 262-63 (1957). This suggests why the conceit of remand as a colloquy between court and agency is more apt in cases raising questions about the limits of an agency's statutory authority than it is in cases raising questions about the limits of Congress' constitutional authority.

[57] Commissioner Eastman's statement remains persuasive:

> Every candid person who has studied the "due-process" clause and the many cases where it has been successfully or unsuccessfully invoked will concede that it offers wide scope for judicial interpretation, that in the process of interpretation the court is, and of necessity must be, guided largely by its conception of what is inherently just and consistent with a sound public policy, and that such conception is not a constant but a variable quantity dependent upon the political and economic views, habits of thought, extent of knowledge, and degree of enlightenment prevailing not only in the court but in the community generally. . . .
>
> In determining such questions knowledge of pertinent facts and an experience which makes it possible to visualize the probable results of a particular public policy are quite as important as familiarity with the law books. It is an instance in which the law is influenced if not governed by the facts. When, therefore, the question relates to the constitutional limits of the public regulation of railroads, an intimate knowledge of railroads, of their relations with and their importance to the shipping and investing classes and to the public generally, and of their past history and future prospects becomes of the highest consequence. Such knowledge it is the peculiar duty of this commission to acquire. As to such matters it occupies a daily front seat upon the stage, while the Supreme Court of necessity is only an occasional visitor in the balcony. Whether the commission has the ability to make the best use of its opportunities for knowledge may be open to debate, but at least it must proceed upon that assumption.
>
> I can not avoid the conclusion that the commission would be derelict in its duty in this case if it should confine its attention, so far as the fundamental law is concerned, to past utterances of the court in more or less analogous cases and should neglect the illumination which is thrown upon the law by its own intimate knowledge of transportation affairs and problems. . . . After the court has heard what we have to say it may decide that our conclusions as to the fundamental law are erroneous, and that will end the matter; but certainly we ought not to deprive the court of the help which it may gain from the special knowledge which it is our duty under the law to acquire.

Excess Income of St. L. & O. Ry., 124 I.C.C. 3, 50-51 (1927) (concurring opinion), *modified*, 22 F.2d 980 (E.D. Mo. 1927), *rev'd*, 279 U.S. 461 (1929).

[58] *Compare* United States v. Raines, 362 U.S. 17 (1960), *with* Aptheker v. Secretary of State, 378 U.S. 500 (1964). *Cf.* Karst, *Legislative Facts in Constitutional Litigation*, in 1960 SUPREME COURT REVIEW 75, 89-95 (Kurland ed. 1960); Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 661-67 (1966).

challenges to the constitutionality of the statute on its face. There is little in their facts to suggest that they stand in a different relation to the statute than other cases arising under it had or would. If the orders to remand were based upon a view that the cases presented challenges to the constitutionality of the statute as applied, it is surprising that the Court did not make this plain so that the Board might have known what was expected of it.

The relevance of the comparison with *Kent v. Dulles*, then, lies in its suggestion that for institutional reasons the decisions to remand in *American Committee* and *Veterans of the Abraham Lincoln Brigade* could not be expected to result in consideration of "serious constitutional questions" concerning the statute on its face. Therefore, it seems likely that the most certain function that remand could perform, other than avoidance of the constitutional questions or mere temporization with the Board, would be to bring the records into compliance with the "current status" requirement of the Act, although it also might result in the production of additional factual information that would be useful to the Court in determining the constitutionality of the statute, even on its face.

For Mr. Justice Douglas, dissenting, there were further reasons for believing that remand was not appropriate. In the first of the cases, the Committee had made no attempt, before the Board or before the court below, to allege facts showing that Abner Green's death had converted it into "a legally different entity." [59] It had "made no effort to reopen the record for evidence concerning Green's successor, any new policies now in effect, or the like," [60] nor had it asked the court of appeals to remand the case for the taking of new evidence, although both courses were open to it. And in the companion case, "None of the parties before us has suggested that the record is stale or incomplete . . . . None of the parties before us has suggested that we need to know more about the Brigade since the Board's decision in 1955." [61] These are relevant arguments that might have prevailed in another context,[62] but it seems proper that they did not prevail here.

That neither party has requested a remand has not generally been allowed to control the question in similar cases. Courts have remanded cases to administrative agencies even though all the parties to the

[59] 380 U.S. at 507 n.2. *But see id.* at 504-05 n.1.

[60] *Id.* at 507 n.2.

[61] *Id.* at 516.

[62] See, *e.g.*, Colorado Radio Corp. v. FCC, 118 F.2d 24 (D.C. Cir. 1941); R.C.A. Communications, Inc. v. United States, 43 F. Supp. 851, 858 (S.D.N.Y. 1942).

appeal have urged that the merits be decided now.[63] As a matter of judicial administration, the practice is plainly necessary. When a court sits to enforce an administrative order that a "Communist-front" organization register with the Board, it sits much as a court of equity; the court "is involved in the judgment, not simply negatively by way of veto, but affirmatively." [64] Violation of the Board's order carries no sanction until it has been enforced by a court.[65] "The decree, when entered, is a judicial order," [66] as Judge Prettyman has written. Violation of the decree is not merely contempt of court, as is usually the case when a court decrees enforcement of an administrative order, but a criminal offense as well.[67] When a court becomes this "positively implicated in the enforcement of the law," [68] it is right that it be satisfied by its own standards with the state of the record upon which an enforcement order will be based.

Both experience and common sense suggest that a court which takes the parties' judgment as to the desirability of a present decision on the existing record will do so at a risk. Parties are adversaries, properly so, whose concern for the integrity of a court's equity processes cannot be assumed to be as sensitive as a court's. In *American Committee*, for example, it would be understandable if the Board, having experienced several postponements already, were "interested in bringing a prolonged case to a close" [69] and knowing the satisfaction of winning. The Committee's incentive to raise the issue of staleness may not have been greater. Having been involved in what increasingly must have seemed an administrative war of harassment and attrition, the Committee might understandably be impatient

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[63] NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965); Fleming v. FCC, 225 F.2d 523 (D.C. Cir. 1955). Compare Communist Party v. SACB, 351 U.S. 115 (1956).

[64] JAFFE 264; *cf.* Labor Youth League v. SACB, 322 F.2d 364, 371 (D.C. Cir. 1963).

[65] 64 Stat. 1001 (1950), as amended, 50 U.S.C. §§ 793-94 (1964). Although an order of the Board may become final "upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time," 64 Stat. 1001 (1950), as amended, 50 U.S.C. § 793(b)(1) (1964), this will not be the usual method.

[66] NLRB v. Eanet, 179 F.2d 15, 20 (D.C. Cir. 1949).

[67] 64 Stat. 1002 (1950), 50 U.S.C. § 794 (1964). Contempt of court, of course, can ripen into a jail sentence, see NLRB v. Savoy Laundry, Inc., 354 F.2d 78 (2d Cir. 1965), but it is rare for this to happen. *Cf.* Note, *Use of Contempt Power To Enforce Subpoenas and Orders of Administrative Agencies*, 71 HARV. L. REV. 1541 (1958).

[68] JAFFE 264. The court is further implicated by the statutory requirement that Board orders be supported by "the preponderance of the evidence," rather than by the usual formulation of substantial evidence. 64 Stat. 1001 (1950), as amended, 50 U.S.C. § 793(a) (1964); see 96 CONG. REC. 14531 (1950) (remarks of Senator Ferguson); 96 CONG. REC. 13765 (1950) (remarks of Representative Nixon).

[69] Comment, 114 U. PA. L. REV. 939, 948 (1966).

to be rid of the proceedings and to win, finally, a vindication of its constitutional claims and an exoneration of its name.[70]

The attitude of the parties, then, ought not be allowed to foreclose inquiry into the possibility that with Green's death the record no longer reflected the character of the Committee. Mr. Justice Douglas was satisfied to make that inquiry himself. The testimony adduced before the Board makes clear, he wrote, "that the organization had an existence above and beyond Green himself." [71] But ordinarily an assessment of the Committee's operations "above and beyond Green himself" would in the first instance be for the Board to make.[72] As the court of appeals said in a subsequent case involving the Board, "It is the Board—and not this court—which must first determine status on a reasonably current record." [73]

But what if Abner Green had not died? Would the Court nonetheless have found the lapses of time since compilation of the record (ten years) or entry of the Board's order (five years) a sufficient basis for remand? The answer almost certainly is that it would. Indeed, in *Veterans of the Abraham Lincoln Brigade*, where the hearings were concluded "more than 10 years ago" [74] and there was no allegation of any specific change of circumstance since, the Court found just that. Given the extended lapse of time since the record was closed, the decision to remand may well reflect a practical assumption that relevant changes in circumstances have probably occurred in the interim.[75]

Courts have made such an assumption in other cases. For example, in *WORZ, Inc. v. FCC*,[76] a license proceeding which three

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[70] On November 1, 1965, the court of appeals remanded to the Board a case ordering a union to register as a "Communist-infiltrated" organization. The remand was based upon the decisions in *American Committee* and *Veterans of the Abraham Lincoln Brigade*. International Union of Mine Workers v. SACB, 353 F.2d 848 (D.C. Cir. 1965). On June 13, 1966, the Attorney General moved the Board to vacate the order. The union's president described the Attorney General's decision as "a vindication after ten years of harassment" of the union's denial that it was "Communist infiltrated." N.Y. Times, June 15, 1966, p. 51, col. 5 (city ed.).

[71] 380 U.S. at 509.

[72] *Cf.* NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 416, 428 (1947); Greater Boston Television Corp. v. FCC, 334 F.2d 552, 554 (D.C. Cir. 1964).

[73] International Union of Mine Workers v. SACB, 353 F.2d 848, 851 (D.C. Cir. 1965).

[74] 380 U.S. at 513.

[75] Compare International Union of Mine Workers v. SACB, 353 F.2d 848, 850-51 (D.C. Cir. 1965), in which remand was ordered. The court stated the chronology as follows:

> This proceeding was initiated by the Attorney General on July 28, 1955. Hearings did not get under way until February 25, 1957, and continued intermittently until March 10, 1961. The examiner's recommended decision was forthcoming December 26, 1961; and the Board's order was issued May 4, 1962.

[76] 345 F.2d 85 (D.C. Cir.), *cert. denied sub nom.* Mid-Florida Television Corp. v. FCC, 382 U.S. 893 (1965).

times came up on appeal and three times was sent back, the court on the third appeal expressed "a nagging uncertainty" as to whether the public interest would be "adequately effectuated by confining the choice to these two applicants in the light of facts put on the record over ten years ago." [77] In ten years the character of a community—the composition of its population, the configuration of its economy, the nature of its communications media—can change significantly.[78] The court ordered the Commission to reopen the proceeding and to hold a new hearing. Similarly, in *NLRB v. Eanet* [79] the court declined to enforce a Labor Board order directing an employer to bargain collectively "with a named union on the basis of a showing that more than two years ago the union had been selected by six out of nine or ten bellboys, maids and a houseman in this small hotel." [80] The court supported its decision by reference to the "common knowledge that the personnel, such as bellboys, elevator operators, maids and janitors, of small hotels constantly changes." [81]

There will inevitably be cases, however, in which (1) the court's attention is not drawn to any specific changes in circumstances comparable in significance to Abner Green's death, and in which (2) the time lapse, although lengthy, is not as extended as it was in *American Committee* and *Veterans of the Abraham Lincoln Brigade*. Should these cases, too, be remanded on the basis of a working assumption that there probably have been significant changes in the circumstances upon which the Board's order rests? This is the question, *mutatis mutandis*, of determining the relevant time at which the administrative record must establish the "current status" of an organization as a "Communist front."

The Subversive Activities Control Act does not provide an answer; Congress did not speak to the issue in terms. The Supreme Court, beyond saying that "the record should be brought up to date to take account of supervening events," [82] did not speak to the issue either. The court of appeals had selected "the time of hearing or reasonably

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[77] *Id.* at 86. *But see* Illinois Cent. R.R. v. Norfolk & W. Ry., 385 U.S. — (1966).

[78] See Comment, 114 U. PA. L. REV. 939, 947-48 (1966).

[79] 179 F.2d 15 (D.C. Cir. 1949). See also NLRB v. Prigg, 172 F.2d 948 (5th Cir. 1949).

[80] 179 F.2d at 17.

[81] *Ibid.* If the court's decision to deny enforcement rests on this ground alone, it is difficult to harmonize with the authorities. Franks Bros. v. NLRB, 321 U.S. 702 (1944); NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563, 568 (1950). However, as the court's opinion on rehearing suggests, several pressures were at work to compel the result of non-enforcement: the court's doubts that the employer's hotel had any impact on interstate commerce, the absence of substantial evidence, the court's sense that this was an "extremely minor" matter best settled by negotiation. 179 F.2d at 17-21.

[82] 380 U.S. at 504-05.

close to it." [83] The Supreme Court, on the chronology presented, found this date too early, although it is not clear that it would hold the same way in cases in which the administrative decision was reached and judicial review had in more typical course. The suggestion that as a result of these decisions "the Government will have to keep its case timely through the entire litigation" [84] cannot be accepted; if it were, a vicious cycle would be created in which the conditions of judicial enforcement would be impossible of attainment.[85] Perhaps the most that can be said in cases of the present description is that the administrative record must provide a reliable demonstration of what the character and activity of the organization being proceeded against are likely to be at the time that the Board's order is enforced and for some time thereafter.

But what is "a reliable demonstration"? The judgment must be a prudential one, and such judgments can be made wisely only on a case-by-case basis. Some records will make out a more compelling case for a decision to remand than others, even though the lapses of time since the records were closed may be of about the same length. Several factors that will contribute to this decision have already been mentioned: the relative importance that the statutory design attaches to current findings of fact in the achievement of statutory objectives, the comparative usefulness of additional factual information to resolution of any constitutional questions presented (which may depend upon the relative seriousness, difficulty, or novelty of the questions), the degree to which a court's equity powers may be implicated in the enforcement of the administrative order. There will be other factors as well; although it is not possible to catalog all of the factors that will be at play in any given case, it is possible to suggest what some of them may be.

The particular facts set forth in the administrative record often will say a great deal about the stability of the organization that the Board has ordered to register. Some records will describe groups that have histories of organizational cohesion and doctrinal continuity. Because, as the Supreme Court has said, "institutions, like other organisms, are predominantly what their past has made them," [86] it

[83] Veterans of the Abraham Lincoln Brigade v. SACB, 331 F.2d 64, 68 (D.C. Cir. 1963); see National Council of American-Soviet Friendship, Inc. v. SACB, 322 F.2d 375, 379 (D.C. Cir. 1963) ("The question on this record and under this statute is whether this Council was a Communist-front organization at the time of the inquiry by the Board.").

[84] Note, *The Registration of Communist-Front Organizations: The Statutory Framework and the Constitutional Issue*, 113 U. PA. L. REV. 1270, 1277 (1965).

[85] Compare Jefferson School of Social Science v. SACB, 331 F.2d 76, 84 (D.C. Cir. 1963) (Bazelon, C.J., dissenting).

[86] Communist Party v. SACB, 367 U.S. 1, 69 (1961).

may be possible in such cases for a court to conclude that an organization that had a certain policy and program in the past "has the same policy and program in the present." [87] Other records will describe organizations that have characteristically been beset by factional strife and signal fluctuations in membership, energy, and ideology. Such records more insistently raise the likelihood of significant intervening change. The question will be whether they do so with sufficient force to justify remand when actual changes have not been demonstrated and the length of the lapse of time is not by itself necessarily persuasive. A court deals here in hints and guesses. In some cases, which means in cases falling at either end of a continuum, a court may be able fairly to draw the inference that the character of an organization is quite likely or quite unlikely to have changed pertinently since the record was made.

However, in most cases the state of the record will preclude a court from drawing either inference with confidence. Then a court must consider other factors in deciding whether to remand. These will include the effect that remand will have upon the life of the organization involved and upon the responsibilities of the Board. Consideration of these factors raises issues in several dimensions.

Organizations that attract the Attorney General's attention and engage the Board's processes are typically more notorious, even boisterous, than affluent.[88] A new round of proceedings will mean a new outlay in litigation costs of funds that are likely to be scarce already. In addition, a new round of proceedings, by perpetuating the cloud hanging over an organization's head, may mean that prospective members will be discouraged from joining and present members from remaining. A court contemplating remand can hardly be unaware that depletion of an organization's lifeblood—its financial resources and its membership—can occur in the interim (just as courts

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[87] Communist Party v. SACB, 223 F.2d 531, 570 (D.C. Cir. 1954), *rev'd*, 351 U.S. 115 (1956).

[88] In Weinstock v. SACB, 331 F.2d 75 (D.C. Cir. 1963), the United May Day Committee, apparently unable to afford a lawyer, appealed a registration order on the basis of briefs filed in another case "insofar as any points of Constitutional Law are raised therein." *Ibid.* See also National Council of American-Soviet Friendship, Inc. v. SACB, 301 F.2d 518 (D.C. Cir. 1962); CHAFEE, THE BLESSINGS OF LIBERTY 143 (1956).

The Attorney General recently filed a petition with the Board seeking an order requiring that the W.E.B. DuBois Clubs of America register as a "Communist-front" organization. Katzenbach v. W.E.B. DuBois Clubs, No. 127-66, SACB, Mar. 4, 1966. The Clubs are youth groups with chapters located primarily on college campuses. STAFF OF SUBCOMM., SENATE COMM. ON THE JUDICIARY, 89TH CONG., 2D SESS., REPORT ON COMMUNIST YOUTH PROGRAM (Comm. Print 1966); *Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 3 (1965).

can hardly be unaware of the consequences to the plaintiff of reversing a personal injury verdict and remanding for a new trial).[89]

If this is an approach from what might be called the private interest of the organization ordered to register, it is necessary to acknowledge an important limitation. The concept of a private interest as a consideration of general application in the decision-making processes of administrative agencies has not often been articulated by courts.[90] This is not surprising. The price of maintaining a society in which the Government has a responsibility to act and in which its actions are made subject to judicial review must sometimes come high. Moreover, although most regulatory statutes command an agency to act in the public interest, none mandates an agency *in haec verba* to give weight to any private interest. None of this is to say that a private right argument can never be made; it is only to say that such an argument, if it is to be successful, must be rooted in considerations made relevant by statutory policy. Do the materials exist, then, for the creation of a private right argument from the policy of the Subversive Activities Control Act?

The basic policy of the Act is often described as the identification of organizations that have a relationship to the Communist "movement" or "network" in the United States and to "the world Communist movement itself." [91] The Act, it is said, seeks to bring such organizations "out into the open where the public can evaluate their activities informedly against the revealed background of their character, nature, and connections." [92] This purpose underlies the registration provisions of the Act [93] as well as the provisions requiring that registered organizations affix to any publication transmitted through the mails the

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89 See CHAFEE, THE BLESSINGS OF LIBERTY 155 (1956).

It may be relevant for a court to consider whether the staleness of the record can be attributed to delay caused by the "fault" of the agency. An agency that has caused substantial unjustified delay ought not be allowed the opportunity to cause further delay during remand proceedings when delay saps the life of the organization involved. In the present cases the long lapse of time since the closing of the records was not caused by the Board's "fault." It was caused, instead, by a decision to await the Supreme Court's disposition of Communist Party v. SACB, 367 U.S. 1 (1961). The "Communist-front" provisions of the Act could not come into play until the "Communist-action" provisions had been sustained in the *Communist Party* case. The proceedings were twice held up, once before the Board and once before the court of appeals, pending the Supreme Court's decision. 380 U.S. at 506 n.1.

90 *Compare* FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940), *with* Jaffe, *Adventures in Administrative Law*, in FELIX FRANKFURTER: THE JUDGE 206, 211 (Mendelson ed. 1964). *Cf.* WHDH, Inc., 3 P & F RADIO REG. 2D 340, 342 (FCC 1964).

91 64 Stat. 987 (1950), 50 U.S.C. § 781(15) (1964).

92 Communist Party v. SACB, 367 U.S. 1, 103 (1961); see McCarran, *The Internal Security Act of 1950*, 12 U. PITT. L. REV. 481, 484 (1951); Note, *The Registration of Communist-Front Organizations: The Statutory Framework and the Constitutional Issue*, 113 U. PA. L. REV. 1270, 1271 (1965).

93 64 Stat. 993 (1950), as amended, 50 U.S.C. § 786 (1964).

legend, "Disseminated by ————, a Communist organization." [94] If there were no other provisions to the Act, one might argue that it was designed to achieve identification only. The argument would add that the Act therefore was not designed to achieve the more severe result of driving an identified organization out of existence, except as public opinion might have that effect.[95] This argument would lead to the conclusion that a court should be concerned when it is proceedings in enforcement of the Act which threaten that result.

It seems plain, however, that the statute provides for more than just identification. The statute is a control device, as Congress said in the finding of necessity, "designed to prevent [the world-wide Communist conspiracy] from accomplishing its purpose in the United States." [96] What could not be achieved by exposure, it sought to achieve by other means. Thus, criminal provisions of the Act prohibit members of "Communist-front" organizations from holding "any nonelective office or employment under the United States" [97] and prohibit them from holding any employment in a defense facility unless they disclose the fact of their membership; [98] the Act further provides that "no deduction for Federal income-tax purposes shall be allowed in the case of a contribution to or for the use of" [99] such organizations. The Act also had made it a felony for a member of a Communist organization to apply for, use, or attempt to use a passport for foreign travel,[100] but the Supreme Court held the section unconstitutional.[101] These provisions obviously increase the possibility, created by the registration requirement, that an organization will be driven out of existence.

Once it is clear that the Act seeks to achieve control as well as identification, the question becomes whether control by a means not

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[94] 64 Stat. 996 (1950), as amended, 50 U.S.C. § 789 (1964). The only decision to pass upon this section sustained it as constitutional. Communist Party v. SACB, 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956).

[95] *Cf.* McCarran, *The Internal Security Act of 1950*, 12 U. PITT. L. REV. 481, 484 (1951).

[96] 64 Stat. 987 (1950), 50 U.S.C. § 781(15) (1964).

[97] 64 Stat. 992 (1950), 50 U.S.C. § 784(a)(1)(B) (1964).

[98] 64 Stat. 992 (1950), 50 U.S.C. § 784(a)(1)(C) (1964). See United States v. Robel, 254 F. Supp. 291 (W.D. Wash. 1965), *prob. juris. noted*, 384 U.S. 937 (1966) (No. 83).

[99] 64 Stat. 996 (1950), as amended, 50 U.S.C. § 790 (1964).

[100] 64 Stat. 993 (1950), as amended, 50 U.S.C. § 785 (1964).

[101] Aptheker v. Secretary of State, 378 U.S. 500 (1964).

Members of an organization ordered to register as a "Communist front" are also subject to disabilities created by federal statutes in addition to the Subversive Activities Control Act. See, *e.g.*, Immigration and Nationality Act § 313(a)(2)(H), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a)(2)(H) (1964) (knowing membership in "Communist front" bar to naturalization); § 340(c), 66 Stat. 261 (1952), 8 U.S.C. § 1451(c) (1964) (membership in "Communist front" during five years subsequent to naturalization sufficient evidence to authorize revocation of naturalization); National Defense Education Act of 1958, § 1001(f)(4), 72 Stat. 1602, as amended, 20 U.S.C. § 581(f)(4) (1964) (member of "Communist front" prohibited from applying for or using payment or loan made under Act); National Science Foundation Act of 1950, § 16, 64 Stat. 156, as amended, 42 U.S.C. § 1874(d)(2) (1964) (member of "Communist front" prohibited from applying for or using scholarship or fellowship awarded under Act).

enunciated in the Act—the process of litigation—should concern a court. The Act itself suggests that it should. The Congress that passed the Act was surely aware that proceedings before the Board had a unique potential for destroying an organization before a court had had an opportunity to find that a Board order was fit for enforcement. Congress could do little to control the damage that would result from the proceedings themselves; the expedient of authorizing secret proceedings is neither practicable nor desirable. Congress could, however, control the timing of the imposition of the Act's sanctions upon an organization, and this, by deliberate design, it did. The Act provides that an order of the Board shall become final and be given effect only after an organization has exhausted its appellate remedies.[102] These provisions reflect a congressional determination that an organization resisting enforcement of an order of the Subversive Activities Control Board should be protected from sanctions prior to a judicial decision on the merits of the order; as such, they are a notable exception to the general rule that administrative orders become effective when issued.[103] This reading of the Act is strengthened by the fact that it would be impermissible to attribute to Congress an intention to drive out of existence an organization that might eventually be found on judicial review not to be within the scope of the statute; so read, the statute would almost surely be unconstitutional.[104]

The statute itself, then, provides a basis for the argument that a court should be concerned when the process of litigation threatens the destruction of an organization before judicial review can be completed. There is, to be sure, a certain irony in the argument that the interests of an organization resisting enforcement of an administrative order will best be protected by a decision on the merits now. Courts probably believe that they are serving a private litigant's best interests in most cases by remanding, thereby thwarting for the moment the agency's attempt at enforcement. That will not be the fact, however, as the discussion has suggested, when exhaustion by litigation is a realistic possibility. When a court remands in these circumstances, a private litigant may find further litigation too costly and allow an order to be entered against him by default, even though he has a defense on the merits.

A decision to remand can also have appreciable effects upon the administrative agency that is seeking enforcement of its order. What

[102] 64 Stat. 1001 (1950), as amended, 50 U.S.C. § 793(b) (1964).

[103] Administrative orders may, however, be stayed pending appeal in particular cases. See Administrative Procedure Act § 705, 80 Stat. 393 (1966), 5 U.S.C. § 705 (Supp. —); 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.19 (1958); JAFFE ch. 18; *cf.* FTC v. Dean Foods Co., 384 U.S. 597 (1966).

[104] See, *e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965).

are some of these effects and how are they relevant to the decision to remand?

One of the effects that such a decision can have is to damage the prestige and public standing of the agency, at least if the case is an important one.[105] Another effect it can have is to frustrate and perhaps demoralize the agency's staff, particularly when members of the staff have lived with the case over a long period of time. In addition, decisions to remand, if they become frequent, may have the effect of discouraging good men—men who like to get things done—from accepting the task of agency leadership. A decision to remand may have these effects even though the reasons for remand, such as staleness, for example, may not at all reflect upon the agency's competence or judgment. It is not unlikely that the difficulty that the Subversive Activities Control Board has encountered in winning enforcement of its orders reflects a shrewd judicial understanding of this fact.[106]

Although a decision to remand may have these effects upon an agency, they are not effects that are entitled to weight in a court's determination of whether to remand, except perhaps in the rare case in which the balance is otherwise evenly struck. These effects usually will be too generalized to be of predictive use in a particular case. They also have the kind of impact that administrative agencies of the federal government ought to be stable enough to absorb; administrators, like judges, "are supposed to be men of fortitude, able to thrive in a hardy climate." [107] And in any event, subsequent enforcement of the administrative order is still possible. If the agency on remand can meet the court's objections, enforcement will be decreed.

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[105] It is possible that some decisions to remand, such as those based upon an agency's failure to state adequate grounds for its decision, SEC v. Chenery Corp., 318 U.S. 80 (1943), may in the long run help to strengthen an agency's prestige by creating the conditions for improving the quality of its opinions. This is less likely to be so when the basis for remand, such as staleness or lack of substantial evidence, does not directly implicate the agency's policy formulations.

[106] Courts may be readier to remand, in short, when they are not in sympathy with the substantive policies that an administrative agency seeks to achieve. A court's decision to remand may also be influenced by its estimate of the personal qualities of the members or staff of a particular agency. "Different agencies receive different treatment from the courts. A reputation for fairness and thoroughness that attaches to a particular agency seeps through to the judges and affects them in their treatment of its decisions." LANDIS, THE ADMINISTRATIVE PROCESS 144 (1938). Although "the reputation and standing of the [agency] for experience, discernment, detachment, reliability, carefulness, probity and other qualities . . . cannot and should not be ignored," 5 MOORE, FEDERAL PRACTICE ¶ 52.03[1], at 2616 (2d ed. 1964), too great reliance upon an estimate of these qualities in reaching a decision to remand can present a risk: the court's estimate may be wrong. A court's opinion of an agency's competence or reputation will not be based upon evidence taken or argument heard in open court. More likely, it will be based upon past experiences with the agency's decisions; these experiences may not have been representative at the time or may not be representative now. In addition, the court's opinion of an agency's competence need not be submitted to the test of express announcement as a basis of decision.

[107] Craig v. Harney, 331 U.S. 367, 376 (1947).

However, if it is unable to do so, enforcement if it is sought will be denied.[108] Of course, an agency aware of its inability to supply the deficiencies of the original order may elect to terminate the proceedings without seeking enforcement a second time. This in fact is what happened on remand in *American Committee* and *Veterans of the Abraham Lincoln Brigade*; the Board, upon joint motion of counsel, vacated its orders and dismissed the petitions of the Attorney General.[109] The Board's action almost certainly was based upon a conviction that it could not compile a "current status" record that would support a registration order. When a decision to remand leads to this *cul de sac*, it no doubt has a short-run depressant effect upon the agency. This is unavoidable so long as courts demand that administrative orders satisfy the requirements of the statute. Still, the agency must be aware that its present inability to enforce the statute against a particular organization means that "the purposes of the Act, and more, are accomplished. . . . [T]here is nothing about which the public needs to be informed or from which it needs to be protected . . . ." [110]

One consequence of a decision to remand, however, is much more important than those just discussed and much more relevant to a court's determination. A decision to remand can have an effect upon an agency's achievement of the substantive policies that have been entrusted to its keeping.[111] In many cases, effective regulation re-

[108] Eventual enforcement also may be precluded by the fortuity of changes in the agency's membership during the period of the remand, *cf.* Rosenblum v. FTC, 214 F.2d 338 (2d Cir. 1954); Welborn, *Presidents, Regulatory Commissioners and Regulatory Policy*, 15 J. PUB. L. 3, 13-29 (1966), or by changes in circumstances that render the order moot. *Compare* Haufrecht v. SACB, 322 F.2d 403 (D.C. Cir. 1963), Blau v. SACB, 322 F.2d 397 (D.C. Cir. 1963), *and* Labor Youth League v. SACB, 322 F.2d 364 (D.C. Cir. 1963), *with* Jefferson School of Social Science v. SACB, 331 F.2d 76 (D.C. Cir. 1963), Patterson v. SACB, 322 F.2d 395 (D.C. Cir. 1963), *and* California Labor School, Inc. v. SACB, 322 F.2d 393 (D.C. Cir. 1963).

[109] Attorney General v. American Comm. for Protection of Foreign Born, No. 109-53, SACB, April 6, 1966; Attorney General v. Veterans of the Abraham Lincoln Brigade, No. 108-53, SACB, April 20, 1966.

The same result followed on remand in International Union of Mine Workers v. SACB, 353 F.2d 848 (D.C. Cir. 1965). Attorney General v. International Union of Mine Workers, No. 116-56, SACB, June 16, 1966. The Board at the same time vacated its earlier order dismissing the Union's petition for redetermination of its status, and entered an order dismissing the proceedings as moot. International Union of Mine Workers v. Attorney General, No. 125-62, SACB, June 16, 1966.

See Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966), ordering remand to the Federal Trade Commission, and Pillsbury Mills, Inc., TRADE REG. REP. (1966 Trade Cas.) ¶ 17,484, at 22,759 (FTC March 28, 1966), in which the Commission responded by dismissing the complaint.

[110] Labor Youth League v. SACB, 322 F.2d 364, 373 (D.C. Cir. 1963).

[111] Two possible effects that it sometimes is said a frequent practice of remand can have upon an agency's achievement of substantive goals may deserve mention.

A decision to remand—particularly in cases involving agencies that regulate business practices—is a decision to postpone the enforcement of an administrative order against a private litigant that may finally be found to have been in violation of the statute. It is sometimes said, by analogy to the criminal law, that such a decision dilutes the deterrent force of the statute. "No one has any real quantitative idea of

quires prompt implementation of the agency's policy choices.[112] When time is of the essence, a decision to remand may jeopardize the agency's ability to make its policy choices effective.[113] The decision to remand in these circumstances may be the same decision as the determination of the public interest on the merits.

How should a court respond to a record that it has reason to believe is stale when a decision to remand may compromise the agency's

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the deterrent force of the criminal law," much less of statutes enforced by administrative agencies, although "there would, we may assume, be some." Bickel, *Justice and Protection*, 37 MISS. L.J. 407, 408 (1966). By putting off the day of reckoning in one case, the argument runs, a court may encourage businessmen to believe that it can be put off in other cases as well. As Professor Andenaes has written of criminal law enforcement, "The time element is important. Threats of punishment in the distant future are not as a rule as important in the process of motivation [to comply] as are threats of immediate punishment." Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 n.21 (1966). He concludes that "there is good reason to believe that certainty of rapid apprehension and punishment would prevent *most* violations." *Id.* at 961.

Although there is something to be said for such speculation, there is good reason not to take it too seriously in connection with regulatory statutes. The deterrent effect of a regulatory statute depends upon the interplay of many factors, including the demands that compliance makes upon the regulated, an estimate of the likelihood that the agency will discover and prosecute the violation, the stringency of the statutory sanctions, the balance between the fruits that violation promises and the risks that it runs, and the focused strength at a given moment of competitive pressures toward violation. In addition, the deterrent force of regulatory statutes is probably affected by the fact that often they are regarded as morally neutral, in a way that most of the criminal law is not, and sanctions for their violation a necessary cost of doing business. Given the many factors at play, it is doubtful that the increment of delay in enforcement caused by remand will have more than a marginal effect on whatever deterrent force the statute may have, even if the agency's order has been stayed pending appeal.

It is sometimes further argued that a frequent practice of remand will dampen an agency's ability to achieve its substantive goals in a second respect. The argument —primarily relevant to agencies that, in Professor Fuller's term, "allocate economic resources," FULLER, THE MORALITY OF LAW 170-77 (1964)—proceeds as follows: The FCC or the CAB, for example, cannot run a national system of communications or air transportation alone; radio and television stations, airlines and air terminals, still must be operated by private parties. If the administrative processes involved in the regulation of these industries become protracted, private parties will be reluctant to enter the industry or, if they are already in it, to expand their operations. Remand would be one factor in protracting administrative proceedings. Whatever the merits of the argument in general—they seem slight in view of the opportunities for profit presented by an expanding economy—the possibility that remand will occur is likely to be a marginal element in the usual business decision.

[112] Recognition of this fact underlies the "emergency" doctrine and justifies summary administrative determinations pending a deliberative hearing. Fahey v. Mallonee, 332 U.S. 245 (1947); Adams v. City of Milwaukee, 228 U.S. 572 (1913); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891) (Holmes, J.).

See also FTC v. Dean Foods Co., 384 U.S. 597 (1966) and JAFFE 654-86 for discussions of the problem of preserving the status quo pending administrative action.

[113] The present focus on the effect of remand upon administrative agencies should not obscure the fact that a decision to remand can also jeopardize the full effectiveness of policy choices that Congress has embodied in a statute directing an agency to act. In Communist Party v. SACB, 351 U.S. 115, 130 (1956), Mr. Justice Clark, dissenting from a decision to remand, wrote:

> If all or any part of the Act is unconstitutional, it should be declared so on the record before us. If not, the Nation is entitled to effective operation of the statute deemed to be of vital importance to its well-being at the time it was passed by the Congress.

opportunity to effectuate its conception of the public interest? The dilemma is illustrated by *Radio Corp. of America v. United States.*[114] After extensive hearings, the Federal Communications Commission issued an order prescribing standards for the transmission of color television.[115] The effect of the order was to accept a system of noncompatible color proposed by CBS and to reject a system of compatible color proposed by RCA. A three-judge district court entered summary judgment sustaining the Commission,[116] and RCA appealed.

The parties agreed that the Commission had the authority on a proper record "to do precisely what it did in this case, namely, to promulgate standards for transmission of color television that result in rejecting all but one of the several proposed systems. Moreover, it cannot be contended seriously that the Commission in taking such a course was without evidential support for its refusal to adopt the RCA system at this time." [117] Indeed, neither the parties nor the Commission disputed that, if all things were equal, a system of compatible color television was more desirable than a noncompatible system.[118] But all things were not equal. Although RCA claimed that it was "on the verge of discovering an acceptable 'compatible' system," [119] CBS already had an acceptable system, albeit a noncompatible one. The question could be readily framed: Was further delay in making a system of color television available to the public too high a price to pay for

114 341 U.S. 412 (1951).

115 Second Color Television Report, 1 P & F RADIO REG. ¶ 91:26 (FCC 1950). The scope of the hearings, as well as earlier attempts by the Commission to deal with color television standards, are discussed in Comment, *"Public Interest" and the Market in Color Television Regulation,* 18 U. CHI. L. REV. 802 (1951); Kirshner, *The Color Television Controversy,* 13 U. PITT. L. REV. 65 (1951).

116 Radio Corp. of America v. United States, 95 F. Supp. 660 (N.D. Ill. 1950).

117 341 U.S. at 416. At oral argument, Mr. Justice Jackson had expressed concern over the Court's competence to determine whether one system was technically superior to the other. He remarked to Solicitor General Perlman, "The thing that bothers me is what issues we must decide when we go into conference about the case. Must we decide which system is technically superior or which is the better investment? What is the scope of our review? How on earth are we going to qualify ourselves on these technical questions?" GELLHORN & BYSE, ADMINISTRATIVE LAW 530 (4th ed. 1960); see Sarnoff, *A Layman Looks at the Law,* 24 PA. B.A.Q. 6 (1952).

118 341 U.S. at 419, 421. Under a compatible system, broadcasts in color could be received on existing sets in black and white. Under a noncompatible system, an adapter would be required to enable existing sets to receive color broadcasts in black and white, and a converter to receive them in color. 341 U.S. at 412; 95 F. Supp. at 666 n.2.

119 341 U.S. at 419. "A fair summary of the Committee's conclusions would be that CBS had made the greatest amount of progress in the perfection of a system with relatively limited theoretical possibilities, and that RCA had as yet made less progress in the development of a system with greater inherent theoretical possibilities." Comment, *"Public Interest" and the Market in Color Television Regulation,* 18 U. CHI. L. REV. 802, 807 n.34 (1951), referring to the Condon Report, prepared for the Senate Committee on Interstate and Foreign Commerce by the Senate Advisory Committee on Color Television under the chairmanship of Dr. E. U. Condon, Director of the National Bureau of Standards. S. Doc. No. 197, 81st Cong., 2d Sess. (1950); see Radio Corp. of America v. United States, 95 F. Supp. 660, 668 (N.D. Ill. 1950); Kirshner, *The Color Television Controversy,* 13 U. PITT. L. REV. 65, 75 (1951).

the possibility of the development of an acceptable compatible system at some time in the future?

The Commission thought that it was. On October 4, 1950, after the hearings had been completed and a preliminary report issued, RCA petitioned the Commission to reopen the proceedings to consider improvements made in its system during the period until June 30, 1951, before reaching a final determination. On October 10, 1950, the Commission denied the petition—to grant it "would postpone a final decision and hence would aggravate the compatibility problem" [120]—and issued its order adopting the CBS system.

There was much to be said for this course. Although recognizing that "the state of the television art is such that new ideas and new inventions are matters of weekly, even daily occurrence," [121] the Commission believed it desirable that standards be issued as soon as possible. If the Commission were to wait, it would do so in order to take a chance on the development of a system of compatible color. But if the development of a compatible system finally proved unfeasible, the Commission would have taken a chance and lost—lost years that could have been devoted to the improvement of a noncompatible system that it already knew was workable.[122] In addition, the Commission could properly feel some duty, in a period of accelerating sale of television sets that could only receive a compatible system, to seek to limit the dislocation that would result if such a system could not be developed.[123] The Commission's decision sought to assure the present development of a workable system of color television and to protect the millions of Americans who would soon be buying television sets. Nevertheless, the effect of the Commission's course was to make a decision of profound public importance on the basis of a record that, because of the "admittedly fluid state of the art," [124] was in danger of becoming progressively obsolete by the week.

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120 First Color Television Report, 1 P & F RADIO REG. ¶ 91:24, at 91:314 (FCC 1950).

121 95 F. Supp. at 671 (dissenting opinion).

122 See Second Color Television Report, 1 P & F RADIO REG. ¶ 91:26, at 91:443 (FCC 1950). It should be noted that the course taken by the Commission also required that it take chances, *e.g.*, that manufacturers would be willing to produce sets capable of receiving noncompatible signals, rather than await future developments by RCA, and that the public would be willing to buy such sets.

123 It has been estimated that 7 million receivers were in use when the Commission began hearings and 12 million by the time the Supreme Court decision was rendered. By the end of 1953, there were 27 million sets in use. See Amendment of the Commission's Rules Governing Color Television Transmissions, 10 P & F RADIO REG. 1501 (FCC 1953); Comment, *"Public Interest" and the Market in Color Television Regulation*, 18 U. CHI. L. REV. 802, 803 (1951).

124 95 F. Supp. at 672 (dissenting opinion). Compare Cavers, *Administering That Ounce of Prevention: New Drugs and Nuclear Reactors—II*, 68 W. VA. L. REV. 233, 237 (1966), discussing Power Reactor Dev. Co. v. International Union of Elec. Workers, 367 U.S. 396 (1961).

The Supreme Court sustained the Commission's action in refusing to reopen the record. The case presented a question of timing, and thus of wisdom, said the Court, and "courts should not overrule an administrative decision merely because they disagree with its wisdom." [125] Was there no more to be said about the Commission's refusal to reopen the record?

The argument that the record should be reopened had seemed to the district court "the most plausible contention made by plaintiffs." [126] The court said, "It is pertinently pointed out, however, that a number of critical findings are based upon evidence which was taken in the earlier stage of the proceeding which is not representative of the situation as it existed at the time the findings were adopted." [127] Moreover, RCA had offered to prove before the court "developments since the entry of the order, which have been called to the attention of the Commission and which it refuses to consider." [128] Yet the court can hardly be said to have given the argument serious consideration. Remand for the taking of new evidence, it said, "would inevitably result in the prolongation of the controversy which badly needs the finality of decision which can be made only by the Supreme Court. In other words, the interests of all, so we think, will be better served with this controversy on its way up rather than back from whence it comes." [129] One judge dissented on the ground that the Commission's "refusal to hear additional evidence clearly indicates an abuse of discretion and constituted action which was arbitrary and capricious," [130] but he did not elaborate the position.

If there was more to be said, the Supreme Court did not say it either. The Court said only that "whether the Commission should have reopened its proceedings to permit RCA to offer proof of new discoveries for its system was a question within the discretion of the Commission which we find was not abused." [131]

Mr. Justice Frankfurter alone did not join the Court's opinion. His divergence reflected the most basic reason possible: the Commission's determination that selection of color television standards must be made now was not in the public interest.[132] In an opinion

125 341 U.S. at 420.

126 95 F. Supp. at 667.

127 *Ibid.*

128 *Id.* at 669.

129 *Ibid.* The Supreme Court rejected RCA's argument that this statement and several others indicated that the district court had not reviewed the administrative record as a whole. 341 U.S. at 414-16.

130 95 F. Supp. at 672 (dissenting opinion).

131 341 U.S. at 420.

132 In a later year, a commentator was to write, "None can read, for one example, Mr. Justice Frankfurter's opinion *dubitante* . . . without being convinced, at least

dubitante,[133] he said that the Commission's decision "will require the addition of an appropriate gadget to the millions of outstanding receiving sets at a variously estimated, but in any event substantial, cost." [134] Such an expenditure "to adapt and convert the millions of sets now in use may well make the Commission reluctant to sanction new and better standards for color pictures if those standards would outmode receiving sets adapted to the system already in use." [135] Moreover, the decision would inevitably relax the incentive to develop the more desirable compatible system.[136]

Thus, the Commission's refusal to reopen the record was not beyond intriguing Mr. Justice Frankfurter:

> To be sure, this proffer of relevant information concerning progress toward the desired goal was made by an interested party. But within the Commission itself the need for further light was urged in view of the rapid development that had been made since the Commission's hearings got under way. The heart of the controversy was thus put by Commissioner Hennock: "It is of vital importance to the future of television

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when history has proved the Justice right, that a most fallible judgment was being immunized from review . . . ." Gardner, *The Administrative Process*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 108, 117 n.29 (Paulsen ed. 1959).

[133] See Note, *Judicial Review of Administrative Determinations: "Dubitante"*, 1 J. PUB. LAW 198, 204 n.23 (1952).

[134] 341 U.S. at 421; see 95 F. Supp. at 669-70.

[135] 341 U.S. at 424. On this point the Commission had said:

> The Commission does not imply that there is no further room for experimentation. . . . Many of the results of such experimentation can undoubtedly be added without affecting existing receivers. As to others some obsolescence of existing receivers may be involved if the changes are adopted. In the interest of stability this latter type of change will not be adopted unless the improvement is substantial in nature, when compared to the amount of dislocation involved. But when such an improvement does come along, the Commission cannot refuse to consider it merely because the owners of existing receivers might be compelled to spend additional money to continue receiving programs.
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> . . . . [A]ny improvement that results from the experimentation might face the problem of being incompatible with the present monochrome system or the color system we are adopting today. In that event, the new color system or other improvement will have to sustain the burden of showing that the improvement which results is substantial enough to be worth while when compared to the amount of dislocation involved to receivers then in the hands of the public.

Second Color Television Report, 1 P & F RADIO REG. ¶ 91:26, at 91:445-46 (FCC 1950), quoted in 341 U.S. at 420-21 n.14. See also Note, *Judicial Review of Administrative Determinations: "Dubitante"*, 1 J. PUB. LAW 198, 203-04 (1952).

[136] 341 U.S. at 424. In fact, it had the effect of "touch[ing] off a frenzy of experimental activity by RCA and NBC resulting in the recent perfecting of a compatible system." Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1124 (1954). This result coincided with the prohibition late in 1951 by the Office of Defense Mobilization of the manufacture by CBS of color television sets. CBS also stopped broadcasting in color. See Kirshner, *The Color Television Controversy*, 13 U. PITT. L. REV. 65, 83-84 (1951). In late 1953, less than three years after the Supreme Court's decision in the *RCA* case, the Commission "deleted" the rules for color television transmission there under review and adopted RCA's compatible system. Amendment of the Commission's Rules Governing Color Television Transmissions, 10 P & F RADIO REG. 1501 (FCC 1953).

> that we make every effort to gain the time necessary for further experimentation leading to the perfection of a compatible color television system." The Commission did not rule out reasonable hope for the early attainment of compatibility. Indeed, it gave ground for believing that success of experimentation to that end is imminent. But it shut off further inquiry into developments it recognized had grown apace because in its "sound discretion" it concluded that "a delay in reaching a determination with respect to the adoption of standards for color television service . . . would not be conducive to the orderly and expeditious dispatch of the Commission's business and would not best serve the ends of justice . . . ." [137]

Mr. Justice Frankfurter was surely correct in saying that the Commission's order, in originating color television, bore "far-reaching implications to the public interest." [138] One might have hoped that an order of such large significance would be based upon a record that contemporaneous or impending technological developments would not soon make obsolete. Given the public importance of the question, RCA's promise of "enlightening new evidence," [139] and "the admittedly fluid state of the art," [140] the case for remand becomes a strong one. However, a decision to remand would have meant a further delay in the effective date of the Commission's order. The Commission had already postponed adoption of color television standards, as the Court pointed out,[141] in the hope that a compatible system would be developed. "But this time, in light of previous experience, the Commission thought that further delay in making color available was too high a price to pay for possible 'compatibility' in the future . . . ." [142] When

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[137] 341 U.S. at 422.

[138] *Id.* at 423.

[139] *Ibid.*

[140] 95 F. Supp. at 672 (dissenting opinion).

[141] 341 U.S. at 419; see Kirshner, *The Color Television Controversy*, 13 U. PITT. L. REV. 65, 83 n.89 (1951).

[142] 341 U.S. at 419. In addition, the Commission's order had been stayed during the pendency of judicial review. At the conclusion of the hearing before the district court, the court issued a temporary restraining order to be in effect during its consideration of the case. 95 F. Supp. at 664. After it had decided the case, the court continued the order in force "until the aggrieved parties have had an opportunity to perfect an appeal to the Supreme Court." *Id.* at 671. The Supreme Court stayed the Commission's order "pending the issuance of the mandate of this Court." Radio Corp. of America v. United States, 340 U.S. 957 (1951).

The district court granted the stay even though it practically conceded that it was not necessary to preserve the status quo:

> It was here stated in oral argument and not disputed that there are no adapters or converters on the market and that manufacturers would require a period of from six to eight months before they could be made available. So it seems reasonable to conclude that if the instant order was now in effect, there would be no broadcasting under the proposed standards for many months, for the simple reason that there would be no sets capable of receiving such

a decision to remand thus jeopardizes an administrative agency's ability to effectuate its substantive goals, it is appropriate that a court pause before deciding that the record that supports the administrative order is stale.

II

An exploration of the ways in which courts have responded to changes in circumstances after the closing of the record in cases arising from two agencies, the Interstate Commerce Commission and the Federal Communications Commission, is instructive. Each agency operates under a statute that, like the Subversive Activities Control Act, gives its orders a prospective impact; rate orders and license awards both take effect in the future. In cases involving these agencies, however, remand has not always been ordered when intervening changes have occurred. These decisions suggest that the fact of prospective impact alone does not control the question. They further suggest that the decision whether the intervening changes are of a character that indicates remand—that is, whether a court will hold that they must be made a part of the record upon which the administrative order is based—will be governed by an interplay and an accommodation of several other considerations that were present, but not explicitly relied upon, in *American Committee* and *Veterans of the Abraham Lincoln Brigade.*

The leading Supreme Court decision remanding a case to an administrative agency because of the staleness of the record is *Atchison, Topeka, & Santa Fe Ry. v. United States.*[143] A group of railroads and shippers sought to enjoin enforcement of a maximum-rate order of the Interstate Commerce Commission.[144] The order, based on a record that had closed in 1928, was issued in 1930 but was not to go into effect until 1931. In the interim the Depression had descended. Before the order's effective date, the carriers petitioned the Commission for a rehearing, alleging "in great detail" the "material and important changes in the operating, traffic and transportation conditions" they

> programs. And it does not square with common sense to think that manufacturers would rush into the business either of manufacturing adapters and converters for existing sets or manufacturing sets with built-in adapters and converters while this controversy is pending. And to maintain that the public in any considerable number would purchase adapters and converters, assuming they were available, under the existing state of doubt and uncertainty, is to cast a reflection on the intelligence of people.

95 F. Supp. at 670; see *id.* at 670-71. Compare JAFFE 693. The delay in effectuation of the Commission's order until completion of judicial review, then, probably would have resulted whether a stay had been issued or not.

143 284 U.S. 248 (1932).

144 164 I.C.C. 619 (1930), *amended,* 173 I.C.C. 511 (1931).

now faced.[145] The Commission denied the petition. It said that in prescribing reasonable rates, "the Commission necessarily projects into the future the results of a decision based on the conditions disclosed in the record," that its "determination can not accurately reflect fluctuating conditions," and that if the record were reopened, "when a new determination had been reached, general conditions might again have become normal." [146] The district court denied relief.[147]

The Supreme Court found the Commission's reasoning unpersuasive. This was not an ordinary petition for rehearing, inviting reconsideration upon the original record, it said. Instead, the petition "presented a new situation, a radically different one, which had supervened since the record before the Commission had been closed," and of which the Court was prepared to take judicial notice as "the outstanding contemporary fact, dominating thought and action throughout the country." [148] Given the fact of the Depression, the Court said, "It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931." [149] In short, the record "pertains to a different economic era and furnishes no adequate criterion of present requirements." [150] The Commission's reasons for denying rehearing, the Court said, "would be appropriate in relation to ordinary applications for rehearing, but are without force when overruling economic forces have made the record before the Commission irresponsive to present conditions." It concluded, in language that would be quoted frequently in later decisions, "This is not the usual case of possible fluctuating conditions, but of a changed economic level." [151] Denial of the carriers' petition for rehearing, therefore, "was not within the permitted range of the Commission's discretion, but was a denial of a right"; rehearing was required "by the essential demands of justice." [152]

Atchison has not proven a generative precedent. The Court "promptly restricted [it] to its special facts" [153] and has invariably

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145 284 U.S. at 256.

146 See Argument for Appellees, *id.* at 253, and the opinion of the Court. *Id.* at 261.

147 Atchison T. & S. F. Ry. v. United States, 51 F.2d 510 (N.D. Ill. 1931).

148 284 U.S. at 260.

149 *Id.* at 260-61.

150 *Id.* at 261.

151 *Id.* at 261-62.

152 *Id.* at 262.

153 ICC v. City of Jersey City, 322 U.S. 503, 515 (1944); see United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 534-36 (1946).

described them as lying at the center of its rationale.[154] At the distance of more than a generation, *Atchison* "stands virtually alone" [155] among Supreme Court opinions, a decision that has never been overruled and never been followed.

Why has *Atchison* not proven generative, why does it stand virtually alone? It is plain, as the Court's opinion stressed, that the facts in *Atchison* made an extraordinary case. The magnitude of the change created by the Depression—the "sudden, progressive, and enormous declines of value" [156] wrought in the economic order—was great. But other events also have resulted in changes of considerable moment in American life. There can be little doubt, for example, that the outbreak of World War II had a decisive impact "upon facilities for transport and upon the transportation business in general" [157] and that "the ending of hostilities by the fall of 1945 brought about a transition from feverish war activity to the readjustment peacetime period and produced numerous changes in conditions." [158] Yet in cases involving orders of the Interstate Commerce Commission entered shortly before the beginning and the ending of the war, it was held that *Atchison* would not support a decision to remand. The cases stress that the Court in *Atchison* was responding to changes in conditions "so great as to bring about a new economic era." [159] The changes created by the beginning and ending of the war, while surely great, cannot be described as having brought about a new economic era. Can *Atchison*'s isolation be explained, then, in terms of the magnitude of the Depression alone?

Although the possibility is tempting, such an explanation cannot be wholly satisfying. There is no doubt that the Court in *Atchison* stressed the magnitude of the change created by the Depression. But the importance of the Depression for the Court lay primarily in the consequences that it had for a completed administrative record; the Depression rendered "the record before the Commission irresponsive to present conditions," [160] so that it "furnishe[d] no adequate criterion

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[154] See, *e.g.*, United States v. Northern Pac. Ry., 288 U.S. 490, 492-93 (1933); Baltimore & O.R.R. v. United States, 298 U.S. 349, 389 (1936) (Brandeis, J., concurring); *cf.* Insurance Group Comm. v. Denver & R.G. W. R.R., 329 U.S. 607, 619 (1947).

[155] ICC v. City of Jersey City, *322* U.S. 503, 515 (1944). See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 8.18, at 603 (1958).

[156] Great Northern Ry. v. Weeks, *297* U.S. 135, 149 (1936).

[157] United States v. Pierce Auto Freight Lines, Inc., *327* U.S. 515, 535 (1946) (record closed in 1940, petition for rehearing denied in 1943).

[158] Inter-City Transp. Co. v. United States, 89 F. Supp. 441 (D.N.J. 1948).

[159] Gardner v. United States, *67* F. Supp. *230, 232* (D.N.J. 1946); see 284 U.S. at *261-62.*

[160] *Id.* at *262.*

of present requirements." [161] These consequences, however, can result and do result from changes in conditions after the closing of the record that are of a lesser magnitude than the Depression. If *Atchison* was based primarily upon the fact of an unresponsive record, and if changes less catastrophic than the Depression can and sometimes do render a record unresponsive, it is surprising that *Atchison* has not proven generative. One begins to suspect that although courts have distinguished *Atchison* in terms of the magnitude of the Depression, their decisions must reflect other considerations as well.

The precision with which the Court has described the reach of *Atchison* suggests one consideration: "Only once in the history of administrative law has this Court reversed a Commission for refusing to grant a rehearing on the contention that the record was 'stale.' " [162] One can speculate about why this is so. The Court speaks only of cases in which an administrative agency has had an opportunity, after its attention has been focused on particular changes in circumstances, to exercise its discretion in passing upon a petition for rehearing.[163] An agency's denial of a petition may be based upon a belief that the intervening changes in circumstances would not have led it to reach a different result if they had occurred before the decision was made, either because they are of insufficient weight or because they are irrelevant to its reasoning. Alternatively, the denial may be based upon a belief that although the intervening events might have changed the result had they occurred before the decision was made, the possibility is not sufficiently strong to justify action at the rehearing stage that would sacrifice the advantages of finality. When denial of a petition for rehearing rests upon an assessment of the sufficiency of evidence or a judgment about the necessity of finality, it implicates an agency's expertise and discretion. The agency having found that reopening would not be practicable, it is not surprising that the Court has accepted its judgment. This is not to say that abuses of discretion in the denial of petitions for rehearing have not occurred; it is only to say, as the Court's carefully limiting language indicates, that those cases have not

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[161] *Id.* at 261.

[162] ICC v. City of Jersey City, 322 U.S. 503, 515 (1944).

[163] It is particularly important that an agency be afforded this opportunity when, like the Interstate Commerce Commission, its decisions in most cases are those of a Division of the full membership. "Under these circumstances," as the Court has said, "what is here called a rehearing" is not a pro forma mechanism but rather "resembles an appeal to another administrative tribunal." United States v. Abilene & So. Ry., 265 U.S. 274, 281 (1924). The rule that a party must exhaust its administrative remedies, including "the administrative remedy afforded by a petition for rehearing before the full Commission," *ibid.*, before seeking judicial review seeks to insure that an agency will have this opportunity. The rule, as the result in *Abilene* itself suggests, is subject to exceptions. See 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 20.02 (1958).

reached the Supreme Court.[164] Conversely, one would expect the Court to be less reluctant to interfere when an agency has not passed upon the intervening changes in circumstances. This in fact was the case in *American Committee*: the decision of the Subversive Activities Control Board did not mention the contention, to which only "passing reference" [165] had been made in oral argument, that the death of Abner Green had rendered the record stale.[166]

A second consideration suggested by *Atchison* as relevant to a decision to remand is the character of the intervening changes. Changes in the economic conditions underlying an administrative order—a frequent allegation in cases arising from the Interstate Commerce Commission—are often difficult to evaluate. It usually will be easier for a court to satisfy itself that changes have occurred than to decide that they are of a certain character or magnitude or precision. The problem is aggravated by the diversity of the available economic indices. In addition, trends in economic conditions, no less than the underlying economic conditions that were thought to exist when the record was made, are not constants; they are continually shifting, producing "continual variations in costs and prices." [167] A court which attempts, in a world of Heraclitean flux, to describe or to measure changes in economic conditions often will achieve only a prismatic sense of their contours. It is doubtful that an agency in these circumstances will be able to attain a clearer sense of the character of the intervening changes. However, even when the character of the intervening changes is clear, remand may be unrewarding if the agency has adjusted its order to reflect its estimate of the probability that economic changes of this kind would occur. This is likely to be the case with agencies, like the Interstate Commerce Commission, that typically do their work against a background of economic change.[168]

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164 In the distribution of judicial authority, the validity of administrative action in most respects "is a question which Congress has placed in the keeping of the Court of Appeals," Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951), and of three-judge district courts. These courts, aware of their institutional position and of the likelihood that in most cases their review will be the last review, have remanded in reliance, at least in part, upon the decision in *Atchison*. See, *e.g.*, Oklahoma v. United States, 193 F. Supp. 261 (W.D. Okla. 1960); Marine Transp. Lines, Inc. v. United States, 173 F. Supp. 326 (D.D.C. 1959); *cf.* Braniff Airways, Inc. v. CAB, 147 F.2d 152 (D.C. Cir. 1945).

165 American Comm. for Protection of Foreign Born v. SACB, 380 U.S. 503, 507 n.2 (1965) (Douglas, J., dissenting).

166 *Id.* at 504-05 n.1.

167 Marine Transp. Lines, Inc. v. United States, 173 F. Supp. 326, 329 (D.D.C. 1959).

168 See 2 SCHWARTZ, FREE ENTERPRISE AND ECONOMIC ORGANIZATION 147-48 (3d ed. 1966). Of course, it will not always be clear whether and how accurately an agency has anticipated the probability of change. *Cf.* Atlantic Coast Line R.R. v. United States, 209 F. Supp. 157, 160 (S.D. Fla. 1962). When it is not clear, a

Because proceedings on remand are not likely to be fruitful when the character of the intervening changes is unclear or when the agency has fairly anticipated them, it is understandable that courts have sustained administrative determinations that the parties should "await the test of actual experience." [169]

A third consideration relevant to the question of remand is the importance and permanence of the administrative decision under review. Although some administrative decisions have important implications for values of public concern, rate decisions of the Interstate Commerce Commission are not intrinsically of this order. Their primary impact is usually upon a single carrier—and then upon only a segment of its business—and its customers. Rate orders also are typically resolutions in degree, granting the petitioner a part of what it seeks, denying it the rest. In addition, although considerations of expediency suggest that rates once prescribed should remain in effect for some time, a rate order does not settle a matter for all time. A carrier has the authority to make or to change rates on its own initiative, subject to Commission approval.[170] This means, as the district court said in *Atchison*, that a rate order is not res judicata and "the carriers may at any time appeal for relief from harsh situations." [171] When the impact of an administrative order is upon only a part of a carrier's business and when changes in circumstances occurring after entry of the order can be presented in a new proceeding, one would expect a court to hesitate before remanding on the ground of staleness.[172] Conversely,

court's determination of whether to remand becomes more difficult. If a court remands in such a case, the agency may mechanically reach the same result that it did in its original decision by asserting that its original decision anticipated the changes that have occurred. Professor Jaffe, in a perceptive passage, has commented on this possibility:

> Is a remand thus futile because the agency will adhere stubbornly to that which it has once willed? There is no doubt that to some extent such an attitude is at work. I would suggest by way of mitigation the hypothesis that when another case comes before it, the agency will be more disposed to follow the judicial admonition. In other words, 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. This is as I have said an hypothesis for investigation. It would require a detailed examination of particular doctrines announced by the courts to determine the effect of a judicial correction on subsequent administrative behavior.

JAFFE 589. See also Eastern Cent. Motor Carriers Ass'n v. United States, 251 F. Supp. 483 (D.D.C. 1966).

[169] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 49 (1936); *cf.* Acker v. United States, 298 U.S. 426, 433 (1936).

[170] See, *e.g.*, United States v. Chicago, M., St. P. & P.R.R., 294 U.S. 499 (1935); Freas, *Ratemaking Powers of the Interstate Commerce Commission*, 31 GEO. WASH. L. REV. 54, 62 (1962).

[171] Atchison, T. & S.F. Ry. v. United States, 51 F.2d 510, 516 (N.D. Ill. 1931).

[172] However, if the new proceeding will differ in form significantly from the present proceeding so that effectively it is "no substitute" for it, the court may order that the intervening changes be heard on remand. Enterprise Co. v. FCC, 231 F.2d 708, 712 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 920 (1956). See also W. S. Butterfield Theatres, Inc. v. FCC, 237 F.2d 552 (D.C. Cir. 1956).

one would expect a court to remand more readily when an administrative order may have a shattering impact upon private parties. Registration orders of the Subversive Activities Control Board are typically of this character; they expose an organization and its members to serious sanctions, formal and informal.[173] Although it is true that Board orders are not res judicata since the Act makes provision for annual redetermination proceedings,[174] these proceedings are not likely to mitigate very much the severity of an order's impact. This is probably one of the reasons that remand was ordered in *American Committee* and *Veterans of the Abraham Lincoln Brigade.*

These considerations—suggested as an alternative analysis to an interpretation based on the magnitude of the Depression alone—may explain why *Atchison* has not proven generative. They speak to different concerns, however. The importance and permanence of the decision is likely to be the central consideration in determining whether the record should be regarded as stale. The other considerations—whether the agency has exercised its discretion and whether the intervening change is of a particular clarity—speak more to the practicability of proceedings on remand than they do to the substantive desirability of remand as a means of achieving a statutory purpose.

How well do these considerations explain *Atchison* itself? Although it is true that the Commission had exercised its discretion in passing upon the intervening changes, its order had a far more extensive impact than rate orders typically do: it related to "a major description of the traffic of the carriers in a vast territory" [175] that comprised the continental United States "on and west of the Mississippi River." [176] In addition, the Court could be confident that the character of the economic changes created by the Depression was clear, indeed self-evident, that the changes should "be regarded not as temporary but as at least relatively permanent," [177] and that the Commission could not have anticipated and provided for them in its order.[178]

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[173] See Labor Youth League v. SACB, 322 F.2d 364, 371-73 (D.C. Cir. 1963); 96 CONG. REC. 15712 (1950) (remarks of Senator Humphrey).

[174] 64 Stat. 998 (1950), as amended, 50 U.S.C. § 792 (1964).

[175] 284 U.S. at 260.

[176] *Id.* at 254 n.1.

[177] Great Northern Ry. v. Weeks, 297 U.S. 135, 150-51 (1936). A year after *Atchison* was decided, the Commission premised an order on the statement that "we can not believe the present financial condition will be permanent." Johnston v. Atlantic Coast Line R.R., 190 I.C.C. 351, 361 (1933). The order was reversed. Baltimore & O.R.R. v. United States, 5 F. Supp. 929 (N.D. Ohio 1933), *aff'd*, 293 U.S. 454 (1935).

[178] It should be added that *Atchison* involved a claim that was presented in part in constitutional terms ("The carriers insisted upon this reopening as a right guaranteed to them not only by the Act of Congress but by the Constitution itself." 284 U.S. at 260) and that may have been resolved in part in constitutional terms, although the Court's opinion is not as explicit on this point as it might be. It is possible that the Court was drawn to the merits by the force of the constitutional claim.

The considerations that helped to explain why *Atchison* has not proven generative are also relevant in helping to explain why license award decisions of the Federal Communications Commission have been remanded with some frequency when changes of circumstances have occurred after the closing of the record.[179]

In *Fleming v. FCC*,[180] the Court of Appeals for the District of Columbia (in which review of FCC decisions is exclusively lodged) remanded because of the death of one of the two principal members of a license applicant that had lost in the Commission's comparative hearing. The facts were not complicated. A partnership consisting of Fleming and McNutt, which did business as Anthony Wayne Broadcasting, appealed the Commission's grant of a television channel to Radio Fort Wayne, Inc., the only competing applicant. Although the Commission had found Anthony Wayne the better qualified of the two applicants, it decided that this superiority was outweighed by the acquiescence of Fleming and McNutt in certain advertising practices—regarded by the Commission as contrary to the public interest—of a newspaper in which they held an interest. "This consideration controlled the Commission's decision in favor of Radio Wayne." [181]

While the case was pending on appeal, McNutt died. Although all of the parties opposed a remand and urged the court to dispose of the appeal on the existing record,[182] the court could not agree:

> As we have indicated, any decision on the present record must turn on the question whether the Commission erred in giving controlling weight to the partnership's attitude toward and acquiescence in the imposition of a joint rate on advertisers. Clearly this consideration depended, in substantial part, upon the mental state and conduct of a person who has since died. The present record does not and could not include a determination of the effect of his death since this crucial circumstance occurred after the record closed. The Commission recognizes that the death of Mr. McNutt would be relevant to reconsideration of the case if we should reverse. We see no reason why it is not relevant now and why we should not have the benefit of its determination before deciding whether to reverse or affirm. Accordingly, the case is remanded to the Commission with directions to reopen the record to the extent necessary to determine the effect of Mr. McNutt's death and with authority to revise its decision on appeal here.[183]

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179 See Ford, *The Impact of Judicial Review on the Federal Communications Commission*, 63 W. VA. L. REV. 25, 33-34 (1960).

180 225 F.2d 523 (D.C. Cir. 1955).

181 *Id.* at 524.

182 *Id.* at 525.

183 *Id.* at 525-26.

Fleming involved the death of a principal partner in a losing applicant. The court also remanded, in *Southland Television Co. v. FCC*,[184] when a principal partner of the prevailing applicant died while the case was on appeal. The Commission had attached "the greatest weight to the fact that a 43% partner with a good record of local residence and civic activity will have full charge of the day-to-day operations of the station." [185] With his death, the court said, "the fact to which the Commission attached greatest weight, no longer exists." [186]

How relevant to *Fleming* and *Southland* are the considerations discussed in connection with *Atchison*? In the first place, the change in circumstances presented by the deaths of the principals had not formally been passed upon by the Commission. In *Fleming* the Commission had been given the opportunity to file a supplemental brief that spoke to the question of how the court should regard McNutt's death. In the brief, the Commission urged the court to dispose of the case on the existing record. Yet it also recognized "that the death of Mr. McNutt would be relevant to reconsideration of the case if [the court] should reverse" [187] because of an error in the existing record. Although the Commission's position perhaps can be rationalized by reference to a desire to act "in the interest of administrative finality and the expeditious conduct of its affairs," [188] it risked the appearance of impatiently brushing away McNutt's death because it jeopardized the highest desideratum that an administrator could conceive—a completed proceeding. The Commission's position, in any event, was not reached by its formal deliberative processes; it seems to have been no more than litigating strategy passed on to its lawyers. And in *Southland*, the Commission at the time of remand apparently had not had the opportunity to consider the intervening death at all. Thus, the court's decisions to remand were not complicated by the fact of having thereby to pass judgment on a formal exercise of discretion by the Commission.

Second, the nature of the intervening change in *Fleming* and *Southland* suggested that remand could be fruitful. "There is a finished feeling/Experienced at graves—" wrote Emily Dickinson. In ordering a case remanded because of an intervening death—the death of Abner Green makes *American Committee* a similar case—a court can be confident of having accurately sensed its character and its per-

184 266 F.2d 686 (D.C. Cir. 1959).

185 *Id.* at 687.

186 *Ibid.*

187 225 F.2d at 526.

188 Ford, *The Impact of Judicial Review on the Federal Communications Commission*, 63 W. VA. L. REV. 25, 33 (1960).

manence. As much cannot usually be said of a court contemplating remand because of intervening changes in economic conditions.

There is, in addition, the fact that in *Fleming* and *Southland* the Commission had clearly indicated that personal qualities of the deceased partners—the business practices of McNutt, the local identification of George—had been "the decisive factor" [189] or an important consideration in its decisions. The court could be sure that the Commission had not anticipated the death of either man and could fairly conclude that its results might have been different had the present state of facts existed when the cases were decided.[190] When it is this clear that an intervening event has worked "a shift in the foundations" [191] upon which an administrative decision rests, the case for remand is persuasive, particularly when the agency has reached its decision "upon a close margin in a closely contested comparative consideration." [192]

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[189] 225 F.2d at 525 n.4.

[190] A court ought not remand a case to an administrative agency on grounds of staleness unless it has some sense that the intervening changes in circumstances are relevant to the agency's standards of decision. The court need not believe it likely that the changes in circumstances will change the administrative result—it may still be wise to allow the agency the opportunity to pass upon them—but it ought to be fairly clear that the changes are of a character and order to make them relevant to it. *Cf.* Community Broadcasting Corp. v. FCC, 363 F.2d 717, 719 n.1 (D.C. Cir. 1966).

In some cases the intervening changes will be irrelevant as a matter of law because recognition of them would subvert the achievement of statutory objectives. Thus, orders of the NLRB and FTC will be enforced even though circumstances since the closing of the record have changed by the fact that the respondent is in compliance. NLRB v. Mexia Textile Mills, Inc., 339 U.S. 563 (1950); NLRB v. Pool Mfg. Co., 339 U.S. 577 (1950); FTC v. Goodyear Tire & Rubber Co., 304 U.S. 257 (1938); Consolidated Royal Chem. Corp. v. FTC, 191 F.2d 896 (7th Cir. 1951).

[191] Enterprise Co. v. FCC, 231 F.2d 708, 711 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 920 (1956).

[192] Greater Boston Television Corp. v. FCC, 334 F.2d 552, 554 (D.C. Cir. 1964). In this case, Choate, the president of the prevailing applicant, died after oral argument had been heard on appeal. The court in remanding said that "the Commission's findings reflect that the late Mr. Choate was an important factor favorable to WHDH and also was the cause of the demerit against the applicant." *Ibid.*

By varying the facts, the limits of this analysis of *Fleming* can be suggested. (1) If the court's order to remand had been based upon another ground—for example, the inconsistency of the Commission's decision with a recent decision in a similar case, Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965), or a related case, see 225 F.2d at 525 n.4—and McNutt had died during the pendency of the remand, would the Commission have been required to consider the effect of his death upon its previous decision? The answer almost certainly is yes; when proceedings on remand have already been ordered, consideration of a subsequent change will have a less disruptive effect than the decision to remand itself. (2) Suppose, however, that McNutt had not died but while the case was on appeal had withdrawn from partnership with Fleming. Would the court of appeals have ordered remand? (3) Or suppose that the court of appeals had ordered remand on another ground and McNutt had withdrawn from the partnership while the proceedings on remand were pending. Would the Commission have been required to consider the effect of this change upon its original decision? The act of withdrawing from a partnership is not irreversible; doubts about its permanence are appropriate. In addition, withdrawal may raise the suspicion that a losing applicant is deliberately attempting to improve its position by eliminating a cause of demerits in the first decision. It is arguable that a court ought not allow a party while a case is on appeal to create the conditions

Third, administrative orders of the kind involved in *Fleming* and *Southland* have implications for the life of the community that can hardly be overestimated. When the Commission awards a communications license, it makes a decision that determines that a private party shall be allowed the use of a channel of communication owned by the public.[193] It also makes a decision that determines the kind and quality of programing that the channel will carry into thousands and sometimes millions of homes.[194] The public implications of license award decisions are enlarged by the fact that in practice they are, if not res judicata, virtually irreversible. Although the Communications Act provides that a licensee must apply for renewal every three years and authorizes the denial of renewal and revocation,[195] these provisions have not proven serious threats to the retention of a license;[196] a successful applicant is likely to retain a license as long as he wants.

A license award also has serious consequences for rejected applicants; their loss is total. License awards, unlike rate orders, are not matters of more-or-less; they are matters of all-or-nothing. In addition, a decision granting a communications license cannot ordinarily be reopened by a rejected applicant at a time of his choosing. It is true that a rejected applicant can oppose renewal of the licensee's permit and seek to gain it for himself, but the chances of success will be minimal.[197] In these respects—the severity of the impact on losing applicants and the comparative ineffectiveness of the redetermination proceedings—license awards resemble registration orders of the Subversive Activities Control Board.

When an administrative decision has such profound consequences for the community and for private parties, it is appropriate that a

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of remand in this fashion, particularly when a decision to remand will have an effect upon other parties and upon the agency's achievement of its substantive objectives. However, once remand has been ordered on another ground, a statutory purpose may be served by recognition of the fact that an applicant has improved its competitive position and may be better able than formerly to serve the public interest. *But see* WHDH, Inc., 3 P & F RADIO REG. 2d 340 (FCC 1964); Indianapolis Broadcasting, Inc., 12 P & F RADIO REG. 883, 947-48 (FCC 1957).

193 See Reich, *The New Property*, 73 YALE L.J. 733, 735 (1964).

194 *Cf.* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966).

195 48 Stat. 1083 (1934), as amended, 47 U.S.C. § 307(d) (1964); 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 312 (1964); see FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940). When a licensee's performance has been of dubious quality, the Commission may grant renewal for a period of less than three years. See 27 FCC ANN. REP. 37 (1961).

196 See 31 FCC ANN. REP. 105 (1965); 30 FCC ANN. REP. 51 (1964); *cf.* KWTX Broadcasting Co., 31 T.C. 952, *aff'd*, 272 F.2d 406 (5th Cir. 1959), citing figures from the period before the 1960 amendments to the Act, which increased the Commission's disciplinary authority.

197 *Ibid.* See also South Fla. Television Corp. v. FCC, 349 F.2d 971, 973 (D.C. Cir. 1965) (Wright, J., dissenting), *cert. denied*, 382 U.S. 541 (1966).

court remand because of post-record changes that might not counsel remand in cases having less profound social implications.[198] This course calls for particularized responses to individual cases, never an easy task, but such responses, as Professor Jaffe has written, are "the sign of a healthy and confident legal system, a system at once sophisticated and sensitive." [199]

One further point of comparison between *Atchison* and *Southland* is of interest. When a case is remanded to an administrative agency because of the staleness of the record, a full-scale rehearing will sometimes be required. In *Atchison*, for example, the Commission had defended its refusal to reopen the record by arguing that "reopening would have meant further lengthy proceedings." [200] That the Commission was not exaggerating is apparent; in reaching its decision, it had "devoted 261 days to the hearing of the part of the general investigation here involved, considering testimony covering 53,000 pages and 2,100 exhibits," [201] and a decision to remand would require a new investigation that might be of the same proportions.

Remand will not always exact so high a price. Sometimes an agency will be able to limit the issues on which new evidence must be taken. At other times reconsideration can be had on the original record without the necessity of taking any new evidence, although oral argument or the submission of supplementary briefs may be thought desirable. In such cases remand exacts a minimal procedural price.

The facts in *Southland* are illustrative. The court in remanding had ordered the Commission to "reconsider its decision in the light of the circumstances that, by reason of the death of Mr. Don George, the fact to which the Commission attached greatest weight, no longer exists"; [202] the court's order did "not prescribe the course or form of the proceedings on reconsideration." [203] Southland then moved to reopen the record for "a further evidentiary hearing," [204] but it did not "make a tender of what it expected to develop at the reopened hearing." [205] The Commission denied the motion, reappraised the original

[198] See Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914 (1966).

[199] *Id.* at 920.

[200] 284 U.S. at 261. The Court's order to remand resulted in extensive hearings that continued until 1939. The Commission's order was finally affirmed in an opinion that describes the course of the proceedings on remand. Board of Trade v. United States, 314 U.S. 534, 536-37 (1942).

[201] 51 F.2d at 513.

[202] 266 F.2d at 687.

[203] Greater Boston Television Corp. v. FCC, 334 F.2d 552, 554 (D.C. Cir. 1964).

[204] 266 F.2d at 688.

[205] *Id.* at 687 n.2. Had a tender of evidence been made, the Commission might have been required to reopen the record in order to determine the comparative qualifications of George's successor.

record in the light of George's death, and ordered its prior decision. The court of appeals affirmed; it found that the Commission had not abused its discretion in deciding the case without reopening the record.

The case was particularly appropriate for reconsideration without reopening. The Commission's task was to determine whether an intervening change in circumstances—the death of George—should alter its original decision. Because the character of the change was clear, its consequences could readily be estimated; because the Commission's original opinion had measured the value of George's participation, the consequences of his death could readily be fitted to concerns set forth in that opinion. In these circumstances, and in the absence of an adequate proffer of evidence, the Commission's decision to reconsider the case without reopening the record was surely proper.

There are, then, a range of procedures which an agency might employ on remand. To what extent should a court by its order seek to control the agency's choice? When a decision to remand is based upon an intervening change in circumstances, the question of whether the court should order the agency to reopen the record or only to reconsider the case will depend upon the clarity of the character and consequences of the intervening event. If the character and relevance of the intervening changes are unclear, it may be wise for the court to leave the determination of reopening to the agency's discretion. When a decision to remand is based upon a lapse of time since the record was closed, the temptation to order the agency to reopen the record may

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In *Fleming*, the court "remanded to the Commission with directions to reopen the record to the extent necessary to determine the effect of Mr. McNutt's death and with authority to revise its decision on appeal here." 225 F.2d at 526. Although the language of the order seems stronger than that used in *Southland*, the Commission did not read it as compelling reopening. Instead, as in *Southland*, it employed the procedural device of a proffer to test the necessity of reopening:

> 2. . . . On July 29, 1955 the Commission having before it the opinion of the court issued an Order (FCC 55-855) wherein it took official notice of the statement suggesting the death of Mr. McNutt and directed the parties to file Memorandum Briefs on the questions presented by said opinion and on the procedures to be followed by the Commission in connection therewith.
> 3. The parties have failed to recommend procedures as requested in our order. None of the parties seeks to have the record reopened with the exception of Radio Fort Wayne which asks a rehearing in the event the Commission changes its grant. It would appear, therefore, that procedurally the parties are desirous of a status quo with the contingent exception noted.
> 4. The Commission has considered the Memorandum Briefs and pleadings and the record as it reflects the death of Mr. McNutt and is of the opinion that such death has no effect upon Commission's Decision of September 29, 1954; that Decision awarding the grant to Radio Fort Wayne, Inc. not having been based solely upon the participation of Mr. McNutt in the Anthony Wayne applicant.
> 5. In view of the foregoing, IT IS ORDERED, This 7th day of December, 1955, that the record of the proceeding including the Decision therein IS REVISED to reflect the death of Paul V. McNutt and that no further revision is made of the Commission's Decision in the proceeding.

Radio Fort Wayne, Inc., No. 10424, FCC, Dec. 7, 1955.

be great. However, such an order would foreclose the agency from testing the necessity of reopening, as the Commission did in *Southland*, by the adequacy of a proffer of evidence. Although this course creates the risk that the agency will subsequently be found to have abused its discretion in refusing to reopen, it has the plain advantage of bringing the agency's expertise and familiarity with the case to bear on the decision whether to reopen. As the Franks Committee said, sometimes "a wise expediency is the proper basis of right adjudication, and the decision must be left with a Minister." [206]

When a court orders a case remanded to an administrative agency because the record is stale, it decides that on balance certain considerations should prevail over the value of bringing finality to the proceedings. The concept of staleness does not tell what these considerations will be in a particular case. Staleness, as Mr. Justice Stone said of reasonableness, "is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines." [207]

I have tried to indicate what some of these considerations may be. The discussion of *American Committee* and *Veterans of the Abraham Lincoln Brigade* suggested the importance of statutory policy as a source of the requirement that an administrative order be based on a "current status" record. The discussion of *Atchison* and *Fleming* suggested the importance of the order's implications for values of public concern, itself an aspect of statutory policy. Although these considerations are likely to be the primary ones in particular cases, they are not the only ones relevant to a decision to remand because of the staleness of the record. I have tried to explore the significance of some other considerations: the pressure of "serious constitutional questions," the probable usefulness of additional factual information, the extent to which a court's equity powers are implicated, the hints and guesses about change that the history revealed in the record would suggest, the degree to which the statutory design seeks to create private rights such as a limitation of the impact of administrative proceedings upon private litigants, the consequences of remand for the agency's ability to make its policy choices effective, whether the agency has already exercised its discretion in passing upon the intervening changes, the clarity of the character and consequences of the changes.

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[206] Committee on Administrative Tribunals and Enquiries, *Report*, CMD. No. 218, at 6 (1957). See also WADE, ADMINISTRATIVE LAW 67-68 (1961).

[207] United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).

In seeking to reach a sensitive accommodation among these considerations, a court ought not allow the value of bringing finality to administrative proceedings to be obscured. Finality is more than a slogan; it is a concession to reality. As the Supreme Court has said, "If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." [208] A court must make its peace with the existential fact that neither the administrative process nor the judicial process can hope to keep full pace with a universe of change. The problem was already old when Marvell wrote, "Had we but world enough, and time . . . ."

[208] ICC v. City of Jersey City, 322 U.S. 503, 514 (1944).