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Role of Remedial Discretion in the Exercise of Ad Hoc Rule Making

NOTES

ROLE OF REMEDIAL DISCRETION IN THE EXERCISE OF AD HOC RULE MAKING

The development of administrative law is a natural concomitant of a modern, complex society. Judicial enforcement of legislative acts no longer provides an exclusive solution to national problems. Congress has neither the time nor the technical knowledge to delve into the complexities of socio-industrial problems and to legislate a detailed solution.[1] Congress is principally a policy making body and an extreme preoccupation with details will divert its attention from more important considerations. Therefore, Congress must frequently legislate by formulating broad policies unaccompanied by detailed legal standards. Thus, of necessity, legislation is often general and incomplete.

Vague legislation, however, cannot be efficiently administered by the courts.[2] Although they can interpret vague legislation to some extent by seeking meaning from legislative history or mechanical rules of construction,[3] courts cannot properly adjudicate if the statute is too indefinite for an effective use of interpretative criteria.[4] The judicial process operates by applying existing law to a particular set of facts and enforcing the legal conclusions deduced therefrom.[5] If the applicable law is vague and uncertain, the courts cannot discharge their judicial responsibility.

Thus, faced with the conflict between the necessity for broader legislation and its resulting incompatibility with the judicial process, Congress is forced to create intervening agencies to administer the details of its "skeleton" legislation. Therefore, one of the reasons for administrative law is to allow the delegation of administrative discretion to an experienced agency to clarify the statutory standards[6] and to apply them in

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1. DAVIS, ADMINISTRATIVE LAW 37, § 1.05 (1958).
2. Gelling v. Texas, 343 U.S. 960 (1952); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Lanzetta v. State of New Jersey, 306 U.S. 451 (1939).
3. Hassett v. Welch, 303 U.S. 303 (1938); Caminetti v. United States, 242 U.S. 470 (1917); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).
4. Lanzetta v. State of New Jersey, *supra* note 2; Krebs v. Thompson, 387 Ill. 471, 56 N.E.2d 761 (1944); Vallat v. Radium Dial Co., 360 Ill. 407, 196 N.E. 485 (1935).
5. Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908); Smith v. Strother, 68 Cal. 194, 8 Pac. 852 (1885); Williams v. Norman, 85 Okla. 230, 205 Pac. 144 (1921).
6. Lichter v. United States, 334 U.S. 742 (1948); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

a manner designed to effectuate the statutory scheme. Essentially, administrative discretion is the power of an agency to act according to its own expert judgment, unrestricted by pre-established rules.[7]

Administrative responsibility may be divided into two categories—the duty to adjudicate controversies arising under the statute and the duty to sub-legislate to fill in the interstices of the Act.[8] The exercise of discretion in the adjudicative process is limited to a determination of factual issues. This is not to imply that interpretation of the statutory language is not a proper judicial function but it is important to realize that as soon as interpretation becomes discretionary it is no longer an adjudicative function. It involves the selection of policy and must therefore be considered as sublegislation.[9] In the usual administration of a regulatory statute the agency may be required to interpret the statutory language. As long as this interpretation is guided by criteria other than the administrator's discretion, it is judicial rather than administrative interpretation. For purposes of this note and to distinguish ordinary judicial interpretation from its more creative administrative counterpart, an agency's discretionary interpretation of its regulatory statute in a judicial proceeding will be referred to as ad hoc action. It is sub-legislative in the sense that it is exercised in the absence of a concrete rule, yet in form it is merely the issuance of an order based upon the agency's consideration of statutory policy for a particular situation.

Generality in the language of a regulatory statute is indicative of a Congressional intent to delegate the duty of defining the statutory standards to the agencies instructed to effectuate the statute.[10] Since Congress cannot always specify its intent in advance, it deliberately employs vague language at critical points in the statute and leaves the definition of these standards to be worked out by the agencies. Vague language, such as "due care" or "detrimental to the public interest," has a wide range of possible meanings. Thus when an agency decides that exclusive contracts are an "unfair method of competition," the interpretation is actually a sub-legislative choice of policy.[11] *Norton v. Warner*[12] illustrates

7. Fuchs, *Fairness and Effectiveness in Administrative Agency Organization and Procedures,* 36 IND. L.J. 1 (1960). Cooper, *Administrative Justice and the Role of Discretion,* 47 YALE L.J. 577 (1938).

8. Administrative Procedure Act § 2(g), 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1958).

9. NLRB v. Guy F. Atkinson, 195 F.2d 141, 144 (9th Cir. 1952).

10. NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944); Gray v. Powell, 314 U.S. 402 (1941); *Supreme Court Evaluation of Administrative Determinations of Law,* 56 HARV. L. REV. 100, 111 (1942).

11. FTC v. Motion Picture Adv. Co., 344 U.S. 392 (1953).

12. 321 U.S. 565 (1944).

that ad hoc action depends upon the administrator's possession of sub-legislative authority.[13] In that case a reviewing court reversed an administrator's compensation award as being based upon an improper interpretation of the regulatory statute. The validity of the award depended upon whether an employee was a "master or member of a crew of any vessel." If the employee came within this definition he would be excluded from the coverage of the statute and denied compensation. The Deputy Commissioner interpreted this language as being inapplicable to a boatman on a barge and the employee was permitted to recover compensation for an injury received in the course of his employment. The reviewing court refused to sustain this award because it disagreed with the commissioner's interpretation of the statute. If the commissioner had possessed interpretative discretion as well as the discretion to find the facts the court could not have disagreed with his decision. Under section 927 of the Longshoremen's and Harbor Worker's Compensation Act,[14] however, the Deputy Commissioner merely has a quasi-judicial authority[15] and he does not have the sub-legislative discretion to interpret the statute in such a way as to preclude judicial review.

Ordinarily sub-legislative authority is to be exercised prospectively through the promulgation of substantive rules. Clarification of the regulatory statute by rule making gives the parties affected by such rules the benefit of advance notice. But rule making is not always an appropriate procedure because regulatory agencies must administer broad policies, parts of which may contain no specific guides to action, and it is preferable that they explore their subjects carefully and advance conclusions tentatively, on a contingent basis.[16] Consequently agency action must be flexible enough to deal with unanticipated problems as they arise in concrete situations. Under these circumstances an agency may prefer to proceed by ad hoc interpretations rather than by rule making.[17] Rule making involves the immediate creation of a comprehensive regulation so it is too rigid and inflexible to solve new problems which are incapable of

13. Nowlin, *Ad Hoc Action By Administrative Agencies,* 2 ARK. L.R. 439 (1947-48). This article indicates that ad hoc action is possible only by administrative agencies possessing both quasi legislative and quasi judicial authority.

14. Longshoremens and Harbor Workers Compensation Act, 44 Stat. 1438, § 27 (1927), 33 U.S.C. § 927 (1958).

15. Woodfield Fish and Oyster Co. v. Wilde, 124 F. Supp. 331 (D. Md. 1953); See Longshoremens and Harbor Workers Compensation Act, *supra* note 14.

16. Board of Investigation and Research, *Report on Practices and Procedures of Governmental Control,* H.R. Doc. No. 678, 78th Cong. 2d Sess. 80, 81 (1944).

17. NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953); SEC v. Chenery Corp., 332 U.S. 194 (1947); American Power and Light Co. v. SEC, 329 U.S. 90 (1946).

being captured within the boundaries of a general rule.[18] If an agency does not have enough familiarity with a particular problem to solve it by rule making, it may not be able to postpone its regulation until it does acquire sufficient experience to promulgate a general rule. The absence of relevant standards in a case of first impression does not relieve the agency of its responsibility to effectuate the statutory scheme.[19] At times, the agency may be required to resort to ad hoc interpretations to provide the necessary standards.

Ad hoc action satisfies the need for a case to case development of policy because it reacts to unique problems as they arise and every interpretation clarifies the statute to some extent. It permits statutory policy to evolve cautiously and the principles so established can be tested by their practical results. Although ad hoc action clarifies the regulatory statute retroactively it nevertheless supplies essential flexibility to administrative procedure.

It is important to distinguish ad hoc action from judicial interpretation because each procedure has a different legal effect. The latter is subject to judicial review and can easily be upset if the court disagrees with its statement of the law.[20] Ad hoc action is within the area of agency discretion, however, and can be invalidated only if it is not authorized by the statute or is so unreasonable as to be an abuse of discretion.[21] This distinction can be emphasized in terms of legal outcome by an analysis of the history of *Securities & Exchange Commission v. Chenery Corporation.*[22] In that case the commission was required to judge the validity of a proposed reorganization plan in accordance with the standards of the Public Utility Holding Company Act of 1935.[23] The case involved a reorganization of the Federal Water Service Corporation and while the proposed plans were awaiting Commission approval, the officers purchased a substantial amount of the corporation's preferred stock. One of the plans considered by the Commission provided for the conversion of preferred stock into common stock and if this plan were unconditionally approved, the officers of Federal would have retained control of the reorganized corporation through their purchases of pre-

18. SEC v. Chenery Corp., *supra* note 17 at 202, 203; Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess., 29, 30 (1941).

19. SEC v. Chenery Corp., *supra* note 17.

20. Norton v. Warner, 321 U.S. 565 (1944).

21. SEC v. Chenery Corp., *supra* note 17 at 207; Mastrapasquce v. Shaughnessy, 180 F.2d 999 (2d Cir. 1950); Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958).

22. 332 U.S. 194 (1947).

23. 49 Stat. 803 (1935), 15 U.S.C. § 79(a) (1958).

ferred stock. Under the Commission's interpretation of the statutory standards, the stock purchases by the officers would not be "fair and equitable to the persons affected thereby" within the meaning of section 11(e), and would be "detrimental to the public interest or the interest of investors" contrary to sections 6, 7(d) and 7(e) of the Act. The Commission ordered the officers to dispose of the newly purchased stock and justified its interpretation by citing judicial precedents which it erroneously believed supported the principle denying insiders the right to deal in corporate securities during reorganization. This was a judicial interpretation of the statute because the Commission purported to define the standards by external criteria rather than by its own independent judgment of statutory requirements. The Supreme Court refused to sustain the order because the judicial authority cited was inapplicable to the *Chenery* situation.[24]

The case was remanded for reconsideration and the Supreme Court suggested that the agency look to its statutory powers to establish an appropriate rationale. Thereafter the Commission abandoned any attempt at judicial interpretation and exercised its sub-legislative authority to reformulate its prior ruling. The second order was clearly based upon the Commission's independent judgment of statutory policy and a divided court upheld the order as a proper exercise of discretion. In effect, the Commission's second order was based upon a discretionary interpretation of the statute which created a new substantive rule, retroactively binding the corporate officers.

Within limits, the possession of interpretative discretion permits an agency to "create" the law it will apply in the decision of a case. The agency does not actually legislate new law but when it interprets language such as "fair and equitable" as prohibiting management stock transactions during a reorganization the impact of such an interpretation may be indistinguishable from retroactive legislation. Before such retroactivity can be properly analyzed, however, it is necessary to examine the effect of an agency's remedial discretion on the exercise of ad hoc action.

The responsibility of regulatory agencies to administer their statutes includes the duty to issue remedial orders to effectuate the statutory scheme. Agencies have a wide discretion in the selection of their remedies and it is not necessary that the powers exercised be expressly authorized by a statute.[25] *Phelps Dodge Corp. v. NLRB*[26] is perhaps the

24. 318 U.S. 80 (1943).

25. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Inland Waterways Corp. v. Young, 309 U.S. 517 (1940); ICC v. New York, N.H. & H.R.R., 287 U.S. 178 (1932); Shawmut Ass'n. v. SEC, 146 F.2d 791 (1st Cir. 1945).

26. 313 U.S. 177 (1941).

most extreme case establishing this principle. In that case, the Supreme Court upheld an order of the Labor Board requiring an employer to hire men who had been refused employment because they were union members. The NLRA authorizes the Board to take affirmative action whenever an unfair labor practice occurs, including reinstatement of employees who have been discriminatorily discharged.[27] However, the Act contains no express provision authorizing instatement of employees who have been refused employment. The Supreme Court analogized discriminatory hiring to discriminatory firing and held that a remedy of instatement should be implied from the express authorization of reinstatement. Both remedies are designed to correct the effects of a specific unfair labor practice and would therefore effectuate the policies of the Act. The two are not analogous remedies, however, and they raise different constitutional questions. Reinstatement involves the enforcement of a personal services contract while instatement compels the execution of such a contract. Compelling an employer to hire someone he might not want to employ is more extreme than compelling him to retain an employee he had originally hired. Insofar as reinstatement is concerned, constitutional doubts are removed by the statutory language that clearly authorizes the agency to go this far in the formulation of its remedial orders. But there is no express authorization for instatement and, by approving the agency's remedial order in the face of serious constitutional objections, the Supreme Court has given administrative agencies complete freedom in the selection of their remedies so long as that relief effectuates the policies of the Act.

Remedial orders may be divided into four categories, according to the severity of their requirements: (1) Declaratory judgments and advisory opinions merely clarify the law without immediately imposing personal obligations; (2) cease and desist orders do impose personal obligations but their effect is prospective since they are not enforced until they are violated in some future instance; (3) corrective orders impose affirmative duties on the regulated parties to restore the status quo as it existed at the time of the violation; (4) compensatory orders generally require the payment of money to provide for the interim period between the occurrence of a violation and its correction by a corrective order.

Corrective and compensatory orders may appear to be punitive to the regulated parties[28] but they are justified as remedies designed to correct

27. National Labor Relations Act § 10(c), 49 Stat 453 (1935), 29 U.S.C. § 160(c) (1958).

28. Chin Yow v. United States, 208 U.S. 8 (1908); NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433, 438 (5th Cir. 1941).

statutory violations. However, the duties which an order impose must bear some reasonable relationship to the statutory purpose.[29] If the requirements of a remedial order go beyond that purpose the order may well be invalidated as a penalty.[30]

For example, *Wong Wing v. United States*[31] involved an Act of Congress designed to exclude Chinese aliens. The Act required that such aliens illegally in the country be imprisoned at hard labor for a period not exceeding one year. The Act contained no provisions for a judicial trial. The argument was advanced that due process did not require a judicial trial because the authority to imprison aliens at hard labor was a remedial rather than a punitive power. The Supreme Court, however, held that the provisions were penalties and that the immigration officials could not subject aliens to such extreme treatment without an indictment and jury trial. Although a temporary detention is remedial in the sense that it is a necessary part of exclusion proceedings,[32] it is clear that the provisions for imprisonment at hard labor go beyond this purpose and are definitely punitive.

On the other hand, if the remedial order corrects a specific violation, the mere fact that it incidentally penalizes the regulated party does not invalidate it. Thus in *L. P. Stewart v. Bowles*[33] an OPA suspension order directed against a dealer who had intentionally violated the rationing standards was upheld by the United States Supreme Court as a proper exercise of the agency's power to "allocate" war scarce resources. The Court considered the suspension order as relevant to the conservation of fuel oil because it protected against the inequitable and inefficient distribution through illegal transactions. Suspension orders have also been sustained in cases of negligent violations[34] on the theory that a negligent disturbance of the rationing system also endangers society. A suspension order merely reallocates the scarce materials away from inefficient dealers.

Agency orders, however, will be invalidated if they only punish a

29. SEC v. Chenery Corp., *supra* note 17; Phelps Dodge Corp. v. NLRB, *supra* note 25.

30. Wong Wing v. United States, 163 U.S. 228 (1896); NLRB v. U.S. Steel Corp. and Local Union 542, 278 F.2d 896 (3d Cir. 1960).

31. 163 U.S. 228 (1896).

32. United States v. Ju Toy, 198 U.S. 253 (1905); United States v. Sing Tuck, 194 U.S. 161 (1904); Moraitis v. Delaney, 46 F. Supp. 425 (D. Md. 1942); United States *ex.rel* Schlimm v. Howe, 222 Fed. 96 (S.D. N.Y. 1915).

33. 322 U.S. 398 (1944), *supra* note 17.

34. Brown v. Wilemon, 139 F.2d 730 (5th Cir. 1944); Williams v. Bowles, 61 F. Supp. 275 (D.C. Fla. 1945).

person without a corresponding effectuation of the regulatory statute.[35] In *Sims v. Talbert*[36] the federal district court of South Carolina held that the OPA could not issue a suspension order against a dealer who had neither negligently nor criminally violated the rationing laws. In that case an employee of the regulated dealer illegally sold gasoline without his employer's knowledge or consent. In reversing the suspension order the court emphasized its penal aspects and held that, since the dealer himself was innocent of any misconduct, "the allocation of gasoline is not affected in the slightest by the order." The suspension order merely punished the dealer for the misconduct of his employee. Thus, the requirement of effectuating statutory policy is an effective limitation on the exercise of remedial discretion as well as a congressional mandate to take the proper curative action in appropriate cases.

Since ad hoc action involves an element of retroactivity, courts will be reluctant to support the action in cases where it operates oppressively.[37] However, administrative agencies can alleviate the onerous effects of such retroactivity by tempering the severity of their remedial orders. The ability of an agency to implement its regulatory statute on a case by case basis may depend upon the remedy the agency selects to effectuate its determinations.[38] It is the consequences of the adjudication that poses the problem of retroactivity—not the adjudication itself. If the agency merely issues a cease and desist order, warning the party against future violations, the remedy operates no more oppressively than does ordinary rule making, because enforcement is postponed until the mandate is transgressed in some future instance. In *NLRB v. Guy F. Atkinson,*[39] the court refused to enforce an order of rein-

35. In speaking of a remedy selected by the NLRB, the Supreme Court stated, "We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric Power Co. v. NLRB, 319 U.S. 533, 540 (1943).

36. 52 F. Supp. 688 (E.D. S.C. 1943).

37. NLRB v. E&B Brewing Co., 276 F.2d 594 (6th Cir. 1960); NLRB v. International Bhd. of Teamsters, Local No. 41, 225 F.2d 343 (8th Cir. 1955).

38. NLRB v. Guy F. Atkinson, 195 F.2d 141 (9th Cir. 1952) (Reviewing Court refused to enforce an order of reinstatement which was based on a retroactive application of a new policy. However, the court specifically excepted a prospective cease and desist order from its decision denying enforcement of the Board's order); NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir. 1944) (Court approved of an order for back pay which was limited to begin from the day the agency notified the employer that it would assert jurisdiction over his business operations).

39. 195 F.2d 141 (9th Cir. 1952). Employer and union executed a closed shop contract prior to the Taft Hartley prohibition of such contracts and at a time when the NLRB was refusing to assert jurisdiction over the industry in which the employer was engaged. The employer discharged an employee in accordance with the terms of this contract and was subsequently charged with an unfair labor practice. The closed shop provisions would have been valid and the collective bargaining contract would have

statement where a new policy was retroactively applied in such a way as to convert previously innocent conduct into an unfair labor practice. But the court expressly excepted those portions of the order which operated prospectively, specifically approving the cease and desist order.

Although a cease and desist order is as innocuous as a formally promulgated rule, it is distinguishable from the latter in that its mandate is limited to a particular situation. Insofar as the content of a cease and desist order affects the public generally it does so merely in terms of precedent and stare decisis. This is an important consideration when a regulatory agency is choosing the appropriate legal procedure to regulate a specific problem. The agency may prefer to clarify its regulatory statute by ad hoc adjudications rather than by formal rule making because precedents may be used more flexibly in future adjudications. It was for this reason that the Commission in the *Chenery* case elected to create an ad hoc rule rather than promulgate a general regulation. The Commission was unwilling to establish a rigid rule specifying when corporation officers can or cannot deal in corporate securities during a reorganization. The agency felt that, without flexibility, a general rule to that effect might operate unfairly in some situations.[40] Thus, ad hoc action is a particularly useful method of developing statutory policy because the principle so established may be limited to the facts of a particular case and a collection of ad hoc interpretations may eventually supply the background for the promulgation of a general rule.[41]

If the agency's remedy is more extreme than a cease and desist order, however, a retroactive interpretation of the statute has less chance of success.[42] A corrective or compensatory order can be combined with an ad hoc interpretation and retroactively enforced against the regulated

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constituted a defense if it had been executed with the representative of the employees of an appropriate bargaining unit. The Board attempted to assert jurisdiction retroactively and held that the contract did not represent an appropriate bargaining unit. The employer was deprived of his defense and the Board found him guilty of discriminatory hiring practices. The Board ordered the employee reinstated and further directed the employer to cease and desist from such hiring practices. The Court held that the retroactive reversal of policy was arbitrary, capricious, and an abuse of discretion and invalidated all retroactive aspects of the agency's order, excepting only the cease and desist order.

40. Chenery Corp. v. SEC, 154 F.2d 6, 9 (D.C. Cir. 1946).

41. Nowlin, *Ad Hoc Action By Administrative Agencies,* 2 ARK. L.R. 439, 496 (1948).

42. NLRB v. E&B Brewing Co., *supra* note 37; NLRB v. Guy F. Atkinson, *supra* note 38.

parties only where it is necessary to effectuate the regulatory statute.[43] In the *Chenery* case the Commission was instructed to approve or disapprove proposed reorganization plans upon such conditions as were consistent with statutory policy. Thus, the Commission was permitted to interpret the "fair and equitable" language of section 11 (e) of the Act as prohibiting the particular stock transactions in the circumstances of a reorganization. A cease and desist order would have modified the effects of this retroactive interpretation but it would not have been an appropriate order because the Commission would not have properly discharged its statutory responsibility if it had not conditioned its approval of the proposed plan. In that case, the Supreme Court established a test for the validity of ad hoc interpretations. "Such retroactivity must be balanced agains the mischif of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effects of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."[44] Because of their retroactivity, ad hoc orders which impose affirmative duties on the regulated parties will be enforced only where the public benefit of such enforcement will outweigh the private harm resulting therefrom.

In applying this test, courts do not have any preconceived notions as to the quality of harm which will invalidate agency action. Each case is decided by its own particular equities and a variety of external factors may have a persuasive influence on the courts. Thus, a reviewing court may properly consider such factors as (1) The kind of agency involved and the nature of its duties, (2) The severity of the order issued and its relationship to the particular facts, (3) The extent of reliance on a previous policy. In a close case, the courts may also be influenced by considerations of good or bad faith.[45] An analysis of the situations in which retroactivity has been permitted or denied will provide a more enlightened approach to the effective use of ad hoc action.[46]

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43. SEC v. Chenery Corp., *supra* note 29; Leedom v. IBEW, 278 F.2d 237 (D.C. Cir. 1960); NLRB v. Stoller, 207 F.2d 305 (9th Cir. 1953); NLRB v. Pierce Bros., 206 F.2d 569 (9th Cir. 1953).

44. SEC v. Chenery Corp., *supra* note 29 at 203.

45. Compare NLRB v. Kobritz, 193 F.2d 8 (1st Cir. 1951) (reviewing court did not condemn the Labor Board's retroactive withdrawal from previous procedures where an employer relied on those procedures as a shield for unfair labor practices); NLRB v. Guy F. Atkinson, 195 F.2d 141 (9th Cir. 1952) and NLRB v. E&B Brewing Co., 276 F.2d 594 (6th Cir. 1960) (reviewing courts would not permit a retroactive amendment of policy which converted previously innocent conduct into unfair labor practices).

46. Not all of the cases to be discussed involve an exercise of ad hoc action in the sense that a new standard is created by an administrative interpretation and simul-

It is important to distinguish the situations in which an administrative agency merely clarifies existing law from those cases where an agency has retroactively departed from a previously announced policy. In the first case the agency is not troubled by the fact that the regulated parties may have relied on a previous policy and taken action in accordance with it. Courts generally permit the retroactive clarification of uncertain law [47] because the principle of judicial consistency is not violated. Where the retroactivity affects a previous policy, however, there is an additional element of reliance to be considered and courts will not permit the retroactive amendment or withdrawal from that policy if particular parties will be prejudiced by their reliance thereon.[48] The case of *NLRB v. Pedersen*[49] is an example of an extreme sort of reliance. In that case, the Labor Board subjoenaed Pedersen to testify against his employer concerning alleged unfair labor practices. Subsequently, Pedersen was discharged as a consequence of his testimony and he filed charges against his employer. The trial examiner, finding that the discharge violated Section 8(a)(4)[50] of the Act, recommended that Pedersen be reinstated with back pay. However, the Board announced new jurisdictional standards before considering the trial examiner's recommendations and dismissed Pedersen's case in accordance with its newly adopted policy. The reviewing court condemned the retroactive application of the new jurisdictional criteria and required the Board to accept the case for to hold otherwise would be, in effect, compelling Pedersen to testify under one jurisdictional policy and retroactively withdrawing his protection under a new set of standards.

It also appears that in cases where the parties were particularly justified in relying on a specific agency policy, the courts will not permit the agency to abandon that policy retroactively to the detriment

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taneously applied in the adjudication of a case. Many of the cases merely involve the application of a new policy retroactively. However, it is the element of retroactivity that makes ad hoc action undesirable so a consideration of these cases is relevant to this note.

47. 2 DAVIS, ADMINISTRATIVE LAW § 17.09 (1958). Compare SEC v. Chenery Corp., *supra* note 29 (retroactive clarification of uncertain law); FTC v. Motion Picture Adv. Co., 344 U.S. 392 (1953) (retroactive clarification of uncertain law), and NLRB v. E&B Brewing Co., *supra* note 45 (retroactive change of settled law).

48. NLRB v. E&B Brewing Co., *supra* note 45; NLRB v. Guy F. Atkinson, *supra* note 45; NLRB v. Pedersen, 234 F.2d 417 (2d Cir. 1956); NLRB v. Braukman, 94 NLRB ANN. REP. 1609 (1951).

49. 234 F.2d 417 (2d Cir. 1956).

50. "It shall be an unfair labor practice for an employer . . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." National Labor Relations Act § 8(a)(4), 49 Stat. 452, 29 U.S.C. § 158(4) (1958).

of the relying parties.[51] Thus in *NLRB v. Braukman,*[52] the Labor Board refused to adopt new jurisdictional standards retroactively where such retroactivity would entrap an employer who had acted in reliance on the Board's previously expressed refusal to exercise jurisdiction over the particular employer's enterprise.

The case of *NLRB v. Baltimore Transit Co.,* involving essentially similar issues, illustrates how an agency can adopt a new policy retroactively and condition its remedial order in such a way as to prevent its action from being invalidated as an abuse of discretion. In that case, the Labor Board had initially refused to assert jurisdiction over a locally operated transit company in a 1937 proceeding. In effect, this decision informed the employer that his operations were not within the coverage of the Act. Subsequently, the Transit Company established relationship with a company dominated union and discharged several employees who had attempted to organize an outside union. In 1942, the Board notified the Transit Company that it had abandoned its 1937 jurisdictional policy. The illegal practices continued, however, and the discharged employees filed charges against the employer. The Board found that the relationship between the company and the union and the discriminatory discharges were unfair labor practices and the Board took affirmative remedial action. Although a portion of the order operated retroactively in that it directed the disestablishment of the company union and the reinstatement of the employees, the Board conditioned its compensatory orders to operate prospectively by limiting the awards of dues reimbursement and back pay to begin only from the time the company had been notified of the Board's amendment of jurisdictional policy.

If the reliance is not particularly justified, however, courts will sustain a retroactive amendment of earlier policy if that will effectuate the statutory scheme. In *NLRB v. Nobritz,*[54] an employer was charged with the commission of unfair labor practices. He attempted to have the case dismissed on the ground that any regulation of his labor policies would be retroactive since the Board had previously refused to exercise jurisdiction in similar cases. The Board rejected this argument and was sustained on appeal. The employer was not justified in assuming that the Board's policy of refusing to accept cases of a similar nature would also extend to his operations. The agency had not formulated

51. NLRB v. Braukman, *supra* note 48; NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir. 1944).
52. 94 NLRB ANN. REP. 1609 (1951).
53. *Supra* note 51.
54. 193 F.2d 8 (1st Cir. 1951).

definite jurisdictional standards nor had the employer received any assurance that his enterprise was not within the coverage of the Act, as was the case with *Braukman* and *Baltimore Transit.* The Board properly precluded the employer from generalizing a policy from isolated agency action and using this presumed policy as a defense for statutory violations.

Notwithstanding the unfairness of a retroactive amendment of policy, administrators may be required to adjust agency policies by ad hoc in order to maintain the flexibility of administrative procedure. Reliance on a previous policy cannot constitute a defense if it will restrict agency procedure unreasonably and rigidify the administrative process.[55] Thus, in *Leedom v. IBEW*[56] the Labor Board was permitted to change its contract bar rules retroactively and apply the new rules to contracts which had been formed in reliance on the earlier policy. The new rules adopted by the agency reduced the contract bar term from five years to two years. The court, finding that the agency was required to adjust its contract bar rules periodically in order to perform its statutory duties, justified the retroactive reversal of policy. If the new rules could not have been established retroactively, the Board would have been required to postpone their operation for five years, until all of the contracts created in reliance on the old rules had expired, or, alternatively, the agency would have been required to administer both sets of rules simultaneously. Neither alternative was satisfactory for an efficient administration of the statute. The postponement of the new rules for five years would have rigidified agency procedure and the simultaneous application of both sets of rules would have created an "administrative monstrosity"[57] which would have impaired the agency's efficiency. Against this kind of necessity the reviewing court weighed the relative harm of the retroactivity and held that the balance favored the agency action.

Although it has been severely criticized,[58] ad hoc action represents

55. Sun Oil Co. v. Federal Power Comm'n., 256 F.2d 233 (5th Cir. 1958); Atlas Tack Corp. v. New York Stock Exch., 246 F.2d 311 (1st Cir. 1957); NLRB v. National Container Corp., 211 F.2d 525 (2d Cir. 1954); NLRB v. Grace, 184 F.2d 126 (8th Cir. 1950).

56. 278 F.2d 237 (D.C. Cir. 1960).

57. *Supra* note 56 at 242.

58. Justice Jackson's strong dissent in the Chenery case:

> It [ad hoc action] makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint. While the opinion does not have the adherence of a majority of the full Court, if its pronouncements should become governing principles they would, in practice, put most administrative orders over and above the law. 322 U.S. 194 at 210.

Editorial in the Washington Post, October 8, 1947, p. 14, col. 2:

a natural development of administrative law, where agencies possess both quasi legislative and quasi judicial authority. There is no inherent contradiction involved in the use of sub-legislative discretion to interpret statutory standards in aid of an adjudication. As long as the courts remain as solicitous of individual rights as they have been in the past and seriously insist upon the observance of due process, there is little danger that ad hoc action will get out of control. It is true, as Justice Jackson noted in his *Chenery* dissent, that ad hoc action places the propriety of the rule beyond judicial review. But the courts can still invalidate the action if it is unreasonable or if it inflicts injury out of proportion to its public value. Despite its retroactivity, if the remedial aspect is appropriately conditioned to effectuate a statutory scheme, ad hoc action may be a valuable instrument of administrative procedure.

AGRICULTURAL COOPERATIVES AND THE ANTITRUST LAWS: A NEW DEPARTURE

The Supreme Court has spoken on agricultural cooperative activity and the antitrust laws in a case that is representative of the conflict between congressional policies seeking to preserve a competitive business economy, and those seeking to obtain better returns for farmers through the medium of collective marketing.[1] That case is *Maryland & Va. Milk Producers Ass'n, v. United States.*[2]

The result of the decision is an expression in unequivocal terms that Capper-Volstead cooperatives are not privileged to engage in trade practices and methods of competition forbidden to business corporations. This position marks a substantial departure from the Court's previous expression in *United States v. Borden Co.*[3]

This note is an effort to analyze the *Borden* and *Maryland & Virginia* cases, to determine the position of the federated cooperative in view of the *Maryland & Virginia* decision, and to analyze the position of agricultural cooperatives in the face of monopoly prohibitions.

Our basic idea of government is that public agencies will act in accord with law that may be known in advance by citizens. It is difficult to read the Court's decision in this case [Chenery] without getting the impression that, within broad spheres of regulatory power, it now regards administrative agencies as laws unto themselves.

1. Brief for Plaintiff, p. 28, Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).
2. 362 U.S. 458. (1960).
3. 308 U.S. 188 (1939).