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Administrative Law - Ad Hoc Rulemaking - Retroactive Rulemaking

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Notes

ADMINISTRATIVE LAW — AD HOC RULEMAKING — RETROACTIVE RULEMAKING — The Securities and Exchange Commission disapproved the reorganization plan of the Chenery Corporation because its officers and directors had purchased a substantial amount of existing preferred stock on the over-the-counter market and sought to convert it into common stock of the new corporation at a substantial profit. The commission concluded this was inconsistent with the standards set forth in Sections 7[1] and 11[2] of the Holding Company Act,[3] although no specific rule prohibiting such conduct was in force, and ordered the stock turned in on a "cost plus 4 per cent" basis. Chenery Corporation appealed from this order, claiming a prior Supreme Court decision[4] barred such an order. (The Supreme Court had earlier reversed the commission's order because it was not supported by the reasons advanced by the commission in support of that order. The commission restated its reasons and formulated the order in contest.) The Court of Appeals for the District of Columbia upheld this contention.[5] On appeal by the commission from this decision, the court of appeals was reversed, and, after almost seven years of litigation,[6] it was finally held, where the action of an administrative body is "the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies" and is "based upon substantial evidence . . . consistent with the authority granted by

1. 49 Stat. 815, 15 U. S. C. A. 79g (1940). Section 7 provides generally for certain declarations in respect to security transactions.

2. 49 Stat. 820, 15 U. S. C. A. 79k (1940). Section 11 provides among other things for the submission and action on reorganization plans.

3. 49 Stat. 803, 15 U. S. C. A. 79 (1940).

4. Securities & Exchange Commission v. Chenery Corporation, 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943). This decision reversed the commission's action as not being supported by the reasons advanced in the opinion and remanded it.

5. Chenery Corporation v. Securities & Exchange Commission, 154 F. (2d) 6 (1946). This decision reversed the commission's order holding that the earlier Supreme Court case precluded such action, since it would be a rule retroactively affecting the corporation.

6. In 1937, the initial voluntary plan of reorganization was filed. Four years later, after a great deal of controversy, an amended plan was approved in 1941. In 1942, the Court of Appeals for the District of Columbia reversed that order in very sweeping language. (Chenery Corp. v. Securities & Exchange Commission, 75 U. S. App. D. C. 374, 128 F. (2d) 303 [1946]. This was modified somewhat by the Supreme Court (See note 4, supra.). The commission dressed up the language, came to the same conclusion and rendered an order similar to its first one. The court of appeals again reversed (See note 5, supra.). On certiorari the court decided the instant case.

Congress," the agency's judgment will not be disturbed. *Securities and Exchange Commission v. Chenery*, 67 S. Ct. 1575 (U. S. 1947).

The action of the officials in purchasing the stock was entirely open and above board; the commission, however, decided that the possibilities of fraud and questionable practices inherent in such conduct justified the restraint thereof. Inasmuch as the commission had no judicial power but only rulemaking power, its decision was necessarily based on a rule which it created after the case had arisen. This activity is characterized as ad hoc rulemaking.

The court gave great weight to the expertise of the commission. In matters which are too complex to permit quasi-legislative codification until the problem under consideration is clarified and crystallized by a series of cases, the court seemingly felt that such ad hoc rulemaking as was practiced by the commission is better adapted to the development of standards of policy by administrative bodies than adoption of an embracive and inelastic "rule." The court rejected the interpretation that its decision in the first *Chenery* case precluded later action by the commission because it amounted to retroactive rulemaking, although this interpretation was certainly justifiable under the broad language used in the majority opinion in that case.[7] Such a construction of the earlier decision would have severely curtailed the exercise of discretion in individual cases by the Securities and Exchange Commission.

The case represents somewhat of a departure from the traditional American distrust of everything administrative and the corollary belief that only Congress and the judiciary can safely devise and apply standards of conduct in a particular situation.[8] The court, at the same time, emphatically reiterated the need for a recital in the written opinion of the commission that certain judgments were in fact made and a recital of the grounds upon which they were founded. It also recognized the desirability of a general rule. Thus, the salutary effect of directing the commission's attention to its statutory functions and the duties attendant thereon were preserved.

There was a vigorous dissent by Mr. Justice Jackson in which Mr. Justice Frankfurter concurred. The dissenters wanted no part

7. This position is strengthened somewhat by the fact that the organ of the court in the first case, Mr. Justice Frankfurter, concurred in Mr. Justice Jackson's vehement dissent reported in 67 S. Ct. 1760 (1947).

8. For an insight into this distrust see Cooper, Administrative Justice and the Role of Discretion (1938) 47 Yale L. J. 577.

of ad hoc rulemaking with retroactive effect; the dissent pointed out that the decision actually represented a direct reversal of the court's stand on such problems. It also contended that the decision was a reversal of the 1943 decision.[9]

Mr. Justice Jackson emphasized the fact that no general rule had previously been adopted because the situation involved had never before been presented to the commission. He denied that experience could be deferred to in a situation which had never arisen before. This denial seemingly overlooks the fact that expertise applies generally to familiarity in the field wherein the problem arises, with all its ramifications, rather than to a particular situation.

This overlooked fact seems to be the true basis on which the majority recognizes such ad hoc action in complex and technical fact situations. Such recognition appears to be in accord with several cases decided in the interim between the two *Chenery* decisions.[10]

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CONSTITUTIONAL LAW—FEDERAL RIGHTS TO TIDELANDS—The United States brought action against the State of California, alleging that the United States was the owner in fee simple, or possessed of paramount rights in and power over, the land and things of value underlying the Pacific Ocean off the coast of California beyond the low water mark and extending three nautical miles seaward, and that California, without the authority of the United States, had executed certain mineral leases in this area. The prayer was for a

9. 67 S. Ct. 1760 (1947). While the majority opinion is not utterly irreconcilable with its earlier decision, it truly represents a change of attitude—hence the significance of the decision.

10. Notably the cases of Pacific Gas and Electric Company v. Securities & Exchange Commission, 324 U. S. 826, 65 S. Ct. 855, 89 L. Ed. 1394 (1945), where a divided court in a per curiam decision upheld the decision of the Circuit Court of Appeals for the Ninth Circuit. That court had upheld a commission order denying plaintiff's application for a declaration that applicant was not a subsidiary—such order being based on an interpretation of the words 'subject to controlling influence' as including susceptibility to domination. There was a dissent saying the order was arbitrary and capricious; and Republic Aviation Corporation v. N. L. R. B., 324 U. S. 793, 65 S. Ct. 982, 89 L. Ed. 1372 (1945), in which ad hoc rulemaking of the commission was upheld so that ". . . a 'rigid scheme of remedies' is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation."

Both cases are distinguishable on their facts, but are closely in point in principle.