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Agency Discretion in Making Policy by Order After Adjudication

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Agencies of the United States implement their policies using a wide range of methods including rulemaking, adjudication, and by manual or informal guidance. Ronald A. Cass, Colin S. Diver, Jack M. Beerman, Jody Freeman, Administrative Law Cases and Materials (Vicki Been et al. eds., 7th ed. 2015). The most interesting of these policy implementation methods is implementation by adjudication, which occurs when an administrative law judge within the agency decides "cases." When an agency implements a policy via adjudication, the affected companies often challenge the policy, arguing that the adjudicating agency should have complied with the Administrative Procedure Act's rulemaking process.

5 U.S.C. § 553

The guidelines for statutory rulemaking come from 5 U.S.C. § 553. The relevant portions of 5 U.S.C. § 553 come from (b), (c), (d), and (e). Part (b) reads that "notice of [a] proposed rule . . . shall be published in the Federal Register . . ." 5 U.S.C. § 553(b). Part (c) reads that after

notice, the agency "shall give interested persons an opportunity to participate in the rule making" and after the opportunity for comment, the agency shall "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). Part (d) provides the time frame for publication, and part (e) requires that each agency shall "give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(c), (d).

This statute is important regarding policy implementation in adjudication because it either provides a guideline for what adjudication rulemaking should be, or what it should not be.

Discussion

Rulemaking Procedures

The rulemaking procedures required under 5 U.S.C. § 553 are important in this analysis because various statutory interpretation methods lead to different conclusions on whether policy implementation by adjudication is even permissible. There are four main statutory interpretation theories. These theories are: (1) archeological; (2) dynamic; (3) preference-eliciting default rules; and (4) traditional doctrine. Adam Muchmore, Penn State Law, Food and Drug Regulation Course Lecture, January 31, 2018.

The archeological theory looks at the statute to determine either the legislative intent or the legislative purpose, or takes a textual approach. All three of these archeological approaches attempt to look at events in the past to determine what the writer of the statute thought at the time of writing. Under the legislative intent perspective, it is clear the legislators were attempting to provide a strict framework within a rigid structure, one that allowed the public to provide their opinion. Therefore, when looking at legislative intent, it appears policy implementation by

adjudication was not intended since it does not follow a rigid structure and does not provide for public comment. However, when looking at the legislative purpose, it appears policy implementation by adjudication is permissible because this approach focuses on the problem the legislators were trying to solve when they wrote 5 U.S.C. § 553. When legislators wrote this statute, they were likely trying to address the problem of agency rulemaking without having to answer to the public, which would have been seen as a threat to the Republic. However, so long as the spirit of this statute is kept, then perhaps policy implementation by adjudication is permissible because it complies with the spirit of the statute. Finally, under the textualist approach, one must look entirely to the text of the statute itself. This approach, championed by Justice Scalia, is even more conservative than the legislative intent approach, and therefore likely leads to the same conclusion in this specific issue.

The dynamic theory attempts to interpret the statute in a way that is right for our society at this specific time. Here, a judge using this approach is being forthright that he or she is using his or her agenda when interpreting the statute, unlike the archeological approach which brings in a policy agenda by the "back door," under a pretext of being true to historical context. Further, the dynamic theory accounts for social classes who have been oppressed and attempts to read the statute to restore the social class back to an equal standing to those in power. This theory of statutory interpretation works well when to 5 U.S.C. § 553. When applied to this statute, one comes to the same conclusion as the Court in *Chenery II*, as will be discussed further below, which reasoned that to force an agency to always undergo rulemaking procedures would be too inflexible and would result in rules too broad or specific for future cases. This would be

very harmful, as it would lead to rules being interpreted incorrectly. Such an effect would certainly harm minority groups, who would be unaccounted for during the public comment process after being outmatched by a stronger and well-funded majority group.

The preference-eliciting default rules theory is an odd approach to statutory interpretation; it asserts a court should interpret a statute in a way that will force Congress to clarify the statute after seeing the court's opinion. If that theory were applied to 5 U.S.C. § 553, then perhaps Congress would clarify the statute to address whether policy implementation by adjudication is permissible. However, this would be unlikely to resolve the situation because statutes always have interpretation issues, and many lawyers' jobs are to find arguments to make in unfavorable situations. Therefore, it is unlikely a new statute would clarify the adjudicatory policy implementation debate; rather, it would probably confuse the issue even further.

The traditional doctrines approach was largely championed by Justice Rehnquist. This approach uses canons of construction to interpret a statute; however, this approach is not helpful to the present dilemma of 5 U.S.C. § 553 because for every canon of construction, there is an equal and opposite cannon.

Therefore, under the previous four theories of statutory interpretation, it appears the strongest arguments come from the archeological theory and the dynamic theory. Here, the best of these two options is the dynamic theory because it straightforwardly accounts for policy concerns, and that is one of the primary jobs of an agency. Agencies answer to Congress, not the electorate. Because of this, agencies have different agendas than those of Congress. There are many different agencies, and each has a different mission. However, all have a political agenda.

Therefore, if an agency fails to follow 5 U.S.C. § 553, it likely does so out of policy concerns in order to serve its agenda. This could be dangerous to the public order, but for an agency to address its policy concerns, it must be flexible and able to adapt to case-by-case situations. From the agencies' perspective, this means 5 U.S.C. § 553 must be interpreted liberally.

Policy Concerns

Policy implementation by adjudication is a difficult issue because it provides strong benefits, yet has the potential to turn our society away from being a republic. Jud Mathews, Penn State Law, Administrative Law Course Lecture, January 31, 2018.

Policy implementation by adjudication is effective because, as *Chenery II* points out, to force an agency to always undergo rulemaking procedures would be inflexible and would result in rules too broad or too specific for future cases. This would be very harmful, as it would lead to rules being interpreted incorrectly. But, if the rules were created on a case-by-case basis for each specific board decision, a board would have the flexibility to decide as it deems best based on the scenario in which it finds itself, instead of being forced to squeeze itself into a rule that is hardly applicable. Further, this flexibility afforded to the adjudicatory process would not be entirely free from public notice and comment, as the company involved as well as the opposing agency would be filing briefs challenging their opponent and arguing for what they deem the rule should become.

However, policy implementation by adjudication has the potential to turn our society away from its roots as a republic because the members of the adjudicatory board are not responsive to an electorate. The members of the board are not elected, and therefore have little if

any obligation to serve the wishes of those who are subject to their decisions. However, since Congress is an elected branch of government, it is therefore subject to the wishes of its electorate. This keeps the wishes of the public within the minds of those in Congress, who must constantly be aware of the best interests of those they were elected to serve. Further, the rulemaking procedures of 5 U.S.C. § 553 are so detailed and stringent that it hardly seems fitting to bypass these rules and allow an agency's review board to create a rule. Such a bypass hardly seems to align with Congressional intent when it created 5 U.S.C. § 553, as Congress surely wrote the stringent process of rulemaking intending that such a process be the only way to achieve rule creation.

Additionally, as Justice Harlan pointed out in his dissent from *Wyman-Gordon*, when an agency applies a rule prospectively, it does so because it knows the rule is "such a departure from pre-existing understandings that it would be unfair to impose the rule upon the parties in pending matters." Therefore, it makes little sense to apply a rule that does not go into effect in the situation that led to its creation. If the rule were acceptable to create, then wouldn't that justify its application to the situation that led to its procurement? However, since agencies do not apply the new rule to the case in which it was created due to a concern of being unfair, this suggests the rule is against the wishes of the public, which means it would not have passed under the notice and comment requirements of 5 U.S.C. § 553.

Therefore, this created an issue of whether agencies may adopt administrative rules procured from individual orders provided in an adjudicatory setting under an administrative law judge.

Chenery II

The first time the United States Supreme Court addressed this issue was in *SEC v. Chenery Corp.* (*Chenery II*). *SEC v. Chenery*, 332 U.S. 194 (1947). In this case, Chenery Corporation filed for approval of its plan to issue new common stock of the reorganized company to members of its management. The SEC denied the application and established the principle that traders cannot reorganize stock during a reorganization of the company.

The Court held it was not going to establish as the norm that agencies must create policies via rulemaking procedures. The Court reasoned that an agency must be able to deal with such applications on a case-by-case basis, and to force the agency to always undergo rulemaking procedures would be too inflexible and would result in rules too broad or specific for future cases. The key component of this decision was the holding that agencies can, like courts, use adjudication to develop rules on a case-by-case basis.

The next major case in the line of policy implementation via adjudication applied the *Chenery II* holding, yet it created even more legal issues. This case was called *Excelsior Underwear, Inc.*

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Excelsior Underwear, Inc. was a consolidation of two opinions. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). In the principal case, a labor union called the Amalgamated Clothing Workers attempted to obtain certification as the bargaining representative of Excelsior's employees. However, before Amalgamated hosted the election on whether Excelsior wanted to unionize, Excelsior sent a letter to all of its employees explaining why it would be

harmful if they joined a union. Excelsior then refused to provide Amalgamated with the addresses of its employees for purposes of contacting Excelsior's employees. After tallying the election results, Excelsior won in a landslide. Amalgamated challenged the election, and the case went under the review of the National Labor Review Board (NLRB).

In this case, the NLRB considered whether an employer must provide a potential union with a list of employee addresses so the union can present its views to the employees. Upon consideration of this issue, the NLRB provided a new policy that employers must provide the names and addresses of its employees to a union, in all future situations. This policy applied prospectively, not retroactively.

Excelsior raised the question of whether prospective adjudication was legal. After all, wasn't the prospective policy created in *Excelsior* a rule? It had prospective application like a rule, and it certainly appeared binding on companies. Additionally, the opinion of the board repeatedly refers to the policy as a "rule." The next significant case in the line of adjudicatory policy implementation tackled these questions, yet failed to muster majority support.

National Labor Relations Board v. Wyman-Gordon Co.

In *NLRB v. Wyman-Gordon*, the NLRB attempted to enforce against Wyman-Gordon the policy created by *Excelsior*. *National Labor Relations Board v. Wyman-Gordon*, 394 U.S. 759 (1969). However, Wyman-Gordon refused to comply with the NLRB's order, even after receiving a subpoena. The Court of Appeals held Wyman-Gordon did not have to follow the *Excelsior* policy because the policy was actually a rule, and the NLRB did not follow the rulemaking requirements of 5 U.S.C. § 553 when it created the rule. However, in a plurality

opinion, the Supreme Court of the United States reversed the Court of Appeals and sustained the NLRB's decision to punish Wyman-Gordon.

The plurality opinion stated *Excelsior* cannot be a basis for punishing Wyman-Gordon because *Excelsior* is not a valid rule. The Court held the NLRB used adjudication to make what it referred to as a "policy." This label was incorrect; instead it should have been referred to as a "rule." The Court reasoned the *Excelsior* rule is not valid because it was created via adjudication, which does not follow the rulemaking requirements. The Court further reasoned that the prospective application of this policy is what made it a rule. Additionally, the NLRB's policy from *Excelsior* was a rule because it was created to resolve a dispute, which is a common characteristic of a court-made rule.

The key holdings of the plurality opinion are: (1) *Excelsior* created a rule for future uses; (2) the *Excelsior* rule was not promulgated via the rulemaking process; and (3) the *Excelsior* rule is therefore invalid. However, the plurality still overruled the appellate court because it believed the NLRB had the authority to force Wyman-Gordon to comply with its subpoena via other routes.

In a concurring opinion, Justice Black followed closely to the *Chenery II* opinion. He reasoned that because the line between deciding cases and making rules is not always clear, agencies should therefore be free to make their own rules when deciding their cases. He also pointed out that when cases are decided, they create policy, even if they do not intend to do so. Therefore, this case should have been decided just like *Chenery II*, which means that to force the agency to follow the rulemaking requirements of 5 U.S.C. § 553 would be too inflexible.

National Labor Relations Board v. Bell Aerospace Co. (1974)

NLRB v. Bell Aerospace is the final case in this analysis regarding policy by order after adjudication. *National Labor Relations Board v. Bell Aerospace*, 416 US 267 (1974). In this opinion, the Court held that *Chenery II* and *Wynam-Gordon* "make plain" that an administrative review board is not precluded from announcing "new principles" in an adjudicative proceeding. The Court further held that the choice between adjudication and rulemaking lies in the administrative review board's discretion. This case was important because it held that when an agency possesses both adjudicatory and rulemaking powers, the agency can choose between those powers.

Future Applications Regarding this Issue

The *Bell Aerospace* opinion has largely been left unquestioned by the courts. However, in *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit addressed the issue of whether there are circumstances in which agencies should not have the discretion to choose between policy implementation by rulemaking and adjudication. By interpreting the Uniform Commercial Code, the court concluded the decision had to be implemented by rulemaking rather than adjudication. The court reasoned that the rulemaking would have a general, national coverage and the parties in the proceeding had no prior warning as to the permissibility of their conduct. The Supreme Court of the United States denied *certiorari*.

This is a difficult issue, yet the United States Supreme Court has provided an extremely broad standard on how to approach future disputes regarding this matter. Fortunately, the Circuit

Courts still interpret this broad rule procured by the United States Supreme Court in a very narrow fashion. The Supreme Court's broad rule and current silence on the matter reveal its trust in agencies to hold close the statutory requirements of 5 U.S.C. § 553, and for the lower courts to keep pressure on the agencies to label what is essentially a "rule" as a "rule."

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