The Function of the Supreme Court in the Development and Acquisition of Powers by Administrative Agencies

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NOTES

THE FUNCTION OF THE SUPREME COURT IN THE DEVELOPMENT AND ACQUISITION OF POWERS BY ADMINISTRATIVE AGENCIES

The best composition and temperature is, to have openness in fame and opinion; secrecy in habit; dissimulation in seasonable use; and a power to feign if there be no remedy.

Francis Bacon, *Essays*, "Of Simulation and Dissimulation"

Francis Bacon would agree that it is impossible not to leave an indication of what is actually being done where what is being done must be disclosed for the world to see. Even so, the cursory or naive may still be misled.

As is to be expected, the justices of the Supreme Court seldom espouse the fact that the Court has been responsible for the acquisition by administrative agencies of certain powers.\(^1\) However, the fact itself is not open to real dispute,\(^2\) nor stated alone of any especial significance. What is of significance are answers to: when, and to what extent does the Court "grant" powers? The justices do not answer these questions explicitly. The purpose of this Note is to examine this neglected area of the law to find, if possible, a common law\(^3\) of how the Court decides a case where it can be said that the Court in a manner is granting or denying power to an administrative agency.

For purposes of this Note powers may be defined as those separate ingredients of an administrative action which are present in an act of an agency which is either legal or valid (in practice, upheld if attacked). In this sense, it is important to think of the administrative process as a whole, for example, when an agency makes an order, the order relies for its validity as much on jurisdiction as on the ability of the agency to make the kind of remedy it has made. Agency action is not simple reflex reaction; it is the culmination of an ability to consider, consideration, and of a remedial determination or dismissal based on the consideration. For purposes of this Note the three steps in agency action will be called: jurisdiction; statutory standards which define the limits

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1. For an exception to the usual judicial silence, see the statement of Mr. Justice Jackson quoted *infra* at note 14.
2. See Davis, Administrative Law 2 (1951). "[T]he great bulk of . . . [administrative law] is created by courts in the process of constitutional and statutory interpretation."
3. "Common law" is used here in the sense of an essentially consistent judge-made law.
of agency consideration; and enforcement and remedial powers. This classification, as any which attempts to separate a process, will have elements of artificiality, and thus cases will arise which do not readily permit classification.4

**JURISDICTION**

Jurisdiction is a primary power in either the judicial or administrative process. Other powers rest upon jurisdiction—if jurisdiction is not present, one need proceed no further in determining the existence of other powers.

The fact that jurisdiction either is or is not present does not mean that jurisdiction is easily determined. In cases which consider the question of whether jurisdiction over the subject-matter exists in the agency, there are many close decisions both in the sense that good arguments are available to each side and in the closeness of the division of the Court over what is the proper determination.5 Often as many as four justices absent themselves from majority opinion and appear either in separate opinions or the inevitably “vigorous” dissents.6

The Court is hardly at fault for the difficulty of the decisions. The difficulty of the jurisdictional cases is the direct result of the highly ambiguous and uncertain language with which the Court is often forced to deal. Despite congressional vagueness, one fact is clear. Congress created agencies which were to have an effective amount of jurisdiction, but, just as clearly, no more jurisdiction than needed to accomplish the end sought. In trying to strike the balance between too much and too little, with scant substance to guide them, the several justices must necessarily fall back on their own bias or belief in reaching a decision. This statement finds support in the frequency of sharply conflicting majority and dissenting opinions.7

There are several kinds of cases which come to the Court in which jurisdiction of an administrative agency becomes involved. The three most often before the Court are: disputes over jurisdiction between similar state and federal agencies; disputes over jurisdiction within the federal regulatory system; and, disputes over

6. See cases cited note 5 supra.
7. See cases cited note 5 supra.
the scope or coverage of the statute as written. Of these three, the last two resemble each other, while the first is inherently different because the existence of some kind of jurisdiction is not disputed.

The problem of jurisdictional disputes between state and federal agencies.

In United States v. Public Utilities Commission of California\(^8\) the Court was called upon to settle a dispute which arose between the California Public Utilities Commission and the Federal Power Commission over which had jurisdiction of electric power sent from California into Nevada to the Navy and a Nevada county where the power was resold. The power company which was the center of this jurisdictional dispute was licensed under Part I of the Federal Power Act.

The jurisdiction as claimed by both sides comes from the Federal Power Act. The state claimed that it had jurisdiction both through Part I\(^9\) of the Act which provides in substance that the federal agency and not the state will have jurisdiction where interstate commerce is involved if either (1) any of the states directly affected has failed to provide a regulatory agency or (2) the state agencies cannot agree, and also through Part II\(^10\) which grants federal jurisdiction over "the transmission of electric energy . . . at wholesale in interstate commerce," but limits it "... to extend only to those matters which are not subject to regulation by the States." Even though the sales were "at wholesale in interstate commerce," the state contended that the limitation of federal jurisdiction in Part II prevents federal jurisdiction and since both California and Nevada had regulatory systems which, it was assumed, could agree, no limitation of state jurisdiction under Part I was applicable. But a substantially unanimous Court held that the electric power in question came under federal jurisdiction while declining to place an exact limitation on state jurisdiction.

The Court relied greatly upon its decision in Public Utilities Commission v. Attleboro Steam & Electric Co.,\(^11\) which held that regulation of wholesale electric power sales in interstate commerce can only come through a congressional grant of power. This means that the states cannot get the power through a mere limitation on federal jurisdiction. Attleboro, the Court contended, clarified a problem which was not answerable when the Act was passed. Such arguments and similar ones based on the legislative history appear

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remarkably weak, and yet, there must be some very sound reasons for the Court to find as it did since even the justices who voiced doubts as to the decision, do not dissent nor do they give better reasons.\(^ {12} \)

There are at least three discernable reasons other than the statutory language for the Court to find as it did. First, the Court believed that federal regulation over the situation presented by Public Utilities Commission of California would conform closely to the policy expressed by Congress when the Act was written.\(^ {13} \) In this way the Court presents its belief that federal rather than state regulation was better in the case before it since the electric power industry had expanded greatly in size and importance after the Act was written and the industry at the time of the decision required the uniformity of regulation which the Federal Power Commission could provide. Secondly, as indicated by the concurrence of Mr. Justice Jackson, the Court believes that Congress can and probably will review the Federal Power Act as the Court has rewritten it.\(^ {14} \) Thirdly, the Court notes its policy of strictly constraining limitations to primary grants of jurisdiction.\(^ {15} \)

The combined weight of these reasons seems to compel the Court to decide as it does despite the fact that the reasoning of the decision was so tenuous that it prompted Mr. Justice Jackson in his concurring opinion to refer to the reasoning and holding, respectively, as "psychoanalysis of Congress" and "our legislation" and Mr. Justice Frankfurter to say that he could not join in an opinion with such "underpinnings."

Of the three reasons for finding federal jurisdiction in Public Utilities Commission of California all are seldom so forcefully present on one side as they were there. The first, who should regulate, is often not sufficiently clear to be determinative of a case, and even where it is clear, justices will not be willing to fly in the face of statutory words which they find to be even clearer.\(^ {16} \) The second, congressional review, is probably seldom consciously present, but may enter into the decisions rather consistently as the Court considers the effect of its decisions.\(^ {17} \) The effect of a decision in-
evitably involves the likelihood of congressional review and the corresponding finality of the determination. The third, the strict construction of limitations on federal jurisdiction, is generally a very strong factor where the Court must construe ambiguous language. It also is a consistent factor in cases concerning jurisdictional conflicts between similar state and federal agencies.

Perhaps a case which gives a clearer indication of the importance of the last reason is *Phillips Petroleum Co. v. Wisconsin* in which the Court had to decide whether the state or the Federal Power Commission had jurisdiction over the company's sale of natural gas. Wisconsin, a consumer state, was contesting the Federal Power Commission's holding that it was without jurisdiction over Phillips. The company, insofar as it is in the natural gas business, was engaged in the production, gathering, processing, and sale of natural gas. Phillips sold gas to five interstate pipeline transmission companies which in turn resold the gas after transporting it to the local distributors and the ultimate consumers, but Phillips itself was not engaged in the interstate transmission of natural gas to the consumer markets from the production fields. The Federal Power Commission held hearings after which it issued an opinion stating that it did not have jurisdiction over Phillips' operations since Phillips was not a "natural-gas company" within the meaning of the Natural Gas Act; therefore the Commission could not regulate Phillips' rates.

The jurisdiction of the Commission is derived from section 1(b) of the Natural Gas Act:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.19 (Emphasis added.)

The argument for lack of Commission jurisdiction is based on the limiting clause at the end of section 1(b) of the Act. Phillips' activities clearly fall under the primary grant; they can only be excluded from Commission jurisdiction by the limiting clause. The Court pointed out that the exceptions to the primary grant of jurisdiction are to be construed strictly. The Court then read the Act

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in the light of the cases and legislative history to give the Federal Power Commission jurisdiction over Phillips' operations involving natural gas.

An important factor in the Court's decision probably was that "... the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act." However, the policy motivation was not sufficient to influence some of the dissenting justices who were willing to concede that perhaps federal regulation would be best.

There was no disagreement among the justices that the purpose of the Act was to provide regulation of the natural-gas industry so that the consumers would not suffer at the hands of the large companies which operate in the field. The Act which created the jurisdiction and coverage of the federal agency was sufficiently broad to cover nearly all the operations of the natural-gas companies which affect interstate commerce. This was the primary grant of jurisdiction, but exceptions were carved out which purportedly left to the states that which they traditionally were allowed to handle. These exceptions to the primary grant of jurisdiction were strictly construed.

The dissenting justices argued that the result of the regulation thus imposed on Phillips would be effectively to nullify the exception which Congress had included in the Act. This basic objection of the dissenting justices can be reconciled to the proposition that the Court strictly construes the limitations on the primary grant of jurisdiction since what the dissenting justices really object to is that there is no longer any limitation to federal jurisdiction, and this, they point out, clearly contradicts the statute which sets out a limitation. Thus they say, the majority has not resolved an ambiguity by strict construction at all, but has instead destroyed all practical regulation on the part of the states.

The practice of the Court strictly to construe limitations to primary grants of jurisdiction, is but a correlative to a broader statutory construction device, that of strictly construing primary grants

20. 347 U.S. at 685.
21. See ibid. Mr. Justice Douglas dissenting at 688, and Mr. Justice Clark dissenting with the concurrence of Mr. Justice Burton at 690.
22. See id. at 690.
23. Mr. Justice Clark believes that this decision leaves only regulation of unused facilities to the states. Id. at 695.
of jurisdiction. That is, first one determines whether the primary grant includes the subject under dispute—this is strictly construed. Then, one determines if a limitation takes the subject under dispute out of the primary grant—this is also strictly construed. However, this practice of the Court is more than a statutory construction device. It embodies an attitude of the Court which makes the Court attempt to avoid being an instrument through which jurisdiction is given. As is the case where state and federal jurisdictions conflict, the finding of a limitation on federal jurisdiction often permits jurisdiction in the state; as a consequence, the Court is doubly strict in its construction.

Where the exceptions and limitations create alternative or concurrent state and federal jurisdictions, the pattern is such that one might say that regulation over the area covered in the general grant is the primary purpose, and that the only problem is who is to regulate. The words used in the primary grant to define the area of regulation intrinsically limit the area—both inclusively and exclusively. It is clear that Congress does not intend to give an agency too much jurisdiction; therefore it is only necessary and proper that the Court should construe the language defining the general area of regulation strictly. On the other hand, where the Court is confronted with the problem of an ambiguous limitation, taking jurisdiction from the federal agency and thereby giving it to the state agency, there are good reasons why the federal agency should win. Federal jurisdiction will probably result in fairer and more uniform regulation. Usually the danger in federal regulation is its inability to handle local needs where, for practical purposes, no national policy is involved. A national interest would seem likely to be present from the very fact that there has been federal legislation. Where the jurisdictional limitation is ambiguous it, therefore, would seem proper to resolve the ambiguity in favor of national regulation.

In some cases state and federal agency jurisdiction may be concurrent. A state labor board may have jurisdiction over violence

25. See Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U.S. 498 (1949), where there was ambiguity in both the primary grant and its exception, and Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1949), which finds power in the state rather than the federal agency and can be explained by the analysis in the text, as can the more usual case where federal jurisdiction is found. See, e.g., Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 (1950).
26. See the discussion of Phillips Petroleum beginning in the text supra at note 18.
even though such violence would also come under the regulation of the National Labor Relations Board. However, in the recent decision of *Guss v. Utah Labor Relations Board* the Court refused to be the instrument through which jurisdiction was granted to the state labor boards to handle labor disputes within businesses over which the NLRB would not exercise its jurisdiction because of self-imposed jurisdictional standards.

**Disputes over jurisdiction within the federal regulatory system.**

In *Powell v. United States Cartridge Co.* the Court had to determine whether the employees of a private contractor who operated a government-owned plant on a cost-plus-a-fixed-fee contract with the United States came under the Fair Labor Standards Act or whether they were excluded as being employees of the United States. It was contended for the employees that they were neither directly employed by the government nor employed by an agency of the government and were thereby entitled to the overtime benefits of the Fair Labor Standards Act.

Of the three contracts between the independent contractors and the government which were before the Court, each provided that the independent contractor was to be reimbursed for the cost of labor, but each contract also said that the employees were not the employees of the United States and that the contractor was not an agent of the United States. This language in the contract could not have been easily avoided by the Court if it had wanted to find that the employees were excluded from the coverage of the Act; however, the Court seems to have been impressed by the fact that Congress did not operate the government owned plants itself and thus preserved free enterprise.

The Court quite easily establishes that the munitions produced at the plants in question are goods for commerce within the meaning of the Act and that the Walsh-Healy Act which applies to employees of employers with government contracts, and the Fair Labor Standards Act are "mutually supplementary," not mutually exclusive. The Court also found that none of the war emergency actions taken by the government prevented the application of the Fair Labor Standards Act.

Such cases as *Powell* which present the problem of disputes over

jurisdiction within the federal regulatory system do not frequently arise. The proposition which can be drawn from the cases which have arisen is: the conflicting agencies or statutes will be held incompatible if there is a likelihood that they will conflict either in their application or in their purpose,32 but probably will be held to be concurrent or supplementary if the objectives sought and the regulations themselves are substantially the same or will not lead to conflict.33

Ordinary disputes over the existence of jurisdiction.

Cases involving ordinary disputes over the existence of jurisdiction are likely to involve private litigants. The bases of the decisions can vary from case to case to such an extent that a great many arguments are available to the contending parties. In cases concerning the Pure Food and Drug Act, the Court will go very far to find jurisdiction.34 In other cases the Court will find that the grant of jurisdiction does not include an attempted regulation of a party,35 or a limitation may not be sufficiently broad to avoid jurisdiction.36

There is a curious type of case concerning the existence of agency jurisdiction. The Court has mentioned that it gives a sympathetic construction to legislation which provides for human welfare,37 but even this sympathy may be sacrificed when confronted with a statute which requires a construction of “interstate commerce.”38 “Interstate commerce” is of course the usual constitutional basis for federal jurisdiction in administrative law; however, it may have a special or limited effect in a statute. Where a kind of “interstate commerce” is the problem in jurisdictional cases, the Court, even while recognizing that Congress has not given jurisdiction to the extent capable under the commerce clause, seems nearly always to find that interstate commerce has been affected in

33. See id. at 686. Mr. Justice Rutledge dissenting. “Ordinarily, when statutes are not inherently conflicting, the rule applied in construing them is to give each as much room for operation as is consistent with its terms and purposes, rather than to create conflict unnecessarily between them.” See also Powell v. United States Cartridge Co., 339 U.S. 497 (1950).
35. See United States v. Champlin Refining Co., 341 U.S. 290 (1951). There may be some question as to this being a jurisdictional problem per se, but the effect appears to be jurisdictional.
38. See ibid. (majority opinion).
the way mentioned in the statute. The jurisdictional result caused by this "interstate" inclination does not always mean, but usually does, that jurisdiction will be found to exist in the federal agency.

In Farmers Reservoir & Irrigation Co. v. McComb, the field employees of a company were found to be engaged in an occupation resulting in the irrigation of crops which move in interstate commerce which meant they were necessary to the production of agricultural goods shipped in commerce, but because these employees were only necessary to production, not having actually engaged in the production, they were not excluded by the agricultural exemption from the Fair Labor Standards Act. The actual business of irrigating was not in interstate commerce, but because of its necessity to the production of agricultural commodities moving in commerce, it comes within the coverage of the Act. To this decision Mr. Justice Jackson wrote a heated dissent. In one of the more restrained sentences he said, "If, as the Court holds, these employees are engaged in production of agricultural crops for commerce, I do not see how it can hold that they are not engaged in agriculture."

Many of the ordinary jurisdictional cases involve definitions. Cases have turned on the application to the case of words such as: "employer," "common carrier," and "manufactured." "Manufactured" was the crucial word in East Texas Motor Freight Lines, Inc. v. Frozen Food Express in which the Court found against the Interstate Commerce Commission in its claim of jurisdiction over motor carriers which were transporting dressed, frozen chickens. These chickens were held not to be "manufactured" within the meaning of the Motor Carrier Act which excepts from ICC regulations all agricultural produce which has not been manufactured. The case was a very close one; the Court split five to four. The denial of jurisdiction in Frozen Foods Express perhaps

40. See cases cited note 39 supra.
42. Id. at 772.
44. See United States v. Champlin Refining Co., 341 U.S. 290 (1951); United States v. Contract Steel Carriers, Inc., 350 U.S. 409 (1956). In the latter case the Court did not use the common law meaning of the words, but instead said there was a statutory meaning, thereby preventing jurisdiction.
46. Ibid.
follows a trend to restore the importance of the agricultural exemption as a reaction to former decisions of the Court which tended to reduce it.48

**Statutory Standards**

Statutory standards are those phrases in statutes, such as "public interest," which define the limits of agency consideration and to which the administrative agency must conform when making a determination. These standards differ from "jurisdiction," as previously referred to, by being concerned with the determination of what as a matter of substance must be considered or may be considered, rather than, the area of possible regulation. In a formal sense, one might say that standards come into importance only after the jurisdiction or coverage of the agency has been established; thereafter, the question of whether the statutory standard has been met may be determined.

The Court has often expressed its reliance upon the specialized knowledge acquired through the experience of the agency in words such as:

> The growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions.49

Despite such statements the Court has not been overly anxious to embrace agency findings. But the reasons for not doing so differ. In this regard it is important to separate the cases which reverse the agency because the agency has not indicated properly what it based its decision on, and those cases where the Court disagrees with the agency's application of the statutory standards. Perhaps the two following statements will indicate the difference and show the fundamental basis for the difference:

> Mr. Justice Frankfurter: If judicial review is to have a basis for functioning, the Commission must do more than pronounce a conclusion by way of fiat and without explication.50

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Mr. Justice Douglas: Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty. 51

The first statement is a call for an account by the agency, clearly indicating the basis of its determination; the second, a statement of the need for the Court to impose standards, or see that those imposed are followed. The first would not, in any real sense, determine a power if applied since Mr. Justice Frankfurter merely says that the Court must understand the reasons why the case was decided as it was; but the latter statement would concern the determination of powers when applied since it would in many cases give the Court at least the "last refusal" as to what an administrative agency does or does not have to consider and at times permit the Court to "give" power to an agency by finding that it has restricted itself by using material from too small an area. 52

In Federal Communications Commission v. RCA Communications 53 the question was whether the FCC had conformed to statutory standards when it authorized Mackay Radio and Telegraph Co. to duplicate services performed by RCA Communications. Its authorization was based upon a national policy in favor of competition. The Commission found that while it had not been shown that the duplicate services would be better, neither had it been shown that they would impair the existing service. The Court held that the Commission could not rely upon its interpretation of national policy, but must exercise its own informed judgment as to whether the "public interest" will be served by competition. The effect of this decision upon the FCC was most certainly a reduction of power, but at least in one sense the decision increased the Commission's power. After this decision the FCC could, it was even told to, exercise its own informed judgment to a greater degree.

Since standards such as "fair and equitable" 54 and "the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service" 55 are of such a vague and intangible quality, whoever ultimately defines the words

52. Federal Communications Commission v. RCA Communications, 346 U.S. 86 (1953). This is at least a possible analysis of the effect of the decision. See the analysis in the text infra.
53. Ibid.
given by Congress to guide the agency to its proper objectives and to limit those things which it may properly consider as justification for a finding, will have a wide range within which to place a meaning. The problem would seem to be one of deciding whether Congress intended the agency or the Court to decide the meaning of its enigmatic words, but the Court has apparently resolved the problem by allowing the agency broad discretion in interpreting statutory standards of this type. The result has been that the Court's idea of what Congress meant, or should have meant, is usually reconcilable with what the agency has done. In this way the agency is given considerable leeway in its use of standards even though the Court does define the limit of the discretion of the agency. Even where the Court finds that the agency has not properly applied the statutory standards, the agency upon redetermination of the case at times may reach substantially the same result while conforming to the standards as defined by the Court.

Most of the cases allow a broad meaning to words where they are in fact general words. Thus the Court said it was "fair and equitable" under a reorganization plan that no recognition be made of stock option warrants which had a market value, but not an investment value. However, at times the Court will, it appears, use the statutory test or standard to reach its own idea of the best policy. In *Delta Air Lines, Inc. v. Summerfield* the Court read the words which said that the Civil Aeronautics Board "shall take into consideration" the need of a carrier before granting a subsidy, to require that the Board *must find* need. The Court said, "As we read the Act, Congress has established a special formula for the fixing of a subsidy rate."

**Enforcement or Remedial Powers**

In cases which deal with enforcement or remedial powers the Court more frequently uses the word "power" to describe the validity or lack of validity of an administrative agency's action, than in either of the other two categories: jurisdiction and statutory standards. This is understandable since remedial powers come the closest

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56. 346 U.S. at 91. The Court has "the responsibility of saying whether the Commission has fairly exercised its discretion within the vague, penumbral bounds expressed by the standard of 'public interest.'".
60. Id. at 78-79. The usual meaning of the words would lead one to believe they meant that the CAB had to consider the need of carriers, but did not have to find a need.
61. Id. at 79.
to being physical actions. The distinction between "standards" and remedial powers is analogous to the power of thought and the power to act in the physical world in reliance on that thought.

Enforcement and other remedial powers will be discussed under three subdivisions: (1) the functioning of the agency as a practical matter; (2) powers found in the general purposes of the agency; (3) powers derived from particular language. These three subdivisions do not result from a mathematical divisibility nor are they completely separable in analysis; however, such treatment both shows their relative importance and facilitates their discussion.

The practical functioning of an agency.

Where the case involves the practical need (or mechanical need) of the agency to have a certain remedial power, the Court will almost invariably find that the agency has the power.\(^2\) One of the clearest statements of this attitude of the Court was made by Mr. Justice Jackson in *United States v. Morton Salt Co.*\(^3\) The case was one testing the power of the Federal Trade Commission to compel corporations to report as to their compliance with a Court of Appeals decree.

The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process. Its agencies are provided with staffs to institute proceedings and to follow up decrees and police their obedience. . . . These agencies are expected to ascertain when and against whom proceedings should be set in motion and to take the lead in following through to effective results. . . .

To protect against mistaken or arbitrary orders, judicial review is provided. . . . Courts are not expected to start wheels moving or to follow up judgments. . . . Those occasions [when a court must become a prosecutor] should not be needlessly multiplied by denying investigative and prosecutive powers to other lawful agencies.\(^4\)

With this the Court upheld the Commission's power in a twenty-page decision in which Mr. Justice Jackson admitted that the argument against authority in the Commission was based on an "elabo-


\(^3\) 338 U.S. 632 (1950).

\(^4\) Id. at 640-41.
rate and plausible argument" supported by authority, short of holding. The decision was unanimous.

Power from the general purpose.

Enforcement or remedial powers found in the broad implied powers given an administrative agency are commonly agreed to be present in some form, but when a case arises where the question must be answered as to a particular agency action, the problem ceases to be an academic generality, and disagreement results. This happened in *American Trucking Association, Inc. v. United States* where the Court had to determine whether the Interstate Commerce Commission had the power indirectly to regulate motor carriers who did not come under its regulation because of the agricultural exemption in the Motor Carrier Act. The regulation which the ICC sought over the exempt carriers, was to be accomplished by rules which directly applied only to non-exempt carriers. Through such rules the ICC contended it was able to restore its ability adequately to regulate the motor carrier industry which had been impaired by certain practices of the exempt carriers by which licensed carriers used the exempt carriers' equipment.

The majority of the Court held that the agricultural exemption had to give way since "the rules in question [were] aimed at conditions [which could have] directly frustrate[d] the success of the regulation undertaken by Congress." The Court said, "The grant of general rule-making power necessary for enforcement compels this result."

The dissent while agreeing that the Commission has "broad implied powers to carry out the general purposes outlined in the law," did not believe that the power as found by the majority conformed either to the purpose of the Act or to its "clearly expressed provisions."

*American Trucking Association* illustrates that the primary difficulty is often in determining what the general purpose of an act is and even where general purposes can readily be seen, determining which of conflicting purposes should take precedence.

Where remedial power, if found, must be found in the general authority, the Court in effect says: the power which the agency is attempting to exercise is one which it was designed to exercise.

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65. 344 U.S. 298 (1953).
66. See supra note 47.
67. 344 U.S. at 311.
68. *Id.* at 312.
69. *Id.* at 327-28.
70. See supra note 48 where the same problem arose in the context of a jurisdictional dispute.
and therefore the agency has the power. Obviously where an agency’s remedial powers are determined from generalized provisions there will at times be disagreement over whether the use of a power in a specific case reaches a good result, and so at times it appears as though each case is decided on the basis of its isolated merits. But this is seldom true, especially where the importance of the power is not limited to a single case.

Powers from specific language.

This last subdivision deals with enforcement and remedial powers which result from limitations created by expressly granted powers. The restriction may be expressly set out as, e.g., “No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs;” or, it may be by negative implication from some express grant of power as where under the Taft-Hartley Act the sole sanction against swearing falsely to a noncommunist affidavit is the criminal sanction against perjury.

In NLRB v. Seven-Up Bottling Company of Miami the Court was called upon to determine whether the Board had properly used the remedy of back pay which is available to it. The Board had found that certain former employees of Seven-Up had been discriminatorily discharged and ordered their reinstatement. Along with reinstatement the Board ordered the payment of back pay on a quarterly basis. Generally, any wages made by an employee while wrongfully discharged in violation of the National Labor Relations Act are set off from the back pay due. In ordering back pay the Board’s order differed from its former practice in one important respect: “Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter.” Former prac-

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71. See Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 582 (1949). “It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both.”
73. See supra note 48. American Trucking had Justices Burton, Frankfurter, and Minton with the majority in an opinion adversely affecting the agricultural exemption from ICC regulation and Justices Black and Douglas dissenting while in Frozen Foods, Justices Black and Douglas were with the majority for the agricultural exemption’s application and the first three justices were dissenting.
76. 344 U.S. 344 (1953).
tice of the Board had been to set off earnings over the entire period of wrongful discharge. 77

The Court held the Board order to be entitled to enforcement. In the words of the majority: "[The Taft-Hartley Act] charges the Board with the task of devising remedies to effectuate the policies of the Act." 78 These remedies are limited essentially only by their reasonableness. "Subject to [the] limitations [of reasonableness], however, the power, which is a broad discretionary one, is for the Board to wield, not for the courts. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." 79 The Court also draws from the policies of the Act to support its decision. "It seems more profitable to stick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act." 80

The Court will, at times, avoid a restriction on agency power as it did in United States v. Great Northern Railway. 81 There the Court found justification in the policy behind the restriction, for not requiring the restriction, and then interpreted the statute in the light of the policy, thereby avoiding the restriction. But where the Court does not have to manipulate the statute, it will not. Thus, where the agency had another effective means of reaching the objective which it was ostensibly prevented from reaching, the Court did not feel called upon to extend its interpretive powers. 82 There is, however, some sentiment on the Court for an agency to come into the open when it is exercising a power which it has in practice, if not in theory. 83

In contrast to the result usually achieved in the other cases involving enforcement or remedial powers, where the restriction is the result of a negative implication from an express grant of power, the Court will, even though unsympathetic with the result, deny the agency power. 84 By saying what tools an agency has to

78. 344 U.S. at 346.
79. Id. at 346.
80. Id. at 348. See Federal Trade Commission v. Ruberoid Co., 343 U.S. 470 (1952) for a case which says essentially the same thing.
81. 343 U.S. 562 (1952).
83. Id. at 611-12.
work with, Congress in effect limits the number of tools. In *Regents of the University of Georgia v. Carroll* the Court held that the Federal Communications Commission is limited to the power to grant, conditionally grant, or deny the issuance or renewal of a license, and could not make an order affecting the validity of a contract between a radio station and a third party.

**THE CASES IN GENERAL**

If the original premise is accepted, that the Supreme Court is in a sense responsible for the acquisition of powers by administrative agencies, the classification of cases may be helpful in reaching an understanding of the Court's decisions. But much can also be understood, and understood more easily, by looking at all the cases dealing with the powers of administrative agencies together. The perspective permits the discovery of threads which run throughout the cases and which at times are important factors in the decisions.

*Interested Parties.*

The parties to an action, their relative interests and the results sought by them, are factors which influence the Court in its determination of whether an administrative agency has certain powers. The agency is, naturally enough, usually a party in the case in some manner and its interests are nearly always considered. The Court gives weight to what the agency believes its own powers to be, but the Court does not always follow the agency belief as to its own powers. Not even where the agency expresses a belief in its lack of power will the Court necessarily find that power is not present.

In his dissent to *Powell v. United States Cartridge Co.*, Mr. Justice Frankfurter pointed out that the real controversy was between the Army Department and the Department of Labor, Wage and Hour Division, which administers the Act. He contended that the Court found the employees to be within the Fair Labor Standards Act out of habit, and the result is that the government will be paying and not a capitalist. "In such unique situations, especially, we should heed our admonition against perverting 'the process of

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interpretation by mechanically applying definitions in unintended contexts."  

Often when federal agencies conflict, interests must be balanced and more than likely resolved on the basis of which agency has the more specific delegation of power over the problem presented. Thus, where the Postmaster General protested a mail subsidy rate given an airline, he won; but when the Secretary of Interior supported several Rural Electrification Associations in attacking the Federal Power Commission's power to give a dam development project to a private concern, the Commission, as the agency delegated with the discretion to make the policy decisions in the matter, won. The public interest is probably considered in many cases. Furthermore, there will probably be a vocal minority protesting anything which appears to be a grab for power by an agency. The cases concerning conflicting state and federal jurisdiction also involve "interests of parties," but they have already been discussed.

Consistency.

It is not surprising to find that an important consideration in any determination by the Court that an administrative agency has or has not a certain power, is the degree of consistency the determination will have, both as to prior decisions and to the symmetry of the law. The importance of consistency, however, is somewhat diminished by the fact that each justice strives for this almost mystical word, "consistency," in his own way. The result is, that in a given decision, one may find a majority opinion, a concurring opinion, and a dissenting opinion each finding support in what each calls consistency. The importance of consistency is not only reduced by the possible variations in the concept, but also because consistency while important is at times disregarded in favor of some factor deemed more important. This is clearly indicated by the fact that the Court has not always followed stare decisis. Even with

89. Id. at 529.
92. See Alabama Great Southern Ry. v. United States, 340 U.S. 216, 223 (1951). "We must not lose sight of the fact that the Commission has the interests of shippers and consumers to safeguard as well as those of the carriers."
94. See supra notes 8 to 28 and accompanying text.
the foregoing qualifications the striving for consistency would appear to be of some importance since a belief in consistency like a belief in morality produces a state of mind which, although it may not always allow prediction of specific results, does allow one to assume a given attitude in the individuals with whom one deals.

"Consistency" stated by itself is a word which demands a context or continuum of sorts from which it can derive a meaning. The question becomes, consistent with what? To support a claim that a given result will either violate consistency or provide it, the Court has spoken of consistency in several different ways. Perhaps the most obvious is precedent—either stare decisis or a less precise form. The Court has also looked to see whether a result will be consistent with what is believed to be the broad congressional purpose. This has been spoken of as finding a "harmonious effectuation of... congressional objectives." Consistency has also been sought from what may be termed similar practices, as where a regulation, new to an industry, is similar to a regulation which has previously been used in another industry. The consistency in the use of terms is also mentioned at times: for example, a common law phrase like "common carrier" may be said to have the common law meaning when read in the context of a given statute. When the Court can find that the words come to them with a "gloss" the difficulty of its decision thereby diminishes.

Congressional review.

Since the Court considers the effect of its decisions, it may at times consciously or unconsciously consider the possibility of congressional review. While it will attempt to find only the agency powers which Congress intended, congressional review may permit the Court a more affirmative role in the law making process.

CONCLUSIONS

With such general considerations in mind as, interests of the parties, consistency, and congressional review, another general out-

96. Ibid.
98. See Transcontinental & Western Air, Inc. v. Civil Aeronautics Board, 336 U.S. 601 (1949); Ayrshire Collieries Corp. v. United States, 335 U.S. 573 (1949).
101. See supra notes 14 and 17 and accompanying text.
line emerges from the classification of the cases. By strict construction of the statutes in jurisdictional cases the Court has imposed a kind of judicial restraint over itself where confronted with ambiguous language.\textsuperscript{102} The Court is reluctant to find jurisdiction unless it is rather clearly present. In cases which concern the standards which define the considerations which should enter into an agency determination, the Court has been somewhat less strict.\textsuperscript{103} In these cases the Court looks to see if the agency considerations can be reasonably included within the prescribed standards. In the last group of cases, enforcement and remedial, the Court is willing to go to great lengths in trusting the agency's discretion.\textsuperscript{104} There are probably two principal reasons why the Court is so lenient with the remedies devised by the agencies. (1) Many of the remedies are of practical necessity to the agency and (2) the Court apparently believes that if an agency has conformed to both jurisdiction and the statutory standards the remedy devised should be upheld if possible. The general pattern then is a gradual relaxing by the Court of the control it exercises over the powers of administrative agencies from the strictness in determining agency jurisdiction and the less strict interpretation of statutory standards to a great reliance on the discretion of the agencies when they are concerned with enforcement and remedial powers.

\textsuperscript{102} See \textit{supra} notes 5 to 48 and accompanying text.
\textsuperscript{103} See \textit{supra} notes 49 to 61 and accompanying text.
\textsuperscript{104} See \textit{supra} notes 62 to 85 and accompanying text.