Administrative Law--The Abolition of the Negative Order Doctrine

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CASE COMMENTS

ADMINISTRATIVE LAW—THE ABOLITION OF THE NEGATIVE ORDER DOCTRINE

The Communication Act of 1934 provided that the Federal Communications Commission should not have jurisdiction over carriers engaged in interstate commerce solely through physical connections with the facilities of another carrier, unless they are under the control of such carrier. In order to obtain knowledge of communication practices, the Commission required all telephone carriers subject to the Act to file certain statements. Plaintiff, engaged in interstate commerce solely through physical connection with the New York Telephone Company, refused to comply on the ground that it was not under the control of the New York Company. After a full hearing, the Commission determined that plaintiff was under New York control and ordered it classified as subject to all telephone carrier provisions of the 1934 Act. In the District Court, Plaintiff's appeal from this order was dismissed on its merits, and a further appeal was made to the Supreme Court. On the latter appeal the Commission contended that since the order classifying Plaintiff as subject to its jurisdiction was a “negative order”, it was not subject to judicial review. The Court (opinion by Mr. Justice Frankfurter) abolished the doctrine of negative orders and held the order subject to review, although the appeal was dismissed on the merits.

The doctrine that negative orders of an administrative body are not subject to review by the judiciary was first announced in the case of Proctor & Gamble v. United States. In that case the plaintiff had applied to the Interstate Commerce Commission for an order forbidding the carriers to continue certain demurrage charges. The plaintiff's application was denied, and it finally appealed to the Supreme Court, which held that such an order was not reviewable because it was negative. The court determined that the words “any order” in the statute conferring power of review to the judiciary gave the courts power to set aside or enjoin only such orders as they might enforce. Thus the apparent origin of the doctrine was a matter of statutory construction, the court interpreting the words “any order” to exclude a refusal by the administrative body to grant relief. The reason impelling the decision, however, was a desire to achieve a proper adjustment of governance between the administrative and judicial authority in order

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1 47 U. S. C. A. Sec. 152 (b).
4 36 Stat. 1087, 1148; Sec. 207 of the Judiciary Act of March 3, 1911.
properly to carry out the purposes for which the administrative body
was created. After Proctor & Gamble v. United States, numerous cases followed
the negative order doctrine. Mr. Justice Frankfurter classifies these
cases as follows:

"1) Where the action sought to be reviewed may have the effect
of forbidding or compelling conduct on the part of the person
seeking to review it, but only if some further action is taken
by the Commission. . . .

"2) Where the action sought to be reviewed declines to relieve the
complainant from a statutory command forbidding or com-
pelling conduct on his part....

"3) Where the action sought to be reviewed does not forbid or
compel conduct on the part of the person seeking review but
is attacked because it does not forbid or compel conduct by a
third person. . . ."

But even under such a classification the distinction between affirmative
and negative orders is a tenuous one. For example, in two cases with
similar facts, opposite decisions were reached.

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5 225 U. S. 282, 294-298. Mr. Justice Frankfurter brings this out
1147, 1156 (1939). At first glance it appears that the Rochester case,
by abolishing a doctrine which limited judicial review, widens the
extent of judicial control of administrative action. To the effect that
such control is not broadened, see infra n. 16.

6 Hooker v. Knapp, 225 U. S. 302, 32 S. Ct. 769, 56 L. ed. 1099 (1912);
(1917); Great Northern Ry. v. U. S., 277 U. S. 172, 48 S. Ct. 466, 72
999 (1931); U. S. v. Griffin, 303 U. S. 226, 58 S. Ct. 601, 82 L. ed. 764
(1938); Diamond Tank Transport v. I. C. C., 23 F. Supp. 497 (D. Wash.


8 For example, where an attempt is made to review an I. C. C.
(1939).

9 For example, where the I. C. C. denies permission to depart from
1147, 1152 (1939).

10 For example, where a shipper requests the I. C. C. to order a
carrier to adopt certain rates, which the Commission declines to do:

11 Compare Pacific Power and Light Co. v. Fed. Power Com'n, 98
F. (2d) 835 (C. C. A. 9th 1938), aff'd 307 U. S. 156, 59 S. Ct. 766,
83 L. ed. 1150 (1939), with Newport Electric Corp. v. Fed. Power Com'n,
27 F. (2d) 550 (C. C. A. 2d 1938), where on essentially similar facts
(application for a license to merge public utility after a showing of
public convenience and necessity) refusal of the Commission to grant
In the Proctor & Gamble case Mr. Justice White apprehended that judicial review where the Interstate Commerce Commission had refused to give relief would be an invasion of the administrative function, and therefore the courts should not review that refusal. The decision, doctrinalized and mechanically followed, ignores the fact that where a negative order of the administrative agency substantially affects rights, judicial review of such order is no more an invasion of the administrative power than where the order is affirmative in form.

The negative order doctrine, evolved to effectuate the board considerations compelling independent administrative judgment, has tortured those considerations into a technical matter of form which no longer is concerned with the proper distribution of governmental power between the judiciary and administrative bodies, but merely with the language in which the administrative agency's order has been couched. Because of this, the doctrine is better done away with if the courts are able, without it, consciously to achieve the results originally desired. A proper coordination of administrative and judicial activity can be attained by the doctrines which Mr. Justice Frankfurter in the principal case terms "primary jurisdiction" and "administrative finality".

A license was held in the first case reviewable as an affirmative order, and in the second, non-reviewable as negative. Commented upon at (1939) 52 Harv. L. Rev. 522 (written while Mr. Justice Frankfurter was professor of administrative law at Harvard, and suggesting the negative order doctrine be abolished as unnecessary. The note points out that the doctrine is a matter of form rather than substance. In the Rochester case, Mr. Justice Frankfurter explains that the doctrine is merely a matter of form. 307 U. S. 125, 142, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1159 (1939).

See to that effect: Notes (1938) 47 Yale L. Jour. 766, 787, (1939) 52 Harvard L. Rev. 522.


By "primary jurisdiction" Mr. Justice Frankfurter means a recognition by the courts of administrative competence to decide technical matters which the statutes allocate to administrative agencies. 307 U. S. 125, 139, 59 S. Ct. 754, 761, 83 L. ed. 1147, 1157 (1939). And see Note (1938) 51 Harvard L. Rev. 1251. Thus where a shipper sues a carrier to recover charges allegedly in excess of a reasonable rate, which charges had been filed with the Interstate Commerce Commission, the shipper must first apply for relief to the Commission, and can not resort to the courts in the first instance. Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 S. Ct. 350, 51 L. ed. 553 (1907); L. C. C. v. Louisville & N. Ry., 227 U. S. 88, 33, 33 S. Ct. 135, 187, 57 L. ed. 431 (1913). For further discussion of "primary jurisdic-
Mr. Justice Butler, concurring in the result in the instant case, complains that this does not seem to be the proper occasion for abolishing the negative order doctrine. Whether or not this is so, the doctrine has rightly been repudiated.

CONSTITUTIONAL LAW—JUDICIAL REVIEW OF LEGISLATIVE DETERMINATION AS TO FACT

The state constitution authorized the general assembly to establish new judicial districts "having due regard to territory, business, and population." A new district was established by the legislature and suit was brought to enjoin the newly appointed judge thereof from discharging any of the duties of his office, on the ground that the general assembly failed to exercise due regard for territory, business, and population. Defendant demurred to the petition, alleging that the court had no authority to review the legislative finding as to those facts. The demurrer was overruled on the basis that it was the duty of the court to determine whether the actual facts justified the creation of the new district. Willis v. Jonson, 275 Ky. 538, 121 S. W. (2d) 904 (1938).

The Kentucky court apparently decides whether or not it will review the legislative determination of fact, by investigating whether or not the act was passed in pursuance of an express authority or duty granted or placed upon the General Assembly by the Kentucky Constitution. If the legislature has power to act only in certain contingencies, the court will look to see if such contingency exists; but