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Comment

ADMINISTRATIVE LAW: RETROACTIVE REVISION OF INVALID REGULATIONS.

On Christmas day, 1946, the Administrator of the Wage and Hour Division of the Department of Labor issued a regulation with no designated effective date.¹ The accompanying press release stated that for enforcement purposes the regulation would be applied beginning March 1, 1947.² For purposes of determining the liability of employers for back wages, however, the effective date of the regulation is October 22, 1938.

This extreme retroactivity is required by the 1944 Supreme Court decision of *Addison v. Holly Hill Co.*,³ where the Court held an earlier regulation invalid and remanded the case to await issuance of a valid substitute, to be retroactively applied. Employees of a cannery were suing for back wages under the Fair Labor Standards Act.⁴ The employer contended that the cannery was located within the "area of production" engaged in canning agricultural commodities for market⁵ and, therefore, that the employees were not covered by the Act. To this the employees pointed out that (1) the "area of production" exemption in the Act depends upon "area of production (as defined by the Administrator)",⁶ (2) the Administrator had defined "area of production" by regulation,⁷ and (3) that the cannery did not meet the requirements of the regulation and thus was not exempt.⁸ The employer answered that the Administrator had exceeded the scope of his authority by including in the definition certain requirements

¹ The regulation defined "area of production" for purposes of and pursuant to sections 7(c) and 13 (a) (10) of the Fair Labor Standards Act. See 11 FED. REG. (1946) 14648 amending 29 C. F. R. (1944 CUM. SUPP.) §§ 536.1, 536.2.

² 1946 W. H. 1515.

³ (June 5, 1944) 322 U. S. 607; Notes (1944) 153 A. L. R. 1026, 1188.

⁴ 52 STAT. (1938) 1060, 1062, 29 U. S. C. (1940) §§ 206, 207.

⁵ *Ibid.* at 1060, 1067, 29 U. S. C. (1940) § 213: "The provisions of sections 6 and 7 of this title [prescribing maximum hours, minimum wages, and time and a half for overtime], shall not apply with respect . . . (10) to any individual employed within the area of production (as defined by the Administrator), engaged in . . . canning of agricultural or horticultural commodities for market."

⁶ 52 STAT. (1938) 1060.

⁷ 29 C. F. R. (1938 SUPP.) § 536.2(b), as amended, 29 C. F. R. (1939 SUPP.) § 536.2(a), (d), (e). The first cited regulation is typical: "An individual shall be regarded as employed in the 'area of production' . . . (b) if the agricultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven"

⁸ The cannery had more than seven employees.

which Congress had not authorized. The Court sustained this contention and held the regulation invalid.⁹

Had the definition been expressed in a mere *interpretive* regulation (one not based on a delegation of legislative power), the Court itself would have redefined "area of production" and applied its new definition retroactively. But this was a *legislative* regulation (one based on an actual and proper delegation of legislative power)¹⁰ and hence the Court conceded that it would be out of its province if it attempted to redefine the term.¹¹

Having decided that the Administrator should redefine, the Court had three alternatives with respect to the application of a definition to the past: (1) To direct that the new regulation be applied retroactively, beginning with the date of the invalid regulation. This was the position of the majority (and October 22, 1938 is thus the effective date for the regulation issued on Christmas day, 1946). (2) To direct that the new regulation be applied prospectively, and for the past to hold that no regulation existed. This was the position of Justices Rutledge, Black, and Murphy.¹² (3) To direct that the new regulation be applied prospectively, and for the past to allow the invalid regulation to stand as the rule for persons who have relied on it. This is the position advocated in this comment.

ALTERNATIVE 1: APPLY THE NEW REGULATION RETROACTIVELY.

Is there justification for holding in 1944 that a regulation issued in 1946 should be effective as of 1938?¹³ Ordinarily, because of general objections to retroactivity, we dislike the prescription of rules of conduct for the past.¹⁴ The prescription of such rules necessarily subjects the maker to greater temptation to partiality. The objectivity expected in general rules of conduct is well-nigh impossible to attain

⁹ The Court held that the administrator had exceeded the scope of his authority in defining "area" in terms of "number" of employees. Rutledge, Black, Murphy, and Douglas, JJ., dissented on this point.

¹⁰ *Redlands Foothill Groves v. Jacobs* (S. D. Cal. 1940) 30 Fed. Supp. 995; Morgenthau, *Implied Regulatory Powers in Administrative Law* (1943) 28 IOWA L. REV. 575, and articles cited at 582, n. 31. Mr. Justice Roberts seemingly disagreed on this point (322 U. S. at 623) and wanted to affirm the circuit court of appeals (*infra* note 32).

¹¹ *U. S. v. Bush* (1940) 310 U. S. 371; *Security Adm'r v. Quaker Oats Co.* (1943) 318 U. S. 218; *Nat. Broadcasting Co. v. U. S.* (1943) 319 U. S. 190; *U. S. v. New York Tel. Co.* (1946) 326 U. S. 638; Alvord, *Treasury Regulations* (1940) 40 COL. L. REV. 252, 261, n. 49.

¹² This was their second ground of dissent.

¹³ Courts have occasionally remanded cases pending a decision by administrative agencies, but the awaited action either has been adjudication or has affected only parties before the court. See Notes (1944) 153 A. L. R. 1026; (1939) 53 HARV. L. REV. 105; (1939) 39 COL. L. REV. 1406.

¹⁴ Griswold, *A Summary of the Regulations Problem* (1941) 54 HARV. L. REV. 398, 411; Lee, *Legislative and Interpretive Regulations* (1940) 29 GEO. L. J. 1, 30; but see Smith, *Retroactive Laws and Vested Rights* (1927) 5 TEX. L. REV. 231; 6 *ibid.* 409.

when those rules are to be retroactive. Further, since there is no advance notice, nothing can be done to conform. One who happened to follow the correct course is safe; otherwise, in spite of all he may do, he is subject to penalty.

If the Administrator's Christmas-day regulation fails to exempt a cannery that was exempt under the invalid regulation,¹⁵ the employees of that cannery can sue for back wages under the Fair Labor Standards Act.¹⁶ This would increase the cannery's production costs retroactively: a hardship to the employer,¹⁷ and a windfall to the employee, neither of which is favored by the law.

The basic objection to retroactive civil laws is analogous to the objection that led the framers of the Constitution to forbid the passage of *ex post facto* criminal laws: an inherent feeling of injustice in the matter.¹⁸ For this reason courts turn to retroactivity only as a lesser evil.¹⁹

It is true that court decisions which overrule previous decisions are normally applied retroactively.²⁰ But here the analogy is not judicial, but legislative: legislative power has been delegated to an administrative officer. If Congress itself had defined "area of production", and if employers and employees had acted in reliance on this definition, a retroactive revision by Congress would have been unconstitutional.²¹ Does it not follow here, where Congress had delegated the power to define, that if the Administrator himself had held his definition incorrect, he could not have revised it retroactively? To permit him to do so would be to permit him to rise above his source and do what his creator could not do.

The cases on this subject fall into two classes: (1) tax cases, where moderate retroactivity is normally permitted,²² and (2) non-

¹⁵ *E.g.*, a small cannery that procured its agricultural products in the immediate locality and had less than seven employees, but was not located in the open country or in a rural community [11 FED. REG. (1946) 14648; 29 C.F.R. (1944 CUM. SUPP.) §§ 536.1, 536.2].

¹⁶ The most probable violation is under section 7 of the Act requiring time and a half for time over forty hours.

¹⁷ In point of hardship, this would be comparable to the back pay claims for portal-to-portal pay made as a result of *Anderson v. Mt. Clemens Pottery Co.* (June 10, 1946) U.S., 66 Sup. Ct. 1187. That case did not involve the invalidation of a legislative regulation, however.

¹⁸ Smith, *loc. cit. supra* note 14.

¹⁹ *Addison v. Holly Hill Co.* (1944) 322 U.S. 607, 622; Eisenstein, *Some Iconoclastic Reflections on Tax Administration* (1945) 58 HARV. L. REV. 477, 546, n. 374.

²⁰ 7 R. C. L. 1010. See Von Moschzisker, *Stare Decisis in Courts of Last Resort* (1924) 37 HARV. L. REV. 409, and cases referred to *infra* note 34.

²¹ Stimson, *Retroactive Application of Law—A Problem in Constitutional Law* (1939) 38 MICH. L. REV. 30.

²² The legislative analogy clearly applies here. Moderately retroactive tax statutes are upheld. Note (1944) 153 A. L. R. 1188. See particularly, *Manhattan Co. v. Comm'r* (1936) 297 U.S. 129; *Titsworth v. Comm'r* (C. C. A. 3d, 1934) 73 F. (2d) 385; *Bam-*

tax cases, where retroactivity is normally objectionable.²³ The leading non-tax case supported the legislative analogy by holding that the Interstate Commerce Commission could not retroactively revise rates on which carriers had relied any more than Congress could have done so.²⁴

Does it not seem, then, that the drastic retroactivity required by the *Holly Hill* case lacks justification, and that such retroactivity will lack justification in most instances?²⁵

ALTERNATIVE 2: APPLY THE NEW REGULATION PROSPECTIVELY,
WITH NO REGULATION FOR THE PAST.

If in the future, when a court declares a legislative regulation invalid, there is no justification for a holding that a new regulation be applied retroactively, the new regulation must be applied prospectively. The question then is what should be done about the past: should a court hold there was no regulation (Alternative 2), or leave the invalid regulation with enough vitality to protect those who have relied on it (Alternative 3)?

Proponents of Alternative 2 might claim an analogy to one of the theories as to the effect of an unconstitutional statute: a legislature's going beyond its authority usually results in the extinguishment of the statute as a rule for past conduct.²⁶ In some cases such a holding in connection with invalid regulations might not lead to either an inequitable result or a result opposed to what the delegating source of power (here the legislature) would have wanted. But certainly regulations dealing with a statute's coverage, such as the "area of production" regulation, cannot be declared never to have existed without reaching a result that is both inequitable and opposed to what the legislature would have wanted.

By its terms the Fair Labor Standards Act indicates that Congress wanted some canneries to be exempt and others to be covered. To hold that the Administrator, by exceeding his authority, in effect denied exemption to all canneries is to fly in the face of the statute. In the *Holly Hill* case the Court said it was the Administrator's duty

berger v. Comm'r (C. C. A. 10th, 1933) 67 F. (2d) 983; *Steingut v. Guaranty Trust Co. of N. Y.* (S. D. N. Y. 1944) 58 Fed. Supp. 623.

²³ *Ochoa v. Hernandez* (1913) 230 U. S. 139; *U. S. v. New York Central R. R.* (1929) 279 U. S. 73; *Wickard v. Filburn* (1942) 317 U. S. 111; *Robertson v. California* (1946) 328 U. S. 440.

²⁴ *Arizona Grocery Co. v. Atchison Ry.* (1932) 284 U. S. 370. See also *Addy Co. v. U. S.* (1924) 264 U. S. 239; but compare dictum by Justice Cardozo in *Great Northern Ry. v. Sunburst Oil Co.* (1932) 287 U. S. 358, 362.

²⁵ *Query*: Will the statute of limitations protect employers, *i.e.*, can the statute run on a retroactive regulation?

²⁶ *Norton v. Shelby County* (1886) 118 U. S. 425; FIELD, EFFECT OF AN UNCONSTITUTIONAL STATUTE (1935) 3; (1937) 14 TENN. L. REV. 634.

to define "area of production", not the Court's. One might well wonder if there is any point to the Court's refraining from prescribing the rule for the Administrator and Congress if the Court nevertheless proceeds to bend its process to bring a result contrary to the intent of both the Administrator and Congress. The great hardship to all who have relied on the previous regulation is apparent; and the same considerations discussed in connection with retroactivity apply with even greater force. Under Alternative 1, the new regulation *may* deny exemption to a cannery that was previously exempt. Under Alternative 2, this hardship for the employer and windfall for the employee exists in *all* instances, since there can be no exemption if there is no regulation defining the exemption.

Furthermore, does not Alternative 2 make it possible for the Administrator to deny exemption to anyone, merely by exceeding his authority?²⁷ The result seems similar to permitting the Administrator to deny all exemptions, by refusing to issue a regulation.²⁸

It is suggested that the argument that an invalid legislative regulation should be completely ignored for the past, as is an unconstitutional statute, fails on other scores. The federal Constitution does not lay down a specific policy, as do most enabling statutes.²⁹ Hence, declaring that the past was a void does not lead to a result contrary to constitutional intent. Furthermore, a court's declaring a statute unconstitutional does not always result in an absolute void—the statute frequently retains enough force to protect those who relied on or acted under it.³⁰

ALTERNATIVE 3: APPLY THE NEW REGULATION PROSPECTIVELY,
WITH THE INVALID REGULATION AS THE RULE FOR THE PAST.

The *Holly Hill* case is a strong precedent for the desirable rule that when a legislative regulation is held invalid the Court will not rewrite it.³¹ The basis for the Court's self-restraint was congressional intent: Congress wanted the Administrator, and no one else, to define "area of production". With this primary emphasis on intent,³² should

²⁷ See *Fleming v. Farmers Peanut Co.* (M. D. Ga. 1941) 37 Fed. Supp. 628.

²⁸ *Ibid.*; *I. C. C. v. U. S. ex rel. Humboldt Steamship Co.* (1912) 224 U. S. 474.

²⁹ *E.g.*, U. S. CONST., Art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ." is a bald grant of power without policy or even standards.

³⁰ *Chicot County Dist. v. Baxter State Bank* (1940) 308 U. S. 371; *Warring v. Colpoys* (App. D. C. 1941) 122 F. (2d) 642; *FIELD, loc. cit. supra* note 26.

³¹ This is implicit from the holding of the majority and the position of the minority. Language in the opinion further strengthens this rule as a precedent. 322 U. S. at 618. Mr. Justice Roberts seemingly disagreed on this point (322 U. S. at 623).

³² *Ibid.* at 620, 639. *Holly Hill Co. v. Addison* (C. C. A. 5th, 1943) 136 F. (2d) 323 held that the part of the regulation referring to the number of employees was invalid, but allowed the remainder of the regulation to stand. In overruling the circuit court

not the Court's next inquiry have been: what did Congress want to happen if the Administrator exceeded his authority?

In some instances, Congress has made clear the result it wanted,³³ but more often, as in the Fair Labor Standards Act, a statute does not expressly provide for such an eventuality. This does not mean, however, that the Court should abandon its deference to congressional intent. As was previously pointed out, there is an express intent against Alternative 2. When an intent against (or for) Alternative 1 or Alternative 3 cannot be found, it seems the Court should choose the one giving the most equitable result. This would be Alternative 3.

The impromptu objection to Alternative 3 is likely to be a supposed metaphysical difficulty in saying in one breath that a regulation went beyond the drafter's authority and in the next allowing it to stand for the past. This difficulty does not actually exist, of course, if congressional intent points to it as the desirable result. Even if such an intent is not apparent, mere metaphysics should not force a court to an inequitable result, or prevent its reaching the most just result.

Alternative 3 has additional justification. In overruling previous judicial interpretations, courts have held it proper to limit the overruling-decision to prospectivity, and to allow the old decision to stand for the past.³⁴ The opinions justifying such decisions have used language of "vested rights", "reliance", "change of position", and "contract impairment". The decisions recognize that in many instances great injustice results from retroactively overruling a prior decision. Would not the same injustice fall upon one who relied on a legislative regulation if its invalidity resulted in a retroactive regulation, or no regulation at all?

If the metaphysical objections, which are based on the declaratory theory of Blackstone,³⁵ can be disregarded when courts interpret a statute against the background of previous judicial interpretations, cannot they be overcome when courts interpret a statute against the background of previous administrative interpretations?

Those who have difficulty in disregarding the unconstitutional-statute analogy may find some justification for Alternative 3 in the infrequent cases where courts have given an unconstitutional statute enough force to protect those who relied on it.³⁶ Such holdings recog-

the Supreme Court said it could not assume the Administrator would have redefined "area of production" merely by leaving out the number-of-employees section had he known it were invalid. Hence even the Administrator's intent was emphasized.

³³ Emergency Price Control Act of 1942, 56 STAT. (1942) 23, 50 U. S. C. APP. (1940) § 901.

³⁴ *Great Northern Ry. v. Sunburst Oil Co.* (1932) 287 U. S. 358, 364, 365, n. 1; (1933) 85 A. L. R. 262.

³⁵ (1933) 42 YALE L. J. 779.

³⁶ Cases cited *supra* note 30.

nize that merely saying there was no statute (or, in this case, no regulation) does not make it so. The statute (or regulation) was an operative fact—it did exist, and aloofness to this fact will result in injustice, and hardship.

The practical aspects of this alternative are its greatest support.³⁷ Obviously there is no such thing as complete certainty, but should not one have some security for the past? A person who has complied with a legislative regulation, one that was given the force of law by statute, reasonably expects protection for his compliance.³⁸ Alternative 3 corresponds to the reasonable expectations of the parties.

Perhaps this alternative would not only be more equitable but would also come closer to the policy of the statute. An administrator makes his regulation only after extensive study of congressional intent and practical necessity.³⁹ His old regulation, even though invalid, will often come closer to what Congress actually wanted than a retroactive regulation which attempts the difficult task of reconstructing the past (Alternative 1), and certainly closer than no regulation at all (Alternative 2).⁴⁰

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³⁷ A suggested practical objection to Alternative 3 is that it would discourage persons affected from attacking a regulation, since no relief for the past would be available. But an employer or employee injured by an invalid regulation certainly would not pass up the possibility of future relief merely because he could not get relief for the past. See Note (1933) 28 ILL. L. REV. 277.

³⁸ In practice, administrators do not attempt to change regulations retroactively. The Wage and Hour Administrator has scrupulously avoided such a change even with respect to interpretive regulations. Seemingly, he has sought to avoid retroactively increasing the coverage of the Act by increasing the scope of the exemption and not enforcing the regulation until March 1, 1947. Good public relations, which are all-important to the proper functioning of administrative agencies, make administrators reluctant to act retroactively.

³⁹ See ATT'Y GEN.'S COMM. ON ADMIN. PROC., WAGE & HOUR DIV. MONOGRAPH, SEN. DOC. NO. 10, 77th Cong. 1st Sess. (1941) 47-65.

⁴⁰ Alternative 3 has been considered from the point of view of protecting those who have complied with an invalid regulation. The employer in the Holly Hill case had not complied. Should he, and others, be subject to civil or criminal penalty for noncompliance? Even if the invalid regulation is not given enough vitality to penalize noncompliers, those who did comply could still be protected under Alternative 3. Also protected would be those who allegedly knew the regulation was invalid and therefore did not comply. The question is: should noncompliers be excused because of the invalidity, or should everyone be required either to comply with a legislative regulation or to attack its validity at once. [See *Del Mar Canning Co. v. Payne* (1946) 29 A. C. 377, 381, 175 P. (2d) 231, 233.] The latter effect was reached by statute in the Emergency Price Control Act, and its constitutionality was upheld in *Yakus v. U. S.* (1944) 321 U. S. 414, and *Bowles v. Willingham* (1944) 321 U. S. 503. Unfortunately, no general discussion of the policy considerations has been found, and a discussion here is beyond the scope of this comment.

*Member second-year class.