COMMENT

ABUSE OF DISCRETION: ADMINISTRATIVE EXPERTISE vs. JUDICIAL SURVEILLANCE

In 1958 the Supreme Court, in *Moog Indus., Inc. v. FTC*,[1] reversed a Seventh Circuit decision postponing an FTC cease and desist order.[2] The Seventh Circuit had stayed enforcement on the ground that the FTC had prosecuted the petitioner while allowing most of his competitors to remain undisturbed, a situation which the court of appeals felt would result in petitioner's "economic extinction."[3] The Supreme Court, in reversing, noted the broad discretion granted the FTC in this area:

> [T]he decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. . . . It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.[4]

Having determined that the question of which potential violators to prosecute is within the discretion of the FTC, the Court concluded that such decisions by the Commission are reversible only for a "patent abuse of discretion."[5] This latter conclusion is apparently compelled by the Administrative Procedure Act. Section 10(a) of the APA states:

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[1] 355 U.S. 411 (1958).

[2] C. E. Niehoff & Co. v. FTC, 241 F.2d 37 (7th Cir. 1957). The Supreme Court concurrently affirmed an Eighth Circuit decision which had enforced a Commission selective prosecution. Moog Indus., Inc. v. FTC, 238 F.2d 43 (8th Cir. 1957).

[3] C. E. Niehoff & Co. v. FTC, *supra* note 2, at 42.

[4] 355 U.S. at 413.

[5] The question, then, of whether orders such as those before us should be held in abeyance until the respondent's competitors are proceeded against is for the Commission to decide . . . . *in the absence of a patent abuse of discretion.*

Id. at 413-14. (Emphasis added.)

> Except so far as . . . (2) agency action is by law committed to agency discretion—(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.[6]

On its face this section might appear to prohibit judicial review of any question committed to agency discretion. Section 10(e), however, provides that agency action may be set aside for "an abuse of discretion," [7] which implies reviewability notwithstanding discretion vested in the agency. In order to give a reasonable meaning to section 10(e),[8] and in light of legislative reluctance to exclude judicial review,[9] the most rational construction of section 10(a) would seem to be that once a question has been committed to agency discretion, the only ground for reversal would be an agency decision which is "arbitrary," or in other words,[10] an abuse of discretion.[11]

The question of what constitutes abuse of discretion, however, is not an easy one. Clearly the existence of discretion in an agency demands judicial deference to some agency decisions which the court would have made differently in the first instance. "Abuse of discretion," then, must mean more than that the agency, after considering and weighing all the relevant facts, struck a balance different from that which the court would have reached. On the other hand, administrative agencies are vested with discretion by Congress primarily because of their expected expertise in divining and effectuating congressional policy. The agency's expertise is probably only of value so long as it weighs those considerations, and only those considerations, which Congress intended that it take into account in effectuating the legislative policy. Thus, if an agency were to include within its consideration irrelevant factors,[12] or if it were to exclude a factor which Congress intended it to consider in enforcing federal policy,[13] it would have "abused" its discretion, because: 1) the agency would no longer be acting under the congressional mandate; and 2) its value as an

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[6] Administrative Procedure Act § 10(a), 60 Stat. 243 (1946), 5 U.S.C. § 1009(a) (1964).

[7] Administrative Procedure Act § 10(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1964).

[8] See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 58-65 (1965).

[9] See S. REP. No. 752, 79th Cong., 1st Sess. 7 (1945).

[10] "[A]buse of discretion" is "arbitrary action not justifiable in . . . the circumstances." NLRB v. Guernsey-Muskingum Elec. Co-op., Inc., 285 F.2d 8, 11 (6th Cir. 1960).

[11] See Berger, *Administrative Arbitrariness—A Reply to Professor Davis*, 114 U. PA. L. REV. 783 (1966). *But see* Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823 (1966).

[12] See JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 181-82 (1965).

[13] *Ibid.*

expert body—the reason for deference by the courts and for congressional trust—would be lost.

A third way in which an agency might abuse its discretion would be to give unreasonable weight to one or more relevant factors.[14] Congress presumably did not,[15] and possibly could not,[16] delegate authority to an agency to act arbitrarily or capriciously. Thus, if an agency reached a completely unreasonable result after weighing the relevant facts, the court should set that finding aside.[17] Admittedly it is a delicate task for a court to decide that an agency acted arbitrarily despite the fact that it purported to have weighed all those considerations, and only those considerations, which are relevant to the congressional purpose;[18] but the task is probably one which the courts must be willing to perform if the vast advantages of administrative agencies are not to be lost through misuse. Because the balance is so delicate, however, the courts should, and probably do, avoid striking down agency action unless they feel competent to find that the agency has clearly acted unreasonably, and thereby "abused its discretion."[19]

Recently, in *Universal-Rundle Corp. v. FTC*,[20] the Court of Appeals for the Seventh Circuit was asked to stay a selective prosecution by the FTC similar to the one in *Moog*, and again granted a stay. The court based its decision largely on three factors: 1) the economic injury Universal would suffer from a cease and desist order;[21] 2) the fact that the order was of primary benefit not to the public, but to Universal's competitors who could continue to sell at unlawful discounts;[22] and 3) the fact that the Commission, having directed itself at a widespread practice, prosecuted one of the smallest market participants and one whose unlawful discounts were allegedly the lowest of all the named competitors.[23]

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[14] See *id.* at 182.

[15] See Berger, *supra* note 8, at 58-60.

[16] *Ibid.*

[17] As stated by Judge Magruder in McBee v. Bomar, 296 F.2d 235, 237 (6th Cir. 1961): "[An abuse of discretion is] a clear error of judgment in the conclusion . . . reached upon a weighing of the relevant factors."

[18] Sometimes a court might rest its finding of an abuse of discretion on the third ground, but might really be drawing the inference either that the agency didn't consider *and* give weight to a relevant factor, or that it gave improper weight to an irrelevant factor. On the other hand, there may be cases in which the agency considers a relevant factor but gives it a completely unreasonable weight. Professor Jaffe cites the hypothetical example of an agency refusal to license a dairy because it found a speck of dirt—the dirt is relevant, but it was given an unreasonable weight. JAFFE, *op. cit. supra* note 12, at 182.

[19] See, *e.g.*, Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958); Berger, *supra* note 8, at 93-95.

[20] 352 F.2d 831 (7th Cir. 1965), *cert. granted*, 35 U.S.L. WEEK 3111 (U.S. Oct. 10, 1966) (No. 101).

[21] *Id.* at 833.

[22] *Id.* at 834.

[23] *Ibid.*

As noted above, the Supreme Court in *Moog* made clear that the decision whether to prosecute selectively suspected violators is for the agency, absent a "patent abuse of discretion." [24] The court in *Universal-Rundle* noted the *Moog* opinion and decided that in this case the FTC had abused its discretion.[25] The question then is whether the decision by the FTC in *Universal-Rundle* was an abuse of discretion as that term is explained above.[26] The court of appeals' three major articulated grounds for staying the Commission order [27] do not alone support a finding of abuse of discretion, for those three elements were largely present, and dismissed by the Court, in *Moog*. The economic despair of petitioner in *Universal-Rundle* was certainly no more critical than that in *Moog*.[28] As to the contention that Universal's competitors, not the public, would be the prime beneficiaries of the selective enforcement, that factor is probably present in every selective enforcement case, and the Supreme Court in *Moog* clearly demanded that that decision be left to the Commission.[29] Finally, the fact that the FTC chose to prosecute a violator who controlled only a small part of the retail market [30] while not prosecuting a larger competitor should not give rise to an automatic finding of abuse of discretion. It is true that the size of the alleged violator would be a relevant factor for the Commission to take into account in deciding whom to prosecute; and if the court could have drawn the inference that the Commission either had totally failed to weigh that factor or had given it unreasonably little weight, it might legitimately have concluded that the Commission had abused its discretion. But the court, not having made such a finding, should not have disturbed the FTC's judgment on this ground. The relevance of the dealer's size lies in the impact of its unlawful activity on the market. Certainly determining this impact, and balancing it with other factors, calls for as much administrative expertise as does determining the effect on competition of a particular order's taking effect.[31] Furthermore, it

[24] See note 5 *supra* and accompanying text.

[25] 352 F.2d at 834-35.

[26] Professor Davis thinks that the prosecuting power is much abused and that the court's action in *Universal-Rundle* was correct and a portent of future case law —*i.e.*, closer control over enforcement discretion. Davis, *"Judicial Control of Administrative Action": A Review*, 66 COLUM. L. REV. 635, 649-50 (1966).

[27] See text accompanying notes 21-23 *supra*.

[28] The Court refused to affirm the stay in *Moog* despite petitioner's claim that such refusal would result in his "economic extinction." See C. E. Niehoff & Co. v. FTC, 241 F.2d 37, 42 (7th Cir. 1957).

[29] 355 U.S. at 413. See text accompanying notes 4 & 5 *supra*.

[30] Universal had only 5.75% of the market. 352 F.2d at 834.

[31] See text accompanying note 4 *supra*. *But see* Address by Commissioner Jones Before the Bar Association of the District of Columbia, Feb. 25, 1965, quoted in Universal-Rundle Corp. v. FTC, 352 F.2d 831, 835 (7th Cir. 1965):

> Industry-wide enforcement of the law is almost a constitutional imperative as a matter both of fairness and equality before the law. It is clear that we have no right to and could not permit some violators to go free while prosecuting others.

may take much longer to investigate a large firm than a small one and during that difference in time the innocent small retailer would have to continue to pay illegally high prices.[32]

Thus, the three grounds on which the Seventh Circuit rested its decision in *Universal-Rundle* do not support a finding of an abuse of discretion, in the absence of a finding—apparently not made by the court—that the Commission had either totally ignored these factors, or had given them unreasonably little weight. The court, however, could have validly reversed for an abuse of discretion if it found that the Commission had included an irrelevant factor in its determination or had given unreasonable weight to a relevant factor. Universal's original request for a stay pending investigation of its competitors was denied by the Commission on the ground that such an investigation "would conflict with an investigation *now* being conducted by the Antitrust Division of the Department of Justice." [33] The remaining questions, then, are whether such an investigation by another department of the government is a factor which the Commission can consider in deciding whom to prosecute and, if this is a relevant factor, whether the Commission assigned to it unreasonably great weight.

The court in *Universal-Rundle* apparently thought that the investigation by the Justice Department was not a factor to be considered by the agency. It stated that such an investigation could "not qualify as an investigation by the Commission, which in our opinion, was the agency which was called upon to act in all matters pertaining to the case at bar." [34] This statement was erroneous. The investigation could qualify in two ways: if the Department would be enforcing the Robinson-Patman Act and, even if not, if the investigation would in some way further the purposes of federal policy in the area.[35] The Justice Department and the FTC have overlapping jurisdiction in prosecuting antitrust and Robinson-Patman Act violations.[36] There has been much criticism of that overlap [37] and the two bodies have

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[32] Holding the FTC's order in abeyance would mean that small retailers not buying in quantities large enough to get the unlawful discount would continue suffering their own economic distress since, if Universal's allegations are true, no producer will have been compelled to sell to them at fair prices. Further, if large quantity buyers are to get their unlawful discounts—discounts not based on decreased seller costs—the small buyer will probably pay a resultingly inflated price. It was exactly these small retailers that the Robinson-Patman Act was meant to protect. See, *e.g.*, FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948); H.R. REP. No. 2287, 74th Cong., 2d Sess. 3-5 (1936); 80 CONG. REC. 8102-03 (1936); ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 46 (1937).

[33] 352 F.2d at 835.

[34] *Ibid.*

[35] See the statement in *Universal-Rundle* that the investigation, *"although not involving* Section 2(a) of the *Clayton Act*, might indicate whether that section was being violated." *Ibid.*

[36] See FTC v. Cement Inst., 333 U.S. 683 (1948); PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 193 (1963).

[37] See LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 51 (1960).

attempted to eliminate much of it by yielding when the other has commenced an investigation of the same company.[38] It is reasonable to assume that Congress was conscious of the overlap of jurisdiction, and it seems reasonable to infer from the statutory scheme a congressional intent that each body take into consideration the actions of the other in regulating in the overlap area; the alternative is to attribute to Congress an intent to create waste and duplication of effort. Thus, an investigation by one pursuant to such overlap could, in some situations, be a relevant factor which Congress intended the FTC to consider before prosecuting suspected violators. The court should not have reinstated that overlap without first discerning the purpose of the Department's investigation, the subject of its inquiry, its scope, its possible results and, if the investigation were relevant, whether the agency gave an unreasonable weight to that factor.

On the other hand, even if the court had properly found that the investigation was merely collateral and not in furtherance of the purposes of the Robinson-Patman Act, or that, while relevant, it was given unreasonable weight, there is still the question of the appropriate remedy. The court's order [39] can be read as directing the Commission to stay the enforcement order until it investigates all of Universal's competitors. This reading would be at variance with language of the Supreme Court in *Moog*.[40]

The Court in *Moog* noted that the Commission must have discretion in deciding how best to allocate its time and resources.[41] Thus, even if the court had properly decided that consideration of the Department of Justice investigation constituted an abuse of discretion, it should still have remanded to the agency for further consideration. The court had no way of knowing what the FTC would decide to do after a judicial determination that such an investigation was not legally relevant or was given an improper weight. It is possible that the Commission might still refuse to prosecute Universal's competitors on other grounds, even, perhaps, on the ground that it desires not to spend its allocated time and money in investigating petitioner's competitors. The Commission may believe that stopping petitioner from selling at unlawful prices will have some beneficial effect on competition—*e.g.*, voluntary obedience by Universal's competitors—and perhaps make available a retailer who will sell at a fair price to all small buyers, even

[38] See Loevinger, *The Department of Justice and the Antitrust Laws*, in VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 90, at 205 (1963).

[39] 352 F.2d at 835.

[40] See text accompanying notes 4 & 5 *supra*. Fortunately, the court's order in *Universal-Rundle* is so ambiguous that it might be read only to order a stay until further consideration of Universal's petition for a more complete stay. This would be appropriate under the suggested analysis, and would be a proper balance between judicial protection against administrative abuse and agency autonomy.

[41] 355 U.S. at 413.

those who now buy at a higher price from Universal's competitors.[42] Thus, on finding an abuse of discretion, the court should have remanded to the Commission for further findings; it should not have imposed on the Commission what it thought would be an appropriate disposition of the case, thereby foreclosing the further exercise by the Commission of the discretion vested in it by Congress.

[42] Thus, it is even possible that Universal might benefit by being forced to sell at lower prices; what it loses in high prices, it may gain in quantity. Of course this is unlikely since Universal must be assumed to know its best interests.