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# Implied Powers of Federal Agencies to Order Divestiture

Michael Stepanek

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## NOTES

### IMPLIED POWERS OF FEDERAL AGENCIES TO ORDER DIVESTITURE.

#### I. Introduction.

While the term "divestiture"<sup>1</sup> in modern antitrust terminology has come to mean the forced liquidation by one corporation or business entity of its holdings in other companies, including its subsidiaries, in the context of the problem to be discussed by this note the term will be expanded to include the liquidation of a company's own assets and facilities. The divestiture order as a remedy for antitrust violations has long been the chief and most effective sanction against restraints of trade and monopolies in the area of interstate commerce.<sup>2</sup> An established line of Supreme Court decisions<sup>3</sup> upholding the divestiture orders of district courts has formed a precedent upon which the property rights of large corporations and their investors have been effectively controlled by the federal courts. The protection of these property rights has been narrowed to the due process question of arbitrary and unreasonable taking of property under the 5th Amendment. Indeed, the proposition that the property rights of those engaged in interstate commerce may legally be regulated by the federal judiciary under antitrust legislation admits of no questioning. However, the expansion of administrative agency powers over the rights of the individual citizen and business entity has become the subject of a newly awakened concern in recent years. Admitting the power of Congress to delegate legislative policy formulation to these agencies, the problem concerns the yielding of *quasi-judicial*<sup>4</sup> powers to these legislative creations. The ultimate question remains as to the extent of the transfer of admitted judicial functions to these agencies. This depends upon the attitude of the federal courts as to the power and intent of Congress in creating these agencies and the allowable scope of the delegated powers.

The scope of this article will be limited to a discussion of the recent claims of the federal agencies that they have the power and discretion to order, through the means of their cease and desist powers, divestiture of certain property holdings. As will be shown, this power to divest is not asserted under express legislative language,<sup>5</sup> but is held to be within the agency's general remedial power under vague and undefined statutory grants.<sup>6</sup> The chief emphasis will be placed upon the Federal Trade Commission's assertion that it may order divestiture under Section 5 of the Federal Trade Commission Act, as claimed in *American Cyanamid Co.*<sup>7</sup>

1 The term has often been used synonymously with "dissolution," "divorcement," and "divestment." Technically the terms have different meanings. See generally Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1 (1951).

2 See *United States v. E. I. Du Pont de Nemours & Co.*, 366 U.S. 316, 330-31 (1961): "Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer and sure."

3 Culminating in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), *affirming* 179 F. Supp. 721 (E.D. Mo. 1959).

4 See CHAMBERLIN, DOWLING & HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES*, 131, 134, 135, 142 (1942); Katcher, *Are Administrative Agencies Usurping Judicial Powers?* 30 N.Y.S.B. BULL. 442 (1958).

5 See the express statutory grant of the Clayton Act, § 11, as amended 64 Stat. 1125 (1950), as amended 72 Stat. 943 (1958), 15 U.S.C. § 21 (1958).

6 The remedial grants of several federal agencies are vague and general. The chief agencies placed in a position to possibly order divestiture under broad language are the Federal Trade Commission, the Interstate Commerce Commission, the Civil Aeronautics Board, the Securities and Exchange Commission, and the Federal Power Commission.

The FTC is empowered to issue an order "to cease and desist from using such method of competition or such act or practice." Federal Trade Commission Act, § 5, 38 Stat. 719 (1914), as amended 52 Stat. 111 (1938), 15 U.S.C. § 45(b) (1958).

The statutory language pertaining to the remedial power of the ICC is that "(i)t shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." Interstate Commerce Act, § 5, as amended 54 Stat. 905 (1940), 49 U.S.C. § 5(7) (1958).

The language of the remedial section of the Federal Aviation Act, giving powers to

This discussion will bring out the relevant questions of the extent to which the injunctive-type divestiture order has been allowed in these federal agencies, what the legislative intent was in granting remedial powers to the agencies, the practical problems which the business community will face in the wake of this new power, and the extent of the protection of private property rights by the federal courts.

In late 1963, the FTC decided *American Cyanamid* under one of the vaguest of the statutory enabling acts, Section 5 of the Federal Trade Commission Act. Upon a finding that the methods used by drug manufacturers to obtain a patent constituted an unfair method of competition, the Commission held that it had the authority to impose royalty-free patent licensing and know-how-sharing requirements upon these manufacturers. The basis of the holding was the claim that Section 5 of the Act gave the Commission authority in "unfair practice" cases to issue injunctive-type orders, including divestiture orders. Commissioner Higginbotham justified the order of the Commission with this language:

Eastman Kodak must be viewed with the insight provided by the Supreme Court in *Pan American Airways v. U.S.* 371 U.S. 296 (1963). There, in construing Sec. 411 of the Federal Aviation Act the Court recognized in administrative agencies the authority to issue injunctive-type orders. The Court specifically noted that 'this section (sec. 411) was patterned after Sec. 5 of the Federal Trade Commission Act,' and thus presumably the equitable powers and authority to 'order divestiture' found in Section 411 are inherent in those of Sec. 5.<sup>8</sup>

The *Pan American* case<sup>9</sup> referred to in the *American Cyanamid* decision was an antitrust action instituted by the Justice Department in a federal court for violations of the Sherman Act, Sections 1, 2, and 3.<sup>10</sup> The Court reversed a divestiture order of the district court, and held that the antitrust violations claimed could properly be remedied by the Civil Aeronautics Board under Section 411 of the Federal Aviation Act. The language cited above by Commissioner Higginbotham appears to be obiter to the decision, but presents sufficient authority upon which the Commission could base its asserted authority under Section 5.

## II. Background Of The Implied Power To Order Divestiture.

The language of the Supreme Court in the *Pan American* case reflects a judicial trend toward allowing a greater reach to administrative agency remedial powers. The holding represents an important shift in judicial thinking. In 1927 the identical issue of implied power under Section 5 was presented to the Court in the case of *Federal Trade Commission v. Eastman Kodak Co.*<sup>11</sup> The FTC claimed that it had the power under Section 5 to order Eastman Kodak to divest itself of three laboratories used in making motion picture prints. Kodak had used these laboratories to monopolize the market in American-made prints. The Court held unequivocally that divestiture was a judicial remedy, not an administrative func-

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the CAB, seems to be equally broad: "The Board is empowered to . . . issue and amend such orders . . . as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter." 72 Stat. 743 (1958), 49 U.S.C. § 1324(a) (1958).

The authority of the SEC under the Public Utility Holding Company Act of 1935 is that the SEC is empowered "to require by order . . . that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary. . . ." 49 Stat. 820 (1935), 15 U.S.C. § 79K(b)(2) (1958).

As to the licensed companies the FPC is empowered to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary and appropriate to carry out the provisions of this chapter." Federal Power Act, § 309, 49 Stat. 858 (1935), 16 U.S.C. § 825(h) (1958).

<sup>7</sup> *American Cyanamid Co.*, FTC Docket No. 7211, Trade Reg. Rep. FTC Complaints, Orders, Stipulations, Par. 16,699 at p. 21,600 (1963).

<sup>8</sup> *Id.* at p. 21,606.

<sup>9</sup> *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963).

<sup>10</sup> *Sherman Act*, §§ 1-3, 26 Stat. 209 (1890), as amended 50 Stat. 693 (1937), 69 Stat. 282 (1955), 15 U.S.C. §§ 1-3 (1958).

<sup>11</sup> 274 U.S. 619 (1927).

tion; Section 5 presented the FTC with administrative authority, not the authority of a court of equity; and that the FTC had no authority under Section 5 to order divestiture. A basic distinction was made between the *express* power to divest given the Commission under Section 11 of the Clayton Act and the powers under the vague language of Section 5. As to the Section 5 powers, the holding was explicit:

So here, the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.<sup>12</sup>

The unequivocal language of the Court demonstrated unwillingness to transfer the judicial power to order divestiture. The dissent of Justice Stone,<sup>13</sup> however, seems to be the basis for the trend toward allowing divestiture by the agencies. He claimed that it must have been the congressional intent, based upon the broad language of Section 5, to order such divestiture because the enforcement of the Act would be futile without such power. The power asserted was not an injunctive-type power merely because the orders "resemble in form familiar equitable decrees."<sup>14</sup> In retrospect it can be seen that this dissent, and its implications, has become the law as to the scope and breadth of cease and desist orders generally, and is probably the law upon the question of an agency's powers to order divestiture as part of its implied powers. The anomaly has been that the *Eastman Kodak* decision has remained the rule as to FTC divestiture powers until the *Pan American* case, while the courts have admitted the existence of the power in similar cases under other statutes.<sup>15</sup> To trace the shift of opinion as to divestiture powers is to trace the general advance of agency discretion when remedies are in question.

Although not a divestiture case, *Phelps Dodge Corp. v. N.L.R.B.*,<sup>16</sup> is a leading case on the question of the remedial powers of a federal agency. In determining whether the broad outlines of Section 10(c) of the National Labor Relations Act<sup>17</sup> could include an order to reinstate workers who had lost their job because of an admitted unfair labor practice but who had gained other employment, the Court used general language in holding that Congress could not have set out all the remedies to be employed in specific situations. The exercise of the power to adapt the statutory remedial language to concrete situations had been committed to the Board. The Court was of the opinion that the relation of remedy to policy was a peculiarly apt matter for agency administrative competence,<sup>18</sup> and the courts should not interfere with this question of *policy*. The Court did not discuss the questions relating to property rights or those relating to the contention that the powers exercised might be judicial, and not legislative, in nature. The Court's only concern appeared to be that the agency make itself clear as to what exactly it was attempting to do: "All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it."<sup>19</sup>

*Jacob Siegel Co. v. FTC*<sup>20</sup> is the leading case on the question of the extent of

12 *Id.* at 625.

13 274 U.S. at 625.

14 *Id.* at 627.

15 These cases will be discussed *infra*: *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115 (1962) (Interstate Commerce Act); *SEC v. Chenery Corporation*, 332 U.S. 194 (1947) (Public Utility Holding Co. Act); and *American Power Co. v. S.E.C.*, 329 U.S. 90 (1946) (Public Utility Holding Co. Act).

16 313 U.S. 177 (1941).

17 The broad statutory grant was: "(T)o cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." National Labor Relations Act, § 10, 49 Stat. 453 (1935), 29 U.S.C. § 160(c) (1958).

18 313 U.S. at 194.

19 *Id.* at 197.

20 327 U.S. 608 (1946).

agency remedial discretion. There the Court defined the power of the administrative and regulatory agencies to form remedies, and the extent of permissible judicial interference. In reviewing an FTC cease and desist order requiring disestablishment of the usage of a trade name, the Court set down the basic standard to be followed in later decisions:

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in the area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy.<sup>21</sup>

Whenever an agency attempts to derive more specific remedial powers from its general legislative grant, the *Siegel* case is cited by the court upholding such power.

In the first big divestiture case concerning a federal agency under a broad statute, *American Power Co. v. S.E.C.*,<sup>22</sup> the Court questioned the reach of the operative words of Section 11(b)(2) of the Public Utility Holding Company Act of 1935.<sup>23</sup> The Court held that it had been the legislative intent to include divestiture as a remedy under the broad language of Section 11(b)(2) because of the indirect references made to "dissolutions" in other sections of the Act. A deeper reading of the opinion evidences a change in judicial thinking as to statutory interpretation; the Court would no longer specifically limit general and vague statutory language affecting property rights as it had tended to do in the past. The new approach appeared to be that broad language should admit of a broad interpretation. The Court did state that the Senate version of Section 11(b)(2) had specifically included a grant of power to order divestiture similar to that of Section 11 of the Clayton Act, but held that the House's rejection of this language and the inclusion of the "such steps as necessary" language meant that it was intended to include this power and more. Under this interpretation the inclusion of such general language could never mean that the application of such a standard would be limited to the known remedies used by agencies at the time of passage of an act. When the issue is whether Congress has given such power to order divestiture this view of the Court granting such power from broad language may surely be deemed a shift in judicial attitude from the rationale presented in the *Eastman Kodak* decision.

The second *Chenery* case<sup>24</sup> involved an SEC order to divest the management of a company, undergoing reorganization, of the stock and profits from such stock acquired during the reorganization. Under the broad standards of the Public Utility Holding Company Act, the Court upheld the divestiture order even though the purchases were made in good faith and there had been no pre-existing court decision or agency regulation prohibiting such activity. The Court extended its prior holdings by saying that the choice of a remedy by the agency was entitled to even greater weight than the other findings in the order. Justice Jackson dissented on the ground that the divestiture order was beyond the power of the SEC, and that the Court had approved "the Commission's assertion of power to govern the matter *without* law, power to force surrender of stock so purchased wherever it will, and power also to overlook such acquisitions if it so chooses."<sup>25</sup>

Although it must be admitted that the Public Utility Holding Company Act of 1935 was passed to place stringent requirements upon the affected companies and the language of the statute permits the interpretation that harsh remedies were intended for the violations specifically set out, there was no express mention of the power to order divestiture, at least when unrelated to licensing of such companies and the power to revoke such licenses.

21 *Id.* at 611-12.

22 329 U.S. 90 (1946).

23 *Supra* note 6.

24 *SEC v. Chenery Corporation*, 332 U.S. 194 (1947).

25 *Id.* at 216.

*Gilbertville Trucking Co., Inc. v. U.S.*,<sup>26</sup> appears to be the leading authority on the question of an agency's power to order divestiture under a remedial grant which does not specify that remedy, but which, on the other hand, does not purport to limit the remedial choice of the agency. The action in *Gilbertville* was instituted as an original action to enjoin and set aside an order of the Interstate Commerce Commission directing a person having the controlling interest in two carriers to sell his controlling stock interest in one of the carriers. Section 5(4) of the Interstate Commerce Act<sup>27</sup> directly prohibited control by one person of two or more carriers through ownership of stock. Going directly to the issue of the alleged authority to order divestiture under Section 5(7) of the Act, the district court based its decision on the fact that, although Congress had not specified the divestiture remedy, the words of Section 5(7) were "of adequate amplitude to authorize a divestiture order" under the prior court decisions.<sup>28</sup> That the authorities cited had discussed the federal courts' power to order divestiture was not mentioned as an important aspect of the case. The injunction sought was denied, and the case came before the Supreme Court upon appeal.

Although the ICC's divestiture power was upheld, the case was returned for further findings under the application of the standard. The Court cited the Senate and House reports<sup>29</sup> on Section 5(4) to indicate that the ownership found in the case was intended to be covered by that section. In its discussion of the divestiture order as an administrative remedy under Section 5(7),<sup>30</sup> the Court stated that there was "little question that divestiture is within the scope of the Commission's power since, . . . it may order any party to 'take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation.' § 5(7)."<sup>31</sup> The Court analogized the administrative agency powers to the powers exercised by the federal courts in framing injunctive-type divestiture orders under the various anti-trust statutes. The only case cited on the question of remedial powers of a federal agency was the *Jacob Siegel* case, in which there had been no mention of the radical divestiture power. It is clear that the power asserted by the ICG here to directly affect property rights of an individual was implied from the statutory language, and the authority upon which the Court comes to sanction this extensive reach of agency discretion appears as vague as the statutory language. No congressional language as to the breadth of the order is referred to in the decision except that relating to the discussions of the sections setting out the violations.

In the *Pan American* case, which shortly followed the *Gilbertville* case, the Court held that the question of antitrust violations in the area of aviation was within the competence of the Civil Aeronautics Board under the Federal Aviation Act with its standards of "unfair practices" and "unfair methods of competition."<sup>32</sup> The Court found that Section 411 was patterned after Section 5 of the Federal Trade Commission Act, and the statutory authority of the FTC in the area of air carriers was specifically transferred to the CAB in 1958.<sup>33</sup> As to the general interpretation of Section 411 the Court held:

The parentage of § 411 is established. As the Court stated in *American Airlines v. North American Airlines*, 351 U.S. 79, 82, this section was patterned after § 5 of the Federal Trade Commission Act, and '(w)e may

26 371 U.S. 115 (1962).

27 Interstate Commerce Act, § 5, as amended 54 Stat. 905 (1940), 49 U.S.C. § 5(4) (1958).

28 *Gilbertville Trucking Co., Inc. v. United States*, 196 F. Supp. 351, 362 (D.Mass. 1961).

29 S. Rep. No. 87, 73d Cong., 1st Sess. 9-10 (1933); H. Rep. No. 193, 73d Cong., 1st Sess. 16-17 (1933).

30 371 U.S. at 129-31.

31 371 U.S. at 129.

32 371 U.S. at 309-10.

33 371 U.S. 303, n.8.

profitably look to judicial interpretation of § 5 as an aid in the resolution of . . . questions raised . . . under § 411.<sup>34</sup>

The Court then held that Section 411 was broad enough to encompass an order of divestiture because the power to order injunctive relief had been given to the CAB under that section. The section referred to, however, mentioned no injunctive power in the CAB beyond the language of the "cease and desist" order sanction. The Court expressly refused to determine the scope of the divestiture powers, but cited the *Gilbertville* decision as authority for the existence of such power.<sup>35</sup> The express holding of this case was that Section 411 must be given the same interpretation as Section 5 of the Federal Trade Commission Act. The Court could have limited the scope of the asserted powers by affirming *Eastman Kodak* which was directly on point as to the exact powers the CAB contended for in this case, but it refused to do so. The only possible conclusion that can be drawn from the *Pan American* case is that the holding and rationale of the earlier *Eastman Kodak* decision are now rejected and the Court is operating under a different philosophy as to agency discretion in the remedial area. Whether *Eastman Kodak* is now deemed bad law as to the interpretation of other statutory sections similar to Sections 5 and 411 remains to be determined. What can be determined from the two recent cases is that the Court appears to be allowing the transfer of effective control over the traditional area of judicial competence, that of injunctive-type remedies including divestiture, to the agencies charged with determining policy matters. Whether the courts are actually yielding to legislative intent in these cases or exhibiting a familiar policy of self-imposed restraint will now be discussed.

### III. Legislative Intent As To The Divestiture Power.

Upon the assumption that the *Second Chenery* and *American Power* decisions were based upon a finding that Congress had clearly exhibited such a specific intent to include the remedy of divestiture that the Court should not subvert an obvious legislative policy, this theory cannot be asserted in explanation of the more recent cases. The statutory grants in question appear much less specific as to congressional intent. Because the Court has held that the statutory interpretation of Section 5 of the Federal Trade Commission Act establishes the standard in interpreting other statutes,<sup>36</sup> the legislative background of Section 5 of the Federal Trade Commission Act must be examined to determine whether the legislature intended to include divestiture.

The language of Section 5 of that Act, like the language of the broad statutory grants of several federal agencies as to their remedial powers, does not answer whether Congress actually intended the transfer of judicial adjudication procedure to the agencies. The question narrows to the more specific one of whether Congress intended, or even discussed the possibility, that vast property interests of companies affected with a public interest and the investors in these companies should be subjected to a Commission having the ultimate power to order divestiture with limited judicial review.

The Federal Trade Commission Act became law in 1914.<sup>37</sup> In 1927 *Eastman Kodak* specifically limited the remedial powers under Section 5 of that act by saying of the FTC that, "It has not been delegated the authority of a court of equity."<sup>38</sup> In 1946 *Jacob Siegel* held that, "Congress has entrusted it with the administration of the Act. . . . The Commission is the expert body to determine

34 *Id.* at 303.

35 *Id.* at 312 & n. 17.

36 This was the holding of *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), and the necessary holding of *Gilbertville Trucking Co., Inc. v. United States*, 371 U.S. 115 (1962).

37 Act of September 26, 1914, c. 11, 38 Stat. 717, 15 U.S.C. §§ 41-51 (1958).

38 274 U.S. at 623.

what remedy is necessary to eliminate the unfair or deceptive trade practices. . . ."<sup>39</sup> In 1958, *Moog Industries, Inc. v. FTC*,<sup>40</sup> the Court held, "Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress. . . ."

In determining that the broad language of Section 5 must have been the result of congressional intent to include broad remedial powers, the Court has looked only to the face of the statute. However, the legislative history is also instructive. The final Senate version of the bill provided for injunctive-type powers to be exercised by the proposed commission without a provision for a right to judicial review,<sup>41</sup> rather than the complete, unrestrained agency control included in the original proposal.<sup>42</sup>

The final House bill rejected the language which would have immediately given the Commission the powers to enjoin "unfair practice" violations of Section 5 and violations of other antitrust statutes. The House included the "cease and desist order" language, added the standard of "interest of the public," included provisions for judicial review with full power to modify or reverse any order, and included the provision giving the reviewing court the power to order additional taking of evidence even though the facts found by the Commission were to be "conclusive" if supported by evidence.<sup>43</sup> Such bicameral interaction seemingly indicates that Congress expressly refused to provide the Commission with the broad powers claimed, including the injunctive-type remedy originally proposed for it. In fact, these reports indicate that the functions of the proposed commission were to be mainly advisory to the courts, and to Congress, in passing future legislation.

Probably the most important factor in ascertaining the intention of Congress as to remedial powers under Section 5 is that Congress debated and passed the Clayton Act in the same year as the Federal Trade Commission Act. In Section 11 of the Clayton Act Congress *expressly* gave the FTC the power to order divestiture.<sup>44</sup> That the Congress did not intend the FTC to have such a power under Section 5 is at least implicit from the result of its efforts. It therefore appears that the Supreme Court made an independent judgment as to the intent of Congress in inserting the Section 5 powers. Thus, the trend toward judicial restraint in limiting administrative jurisdiction can remain as the only plausible basis for the court's action.

#### IV. Judicial Review Of The Divestiture Order.

The importance of recognizing divestiture as an adjunct of an agency's cease and desist order stems from the fact that a limited judicial review will place the practical power to determine the extent and usage of property rights in a federal agency rather than a federal court. Whether such rights will be protected from arbitrary and unreasonable acts of the agency in the same manner as they have been protected by the federal judiciary is a relevant inquiry. The question of which branch has the initiative in formulating such orders is of practical importance to the affected corporations and individuals.

The corporations regulated by the various agencies are provided with judicial review. The basic problem area under review of agency orders is the extent to which the Supreme Court will continue to sanction the administrative agencies'

39 327 U.S. at 612.

40 355 U.S. 411, 418 (1958).

41 S. Rep., *supra* note 29, at p. 18.

42 Besides providing for complete price regulation powers, Senator Newland's original proposal contained provisions for federal incorporation under the direct control of the proposed commission, non-reviewable revocation power in the commission, and power to order that such corporation which lost its license "shall not engage in interstate commerce." S. Rep., *supra* note 29, at pp. 1, 18.

43 H. Rep., *supra* note 29, at pp. 3-4.

44 See note 5 *supra*.



injunctive-type orders without allowing discretion in the reviewing courts to inject their judgment when such agencies determine remedies as well as violations. The general view today is that the weight to be given to the facts found, and the inferences to be drawn therefrom, are for the commission or board.<sup>45</sup> However, no distinction has been made between the extent of review of the underlying facts concerning the violation, and the extent of review of the facts and findings underlying the remedy chosen. A popular theory upon which review is extended or not depends upon the relative and comparative qualifications of the agency and the courts to decide the particular issue.<sup>46</sup> Professor Davis explains the extent of judicial interference as based upon the reviewing court's choice of either the "analytical" approach, which follows conventional "law-fact" lines; or the "rational" approach, which tends to mix the questions of "law" and "fact" together and bases a decision upon the practical and realistic reasons for or against a certain policy.<sup>47</sup> He claims that the majority of administrative decisions are reviewed under the "rational" approach. Almost without exception the courts have deferred to the expertise of the agency in the formulation of policy, and it appears that the technical distinction between what is a legislative function and what is a judicial function no longer exists. Both have been grouped under the general heading of "policy determinations" as to which the agency is deemed the expert.<sup>48</sup> In most cases, therefore, review of agency orders is initially curtailed by classifying such agency action as a "legislative determination" over which the court has no power.<sup>49</sup>

When the issue of whether the remedy was proper or not is actually discussed, the standards of review have not differed as to orders determining property rights and those concerned with administrative matters. The standards have not differed when the finding of a violation is in question and when the remedy imposed for such a violation is claimed to be excessive or without the power of the agency. The *Jacob Siegel* case has become the leading authority on this latter proposition. In discussing the extent of review under Section 5 of the Federal Trade Commission Act, the Court set down the standard which has remained the law to date:

Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. As applied to this particular type of case, it is whether the Commission *abused its discretion*. . . .<sup>50</sup>

The Court set down another standard of review when it held that the agency "has wide latitude for judgment and the courts will not interfere except where the remedy selected *has no reasonable relation to the unlawful practices found to exist*."<sup>51</sup> The *abuse of discretion* standard announced by the Court is one of the standards set out in the Administrative Procedure Act, Section 10(e) (B) (1),<sup>52</sup> and presumably the remaining portions of Section 10(e)<sup>53</sup> were deemed not ap-

45 *Corn Products Refining Co. v. FTC*, 324 U.S. 725 (1945); *FTC v. Pacific States Paper Ass'n*, 273 U.S. 52 (1927).

46 4 DAVIS, ADMINISTRATIVE LAW § 30.09, at 241 (1958).

47 *Id.* § 30.02, at 192-93.

48 *Id.* § 29.05, at 137-39. See Davis' discussion of how the Court may deem a question a matter of court-made law and remove it from the area of administrative discretion.

49 See *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952), which appears to put review of facts relating to the violation on a par with review of the facts underlying the choice of remedy.

50 327 U.S. at 611-12 (Emphasis added).

51 *Id.* at 613 (Emphasis added).

52 "Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion — . . . (e) Scope of Review . . . It shall . . . (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. . . ." 60 Stat. 243 (1946), 5 U.S.C. § 1009 (e) (1958).

53 The Court did not refer to § 10(2) which limits judicial review where agency action is by law committed to agency discretion, and omitted the general statement at the beginning of § 10 that "So far as necessary to decision and where presented the reviewing

plicable to the choice of remedies situation. Although the case did not specifically relate to divestiture orders, the *abuse of discretion* standard of review has remained a limitation upon a reviewing court in its ability to protect essential property rights. Thus, the "substantial evidence rule"<sup>54</sup> is not the standard of review when the remedial discretion of the agencies is at issue. Indeed, cases exist in which the evidence was not even reviewed in upholding an agency decision in this area.<sup>55</sup> Whatever the standard of review in this context, the questioning of agency decisions is definitely narrower than the review of court antitrust decisions under the "clearly erroneous" doctrine.<sup>56</sup>

In the leading case on the scope of review of divestiture orders,<sup>57</sup> the Court held that it could not reverse the Commission except in the situation where the Commission had "plainly abused its discretion in these matters,"<sup>58</sup> and held that the Commission was the expert and best-qualified tribunal to decide such matters of divestiture. The Court went even further and held that the Commission's remedy power and judgments rendered thereunder was the area in which the courts should least interfere. Justice Jackson dissented from this extension of agency authority to make final decisions affecting property rights, and concluded that an appeal to the judicial branch would be a "mere feint."<sup>59</sup> The *Siegel* and *Chenery* decisions appear to remain the standards as to review of this type of order, and the *Gilbertville* case so implies.<sup>60</sup>

It might be stated, by those who favor the extension of agency power to order divestiture, that the doctrine of *Ohio Valley Water Co. v. Ben Avon Borough*,<sup>61</sup> provides protection of the extensive property rights involved in a divestiture order. The *Ben Avon* case was a decision under the due process clause of the 14th Amendment based on a contention that a Pennsylvania statute, interpreted by the Pennsylvania courts to eliminate review of confiscatory rate questions, was unconstitutional. The Court held that a full and independent review of both law and fact must be provided when a question of confiscation of property is brought before the reviewing court. But the holding of the *Ben Avon* case was directly limited in *St. Joseph Stock Yards Co. v. U.S.*<sup>62</sup> After stating the general proposition that when constitutional rights are involved judicial interference cannot be blocked, the Court limited those statements by holding that a reviewing court should not upset the agency action after a full hearing except where the presumption that the agency's actions are constitutional is overcome by a convincing showing that the confiscation was clearly established. The *Ben Avon* doctrine seems to be

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court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." Perhaps more relevant to the question at hand, the Court did not even discuss § 10(e)(B)(6) which provides specifically for *de novo* review of facts when the conclusion of the agency is unwarranted by the facts found. Section 5 of the Federal Trade Commission Act calls for additional review of facts by the court of appeals.

54 See *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); and *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939), where it is stated that "substantial evidence . . . means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

55 *FTC v. Cement Institute*, 333 U.S. 683 (1948), and the dissent of Mr. Justice Burton.

56 4 *DAVIS*, *op. cit. supra* note 46, § 29.02.

57 *SEC v. Chenery Co.*, 332 U.S. 194 (1947).

58 332 U.S. at 208.

59 "I feel constrained to disagree with the reasoning offered to rationalize this shift. It makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to a mere feint." 332 U.S. at 210.

60 371 U.S. at 130.

61 253 U.S. 287 (1920).

62 298 U.S. 38 (1936).

limited to such an extent today, that many feel an appeal based upon it as authority might be fruitless.<sup>63</sup>

With the demise of the *Ben Avon* doctrine, and the continuance of the *Siegel* "abuse of discretion" and "reasonable relation" tests, the admission of the divestiture power in the federal agencies becomes extremely important to the business community. The difficulty presented to the executives of large interstate corporations will be to anticipate divestiture orders under fact situations different from those under which a court would order such a remedy.

#### V. Practical Consequences Under The Exercise Of The Power.

Another important consideration is whether there will be a substantial difference of result if the power to order divestiture is given to the major federal agencies. There would appear to be a rather large difference between an order which merely calls for the cessation of some business practice in the future and an order directing the sale of a business holding or portion of a corporation's own plant or facilities. With the coming of the newly acquired remedial powers in the agencies, corporate executives can anticipate severe, rather than relatively minor, sanctions for erroneous choices of a particular business practice.

An examination of the practices of several administrative agencies will place this difficulty in its true perspective. In these situations a prosecutory-type of "rule-making" is used, and the respondent company is apprised of a possible violation for the first time upon the filing of the complaint against it. The difficulty becomes apparent when it is recognized that the agency is charged with the duty of "filling in" the vague boundaries of the statutory standards such as the "unfair and deceptive practices" violations of Section 5 of the Federal Trade Commission Act.<sup>64</sup> The companies charged with violations of the act are severely disadvantaged because prior transactions or activities which were assumed to be legal and good business practices prior to the agency action are made violations of standards promulgated for the first time in the cease and desist order of the agency. Under Section 5 the initial finding of a violation occurs when the vague contours of the statutory language are applied to conduct of the violator in the cease and desist order. Even though an agency has given notice of some of the violations in its prior case rulings, the problem remains because the past standards need not remain the same and new ones are constantly being added. Thus, the possibility of finding a due process violation in the rendition of injunctive relief is greatly curtailed because it must be found that such relief is violative of some definite rule of law or administrative regulation, or is contrary to established principles of equity.<sup>65</sup>

In the *Second Chenery* case, the contention was made that since the SEC had found no conscious wrongdoing on the part of the officers of the companies when they purchased stock during a reorganization, and since there had been no prior decision or regulation on the subject, the SEC should not be allowed to order the sale of the stock because it would be a retroactive application of law. The Court held that the agency must be allowed to determine the law in the holding company area on a *case by case* method, and *ad hoc* litigation was the only practical way that the statutory standards could develop.<sup>66</sup> The rationale of the Court was that the SEC was the only body deemed competent to find violations of the general statutory prohibitions. The Commission was not bound to promulgate a general rule or regulation prior to the finding of a violation under such standard, and the only practical way for the Commission to regulate under the statute was *by order* after a due consideration of the facts "in the light of the relevant and

<sup>63</sup> See 4 DAVIS, *op. cit. supra* note 46, § 28.09, p. 165.

<sup>64</sup> Federal Trade Commission Act, § 5, as amended 66 Stat. 631 (1952), 15 U.S.C. § 45(a) (1958).

<sup>65</sup> See generally on this point *Permissible Scope of Cease and Desist Orders*, 29 U. CHI. L. REV. 706 (1962).

<sup>66</sup> 332 U.S. at 203.

proper standards."<sup>67</sup> These "standards" to be viewed in the promulgation of further rules were themselves vague and undefined to a point that they could give no notice.

Justice Jackson dissented and objected to "the Commission's assertion of power to govern the matter *without law*,"<sup>68</sup> and concluded that the judicial process of review would be completely eliminated if such activity were sanctioned by the Court. The fact that the agency had no experience, and claimed no experience, with the type of problem presented to it was deemed a determinative issue by Jackson, and led to his opinion that the agency's law might become a "law unto itself."<sup>69</sup>

In *American Power Co.* the Court held that the application of a retroactive standard was not unconstitutional. Another important holding of the case was that the SEC's failure to take into account other possibly less harsh remedies would in no way affect the validity of the divestiture order.<sup>70</sup> The evidence of the respondent violators tending to show that divestiture was not needed to cure the violation, and their proposals for more moderate relief were not even discussed by the Court in its review.

Although the *American Power Co.*'s holding as to the duty to give weight to other solutions besides divestiture is doubtful authority under the *Gilbertville* decision,<sup>71</sup> the practical problems for the business community in the area of reasonable notice and fair hearing remain. Thus, today, the respondent company is presented with the difficult task of presenting evidence to combat a claimed violation which it initially had notice of in the complaint. Every expansion of facilities, by purchase, merger, consolidation, or by internal growth, will have to be previously documented as to its purpose and effect upon competition. As the list of violations found against other firms is lengthened, the remaining competitors will have a better idea of what may and may not be done. This is not the prior notice a business executive would desire in his everyday activities. If activities of a corporation lead to a larger share of the relevant market, the tendency to shrink the permitted market share may indeed cause anticipation in the business community if divestiture becomes an effective remedy for newly designated "unfair or deceptive practices." If the theory that mere size of a company is a violation becomes a matter of administrative policy similar to the theory adopted by the courts, and as such will not be reviewed under the *Ruberoid* doctrine,<sup>72</sup> the federal agencies will indeed have a great power of practical control over the distribution of an industry's competition.

## VI. Conclusion.

The series of cases since the *Eastman Kodak* decision of 1927, culminating in the *Gilbertville* and *Pan American* cases in 1963, reflect a radical change in the views of the Supreme Court as to agency powers and the protection of basic property

67 *Id.* at 201.

68 *Id.* at 216.

69 *Id.* at 215.

70 "In view of the rational basis for the Commission's choice, the fact that other solutions might have been selected becomes immaterial." 329 U.S. at 118.

71 In the *Gilbertville* case the Court remanded the case for a finding of evidence that the parties concerned had actually been heard on the issue of divestiture.

72 In *FTC v. Cement Institute*, 333 U.S. 683 (1948), it appeared that the FTC had decided that there was a violation before any relevant evidence had been offered in the hearing. The FTC had published its findings in reports to the Congress and the President. The Court assumed that the *entire* Commission had decided the issues before relevant defense evidence had been offered, and held that this was not to be objected to under due process. The Court held that even though the Commission had been biased and had decided the issue already, this was within the legislatively delegated authority to form policy decisions. This decision would surely affect property rights to a great extent when the agency is acting judicially in forming a remedy.

rights under the federal constitution. The change of policy toward the more restrictive usage of private property for the protection of the public has not been limited to the loosening of control over the agency action concerning the adjudication of such rights. It seems to have extended to the delegation of judicial power to form remedies deemed appropriate by the agency. That the Congress has the plenary power to determine regulation of interstate commerce is undoubted, but the question of the constitutional protection of property rights within such regulation is a judicial matter which should remain under the effective control of the federal courts.

The question of extreme importance here is whether the remedy deemed appropriate by the agency, that of a possible divestiture, is in reality too drastic under the facts of the case. The forced sale of assets held by an antitrust violator may be more than a mere remedy; it may be the articulation of a policy of reallocation of the means of competition between competitors in a line of commerce. It is clear that this is the rationale behind several of the decisions of the courts under the Sherman and Clayton Acts.<sup>73</sup> The question of size as relating to effective competition has become the relevant measure of an antitrust violation.<sup>74</sup> This has generally remained an area of decision wherein the Supreme Court has the final interpretation under the traditional theory that the protection of basic property rights is a matter for judicial control. But the trend shown by the recent decision indicates that the agencies now have the size and political power to control the business community with policy decisions initiated in the agency itself, which determinations are not effectively controlled or modified by either the Congress or the courts.<sup>75</sup> The shifting of this essential power has been caused by a shift in judicial thinking since the decision in *Eastman Kodak*.

There has been a shift from allowing the agency to declare legislative policy as to the formulation of standards of violation to allowing the agency the discretion in stating antitrust policy; presently, such agencies have the power to control remedial policy and the standards as to the proper allocation of business opportunity. Probably the most succinct and pointed opinion written against the transfer of judicial control over basic property rights is the dissent of Justice Jackson in the *Second Chenery* case.<sup>76</sup> He sums up his objections to the judicial shifting of authority over agency discretion, when property rights are concerned, in these words:

It (the final order of the SEC) does not remotely affect the impersonal financial or legal factors of the plan. It is a personal deprivation denying particular persons the right to continue to own their stock and to exercise its privileges. Other persons who bought at the same time and price in the open market would be allowed to keep and convert their stock. Thus, the order is in no sense an exercise of the function of control over the terms and relations of the corporate securities.

Neither is the order one merely to regulate the future use of property. It literally takes valuable property away from its lawful owners for the

<sup>73</sup> See Jones, *The Thrust of the Antimerger Act: The Brown Shoe Decision*, 38 NOTRE DAME LAWYER, 229 (1963), where the question of judicial policy under § 7 of the Clayton Act is discussed.

<sup>74</sup> *Brown Shoe Co. Inc. v. United States*, 370 U.S. 294 (1962).

<sup>75</sup> In *Pan American Airways, Inc. v. United States*, 371 U.S. 296, 304 (1962), it was stated:

There are various indications in the legislative history that the Civil Aeronautics Board was to have broad jurisdiction over air carriers, insofar as most facets of federal control are concerned. The House Report stated:

"It is the purpose of this legislation to coordinate in a single independent agency all the existing functions of the Federal Government with respect to civil aeronautics, and, in addition, to authorize the new agency to perform certain new regulatory functions which are designed to stabilize the air-transportation industry in the United States. H.R. Rep. No. 2254, 75th Cong., 3rd Sess., p. 1."

<sup>76</sup> 332 U.S. at 209.

benefit of other private parties without full compensation and the court expressly approves the taking.<sup>77</sup>

Agency cease and desist orders may be viewed as either remedies for past violations or as preventions of future violations. Under either view complete or partial divestiture can readily be anticipated under the Du Pont statement that divestiture should be the first remedy to enter the mind.<sup>78</sup> The complaint of many a business executive that the fate of his corporation's existence lies in the hands of administrative officers, and not within the safer confines of a judicial court, is becoming a realistic, if not a valid, complaint. And under the recent *Pan American* and *Gilbertville* cases, there is an unmistakable trend toward allowing the "fourth branch" of the federal government to decide the questions relating to basic property rights. Whatever the arguments for divestiture as a valid means of economic reorganization of a monopolistic industry, there must be an effective means of reviewing any such determination by a federal agency.

*Michael Stepanek, Jr.*

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<sup>77</sup> *Id.* at 211.

<sup>78</sup> See *United States v. E. I. Du Pont de Nemours*, 366 U.S. 316, 330 (1961), where divestiture as the chief remedy is discussed.