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# Gemsco v. Walling A New Principle of Judicial Construction

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# GEMSCO v. WALLING
## A New Principle of Judicial Construction

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The decision and reasoning of the United States Supreme Court in three recent cases arising under the Wage and Hour Act[1] has greatly broadened the extent to which the Court will liberally construe a delegation of power to an administrative officer, in order to preserve the effective administration of the Act. In *Gemsco* v. *Walling*[2] the Administrator of the Wage and Hour Division of the United States Department of Labor had convened a committee for the embroideries industry under the power given to him in Section 8 of the Act,[3] and had referred to it the question of the minimum wage rate to be fixed for that industry. After an investigation of the conditions in the industry the committee filed its report with the Administrator, recommending a minimum rate of 40 cents an hour. The Administrator then held a hearing, pursuant to Section 8 (d) of the Act,[4] at which he proceeded to consider

[1]Fair Labor Standards Act of 1938, 52 STAT. 1060 (1938), 29 U. S. C. § 201 *et seq.* (1940).

[2]324 U. S. 244, 65 Sup. Ct. 605 (1944).

[3]Section 8 provides in part as follows:

"(a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry."

[4]Section 8 (d) reads as follows:

"The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry

the further question: What, if any, prohibition, restriction, or regulation of home work in this industry is necessary to carry out the purpose of such order? After the hearing an order was entered by the Administrator. That order approved the recommendations of the industry committee, established a minimum rate of 40 cents an hour, and in addition prohibited all homework in the industry, on the ground that the abolition of homework was necessary in order to make effective the administration of the wage order. Approximately 40 per cent of all workers engaged in the industry were homeworkers, that is, they performed their work on goods or articles in their own homes and turned over the finished product to the employer; the remaining 60 per cent were employed in factories, which, for the year 1939, averaged 12 or 13 workers per factory.[5] Certain home workers and employers of home workers filed petitions in the circuit court of appeals for a review of this order insofar as it undertook to prohibit homework. The cases were consolidated for hearing in that court, and judgments were entered sustaining the Administrator's order.[6] Certiorari was granted by the Supreme Court, limited to the issue whether the Administrator has authority under Section 8 (f) of the Act to so prohibit industrial homework. The Supreme Court affirmed the judgments for the Administrator, in an opinion reading in part as follows:

> "The statute itself thus gives the answer. It does so in two ways, by necessity to avoid self-nullification and by its explicit terms. The necessity should be enough. But the Act's terms reinforce the necessity's teaching. Section 8 (d) requires the Administrator to 'carry into effect' the committee's approved recommendations. Section 8 (f) commands him to include in the order 'such terms and conditions' as he finds necessary to carry out' its purposes. These duties are backed up by other provisions. When command is so explicit and, moreover, is reinforced by necessity in order to make it operative, nothing short of express limitation or abuse of discretion in finding that the necessity exists should undermine the action taken to execute it. When neither such limitation nor such abuse exists, but the necessity is conceded to be well founded in fact, there would seem to be an end of the matter."[7]

Section 8 (f) of the Wage and Hour Act provides in full as follows:

> "Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such

committee for such industry (which he may appoint for such purpose), for further consideration and recommendations."

[5]See opinion of the Court, Gemsco v. Walling, 324 U. S. 244, 251, 65 Sup. Ct. 605, 610 (1944).

[6]Guiseppi v. Walling, 144 F. (2d) 608 (C. C. A. 2d, 1944).

[7]Gemsco v. Walling, 324 U. S. 244, 255, 65 Sup. Ct. 605, 612 (1944).

terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance."[8]

By the use of the words "terms and conditions," Congress must either have intended to empower the Administrator to require any conceivable act on the part of the persons affected by the order (providing he found it necessary in order to carry out its purposes), or Congress must have had in mind some limitation on that power implicit in the words used and in the context in which they were used. In the present decision, the Court has apparently declared that the former is the correct interpretation. It is submitted that the soundness of such a construction of the provisions is highly questionable; in effect a new rule is announced for construing statutes, namely, that where it is found by the administrative official that a statute cannot be made effective without the exercise of a given power, that power will be considered as being explicitly conferred under words of general import, regardless of the context in which such words appear or the incidental nature of the duties to which they relate.[9]

Even considering the words used aside from their context, it seems clear that Congress did not intend that the Administrator could order anything he wished so long as he found it necessary to carry out the purposes of his order, etc. The word "terms" could not have been used in this all-inclusive sense, because then the additional words "and conditions" would be mere surplusage. Furthermore, if used in this sense the word "terms" is co-extensive with the order itself. That is, the order can be nothing aside from its terms. Read in this fashion the provision becomes ridiculous. Thus, in the instant case, prohibition of homework would be one of the terms of the order "issued under this section," to carry out the purpose of which the Adminis-

[8] 52 STAT. 1060, 1065 (1938), 29 U. S. C. § 208 (f) (1940).

[9] It would seem that, with all due respect to the opinion of the Court, the power in question, namely the power to prohibit homework, is not explicitly conferred on the Administrator by the provision in question. Webster defines the word "explicit" as "Not implied merely, or conveyed by implication; distinctly stated; plain in language; open to the understanding; clear; not ambiguous; express; unequivocal; . . ." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1944) 897. If the clause, "including the restriction or prohibition of industrial homework," had been included in § 8 (f), as proposed in Congress (see note 16 *infra*), then the statute could be said to be explicit in granting the power in question. In the absence of such specific reference to this power, it seems somewhat misleading to apply that word to the provision in question.

trator can prohibit homework. The legislature would thus be saying that the Administrator can prohibit homework in order to carry out the purposes of prohibiting homework. And he can order anything further which he finds necessary in order to carry out the purposes of prohibiting homework, which he ordered as being necessary to carry out the purposes of the original order, and so on *ad infinitum*. The absurdity of such a conclusion is perhaps greater than that of the immediate aspects of this decision, but it clearly must follow from a construction of the word "terms" which allows no reasonable limit to its scope. The same result would follow in a lesser degree from construing the word "conditions" in its all-inclusive sense. But when the words "terms and conditions" are construed as meaning reasonable requirements, such as keeping records and filing reports, which are incidental to administration of the substantive portions of the order, then the provision becomes intelligible to the average person subject thereto, and he can foresee with some degree of accuracy the nature of the requirements with which he will have to comply. Under the present construction, a worker or employer in this industry or any other industry must constantly live and work in the darkness of uncertainty as to what kind of prohibition the Administrator will next find it necessary to order. Formerly one could examine the statute and predict within reasonable limits how he would be required to work or conduct his business. After the present decision he must operate under a constant threat that his job or business may be virtually obliterated as a result of an order the Administrator finds is necessary to carry out the purposes of an order, or prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein.

When read in the context in which they appear, the words "terms and conditions" become still less susceptible to the broad construction given them in the instant decision. One of the purposes of the Act is to fix minimum wages in industries engaged in commerce or in the production of goods for commerce. A figure of 40 cents an hour was set as the objective, and that level was to be reached as rapidly as "economically feasible without substantially curtailing employment."[10] Section 6 of the Act provided for a minimum of 25 cents an hour for the first year during which that Section was in operation, 30 cents an hour during the next six years, and 40 cents an hour after the expiration of seven years from such effective date. In Section 8 a method is provided whereby the minimum rate for a given industry can be increased before the expiration of the stated intervals, providing such action

[10]Section 8 (a), quoted *supra* note 3.

will not substantially curtail employment in the industry. The first sentence of paragraph (f) of Section 8, in providing that "Orders issued *under this section* . . . shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders . . ."[11] clearly limits the power in question to orders establishing the accelerated minimum provided for *under Section 8*. Obviously paragraph (f) does not authorize the Administrator to prohibit homework if the minimum rate was left at the level prescribed by Section 6. The Act as construed, therefore, creates the anomalous situation of broad powers in the Administrator where he can prescribe a special rate under Section 8, which do not exist in the general case where the minimum rate remains fixed under Section 6. In the clear language of Mr. Justice Roberts' dissenting opinion, "The result of the decision is that, in the exceptional case where a special rate of wages is set in advance of the prescribed rate, the Administrator may do what, in the generality of cases, he may not do."[12] The dissenting opinion continues as follows:

> "We have, then, this situation: With respect to any industry which has not been taken out of the provisions of § 6 by an industry committee's report and an Administrator's order, the Administrator cannot forbid homework. As respects an industry in which wages have been fixed by a committee, the Administrator has these sweeping and destructive powers. And this, in spite of the fact that the committee is authorized and required to deal with the wages of the industry as a whole, and did so deal with them here. The committee never considered the question of an appropriate wage for the industry, under the conditions which would prevail, after the suppression of a substantial part of it by the Administrator's order. The interpretation now sanctioned of the Administrator's statutory authority to make orders 'to prevent the circumvention or evasion' of the purposes of the Act, as including the power to make over the industry to which a wage order is to apply, thus defeats one of the most fundamental purposes of the Act. By § 8 no wage order is to be promulgated with respect to an industry unless the question of the minimum wage for the industry has been referred by the Administrator to the industry committee, and the conditions in the industry and the appropriate wage for it have been the subjects of investigation and report by the committee. The committee is specifically enjoined to recommend to the Administrator 'the highest minimum wage rates for the industry which it determines, having due regard to the economic and competitive conditions, will not substantially curtail employment in the industry.' And by § 8 (d) the Administrator,

[11]Italics added.
[12]Gemsco v. Walling, 324 U. S. 244, 273, 65 Sup. Ct. 605, 621 (1944).

before he promulgates a wage order, is required to find, after 'taking into consideration the same factors as are required to be considered by the industry committee,' that its recommendations will carry out the purpose of § 8. These requirements make it clear that the terms and conditions which § 8 permit the Administrator to attach to his wage orders do not include those which materially alter the conditions of the industry which must be considered and reported upon by the committee. Such requirements are futile if the Administrator, under guise of preventing evasion of a minimum wage order, which the committee has recommended, has power, on promulgating a wage order, to change the industry into one which the committee has never investigated. The Administrator's action is in effect a subversion of the committee's report, whereas the Act contemplates a resubmission to the committee in such a case."[13]

It will be observed, moreover, from a reading of Section 8 that in each of the paragraphs preceding paragraph (f) the legislature, either expressly or by implication, has provided that the minimum rate or the classification within an industry can become effective only after a finding has been made that such minimum rate or classification "will not substantially curtail employment in the industry." And in each such instance it is necessary that that finding be made by the industry committee; at no place is that function conferred upon the Administrator alone. Certainly, in the face of such definitions of the functions of the industry committee, the Administrator would not be allowed to assume that function when the matter had not been considered by the committee. The finding of the Administrator in the present case that prohibition of homework "will not eliminate the great majority of homeworkers from the industry"[14] surely cannot be taken as equivalent to a finding *by the industry committee* that an increase of the minimum to 40 cents per hour, coupled with a prohibition of homework, would not substantially curtail employment in the industry. It may well be that if the committee had considered evidence on the possibility that homework would be prohibited by the Administrator, it would have found that the increase of the minimum to 40 cents an hour would substantially curtail employment. Indeed, in order to foresee the effect of an increase in the minimum wage rate and to eliminate the chance of its finding being nullified as a result of changed conditions ordered by the Administrator, the committee must consider evidence upon the question of what the Administrator will find to be necessary to carry out the purposes of the order. It becomes necessary for the committee to deter-

[13]Gemsco v. Walling, 324 U. S. 244, 273, 65 Sup. Ct. 605, 621 (1944).
[14]See majority opinion, *id.* at 259, 65 Sup. Ct. at 614.

mine in advance what the Administrator will find necessary to order in addition to the minimum rate. If he is given such power as he assumed in these cases, the character of the entire industry can be changed if he finds that necessary in order to make effective the minimum rate. It can hardly be supposed Congress intended that the committee would have to consider evidence on that matter. Its job of determining whether a minimum rate will substantially curtail employment in an industry of an existing character is difficult enough. When it must, in addition, attempt to foresee the effect of a raise in minimum rate for a given industry after the manner in which the industry is conducted has been substantially altered, its function in this respect is reduced to mere speculation.

When one goes outside the statute itself and considers the legislative history of this provision, it is again found that Congress did not intend to confer upon the Administrator the power assumed in the present cases. In the dissenting opinion of Mr. Justice Roberts, it is clearly pointed out that this background negatives any inference that Congress intended to empower the Administrator to prohibit industrial homework.[15] The very question of giving administrative authority to deal with the problem of industrial homework was presented both at joint hearings of the Senate and House committees and on the floor of the Senate, and both the Senate bill and substitute bill offered in the House, in granting authority to the Administrator to include in his order terms and conditions he should find necessary to carry out the purposes of the order, etc., added the provision, "including the restriction or prohibition of industrial homework."[16] The conference committee then considered both bills, and rejected the provision in question, the new bill reported by it being enacted into law. Surely if the legislative history of a statute is to retain any value whatever as an aid in construing the statute, that in the present case should resolve any doubt as to the legislative intention. If Congress had intended to entrust the Administrator with such far-reaching power as this, it would have said so in unmistakable terms; it would not have left such authority to be inferred from a clause presumably relating to filing reports, keeping records, and other common matters of administration. As the Supreme Court has said in another recent decision construing a different section of the Wage and Hour Act, "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing,

[15] *Id.* at 273-277, 65 Sup. Ct. at 621-622.
[16] *Ibid.*

as the ordinary man has a right to rely on ordinary words addressed to him."[17]

If, as the Court declares, the construction sought "would make the statute a dead letter for this industry"[18] Congress most certainly would have eliminated the chance of such a disaster by adding the proposed clause, had it intended the power to be included. The objection that this might make the statute somewhat more cumbersome and specify too much would weigh little as against the alternative that its absence might result in the administrator's being deprived of "the only means available to make its mandate effective."[19] The Court stresses the view that Congress must have intended to confer the power in question because in its absence the statute (it is said) cannot be applied to this industry. But even assuming this extreme view of the facts to be true, it is only after the statute has been in effect for a number of years that it is found that an industrial reformation of such magnitude is necessary in order to maintain its effective administration. To ascribe an unlimited intention to Congress based upon an unsuccessful application of the statute, viewed retrospectively, is to convert the judicial function of construction into one of legislation. In *Addison* v. *Holly Hill Fruit Products, Inc.,* a case already cited, the Court stated:

> "Legislation introducing a new system is at best empiricial, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' *Commonwealth* v. *Grunseit* (1943) 67 C. L. R. [Austr.] 58, 80.
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> ". . . While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."[20]

The power to abolish outright the method whereby almost half of the employees in an industry earn their living extends far beyond the matter of setting the minimum wage rate for such industry. Yet the Court in the

[17]Addison v. Holly Hill Fruit Products, Inc., 322 U. S. 607, 618, 64 Sup. Ct. 1215, 1221 (1944).

[18]Gemsco v. Walling, 324 U. S. 244, 255, 65 Sup. Ct. 605, 612 (1944).

[19]*Ibid.*

[20]322 U. S. 607, 617-618, 64 Sup. Ct. 1215, 1221 (1944).

present case says that he can do virtually that under a power to make effective the rates which he could not establish himself in the first place. A mere ancillary power is thus construed so as to exceed in scope the principal power, which consists merely of the authority to order rates after the prerequisites have been found to exist by the committee. Certainly it is a novel doctrine of construction that can give this meaning to such an inconspicuous and harmless-looking provision as that in question.

It should be possible for a person, subject to the provisions of a given statute, to discover with some degree of accuracy the general nature of the substantive requirements thereof, so that he can adjust his business accordingly. It is a fundamental rule of law that a statute must not be so vague and general in its terms that the persons to whom it applies cannot ascertain what it forbids. Yet the construction adopted in the present case achieves just that. An employer who had built his factory or place of business on the plan that a large part of his product would be manufactured or worked on in the homes of his employees, and on the wholly reasonable assumption that the Act did not prohibit this method, now finds his facilities inadequate to conform to the manner in which he is now told he must run his business. An employee who had established his home at a given place on the assumption that his work would continue to be performed in the customary way, now finds it necessary to move his family to some other location so that he can travel to and from a factory each day. And this revolutionary change is not brought about through the enactment of a new statute or the amendment of an existing statute, where his representatives in Congress can protect his interests. It is ordered by an appointed official under a provision interpreted so broadly that it loses all meaning as a statement of the law.

The significance of the decision extends, of course, far beyond the embroideries industry or the administration of the Wage and Hour Act. As a result thereof Congress must spell out with precision the limits of every minor power delegated to an administrative official, lest that individual in exercising such power exceed the scope of the very statute itself. This decision can result only in uncertainty and apprehension on the part of employers and employees alike. If provisions purporting to relate merely to the means whereby an administrative order can be made effective are to be construed in this comprehensive fashion, other statutes must be re-examined by the industries affected, and speculation made as to whether other administrative officials are likewise given *carte blanche* in their respective fields. It must be constantly borne in mind, in order to safeguard against being caught un-

awares by such wholesale reformations of industries, that, at least insofar as the Wage and Hour Act is concerned, almost nothing ordered by the Administrator is too fantastic to be upheld, so long as he makes a finding that it is necessary to carry out the purposes of the order, etc. Upon the question of what the courts will uphold as being necessary to carry out the purposes of an order, there is of course the familiar rule that an administrative finding will not be disturbed if it has substantial evidence to support it. This naturally gives considerable latitude to the Administrator in making such a finding, and it will no doubt become apparent that the Administrator has a very high standard in determining whether the statute can be effectively administered under existing conditions.

It is thus seen that there are virtually no standards by which to limit the action of the Administrator so long as he finds the proposed measures "necessary" to carry out the purposes of the order in question. At no place in the opinions in these cases is there a discussion or consideration of the reasonableness of the measure. It is apparently enough that the Administrator finds the proposed action necessary in order to make the order effective. When the implications of this doctrine are fully realized, it will no doubt become clear that this is indeed a remarkable decision in the field of construction of statutes.

In a concurring opinion in the circuit court of appeals, it is said that this prohibition of homework "will disorganize and make over the industry, break up much family economy, and produce conditions which cannot possibly adjust themselves" for a considerable period of time.[21] And yet, under the present provision, the Administrator is quite free thus to remake an entire industry if he finds it necessary to carry out the purposes of an order.

It is difficult to find adequate authority in past decisions for the construction here adopted. Perhaps, however, the law has undergone a metamorphosis in recent years; and a detailed search would, after all, serve little purpose, for, in the eloquent words of the above-mentioned concurring opinion:

> "Such treatment of a statute needs no apology today, whatever were the scruples of the past."[22]

[21] Guiseppi v. Walling, 144 F. (2d) 608, 623 (C. C. A. 2d, 1944).
[22] *Id.* at 624.