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Symposium Introduction: Agricultural Marketing Agreement Act of 1937

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SYMPOSIUM
INTRODUCTION

The genesis of federal marketing orders regulating the distribution and sale of various agricultural commodities is found in the Agricultural Adjustment Act (AAA), which was adopted in 1933. The contemporary regulatory framework underlying marketing orders is the result of the Agricultural Marketing Agreement Act of 1937 (AMAA), which has been amended periodically since its adoption. This latter New Deal-era statute embodies the twofold objective of attempting to achieve "parity prices" for the producers of certain agricultural commodities while establishing and maintaining the "orderly marketing conditions" that could be expected to benefit producers and consumers alike.

Variously praised and criticized by industry representatives, and generally maligned by consumer advocates, marketing orders are often misunderstood by those not directly influenced by them in the agri-business community. Marketing orders are perhaps least understood by the vast majority of consumers who depend upon a national food distribution system deeply affected by marketing orders to provide them with adequate supplies of high-quality fruits, vegetables, nuts, specialty commodities and dairy products at affordable prices.

The *San Joaquin Agricultural Law Review* presents this symposium on marketing orders with the goal of offering interested parties a com-

pendium of information and viewpoints through which they can enhance their understanding of a national policy and agricultural program that has evolved with increasing complexity since its idealistic beginning in the 1930's. The symposium consists of five practitioner-written articles and two student-authored comments.

Daniel Bensing surveys and analyzes the procedures governing adoption, administration, amendment, enforcement and termination of marketing orders regulating fruits and vegetables, and offers recommendations for a comprehensive revision of the AMAA to modernize, simplify and strengthen its procedural and enforcement provisions. Barry Pineles examines the operation of marketing orders by placing the decision-making process in what the author believes to be its proper administrative and legal context, and thereby suggests changes to improve the administrative process. Lois Bonsal Osler offers a general overview of the basic structure of the federal milk marketing system.

Brian C. Leighton focuses on the provision in various federal marketing orders requiring assessments by handlers to underwrite commodity advertising and promotion programs, and evaluates whether any promotion or advertising program can be developed that would not be violative of the First Amendment. Daniel I. Padberg and Charles Hall focus initially on the political and economic dimensions of early American agriculture as a foundation for their perspective of the economic rationale underlying federal marketing orders for fruits, vegetables, nuts and specialty crops.

Dennis M. Gaab offers the California-Arizona citrus marketing orders as examples of failed attempts by the federal government to regulate markets for agricultural commodities. Finally, Elizabeth S.M. Karby suggests actions that could result in liability by producer members of marketing order boards, examines the limits of board members' immunity for their actions, and suggests how a complaint could be framed to survive the immunity defense.

These articles and comments are offered to provide information and provoke discussion concerning a topic of current interest to producers and consumers of a variety of agricultural commodities. The views expressed by these authors are theirs alone and do not necessarily represent the views of the editors, staff or supporters of the *San Joaquin Agricultural Law Review* or the San Joaquin College of Law.

The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937

by

Daniel Bensing

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ARTICLES

THE PROMULGATION AND IMPLEMENTATION OF FEDERAL MARKETING ORDERS REGULATING FRUIT AND VEGETABLE CROPS UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

*Daniel Bensing**

INTRODUCTION

Federal "marketing orders" regulating the sale of various agricultural commodities, promulgated pursuant to the Agricultural Marketing Agreement Act of 1937 (AMAA),[1] have generated considerable controversy. Consumer advocates, economists and certain independent growers have sharply criticized, on a wide variety of public policy grounds, the size and maturity standards, volume control restrictions and generic advertising programs imposed by marketing orders.[2] A sig-

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The opinions expressed herein are exclusively those of the author and not those of any officer or agency of the United States government.

[1] Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

[2] *See, e.g.*, JAMES BOVARD, THE FARM FIASCO 179-207 (1989); Carolyn Lochhead, *Forbidden Fruit: How California Cartels Keep Prices High and Frustrate Free Enterprise*, INSIGHT, July 29, 1991, at 12.

nificant, but less recognized, factor contributing to this controversy is the confusing and antiquated nature of the implementation and enforcement provisions of the AMAA itself. This New Deal-era statute is very unusual in the elaborate and complex nature of its administrative procedures as well as in the central role it gives to industry members, particularly cooperatives, in the formulation and administration of marketing orders.[3]

This article will survey and analyze the AMAA procedures for the adoption, administration, amendment, enforcement and termination of marketing orders regulating fruits and vegetables, with particular focus on a series of recent decisions by the Ninth Circuit Court of Appeals.[4] A critical problem with the current Act is the tension between an exhaustion of administrative remedies requirement that routinely delays resolution of challenges to marketing order provisions for many years and the statutory mandate for immediate and universal compliance. Further difficulties arise from the conflict between the elaborate procedures of the AMAA and the more streamlined provisions of the subsequently enacted Administrative Procedure Act (APA),[5] and the unique

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[3] The AMAA has not been the subject of extensive legal analysis or criticism over its 57-year history. The two principle treatises on the AMAA are: Marvin Beshore, *Agricultural Marketing Agreement Act of 1937, in* 9 NEIL E. HARL, AGRICULTURAL LAW §§ 70.01-70.07 (1993 & Supp. 1994); John H. Vetne, *Federal Marketing Order Programs, in* 1 AGRICULTURAL LAW 75 (John H. Davidson ed., 1981 & Supp. 1989). *See also* Sellers & Baskette, *Agricultural Marketing Agreement and Order Programs, 1933-44*, 33 GEO. L.J. 123 (1945).

[4] Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682 (9th Cir. June 27, 1995) (rehearing petition pending) (the author is counsel for the government in this action). Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429 (9th Cir. 1993); Cecelia Packing Corp. v. United States Dep't of Agric., 10 F.3d 616 (9th Cir. 1993); Sequoia Orange Co. v. Yeutter, 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (1993); Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992); Cal-Almond, Inc. v. United States Dep't of Agric., 960 F.2d 105 (9th Cir. 1992); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990); Saulsbury Orchards & Almond Processing, Inc. v. Yeutter, 917 F.2d 1190 (9th Cir. 1990).

[5] Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.). *Compare* 5 U.S.C. § 553 (1994) (APA) *with* 7 U.S.C. § 608c(15) (1994) (AMAA). The AMAA was enacted in 1937 during a period when Congress was receptive to the argument that more formalized, administrative procedures were necessary to protect the public from an arbitrary, and possibly unconstitutional, "headless fourth branch of government." *See* 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE, § 1.7 (2d ed. 1978). The initial version of the APA, the Walter-Logan bill, sponsored by the American Bar Association, was vetoed by President Roosevelt in 1941. The APA, as enacted in 1946, allowed most government action to be implemented through informal rulemaking under 5 U.S.C. § 553.

and unsettled legal status of marketing order committees. Finally the article concludes with a series of recommendations for a comprehensive revision of the AMAA provisions relating to fruit and vegetable marketing orders to modernize, simplify and strengthen its procedural and enforcement provisions.

I. Background: The Rationale for Regulation and the Purposes of the Act

The AMAA is a direct statutory descendent of President Roosevelt's Agricultural Adjustment Act (AAA),[6] a centerpiece of the New Deal's first 100 days. This Act authorized restraints on production, designed to halt the deflationary spiral of the Great Depression through the issuance of "licenses" required for the handling of agricultural commodities. The Agricultural Adjustment Act of 1935[7] refined certain provisions of the AAA and attempted to address the Supreme Court's delegation doctrine cases that had invalidated certain New Deal regulatory programs.[8] The Agricultural Marketing Agreement Act of 1937 reenacted the marketing order and agreement provisions of the 1935 AAA without substantial change.[9] The statutory objectives identified in 7 U.S.C. § 602 focus on the twofold goal of seeking to achieve "parity prices" for agricultural commodities,[10] and establishing and maintaining "orderly marketing conditions" for agricultural commodities.[11] The principal rationale of the AMAA is that government must provide a

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[6] Act of May 12, 1933, ch. 25, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-605, 607-623 (1994)).

[7] Act of Aug. 24, 1935, 49 Stat. 761 (codified as amended in scattered sections of 7 U.S.C.).

[8] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry v. United States, 295 U.S. 495 (1935). *See also* United States v. Butler, 297 U.S. 1 (1936).

[9] *See* H.R. Rep. No. 468, 75th Cong., 1st Sess. 1 (1937).

[10] Pursuant to 7 U.S.C. § 1301(a)(1), the USDA periodically publishes an official list of parity prices for agricultural commodities. Parity prices generally are determined through a calculation designed to give farmers the purchasing power equivalent to that during a base period (1910-14) and serve as a trigger price for the operation of various agricultural programs. *See* H.R. Rep. No. 468, 74th Cong., 1st Sess. 1241 (1937). A goal of the AMAA is to achieve parity prices in such a way as to "protect the interest of the consumer." 7 U.S.C. § 602(2) (1994). Prices have rarely achieved parity. The AMAA does not authorize any action which has as its purpose to maintain prices above parity. *Id.* § 602(2)(b).

[11] Block v. Community Nutrition Inst., 467 U.S. 340, 346 (1984) ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.")

mechanism whereby select segments of the agricultural economy can work in concert to prevent the recurring cycles of oversupply and scarcity which caused such severe distress in the farm economy in the 1920's and 1930's. Marketing orders allow producers of specific farm commodities to implement programs to both encourage demand for their products, through promotional programs and quality control regulations, and regulate the flow to market of the commodity to promote price stability. While in theory both producers and consumers should benefit from the maintenance of "orderly marketing conditions" ensuing a stable supply of agricultural commodities, in practice the primary focus of the industry committees and the United States Department of Agriculture (USDA) has been to maximize return to the grower.

At 7 U.S.C. § 608c(6), the AMAA expressly authorizes several specific types of regulatory action that can be incorporated in fruit and vegetable marketing orders. The principle options are:

(1) restrictions on the quantity of a commodity that can be sold, either through marketing allotments[12] or reserve pools;[13]

(2) limits on the grade, size or quality of the commodity,[14] or regulation of pack and container size;[15] and

(3) the option to institute market research, development, promotion and advertising programs.[16]

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[12] 7 U.S.C. § 608c(6)(A)-(B)(1994). The recently terminated orders regulating California citrus authorized a weekly volume control program referred to as "prorate." *See* 7 C.F.R. pts. 907, 908, 910 (1994). Allotments must be "equitably apportioned" on the basis of a "uniform rule." 7 U.S.C. § 608c(6)(C) (1994). *See* Vaughn-Griffin Packing Co. v. Freeman, 294 F. Supp. 458, 463-65 (M.D. Fla. 1968), *aff'd* 423 F.2d 1094 (5th Cir. 1970). Also, allotment programs frequently contain elaborate provisions for loans, carryovers and special credits.

[13] 7 U.S.C. § 608c(6)(E) (1994). Reserve pools are most commonly utilized with commodities that can be stored for long periods, such as California almonds. *See* 7 C.F.R. § 981.46 (1994).

[14] 7 U.S.C. § 608c(6)(A) (1994). The marketing orders regulating California peaches and nectarines require that fruit reach a minimum level of maturity (i.e., ripeness) and size before it can be sold. *See* 7 C.F.R. §§ 916.356, 917.459 (1994). These programs are enforced through inspections implemented by the Federal-State Inspection Service, 7 U.S.C. § 608c(6)(F) (1994). Under 7 U.S.C. § 608e(1), the imposition of grade, size, quality or maturity restrictions on a specified list of 23 commodities will almost invariably result in the imposition of identical restrictions on imports of such commodities. *See, e.g.*, Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971) (successful APA challenge to regulation restricting import of Mexican tomatoes); Cal-Fruit Suma Int'l v. United States Dep't of Agric., 698 F. Supp. 80 (E.D. Pa. 1988), *aff'd* 875 F.2d 309 (3d Cir. 1989).

[15] 7 U.S.C. § 608c(6)(H) (1994).

[16] *Id.* § 608c(6)(I). This provision contains a discrete list of products for which

Generic advertising programs for select agricultural commodities are also authorized by several other commodity-specific statutes.[17]

The AMAA further requires that fruit and vegetable orders be restricted "to the smallest regional production areas . . . practicable" and consistent with the policy of the Act,[18] and hence there may be different orders for the same commodity grown in different states.[19] Additionally, the USDA is authorized and directed to cooperate with state programs for the regulation of agriculture,[20] and many states have statutes authorizing programs similar to federal marketing orders.[21] There are 35 federal marketing orders in existence for fruit, vegetable and nut crops. These marketing orders range from simple and noncontroversial research programs to hotly-contested volume control, maturity and adver-

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"marketing promotion including paid advertising" is authorized, and a more limited subset of commodities where the handler may receive a credit for direct expenditures for marketing promotion. The marketing order regulating California almonds provides a (controversial) example of an order with a significant advertising and promotional component. *See* Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429 (9th Cir. 1993) (generic advertising program invalidated as unconstitutional restriction on commercial speech); Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *6-*9 (9th Cir. June 27, 1995) (rehearing petition pending). ***But see*** United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (beef promotion program upheld against First Amendment challenge).

[17] *See, e.g.*, Beef Research and Information Act, Pub. L. No. 94-294, 1976 U.S.C.C.A.N. (90 Stat.) 529 (codified as amended at 7 U.S.C. §§ 2901-2911 (1994)), *creating* Beef Promotion and Research Order, 7 C.F.R. pt. 1260 (1994); Egg Research and Consumer Information Act, Pub. L. No. 93-428, 1974 U.S.C.C.A.N. (88 Stat. 1171) 1341 (codified as amended at 7 U.S.C. §§ 2701-2718 (1994), *creating* Egg Research and Promotion Order, 7 C.F.R. pt. 1250 (1994). Ten other non-AMAA advertising orders (applicable to cotton, potatoes, mushrooms, watermelons, pecans, limes, soybeans, pork, honey, and a single program for wool and mohair) are contained in 7 C.F.R. pts. 1205-1270.

[18] 7 U.S.C. § 608c(11)(B) (1994).

[19] *E.g., compare* 7 C.F.R. pt. 948 (1994) (Irish potatoes grown in Colorado) and *id.* pt. 950 (Irish Potatoes grown in Maine) *with id.* pt. 953 (Irish potatoes grown in southeastern states).

[20] 7 U.S.C. § 610(i) (1994). State and federal programs regulating fruits and vegetables can co-exist, unless the state program "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[21] *See, e.g.*, California Marketing Act of 1937, 1937 Cal. Stats. 1343, ch. 404 (codified as amended at CAL. FOOD & AG. CODE §§ 58601-59281 (West 1986 & Supp. 1995). Currently, the California marketing order regulating plums is administered by the same staff which administers the federal marketing orders regulating California nectarines and peaches.

tising programs.[22]

The AMAA also authorizes marketing orders to regulate the sale of milk, an elaborate program generally designed to provide producers with a blended price reflecting the percentage that is sold as fresh fluid milk, (receiving a higher price) and for products such as butter and cheese, (which generally receive a lower price).[23] The analysis of milk marketing orders is beyond the scope of this article. However because both types of orders are authorized under the AMAA, milk precedents may affect fruit and vegetable orders.

A fundamental premise underlying the use of marketing orders is that regulatory restrictions must be placed on "handlers," i.e., packing houses and processing plants,[24] for the benefit, principally, of growers. While there may often be some overlap and community of interest between handlers and growers, the AMAA is the product of an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position.

The constitutionality of the AMAA was affirmed by the Supreme Court in *United States v. Rock Royal Coop.*[25] against New Deal-era delegation doctrine and due process attacks.[26] However these constitutional challenges have been periodically renewed, citing recent Supreme Court rulings addressing the delegation doctrine,[27] the due process

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[22] The most controversial marketing orders all regulate fruit and nut crops produced in California's San Joaquin Valley. *See* 7 C.F.R. pt. 981 (1994) (almonds); *id.* pt. 916 (nectarines); *id.* pt. 917 (peaches); and the recently terminated (59 Fed. Reg. 44,022 (Aug. 20, 1994)) California-Arizona citrus orders: *id.* pt. 907 (navel oranges); *id.* pt. 908 (Valencia oranges); *id.* pt. 910 (lemons).

[23] The specific statutory authority for milk marketing orders is at 7 U.S.C. § 608c(5), (18) (1994). *See generally* Zuber v. Allen, 396 U.S. 168 (1969).

[24] "Handle" is defined in each marketing order. Typical is the California nectarine order where handle means "to sell, consign, deliver or transport nectarines . . . between the production area and any point outside thereof." 7 C.F.R. § 916.11 (1994). "Handlers," who may be required to register with the administrative committee implementing the order, are either agricultural cooperatives or proprietary businesses which assess growers a fixed charge per carton to harvest, pack and sell growers' products.

[25] 307 U.S. 533 (1939).

[26] *Id.* at 568-78. *Accord* H.P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); Edwards v. United States, 91 F.2d 767 (9th Cir. 1937); Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *15 (9th Cir. June 27, 1995) (rehearing petition pending). *See also* United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) (AMAA regulation of intrastate milk sales is permissible regulation under commerce clause).

[27] Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring). *But see* Mistretta v. United States, 488 U.S. 361, 371-79 (1989); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989).

clause,[28] and the First Amendment protections for commercial speech.[29]

II. The Structure and Operation of the AMAA

A. Marketing Agreements—A Statutory Dead End

The drafters of the AMAA evidently contemplated that the Secretary of Agriculture (hereinafter sometimes referred to as the "Secretary") would frequently utilize the authority in 7 U.S.C. § 608b to enter into "marketing agreements" with handlers to regulate the affected commodity. The agreements could be adopted after simple notice and hearing and without any of the elaborate procedural requirements applicable to marketing orders. However with the exception of a single marketing agreement program for peanuts,[30] handlers have never been willing to voluntarily enter into marketing agreements, which by their very nature regulate handlers for the benefit of growers.[31] Where a marketing order is in effect, however, the USDA will request handlers to sign marketing agreements which simply restate their obligations under the order. Action taken pursuant to agreements will receive the benefit of antitrust immunity when properly approved by the Secretary.[32]

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[28] Plaintiffs in Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429 (9th Cir. 1993), claimed that the lengthy delay in resolving their challenge amounted to a denial of due process, citing McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990). However the Ninth Circuit rejected that argument, noting that plaintiffs' own litigation tactics explained much of the delay and that a "refund" of assessments found not to have been due would ensure a constitutional remedy. *Cal-Almond*, 14 F.3d at 448-49. *See infra* part II.G.

[29] *See* Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) (test for regulation of commercial speech); Edenfield v. Fane, 113 S. Ct. 1792 (1993). *See also supra* note 16.

[30] 7 U.S.C. § 608b(b) (1994). The agreements cover all peanut production areas nationwide and permit the indemnification of participating handlers from losses due to aflatoxin, a mold making peanuts unfit for human consumption. This goal is not one of the authorized purposes for marketing orders under 7 U.S.C. § 608c(6); hence, marketing agreements are the only available option.

[31] Suntex Dairy v. Block, 666 F.2d 158, 165 (5th Cir. 1982).

[32] 7 U.S.C. § 608b. *See* United States v. Borden Co., 308 U.S. 188 (1939) (Secretarial approval required); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332 (9th Cir. 1990) (lack of Secretarial disapproval not equivalent of approval).

B. Adoption and Amendment of Marketing Orders

1. Rulemaking Proceedings

Under the AMAA, a new marketing order is initiated by a petition from growers of a commodity who present proposals for the adoption of marketing orders containing one or more of the authorized regulatory tools. If, after a preliminary and informal investigation by staff of the Agricultural Marketing Service (AMS), an agency within the USDA, it appears that the proposed order might effectuate the purposes of the Act, a notice of a hearing on the proposal is published in the *Federal Register*.[33] The exclusion of certain proposals from consideration at the hearing has prompted suits seeking immediate injunctive relief to compel the Secretary to hold hearings on the rejected proposals.[34]

The USDA takes the position that hearings to adopt or amend marketing orders must be conducted pursuant to the formal, on-the-record rulemaking proceedings of the APA,[35] and its rules of procedure and practice for the adoption of marketing orders[36] require an elaborate and detailed hearing procedure. This degree of procedural formality is almost certainly not required by the AMAA, however, since the Supreme Court held in *United States v. Allegheny-Ludlum Steel Corp.*[37] and *United States v. Florida East Coast Railway Co.*[38] that formal rulemaking is only required where the statute uses the phrase "on the record" or other language having the same meaning. The applicable

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[33] 7 C.F.R. § 900.3 (1994). The consultation process leading up to a proposal for a hearing is described in some detail in AGRIC. MKTG. SERV., U.S. DEP'T OF AGRIC., MARKETING AGREEMENT AND ORDER OPERATIONS MANUAL 20-24 (1986) [hereinafter *AMS Manual*] (copy on file with the *San Joaquin Agricultural Law Review*). Substantial support in the industry for the proposed order is considered particularly important by the AMS.

[34] *Compare* Alabama Dairy Prods. Ass'n, Inc. v. Yeutter, 980 F.2d 1421, 1423 (11th Cir. 1993) (injunction denied; handler may not interrupt administrative process but must exhaust remedies and challenge order pursuant to section 15 proceedings) *and* Friends of the Hop Mktg. Order v. Block, 753 F.2d 777, 778 (9th Cir. 1985) *with* National Farmers Org. v. Lyng, 695 F. Supp. 1207, 1213 (D.D.C. 1988) ("patently arbitrary action" by Secretary in excluding proposal of National Farmers Organization that was opposed by milk handlers).

[35] 5 U.S.C. §§ 556-57 (1994). Generally, formal rulemaking and adjudication under the APA involve on-the-record, evidentiary proceedings before an Administrative Law Judge (ALJ) who then issues a recommended decision that is reviewed and adopted (perhaps with modifications) by the head of the agency. *See generally* RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 279-284 (2d ed. 1992).

[36] 7 C.F.R. §§ 900.1-900.18 (1994).

[37] 406 U.S. 742, 756-57 (1972).

[38] 410 U.S. 224, 237-38 (1973).

provision of the AMAA, 7 U.S.C. § 608c(4), only requires that marketing orders be issued "after . . . notice and opportunity for hearing."

In *Marketing Assistant Program, Inc. v. Bergland*,[39] Judge Harold Leventhal recognized that in the absence of the phrase "on the record" or its equivalent, a proceeding to adopt a milk marketing order only required notice and comment rulemaking.[40] A shift to informal rulemaking would greatly simplify and streamline the process for adoption or amendment of marketing orders, but until the USDA amends or repeals its existing procedural rules, it will be bound to use cumbersome, "formal" rulemaking procedures.

At the formal hearing before an ALJ, all interested persons can present oral and documentary evidence with full opportunity for cross examination.[41] Not surprisingly, these hearings can take a great deal of time and generate enormous records. From this record, the Administrator of AMS must identify and publish in the *Federal Register* the terms of the order that "will tend to effectuate the declared policy of this chapter with respect to such commodity," in the form of a "recommended decision."[42] The terms of this proposed order are then published in the *Federal Register*, with a request for comments and exceptions.[43]

After review of these comments, the Secretary then publishes the proposed order (or amendments thereto), along with the statutorily-mandated "tendency finding," that the order "will tend to effectuate the declared policy" of the AMAA.[44] Under ordinary administrative law principles, this would be the final rule, binding on the public 30 days

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[39] 562 F.2d 1305, 1309 (D.C. Cir. 1977).

[40] *Id.* at 1309. "Notice and comment" rulemaking governed by 5 U.S.C. § 553 merely requires the publication of the proposed rule in the *Federal Register*, an opportunity for interested members of the public to submit written comments, and the publication of the final rule and a "statement of basis and purpose" explaining its terms 30 days before it is made effective.

[41] The elaborate procedures are set forth in 7 C.F.R. §§ 900.4-900.11 and discussed in the *AMS Manual*, *supra* note 33, at 24-27.

[42] 7 U.S.C. § 608c(4) (1994); 7 C.F.R. § 900.12 (1994) (Administrator's recommended decision).

[43] 7 C.F.R. § 900.12(c).

[44] The "tendency" finding is required by 7 U.S.C. § 608c(4). This two-step process (i.e., recommended decision of the Administrator and final decision of the Secretary) is not mandated by statute, but is required by USDA's procedural regulations (7 C.F.R. §§ 900.12, 900.13, 900.13a) unless the Secretary makes a finding that "timely execution of his functions imperatively and unavoidably requires . . . omission" of the recommended decision. *Id.* § 900.12(d).

after publication in the *Federal Register*.[45] However under 7 U.S.C. § 608c(9), the Secretary must make two additional determinations[46] and, most importantly, must receive the approval of a super-majority of producers of the affected commodity through a referendum on the proposed order.[47]

2. Producer Referendum

Under the referendum process, the USDA issues a referendum order setting forth the period during which those who produced the commodity may be eligible to vote, as well as the procedures for the vote and the identity of the referendum agent.[48] AMS personnel then mail copies of ballots to all known producers and to cooperative corporations, who can vote on behalf of their producer members. AMS personnel, as the referendum agent, subsequently count and tabulate the ballots and announce the result by press release.[49] With the exception of California citrus orders, two-thirds of producers, or producers who account for two-thirds of the volume of the commodity, must vote to approve the marketing order.[50] The AMAA is relatively unusual in giving the supposed beneficiaries of a government program explicit veto power over the implementation and continuation of that program.

A critical provision of the AMAA permits any cooperative association of producers to "bloc vote" in the referendum on behalf of all its members, stockholders or those under contract with such cooperative.[51]

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[45] 5 U.S.C. § 553(d) (1944). *See generally* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 40-66 (1993).

[46] Both determinations effectively follow from the earlier "tendency" finding. First, the Secretary must determine that the refusal of the requisite number of handlers to sign marketing agreements "tends to prevent the effectuation of the declared policy of the Act." 7 U.S.C. § 608c(9)(A). Second, the Secretary must find that "the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy" of the Act, sometimes referred to as the "necessity" finding. *Id.* § 608c(9)(B). *See generally* Suntex Dairy v. Block, 666 F.2d 158, 161 (5th Cir. 1982).

[47] Producer referenda are mandated for new marketing orders, but not for amendments to orders. 7 U.S.C. § 608c(19). However, it is the practice of the USDA to hold referenda on amendments as well. *See AMS Manual, supra* note 33, at 27.

[48] *AMS Manual, supra* note 33, at 28.

[49] Referendum procedures for fruit and vegetable orders are set out at 7 C.F.R. §§ 900.400-900.407 and are discussed in the *AMS Manual, supra* note 33, at 27-30.

[50] 7 U.S.C. § 608c(9)(B). Three-fourths of producers (but still only two-thirds of volume) must approve an order applicable to California citrus fruits. *Id.* § 608c(9)(B)(i).

[51] *Id.* § 608c(12).

This provision is consistent with the general policy of federal agricultural law to foster and encourage agricultural cooperatives.[52] Because there will not infrequently be a single cooperative corporation that dominates the production of the commodity, this provision can effectively grant such cooperative veto power over the adoption or amendment of a marketing order when it elects to bloc vote. The cooperative's power is enhanced because, through its bloc vote, it can vote on behalf of those of its members who oppose a marketing order requirement as well as those who are apathetic and would not ordinarily vote.[53]

In *Cecelia Packing Corp. v. USDA*,[54] the Ninth Circuit rejected First Amendment and Equal Protection challenges to the bloc vote by Sunkist in the 1991 orange order continuation referendum. The action was brought by independent orange handlers and anonymous "John Doe" Sunkist members. The court concluded that the First Amendment rights of Sunkist members were not infringed because, like any member of an organization, they retained the right to withdraw and vote independently or to act within the cooperative's governing structure to change its position.[55] The court further held that voting in a marketing order referendum is not a " 'bedrock of our political system,' like voting in an election for national, state or local legislative representatives," and hence did not implicate strict scrutiny or one-person one-vote requirements.[56] Finally, the court easily concluded that given the congressional policy of fostering agricultural cooperatives, the authority to bloc vote had a rational basis and hence did not violate the Equal Protection component of the Fifth Amendment.[57]

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[52] It is the declared policy of Congress to "encourage[] the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing . . . ." 12 U.S.C. § 1141(a)(3) (1994). In addition, the Capper-Volstead Act specifically authorizes agricultural cooperatives (7 U.S.C. § 291 (1994)) and provides limited antitrust immunity (*id.* § 292). *See* Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1968).

[53] For example, in the 1991 referendum on the continuation of the navel orange and Valencia orange marketing orders (a continuance referendum every six years was required by the terms of the orders themselves (7 C.F.R. §§ 907.83, 908.83 (1994))), Sunkist Growers, Inc. the large agricultural cooperative, bloc voted on behalf of its entire membership, thereby accounting for over 80% of the votes (Cecelia Packing Corp. v. United States Dep't of Agric., 10 F.3d 616, 620 (9th Cir. 1993)), notwithstanding that it only marketed approximately 50% of California oranges.

[54] 10 F.3d 616 (9th Cir. 1993).

[55] *Id.* at 621-23.

[56] *Id.* at 624 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)).

[57] *Id.* at 625.

3. Critique of the AMAA Procedures for the Adoption and Amendment of Marketing Orders—Lessons from the California Citrus Orders

The process for the adoption or amendment of a marketing order thus requires six distinct steps: (1) industry petition for a proposed order; (2) formal rulemaking hearings on the proposed order; (3) issuance of a recommended order by the Administrator of AMS; (4) recommendation of a final order by the Secretary after notice and comment, accompanied by the required "tendency" finding on the recommended order; (5) producer approval on the recommended order through a referendum; and (6) final issuance of the order by the Secretary with the required "necessity" finding. An example of the sort of unexpected outcome that can result from the operation of this unusual and convoluted rulemaking process is presented in two recent decisions, *Sequoia Orange Co. v. Yeutter*[58] and *United States v. Sunny Cove Citrus Association*,[59] which in conjunction led to the termination of the controversial California citrus marketing orders in 1994, with legal consequences that may be retroactive to 1984.

In considering amendments to the marketing orders regulating California navel and Valencia oranges in 1984, the USDA adopted a new approach of requiring the producer vote to be on the entire order as amended, rather than allowing individual "line item" votes on each of the 21 proposed amendments. An up or down vote on the entire order had been the consistent practice with respect to milk orders because the nationwide coordinated pricing system for milk required that each milk orders be consistent with pricing terms for adjacent milk orders,[60] but this was the first time the USDA utilized such an "all or nothing" approach in a fruit and vegetable order.

Announcement of this referendum procedure was accompanied by a "tendency finding" that the orders, as amended effectuated the purposes of the Act, and a press release stating that if all amendments were not adopted, the orange orders would be terminated.[61] However

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[58] 973 F.2d 752 (9th Cir. 1992), *modified*, 985 F.2d 1419 (9th Cir. 1993).

[59] 854 F. Supp. 669 (E.D. Cal. 1994). This decision is a ruling in three unconsolidated cases, on Sunny Cove Citrus Association's numerous challenges to the orange marketing orders, in defense of a $3 million civil penalty action brought against the association by the government.

[60] *See* Freeman v. Hygeia Dairy Co., 326 F.2d 271, 274 (5th Cir. 1964).

[61] 49 Fed. Reg. 29,071 (July 12, 1984). As the Ninth Circuit noted in *Sequoia Orange Co. v. Yeutter*, this "all-or-nothing approach to the slate of amendments . . . made at least an implicit value judgment that without the amendments the marketing

Sunkist, which dominated the California citrus industry, objected to this referendum procedure, which the Secretary evidently adopted to circumvent Sunkist's right to bloc vote on behalf if its membership to defeat those amendments that it opposed. Shortly after making the initial announcement that all amendments must pass for the orange orders to continue, Agriculture Secretary John Block succumbed to Sunkist's political pressure and reversed the USDA's position on the voting procedure—thereby allowing Sunkist to bloc vote in opposition to the amendments it opposed—without benefit of further notice and comment on this new referendum procedure.[62]

After an administrative and judicial review process that consumed no less than *eight years*, the Ninth Circuit ruled in *Sequoia Orange Co. v. Yeutter* that the Secretary was bound to follow the APA in reversing his decision in the initial referendum order on how the amendments would be presented for producer approval.[63] The court remanded the matter to the Secretary, without any specific directions and the Secretary terminated the procedurally flawed amendment proceeding, concluding that the unamended orange orders remained in effect.[64]

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order should be terminated." 973 F.2d at 757.

[62] 49 Fed. Reg. 32,080 (Aug. 10, 1984). The critical decision point is recounted in a declaration by then-Deputy Assistant Secretary John Ford (who subsequently became a lobbyist for Sunkist's opponents):

> [T]he Secretary of Agriculture was in effect politically blackmailed into abruptly and without rational reason or legal justification changing the Final Decision. Despite three years, hundreds of thousands of dollars, and hundreds of thousands of hours on this proceeding, the basic decision and the resulting outcome of it was made in a one-minute or three-minute phone call from the president of Sunkist, R.L. Hanlin, to the Secretary.

Declaration of John Ford (Jan. 29, 1990) (copy on file with the *San Joaquin Agricultural Law Review*), *filed in* Sequoia Orange Co. v. Yeutter, No. CV-F-632 (E.D. Cal. Nov. 28, 1990), *quoted in* Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 758 n.5 (9th Cir. 1992), *modified*, 985 F.2d 1419 (1993). Additionally, Congress was then in the process of enacting appropriations riders to prohibit USDA's use of "all-or-nothing" referendum procedures for non-milk orders. *See* Act of Aug. 22, 1984, Pub. L. 98-396, 1984 U.S.C.C.A.N. (98 Stat.) 1369; Act of Oct. 12, 1984, Pub. L. 98-473, 1984 U.S.C.C.A.N. (98 Stat.) 1837.

[63] 973 F.2d at 757-59. The court's reasoning is somewhat undercut by the fact that the Secretary had not allowed notice and comment on the initial "all-or-noting" referendum order either. The court rejected the government's argument that the AMAA provided no meaningful standards on which referendum procedures to use; hence, that determination was committed to agency discretion by law under 5 U.S.C. § 701(a)(2). Sequoia Orange Co. v. Yeutter, 973 F.2d at 756-57.

[64] 57 Fed. Reg. 49,655 (Nov. 3, 1992) ("In view of the passage of time, the level of contention in the industries concerning various proposed amendments, and the Ninth Circuit's decision that the amendments were not properly enacted under the APA, the

That decision was immediately challenged by non-Sunkist handlers in a new section 15 proceeding on a variety of grounds and in *United States v. Sunny Cove Citrus Association*,[65] Judge Oliver W. Wanger of the Eastern District of California accepted one of Sunny Cove's arguments. Notwithstanding the termination of the rulemaking proceeding in which it was issued, the court gave independent legal effect to the July 12, 1984 "tendency" finding; i.e., that without all 21 proposed amendments, the orders should be terminated. The court characterized this as the Secretary's "last valid act," and held that until that tendency finding was reversed or modified through notice and comment proceedings, all orange volume control regulations from 1984 through the end of regulation in 1992 could not be enforced.[66] The court then remanded for the Secretary of Agriculture to determine the status of the pre-amendment marketing orders.[67]

Confronted with the need to revisit and retroactively reverse 1984's "implicit value judgment" that the orders needed all 21 amendments to continue, in light of a decade of controversial developments, Secretary of Agriculture Michael Espy elected instead to terminate the California citrus orders and dismiss all pending enforcement actions.[68]

The *Sequoia/Sunny Cove* litigation highlights a significant problem with operating under a statute utilizing *sui generis* administrative procedures: it is difficult to predict what significance a court will give to unusual agency action such as a negative "tendency" finding. The orange litigation also underscores the difficult issues of control created where the dominant agricultural cooperative has effective veto power over the terms of a marketing order through its right to bloc vote. Finally, an administrative exhaustion requirement that contributes toward a decade's delay in obtaining a definitive ruling on the legality of a marketing order requirement is clearly counter productive.

[amendment] proceeding is hereby terminated. The orders will continue to operate without the 1985 amendments.").

[65] 854 F. Supp. 669 (E.D. Cal. 1994) (the author was counsel for the government in *Sunny Cove*).

[66] *Id.* at 694-98.

[67] *Id.* at 698. The court appeared to conclude that the AMAA authorized retroactive reversal of the 1984 tendency finding. *Id.* at 695 (citing Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 444 (9th Cir. 1995) (holding that the AMAA authorizes retroactive application of almond reserve obligation rules)).

[68] This decision was announced on May 16, 1994 in a letter to the House and Senate Agriculture Committees and described in an accompanying briefing paper (copy on file with the *San Joaquin Agricultural Law Review*). Formal termination occurred on August 20, 1994. 59 Fed. Reg. 44,022 (Aug. 20, 1994).

C. Implementation of Marketing Orders

1. Status and Responsibilities of the Committees

Under § 608c(7)(C), the Secretary may select an "agency" to administer the marketing order, recommend regulations and amendments to the order, and to oversee compliance. Fruit and vegetable orders are typically administered by a committee composed of members of the regulated industry, and occasionally a member of the public, who are appointed by the Secretary.[69] Frequently growers of the regulated commodity meet to nominate and vote for candidates to be recommended for membership on the committee.[70] The Secretary has always appointed such nominees. The committees are authorized to hire employees, enter into contracts and generally to administer the order on a daily basis.[71] Because the committees' primary responsibility is to administer the orders (although they also provide advice and recommendations to the Secretary), the Federal Advisory Committee Act (FACA) probably does not apply.[72]

The precise legal status of committees and their members and staff has presented some difficulty. In "administering" marketing orders, committee members may take actions that can subject them to individual liability.[73] Because the orders provide the Secretary with uncondi-

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[69] *See, e.g.*, 7 C.F.R. §§ 916.20-916.27 (1994) (nomination and appointment procedure for California nectarine marketing order). Because committee members are appointed by the Secretary and may be removed by the Secretary at any time and for any reason (*see, e.g.*, 7 C.F.R. § 916.62) they are government agents, not private parties. *See generally* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegation of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62 (1990).

[70] *AMS Manual*, *supra* note 33, at 37-39.

[71] *See, e.g.*, 7 C.F.R. § 916.31 (duties of Nectarine Administrative Committee include: selection of a chair; appointment of employees; submission of a budget to AMS; keeping minutes, books and records; causing records to be audited each fiscal year; assembling data on market conditions; and investigating compliance.).

[72] Federal Advisory Committee Act, Pub. L. No. 92-463, 1972 U.S.C.C.A.N. (86 Stat.) 892 (codified at 5 U.S.C. Appx. §§ 1-505 (1994)). Federal Property Management Regulations construe the Act not to apply to "[a]ny committee which is established to perform primarily operational as opposed to advisory functions." 41 C.F.R. § 101-6.1004(g). *Accord* Natural Resources Defense Council v. EPA, 806 F. Supp. 275, 277 (D.C.C. 1992). *But see* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1488 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992) (suggesting, in dicta and without discussion, that the FACA might apply to marketing order committees).

[73] For example, prior to 1992, the California tree fruit marketing orders authorized a maturity subcommittee to grant a variance from maturity or size regulations. *See, e.g.*, 7 C.F.R. § 916.356 (nectarines); *id.* § 917.459 (peaches); *id.* § 917.460 (plums).

tional authority to remove committee members and staff and to reverse any action taken by the committees,[74] courts have accorded committee members and staff the status of government officers or employees. Thus in *Saulsbury Orchards & Almond Processing v. Yeutter*,[75] the court concluded, without discussion, that members and staff of the Almond Board were "government officials performing discretionary functions," and hence entitled to the defense of qualified immunity.[76]

In *Berning v. Gooding* the court avoided the need to focus on the nature of the governmental immunities available to members of the Hop Administrative Committee, concluding that the committee only makes non-binding recommendations to the Secretary which have no legal effect in themselves.[77] All orders contain a clause providing members with immunity "for errors in judgment, mistaken or other acts . . . except for acts of dishonesty, willful misconduct or gross negligence."[78]

While the exact nature of governmental immunities available to committee members is somewhat unclear, the governmental nature of these entities has been recognized in numerous other contexts. In an unpub-

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Currently the Federal-State Inspection Service is authorized to grant a variance "to reflect changes in crop, weather, or other conditions . . . ."

[74] For example, the nectarine order provides that members and employees of the committee "shall be subject to removal or suspension by the Secretary at any time[,]" and every decision of the committee "shall be subject to the continuing right of the Secretary to disapprove of the same at any time." 7 C.F.R. § 916.62.

[75] 917 F.2d 1190 (9th Cir. 1990).

[76] *Id.* at 1196. In pending litigation brought against members of the peach and nectarine committees, Judge Wanger affirmed the government's certification that the committee members and staff were "employees of the government" for purposes of 28 U.S.C. § 2679, thereby substituting the United States as defendant on plaintiffs' state law claims. Wileman Bros. & Elliott, Inc. v. Giannini, No. CV-F-88-251, slip op. at 14-19 (E.D. Cal. Apr. 5, 1993) (copy on file with the *San Joaquin Agricultural Law Review*) (the author is counsel for the federal defendants (committee members and employees) in this action). In *Wileman Bros. & Elliott, Inc. v. Espy*, the Ninth Circuit held that the maturity regulation which the court found to be ambiguous in *Wileman Bros & Elliott, Inc. v. Giannini*, 909 F.2d 332, 335-36 (9th Cir. 1990), did in fact authorize the maturity determinations challenged by plaintiffs in the *Giannini* antitrust action. Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *11-*12 (9th Cir. June 27, 1995) (rehearing petition pending).

[77] 820 F.2d 1550, 1552 (9th Cir. 1987).

[78] 7 C.F.R. § 916.70 (nectarine order). Some orders use slightly different language, dropping the phrase "willful misconduct or gross negligence" from the exception clause at the end of the section. *See, e.g.*, 7 C.F.R. §§ 981.85, 946.76. The legal authorization for this "regulatory immunity" clause is unclear, and it is of little value to committee members and employees in any event.

lished decision in *Jensen v. Almond Board*, Judge Wanger held that the Almond Board was an "agency" for purposes of the Freedom of Information Act.[79] And in another unpublished decision, *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, Judge Wanger concluded that the Lemon Administrative Committee was an agency of the USDA and assessment funds paid to fund the marketing order are government funds for purposes of False Claims Act liability.[80]

However in *Kyer v. United States*,[81] the Court of Claims held that there could be no suit against the United States under the Tucker Act for breach of contract entered into by the Grape Crush Administrative Committee, because the committee was not authorized to expend *appropriated* funds, the essential prerequisite for Tucker Act jurisdiction.[82] And the federal conflict of interest statute,[83] and whistleblower protection provisions of the Civil Service Reform Act,[84] do not apply to marketing order committee members and employees because they are not employees "appointed in the civil service" by a specified list of federal officials.[85]

The limited antitrust immunity provided by 7 U.S.C. § 608b to parties to marketing agreements has been construed to apply to action

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[79] No. CV-F-91-474 (E.D. Cal. Mar. 23, 1992) (copy on file with the *San Joaquin Agricultural Law Review*).

[80] United States *ex rel.* Sequoia Orange Co. v. Oxnard Lemon Co., No. CV-F-91-194, slip op. at 12-14 (E.D. Cal. May 4, 1992) (copy on file with the *San Joaquin Agricultural Law Review*). *Oxnard* is a single decision involving four consolidated *qui tam* actions brought by Sequoia Orange Co. against Sunkist-affiliated lemon handlers and Sunkist under the False Claims Act (Oxnard Lemon Co., No. CV-F-91-194; Mission Citrus Co., No. CV-F-91-195; Ventura Pacific Co., No. CV-F-91-196; Saticoy Lemon Ass'n, No. CV-F-91-197). The author was counsel for the government in these actions.

[81] 369 F.2d 714 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967).

[82] *Id.* at 718. While undoubtedly correct in its interpretation of the Tucker Act, *Kyer* does not alter the governmental status of the committee, since entities can be federal instrumentalities for purposes of sovereign immunity even if they operate on non-appropriated funds. *See* Army & Air Force Exch. Serv. v. Sheehen, 456 U.S. 728, 733-34 (1982) (military PX); *In re* Sparkman, 703 F.2d 1097, 1100-01 (9th Cir. 1983) (federally-chartered credit association).

[83] 18 U.S.C. § 208 (1994).

[84] 5 U.S.C. § 2302(a)(2)(C) (1994).

[85] *Id.* § 2105(a)(1). *Cf.* Hamlet v. United States, 14 Cl. Ct. 62 (Cl. Ct. 1988), *rev'd on other grounds*, 873 F.2d 1414 (Fed. Cir. 1989) (employee of state committee administering Agricultural Stabilization and Conservation Service (ASCS) programs is not employee appointed in civil service and, hence, cannot maintain a suit in claims court under the Back Pay Act).

taken pursuant to marketing orders as well.[86] However the broader question of the antitrust exposure of committee members and employees is unclear. Following allegations that members of the Raisin Administrative Committee engaged in illegal price-fixing and market division discussions with foreign producers,[87] the Antitrust Division of the United States Department of Justice, in conjunction with the USDA, issued "Antitrust Guidelines" in 1982, designed to advise marketing order committee members and employees of the extent of their antitrust immunity.[88] The Guidelines describe certain conduct that would almost invariably be unlawful (e.g., price-fixing and allocation of markets), and state that generally immunity is limited to "acts within the confines of . . . committee obligations" while "[c]onduct that falls outside the range of activities authorized by Federal marketing order regulations . . . may be subject to prosecution."[89]

However these Guidelines may reflect an overly-expansive interpretation of the antitrust laws. The Supreme Court long ago held that the United States is not a "person" as defined in the Sherman Anti-Trust Act,[90] and courts have categorically held "that the United States, its agencies and officials, remain outside the reach of the Sherman Act."[91] So long as a federal official is acting within the "outer perimeter of the authority vested in him by statute," he is acting on behalf of the sovereign and hence is not a "person" for purposes of Sherman Act liability,

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[86] United States v. Borden Co., 308 U.S. 188, 201-02 (1939); Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 334-35 n.4 (9th Cir. 1990). *But see In re* Midwest Milk Monopolization Litig., 380 F. Supp. 880, 885 (W.D. Mo. 1974).

[87] The Raisin Marketing Order, 7 C.F.R. pt. 989, was amended in 1981 to explicitly prohibit such conduct. *See* 46 Fed. Reg. 39,983 (Aug. 6, 1981) (adding new § 989.801 to the order).

[88] UNITED STATES DEP'T OF AGRIC., ANTITRUST GUIDELINES (1982) (copy on file with the *San Joaquin Agricultural Law Review*).

[89] *Id.* at 2. *Accord* 7 C.F.R. § 989.801 (1994).

[90] United States v. Cooper Corp., 312 U.S. 600, 606 (1941). Congress later amended the Act to allow the United States to sue as a plaintiff (*see* 15 U.S.C. § 15a (1994)), but the Court's construction of the definition of "person" contained in 15 U.S.C. § 7 remained unaffected.

[91] Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d 243, 246 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). *See also* Rex Systems, Inc. v. Holiday, 814 F.2d 994, 997 (4th Cir. 1987) (Navy contracting officer, sued in official capacity, is not a "person" under the Sherman Act); Jet Courier Servs., Inc. v. Federal Reserve Bank of Atlanta, 713 F.2d 1221, 1228 (6th Cir. 1983); Lawline v. American Bar Ass'n, 956 F.2d 1378, 1384 (7th Cir. 1992), *cert. denied*, 114 S. Ct. 551 (1993) (district judges and U.S. trustee acting in official capacity not liable under Sherman Act); Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285, 1288-89 (9th Cir. 1985); Mylan Lab., Inc. v. Akzo, N.V., 770 F. Supp. 1053, 1064-65 n.12 (D. Md. 1991).

regardless of whether his actions are authorized by a regulation.[92]

Finally, the scope of antitrust immunity available to cooperatives acting under the auspices of federal marketing orders is unclear and has resulted in litigation.[93]

2. Implementation Through Informal Rulemaking

Under 7 U.S.C. § 608c(7)(C), the Secretary is authorized to implement marketing orders through the adoption of regulations. The ordinary requirements for informal rulemaking under the APA apply to such implementing rules, not the formal rulemaking provisions required to adopt or amend marketing orders.[94] In implementing certain orders, the USDA is required to act nearly every year to issue new or amended rules making minor changes in grade or size standards. In response to industry complaints about delay, a recent amendment to the AMAA requires the Secretary to complete informal rulemaking on committee recommendations within 45 days.[95] Another common issue in marketing order rulemaking is whether the rule has a significant impact on small businesses thereby triggering the need to do the analysis required by the Regulatory Flexibility Act.[96] The USDA typically certifies that its rules do not have such an impact.

Difficult issues have arisen where the rules are the product of committee recommendations and there is not time for ordinary APA notice and comment proceedings. In issuing weekly prorate (volume control) regulations under the California orange orders, the Secretary considered the Tuesday recommendations of the administrative committees before publishing the regulation in the *Federal Register* on Fridays,

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[92] Alabama Power Co. v. Alabama Elec. Coop., Inc., 394 F.2d 672, 675 (5th Cir. 1968); *accord* S & S Logging Co. v. Barker, 366 F.2d 617, 619-20 (9th Cir. 1966). Both decisions relied on the "outer perimeter of line of duty" formulation for determining a government official's absolute immunity from common law tort claims established in Barr v. Mateo, 360 U.S. 564, 575 (1958).

[93] *See, e.g., In re* Midwest Milk Monopolization Litig., 380 F. Supp. 880 (W.D. Mo. 1974); Sunkist Growers, Inc. v. FTC, 464 F. Supp. 302 (C.D. Cal. 1979).

[94] Walter Holm & Co. v. Hardin, 449 F.2d 1009, 1015 (D.C. Cir. 1971). *See also Cal-Almond, Inc. v. United States Dep't of Agric.*, 14 F.3d 429, 444-45 (9th Cir. 1993) (adequate statement of basis and purpose and response to public comments in adoption of almond reserve rule); Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *9-*14 (9th Cir. June 27, 1995) (minimum maturity and size regulations applicable to California tree fruit affirmed) (rehearing petition pending).

[95] 7 U.S.C. § 608c(1) (1994).

[96] Act of Sept. 19, 1980, Pub. L. No. 96-354, 1980 U.S.C.C.A.N. (94 Stat.) 1164 (codified as amended at 5 U.S.C. §§ 601-12 (1994)).

but consistently made a "good cause" determination to obviate the need for public proceedings and delayed effective date.[97] In *Riverbend Farms, Inc. v. Madigan*,[98] the court found procedural error in two respects (the failure to publish notice of the proposed rule in the *Federal Register* before the meeting and the failure to allow written comments), but affirmed the validity of the challenged regulation on a harmless error theory.[99]

The *Riverbend* court noted that "all parties before us [five orange handlers], knew the ground rules" as to how the orange prorate regulations were issued each week, and "it was only after some handlers ran into trouble with the Department of Agriculture that, in looking for an escape, they came up with this challenge."[100] Thus, while rejecting the USDA's blanket assertion of the good cause exception, the Ninth Circuit treated the public meeting of the administrative committee as the de facto equivalent of notice and comment rulemaking for handlers who were aware of the meetings.

In recent amendments to the AMAA, a House committee report stated that "[t]o the extent that recommendations of the Administrative Committee are reasonable, further the purposes of the AMAA and reflect a consensus of all elements of an industry, the Secretary generally should not substitute his judgment for that of an industry in how best to market a crop."[101] And in fact the Secretary has almost invariably adopted recommendations that are the product of an industry consensus; the difficulties have arisen, as in the California citrus orders, when there was no industry consensus.

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[97] *E.g.*, 55 Fed. Reg. 1,171 (Jan. 12, 1990). The APA actually contains two good-cause provisions: one to allow the agency to dispense with published notice of the terms of the rule and the opportunity of the public to comment (*see* 5 U.S.C. § 553(b)(B)), and a second to allow the rule to become effective immediately rather than after 30 days (*see id.* § 553(d)). *See generally* AMAN & MAYTON, *supra* note 45, at 98-101.

[98] 958 F.2d 1479 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992).

[99] *Id.* at 1486-88. In reviewing agency action under the APA, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. *See* Sagebrush Rebellion, Inc. v. Hodel, 790 F.2d 760, 764-65 (9th Cir. 1986).

[100] Riverbend Farms, Inc. v. Madigan, 958 F.2d at 1487-88. *Accord* Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 443 (9th Cir. 1993) (harmless error in failing to provide notice and comment on almond assessment regulations adopted after public meetings of Almond Board); Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *5-*6 (9th Cir. June 27, 1995) (rehearing petition pending).

[101] H.R. REP. NO. 271, 99th Cong., 1st Sess., pt. 1, at 193 (1985) (accompanying the Food Security Act of 1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1297.

3. Funding Orders Through Handler Assessments

Under 7 U.S.C. § 610(b)(2) each handler is liable for "such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and likely to be incurred" by the committee. The committees' recommended budgets are submitted for approval by the Secretary, and based upon such budgets, the Secretary then issues annual regulations specifying the per-carton charge that each handler must pay to fund the operations of the committees. Frequently, the Secretary will not issue assessment regulations until the season is underway, and in *Cal-Almond, Inc. v. USDA*,[102] the Ninth Circuit held that § 610(b) is one of those relatively rare statutes that expressly authorizes retroactive regulation.[103]

Courts have not been demanding in the level of USDA scrutiny and review of the recommended budgets, which provide the basis for assessments, reasoning that "[u]nder the unique regulatory scheme of the Act, the Secretary may rely on the industry-led committees and their staff to do his homework for him and to provide up-to-date information."[104] Moreover in nearly all fruit and vegetable orders, the committee must annually submit a "marketing policy" setting forth anticipated supply and demand as well as recommending appropriate regulatory proposals.[105]

4. The USDA's Audit and Investigative Powers

One of the duties of marketing order committees is to "receive, investigate and report to the Secretary of Agriculture complaints of violations of such order,"[106] and most committees require that handlers file reports with the committees,[107] and may employ auditors or investigators to monitor compliance by handlers. The committees have primary

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[102] 14 F.3d 429 (9th Cir. 1993).

[103] *Id.* at 442-43. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (held that rules having retroactive effect are not favored in the law and will only be allowed if authorized by Congress "in express terms"). There is some tension between *Georgetown* and the Court's prior decision in Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974), that a new statute should be applied retroactively absent "manifest injustice." *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).

[104] Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *4 (citing Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1488 (9th Cir. 1992), cert. denied, 113 S. Ct. 598 (1992)).

[105] *See, e.g.*, 7 C.F.R. § 916.50 (1994).

[106] 7 U.S.C. § 608c(7)(C)(iii) (1994).

[107] *E.g.*, 7 C.F.R. § 916.60 (California nectarine handlers required to file reports describing date, quantity and destination of each shipment).

responsibility for ensuring compliance in the first instance.[108]

The USDA has extensive authority to acquire information to ensure compliance with the AMAA, in particular 7 U.S.C. § 608d(1), which requires all handlers subject to an order to provide the Secretary with "such information as he finds to be necessary to enable him to ascertain" compliance with the order, whether the order is operating effectively, and whether "there has been any abuse of the privilege of exemptions from the antitrust laws." In addition, 7 U.S.C. § 610(h) grants the USDA the same sweeping administrative subpoena authority enjoyed by the Federal Trade Commission (FTC).[109]

The AMS's Office of Compliance has a small staff of investigators which oversees the committees' compliance activities and assists directly in investigating serious problems. Until recently, AMS has not had, or needed, a particularly elaborate compliance program. Finally, the USDA's Office of Inspector General (OIG) has also assisted in investigating alleged violations of marketing order requirements in special cases.[110]

The AMAA provides that information obtained by the Secretary pursuant to § 608d "shall be kept confidential by all officers or employees of the Department of Agriculture" and may only be disclosed if the Secretary thinks the information relevant in a judicial or administrative proceeding brought by the Secretary or one to which he is a party.[111] There has been litigation over whether lists of the names and addresses of growers selling their produce through a particular handler are protected from disclosure under the AMAA. *Ivanhoe Citrus Association v. Handley*,[112] was a reverse Freedom of Information Act (FOIA) ac-

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[108] *AMS Manual*, *supra* note 33, at 75-78.

[109] 15 U.S.C. §§ 48-50 (1994). This authority extends to permit the Secretary to obtain information relating to an investigation from persons who are not subject to regulation under the AMAA. Freeman v. Brown Bros. Harriman & Co., 250 F. Supp. 32 (S.D.N.Y. 1966), *aff'd*, 357 F.2d 741 (2d Cir. 1966), *cert. denied, sub nom.* Meyer Zausner Salves v. Freeman, 384 U.S. 933 (1966).

[110] Continued OIG investigative involvement in ordinary regulatory compliance matters may be called into question by a recent Fifth Circuit decision, Burlington Northern R.R. v. Office of Insp. Gen., 983 F.2d 631 (5th Cir. 1993). In ruling on the enforceability of a subpoena issued by the OIG of the Railroad Retirement Board for records of tax compliance, the court held "that an Inspector General lacks statutory authority to conduct, as part of a long-term, continuing plan, regulatory compliance audits." *Id.* at 642. ***But see*** Adair v. Rose Law Firm, 867 F. Supp. 1111, 1117 (D.C.C. 1994).

[111] 7 U.S.C. § 608d(2) (1994). Typically, USDA will obtain the names and addresses of growers (essential for conducting the periodic referenda) and, in support of compliance cases, information relating to a handler's customers and business strategy.

[112] 612 F. Supp. 1560 (D.C.C. 1985).

tion[113] brought by Sunkist-affiliated handlers to block disclosure of lists of orange growers provided to the USDA that were requested by Carl Pescosolido, an independent grower and handler. The court ruled that the lists were not exempt under the FOIA and that the confidentiality provisions of § 608d were inapplicable because the grower lists were obtained to conduct a referendum under 7 U.S.C. § 608c, not to monitor compliance.[114]

Congress responded with an appropriations rider prohibiting the expenditure of appropriated funds to "release information acquired from any handler" under the AMAA.[115] Further litigation ensued, and ultimately, in *Cal-Almond, Inc. v. Yeutter*,[116] the appropriations rider was held not to be an exempting statute under the FOIA, 5 U.S.C. § 552(b)(3).[117] More dramatically however, the Ninth Circuit construed the AMAA to mandate release of grower lists in the government's possession, holding that "implicit in the Act is the expectation that the Secretary would adopt procedures that are consistent with an open democratic process," which would require that "lists of eligible voters be a matter of public record."[118]

D. Termination of Marketing Orders

While the adoption or amendment of marketing orders is a procedural nightmare, the termination of orders is ridiculously easy. Under 7 U.S.C. § 608c(16), whenever the Secretary finds that an order obstructs or does not tend to effectuate the purposes of the AMAA, he shall terminate or suspend the order, and because such action is not considered an order under the Act,[119] the Secretary may act without any administrative hearings or public comment.

In response to the Secretary's action in terminating the hops marketing order in 1985, the first termination of a marketing order since the AMAA was enacted, Congress amended the AMAA to require 60 days

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[113] Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[114] Ivanhoe Citrus Ass'n v. Handley, 612 F. Supp. at 1565.

[115] *See, e.g.*, Rural Development, Agriculture, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-460, § 630, 1988 U.S.C.C.A.N. (102 Stat.) 2229, 2262.

[116] 960 F.2d 105 (9th Cir. 1992).

[117] *Id.* at 108. The court rejected USDA's argument that the nominal expenditure of government resources needed to direct the requester to the documents so that he could make copies with his own copying machine triggered section 630. "Surely there are enough lawyers in Congress for us to assure its familiarity with the maxim 'de minimis non curat lex.' " *Id.*

[118] *Id.* at 110.

[119] 7 U.S.C. § 608c(16)(C) (1994).

notice to House and Senate Agriculture Committees prior to termination.[120] In the recent termination of the California citrus orders, the Secretary issued a letter to Congress and press release on May 16, 1994, announcing the intention to terminate the order and then published a termination notice in the *Federal Register* on August 26, 1994.[121]

In addition to his own authority to terminate, the Secretary must terminate an order whenever, during a periodic referendum, a majority of producers, by either number or volume of commodity, vote against the order.[122] Thus, as with procedures for adoption, a majority of the regulated industry effectively has the power, equivalent to that of the Secretary, to compel termination of a government program.[123]

Somewhat unclear is the scope of Secretary's authority under 7 U.S.C. § 608c(16)(A) to "suspend" the order or portions thereof. Two courts have held that the Secretary may not effectively amend a marketing order by suspending select provisions.[124]

E. Judicial Review of Marketing Order Requirements

1. Producer and Consumer Standing to Challenge Marketing Orders

While the AMAA provides handlers with an elaborate and exclusive method of redress under 7 U.S.C. § 608c(15),[125] the right of growers or consumers to challenge marketing order requirements is greatly limited.

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[120] 7 U.S.C. § 608c(16)(A)(ii). *See* H.R. REP. NO. 271, 99th Cong., 1st Sess. 195-96 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1103, 1299-1300 ("Termination of an order without the approval of, or consultation with, the affected industry strikes the Committee as a drastic measure.").

[121] 59 Fed. Reg. 44,020 (Aug. 26, 1994). The members of the committees were appointed as trustees to complete the order's unfinished business.

[122] 7 U.S.C. § 608c(16)(B). Some marketing orders expressly authorize growers to petition the committee for a termination referendum and require the Secretary to hold such a referendum if the committee so recommends. *E.g.*, 7 C.F.R. § 916.64(d).

[123] In Congressional testimony on the 1935 amendments to the AAA, the Agricultural Adjustment Administrator described this industry power to compel termination as "a limitation on the Secretary's authority. It contemplates the assurance that the farmers will keep control over their own affairs, in any allotment or quota plan." Schepps Dairy, Inc. v. Bergland, 628 F.2d 11, 22-23 n.94 (D.C. Cir. 1979) (citing *Hearings on H.R. 5585 before the House Comm. on Agric.*, 74th Cong., 1st Sess. 16 (Feb. 26, 1935).

[124] Carnation Co. v. Butz, 372 F. Supp. 883 (D.C.C. 1974); Abbotts Dairies Div. v. Butz, 389 F. Supp. 1 (E.D. Pa. 1975).

[125] *See infra* part II.E.2.

In 1944, the Supreme Court decided *Stark v. Wickard*,[126] holding that where producers had "definite personal rights" affected by a marketing order (funds being deducted by the USDA from minimum prices due from the sale of milk), they were implicitly authorized by the statutory scheme to bring suit against the Secretary.[127] In subsequent years, courts struggled to define the circumstances where "definite personal rights" authorized producer standing.[128]

In 1984, the Supreme Court revisited this issue in *Block v. Community Nutrition Institute*,[129] and construed the AMAA to preclude judicial review by consumers. The Court noted that the AMAA contemplated that challenges to its comprehensive and elaborate regulatory program should be presented to the Secretary through a section 15 petition, and construing the Act to allow direct consumer suits would permit easy circumvention of that provision.[130] Since the *CNI* decision, some courts have adopted a narrow interpretation of the AMAA, precluding direct challenges by producers,[131] but other courts have limited the *CNI* holding to suits by consumers and hence have continued to permit producer standing.[132]

2. Administrative Exhaustion Required by Handlers

Handlers subject to a marketing order may only obtain review of its terms under 7 U.S.C. § 608c(15) by filing a petition with the Secretary and undergoing a formal hearing before an administrative law judge, with subsequent review of the ALJ's recommended decision by the USDA's Judicial Officer.[133] Within 20 days of the final decision by the

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[126] 321 U.S. 288 (1944).

[127] *Id.* at 309. The Court noted that handlers were without standing to challenge this deduction from the fund and that the silence of the statute, in the absence of any provision for an administrative remedy, should not be construed as a complete preclusion of judicial review.

[128] *Compare* Suntex Dairy v. Bergland, 591 F.2d 1063, 1067 (5th Cir. 1979) (producers have standing to bring a generalized "arbitrary and capricious" claim) *with* Benson v. Schofield, 236 F.2d 719, 723 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 976 (1957) (no producer standing to vindicate a general interest in the execution of the law).

[129] 467 U.S. 340 (1984) [hereinafter *CNI*].

[130] *Id.* at 346-48. *Accord* Rasmussen v. Hardin, 461 F.2d 595 (9th Cir. 1972), *cert. denied*, 409 U.S. 933 (1972) (no consumer standing).

[131] *See, e.g.*, Pescosolido v. Block, 765 F.2d 827 (9th Cir. 1985).

[132] Minnesota Milk Producers Ass'n v. Madigan, 956 F.2d 816, 818 (8th Cir. 1992); Farmers Union Milk Mktg. Coop. v. Yeutter, 930 F.2d 466, 474 (6th Cir. 1991).

[133] 7 U.S.C. § 608c(15)(A) (1994). The handler may seek a modification of the

Secretary on a handler's petition, the handler may obtain judicial review in any judicial district where the handler is an inhabitant or has its principle place of business.[134] Review of the final decision of the Judicial Officer rejecting the petition is pursuant to the APA, based on the record before the agency.[135]

The AMAA clearly requires handlers to exhaust the section 15(A) administrative petition process prior to filing suit in district court under 7 U.S.C. § 608c(15)(B).[136] This provision cannot be avoided through a suit in state court to enjoin operation of a federal marketing order.[137] While the drafters intent in creating the section 15 process was "directed toward the effect of such an order upon an individual rather than toward the formulation of a general regulation,"[138] the requirement that all challenges by handlers be presented in the section 15 forum has channeled all challenges, whether handler-specific or generalized, into the cumbersome section 15 process.

Not surprisingly, there is no waiver of sovereign immunity in the AMAA to permit an award of compensatory damages for marketing order regulations found to be unlawful.[139] Nor have marketing order regulations that require the destruction of produce been found to constitute a taking of property entitling handlers to compensation under the Fifth Amendment.[140]

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order or the right to be "exempted therefrom." The procedural regulations governing section 15(A) proceedings are at 7 C.F.R. §§ 900.50-900.71 (1994).

[134] *Id.* § 608c(15)(B).

[135] *See* 5 U.S.C. § 706 (1994). In Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 444 (9th Cir. 1993), the court accepted without discussion the application of traditional APA standards of review to marketing order requirements.

[136] This point is critical because, in Darby v. Cisneros, 113 S. Ct. 2539 (1993), the Supreme Court held that absent explicit statutory or regulatory provisions requiring exhaustion of administrative remedies, section 10(c) of the APA (5 U.S.C. § 704) makes agency action immediately reviewable. Courts cannot impose additional exhaustion requirements. *Cf.* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

[137] United States v. Superior Court, 19 Cal. 2d 189 (1941).

[138] Ashley Sellers & Jesse E. Baskette, Jr., *Agricultural Marketing Agreement and Order Programs, 1933-44*, 33 GEO. L.J. 123, 132 (1945).

[139] Cal-Almond, Inc. v. Yeutter, 756 F. Supp. 1351, 1356 n.2 (E.D. Cal. 1991); Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 448 n.19 (9th Cir. 1993). Waivers of sovereign immunity must, of course, be "unequivocally expressed in the statutory text." United States v. Idaho *ex rel.* Director, Idaho Dep't of Water Resources, 113 S. Ct. 1893, 1896 (1993).

[140] Prune Bargaining Ass'n v. Butz, 444 F. Supp. 785, 793 (N.D. Cal. 1977), *aff'd*, 571 F.2d 1132 (9th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); *accord* Carruth v. United States, 627 F.2d 1068 (Ct. Cl. 1980). However, handlers continue to press

Due to the elaborate, "formal" proceedings under section 15, the administrative review process frequently consumes several years, during which the petitioning handler must continue to comply with all terms of the order or regulation under attack. The AMAA expressly provides that "[t]he pendency of proceedings instituted pursuant to [7 U.S.C. § 608c(15)] shall not impede, hinder or delay" any action to obtain injunctive relief to compel compliance with a marketing order requirement. This strict rule was affirmed by the Supreme Court in the seminal case *United States v. Ruzicka*,[141] holding that a handler may not raise its challenges to the terms of an order as an affirmative defense to a government enforcement action. Justice Frankfurter's opinion stresses principles of deference to the expert judgment of an agency charged with administering a complex economic regulatory program which can only function if immediate and universal compliance is ensured:

> Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider non-compliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements.[142]

However, the Court limited its holding, stating, "we are not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit such as was here brought by the United States."[143] While the courts have consistently re-affirmed the *Ruzicka* holding—comply now and litigate later—they have simultaneously recognized several significant loopholes in this crucial rule.[144]

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takings claims in light of recent Supreme Court decisions expanding the scope of the takings clause. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). *See, e.g.*, Cal-Almond, Inc. v. United States, 30 Fed. Cl. 244 (Cl. Ct. 1994), *appeal pending*, No. 94-5084 (Fed. Cir. filed Mar. 7, 1994) (rejecting a takings claim to the requirement that handlers set aside as a reserve a portion of each almond crop).

[141] 329 U.S. 287 (1946).

[142] *Id.* at 293. *Accord* United States v. Frame, 885 F.2d 1119, 1135 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) (beef promotion program made mandatory to prevent "free riders" from receiving the benefits without sharing the costs).

[143] *Id.* at 295. *Accord* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 193 (1978) ("[A] federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law."); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1978). *But see* United States v. Odessa Union Warehouse Coop, 833 F.2d 172, 175 (9th Cir. 1987) ("Where an injunction is authorized by statute, and the statutory conditions are satisfied as in the facts presented here, the agency to whom the enforcement of the right has been entrusted is not required to show irreparable injury.").

[144] *See* Saulsbury Orchards & Almond Processing, Inc, v. Yeutter, 917 F.2d 1190, 1194 (9th Cir. 1990); Navel Orange Admin. Comm. v. Exeter Orange Co., 722 F.2d

3. Defenses to Enforcement Actions

In principle, the only issues in a § 608(a)(6) action seeking to compel compliance with marketing order requirements should be whether the defendant is a handler subject to the order and is in violation of the order. Occasionally, however, courts have exercised their equitable discretion to allow milk handlers to raise, as an affirmative defense, issues that require little if any administrative expertise. For example in *United States v. Tapor-Ideal Dairy Co.*,[145] the defendant handler was allowed to raise accord and satisfaction as a defense to an action by the government to compel it to pay funds to a cooperative. In *United States v. Brown*,[146] defendants were allowed to contest their status as a "handler" under the milk marketing order (the defendant contended that it had structured its affairs such that it was either a grower or an independent contractor), and enforcement was stayed pending an administrative appeal that the defendants ultimately lost.[147]

A more questionable line of authority involves rulings that a handler is entitled to a "refund" of assessments for the operation of the marketing order in the event that the handler is successful in its section 15 challenge. In *Navel Orange Administrative Committee v. Exeter Orange Co.*,[148] the Ninth Circuit cited *Ruzicka* in affirming injunctions compelling handlers to comply with marketing order requirements pending administrative exhaustion, but then dropped this explosive dicta:

> If the ultimate determination of the administrative proceeding, emanating either from the Secretary of Agriculture or from the federal courts through the statutory right of appeal, should substantiate Exeter *et al.*'s challenges to the marketing orders, *then refund of any unpaid assessments found not to have been due would be in order.* (Emphasis added.)

No legal authority, much less an "unequivocally expressed" waiver of sovereign immunity,[149] was offered for the suggestion that the court could compel the payment of funds by a governmental entity. In *United*

449, 452 (9th Cir. 1983); United States v. Lamars Dairy, Inc., 500 F.2d 84, 86 (7th Cir. 1974).

[145] 283 F.2d 869 (6th Cir. 1960), *aff'd per curiam*, United States v. Tapor-Ideal Dairy Co., 175 F. Supp. 678 (N.D. Ohio 1959).

[146] 211 F. Supp. 953 (D. Colo. 1962), 217 F. Supp. 285 (D. Colo. 1963), *aff'd*, 331 F.2d 362 (10th Cir. 1964).

[147] Brown v. United States, 367 F.2d 907 (10th Cir. 1966), *cert. denied*, 387 U.S. 917 (1967).

[148] 722 F.2d 449, 452 (9th Cir. 1983) [hereinafter *NOAC*].

[149] United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1014 (1992).

States v. Riverbend Farms, Inc.,[150] the Ninth Circuit again reaffirmed the *Ruzicka* principle in the context of a § 608a(5) forfeiture action, but extended the *NOAC* dicta one step further, suggesting that "the district court could exercise its equitable powers to stay distribution of the damage award until completion of the administrative proceeding."[151]

It was not long before certain handlers took advantage of this loophole in *Ruzicka* to circumvent the explicit language of § 608c(15). In the pending *Wileman* litigation involving the California tree fruit marketing orders, the defendant handlers resisted government actions to compel payment of the statutorily-mandated assessments, arguing that in order for them to be assured of a "refund" of assessments that might be found not to have been due, the assessment collection actions must be stayed, with the assessments to be paid into a trust fund account. In 1989, Judge Edward Dean Price granted this motion for stay of the government's collection actions, effectively overturning *Ruzicka*.[152]

However it was in challenges to the almond marketing order that a "refund" of assessments was finally ordered. After sustaining the First Amendment challenge to the generic advertising program, the court of appeals in *Cal-Almond* remanded the case to the district court to ascertain the appropriate remedy: "Because of the fact-intensive nature of the inquiry, we find that '[t]he determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court.' "[153] On remand, Judge Robert E. Coyle concluded that the question of whether Cal-Almond and the three other petitioners indirectly benefited from the advertising program, or whether the assessment charge was passed through to the Cal-Almond petitioners' growers as part of their packing charges, was not the sort of "fact in-

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[150] 847 F.2d 553 (9th Cir. 1988).

[151] *Id.* at 559 n.7. *Accord* United States v. Guimond Farms, Inc., 203 F. Supp. 471 (D. Mass. 1962) (defendant's motion to stay government injunctive action to compel payment into producer settlement fund granted).

[152] United States v. Wileman Bros. & Elliott, Inc., No. CV-F-88-568 (E.D. Cal. July 6, 1989), *aff'd in part, rev'd in part,* Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682 (9th Cir. June 27, 1995) (rehearing petition pending). Subsequently, other California tree fruit handlers who opposed marketing order requirements also filed section 15 petitions and withheld assessment payments.

[153] Cal-Almond, Inc. v. United States Dep't of Agric., 14 F.3d 429, 449 (9th Cir. 1993) (quoting Chicago Teachers Union v. Hudson, 475 U.S. 292, 310 (1986). In *Wileman Bros. & Elliott, Inc. v. Espy*, the court of appeals also remanded for a "fact intensive . . . remedial inquiry" to determine the amount of the refund of assessments used to fund the generic advertising program that the court found to be unconstitutional. Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *16.

tensive . . . inquiry" that the court of appeals contemplated. The district court ordered that the Cal-Almond plaintiffs could retain the $1.7 million in assessments withheld and recover an additional $2.6 million in assessments that were paid to the Almond Board or in creditable advertising expended by petitioners.[154] The court did not identify the source of this refund.[155]

F. Enforcement of Marketing Orders

The AMAA contains a combination of criminal, civil and administrative penalty provisions that appear formidable on the surface but which have not been particularly effective when confronted with handlers who file challenges under section 15 and simultaneously embark on a determined policy of noncompliance.

Any handler (or officer, director, agent or employee) who violates the requirement of an order may be fined not less than $ 50 nor more than $5,000 for each violation.[156] However the pendency of a section 15 petition challenging the terms of the order, if brought in "good faith and not for delay" provides a complete defense to such prosecution. This provision has rarely been utilized[157] and, given the dramatic expansion of federal criminal liability in areas of substantially greater public concern, is not likely to be utilized in the future.

Volume control regulations are subject to a "strict liability" civil forfeiture provision contained in § 608a(5). Handlers exceeding a quota and "any other person knowingly participating or aiding in the exceed-

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[154] Cal-Almond, Inc. v. United States Dep't of Agric., No. CV-F-91-064 (E.D. Cal. Sept. 6, 1994) (copy on file with the *San Joaquin Agricultural Law Review*), *appeal docketed*, Nos. 94-17160, 94-17163, 94-17164, 94-17166, 94-17167, 94-17182 (9th Cir. Nov. 18, 1994).

[155] Because fruit and vegetable committees use assessments to fund each year's program, they do not have a source of funds to pay this refund. Absent a specific appropriation, payment from the judgment fund created by 31 U.S.C. § 1304, is the only other possible source of such a "refund." *See* Availability of Judgment Fund for Settlement of Cases or Payment of Judgments Not Involving a Money Judgment Claim, 13 Op. Off. Legal Counsel 118 (1989); 69 COMPTROLLER GEN. 114, 116 (1990) (judgment fund not available). *Cf.* Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992).

[156] 7 U.S.C. § 608c(14)(A)(1994). Filing a false report with the administrative committee (e.g., as to quality or volume of produce shipped) would also subject the handler to "false statement" liability under 18 U.S.C. § 1001.

[157] *See* Panno v. United States, 203 F.2d 504 (9th Cir. 1953) (alleged unconstitutionality of order cannot be raised as an affirmative defense); United States v. Beatrice Foods Co., 224 F. Supp. 353 (W.D. Mo. 1963) (proof of intent or mens rea not required).

ing of such quota" are subject to a forfeiture equal to the "current market price for such commodity at the time of the violation." This provision was amended in 1961 to delete the requirement that the handler have "willfully" violated the quota.[158] Handlers do not have immunity from civil forfeiture penalties during the pendency of a section 15 petition challenging the legality of the volume control regulation.[159]

The scope of the aiding and abetting liability under § 608a(5) is unclear, and in the recent California citrus litigation, the United States sought to impose penalties on an agricultural cooperative, Sunkist Growers, Inc., for its conduct in facilitating its handlers' violations.[160] The unique status of agricultural cooperatives, which generally have indemnity agreements with handlers who are subject to regulation,[161] present unsettled issues of secondary liability under the current Act.

The California citrus litigation also produced a district court ruling that violations of volume control regulations are actionable as "reverse false claims" under the 1986 amendments to the False Claims Act (FCA).[162] In a 1992 decision, in *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*,[163] Judge Wanger denied the government's

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[158] Agricultural Act of 1961, Pub. L. No. 87-128, § 141, 75 Stat. 294. The only reported case under this provision is United States v. LoBue Bros., 274 F.2d 159 (9th Cir. 1959), where the United States was unable to prove that the handler's conduct was willful.

[159] United States v. Riverbend Farms, Inc., 847 F.2d 553, 555-57 (9th Cir. 1988).

[160] The government alleged that Sunkist knew that its handlers were engaged in widespread violations of volume control regulations and continued to issue invoices which contained incorrect shipment dates (based on the date provided to Sunkist's billing department by its handlers), thereby knowingly aiding the handlers in covering up the violations. *See* Third Amended Complaint in United States *ex rel.* Sequoia Orange Co. v. Magnolia Citrus Ass'n, No. CV-F-89-056 (E.D. Cal. filed Mar. 21, 1994) (setting forth government's allegations) (copy on file with the *San Joaquin Agricultural Law Review*). Sunkist denied all liability and the government elected not to pursue any civil penalty actions after it terminated the California citrus orders. The author was counsel for the government in this litigation.

[161] Sunkist's by-laws provide that Sunkist-affiliated handlers "shall severally indemnify and save Sunkist harmless against all loss, damage, injury, liability, cost and/or expense of whatsoever nature suffered . . . by Sunkist by reason of any claim . . . asserted . . . against Sunkist by reason of any act of commission or omission of such member." SUNKIST GROWERS, INC., AMENDED ARTICLES OF INCORPORATION AND BY-LAWS 20, § 11.4 (Jan. 18, 1984).

[162] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (100 Stat.) 3153 (codified as amended at 31 U.S.C. §§ 3729-3733 (1994), 18 U.S.C. § 287 (1994)). The *qui tam* provisions, which permit citizen "whistleblowers" to bring suit on behalf of the United States and retain a portion of any recovery, are codified at 31 U.S.C. § 3730.

[163] *See also supra* note 80.

motion to dismiss the FCA claims, holding that by falsely reporting the amount of a commodity shipped, the handler has "made . . . a false record . . . to . . . avoid . . . an obligation to pay . . . money . . . to the Government[,]"[164] i.e., the AMAA forfeiture penalty. After re-intervening in the actions in an effort to settle the alleged violations, the government ultimately moved to dismiss the cases after the California citrus orders were terminated in 1994.

Finally, under § 608c(14)(B), the USDA may assess administrative penalties of up to $1,000 per violation of any provision of an order, and each day in violation may be deemed a separate violation. This penalty may only be assessed after "agency hearing on the record," and any penalty must be pursued as a collection action in district court. Moreover, no civil penalty may be assessed if prior to the violation, the handler has filed an administrative petition challenging the order pursuant to 7 U.S.C. § 608c(15), and the petition was filed "in good faith and not for delay."[165]

Recent experience suggests that a handler who wants to mount a determined challenge to any regulatory policy implemented under the AMAA can effectively avoid any consequences for its "civil disobedience" by: (1) filing a section 15(A) petition (thus avoiding both criminal and administrative liability); and (2) asking that the court exercise its equitable discretion to "stay" government injunctive actions brought to compel immediate compliance including payment of assessments. Thus the handler can opt out of the regulatory constraints of the marketing order until the completion of its section 15 challenges and may even win a "refund" of its assessments if it ultimately prevails.

G. The AMAA's Fatal Flaw: The Judicial Review-Enforcement Tension

It would be difficult to imagine a clearer departure from the intent of Congress than the *NOAC* and *Cal-Almond* decisions. Granting a "stay" of a government enforcement action pending the outcome of the handler's challenge is inconsistent with the plain language of 7 U.S.C. § 608c(15)(A): "the pendency of [administrative and judicial review] proceedings *shall not impede, hinder or delay* the United States . . .

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[164] 31 U.S.C. § 3729(a)(7) (1994). The legislative history of this provision discusses its use in a contractual setting (e.g., falsely reporting low occupancy rates in government-owned housing to reduce obligation to remit funds to the United States), not as a penalty for regulatory violations. *See* S. REP. NO. 345, 99th Cong., 2d Sess. 18-19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5283-84.

[165] 7 U.S.C. § 608c(14)(B) (1994).

from obtaining [injunctive] relief . . . ." And awarding a "*refund of assessments* found not to have been due" is squarely inconsistent with the requirement in 7 U.S.C. § 610(b) that *each handler is liable for its pro rata share of expenses* incurred in the operation of the marketing order. Because the Ninth Circuit's sweeping dicta on handlers' right to a refund of assessments, is neither compelled by the Constitution nor consistent with the AMAA, it should be reconsidered or reversed by legislation.

At the outset, it is necessary to recognize that the question of the appropriate *remedy*, where a citizen has been assessed fees to fund an invalid regulation, is distinct from the issue of whether the reviewing court has discretion to make its ruling on the regulation purely *prospective* in effect. In *Harper v. Virginia Department of Taxation* the Supreme Court categorically held that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law *and must be given full retroactive effect* . . . ."[166] *Harper* overruled the three-part balancing test for determining whether to give retroactive effect to a new rule of law announced in a civil case—a principle which the Court had adopted in *Chevron Oil Co. v. Huson*,[167] and which had followed the Court's determination that newly declared rules must be given full retroactive effect in all criminal cases pending on direct review.[168] However, the Court has also recognized that the requirement that a rule of federal law be given *retroactive effect* is distinct from the question of the appropriate *remedy* that should be ordered.[169]

1. Remedy After APA Violation

Where a court sustains a challenge to agency action for procedural violations of the APA, it does not announce a new "rule of federal law," but instead must generally remand the matter to the agency for

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[166] 113 S. Ct. 2510, 2517 (1993) (emphasis added). *See also* Reich v. Collins, 115 S. Ct. 547 (1994); James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).

[167] 404 U.S. 97, 106-07 (1971).

[168] Griffith v. Kentucky, 479 U.S. 314 (1987), *overruled* Linkletter v. Walker, 381 U.S. 618 (1965).

[169] "A decision may be denied '*retroactive* effect' in the sense that conduct occurring prior to the date of decision is not judged under current law, or it may be denied 'retroactive *effect*' in the sense that independent principles of law limit the relief that a court may provide under current law." American Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 209 (1990) (Stevens, J., dissenting); United States v. Estate of Donnelly, 397 U.S. 286, 297 (1970) (Harlan, J., concurring).

further proceedings.[170] Critically, the reviewing court has the equitable discretion to refrain from enjoining the invalid agency action pending completion of remand proceedings. For example, in *Western Oil & Gas Association v. United States Environmental Protection Agency*,[171] the court left in effect procedurally flawed air quality regulations pending remand proceedings "from a desire to avoid thwarting in an unnecessary way the operation of the Clean Air Act in the State of California . . . [and] . . . the possibility of undesirable consequences which we cannot now predict . . . ."[172] In *Schurz Communications, Inc. v. Federal Communications Commission*, the court invalidated as arbitrary and capricious the FCC's financial interest and syndication rules for television stations, but then considered five separate options (from complete deregulation to leaving the old rules in effect), and ultimately elected to leave the invalid rule in effect for a limited period during remand.[173] These decisions recognize that courts and administrative agencies "are to be deemed collaborative instrumentalities of justice,"[174] working together to jointly effectuate the Congressional purpose and hence a reviewing court's remedial orders must be crafted to that end.

2. Remedy After Constitutional Violation

A more difficult question is presented where the reviewing court finds a constitutional infirmity, such as a violation of a handler's First Amendment commercial speech right as in *Cal-Almond. McKesson Corp. v. Division of Alcoholic Beverages & Tobacco* held that where the state penalizes taxpayers for failure to pay in a timely manner, federal due process principles require the state's post-deprivation procedures to provide a "clear and certain remedy."[175] *McKesson* did not in fact require that a tax refund must be provided, but rather remanded to the Florida courts for consideration of the appropriate remedy.[176] How-

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[170] Burlington Northern, Inc. v. United States, 459 U.S. 131, 143 (1982).

[171] 633 F.2d 803 (9th Cir. 1980).

[172] *Id.* at 813. Other circuits have also struggled with the appropriate remedy where the air quality regulations of the Environmental Protection Agency (EPA) did not comply with the notice and comment requirements of the APA. *See* Sharon Steel Corp. v. EPA, 597 F.2d 377, 381 (3d Cir. 1979) (rule left in effect except as to specific designations contested by plaintiffs); United States Steel Corp. v. EPA, 649 F.2d 572, 577 (8th Cir. 1981) (same); New Jersey v. EPA, 626 F.2d 1038, 1050 (D.C. Cir. 1980) (same plus court retained jurisdiction).

[173] 982 F.2d 1043, 1055-57 (7th Cir. 1992).

[174] United States v. Morgan, 313 U.S. 409, 422 (1941).

[175] 496 U.S. 18, 52 (1990).

[176] *Id.* In James B. Beam Distillers Co. v. Georgia, 111 S. Ct. 2439 (1991), the

ever in *American Trucking Associations, Inc. v. Smith*,[177] decided simultaneously, the Court, in a fragmented holding, denied retroactive relief.[178] The question is whether *McKesson* mandates a refund of all AMAA assessments used to fund "unconstitutional" marketing promotion campaigns, (and the corollary right to a stay of assessment collection actions), even if the effect of such rulings is to render marketing orders effectively unenforceable and patently unfair to those handlers who pay their assessments.

As a threshold matter, the *McKesson* line of authority, involving state *taxes*, has limited relevance to a federal *regulatory program funded through industry assessments*. In the *Head Money Cases v. Robertson*,[179] the Supreme Court recognized that the assessment of fees to fund an immigration program "is not the taxing power," but "the mere incident of the regulation of commerce."[180] Recent decisions have continued to recognize that "a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of Article I, section 8 apply."[181]

Consequently, when an AMAA-mandated assessment is analyzed as an exercise of Congress' power to regulate interstate commerce, general

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Court held that a Georgia excise tax impermissibly discriminated against non-Georgia producers, yet reiterated that *McKesson* did not address the issue of remedy. *Id.* at 2448. Moreover, the *Beam* Court noted that on remand the state could "raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided . . . ." *Id.*

[177] 496 U.S. 167 (1990).

[178] 467 U.S. 187-88 (O'Connor, J., plurality opinion). The plurality is of limited relevance, as it relied on the now-rejected *Chevron Oil Co. v. Huson* formula. However, *McKesson* was an easier case to decide because that tax was clearly unconstitutional under settled Supreme Court authority, while American Trucking presented a closer question and, hence, less justification for full retroactive relief. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1754 (1991).

[179] 112 U.S. 580 (1884).

[180] *Id.* at 595. The challenged statute in these cases required ship owners to pay a levy of 50 cents for each passenger who was not a United States citizen and who was entering the United States from a foreign port. The proceeds were deposited in a special fund "to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States . . . ." *Id.* at 590 (quoting Act of Aug. 3, 1882, 22 Stat. 214, 214 (an Act to regulate immigration)).

[181] Union Pac. R.R. Co. v. Public Utility Comm'n, 899 F.2d 854, 859 (9th Cir. 1990); *accord* South Carolina *ex rel.* Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1903 (1983) ("The imposition of assessments have [sic] long been held to be a legitimate means of regulating commerce." (citing Wickard v. Filburn, 317 U.S. 111 (1942))).

principles of sovereign immunity should apply to shield the government from any claims for a refund of the user fees which funded that activity. The unique fact that marketing orders operate through industry assessments rather than appropriated funds should not dictate a different rule with respect to the application of sovereign immunity to claims for a refund of assessments, absent special circumstances. [182] Because there is no entitlement to damages or refunds for federal programs found to be procedurally-flawed, unconstitutional or simply mis-guided, no handler should be entitled to a "refund" of assessments or "stay" of an enforcement action.

Yet there is an even more basic point relating to the appropriate remedy for a violation of constitutional rights in the marketing order context. In a recent article by Professors Richard H. Fallon, Jr. and Daniel J. Meltzer of Harvard Law School,[183] the authors argue that while American constitutional jurisprudence does not guarantee an individually-tailored remedy for every newly-identified constitutional violation, it does and should provide "an overall structure of remedies adequate to preserve separation of powers values and a regime of government under law."[184] Thus, sovereign immunity shields the federal government from damages claims arising out of Constitutional violations,[185] and qualified immunity frequently shield federal officers sued in their individual capacities for Constitutional violations, unless the right was "clearly established" at the time of the violation.[186] Yet

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[182] In O'Connell Management Co. v. Massachusetts Port Auth., 744 F. Supp. 368, 378 (D. Mass. 1990), the court concluded that where the government frustrated the opportunity for a final administrative adjudication of the validity of the fees prior to coercing payment, due process required that there be an opportunity for a post-deprivation refund. The case involved an increase in landing fees, by the Port Authority at Boston's Logan Airport, which went into effect notwithstanding a request by the Department of Transportation (DOT) that the increase be delayed pending DOT's ruling on its legality.

[183] Fallon & Meltzer, *supra* note 178.

[184] Fallon & Meltzer, *supra* note 178, at 179.

[185] *See supra* note 139. *See also* Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986); Holloman v. Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). Of course, Congress has waived sovereign immunity in numerous respects to allow tort actions against the United States for acts that would constitute Constitutional violations. *See* 28 U.S.C. § 2680(h) (1994) (Federal Tort Claims Act waiver of sovereign immunity extended to assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution by federal law enforcement officers).

[186] Harlow v. Fitzgerald, 457 U.S. 800 (1982) (federal defendants immune where the right was not "clearly established" at the time of the violation); Fallon & Meltzer, *supra* note 178, at 1749-53, 1820-24.

notwithstanding the absence of a monetary remedy where the courts announce a new rule of Constitutional law, courts can always grant injunctive relief to halt ongoing Constitutional violations. In fact, under current principles of Constitutional remedies, retroactive monetary relief is only mandated where there has been a Fifth Amendment taking and possibly where state taxes are found to discriminate against foreign taxpayers.[187]

Hence, in framing a remedial order after a handler has successfully challenged a marketing order provision, courts can ensure compliance with the rule of law, (without automatically ordering refunds and thereby rendering this program effectively unenforceable), by limiting the remedy to prospective injunctive relief. In any action to compel payment of assessments under 7 U.S.C. § 608a(6), a court would still have the equitable discretion to limit or condition the relief granted to the government.[188] However except in the rarest cases, handlers who have benefited by the services provided under fruit and vegetable marketing orders should pay their statutorily-mandated pro rata share of the order's expenses, without any right to a refund.[189]

Bowen v. Massachusetts, which held that the Administrative Procedure Act authorized an *equitable* action against the United States for the "recovery of specific property or monies,"[190] has also been con-

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[187] Additionally, the Court has also placed significant limits on the scope of the retroactive habeas corpus remedy where the petition is premised on a new rule of law. Teague v. Lane, 489 U.S. 288 (1989); Fallon & Meltzer, *supra* note 178, at 1738-49.

[188] United States v. Ruzicka, 329 U.S. 287, 295 (1946). Alternately, the USDA could grant a stay of certain regulatory requirements upon an appropriate showing, which its existing section 15(A) regulations appear to authorize. 7 C.F.R. § 900.70 (1994). *See* La Verne Coop. Citrus Ass'n v. United States, 143 F.2d 415, 419 (9th Cir. 1944).

[189] Some special treatment might be appropriate where the handler can demonstrate that due to its unique position in the industry, it did not benefit from the challenged activity on an equal basis with others. For example, the successful handlers in *Cal-Almond, Inc. v. United States Dep't of Agric.* presented evidence that the advertising program was directed toward the retail almond market, overwhelmingly dominated by a large cooperative, Blue Diamond Growers, Inc. 14 F.3d at 438-40. Conversely, Cal-Almond and others were denied credit for advertising to cereal companies and ice cream processors, their particular market niche. *See* 14 F.3d at 438, 440. However even here, the "fact-intensive . . . inquiry" ordered on remand might have shown that advertising increased total demand for California almonds from all markets, thereby indirectly increasing prices in Cal-Almond's ingredients market.

[190] 487 U.S. 879, 893 (1988) (quoting Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949)). Generally, *Bowen* recognized the distinction between an action for money damages, generally actionable only under the Tucker Act, and an APA claim under 5 U.S.C. § 702 for declaratory and injunctive relief, which might

strued too expansively in support of claims for refunds of assessments.[191] Moreover, *Bowen* and its progeny all involved cases of statutory entitlement to the payment of money by the government,[192] whereas the AMAA contains no entitlement for a handler to receive a refund of the sums it is compelled to pay to implement this regulatory program. Marketing orders provide a program of immediate benefits to the regulated industry (e.g., inspections, advertising, research and data collection), paid for by pro rata assessments on all handlers. Even if some activity authorized under the marketing order is held to be unlawful, it will almost invariably be the case that all handlers will have benefited (or suffered) more or less equally from that activity and hence there is no *equitable* basis for one handler (the successful litigant), to obtain a refund of its assessments.

Moreover, *McKesson* recognizes that the right to a post-deprivation refund action may not be constitutionally-mandated if there is an adequate opportunity for pre-deprivation process.[193] It could be argued that the elaborate formal rulemaking proceedings which occur prior to the adoption of every marketing order, in conjunction with the opportunity of all handlers to express their views at the committee meetings that recommend budgets to the USDA for approval, provide ample pre-deprivation process. However, in the final analysis, these difficult constitutional issues could be largely avoided if handlers could be assured of prompt judicial review of challenged regulations—preferably before the onset of a harvest season and the associated compliance costs.

III. The Agricultural Marketing Agreement Act—A Proposal for Amendment

The recent marketing order litigation in California has highlighted a number of fundamental policy judgments implicit in the AMAA, that deserve to be reevaluated by Congress in any reauthorization of the AMAA. If the judgment is made to continue federal marketing orders for fruits and vegetables, several critical changes in the AMAA are es-

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have the effect of requiring the payment of monies by the United States.

[191] *See, e.g.*, Cal-Almond, Inc. v. United States Dep't of Agric., No. CV-F-91-064, slip op. at 3-9 (E.D. Cal. Sept. 6, 1994); Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *15-*16 (9th Cir. June 27, 1995) (rehearing petition pending).

[192] *See, e.g.*, Dia Navigation Co. v. Pomeroy, 34 F.2d 1255, 1266-67 (3d Cir. 1994).

[193] McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36-37 (1990). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discussing trade-off between pre-deprivation and post-deprivation process).

sential to ensure the effective administration and enforcement of marketing orders.

A. Fundamental Policy Judgments

1. Do We Still Need This Program?

In *Riverbend*, Judge Kozinski noted that "[a]s governments elsewhere loosen their grip over commercial markets, the Secretary of Agriculture forges ahead with a government-mandated system of quantity restrictions adopted nearly four decades ago."[194] After 58 years, it might be appropriate for Congress to comprehensively reconsider an economic regulatory program that was a centerpiece of the New Deal but which has generated increasing controversy. However, the undeniable popularity of marketing orders with small farmers, combined with the inherent instability of the agricultural economy, and the need for a mechanism for growers to cooperate, may still justify a comprehensive *federal* regulatory scheme.[195]

2. Can This Governmental Function be Better Implemented at the State Level?

If some regulatory scheme for fruit and vegetable crops is appropriate, the federal government should defer to state-initiated programs wherever possible.[196] Both fundamental principles of Federalism, as well as the inherently localized nature of any fruit and vegetable program, would seem to suggest that marketing orders should, if possible, be the product of *state* rather than federal statutory authority. Only where there is no state authority for an equivalent program, or where it

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[194] Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1489 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 598 (1992). *Riverbend*, of course, involved the recently terminated marketing order authorizing volume control regulations on California oranges.

[195] *See* OLAN D. FORKER & RONALD W. WARD, COMMODITY ADVERTISING: THE ECONOMICS AND MEASUREMENT OF GENERIC PROGRAMS 268 (1993) ("[M]andatory assessments to support commodity promotion programs are in the public interest. They have the potential of enhancing producer and consumer welfare."); NICHOLAS J. POWERS, ECONOMIC RESEARCH SERV., U.S. DEP'T OF AGRIC., FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS AND SPECIALTY CROPS (Agric. Econ. Rep. No. 629, 1990); Nicholas J. Powers, *Effects of Marketing Order Prorate Suspensions on California-Arizona Navel Oranges, in* 7 AGRIBUSINESS 203 (1991).

[196] As the Supreme Court noted in a case challenging the California marketing program for raisins, "the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act [the AMAA] will be effectuated without the promulgation of an order." Parker v. Brown, 317 U.S. 341, 354 (1943).

is necessary to regulate production on a nation-wide basis (as with milk), should there be a federal marketing order.

3. What Type and Degree of Industry Participation is Appropriate?

Marketing orders allow growers, who have the most knowledge about industry conditions, to implement and oversee this very sensitive program. Due to their experience and reputation among their peers, industry representatives are generally in a far better position than ordinary federal employees to make the subtle market-related judgments necessary to effectively implement this program (e.g., when is fruit really mature and ready for the consumer). However giving industry leaders the authority to administer a program that regulates their competitors and themselves may result in at least an appearance of insider abuse and manipulation. The special role given agricultural cooperatives through their power to bloc vote raises especially difficult concerns, as indicated by the *Sequoia/Sunny Cove* litigation.

Consequently, a comprehensive Congressional reconsideration of the unique role provided for the regulated industry is warranted and more elaborate procedures for USDA oversight of committee decisions should be considered. Another critical question is whether consumers or other non-handlers should be given an explicit role in the regulatory program,[197] including standing to challenge marketing order restrictions.

B. Essential Procedural Changes in the AMAA

1. Resolve the Judicial Review/Enforcement Tension

The critical flaw in the existing statute is the conflict between the need for immediate compliance with regulations and the unfairness of delaying any resolution of a legal challenge for many years during the lengthy administrative and judicial appeal process required by 7 U.S.C. § 608c(15). Elimination of the section 15(A) administrative appeal requirement, in conjunction with a statutorily-mandated annual rulemaking subject to expedited judicial review, would solve this difficult judicial review/enforcement dilemma.

The AMAA should be amended to require the USDA to approve, through informal rulemaking, an annual "marketing policy statement"

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[197] During the 1970's, several marketing orders were amended to add a "public" member to the administrative committee. *See, e.g.*, 43 Fed. Reg. 14,375 (Apr. 5, 1976) (public member added in Marketing Order 917).

for each and every fruit and vegetable marketing order. An opportunity for public comment on the committees' annual recommendations will conclusively foreclose claims of industry domination or insider abuse and ensure regular reconsideration of programs in light of changing marketplace developments. The marketing policy statement (effectively the recommendation of the committee), should comprehensively address the issues affecting the industry, describe the ongoing programs and the recommended budget and include a detailed justification for any regulatory program proposed, including the identification and analysis significant alternatives. Even if the committee elects to recommend little or no regulatory action, which typically would be subject to only the most cursory judicial review,[198] the pervasive nature of marketing order regulation suggests that any sudden shift to deregulation should be subject to some measure of public comment and associated judicial review. Finally, a marketing policy statement would provide a vehicle for the USDA to articulate and justify why each season's advertising and promotion program directly advances a substantial state interest, as is required for the regulation of commercial speech.[199]

If each season's program is implemented through informal rulemaking on a marketing policy statement (and associated regulatory amendments), a record can be generated through the receipt of public comment and the agency can apply its expertise to the committee's recommendations, without need for the cumbersome and time-consuming section 15(A) administrative hearing.[200] The inherently seasonal nature of most regulated commodities should provide the USDA with a sufficient time window for the completion of notice and comment before the commencement of a each harvest season.

A rough outline of a timetable to consider all significant actions (regulatory, advertising and budget) would be as follows:

September: End of harvest season: committees meet in noticed, public session to recommend regulations for next season.

October: The USDA issues notice of proposed rulemaking based on committee recommendations.

January: After a 30-day public comment period, internal review, and

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[198] Oil, Chemical and Atomic Workers Int'l Union v. Zegeer, 768 F.2d 1480, 1488 (D.C. Cir. 1985); Natural Resources Defense Council v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979).

[199] Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

[200] *See, e.g.*, SEC v. G.C. George Sec., Inc., 637 F.2d 685, 688 n.4 (9th Cir. 1981) (purpose of administrative exhaustion doctrine is to allow agency to build a record, apply its expertise and correct errors).

perhaps a public hearing, the USDA issues a final rule for upcoming season.

February: Any affected handler *must* challenge the newly issued regulations in district court. Handlers who fail to do so may not challenge its legality subsequently in a defense against an enforcement action.[201]

April: If the AMAA is amended to require expedited consideration of such claims by the district courts,[202] a ruling should be feasible prior to the initiation of the harvest season.

This guarantee of an expedited rulemaking/judicial review schedule would eliminate any due process objection to the existing requirement that handlers comply immediately with marketing order requirements while pursuing any legal challenges.[203] To remove all doubt, the statute should expressly provide that after a regulation is affirmed by the district court, all obligations, particularly the payment of assessments, are final, with no right to any "refund" of assessments if the district court's ruling is later reversed.

2. Additional Procedural Changes

a. Clarify the AMAA's Statement of Purposes

The declaration of policy contained in 7 U.S.C. § 602 focuses on the vague goals of attaining "orderly marketing conditions" and achieving "parity prices." Congress should clarify the purposes and goals of the AMAA and attempt to reconcile the potentially conflicting interests of

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[201] Similar limitations on the timing of judicial review have been upheld by the Supreme Court. *See* Yakus v. United States, 321 U.S. 414 (1944); Adamo Wrecking Co. v. United States, 434 U.S. 275, 289-91 (1978) (Powell, J., concurring) (albeit with some reservations where the challenge alleges a *constitutional* violation).

[202] Each court of the United States may determine the order and priority in which civil actions are heard, subject to certain limited actions commanding priority, i.e., habeas corpus actions under 28 U.S.C. §§ 2241-2255 and actions to compel testimony of a recalcitrant witness under 28 U.S.C. § 1826. *See* 28 U.S.C. § 1657 (1994). *See also* FED. R. CIV. P. 57 ("The court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar."). Finally, the FOIA at one time contained a provision that FOIA cases would "take precedence" over other cases and should be "expedited in every way." 5 U.S.C. § 552(a)(4)(D), *repealed by* Act of Nov. 8, 1984, Pub. L. No. 98-620, § 403, 1984 U.S.C.C.A.N. (98 Stat.) 3335, 33361. The time-sensitive nature of marketing orders justifies a limited Congressional directive to the federal courts to expedite this class of cases.

[203] 7 U.S.C. § 608c(15)(B) (1994). In McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 36-37 (1990), the Supreme Court recognized that an opportunity for "pre-deprivation process" would relieve the state of any obligation to provide a refund.

growers, handlers and consumers. Regardless of what policies guide the new statement of goals, the concept of "parity pricing"—guiding American agricultural policy based upon the lodestar of the status quo of the farm economy during the Woodrow Wilson Administration—surely deserves a comprehensive reconsideration. Finally, the authorization for certain particularly controversial regulatory tools, such as volume control, should be reconsidered or perhaps held to a precisely articulated and demanding standard.

b. End Formal Rulemaking for Adopting and Amending Marketing Orders and Expedite Informal Rulemaking Proceedings

The existing AMAA rulemaking provisions for the adoption of a marketing order should be replaced with a generic procedure utilizing simple "notice and comment" rulemaking proceedings under 5 U.S.C. § 553. Except for the most significant regulatory changes, discussion at committee meetings and expedited notice and comment proceedings (i.e., no public hearing and a 30-day comment period) should suffice.[204] The AMAA's unique "tendency" and "necessity" findings will produce nothing but confusion, as the California citrus order litigation demonstrates, and should be abolished.

c. Clarify the Legal Status of Committee Members and Employees

The precise legal status of marketing order administrative committees and the rights and responsibilities of members and staff is not entirely clear under current law and constitutes an invitation to litigation. Legislation should confirm the status of the committees as federal instrumentalities and address the application of other statutes to the committees (e.g., the FOIA, the FACA and conflict of interest restrictions), clarify the employment protections and remedies of committee staff,[205] and the official immunities enjoyed by committee members and staff.

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[204] The USDA must, of course, always respond to significant comments on the proposed rule. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977). However, the principle arguments of producers and handlers typically will have already been raised and considered at committee meetings or in past rulemakings.

[205] Congressional silence on the rights of employees of state committees which implement Agricultural Stabilization and Conservation Service (ASCS) programs caused one court to hold that a terminated ASCS employee could bring a *Bivens* action against his former supervisors. Krueger v. Lyng, 927 F.2d 1050 (8th Cir. 1991), *after remand*, 4 F.3d 653 (8th Cir. 1993).

d. Reconsider the Circumstances When the USDA Must Seek Grower Approval Through a Supermajority Referendum

While the referendum process is valuable in ensuring the necessary level of grower support for marketing orders, not every regulatory change or amendment justifies a referendum. It would appear advisable that producer referenda be conducted: (1) at the initial adoption of a marketing order; (2) periodically thereafter; and (3) whenever the USDA concludes, in its unreviewable discretion, that an amendment making a significant policy change should be ratified by a producer referendum. Additionally, the AMAA should recognize that the grower referendum and the selection of committee members constitute political processes, which should be as open and as fair as possible.[206]

e. Require Notice, Comment and Judicial Review Prior to Termination of a Marketing Order

The current termination by press release and 60-day Congressional notice is not consistent with general principles of administrative law that "deregulation" should be subject to the same requirements of notice and comment and judicial review as an affirmative assertion of agency authority.[207]

f. Evaluate a Comprehensive Recodification of All Generic Agricultural Promotion Programs

In addition to the AMAA there are currently at least eleven commodity-specific statutes authorizing advertising programs to promote consumption of agricultural products.[208] Moreover, the AMAA provides identical procedures for milk marketing orders, which are fundamentally different in purpose and administration from those which regulate fruit and vegetable crops.[209] Congress should enact a single,

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[206] Access to growers lists is mandated in the Ninth Circuit after Cal-Almond, Inc. v. Yeutter, 960 F.2d 105 (9th Cir. 1992), but the assurance of open political processes is an important value worthy of Congressional attention. *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[207] Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

[208] *See supra* note 17.

[209] In particular, because milk orders frequently contain a "reserve" fund from which handlers may be compensated for any overpayment, courts have occasionally ordered refunds in milk marketing order cases. *See, e.g.*, Borden, Inc. v. Butz, 544 F.2d 312, 319-20 (7th Cir. 1976); Fairmont Foods Co. v. Hardin, 442 F.2d 762, 773 (D.C. Cir. 1971). However, the concept of a refund is incompatible with fruit and vegetable

comprehensive and generic procedural statute to establish ground rules for all non-milk agricultural marketing programs.

g. Clarify and Strengthen Civil and Administrative Enforcement Authorities

With the elimination of the cumbersome section 15(A) process and the assurance of prompt judicial review, the government's existing authority under 7 U.S.C. § 608a(6) to compel unconditional and immediate compliance with all marketing order requirements through injunctive relief should be sufficient. This authority could be supplemented through a reliable and tough civil or administrative monetary penalty provision to ensure that handlers do not benefit from any violation that occurs before the government can obtain an injunction. Finally, Congress ought to simply abolish any criminal penalties for marketing order violations as it is doubtful that any American jury is ever going to send a anyone to jail for selling "illegal" fruit.

CONCLUSION

Under the current state of the law—at least in the Ninth Circuit—fruit and vegetable marketing orders are fundamentally dysfunctional. There is no assurance of prompt judicial review, which is unfair to dissidents, and no assurance of prompt enforcement of legal obligations, which is unfair to supporters who should not be required to support free riders. Antiquated formal rulemaking proceedings, the cumbersome section 15(A) process and the ambiguous legal status of these committees compound the confusion and invite litigation.

This important economic regulatory program cannot tolerate the current level of procedural complexity, judicial uncertainty and delay if it is to survive. At a minimum, the fundamental judicial review-enforcement tension needs to be resolved before fruit and vegetable marketing orders can regain the "tendency to effectuate the purposes of the Act"—to ensure orderly marketing conditions that will reliably provide high quality agricultural products to consumers in exchange for a fair price to growers.

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orders, which provide annual marketing services in exchange for the handler's pro rata share of the expenses incurred.

An Agricultural Law Research Article

The Socialization of Agricultural Advertising: What Perestroika Didn't Do the First Amendment Will

by

Brian C. Leighton

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THE SOCIALIZATION OF AGRICULTURAL ADVERTISING: WHAT PERESTROIKA DIDN'T DO THE FIRST AMENDMENT WILL

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INTRODUCTION

President Roosevelt and Congress passionately embraced socialism when they instituted the Agricultural Marketing Agreement Act of 1937 (AMAA)[1] as a guaranteed, "short term fix" to pull farmers out of the Depression.[2] The AMAA and its later amendments had a provision permitting marketing orders to promote the products the legislation regulated.[3] In 1970, this provision was amended[4] to permit marketing

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[1] Act of June 3, 1937, ch. 296, 50 Stat. 246 (codified as amended in scattered sections of 7 U.S.C.).

[2] Ruth R. Harkin & Thomas R. Harkin, *"Roosevelt to Reagan," Commodity Programs and the Agriculture and Food Act of 1981*, 31 Drake L. Rev. 499 (1982). Congress passed the AMAA "to establish and maintain such orderly marketing conditions for agricultural commodities" as well as to establish "parity prices" for those commodities. 7 U.S.C. § 602(1) (1994). The AMAA authorized the Secretary of Agriculture to promulgate marketing orders for certain commodities if he finds that an order "will tend to effectuate the declared policy of the Act" after providing adequate notice and a hearing. 7 U.S.C. §§ 608c(3), (4) (1994). Marketing orders can only be implemented following approval by either two-thirds of the affected producers *who vote*, or by producers who market at least two-thirds of the volume of the commodity *voted*. 7 U.S.C. § 608c(9)(B) (1994). The United States Department of Agriculture (USDA) has promulgated more than 50 marketing orders governing approximately 100 fruits, vegetables, nuts and specialty crops. See 7 C.F.R. pts. 905-999 (1994). Marketing orders may contain provisions limiting the quantity of commodities produced; the grade, size or quality of commodities shipped; or the quantity of commodities shipped in interstate or foreign commerce. 7 U.S.C. § 608c(6)(A) (1994).

[3] 7 U.S.C. § 608c(6)(I) (1994).

[4] Pub. L. No. 91-522, 84 Stat. 1357 (1970) (current version at 7 U.S.C. § 608c(6)(I) (1994)).

orders applicable to almonds, and some other agricultural products, to credit "the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order . . . ."[5]

A marketing order is administered by a board (sometimes referred to as a committee or a commission) composed of members of the commodity group to which the marketing order applies.[6] Producers (growers) and handlers (or handlers' representatives)[7] sit on the board; and the handlers who serve on the board compete with other handlers of the commodity group for growers' product production, buyers and market share. Producers who are members of cooperatives, and thus "own" the handler or handler entity, bloc vote consistent with their handler board member. The board makes recommendations to the Secretary of Agriculture, who promulgates rules regulating handlers.

In effect, 7 U.S.C. § 608c(6)(I) compels almond handlers[8] to pay money to a board of competitors to support an almond advertising and promotional program. The board recommends an assessment rate for advertising and promotion to the Secretary.[9] The board of competitors then designs an advertising and promotional program, and determines how much money should be allocated to various promotional and advertising activities. With respect to "crediting" the assessment obligations of the handler, the board determines which promotional and advertising activities are worthy of credit and which are not.[10]

In mandating the payment by handlers of advertising assessments, and then regulating which methods of advertising and promotion are creditable, neither Congress nor the USDA once gave any thought to

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[5] 7 U.S.C. § 608c(6)(I).

[6] *Id.* §§ 608c(7)(C), 610.

[7] A "handler" is a person or company which places an agricultural product in the stream of interstate or foreign commerce, i.e., the processor and marketer of the product.

[8] Congress recognized that it could not possibly regulate all of the growers of these commodities because it would take a sizeable army to do the job, so it was the handler who was regulated. Even though only the producers are entitled to vote in a referendum to establish a marketing order, a marketing order, once promulgated, is binding on all handlers, even those who do not wish to be parties to the order. *See* 7 U.S.C. § 608c(3), (4), (6), (9).

[9] *See, e.g.*, 7 C.F.R. §§ 981.41, 981.81 (1994) regarding assessment recommendations to the Secretary by the Almond Board of California [hereinafter referred to as the "Almond Board" or the "Board"].

[10] *See, e.g., id.* § 981.441 regarding the permissible and impermissible forms of advertising and promotion with respect to almonds.

whether the First Amendment of the United States Constitution[11] would become the "skunk at the company picnic." There were no discussions before Congress as to whether advertising regulations even implicated First Amendment rights. When the almond marketing order was initially attacked on First Amendment grounds,[12] the USDA claimed the argument was "at best, an indulgence in hyperbole"[13] and "an assertion so bereft of logic, that it is best left buried under petitioners' admissions."[14]

Various federal marketing orders provide for advertising assessments.[15] Other federal legislation has been separately introduced for specific commodities' compelled advertising programs.[16] For years, California boards and commissions which administer state marketing orders have jumped on the advertising bandwagon, as well.[17]

However, in *Cal-Almond, Inc. v. United States Department of Agriculture*,[18] the Ninth Circuit Court of Appeals struck down the almond marketing order advertising and promotional program as violative of the First Amendment. There have been very few challenges to the advertising provisions of marketing orders. But in light of the decision in *Cal-Almond,* it is reasonable to believe that additional challenges will

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[11] The First Amendment of the United States Constitution states, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

[12] The almond marketing order was the first marketing order challenged on First Amendment grounds.

[13] Proposed Findings of Fact, Conclusions of Law, Order, and Brief for Respondent [USDA] at 84, *In re* Saulsbury Orchards & Almond Processing, AMA Docket No. F&V 981-4 (Dep't of Agric. Jan. 31, 1990) (petitioners included Cal-Almond, Inc. and Carlson Farms).

[14] *Id.* at 89.

[15] *See* 7 C.F.R. pts. 905-999 (1994) and corresponding federal marketing orders containing provisions for compulsory advertising expenditures for certain fruits, vegetables and nuts, including nectarines, peaches, pears, Tokay grapes, olives, almonds, dates and raisins.

[16] *See, e.g.,* 7 U.S.C. §§ 2101-2119 (cotton), 2901-2918 (beef), 4601-4612 (honey), 4901-4916 (watermelons), 6101-6112 (fresh mushrooms) (1994). Compelled advertising programs pertaining to these and several other commodities are governed by legislation separate from the AMAA.

[17] California marketing orders have compelled advertising provisions for the following commodities: apples, apricots, artichokes, asparagus, avocados, dry beans, beef, cantaloupe, fresh carrots, cherries, eggs, figs, cut flowers, forest products, kiwi fruit, manufactured milk, fluid milk, cling peaches, pears, pistachios, plums, Lake County wine grapes, Lodi wine grapes, prunes, rice, wild rice, salmon, seafood, strawberries, table grapes, tomatoes, walnuts and wheat.

[18] 14 F.3d 429 (9th Cir. 1993).

be forthcoming.[19]

Because of the substantial attention directed toward the *Cal-Almond* decision in agriculturally-oriented publications, growers and handlers will no longer believe that there is nothing they can do about advertising programs and assessments. More of the programs are sure to come under attack. Which ones will depend upon the amount of the assessment, the perceived unfairness of the assessment, the potential cost of pursuing a legal challenge, the expected response to a challenge by the USDA or the affected state board or commission (some fear government retaliation and grower or buyer boycotts), and the individual challenger's degree of aversion to litigation.

With respect to a strictly "generic" advertising program,[20] challengers contend that the targeted application of advertising expenditures is determined by their competitors who sit on the board and who attempt to target markets board members believe will benefit their own individual companies. The challengers also contend that they do not need a group of their competitors and government bureaucrats telling them how to promote their products, or how much money should be spent on product advertising. After all, they are all competitors in the marketplace for their agricultural products. The challengers desire to target markets of their own choosing, or markets that they have an interest in developing.

The challengers contend that, with respect to certain commodities, some members of boards or commissions have monopolized the market

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[19] On June 27, 1995, the Ninth Circuit held that the generic advertising program authorized under the federal marketing order governing California nectarines and peaches, 7 C.F.R. parts 915 and 917, also failed to satisfy the *Cal-Almond* standard of First Amendment scrutiny. Wileman Bros. & Elliott, Inc. v. Espy, No. 93-16977, 1995 WL 379682, at *6-*9 (9th Cir. June 27, 1995). Challenges are also being pursued with reference to the advertising programs mandated by the federal marketing order governing fresh mushrooms and the California marketing orders pertaining to kiwi fruit, walnuts, apples and plums. More challenges are likely with respect to milk, artichokes, cut flowers and nursery plants.

The USDA and the Almond Board "changed" their advertising program, in light of the *Cal-Almond* decision, but still compel handlers to pay money to the Almond Board for generic promotion and to advertise (or, in lieu thereof, to pay money to the Almond Board), and still regulate methods of advertising "speech." A challenge has been mounted against this "new" Almond Board program by Cal-Almond, Inc., and approximately 13 other almond handlers. On June 15, 1995, a USDA administrative law judge ruled that the modified almond advertising program is also in violation of the handlers' First Amendment rights.

[20] A "generic" advertising program promotes or advertises an agricultural commodity generally, as opposed to promoting or advertising a specific brand of the commodity.

for the commodity, and that the "generic" advertising program targeted toward the monopolized market results in greater benefits for the challengers' competitors than for the challengers. Yet the challengers are required to contribute equally toward underwriting the board's advertising message. This scheme, allege the challengers, unfairly benefits the challengers' competitors.

An additional argument by the challengers is that marketing order boards and commissions attempt to advertise and promote a particular product as though it were homogeneous and indistinguishable among producers and handlers. Instead, the challengers desire to convey the message that their own product is distinguishable in the marketplace. The product is either distinguishable to consumers, because it is sold directly to consumers, or distinguishable to a commercial buyer who uses the product as a food ingredient item. The challengers contend that they desire to spend money distinguishing their products from those of their competitors, providing service and quality, and developing personal relationships in the marketplace to advance their products. By comparison, the boards and commissions attempt to convey the message that *all* California apples, *all* California almonds, or *all* California nectarines are the same. This is certainly not the message individual challengers want to convey. Worse, after the message is conveyed, the challengers must spend more money to attack it and counteract its adverse effects on their businesses.

Other challenges include allegations that the boards' and commissions' programs are ineffective. Challengers contend that so much of the money derived from the compulsory assessments is used to fund overhead and outside consultants and organizations that very little ends up actually supporting promotional or advertising programs. Additionally, the handler or grower challenging the advertising program often contends that it is simply un-American to force a businessperson to contribute to an advertising program or to be compelled to advertise in certain ways.[21] This is born out of the notion that a grower—not the government and not the grower's competitors—knows best how to promote his products.

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[21] If, for example, Congress passed a law requiring that every registered Democrat and every registered Republican *must* contribute a dollar to a candidate representing the Democrat's or the Republican's respective political party, there would doubtless be thousands of challenges to such a program, even if the challengers would have otherwise voluntarily donated a dollar or more to their candidates. There are a number of handlers and growers who find it repugnant to the Constitution to *compel* speech, even if they would voluntarily engage in that speech absent the compulsion.

On the other side of the dispute, the boards and commissions under attack, and their supporters (including the USDA, the Department of Justice, the California Department of Food and Agriculture, and the California Attorney General), attempt to justify the programs. Several arguments are advanced in support of the compelled promotional programs. First, it is contended that a majority of producers and handlers desire the programs. Second, it is argued that no single producer or handler has the marketing clout to increase demand for a particular agricultural commodity. Third, since agriculture is a significant industry in California and throughout the nation, the industry must engage in self-help to keep producers in business and to educate consumers concerning the value of the agricultural product being advertised.

The government attempts to justify the compelled advertising programs as necessary to increase demand for the affected products and to raise grower returns. The government has also attempted to depreciate the challengers' arguments by resorting to rhetorical observations that challengers should not object to advertising a product they are in business to sell. Advertising expenditures, according to the government, are based upon "overwhelming" support for the marketing orders. In essence, the government's position is that the majority rules.[22]

Fortunately for the challengers, and unfortunately for the proponents of marketing orders, the First Amendment of the United States Constitution regulates the regulators, and places the burden on the regulators to legally justify each individual program under attack.

This article does not analyze the necessity for, or what is to many the absurdity of, marketing orders.[23] Nor does it address whether marketing orders have increased grower returns, with or without forcing consumers to pay higher prices for agricultural products made artificially scarce. It does not address various provisions of the AMAA, other than the provisions for the payment of assessments for, and the regulation of, advertising and promotion "authorized" by 7 U.S.C. § 608c(6)(I).

Rather, the focus of this article is on the Ninth Circuit Court of Appeals' decision in *Cal-Almond*. The article explores whether it is possible for government, at either the federal or state levels, to institute

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[22] Throughout the challenge of the almond marketing order, the government claimed the First Amendment challenge was "bereft of logic" and "an indulgence in hyperbole" and that the regulations, at most, merely provided an incentive to promote the product the handler was in business to sell. *See supra* notes 13, 14 and accompanying text.

[23] For an enlightening and entertaining history of the United States' agricultural policy generally, and marketing orders specifically, see JAMES BOVARD, THE FARM FIASCO 179-207 (1989).

any promotional or advertising program which would not be violative of the First Amendment.

I. THE *FRAME* DECISION

While the federal almond marketing order advertising program was languishing in the administrative tribunal before the USDA,[24] the Third Circuit Court of Appeals in *United States v. Frame*,[25] a two-to-one decision, was impressed with the argument that a forced federal promotional program for the beef industry did not violate the First Amendment. However, that case was decided on freedom of association grounds. The court chose that test because it requires "strict scrutiny." By comparison, a "commercial speech" test commands a lower level of scrutiny. The court in *Frame* stated it would sustain the constitutionality of the Beef Promotion and Research Act of 1985[26] "only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms."[27]

In *Frame*, the court found that the beef promotional program was ideologically neutral and could not be achieved through means significantly less restrictive of free speech or associational freedoms. There was a compelling state interest in the program, because there were congressional findings that

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[24] Under the AMAA, a handler must exhaust administrative remedies before the USDA prior to bringing a challenge in the district court. 7 U.S.C. § 608c(15)(A) (1994); United States v. Ruzicka, 329 U.S. 287 (1946); Saulsbury Orchards and Almond Processing, Inc. v. Yeutter, 917 F.2d 1190 (9th Cir. 1990); Cal-Almond, Inc. v. Yeutter, 756 F. Supp. 1351 (E.D. Cal. 1991). The State of California likewise contends that, with respect to every California marketing order, internal grievance procedures are established requiring exhaustion of administrative remedies. However, Article III, § 3.5, of the California Constitution states that an administrative agency does not have the power to declare a state statute unconstitutional. Furthermore, a California statute cannot limit federal court subject matter jurisdiction. *See* Ferrari v. Woodside Receiving Hosp., 624 F. Supp. 899, 902 (N.D. Ohio 1985), *aff'd* 827 F.2d 769 (3d Cir. 1987), *cert. denied*, 487 U.S. 1204 (1988). Thus, it appears that the exhaustion of administrative remedies prerequisite to bringing suit in federal court attacking a federal marketing order program under the First Amendment of the United States Constitution will not prevent a direct challenge in federal court under the First Amendment regarding a state marketing order program.

[25] 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

[26] Beef Promotion and Research Act of 1985, Pub. L. No. 99-198, § 1601(a), 1985 U.S.C.C.A.N. (99 Stat.) 1597 (1986) (codified at 7 U.S.C. §§ 2901-2911 (1994).

[27] *Frame*, 885 F.2d at 1134.

> [w]idespread losses and severe drops in the value of inventory have driven many cattlemen to bankruptcy, as well as to the abandonment of ranching altogether. A continuation of this trend would endanger not only the country's meat supply, but the entire economy. The Act also furthers important non-economic interests. Maintenance of the beef industry ensures preservation of the American cattlemen's traditional way of life.[28]

Indeed, the "free association" test requires a higher degree of scrutiny than the "free speech" test.[29] However, the Ninth Circuit Court of Appeals in *Cal-Almond* did not analyze the almond advertising program under the more stringent free association test, as was done in *Frame*, because the court found that not even the lesser standard of review for commercial speech was satisfied by the government with respect to the almond program.[30]

Under the more stringent free association test discussed in *Frame*, the government must show a "compelling state interest" that is ideologically neutral and cannot be achieved through means " 'significantly less restrictive of free speech or associational freedoms.' "[31] By comparison, the Ninth Circuit in *Cal-Almond* applied the commercial speech test originally outlined by the United States Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York.*[32] The Ninth Circuit described this three-prong test as requiring the government to prove (1) that the interest behind the restrictions is " 'substantial[,]' " (2) that the restrictions " 'directly advance [] the governmental interest asserted[,]" and (3) that the restrictions are " 'not more extensive than is necessary to serve that interest.' "[33]

Under the *Frame* analysis, nowhere in the free association test is the government required to prove that the speech compelled "directly advances the governmental interest asserted." If the Third Circuit Court of Appeals had analyzed the argument under the *Central Hudson* test, its decision would not have been the same, even though it upheld the regulations under the more stringent test. Obviously, a federal, state or local law can raise free association arguments without raising free speech issues at all. Likewise, regulations can raise free speech issues without raising free association issues. Marketing orders, by their na-

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[28] *Id.* at 1134-35 (citations omitted).

[29] *Id.* at 1133-34; Cal-Almond, Inc., v. United States Dep't of Agric., 14 F.3d 429, 436 (9th Cir. 1993).

[30] *Cal-Almond*, 14 F.3d at 436.

[31] *Frame*, 885 F.2d at 1134 (citing Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

[32] 447 U.S. 557 (1980).

[33] *Cal-Almond*, 14 F.3d at 436 (citing *Central Hudson* at 566).

ture, raise both issues.

Although the Supreme Court has never defined the difference between a "compelling" governmental interest and a governmental interest that is merely "substantial," there certainly could be governmental agricultural programs which require association and speech and which have attached to them a governmental interest that is substantial but not compelling. There could also be governmental agricultural programs in which the government's asserted interest is *neither* compelling *nor* substantial.

The court in *Frame*, deferring to legislative findings, concluded that the governmental interest in implementing the Beef Promotion and Research Act of 1985 was compelling.[34] In *Cal-Almond*, while the Ninth Circuit felt it " 'must identify with care the interests the State itself asserts,' "[35] it also concluded that the purpose of the Act was to assist, improve or promote the marketing, distribution and consumption of almonds, and that the regulations at issue[36] would provide the "opportunity to stimulate the demand for almonds."[37] Therefore, the court held "that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial governmental interest."[38] However, the Supreme Court has not had occasion to decide the issue whether requiring producers or handlers to advertise an agricultural product is either a compelling or a substantial state interest. If forcing the advertising of an agricultural commodity is either a compelling or a substantial governmental interest, it certainly would seem to dilute and depreciate what are truly compelling and substantial governmental interests such as maintenance of the public's health and welfare, food safety, enhancement of the environment, and police protection. Indeed, the United States Supreme Court has stated that it will not simply defer to legislative and executive judgment on this question, but must itself determine whether a program directly advances the government's asserted interest.[39]

It can be argued whether forcing a businessperson to contribute to an advertising program, including compelling that businessperson to ad-

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[34] *Frame*, 885 F.2d at 1134-35.

[35] *Cal-Almond*, 14 F.3d at 437 (citing Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993)).

[36] 7 U.S.C. § 608c(6)(I) (1994); 7 C.F.R. §§ 981.41, 981.441 (1994).

[37] *Cal-Almond*, 14 F.3d at 437.

[38] *Id.* (citing *Frame*, 885 F.2d at 1134).

[39] City Council v. Taxpayers for Vincent, 466 U.S. 789, 803 n.22 (1984); *Cal-Almond*, 14 F.3d at 437. *See also* Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084, 2089-90 (1994).

vertise or pay a "tax" in lieu thereof, is ideologically neutral or is merely commercial speech, which requires a lesser standard of scrutiny than political speech.[40] Cases may arise in which the government may be unable to establish that the type of agricultural product compelled to be promoted is one in which the government has a substantial or a compelling interest.

II. THE *CAL-ALMOND* DECISION

In *Cal-Almond*, the court addressed the First Amendment issue brought by handlers of California almonds. The handlers receive almonds from growers, process them and sell the processed commodity primarily for use as an ingredient in candy, ice cream and cereal. The Almond Board was established in 1950, pursuant to the AMAA and the almond marketing order. The Board consists of ten members, all of whom are nominated by representatives of the industry and appointed by the Secretary.[41] Besides advertising, the Almond Board engages in research, development, quality control and volume regulation.[42] The Board also engages in "marketing research" through which it funds a generic pro-almond public relations program paid for by handler assessments. Pursuant to the AMAA and the almond marketing order, the Board requires handlers to spend a defined amount of money (based upon the amount of almonds handled) each year on advertising, or to pay an equal amount of money to the Board in lieu of spending it

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[40] Just a supposition, but believed to be well-reasoned, is the notion that most businesspersons would find, even more abhorrent, regulations that compel advertising and allow competitors to dictate where that advertising is to be directed (particularly when the advertising regulations compel the expenditure of tens, if not hundreds, of thousands of dollars) than regulations restricting or compelling "political speech," which require the government to overcome exacting scrutiny. *See, e.g.*, Stuart Banner, *Who's Afraid of Commercial Speech?* 76 VA. L. REV. 627, 652 (1990). Neither the *Frame* court nor the *Cal-Almond* court addressed this issue. The court in *Frame* stated that the advertising program for almonds constitutes "commercial speech;" i.e., speech that merely "proposes a commercial transaction" (citing Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986)). It must be assumed that the Supreme Court will reach this issue in some future case, given the fact that the commercial speech cases previously decided by the Court dealt with regulating commercial speech that was *voluntarily* engaged in by the businessperson who desired to sell a particular product or service. None of the Supreme Court's cases to date have dealt with a situation wherein the government compels a businessperson to engage in and fund "commercial speech" and then dictates where and how much money is to be spent on the speech.

[41] *Cal-Almond*, 14 F.3d at 433; 7 C.F.R. §§ 981.30-.34 (1994).

[42] *Cal-Almond*, 14 F.3d 429.

on qualified product advertising.

The method engaged by the almond marketing order to compel the advertising by handlers involves a rate of assessment imposed by the Secretary of Agriculture after he receives a recommendation from the Almond Board. A portion of the assessment is creditable to a handler for market promotion, including paid advertising, if engaged in by the handler consistent with the regulations and authorized by the marketing order and the Secretary.[43] Handlers Cal-Almond, Inc., Saulsbury Orchards & Almond Processing, Inc., and Carlson Farms filed administrative petitions before the Secretary of Agriculture[44] alleging that the advertising assessments, whether for the generic promotional program or for creditable advertising, violated the handlers' rights guaranteed under the First Amendment of the United States Constitution.[45]

Following the handlers' exhaustion of administrative remedies, the case came before the District Court for the Eastern District of California in Fresno. The district court "held that the almond marketing program did not even implicate, let alone violate, the [handlers'] First Amendment rights 'because plaintiffs are not "compelled" to advertise.' "[46] On appeal, the Ninth Circuit found that, even though the marketing order did not compel the handlers to advertise, the order compelled them to expend a certain sum of money each year on either assessments or creditable advertising. Either of the alternatives burdened and thus implicated the handlers' First Amendment rights.[47]

The Ninth Circuit held that even if there were no "creditable advertising regulations," and the handlers merely paid the money to the Board for the Board to conduct generic advertising and promotional programs, the handlers' First Amendment rights to be free from compelled speech and association would be infringed.[48] The Ninth Circuit also concluded that the almond promotion program was not "government speech," because the program singled out a certain group, almond handlers, to contribute money to fund the "dissemination of a particular message associated with that group."[49] The court found, therefore, that a contribution of money for an advertising program implicated the

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[43] *Id.*

[44] *See* requirements for exhaustion of administrative remedies in 7 U.S.C. § 608c(15)(A) (1994). *See also supra* note 36.

[45] *Cal-Almond*, 14 F.3d at 433-34.

[46] *Id.* at 434. "Almond marketing program" is the court's euphemism for the Board's generic program and the creditable advertising program.

[47] *Id.* (citing dicta from the district court's decision).

[48] *Id.*

[49] *Id.* at 435.

handlers' rights to freedom of association and speech.[50]

The court of appeals stated that even if the almond marketing order did not require the payment of assessments or alternative contributions, but only required that handlers spend "the equivalent sum every year on advertising that met the requirements of [the almond marketing order regulations]," the order would nonetheless "clearly implicate" the handlers' First Amendment rights, "both because it would compel them to speak and because it would impose content-based restrictions on that speech."[51]

The Ninth Circuit held: "Thus, both an assessment-only program and an advertising-only program would implicate Appellants' First Amendment rights. Because the order is a combination of both, it implicates those rights as well."[52]

The Ninth Circuit also analyzed the type of speech restricted. The court found the speech to be commercial speech, and thus subject to a lesser standard of scrutiny than if it were political speech.[53] The court concluded that the advertising regulations would implicate freedom of association rights. However, the court did not need to apply the more "exacting scrutiny" discussed in *Frame*, because the almond marketing order program did not even pass the less stringent *Central Hudson* standard.[54] The court held that the USDA, under the *Central Hudson* commercial speech test, had the burden of justifying the program and establishing each *Central Hudson* element by presenting evidence "sufficient to satisfy these requirements."[55]

First, the Ninth Circuit held that there was a "substantial government interest"[56] in enhancing returns to almond producers and stabilizing the health of the almond industry through an advertising program.[57] However, in turning to whether or not the government's evidence showed that the program directly advanced that governmental interest under *Central Hudson*, the court stated that it would not simply defer to "legislative and executive judgment on this question; we must determine ourselves whether the program directly advances the USDA's asserted interest."[58] In an interesting twist, the Ninth Circuit

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[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 436.
[54] *Id.*
[55] *Id.* at 437.
[56] *Id.*
[57] *Id. But see supra* note 27 and accompanying text.
[58] *Cal-Almond*, 14 F.3d at 437 (citing City Council v. Taxpayers for Vincent, 466

held that

> because the Order forces each handler to fund Board promotional efforts with every assessment dollar not spent on creditable advertising, [the] USDA must show both that the advertising for which credit is *granted* is *better* at selling almonds than the Board's own efforts *and* that the advertising for which credit is *denied* is *worse* at selling almonds than the Board's own efforts.[59]

The Ninth Circuit found it important that the Almond Board had conducted no studies which would show whether or not the creditable advertising rules and assessments caused more sales of almonds.[60] The court concluded that

> [b]ecause [the] USDA has presented little or no evidence regarding the effectiveness of the Board's promotional efforts, it cannot show that the creditable advertising regulations "directly advance" the government's interest in increased almond sales by enhancing the effectiveness of those efforts.[61]

The court cited *Edenfield v. Fane,* wherein the Supreme Court held that the Florida Board of Accountancy had failed to justify a ban on personal solicitation of prospective business clients by accountants when it had provided no studies or anecdotal evidence suggesting that such solicitation creates the asserted dangers of fraud, overreaching or compromised independence.[62] Moreover, in *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy,*[63] decided by the United States Supreme Court after the *Cal-Almond* decision, the Court refused to countenance "hypothetical" or insubstantial assertions: "Given the state of this record—the failure of the Board to point to any harm that is potentially real, not purely hypothetical—we are satisfied that the Board's action is unjustified."[64] As the Court pointed out in *Edenfield*, the government must show that the "harms" are real and that the program will alleviate them to a "substantial degree."[65] The Court in *Edenfield* also stated that the government's burden applies as well to prophylactic regulations, wherein the government must "demonstrate that it is regulating speech in order to address what

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U.S. 789, 803 n.22 (1984)).

[59] *Id.*

[60] *Id.* at 437-38.

[61] *Id.* at 438 (footnote omitted).

[62] *Id.* (citing Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993)).

[63] Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084 (1994).

[64] *Id.* at 2090.

[65] *Edenfield*, 113 S. Ct. at 1800.

is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem."[66]

The Ninth Circuit found that most of the evidence in the record showed that the regulations actually hindered the handlers' efforts to increase sales and returns to growers. Because of the way that the handlers market their almonds, those marketing efforts were not creditable under the Board's advertising regulations.[67] The Ninth Circuit also found that there was no evidence that the regulations actually stimulated additional or more effective advertising from other handlers, since Blue Diamond Growers, Inc., the dominant handler in the industry, would continue to advertise in the same manner absent the regulations. Therefore, there was no reason to *compel* handlers to advertise to begin with.[68] The Ninth Circuit concluded that the USDA failed to present evidence that the regulations stimulated additional or more effective advertising, and that the regulations were, therefore, unconstitutional restrictions on the handlers' First Amendment rights.[69]

Next, the Ninth Circuit addressed the Board's "generic" promotional program. The court first assumed, as a matter of law, that advertising increases consumption of the product or service being advertised.[70] But the court found that

> because [the Board's] efforts are funded with money that handlers would presumably have spent on their own advertising, we cannot compare the Board's program with a no-advertising situation; we must compare it to a situation where handlers spent their assessments on their own marketing.[71]

The court's conclusion with respect to the second prong of the *Central Hudson* test established an incredibly difficult hurdle for the government, not only with respect to the almond promotional and advertising program, but also any advertising or promotional program which compels handlers or producers to contribute to such a program. The court observed:

> [the] USDA has presented no evidence tending to show that the generic Board promotion financed by that money sells almonds more effectively than the specific, targeted marketing efforts of individual handlers. *We agree with Appellants' argument that each handler knows best how to*

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[66] *Id.* at 1803.

[67] Cal-Almond, Inc., v. United States Dep't of Agric., 14 F.3d 429, 438 (9th Cir. 1993).

[68] *Id.* at 438-39.

[69] *Id.*

[70] *Id.* at 439.

[71] *Id.*

> *sell his own almonds*; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson. The USDA has failed to meet its burden of showing that the overall almond marketing program "directly advances" its stated goals of selling more almonds and increasing returns to producers.[72]

Since the Ninth Circuit assumes that advertising increases consumption of the product or service being advertised, a simple showing that advertising increases consumption of the product through handler (or with respect to state cases, producer) assessments will not be enough to overcome the formidable hurdle erected by the Supreme Court in *Central Hudson* and by the Ninth Circuit in *Cal-Almond*. Therefore, the question to be answered in future litigation is not whether the advertising program increases consumption, and thus increases grower returns, but rather whether the program is "better" than what individual handlers could achieve if left with their own money to target their own individual markets. This is because the Ninth Circuit presumes, absent "hard evidence" to the contrary, that a handler "knows best how to sell his own almonds . . . ."[73]

The Ninth Circuit, addressing the third prong of the *Central Hudson* test,[74] held that the regulations were more extensive than necessary to serve the interest of increasing almond sales.[75] Utilizing the test announced in *Board of Trustees of State University v. Fox*,[76] the government would have to show that the restrictions in the almond marketing order relating to advertising and promotional credits were "narrowly tailored to achieve the desired objective."[77] The court held that the government failed this test in that it offered no evidence to show that the type of advertising and promotion which could be engaged in by handlers not receiving credit under the Board's program was reasonably denied:

> [the] USDA offers *no* justifications for the restrictions that *deny* credit for certain advertisements . . . . It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who [sic] overwhelmingly dominates the retail almond

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[72] *Id.*(emphasis added) (footnotes omitted).

[73] *Id.*

[74] If the government is not sustained under any one of the three prongs of the *Central Hudson* test, the program regulations violate the First Amendment. *See* Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993); *Cal-Almond*, 14 F.3d at 437.

[75] *Cal-Almond*, 14 F.3d at 439.

[76] 492 U.S. 469, 480 (1989).

[77] *Cal-Almond*, 14 F.3d at 439-40.

> market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers.[78]

The court concluded by stating that the regulations disregarded the *Fox* "narrowly tailored" standard, and the almond marketing program therefore violated the handlers' First Amendment rights.[79] Finally, the Ninth Circuit held that while there is a substantial governmental interest in advertising agricultural products in order to increase consumption and grower income, the government has the substantial burden of proving, by "hard evidence," that there is a real problem and that the regulations and assessments will alleviate the problem to a "material degree."[80] The court concluded that, in the absence of hard evidence to the contrary, it will be presumed that businesspersons know best how to promote their own products in their own targeted markets.[81]

Thus, it is not enough for the government or commodity groups to be anxious to regulate.[82] It is not enough to simply prove that a majority of the industry desires the regulations.[83] Nor is it enough to merely put on evidence showing that product sales have increased. The Ninth Circuit presumes that sales will increase as a result of an advertising program. Instead, the marketing order boards and commissions—that is, the government—must prove that the mandated program is more effective at producing sales than would be the case if handlers or producers were left with their own money to target their own particular markets. That is, the government's paternalistic view that it rather than handlers and producers can do a better job of marketing agricultural products must be proven by it, with hard evidence. And the government must show that its program, taking into consideration that it is wresting money away from handlers and producers who would otherwise spend money on advertising and promotion, will increase sales more than would be the case if handlers and producers were left to pursue the task with their own money.

The Ninth Circuit's *Cal-Almond* decision, coupled with the Supreme Court's opinions in *Ibanez, Edenfield*, and *Taxpayers for Vincent*, points out that the government must show that the industry has a "problem" with sales, consumer demand and grower prices, and that

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[78] *Id.* at 440.

[79] *Id.*

[80] *Id.* at 439.

[81] *Id.*

[82] *See, e.g.*, Simon & Schuster v. New York State Crime Victims Bd., 502 U.S. 105 (1991).

[83] Harris v. Joint Sch. Dist. No. 241, 41 F.3d 447, 455 (9th Cir. 1994).

the government-sponsored program will alleviate the problem to a material degree.[84]

CONCLUSION

Only time will tell whether handlers or producers who are compelled to fund a board's or commission's advertising program for commodities other than almonds will take the time and incur the expense necessary to litigate the issue, or whether they will have the thick skin necessary to deflect the criticism of government and industry members when the advertising program is challenged. But the Ninth Circuit has made it extremely clear that if a case comes before it regarding a compelled advertising program dealing with an agricultural commodity, the government, whether state or federal, must be prepared to defend the challenge with hard evidence, not merely the often repeated rhetoric that the majority of people in the industry support the program, therefore it must be "good." After all, the First Amendment was established to protect not only the voice of the majority, but the voice of the minority, even the voice of one. If forced advertising has been so good for agricultural products, why aren't there "marketing orders" applicable to every industry in the United States? Citizens could collectively pool their money and allow a few competitors and the government to decide where and how it should be spent.

The First Amendment requires (1) that the advertising program be needed, (2) that there is harm that will result unless the program is mandated, (3) that the program be fair, (4) that the program will be or is effective, and (5) that a group of competitors can do a better job of spending promotional money than can an individual businessperson left with his or her own money to target his or her own markets. Placing such a burden on the government is a necessary requirement to insure that the First Amendment protects not only door-to-door solicitors, political speakers, flag burners, nude dancers and X-rated movie producers, but also businesspersons growing or selling agricultural products.

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[84] Ibanez v. Florida Dep't of Business & Prof. Regulation, Bd. of Accountancy, 114 S. Ct. 2084 (1994); Edenfield v. Fane, 113 S. Ct. 1792 (1993); City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

An Agricultural Law Research Article

The Economic Rationale for Marketing Orders

by

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THE ECONOMIC RATIONALE FOR MARKETING ORDERS

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INTRODUCTION

The purpose of this article is to give a perspective of marketing orders as they are authorized and used in the marketing of several agricultural commodities. It is not intended to be an analysis. Rather, it is intended to make something of a bridge between the "early years" of American agriculture, when many special policies and laws were developed, and the present, when most people have little reason to understand the origin of our rather developed pattern of agricultural marketing policy. Milk marketing orders are unique in their own right and are beyond the scope of this article. This article relates to fruits, vegetables, nuts and other specialty crops.[1]

I. EARLY AMERICAN AGRO-POLITICS

The conditions in which our democracy developed were especially favorable for agricultural interests. Most countries had come up from the dawn of history with a long pattern of development of both the economy and the pattern of economic policy. Political balances had been worked out between different sectors of the economy and different classes of society through decades and centuries of trial and error. After the American Revolution, a participative government was set up to relate to a universe that was balanced much differently than in other countries. The agricultural sector comprised a huge portion of the elec-

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[1] Specialty crops include greenhouse and nursery crops, herbs, turfgrass and Christmas trees.

torate. There was no industrial sector to accommodate the flow of immigrants, so they went to the free, or nearly free, land at the frontier. Many voters practiced "subsistence agriculture" as it would be classified in today's terms. They lived on a general farm, but had little marketable farm output. The first priority of the farm was to provide a living for the family.[2]

Consideration of the economics of this situation reveals a chronic pattern of overburdened markets. With a large segment of the population attempting to make a living in agriculture, the market for the saleable surplus from farms was much less attractive than one would find in other countries. In most countries, food production resources were meager and population levels were high in relation to food availability. The classic focus of economics was the balancing of scarce means among unlimited needs. Here, needs were limited while production was great. Because the focus of the Early American economy was different from the usual and typical problems, we were forced very early to develop policies to deal with overburdened markets.[3]

The politics of this situation favored the agricultural interests more than in any government in history. The participative nature of government which was chosen and the overbalancing of voters in farming was unprecedented. The form of voter representation chosen gives political advantage to geographic space—Wyoming's two senators vastly overrepresent their few constituents as compared to those representing California's millions. These conditions combined with the unusual economic conditions to enable and encourage a pattern of public agricultural infrastructure more developed than any in the world. It includes not only marketing orders, but also farmers' cooperatives, farm credit, rural electrification, the land grant universities, etc. All of these policies were unheard of in other countries. They made perfect sense here because of the special economic and political conditions.

A few more general observations may be useful. The role of large firms is interesting.[4] In most free market economies or sectors, there will develop a balance between the component of economic activity coordinated by markets and situations where coordination works best

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[2] *See generally* Everett E. Edwards, *American Agriculture—The First 300 Years, in* YEARBOOK OF AGRICULTURE 171, 171-276 (1940).

[3] *Id.*

[4] Private firms with a national or regional structure must have a governance structure simply to manage their operations. Accounting rules and many other standards are set up which make the management of the firm more orderly and at the same time make the markets and general business environment more orderly.

within the firm. R.H. Coase argued that large firms emerged to take advantage of those situations where coordination works best within the firm.[5] Where large firms are present, they may have an advantage in defining product or commodity characteristics. This seems to be true around the world. In America, large firms were not present on the frontier. It is likely that the resulting balance of public marketing machinery was influenced by this "more atomistic"[6] nature of traders in the American experience. Here the alternative to a public system of grades and standards was not a functional private one, but chaos.

One of the major themes of our new democracy was its break away from the general pattern of monarchy. This feature of our government glorified a general distrust of concentrated power. This distrust of power was also based in the massive ethnic diversity of our new nation. In this population of rugged individualists, instruments to combat the perceived evil effects of large firms or monopolies were attractive. There is a strong current of this feeling in our antitrust tradition as well as the policies for cooperatives and marketing orders.[7]

II. The Transition to Modern Times

How does this pattern from the earliest days of our nation translate to more modern times? Most of the marketing policies emerged in the early years of the twentieth century—some as late as the 1930's. It is not easy to document the transition from a pattern with great political sensitivity to rural issues to our modern, post-industrial society. It is our judgment, however, that most of this transition came in the second half of this century. In 1950, commercial farmers accounted for almost 40% of the rural population.[8] While this is not a majority, this population cohort was more organized than the others who worked in many different industries or were, for example, retirees. The well-developed agricultural infrastructure gave them organization, cohesiveness and voice. They were well integrated with, and natural leaders among, rural people. Agricultural interests were strongly represented at mid-

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[5] R.H. Coase, *The Nature of the Firm*, 4 Economica 368, 368-405 (1937).

[6] We mean, here, a nature determined by the existence of many small firms.

[7] Daniel I. Padberg & Alan Love, *Rationale for Public Intervention in Food and Agricultural Markets, in* Food and Agricultural Marketing Issues for the 21st Century (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1993, at 143, 148.

[8] M.C. Hallberg, The U.S. Agricultural and Food System: A Postwar Historical Perspective 23 (Northeast Regional Center for Rural Dev., Pa. State Univ., Univ. Park, Pa.) (Publication No. 55, 1988).

century.

Since that time, commercial farmers have become much larger and fewer. They now make up only slightly more than five percent of the rural population.[9] Further, they tend to be estranged from other rural people. They have vast assets as compared to their neighbors. Their interests are differentiated from the rural rank and file as well. On important issues, such as matters of environmental policy or labor concerns, they are likely to be a very small minority interest.

Much has been written about the industrialization of agriculture.[10] As a much more sophisticated industrial infrastructure has developed, there is less need for some of the provisions available in marketing orders. In some cases, the patterns of product definitions of large firms work better and the public one has been abandoned.[11] Vertical systems seem to be a more functional coordinating mechanism than classic markets in some commodities—such as poultry and pork.[12] Our broad national priorities have changed as well. With the rising concern for global competitiveness, and perhaps for many other reasons, we are much less concerned with antitrust. As a general matter, the special needs for more agricultural marketing infrastructure, as well as the facilitating political atmosphere have both disappeared with the transition to a more industrialized system.[13]

III. The Modern Meaning of Marketing Orders

Before assessing the significance of marketing orders as used today, it is necessary to see what they are doing. The following table shows a general pattern of applications which have been made of the permissive features in marketing orders for fruits and vegetables for 1964-65 and 1989.[14]

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[9] *Id.* at 44.

[10] Alan Barkema et al., *The Industrialization of the U.S. Food System, in* Food and Agricultural Marketing Issues for the 21st Century (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1993, at 3, 20.

[11] Marvin Hayenga & James Kliebinstein, *Grading Systems in Pork and Beef Industries, in* Re-Engineering Marketing Policies for Food and Agriculture (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 140, 145.

[12] "Vertical systems" refers to an integrated sector of the food economy where organizational administration has replaced the traditional patterns of buyers' and sellers' markets as an instrument of economic coordination.

[13] Padberg & Love, *supra* note 7, at 146.

[14] *See* John A. Jamison, *Marketing Orders and Public Policy for the Fruit and*

TABLE 1

FEATURES OF
MARKETING ORDERS

Marketing Order Provision	Percent of Orders Containing Provision 1965	1989
1. Control of Total Quantity or Surplus	17	20
2. Grade, Size, Maturity or Other Quality Control	96	93
3. Regulation of Flow to Market	19	20
4. Pack and/or Container Regulation	55	62
5. Assessment for Research	66	80
6. Assessment for Advertising and Promotion	0	80

Note: The number of marketing orders in use in 1965 was 47. The number in use in 1989 was 45.

These data relate to federal marketing orders. In both periods there was an approximately equal number of marketing orders promulgated under the authority of state laws.[15] The biggest change in use of marketing orders is provision 6 in Table 1: generic commodity promotional programs. These are programs where producers or first handlers of agricultural commodities are assessed fees on a per-unit basis (often called "check-off's") to support advertising programs for their commodities. In the mid-1960's, there were several state orders assessing check-offs for advertising, but no federal orders. Today, that is one of the most common ways the federal orders are used.[16] This is not a very contentious

Vegetable Industries, in 10 STAN. FOOD RES. INST. STUD. (1971); NICHOLAS J. POWERS, U.S. DEP'T OF AGRIC., FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, NUTS AND SPECIALTY CROPS 3-4 (Agric. Econ. Rep. No. 629, Mar. 1990); NATIONAL COMM'N ON FOOD MKTG., TECH. STUDY NO. 4, ORGANIZATION AND COMPETITION IN THE FRUIT AND VEGETABLE INDUSTRY (June 1966).

[15] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 3-401 to -406 (1994); CAL. FOOD & AGRIC. CODE § 58231 (Deering 1995); COLO. REV. STAT. § 35-28-121 (1994); FLA. STAT. ch. 573.101-.124 (1994); GA. CODE ANN. §§ 2-8-21 to -26 (1995); LA. REV. STAT. ANN. § 3:552.9 (West 1995); N.Y. AGRIC. & MKTS. LAW § 16 (Consol. 1994); TEX. AGRIC. CODE ANN. § 91.005 (West 1995); WASH. REV. CODE ANN. § 15.65.580 (West 1994); WYO. STAT. § 11-35-105 (1995).

[16] Walter J. Armbruster & John P. Nichols, *Commodity Promotion Policy, in* 1995

observation. Few are critical of enabling farm groups to advertise their products. The same is true of another frequent use of marketing orders—assessments for research (provision 5 in Table 1). Frequently, these assessments relate to marketing research. Research has been useful to improve marketing or product attributes or respond to emergencies which arise in the marketing of particular commodities. These activities are the sorts of things large firms in other industries would do. It is difficult for individual farmers to do much in either of these categories, but few critics would deny farmers the right to combine their funds toward advertising or conducting research about marketing.

In both periods, "pack or container" regulations (provision 4 in Table 1) were features used in a majority of federal marketing orders. These features do not seem terribly important or controversial. Historically, there have been efficiency consequences to standardization of pack or container. Agents throughout the distribution system have developed equipment and procedures for more efficient handling of the standardized unit. In addition, there are marketing advantages to standardized units of products or commodities. They facilitate reporting prices and all types of marketing information. They reduce deception and confusion. It is unlikely that this use of marketing orders is the focus of much criticism. Even where these standards are obsolete, they are not likely to do much harm. At the same time, it is clear that the "standardizing function" is more important in a past with many small producers than it will be in a future with vertically coordinated systems of private infrastructure focusing on unique product attributes.

The other three categories of provisions (numbered 1, 2 and 3 in Table 1) are more controversial because they are frequently, perhaps typically, used to change or restrict the flow of product to market. Many critics find the restriction of flow to market always to be anti-consumer in character. The typical behavior of monopolists is to restrict the quantity of products for which no close alternative is present, thereby requiring consumers to pay more. While we find this to be a very powerful argument, in our experience there are situations in which issues other than this one are important, and the anti-consumer aspects of quantity restriction may be outweighed by other factors.[17]

FARM BILL POLICY OPTIONS AND CONSEQUENCES (Tex. Extension Serv., Tex. A&M Univ., College Station, Tex.), Oct. 1994, at 177, 179.

[17] For example, being able to smooth out the flow to market enables producer cost reductions, improved product uniformity, better product quality, better market information and greater seasonal stability of products. *See* Michael McLoed, *Look Through the '90s: The U.S. Fruit and Vegetable Industry, in* THE CHANGING WORLD OF FED-

Quality restrictions (provision 2 in Table 1) are the most popular feature of marketing orders in both time periods. In earlier days, producers of fruits and vegetables for the fresh market were less able to produce a perfect, flawless product. There were more natural variations in size and other characteristics. There was a wider range of plant genetic material in production. Damage from pests was less controllable. In this situation, quality restrictions were quite a powerful quantity restriction. Many felt that use of this feature benefited the industry by building a better image with better fruit. It rewarded the best growers. In addition to restricting the quantity from local growers, it restricted the inflow of trade. As a general matter, importers are subjected to the same level of "discipline" which domestic growers impose upon themselves through marketing orders.

More recently, this feature has come into criticism because it encourages use of pesticides which may be higher than would be necessary to produce a less restrictive quality level.[18] It is also argued that quality standards may retard the introductions of new products.[19] In addition, the interference with trade has become a greater concern.

Regulation of flow to market is a feature of marketing orders which allows officials to determine conditions of excess from time to time throughout a marketing season and declare a "market holiday" in which producers are not allowed to ship to market.[20] There are no provisions to destroy output or reduce the total output by these actions. It may be that some perishable output is lost because of the enforced waiting period. The economic expectation is that overburdened markets can be relieved enough to prevent market chaos with a great deal of perishable product having no market outlet and a collapse of prices. Growers can take their losses in the field without the losses being compounded by harvesting, packing and shipping costs. These programs may be very useful for some commodities and not important for others.

Last, and clearly the most contentious, are marketing order features

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ERAL MARKETING ORDERS FOR FRUITS AND VEGETABLES (Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1992, at 34, 34.

[18] P.A. Mischen & Neilson C. Conklin, *The Role of USDA Grade Standards in Quality Determination, in* PESTICIDE USE AND PRODUCE QUALITY (Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 48, 51.

[19] Daniel I. Padberg & Phillip Kaufman, *Are Standards of Identity Obsolete or Redundant?, in* RE-ENGINEERING MARKETING POLICIES FOR FOOD AND AGRICULTURE (Agricultural & Food Policy Center, Dep't of Agric. Economics, Texas A&M Univ., College Station, Tex.), 1994, at 158, 161.

[20] For example, Florida tomato growers enacted a tomato moratorium, which halted tomato shipments for five weeks, in an attempt to bolster prices at the retail level.

which are designed to control the total market quantity or to control a part of output classified as "surplus." On the face of it, this seems to most directly insult consumer welfare. In addition to disapproval of critics on conceptual grounds, there are highly developed examples where the actual programs have worked to the disadvantage of consumers as well as producers. The California cling peach experience is perhaps the most famous.[21] In this arrangement, an analysis of the market was performed to determine the optimal "market quantity." A determination was made concerning what proportion of trees would provide the right market quantity. Every grower was required to save that proportion of trees and destroy the unripened fruit of the others. This arrangement led to returns above competitive levels, but they were soon diluted by increased plantings, increased waste, higher than necessary costs and bad publicity.

As the criticism of marketing orders which restrict output has heightened, a higher standard of economic behavior is being demanded of farm producers than we set routinely for other industrial producers of consumer goods. A particular brand of household appliance may be no more or less differentiated from competing brands than almonds are from pecans. A seller of microwaves or automobiles does a market analysis to arrive at an estimate of price and quantity for the normal factory output. When it turns out that the market is overburdened, manufacturers do not hesitate to restrict production. In many cases, they cause unemployment, passing the cost of reducing production on to others rather than bearing it directly as the farmer would. If consumers would benefit from overburdened markets for food commodities, why would they not also benefit from overburdened markets for automobiles or microwaves? In fact, consumers would not benefit much from an overburdened market for perishable food products where they would benefit directly from an overburdened market for consumer durables. Just because vegetable producers are not as big as General Electric, should they be required to use a more restricted set of marketing approaches?

Another reason for our concern with the criticism of marketing order provisions to restrict market volume is that not all uses of these provisions have led to negative results. In the mid-1970's, the tart cherry industry had production in a Northeast belt including the Great Lakes states to New Jersey.[22] There was a tendency for the trees to produce

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[21] Jamison, *supra* note 14, at 20.

[22] D.J. RICKS & LARRY HAMM, THE U.S. TART CHERRY SUBSECTOR (Dep't of Agric. Economics, Mich. State Univ., East Lansing, Mich.) (Staff Paper No. 85-60,

in alternate years, causing a large variation in output and prices. The resulting instability was a burden for producers, processors and distributors. After a great deal of study and discussion, a marketing order was instituted.[23] It had provisions for taking a share of the heavy production year's crop into frozen storage. In short years, these supplies were used to develop a larger and more stable market—involving the food service industry as well as conventional distribution. This program operated successfully for more that a decade until it was dissolved by a federal administration that did not believe in marketing orders, apparently for ideological rather than practical reasons. The complete explanation for this termination is complex. Large crops in consecutive years caused problems for the program. Many observers believed that the program was harassed by a hostile administration, which affected a grower referendum.[24]

We have another concern with the criticism of marketing orders on anti-monopoly grounds. The classic monopoly model relates to historic conditions of very low levels of living where the household obtains food by the direct purchases of a few food commodities. Sellers of those commodities may have had little competition, being controlled by the landed aristocracy. The monopoly strategy was to restrict the availability of the product and extract a higher price. Today, manufacturers buy those commodities and create thousands of products. The typical supermarket stocks almost 20,000 items, although some stock as many as 31,000.[25] In this environment, the typical selling strategy is expansive rather than restrictive. Any seller who wants to use a restrictive policy stands a very probable chance of losing market share quickly. There is a danger that the products will receive low visibility and drop out of contention. The classic monopolistic behavior is a persuasive conceptual argument, but it is not descriptive of the behavior of firms in the food market place.

1985).

[23] Coauthor Daniel I. Padberg was involved in the preliminary discussions and investigation into the feasibility of a tart cherry marketing order. The investigation culminated in the adoption of Order No. 930, which applied to eight states. *See* AGRICULTURAL MKTG. SERV., U.S. DEP'T OF AGRIC., PROGRAM AID NO. 1095, MARKETING AGREEMENTS AND ORDERS FOR FRUITS AND VEGETABLES 9 (1979); RICHARD HEIFNER ET AL., U.S. DEP'T OF AGRIC., A REVIEW OF FEDERAL MARKETING ORDERS FOR FRUITS, VEGETABLES, AND SPECIALTY CROPS: ECONOMIC EFFICIENCY AND WELFARE IMPLICATIONS 17 (Nov. 1981).

[24] *See* U.S. GEN. ACCT. OFF., GAO/RCED 85-57, THE ROLE OF MARKETING ORDERS IN ESTABLISHING AND MAINTAINING ORDERLY MARKETING CONDITIONS 44 (July 1985).

[25] PROGRESSIVE GROCER, 62ND ANNUAL REPORT OF THE GROCERY INDUSTRY, Apr. 1995 Supp., at 25, 48.

IV. Updating the Concept of Marketing Orders

It is an interesting idea to think we could take a historic instrument like marketing orders and redesign it to bring it into correspondence with modern food industry institutions. This is a first and primitive effort to do that. It will require highlighting situations in the environment which have changed and which are important to the design and function of marketing orders. It will require determining which features are not needed and what changes might improve marketing orders.

A. Emergence of the Multinational Food Manufacturer

Some marketing order commodities, like fresh market vegetables, would seem to be minimally affected by this event in the marketing system. Yet, selling products alongside the highly advertised brands of these giant conglomerates may make the ability to advertise and develop an image and some consumer awareness of a product more important. It makes it easier for a product to get lost. The expansive selling strategies of multinational firms also make monopolizing more difficult. The consumer is likely to completely forget the restricted product.

Marketing order commodities produced for sale to these giants are affected in several ways. Programs to control pack or containers, grade size and maturity (one of the most popular features) are not likely very important or necessary because the large firms have their own, often superior, handling methods and product definitions. Research and advertising is less important also. The large manufacturer does both research and advertising and it is unlikely that growers would find it useful to compete with them. Growers have typically done these things only when nothing would be done without their efforts.

Quantity control or surplus management will also be of little importance. The large firms will manage the quantity for their brands. Other producers not having contracts with large manufacturers will find the private label channel to be an economy alternative to the advertised brands. These channels of manufacturing and distribution have many alternatives for managing the quantity and quality variability of the commodity within the large firms in either manufacturing or distribution.

B. The Transition from Food Commodities to Food Products

The transition from food commodities to food products is a profound one. Commodities market themselves. They are unchanging through

time. Marketing consists of assembling information and making intelligent but reactive choices or decisions. Products require proactive marketing. They must stay up-to-date in their physical attributes. Advertising and selling effort is required. In competition with aggressively sold products, commodities need to maintain visibility and a good image. To accomplish this, a commodity needs something of a brain trust or collection of expertise and observation. It is difficult for individual producers to perform these functions. The research and advertising features of market orders have enabled commodities to perform much better in the environment of modern food marketing than they would have otherwise. This transition has made these provisions more important.

Beef and pork are good examples of the benefit a commodity can have from marketing programs operated by a functional commodity brain trust. The brain trusts have done an important job in managing the commodity public image. In the process, growers have become more exposed to the values and attitudes in the food market. The brain trust has gotten the trim specifications changed along with making a more lean image for red meat. This has been a very important turning point in the history of these industries.

It is true that neither beef nor pork obtained these marketing features through a marketing order. The reason was that they are so broadly produced that the voting procedures would have made putting a marketing order in place very difficult. Instead, these industries went with national legislation.[26] In other situations, commodities are not so broadly produced and it would be most difficult to get national legislation. For this reason, it is important to have these features available in marketing orders, a format especially accessible to specialty crops.

C. Increased Vertical Coordination[27]

Vertical coordination is essentially complete in poultry and is moving rapidly in pork. In addition, contracts between producers and manufacturers seem to be increasing in a number of commodities. Marketing orders have not been important in either poultry or pork, but do exist in some cannery crops. For the most part, these complex vertical sys-

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[26] R.L. KOHLS & JOSEPH UHL, MARKETING OF AGRICULTURAL PRODUCTS 370, 375 (1990).

[27] "Vertical coordination" refers to situations where integrating firms have acquired or built operations in position of their former buyers or sellers. The result is a network of subsidiaries conducting business rather than independent firms buying and selling to each other. Some of the units in these systems are linked by contracts, while others are owned.

tems will internally perform most of the functions of marketing orders. As such systems become more frequent and more developed, the role for marketing orders will be reduced.

D. The Industrialization of Agricultural Production

Industrialization is used to relate to many changes in the food marketing system, including some of the transitions discussed in previous sections. In this instance, it refers to the changing structure of farming. Accompanying the changes farmers have experienced in their political representation as discussed above, their role and stature in the market has changed also. During the first half of this century, over 90% of farmers were what we would call "subsistence farmers."[28] They produced many commodities, mostly for their own consumption. A few commodities were produced for specialized markets, but most of what was sold was unplanned surplus exceeding home consumption.[29] These "odds and ends" were difficult to handle in the marketing channel. Programs to control quality, size and maturity, as well as pack or container, were most important. Regulation of flow to market was also important.

Today's producer is much more specialized and functions more like an industrial producer. Families rarely consume the majority of the few farm commodities they produce. Very specialized genetics and mechanical equipment lead to the output of commodity attributes, often for contracts with industrial processors. The market does less coordinating; the more mature marketing infrastructure does more. In many situations, these changes may lead to less need for marketing orders. This is especially true where a large sophisticated manufacturer is involved. Where a farm commodity goes directly to sale to consumers, marketing orders may be more important. They give the commodity a sufficient infrastructure of its own to compete in an industrial food system.[30]

E. The Increase in Environmental Concerns

It is alleged that growers who are motivated to meet product standards, sometimes set within marketing orders, may apply more pesticide than is necessary for food production, and that environmental degradation occurs as a result. However, a study by Powers and Heifner concluded that there is little evidence regarding detrimental effects of

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[28] *See* Edwards, *supra* note 2.

[29] *See* Edwards, *supra* note 2, at 236-42.

[30] *See* KOHLS & UHL, SUPRA note 26, at 249.

grades on pesticide use.[31] In addition, the marketplace may dictate quality standards that are more restrictive. In view of large private firms in manufacturing and distribution, public product standards are less important. Cases where product standards conflict with environmental concerns may lead us to put less emphasis on the quality provisions of marketing orders for fresh produce.

F. Increased Emphasis on Trade

Features of marketing orders have been used to exclude imports.[32] In those situations, they served as trade policy in the absence of more formal and intentional policy. It is likely that this role will be superseded, since we currently have a much more developed trade policy coming on stream. The more likely role will be making the formal trade policies more difficult to operate. In earlier times, public marketing policies were the broadest bases for product definitions and other standards. Public standards could cut across conflicts among the many smaller private firms. Today, that is no longer true. The larger individual private firms span many countries. It may be easier to harmonize product definitions and other marketing arrangements if public definitions are emphasized less. In early America, public definitions reduced conflicts. Today, they may introduce unnecessary rigidities. This seems most obvious in quality regulations and pack/container policy. It may also apply to other quantity control policies.

V. Evaluation Criteria

We have long struggled with criteria to fit all these influences together.[33] Our preference is for favoring practical rather than theoretical criteria. Our theoretical criteria come from classic markets, while in practice we have departed from dependence on those markets where

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[31] Nicholas J. Powers & Richard G. Heifner, U.S. Dep't of Agric., Federal Grade Standards for Fresh Produce: Linkages to Pesticide Use 11 (Agric. Info. Bull. No. 675, Aug. 1993); *see also* R.D. Knutson et al., Economic Impacts of Reduced Pesticide Use on Fruits and Vegetables 6-8 (American Farm Bureau Research Found.) (Sept. 1993).

[32] Robert G. Chambers & David H. Pick, *Marketing Orders as Nontariff Trade Barriers,* 76 Am. J. Agric. Econ. 47, 47-54 (Feb. 1994).

[33] *See* L.C. Polopolus et al., Criteria for Evaluating Federal Marketing Orders: Fruits, Vegetables, Nuts, and Specialty Commodities 17 (1986); Heifner et al., *supra* note 23; G.F. Fairchild, *Observations on Fruit and Vegetable Marketing Orders, in* Re-Engineering Marketing Policies for Food and Agriculture (Agricultural & Food Policy Center, Dep't of Agric. Economics, Tex. A&M Univ., College Station, Tex.), 1994, at 102, 102.

possible. Our efforts here are to consider each group of marketing order provisions and classify them into one of three groups: (a) always positive or neutral, (b) always negative or neutral, or (c) may be positive or negative.

A. Advertising and Research

There may be situations where these have been useless, but we are unaware of any situation where serious harm was done to anyone through these programs. In addition, we have the understanding that there are several experiences where both of these provisions (singularly and combined) have been a useful part of industry development.[34] It is easy for us to classify these as always positive or neutral.

B. Pack and/or Container Regulations

We believe these have been very useful in the past. There may be some current situations where they are still important. Conversely, it is our expectation that, in the future, these provisions and the regulations they support will protect obsolete marketing methods and arrangements more often than they will promote efficiency. We put them in the negative or neutral category.

C. Regulation of Flow to Market

Rate of flow regulations and the market holidays they enable are useful and effective instruments for fresh market crops. This is especially true where the producing industry is composed of large numbers of growers. The citrus orders in California have recently been very contentious, but it is our perspective that these programs are important in other cases.[35] We classify these provisions as positive or neutral.

D. Grade, Size, Maturity or Other Quality Control

Programs under these provisions have been very useful in the past in giving producing industries more discipline over both quality and quantity. More recently, they have produced some conflicts with environ-

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[34] For example, this has been the case with respect to Vidalia onions, Florida avocados and limes, watermelons, celery, and spearmint oil.

[35] For example, Florida celery; *see* RICHARD KILMER & TIM TAYLOR, PRICE DETERMINATION AND ACREAGE ADJUSTMENT BEFORE AND AFTER THE IMPLEMENTATION OF A MARKETING ORDER 13-15 (Dep't of Food & Resource Economics, Univ. of Fla., Gainesville, Fla.) (Staff Paper No. 383, May 1990).

mentalists.[36] Fundamentally, they are out of tune with the future. With producers and processors developing new and different products, and developing special uses for particular attributes, it seems that market-wide quality standardizing policy will be less useful as we embrace the future. In view of this perspective, we classify these as negative or neutral.

E. Control of Total Quantity or Surplus

There have been programs under this provision which had many of the characteristics of classic monopoly leading to waste and unnecessary costs to producers and higher than necessary prices to consumers.[37] At the same time, there have been successful experiences with surplus management programs under this provision. As a result of these observations, this goes into the "may be positive or negative" category.

CONCLUSION

While marketing orders represent a pattern of commodity marketing policy with roots in very early American history, it is our judgment that they will be able to serve some useful purposes in the future within our industrialized food system. The main focus of marketing orders is the fresh-product markets that do not have the services of a manufacturing industry. Marketing orders will enable the development and maintenance of a body of marketing expertise—a brain trust. Such a marketing nerve center could keep growers better informed about markets as well as develop and execute promotion programs. The advertising and research features of marketing orders will be the most important.

We would eliminate the quality control provisions and the pack and container provisions. In addition, it seems that the Secretary of Agriculture should consider carefully any programs under the quantity or surplus control provisions. Programs promulgated under this provision should be monitored throughout their existence because some of them have the capacity for abusive results.

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[36] Mischen & Conklin, *supra* note 18, at 52.

[37] *See* Jamison, *supra* note 14, at 17.