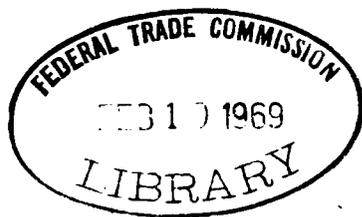


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THE CASE AGAINST THE TRADE REGULATION SECTION OF THE PROPOSED ADMINISTRATIVE COURT

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The Federal Trade Commission Act of 1914 established the second of the nation's great regulatory commissions.¹ It was empowered to investigate and to issue "cease and desist" orders against concerns engaged in "unfair methods of competition." Despite a long history of exemplary service by the Commission, the second Hoover Commission proposes to reduce it to a mere shell by transferring its adjudicatory functions to a trade regulation section of an Administrative Court. This article will attempt to evaluate this proposal in light of the Commission's historical origin and performance record.

HISTORICAL BACKGROUND

Although the establishment of such a Commission had been urged by the President, by consumer groups, by small businessmen, by many prominent individuals and in the 1912 platforms of all three of the political parties then existing, the creation of the Federal Trade Commission in 1914 was not accomplished without great opposition in Congress. Section 5 of the Act was the center of controversy.² The basic argument used in opposition was that to confer a power of adjudication upon an administrative agency is improper.³ The early demise of the Commission on the basis of unconstitutionality was confidently predicted on the floor of the Senate.

The proponents of the measure countered this violent opposition by arguing that ordinary court procedures were almost totally ineffective to protect the public from unfair methods of competition,⁴

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¹ 38 STAT. 717 (1914), as amended, 15 U.S.C. § 41 (1952).

² This section as amended in 1938 provides, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." The section provides also for complaints by the Commission, for hearing, for the issuance of cease and desist orders and for court review of such orders.

³ See remarks of Senators Sutherland and Brandegee, 51 CONG. REC. 12928, 13103 (1914).

⁴ "It loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant. . . . It is doubtless morally wrong and improper to impose upon the public by the sale of spurious goods, but this does not give rise to a private right of action unless the property rights of the plaintiff are thereby invaded. There are many wrongs which can only be righted through public prosecution, and for which the legislature and not the courts, must provide a remedy." *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 285 (6th Cir. 1900). See also *India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598 (1888).

that, in the words of President Wilson, something more than "the menace of legal process" was necessary for the guidance of businessmen,⁵ that an administrative agency, unlike a court, could terminate unfair trade practices in their incipiency⁶ and thus prevent injury to the consuming and business public before a "cause of action" in the traditional legal sense had matured, and that administrative treatment of unfair practices would result in elimination of such practices in considerably less time, and at considerably less expense than was involved in court litigation. The broad legislative purpose is perhaps best outlined in the Senate Report:

[T]he committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman law and to aid the business public as well, and, incidentally, to build up a comprehensive body of information for the use and advantage of the Government and the business world. Its subsequent recommendations to Congress will be fortified with actual knowledge of practical conditions, both from the point of view of business desirability and economic tendency, and will furnish to Congress an analysis of conditions that will give other and further legislation the certainty and security of foundation commensurate with the vast interests of the public and of the business world which are at stake.⁷

THE WORK OF THE COMMISSION

Since 1914, the Federal Trade Commission has issued a total of 4,761 orders to cease and desist; since 1925, it has approved 8,737 informal stipulations whereby parties believed by the Commission to be engaged in unfair practices agreed formally to terminate such practices; in countless thousands of other cases technical violations of law and those lacking sufficient public interest to justify formal handling have been voluntarily terminated with assurance to the Commission that they would not be resumed. In addition, the investigatory processes of the Commission have served as a strong deterrent against unfair practices and have been a fruitful source of infor-

⁵ Message to Congress by Woodrow Wilson, January 21, 1914.

⁶ "A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained." *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948).

⁷ S. REP. No. 597, 63d Cong., 2d Sess. 10 (1914). This statement of legislative purpose was reaffirmed by the Supreme Court in 1948: "But on the whole the Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission." *FTC v. Cement Institute*, 333 U.S. 683, 692 (1948).

mation for the Congress, the Attorney General, the courts, the President and the public.⁸

Industry-wide investigations by the Commission have provided the basis for much remedial legislation; the Packers and Stockyards Act, the Federal Power Act, the Natural Gas Act, the Public Utility Holding Company Act, and the Securities Act being numbered among the legislative enactments which have followed investigations and reports to Congress by the Federal Trade Commission.⁹ In addition to the important investigations which have focused the remedial light of publicity upon industry-wide unfair trade practices, the Commission has, in a long line of legal cases, developed consumer and business protection against monopolistic and unfair trade practices, and its efforts in this direction have had a beneficial effect upon every pocket-book in the Nation.

In conducting this vast volume of work in the course of enforcing the several laws entrusted to it, the Commission has, from time to time, been subjected to criticism. In some instances, the criticisms have been authored by parties who have been ordered to cease from their unfair methods of competition or by their lawyers,¹⁰ and, as such, have been no serious cause for concern, for a regulatory agency firmly adhering to statutory functions manifestly cannot expect to find universal favor with those regulated. Another frequently recurring species of attack upon the Commission is that inspired by politics, and criticism from this source, upon analysis, is usually found to be in the nature of tongue-in-cheek political sniping, for the Commission is by a statute a bipartisan group.¹¹

THE PROPOSED ADMINISTRATIVE COURT

The very existence of the Federal Trade Commission is now threatened. This attack bears scrutiny because it is apparently neither inspired by parties who have borne the brunt of adverse decisions by the Commission nor the product of partisan politics. While the Commission itself is not under attack it may perish in a general attack on the administrative process of which it is a part.

⁸ 38 STAT. 721, 722 (1914), as amended, 15 U.S.C. §§ 46, 47 (1952).

⁹ 42 STAT. 159 (1921), as amended, 7 U.S.C. § 181 (1952); 41 STAT. 1063 (1920), as amended, 16 U.S.C. § 791 (1952); 52 STAT. 821 (1938), as amended, 15 U.S.C. § 717 (1952); 49 STAT. 803 (1935), 15 U.S.C. § 79 (1952); 48 STAT. 74 (1933), as amended, 15 U.S.C. § 77 (1952); 52 STAT. 446 (1938), 15 U.S.C. § 13c (1952).

¹⁰ Wilson, *We the Accused*, Saturday Evening Post, Jan. 24, 1953, p. 20 and Simon, *The Case Against the FTC*, 19 U. CHI. L. REV. 297 (1952).

¹¹ See references in Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1144 (1955). The FTC Act provides in section 1: "Not more than three of the [five] commissioners shall be members of the same political party."

The present attack emanates from two sources. The first is the Commission on Organization of the Executive Branch of the Government, more familiarly known as the Hoover Commission. In a Report on Legal Services and Procedure the Hoover Commission recommended the establishment of an Administrative Court of the United States, with a number of sections, including a "Trade Section which should have the limited jurisdiction in the trade regulation field now vested in the Federal Trade Commission, the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, the United States Tariff Commission, the Federal Power Commission, the Department of the Interior, and the Department of Agriculture."¹²

The Hoover Commission report was based almost entirely upon a subsequently published report of its Task Force on Legal Services and Procedure.¹³

The second source of the present movement is a group within the organized bar. In a report of January 31, 1956, a Special Committee on Legal Services and Procedure of the American Bar Association recommended that a specialized court be created with "limited jurisdiction in the trade practice field with respect to certain powers now vested in the Federal Trade Commission and in certain other agencies."¹⁴ The recommendations of the Special Committee were approved by the House of Delegates of the American Bar Association at the mid-winter meeting held in February 1946.

Effect of the Recommendations

Insofar as impact upon the Federal Trade Commission is concerned, there is no serious difference between the recommendations of the full Hoover Commission and the recommendations of the American Bar Association. Although the Hoover Commission and the American Bar Association speak in terms of a "limited"¹⁵ transfer of functions from the Federal Trade Commission, both would remove from the Federal Trade Commission the authority under Section 5 of its organic act to terminate unfair methods of competition.

¹² COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE, Recommendation No. 51, 87-88 (1955), hereinafter referred to as COMMISSION REPORT.

¹³ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE (1955), hereinafter referred to as TASK FORCE REPORT. Although the Task Force Report was prepared earlier, publication was, apparently for tactical reasons, delayed until after publication of the Hoover Commission Report.

¹⁴ REPORT OF THE SPECIAL COMMITTEE ON LEGAL SERVICES AND PROCEDURE TO THE 1956 MIDYEAR MEETING OF THE HOUSE OF DELEGATES 42 (1956), hereinafter referred to as ABA REPORT.

¹⁵ COMMISSION REPORT 87; ABA REPORT 42.

The adoption of either proposal would virtually destroy the Federal Trade Commission.

The Hoover Commission Task Force appears to have generated the notion (adopted by the Hoover Commission and the American Bar Association Special Committee) that the Commission's basic power under Section 5 to terminate unfair methods of competition is incident to more important functions of the agency as basis for a conclusion that: "The Federal Trade Commission and other departments and commissions charged with enforcement of the antitrust laws can more expeditiously perform their basic responsibilities in the area of trade regulation if relieved of the burden of deciding individual formal cases." Quite the contrary is true. If relieved of the "burden" of declaring unfair methods of competition unlawful by means of cease and desist orders, the continued existence of the Federal Trade Commission would be in jeopardy.¹⁶

The "limited jurisdiction in the trade regulation field now vested in the Federal Trade Commission" which these groups propose to transfer away from the Federal Trade Commission constitutes *all* the jurisdiction of the Federal Trade Commission under Section 5 of its organic act. The power to adjudicate under Section 5, to determine whether or not a method of competition is "unfair" or "deceptive" is the basic power from which all of the other actions of the Federal Trade Commission draw their vitality. When such authority is removed, the Commission is in effect dead.

What authority would remain with the Federal Trade Commission under the Hoover Commission and American Bar Association recommendations is not clear. However, under the Task Force recommendations, the Commission would lose not only its adjudicative authority but also, by reason of a smooth piece of verbal legerdemain,¹⁷ its authority to prosecute complaints. While, under Section

¹⁶ "The task force of the Commission on Organization (at page 254) concluded that creation of the Trade Section of the Administrative Court would not impair the work of the Federal Trade Commission. There may be a germ of truth in this statement, for it would not 'impair' our work, but would rather 'destroy' it. . . . The task force concluded, 'The Federal Trade Commission and other departments and commission charged with enforcement of the antitrust laws can more expeditiously perform their basic responsibilities in the area of trade regulation if relieved of the burden of deciding individual formal cases.' Whether or not this may be true as to the other agencies, it is certainly not true with respect to the Federal Trade Commission. Our authority to declare unfair methods of competition unlawful by means of cease and desist orders is our basic responsibility. Relieved of this 'burden,' there would be little reason for our continued existence." *Comments of the Federal Trade Commission regarding the recommendations contained in the Report on Legal Services and Procedure of the Commission on Organization of the Executive Branch of the Government*, June 23, 1955.

¹⁷ "In any proceeding before the Administrative Court, or any Section, division, or judge thereof, the United States shall be represented either by the

4 of the amendments to the Judicial Code, the Commission would have authority to file petitions in the Administrative Court, it is evident that under Section 412 of the "Legal Services Act," Commission cases before the Court would be presented and argued by the Attorney General,¹⁸ for the appointment of the chief legal officer of the Federal Trade Commission is not made "pursuant to specific statutory authority" but rather under the general authority in section 2 of the Federal Trade Commission Act "to employ and fix the compensation of such attorneys . . . as it may from time to time find necessary for the proper performance of its duties. . . ." ¹⁹

The adoption of the proposal for a transfer away from the Federal Trade Commission of its authority under Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act would relegate the Commission to the status of the "Bureau of Corporations" which existed prior to 1914 and its predecessor, the "Industrial Commission." This backward step would be a serious blow to the people of this country and particularly to small businessmen throughout the land who have come to depend upon the Federal Trade Commission for protection against monopolistic practices.

The worth of the Commission, as demonstrated in the past, and its vast, untested potential for greater future service makes particularly alarming the fact that so many of the very fine people of unquestioned integrity who served on the Hoover Commission and on the Special Committee of the American Bar Association support the proposed Trade Regulation Court. No less alarming is the possibility that this undesirable change, which had its genesis in the legal profession, may by default be conceded to have the undivided support of the profession, for it appears that only one side of the picture has thus far been presented.²⁰

The recommendation for the emasculation of the Federal Trade Commission is based purely upon legal theory. It does violence to

chief legal officer of the agency which initiated the proceeding, if his appointment was made pursuant to specific statutory authority therefor, or by the Attorney General." TASK FORCE REPORT 381.

¹⁸ This has escaped the notice of other commentators who have assumed that the Federal Trade Commission and other regulatory commissions would become prosecutors. Note the conclusion: "Thus, in effect, administrative agencies would become essentially prosecuting authorities in their respective fields, bringing actions before the appropriate sections of the administrative Court."

Impact of Proposed Administrative Code, 23 ICC PRAC. J. 23 (1955). See also ABA REPORT 44: ". . . the administrative agency . . . can present all relevant factors for consideration by the specialized court."

¹⁹ 15 U.S.C. § 42 (1952).

²⁰ Voices advocating caution are, however, beginning to be heard. Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 IND. L.J. 1 (1955), and Nutting, *The Administrative Court, Symposium on Hoover Commission*, 30 N.Y.U.L. REV. 1384 (1955).

practicality, and it does equal violence to the best interests of the consuming and business public. I view broadly the public responsibilities of the legal profession, and I fear that a segment of our profession, in espousing the recommendation for a Trade Regulation Court, is paying more heed to unreasoning legal theory²¹ than to the needs of the American people.

The proposal for a Trade Regulation Court will not stand up against careful scrutiny. Analysis of the arguments advanced quickly reveals their illogic.

The recommendation to create an administrative court is by no means a novel one. As one commentator recently put it, discussion of this proposal requires a "revisiting of old battle fields,"²² for the issue has been a subject of recurring consideration over a span of several decades.

The Hoover Commission and its Task Force

This, the "second"²³ Hoover Commission, was organized in accordance with Public Law 108, approved July 10, 1953. The Commission functioned by means of task forces appointed to study various segments of the Executive Branch of the Government. A task force of 14 members was appointed to study legal services and procedures.²⁴ The basic working materials of the Task Force staff are referred to as Part VI of the Task Force report²⁵ but were not published as part of the report and are not generally available. These materials show that the staff functioned, insofar as the regulatory agencies are concerned, by means of two questionnaires addressed to such agencies.²⁶ The work was completed in ten months.²⁷ That the approach suffered by reason of lack of experience, lack of time and lack of method is made evident by comparison with the procedure of the Attorney General's Committee on Administrative Procedure as described in its 1941 report.²⁸

²¹ "But it is doubtful wisdom to reform an institution which is not felt to be unjust or inefficient simply because it does not conform with abstract principles." Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273, 1288 (1955).

²² Nutting, *op. cit. supra*.

²³ The 1950 Reorganization of the FTC resulted from the work of the first Hoover Commission—Reorganization Plan No. 8.

²⁴ TASK FORCE REPORT 1.

²⁵ TASK FORCE REPORT viii.

²⁶ One limited to representation, the other a general procedural questionnaire. In addition, with respect to the Department of Defense, this questionnaire procedure was augmented by a series of interviews and conferences. With respect to the Federal Trade Commission, no hearings were held, there was no consultation and there was no opportunity for the Commission or for other interested parties to present their views.

²⁷ TASK FORCE REPORT 3.

²⁸ "[T]he Committee assigned to a staff of lawyer-investigators the task of studying the procedure of these agencies. The staff interviewed agency offi-

The methodology is even more suspect when the substance of the recommendations is examined. The field to be covered was "legal services and procedure." The recommendation for vacating the powers of the Federal Trade Committee under Section 5 of its organic act is decidedly substantive rather than adjective in nature.²⁹ Moreover, the Task Force, at least insofar as the Federal Trade Commission is concerned, may in another respect have been operating beyond the authorization of statute, for the Hoover Commission was created to study the "Executive Branch of the Government."³⁰

The superficiality of the Task Force approach to the question of the administrative court has been the subject of comment by impartial students of administrative law who have reviewed its work. The need for a more detached and pinpointed study has been noted.³¹ One writer has referred to the sketchy type of consideration given.³² Another remarks that the Task Force has spread itself too thin.³³ Nor have the inconsistencies of the Reports escaped notice.³⁴

Without minimizing the importance of the members of various commissions or consultants to commissions, when such commissions consist of widely scattered individuals, however intelligent, it often

cials, attorneys who practice before these agencies, and members of the public affected by them. Staff members attended proceedings, read the records of cases, and examined administrative files to see how the proceedings are conducted. Upon the completion of these studies, the staff prepared for the Committee a description of each agency's procedures. As each study was made available to the appropriate agency for its consideration, the full Committee met for discussion of the study with agency officers. . . . On June 26, 27, and 28 and on July 10, 11, and 12, 1940, the Committee held public hearings to receive opinions on administrative procedure and comment on the monographs." FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, 77th Cong., 1st Sess. 4 (1941), hereinafter referred to as A.G. REPORT.

²⁹ "But on a great many matters it attempts to state general principles quite divorced from a particular context of research, or experience, or of current concern." Jaffe, *op. cit. supra*, at 1275.

³⁰ No less an authority than the Supreme Court has ruled that the Federal Trade Commission is not part of the Executive Branch of the Government. In *Rathbun (Humphrey's Executor) v. United States*, 295 U.S. 602, 630 (1935), the Supreme Court stated:

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of the commission, *which is not only wholly disconnected from the executive department*, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments. [Emphasis added.]

³¹ ". . . [A]t this point we would need, I think, a much more detached and pinpointed study than we have here." Jaffe, *op. cit. supra*, at 1287.

³² "There are problems aplenty in the antitrust field, including problems as to the suitability of alternative enforcement tribunals; but perplexity as to the best means of enforcement will scarcely [sic] be resolved by the sketchy type of consideration given by the Task Force to the choice of a tribunal." Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 IND. L. J. 1, 21 (1955).

³³ Jaffe, *op. cit. supra*, at 1275.

³⁴ Nutting, *id.* at 1385.

happens that the staff does the work, and staff findings, unless patently erroneous, are adopted by the group. While excellent in the field of personnel and in the workings of the Department of Defense, the Task Force staff demonstrated a lack of practical approach, awareness and experience in administrative law. The resulting errors were, I feel, unintentionally in many cases carried forward by the Task Force and Hoover Commission.³⁵

THE ARGUMENTS FOR THE TRANSFER OF F.T.C. FUNCTIONS TO AN ADMINISTRATIVE COURT

For the reasons underlying the recommendation under consideration we must generally look to the Task Force report since the report of the Full Hoover Commission and the report of the American Bar Association Special Committee contain only general conclusions without supporting rationale.³⁶

Elimination of Confusion

The Task Force argues first that creation of a trade regulation court with the authority of nine existing agencies to terminate unfair trade practices will serve to remove confusion. There is a certain amount of charm in this argument for the removal of confusion is always earnestly to be desired. The Task Force argues also that "more uniform and effective enforcement" of the nine laws concerned would be gained by withdrawing the powers of the individual agencies and transferring such functions to a court. This argument also carries with it a similar charm.

These arguments appear to be based on a very superficial examination of existing statutes. Having observed the word "unfair" in five statutes, the Task Force apparently assumed that five agencies were operating in a single field. This is inaccurate. What is unfair in the motor carrier business may be completely unrelated to what is unfair under the Packers and Stockyards Act or in the communications business. A determination as to what is unfair under any one of the five statutes can be made only upon the basis of expert knowledge in each field. There is no real overlap among the fields. The statement that, "More uniform and effective enforcement" of the laws would be gained by an administrative court is not documented.

³⁵ "The Commission indeed was well aware that its Task Force had dealt with much more than the Commission itself had the time or competence to study or evaluate. Half of the commissioners do not accede to the recommendations dealing with amendments to the APA . . . but feel that 'in view of the searching investigation and the eminence at the Bar of the members of the task force . . . these [recommendations] should be furnished to the Congress but without Commission action upon them.'" Jaffe, *op. cit. supra*, at 1275.

³⁶ See COMMISSION REPORT 86; ABA REPORT 44.

Where is the present confusion? Not a single case of confusion or overlap among the agencies is cited. This lack of documentation is typical of the report.

Actually, an administrative court operating in all such fields would overlap and conflict with the work of each of the agencies. Confusion would be created rather than eliminated.³⁷ This recommendation of the Hoover Commission collides head-on with another recommendation which advocates that only a single agency should operate in each field.³⁸ It would be impossible to determine whether the individual agency or the administrative court had jurisdiction as to any specific problem.

With respect to the Clayton Act, the Task Force takes great delight in pointing out that five independent regulatory agencies are charged with the enforcement of this single statute, and this is described as "diffused enforcement of the Clayton Act." That in so far as the Clayton Act is concerned the Administrative Court would accomplish nothing but compound confusion is demonstrated by an examination of actual practice under that act. Agencies other than the Federal Trade Commission do not generally rely on the Clayton Act but on more specific powers provided in their organic acts. Consequently, the weight of this recommendation falls squarely upon the Federal Trade Commission which is the one agency found by the Task Force to have acquired "special competence" in this field.³⁹ Adjectives such as "useless," "productive of confusion," "improper," and "illogical" have elsewhere been ascribed to this proposal.⁴⁰

Instead of a competent agency satisfactorily enforcing this section, the Hoover Commission recommendation would result in a diffusion of that agency's presently competent work into three unworkable and inseparable parts. One part would find the facts, another part would prosecute the case, and a third part would make the determination. Thus, instead of remedying existing "diffusion" of responsibility, this recommendation would increase it threefold.

Greater Economy and Efficiency

The other arguments of the Task Force relate to economy and efficiency. With respect to the Federal Trade Commission, the Task Force concluded that creation of a trade section in the Administra-

³⁷ "Thus, any unfair method of competition or deceptive practice is, and would continue to be, a subject of I.C.C. proceedings. Any attempt to transfer jurisdiction over such practices to the Administrative Court, if construed to apply to common carriers, would thus result in intolerable conflict of authority." *Impact of Proposed Administrative Code*, 23 ICC PRAC. J. 29 (Nov., 1955 Sec. II).

³⁸ COMMISSION REPORT, Recommendation No. 29, 48.

³⁹ TASK FORCE REPORT 252.

⁴⁰ See 23 ICC PRAC. J. 28 (1955).

tive Court will result in "a substantial reduction of personnel in the Federal Trade Commission."⁴¹ The Task Force also concluded, "The requirement of bringing formal cases to trial in an independent tribunal should result in more frequent and effective utilization of informal procedures by the regulatory commissions and departments concerned. The over-all reduction of legal and other personnel should lead to substantial savings."⁴²

Experience in the field leads me to believe that exactly the opposite would occur; that infinitely more formal complaint cases would result⁴³ and that the over-all expense of handling trade regulation work would be at least doubled and possibly trebled. The basic fallacy in the Task Force approach to this question arises from a lack of comprehension as to what is involved in the informal settlement of a case. The elementary reasoning was expressed by the Attorney General's Committee in 1941:

And, it should be noted, a separation of functions would seriously militate against what this Committee has already noted as being, numerically and otherwise, the lifeblood of the administrative process—negotiations and informal settlements. Clearly, amicable disposition of cases is far less likely where negotiations are with officials devoted solely to prosecution and where the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies.⁴⁴

The same basic proposition was more recently expressed by Professor Nutting.⁴⁵

Moreover, approval of a settlement of a case is no less adjudicative than the function of issuing a cease and desist order. Before the Commission can approve an informal stipulation wherein a party agrees voluntarily to terminate a practice, the Commission must make a determination that it has reason to believe that a violation of law has occurred. If this were not true, an informal stipulation would constitute a colossal injury to the party agreeing to terminate a practice.

⁴¹ TASK FORCE REPORT 253-254.

⁴² *Id.* at 254.

⁴³ "First, a body devoted solely to prosecuting often is intent upon 'making a record.' It has no responsibility for deciding and its express job is simply to prosecute as often and successfully as possible." A.G. REPORT 58.

⁴⁴ A.G. REPORT 58-59.

⁴⁵ "Adjudication may be so tied up with the whole regulatory process that to separate it would jeopardize the effectiveness of administration. This is particularly true in instances where the possibility of an adjudicative proceeding may produce a compromise or other adjustments satisfactory to the Government and the parties. Such a possibility gives the administrative agencies a means of carrying out its policies which would not be so clearly available if the adjudicative function were vested in a separate body." Nutting, *op. cit. supra* note 20, at 1387.

The number of stipulations is almost double the number of cease and desist orders issued by the Commission. The power in the Commission to approve a stipulation would not and could not exist without the authority under Section 5 to determine whether or not a particular practice is unfair. If the basic power under Section 5 moves to the courts, the Commission will not legitimately be able to approve stipulations, for its power of determination will have vanished. The alternatives will be: (1) there will be no termination of such unfair practices as are normally terminated by stipulation, or, (2) the Commission will be forced to summon those charged with such unfair practices before the Administrative Court for formal action by that body. It cannot be otherwise.

With respect to "substantial reduction in personnel"⁴⁶ at the Federal Trade Commission, we are not informed of the method. Actually, the Federal Trade Commission is unique in government, for it has in 1956 fewer employees than in 1918.⁴⁷

The Cement Institute Case

The discussion of "inefficiency of present methods"⁴⁸ illustrates a decided lack of feeling toward due process, for the Task Force in this section of its report soundly chastises the Federal Trade Commission for granting due process in one of the most important cases ever handled by the Commission.⁴⁹ In the *Cement Institute* case, the Commission granted a full and fair hearing and its decision was subsequently upheld by the Supreme Court of the United States. Had the Commission denied due process, as appears to be urged by the Task Force, I am certain that the exact opposite result, namely, a reversal of the Commission, would have occurred.⁵⁰

⁴⁶ TASK FORCE REPORT 253.

⁴⁷ In 1918, F.T.C. had 689 employees; at present it has 620.

⁴⁸ TASK FORCE REPORT 252.

⁴⁹ "In 1937 the Federal Trade Commission instituted a proceeding against the Cement Institute to invalidate multiple basing-point pricing, see *Federal Trade Commission v. Cement Institute, et al.*, 333 U.S. 683 (1948). This proceeding took 3 years to try before a hearing examiner. The evidence consisted of about 49,000 pages of oral testimony and 50,000 pages of exhibits. The findings and conclusions of the Commission took 176 pages to state. Yet, the Commission had already indicated to Congress prior to the institution of the proceedings that in its view multiple basing-point pricing was unlawful. All this tremendous effort and cost was thus principally for the purpose of providing a record upon which a reviewing court could decide that question. It would have been far less costly and more efficient if the legal question had been decided in the first instance by a judge who had personally heard the evidence." *Id.* at 253.

⁵⁰ In commenting on Marquette's argument regarding bias, the Court stated: "They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities." *FTC v. Cement Institute, supra*, at 701.

It is true that the proceedings lasted three years, but it must be remembered that the case involved the entire cement industry of the United States. Comparison of the *Cement Institute* case and its statistics with a similar but more recently concluded conspiracy case brought by the Department of Justice in a Federal court, the *Investment Bankers* case⁶¹ reflects very favorably upon the administrative process. And, after all, the Commission decision was upheld in its case.

The statement by the Task Force that, "All this tremendous effort and cost was thus principally for the purpose of providing a record upon which a reviewing court could decide that question," is not correct. The purpose of the record was to grant to the respondents a full and fair hearing upon the record as required by the law and by fundamental justice.

The Task Force also states: "It would have been far less costly and more efficient if the legal question had been decided in the first instance by a judge who had personally heard the evidence." How it would have been less costly and more efficient is not described in the report. The *Cement Institute* case and other involved conspiracy cases like it are by far the most adaptable to the methods and the procedures of the Federal Trade Commission. The writers of the Task Force Report again demonstrate a lack of knowledge of what actually happens. After the Commission has reached its decision and the parties seek court review, the appeal goes to the court of appeals, just as it would have gone had the case been originally heard and decided by a district court.

The selection of the *Cement Institute* basing-point conspiracy case by the Commission Task Force as the "piece de resistance" in its argument against the FTC is doubly interesting, because this case is a striking example of the important work of the Federal Trade Commission. In 1937, when the Federal Trade Commission was investigating the cement industry, the President of the United States directed the Attorney General to investigate a similar problem in the steel industry. The Attorney General after study of the problem reported to the President as follows:

The administrative and quasi-judicial remedies in the hands of the Federal Trade Commission may be better adapted to the control of the subject matter of this particular complaint than action by the Department of Justice. The machinery of the courts is not geared to the handling of the social and economic factor necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under

⁶¹ United States v. Morgan, 118 F. Supp. 621 (S.D.N.Y. 1953).

the Antitrust Laws. It appears therefore that a problem is presented which can be more satisfactorily investigated and dealt with through the more flexible remedies of the Federal Trade Commission.⁵²

THE SEPARATION OF FUNCTIONS ARGUMENT

The basic argument for the removal from the Federal Trade Commission of its authority to determine unfair means of competition under Section 5 of the Task Force Report, the Hoover Commission Report, and in the Report of the ABA Special Committee, is based upon an alleged necessity for "separation of functions." The Task Force stated: "Where the process before the administrative agency is strictly judicial in nature, and the remedy afforded by the agency is one characteristically granted by courts, the effective protection of private rights may call for a complete separation of the prosecuting and the deciding functions at the trial level."⁵³

The Hoover Committee put it thus: "In special areas of regulation, executive, legislative and judicial powers have been combined in a single instrumentality, but such a comingling of functions is justified only where the Congress finds that it is necessary to the effective performance of the regulatory responsibilities of the Federal Government."⁵⁴

The Special Committee of the ABA considered an administrative court necessary "to insure the tradition of independence in areas presently subject to administrative action equivalent to judicial action in courts of general jurisdiction."⁵⁵

The lack of documentation for the recommendation is striking. Not a single example of lack of due process or prejudice by reason of lack of separation of functions is set forth. Instead, reliance is placed upon abstract theory and upon tradition. The Task Force report was in the nature of a broadside attack upon administrative law. The treatment by the Hoover Commission is more restrained, there having been added many words indicating an intent to avoid "harm to the regulatory process,"⁵⁶ disclaimer of intent of "endangering the administrative processes"⁵⁷ and the saving words "wherever practicable." But even this report indicates that the present proposal is merely an opening wedge in the destruction of administrative law.⁵⁸

⁵² White House Press Release, April 27, 1937.

⁵³ TASK FORCE REPORT 239.

⁵⁴ COMMISSION REPORT 84.

⁵⁵ ABA REPORT 42.

⁵⁶ COMMISSION REPORT 85.

⁵⁷ *Id.* at 86.

⁵⁸ "We believe, however, that once it is established the Administrative Court will provide an instrumentality to which, from time to time in the future,

The subject of separation of functions was among those most deeply pondered by the Attorney General's distinguished committee in its two-year investigation of the administrative process. Its Final Report recommended against separation.⁵⁹ The Administrative Procedure Act which resulted from that Committee's fine work provides adequate safeguards for due process in administrative proceedings,⁶⁰ and the Task Force itself concedes that the Federal Trade Commission has "whole-heartedly conformed" its procedures to the purposes of the Administrative Procedure Act⁶¹ and the Hoover Commission similarly comments upon the Commission's work.⁶²

This conclusion is no surprise to those who are experienced in the work of the Federal Trade Commission. The functions of the Commission are performed in accord not only with the letter but also with the spirit of the Administrative Procedure Act.⁶³ All investigation is conducted by the Bureau of Investigation. Formal complaints are prosecuted by the Bureau of Litigation. The cases are initially heard by hearing examiners who are completely divorced from management, save for administrative purposes. Final decision is by the members of the Commission themselves sitting *en banc*.

Although giving credit to the "special competence"⁶⁴ of the Federal Trade Commission, the Task Force was very critical of the Board of Governors of the Federal Reserve System for its handling of the *Transamerica* case under Section 7 of the Clayton Act, as amended. The comment of the Federal Trade Commission on this question speaks for itself: "We question the advisability of predicting the removal of the Federal Trade Commission authority in a field where

additional adjudicatory functions in special areas might be transferred. Additional Sections of the Court could readily be established. The Administrative Court thus would serve as an intermediate stage in the evolution of administrative adjudication and the transfer of judicial activities from the agencies to courts of general jurisdiction." COMMISSION REPORT 87.

⁵⁹ A.G. REPORT 60.

⁶⁰ Compare § 5(c) of the Administrative Procedure Act of 1946, 5 U.S.C. § 1004(c) (1952), with Rule XXV of the FTC Rules of Practice, 16 C.F.R. § 2.25(b) (Supp. 1955).

⁶¹ TASK FORCE REPORT 140. Not all Commissions and agencies have so adequately implemented their salutary provisions.

⁶² *Commission Report, Separation of Functions*.

⁶³ That there has been no "railroading" of cases through the Commission may easily be proved by reference to statistics available at the offices of the Commission. As of June 30, 1952, 29,379 preliminary inquiries had been instituted by the Commission and of them more than 21,000 were dismissed after investigation. Of 25,173 applications for complaint docketed as of May 21, 1954, a total of more than 19,000 were dismissed or closed. As of March 1, 1956, of 6,520 formal complaints issued by the Commission, 1199 were dismissed and did not result in the issuance of orders to cease and desist. Only in Docket 6074, Florida Citrus Mutual, has the writer found reason to criticize procedure.

⁶⁴ TASK FORCE REPORT 252.

it is found to have acquired 'a special competence' on an alleged lack of competence in other agencies, which seldom or never act on such problems."⁶⁵

The question arises as to whether a cease and desist order is a strictly judicial act. The Commission has no power to inflict fines or punishment. It is limited to declaring the act to be unfair, and the Commission must depend on the courts for enforcement of its order. The courts have considered the action of the Commission in finding facts which it declares to be a specific offense is actually a conversion of existing legislation from a static into dynamic form.⁶⁶ If it may be assumed that these functions are indeed legislative, one might wonder about the constitutionality of a transfer of them to a judicial body.

However, the effect which the adoption of the recommendation would have upon the future of trade regulations and upon the public interest should be controlling.⁶⁷

The work of the Federal Trade Commission in the field of trade regulation has been under scrutiny by many persons. Its specialized competence has been recognized.⁶⁸ In its recent report the Attorney General's Committee to Study the Antitrust Laws has recommended the continuance of the dual approach to antitrust enforcement.⁶⁹ This

⁶⁵ *Comments, Op. cit. supra* note 16.

⁶⁶ See *Sears, Roebuck & Co. v. FTC*, 258 Fed. 307, 311-12 (7th Cir. 1919). The effect of the Commission's order is "not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *FTC v. Cement Institute*, 333 U.S. 683, 706 (1948).

⁶⁷ "These are times in which government is distrusted as it has not been since the boom period of the 1920's. . . . It would be a dangerous fallacy for lawyers to conclude, however, that the answers to all procedural problems reside exclusively in their tradition, and that present and future governmental needs can be met without allowing scope for the methods which administrative officials have found to be adapted to their functions. The more extreme recommendations of the Task Force and, to a less degree, those transmitted by the Commission seem chargeable with origination in just this fallacy." Jaffe, *op. cit. supra* note 21, at 1373-74.

⁶⁸ "A purely adjudicative agency such as an administrative court, even though its judges specialize in particular subjects, can gain experience only through testimony and argument before it. There are strong grounds for concluding that this is not enough. The impact of continuous grappling at first-hand with the problems the legislature desires to have solved, and has conferred discretionary authority as an aid in solving, is often necessary. Where this is true, the transfer of adjudicatory functions to a court not subject to this impact would sacrifice vital public interests." Fuchs, *The Hoover Commission and the Task Force Reports on Legal Services and Procedure*, 31 *IND. L.J.* 1, 20 (1955).

⁶⁹ "Both the legislative history of the Trade Commission Act and its specific language indicate a Congressional purpose * * * to permit the simultaneous use of both types of proceedings.' Toward this end, there was created a 'body specially competent * * * by reason of information, experience and careful study of * * * business and economic conditions * * * to [treat] * * * special questions concerning industry' and 'to exercise a special competence in formulating remedies to deal with problems in general sphere of competitive practices! This Committee endorses this goal of 'efficient cooperation' through

thought has been consistently expressed by the Supreme Court.⁷⁰

The Hoover Commission Task Force report reflects a basic assumption that all unfair methods of competition are presently known and catalogued. The irresponsibility of this assumption is disturbing. This idea is completely at odds with the facts. It is probably a reflection on the highly ingenious and inventive mind of the American business huckster. The Federal Trade Commission is confronted daily with novel fact situations involving problems as to whether or not certain acts and practices are unfair within the meaning of the Federal Trade Commission Act, many of which are arising for the first time. The fact that it was impossible to catalogue unfair trade practices was recognized by Congress in 1914. That the opinion of Congress has been correct is demonstrated by forty years of operations.

CONCLUSION

The "three stage" argument advanced by the Task Force, and adopted by the Hoover Commission, smacks of a Hegelian approach to the problem of government. First, there comes a violent change with the adoption of administrative law; there follows a second stage of unpalatable but necessary suffering under the scourge until law and order have developed; and, in the third stage, as one commentator put it, "Discretion will yield its harvest of rules and regulations and can then be put back in the box."⁷¹

It is not likely that the creation of a trade section of the Administrative Court would save money, for it would result in at least double the number of cases. Rather than remove confusion, it would result in "confusion worse confounded." Rather than increased efficiency, its result would be a destruction of that efficient handling of trade cases which the Commission has developed down through the years.

The argument made against the Commission forty-two years ago has been given several interesting new twists. One of these is the selection of the oldest and the best agencies with the "soundest methods of administration" as the first candidates for judicialization.⁷² It

dual enforcement." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 375 (1955).

⁷⁰ "But on the whole the Act's legislative history shows a strong congressional purpose not only to continue enforcement of the Sherman Act by the Department of Justice and the federal district courts but also to supplement that enforcement through the administrative process of the new Trade Commission." *FTC v. Cement Institute*, 333 U.S. 683, 692 (1948).

⁷¹ Jaffe, *op. cit. supra note 21*, at 1285. "There is merit in this thesis insofar as it can be applied without sacrifice of the ends in view." *Ibid.*

⁷² "One of the difficulties in proposing judicialization of the administrative process is that it is bound to affect primarily those agencies which have been the longest established and have developed the soundest methods of administra-

thus appears that the functions of the Federal Trade Commission are to be removed not because it has handled them poorly but because it has handled them well. This is a novel argument for "remedial" legislation. The recommendation proposes to substitute for the successful administrative process a judicial process which was found wanting in the past.

Another new twist is that the legislative purposes have been fulfilled and that the judicial power in the Commission is now ready to be put back into the judicial "box."⁷³ But the Commission's work is far from completed. While the accomplishments of the Commission are legion, it must be conceded that the Commission remains a long distance away from the goals laid out by its creators. Its procedures only recently have achieved the speed then contemplated.⁷⁴ At times the Commission has been unduly preoccupied with cases not of national concern or of wide public interest, but in recent years it has been moving in the direction of developing coordinated programs of concentrating upon hard-core cases and of utilizing a combination of voluntary and compulsory procedures to effect simultaneous industry-wide correction of unfair trade practices which would be impossible under a trade regulation court.⁷⁵

To abolish the adjudicative work of the Federal Trade Commission would eliminate the whole concept of the administrative process in the field of antitrust enforcement and the attendant function of considering and weighing all relevant economic factors. It would nullify the Commission's expertness in dealing with deceptive practices. It would remove from the field of trade regulation a bipartisan agency "charged with enforcement of no policy except the policy of the law," and would deprive the government of the "cumulative remedies" which are now provided "against activity detrimental to competition." It would largely sacrifice the body of law which the Commission had developed over a period of some 40 years, and the specialized knowledge of five commissioners aided by a staff of skilled legal and economic experts. It would impose upon the courts a flood of tedious, specialized and highly complex litigation, which they are not geared to handle.

The very existence of administrative law does violence to the ideas of many legal theorists who view administrative tribunals as para-

tion. . . . The divestment of judicial functions is thus not a criticism of the agency, but an acknowledgment of its ability to handle the problems of adjudication within its jurisdiction." TASK FORCE REPORT 242.

⁷³ See note 71 *supra*.

⁷⁴ Kintner, *The Revitalized Federal Trade Commission; A Two Year Evaluation*, 30 N.Y.U.L. Rev. 1148-50 (1955).

⁷⁵ *i.e.* Trade Practice Rules and Complaints in the Cosmetic Industry and the Insurance Industry Complaints and Trade Practice Rules.

sitic appendages to the traditional court system. Such lawyers opposed the creation of administrative law in 1887 and in 1914;⁷⁶ they sought its abolition in the 1930's, in the 1940's and are currently engaged in the same pursuit. This appears to be the underlying proposition upon which the two Reports are founded. This hardly seems sufficient reason for destruction of the Federal Trade Commission.

It is to be hoped that the legal profession shall not be so foolhardy as to perennially attempt to refight a lost cause on an old battlefield in the hope that to do so may some day change the decision. Such efforts are foredoomed to failure. The administrative process is here to stay. While it may not always be consistent with the "distinguished minds of lawyers," its response to the "need of the country in order to give relief to its people" is unquestioned.⁷⁷ All of our efforts should be concentrated in a united effort to improve the administrative process rather than by recurring attacks to destroy its long established and beneficial role of determining proper relationship between the government and its citizens in the World's greatest political and economic democracy.

⁷⁶ "We saw [The Supreme Court] pause and consider what the American people needed rather than what the distinguished minds of lawyers demanded. We saw that court listen to the needs of the country in order to give relief to its people, rather than that which merely prescribed distinctive lines of demarcation in construction that would have given justification to refined distinctions." Senator Lewis, 51 CONG. REC. 12925, 12926 (1914).

⁷⁷ *Ibid.*