

15002
57
8

**THE TRADE COURT, THE ABA, THE LAWYER
AND THE PUBLIC INTEREST**

Remarks of

**Earl W. Kintner, General Counsel
Federal Trade Commission**

Before

**SECTION OF ANTITRUST LAW
AMERICAN BAR ASSOCIATION**

Washington, D. C.

April 5, 1957

THE TRADE COURT, THE ABA, THE LAWYER
AND THE PUBLIC INTEREST

*Remarks of

Earl W. Kintner
General Counsel, Federal Trade Commission

I. Introduction and Statement of the Question

It gives me great pleasure to appear before you on the occasion of this debate with my good friend Herbert Clark, whom I regard with affection and respect. I am honored by your invitation. The subject is one of great interest and importance, not only to the American Bar Association and to lawyers everywhere, but also to the American public. It is, particularly, a subject which is of very great personal interest and importance to all members of the Antitrust Section. And I know of no group better fitted, by knowledge or experience, to evaluate the proposal for a trade court.

Another group within the American Bar Association having, like this Section, considerable expert knowledge of the administrative process recently studied the current proposals for Specialized Courts, and declined to endorse such proposals. I refer to the September 29, 1956, action of the District of Columbia Bar Association. Perhaps, if I am persuasive enough here today, I can induce my colleagues in this Section to take a second, informed look at the whole problem. 1/

Before I launch into what may seem to be harsh criticism of an action of the American Bar Association, I might point out that I am, and for many years have been, one of the ABA's loyal and active members. In my work in the ABA and in the Federal Bar Association, which I have the honor to head this year, I have sought assiduously to promote mutual understanding between the Government lawyers and the lawyer in private practice. Our common heritage dictates that we always act in concert in improving the administration of

*The opinions expressed herein do not necessarily constitute official views of the Federal Trade Commission.

1/A special committee of that Association, composed of 15 members, made a study of the current Hoover Commission proposals with respect to the field of administrative law and, although unanimously approving generally the proposals for improvement of the process, recommended that the District Association defer action on the Specialized Courts. The two-thirds majority report of the Committee cited as reasons for its recommendation: lack of information as to considerations which prompted the ABA Special Committee to select two agencies out of nine mentioned in the Hoover proposals for Specialized Court treatment; the lack of documentation motivating the Task Force recommendations; necessity of studying the 1910 Commerce Court shortcomings; alarm at the growing tendency toward specialized bars; and the possibility that other proposals for improvement of the administrative process would achieve the desired end short of the more drastic proposal for an administrative court. The Committee's majority report was approved by the District of Columbia Bar Association after spirited debate on the merits.

justice. To this end I have been an outspoken critic within Government of any shortcomings in the administrative process and dedicated to its improvement.

The remarks of my opponent indicate that he has some reservations regarding the genealogy of the administrative process. I am prepared to concede that the administrative process did not come over in the Mayflower.

The American Bar Association was founded in 1878.^{2/} Thus, the ABA has nine years seniority on the administrative process which is generally recognized as having been established in 1887 with passage of the Interstate Commerce Act,^{3/} and even this slight seniority is debatable since experts have traced the origin of various present-day agencies as far back as 1789.^{4/}

You are familiar with the fact that 70 years ago, when the question of the ICC was being debated in Congress, the nine-year old infant ABA registered strong opposition on the ground that the proposal did violence to legal tradition. The opposition has been described as follows:

"The assault that it [the I. C. C. Act] was unconstitutional for the reasons laid down by the able Senator from Utah [Mr. Sutherland] as to section 5, and the able Senator from Connecticut [Mr. Brandegee] as to the general purpose of this similar bill was led by Senator Evarts, of New York, accredited to be a distinguished lawyer and head of the American bar, former Secretary of State. So confirmed was Senator Evarts that it was not in the power of the Government to vest this form of inquisition--to use the words of the able Senator from Utah--within an administrative body, that he denounced the act as being a reflection upon the intelligence of this body. Not only would he not support it, but at home, before the bar association of the State of New York, he gave the passage of the act as evidence of a decadence of wisdom on the part of the Senate."^{5/}

^{2/}A brief history of the development of American bar associations may be found in Chapters VII and IX of Pound, *The Lawyer from Antiquity to Modern Times*, 175, 251 (1953).

^{3/}Act of Feb. 4, 1887, c. 104, 24 Stat. 379 (codified in scattered sections of 49 U.S.C.).

^{4/}Attorney General's Committee, *Report on Administrative Procedure in Government Agencies* 8 (1941); S. Doc. No. 8, 77th Cong., 1st Sess.

^{5/}Statement of Senator Lewis, 51 Cong. Rec. 12925 (1914). Senator Lewis went on to state:

"We saw the Supreme Court of the United States, however, overrule the able Senator from New York, the head of the American bar. We saw that 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 demarkation in construction that would give justification to refined distinctions." *Id.* at 12926.

Today, in 1957, the ABA and lawyers everywhere must recognize the self-evident fact that administrative law has itself become an important legal tradition in this country.

The functions of the American Bar Association are "to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public."^{6/} This is indeed an impressive compendium of functions. But later I shall suggest that in espousing the proposal for a trade court the American Bar Association may be neglecting one of the most important of the listed functions.

I have mentioned the Mayflower. History does not record that there was even one lawyer on her.^{7/} If there had been any lawyers aboard they probably would have been either solicitors or barristers, but not both, for legal tradition in England has generally dictated a separation of such functions. But the American lawyer has combined those traditionally separate functions into one and I might add has done very well at both.

The American lawyer is a complex creature, and all the more useful by reason of his complexity. Indeed, he is almost a public utility--fortunately, without regulated rates. The lawyer is, first, advisor and counselor. In the course of such duties he often finds himself in the role of father-confessor. Also, more than he would like to admit, the lawyer today is an administrator. As time goes on, the lawyer more and more finds that he is a businessman and entrepreneur, as well as advocate. Nor can his role as judge be minimized; he may sit as a referee; his expert judgment is often called upon; and this may necessitate investigational action which might be looked upon as that of a grand jury. When the needs of his client require, the lawyer prosecutes vigorously and by the same token, defends equally vigorously. The lawyer fulfills one or many of these myriad functions concurrently as the case, the time, the client, and the situation may demand.

Now what does the present situation demand of all the lawyers who are sitting in this room? Obviously, you are now sitting as judges. I must respectfully ask, therefore, that you carefully withdraw from all your other functions and assume your judicial mien in order that you may adjudicate impartially the merits of the question which Mr. Clark and I are debating.

^{6/}43 A.B.A.J. 101 (1957).

^{7/}See Leon Clark Hills, *The Mayflower Planters* (1936).

The Question

What is the question? As stated by the proponents of the Trade Court, the question is "Should the judicial functions of the Federal Trade Commission be transferred to a court or courts?"

I must caution you at once that the question so stated is itself "loaded." It assumes that the Commission does possess strictly "judicial" functions, and this is one of the key questions in this debate. I shall demonstrate that the correct legal wording of the question is "Should certain legislative and quasi-judicial functions of the Federal Trade Commission be transferred to a court or courts?"

II. The Two Areas of Discussion

There are two basic areas of discussion which encompass all of the arguments which have thus far been made for or against a trade court. There is, first, the Constitutional issue; that is, separation of powers and separation of functions. This includes the bias question--whether or not the parties appearing before administrative tribunals are accorded fair treatment and due process of law. As to this basic question, the advocates of the Trade Court argue that when federal administrative agencies decide cases or controversies the parties affected lose some of the protection they would have been afforded in court proceedings. This argument was made by the Hoover Commission Task Force,^{8/} the Hoover Commission itself,^{9/} the ABA Special Committee of 15,^{10/} and by my opponent this afternoon. But to the best of my knowledge, no cases have been cited which support this argument.

The second basic area of discussion is effectiveness--that is, will a trade court result in better decisions and more effective trade regulation? This includes the question of expertness, etc. As to this area, the advocates of the Trade Court argue that an independent federal judiciary is better able to decide cases and controversies than are federal administrative tribunals.^{10/} They argue also that administrative tribunals, if relieved of the burden of deciding cases, would be free to concentrate upon other duties.^{11/} As to this second major area of discussion, no cases were cited by the Hoover Commission or the ABA, but, the Task Force did, at length,

^{8/}Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedure 239, 251 (1955) (hereinafter cited as Task Force Report).

^{9/}Commission on Organization of the Executive Branch of the Government, Report on Legal Services and Procedure 84-5 (1955) (hereinafter cited as Hoover Commission Report).

^{10/}See, for example, Sellers, The Administrative Court Proposal--Or Should Judicial Functions of Administrative Agencies Be Transferred to an Administrative Court?

23 J. Bar Assoc. of D. C. 703 at 705 (1956).

^{11/}Id at 706.

cite a case which it claimed as proof that the Federal Trade Commission was inefficient. The Hoover Commission Task Force, as its only case supporting this argument, cited the Commission's proceeding and decision in Federal Trade Commission v. Cement Institute, et al. ^{12/} I submit that no advocate ever more successfully selected a case which so strongly supported the position of his opponent. For no case more conclusively demonstrates the worth and the need for the Federal Trade Commission as presently constituted.

III. Separation of Powers

As has already been noted a key issue is whether or not the entry of a cease and desist order by the Federal Trade Commission is a judicial function. What is an order to cease and desist? It has been likened to an injunction and also to a declaratory order. Former Chairman of the Federal Trade Commission, James Mead, described the nature of the order very aptly when he used the Biblical words "go and sin no more." The Federal Trade Commission does not assess penalties or levy fines. It does not put people into jail. What it does is to carry its broad Congressional mandate of searching out abuses to the competitive process and of declaring such methods unlawful. All of such declarations are appealable to the courts. ^{13/} If the courts affirm the order, there is still no penalty. Only if the respondent violates the final order can there be a penalty, but, contrary to what the trade court advocates indicate, all penalty actions are tried in district court and the prosecutor is the Attorney General. ^{14/}

The Case of ABA v. ABA

In 1936, a Special Committee of the American Bar Association recommended that an administrative court system be established. ^{15/} However, the 1936 Special Committee carefully excluded from its court recommendations the issuance of cease and desist orders by the Federal Trade Commission. ^{16/} That Special Committee, after three years of intensive, specialized study, reached the obvious conclusion that the entry of such order by the Federal Trade Commission was a mixed legislative and judicial act, but primarily legislative, and one which should not be transferred to the courts.

^{12/}333 U.S. 683 (1948). For the Task Force discussion of this case, see Task Force Report at 253.

^{13/}Section 5(c), Federal Trade Commission Act, 15 U.S.C. § 45(c) (1952); Section 11, Clayton Act, 15 U.S.C. § 21 (1952).

^{14/}Section 5(l), Federal Trade Commission Act, 15 U.S.C. § 45(l) (1952). Under Clayton Act orders, respondent may actually defend at least three separate violations before any punishment will be adjudged: one in the trial before the Hearing Examiner; one before the Commission's order will be made an order of a Court of Appeals; and the third in contempt of the latter order. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952).

^{15/}American Bar Association, Report of the Special Committee on Administrative Law at 209 (1936).

^{16/}*Id* at 238.

In 1956, 20 years later, another Special Committee of the ABA, after no visible indications of analysis or study, reached exactly the opposite conclusion. We are now told by this second Special Committee that the entry of a cease and desist order is strictly a judicial function, which must be transferred to the courts. All of the court functions which the 1936 Committee found to be judicial are overlooked, and the one function which the 1936 Committee found to be primarily legislative is now found to be judicial.

Obviously, if the 1936 Special Committee was right the 1956 Special Committee is wrong. Further, if the 1956 Committee is wrong and the 1936 Committee is right the proposal for a trade court which is being debated here this morning must fall. The Supreme Court supports the 1936 Committee: "In administering the provisions of the statute in respect of 'unfair methods of competition' - that is to say in filling in and administering the details embodied in that general standard--the Commission acts in part quasi-legislatively and in part quasi-judicially."^{17/}

Although urged to do so, the Supreme Court has never ruled that the separation of powers doctrine of the Constitution prohibits the mixing of executive, legislative and judicial functions in an administrative agency such as the Federal Trade Commission.^{18/} Moreover, a Constitutional court could create more separation of powers problems rather than cure existing problems, for the courts have held to a distinction between Article III courts and legislative courts.^{19/} Ironically, the American Bar Association has endorsed a proposal for the establishment of an Article III court. Thus, the proposal involves the transfer of legislative functions, or at best a mixture of legislative and judicial functions, to a Constitutional court.

I have referred to you lawyers here present as judges, and I suppose I could ask your leave to read into evidence the reports of the 1936 and 1956 Special Committees. On that basis you could quickly reach a decision on the merits and our debate might end summarily at this point. But that would be the easy way out. I suggest instead that when you return to your homes you assume the grand jury function and obtain copies of these reports and compare for yourself. In the meantime, in order to prevent this debate from coming to too abrupt an end let us assume for purposes of further argument today that the entry of a cease and desist order is a judicial function.

Prosecutor and Judge?

The next question--does the Commission exercise at one and the same time the roles of prosecutor and judge? To resolve this

^{17/}Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

^{18/}Davis, Administrative Law 27 (1951).

^{19/}See Comment, The Distinction Between Legislative and Constitutional Courts, 43 Yale L. J. 316 (1933).

question we must necessarily analyze the operations of the Commission. 20/

The usual case begins with a letter of complaint by a business concern, by an organization, or by a member of the public addressed to the Federal Trade Commission and asking that the Commission investigate a certain business practice. All investigational work is handled by a separate bureau of investigation within the Commission. In 1956 the Bureau of Investigation received 3,141 such letters or petitions. Of those, approximately 150 were referred to other agencies having primary jurisdiction. Approximately 250 were closed because they involved private controversies; 150 others were closed for other public interest reasons -- insubstantiality of the practice or abandonment of the practice. Another 200 were closed because of refusal of the applicant to furnish needed information. In fact, of the entire 3,000 petitions, 547 resulted in actual scheduling of field investigation by the Commission.

When a matter is scheduled for investigation, it is assigned to a Commission project attorney in the Bureau of Investigation and it is his duty to follow the case until completed. If, at any time in the course of the investigation it develops that there is no violation of law, it is the duty of the project attorney to see to it that the matter is closed. Upon completion of the investigation, if it appears that complaint is warranted, the results of the investigation are referred to another separate bureau within the Commission, the Bureau of Litigation, which prepares a complaint but only if it feels that a complaint is justified and in the public interest. When the complaint has been drafted it is referred to the Commission. And if adopted by the Commission the complaint is served by the Commission's Secretary.

To this point, the Commission has had no part in the investigation; it has had no part in the drafting of the complaint, and after the issuance of the complaint, the Commission will have no part in the prosecution of the case. This will solely be in the hands of the Commission's Bureau of Litigation. Query: is adoption and issuance of the complaint by the Commission an act of prosecution?

If the Commission in the issuance of a complaint were expressing a belief in the veracity of allegations in the complaint, there would be basis for arguing that the Commission had disqualified itself to sit in a judicial capacity. As a matter of fact, however, in looking at a complaint and directing its issuance the Commission is merely signifying its belief that a probability of law violation exists and that a proceeding is in the public interest.

^{20/}For a general description of the Commission's organization and procedure, see 16 CFR, 1955 Supp., 1.1-3.30 and Annual Report of the Federal Trade Commission, 1955.

The issuance of a complaint by the Commission has both legislative attributes and judicial counterparts. It is a legislative act in that the Commission by the issuance of a complaint initiates a process which gives substance to the Congressional mandate of declaring unfair methods of competition unlawful. This setting in motion of the machinery of inquiry is also analogous to the grand jury function of the courts. In adopting a complaint the Commission takes action similar to that of a court which empanels a grand jury; when carrying out the latter function the court must decide whether or not there are sufficient grounds to warrant grand jury investigation. Even more similar are contempt of court proceedings where the judge or court sits in judgment on cases of alleged violation of its own orders. In a sense the court is judge, jury and prosecutor, and the court power is much greater than that of the Federal Trade Commission, because in a contempt trial the judge can apply the sanctions of fine or imprisonment as well as find the facts. 21/

Another analogy is the ruling by a trial court on a temporary restraining order. Still another is the ruling on a demurrer. In some respects also the adoption of a complaint is similar to the function of the Supreme Court in granting certiorari. In the case of certiorari as in the case of empaneling a grand jury there is no prejudging of the facts or of the law; this must always be done on the record. And so it is with the Federal Trade Commission. The ultimate decision on the merits is and must be made on the record.

In his treatise on administrative law Kenneth Culp Davis stated:

"If the agency heads were announcing in effect that 'we believe the defendant is guilty,' they would be taking a position incompatible with impartial judging. ... But it is a distortion to say that such an agency as the FTC is taking a position on factual issues by the issuance of a complaint, except to the extent of finding a prima facie case on the facts and determining that the allegations, if proved, are sufficient as a matter of law. ... /A/ny adjudicator, judicial or administrative, who is worth his salt, can maintain the scales of justice in even balance and still authorize the institution of administrative proceedings." 22/

Possibly most conclusive of the fact that there is no bias or prejudging of cases by the Commission is the record of disposition of cases before the Commission.

During the calendar year 1956, the Commission entered 185 orders to cease and desist. Of such 185 orders, 132 were based

21/"This bill /the Clayton Act/ does not, any more than does the contempt bill, invade the jurisdiction of the Courts or attempt legislatively to exercise a judicial function. It merely limits and circumscribes the remedy and procedure." S. Rep. No. 698, 63rd Cong., 2d Sess. 33 (1914), accompanying H.R. 15657, the Clayton bill. 22/Davis, Administrative Law 436, 437 (1951).

upon the Commission's consent order procedure. ^{23/} In 1956, there were 50 contested cases which resulted in the entry of orders by the Commission. ^{24/} What is important to you in your consideration of the question of bias is the fact that of such 50 orders in contested cases, 16, ^{25/} or 32%, were orders of dismissal. These figures hardly support a charge of prejudgment or bias. As a matter of fact, there is no more reason to impute bias to a Federal Trade Commissioner than there is to impute bias to a judge. The law requires the Commissioner to make his decision upon the record. If, instead, his decision results from bias, he is breaking the law, and he has no business being a Commissioner, just as a biased judge has no business being a judge.

Some Anomalies

In the report with special studies of the President's Committee on Administrative Management, Robert E. Cushman found that the only strictly judicial function of the Federal Trade Commission was its duty to aid the Federal courts in working out decrees of dissolution in antitrust actions. ^{26/} Thus, we have in the present proposal for a trade court the very anomalous situation wherein the leaders of the American Bar Association are promoting the transfer to a constitutional court of functions which are primarily legislative and at the same time propose to leave with the Commission that one function which is clearly an unmixed judicial function.

Another anomaly is found in the fact that while separation of functions is alleged to be a primary aim of the proposal, there have been selected for judicialization (1) the Tax Court which has no separation problem, (2) the NLRB which is already separated by statute, and (3) the Federal Trade Commission ^{27/} which was recognized by the Task Force as having been one of the agencies which had achieved that internal separation of functions required by the Administrative Procedure Act. ^{28/}

The advocates of the trade court have attempted to capitalize on the slogan "No man should be a judge in his own cause."

^{23/} FTC Rule 3.25; 16 CFR, 1955 Supp., 3.25.

^{24/} Three others were terminated by default or admission answer.

^{25/} This figure does not include partial dismissals, where the Commission has dismissed all the charges as to certain parties or has dismissed one or more charges as to certain or all parties. In addition, it is important to note that in numerous other cases, the Commission in its decision has modified the initial decision of its hearing examiner.

^{26/} President's Committee on Administrative Management, Report with Special Studies 230-1 (1937). See also *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935): "Under § 7 of the FTC Act, which authorizes the Commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary."

^{27/} Hoover Commission Report 87-8 (1955); Sellers, *op. cit. supra*, note 10, at 708-9.

^{28/} See Task Force Report at 140: "The task force finds that some agencies, such as ... the Federal Trade Commission ... have wholeheartedly conformed their procedures to these purposes of the Administrative Procedure Act."

Obviously I can have no quarrel with the merits of this slogan, but I must point out that the idea has no practical application to the Federal Trade Commission. The five Commissioners derive no personal profit from proceedings before them. The only cause on which they sit in judgment is the cause of the American public, the public interest in the maintenance of a free competitive system. As stated by the Supreme Court in Humphrey's Executor v. United States, the Commission "must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law."^{29/}

Section 5(c) of the Administrative Procedure Act provides for internal separation of functions by administrative agencies. The Commission has carried out this provision, in FTC Rule 3.28, to an extent beyond that required by the APA.

"§ 3.28 Ex parte consultation. No official, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission and no party respondent or his agent or counsel in any adjudicative proceeding shall, in that or a factually related proceeding, participate or advise ex parte in any decision of the hearing examiner or of the Commission therein."

That the Commission has been a leader among administrative agencies in complying with not only the letter but the spirit of the APA has been recognized by the Task Force.^{30/}

If there is any bias or preconception in this question which should be brought to your attention, it is the bias of the trade court advocates who have set out on a path which would destroy the Federal Trade Commission and possibly scuttle the entire administrative process, I fear, on the basis of preconceived notions and without knowledge of the facts.

Background of Current Proposal

Steam for the current drive to divorce "judicial" functions from administrative agencies came in March, 1955, from the second Hoover Commission's Task Force recommendation No. 63 that "An administrative Court of the United States should be established to consist of two Sections having jurisdiction, respectively, in the fields of trade regulation and taxation."^{31/} Recommendation No. 64 proposed that the trade Section "should be established with limited

^{29/}295 U.S. 602, 624 (1935).

^{30/}Op. cit. *supra*, note 28.

^{31/}Task Force Report at 246.

jurisdiction in the trade regulation field with respect to certain powers now vested in the Federal Trade Commission" and others.^{32/}

This steam turned the wheels of the "Special Committee of 15" of the American Bar Association, which recommended in a report on January 31, 1956, 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."^{33/} The House of Delegates approved this recommendation in February, 1956.

Despite the statutory provision for its existence, ("to promote economy, efficiency, and improved service in the transaction of the public business")^{34/}, the Task Force on Legal Services and Procedure of the second Hoover Commission concluded with recommendations of substantive changes in the law.^{35/} Part III, Report and Recommendations on Legal Procedure, of the Task Force Report, containing the recommendation for an administrative court, was prepared by two Task Groups. Task Group 2 was chairmaned by Carl McFarland; Task Group 3, of which Mr. Clark was a member, was chairmaned by E. Blythe Stason.^{36/} Mr. McFarland^{37/} and Mr. Stason had been members of the Attorney General's Committee on Administrative Procedure and signed its report in 1941, but, with Arthur T. Vanderbilt, appended a statement of additional views and recommendations in which they advocated, as a matter of principle, "complete segregation /of adjudication functions/ into independent agencies," either courts or boards.^{38/}

The report of the two Task Groups was "based primarily" on material contained in a single questionnaire sent to "the departments and independent establishments of the executive branch." The entire survey was done "in a period of 10 months with the assistance of

^{32/}Id at 250. The other agencies were: 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.

^{33/}American Bar Association, Report of the Special Committee on Legal Services and Procedure 42 (1956), cited in Freer, The Case Against the Trade Regulation Section of the Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637, 640, note 14 (1956).

^{34/}P.L. 108, c. 184, 83d Cong., 1st Sess., 67 Stat. 142 (1953).

^{35/}Unhappily, failing to emulate the work of the Task Force of the first Hoover Commission which directed its attention to the "effectiveness of independent commissions as agencies for carrying on Federal regulatory activities," Commission on Organization of the Executive Branch of the Government, Task Force Report on Regulatory Commissions 5 (1949).

^{36/}Task Force Report at 5.

^{37/}Some years earlier Mr. McFarland wrote: "The administrative body exercises no more authority from a functional point of view than a public prosecutor." McFarland, Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission 10 (1933).

^{38/}Attorney General's Committee, Report on Administrative Procedure in Government Agencies 205, 209 (1941); S. Doc. No. 8, 77th Cong., 1st Sess.

only a few professional consultants and a small staff.”^{39/} The questionnaire consisted of 14 basic sections in the pattern of the Administrative Procedure Act of 1946. The first 13 sections requested statements of functions and procedures; the 14th section requested evaluation and recommendations from the reporting agency itself.^{40/} That the trade court proposal has not been justified by facts or study or even current concern has been noted by several writers.^{41/}

In the introduction to its Report, the Task Force states: “Problems encountered by the task force have arisen from factual analysis and not from preconception.”^{42/} However, no amount of “analysis” of the data elicited in the questionnaire could warrant the Task Force recommendations for substantive changes in law. Recommendation No. 62 states that “Judicial functions . . . should be transferred to the courts wherever possible.”^{43/} The supporting section concludes with the statement: “the trend should be toward returning essentially judicial functions to the judiciary.”^{44/}

The Task Force has been caught with its facts down and its preconception showing.^{45/}

IV. Effective Trade Regulation

In the arguments which have been made in support of the trade court we find a singular lack of basic facts or statistical material. In the first area of discussion we have seen that the advocates of the trade court argue that this is something which should be done. When we ask “why” we are told in effect that it should be done because it is the proper thing to do.

As to the second basic area of argument the advocates of the trade court declare that a court will be “better able to decide cases

^{39/}Task Force Report 3, 4.

^{40/}The questionnaire is contained in an unpublished mimeographed compilation, Part VI of the Report of the Task Force on Legal Services and Procedure, Appendices and Charts (February 1955).

^{41/}Freer, The Case Against the Trade Regulation Section of the Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637, 644 (1956); Fuchs, The Hoover Commission and Task Force Reports on Legal Services and Procedure, 31 Ind. L. J. 1, 21 (1955); Nutting, The Administrative Court, 30 N.Y.U. L. Rev. 1384, 1385 (1955); and Jaffe, Basic Issues: An Analysis, 30 N.Y.U. L. Rev. 1273, 1275, 1287 (1955).

^{42/}Task Force Report at 3.

^{43/}*Id* at 242.

^{44/}*Id* at 246.

^{45/}The Hoover Commission itself did not support the Task Force recommendations. In its Recommendation No. 50, it stated: “Congress should look into the feasibility of transferring to the courts certain judicial functions” Hoover Commission Report at 85 (my italics). In Recommendation No. 51: “An Administrative Court of the United States should be established” with a Tax Section, a Trade Section, and a Labor Section, but “It is further recommended that the Congress should study and determine whether the Trade and Labor Sections should have original or appellate jurisdiction.” *Id* at 87-8 (my italics). Actually, only 6 of the 12 Commission members “fully support” those uncertain recommendations. *Id* at 95.

and controversies." When we ask "how," we receive no answer at all.

I have already pointed out that the Supreme Court answer to the first question is contrary to that of the Trade Court advocates. Does the Supreme Court have any answer to the basic question in our second major area of debate?

Yes, the Supreme Court has answered this question in many Court cases involving most administrative tribunals.

For example:

(a) Securities and Exchange Commission. "... [The Commission's conclusion] is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of the administrative process. See *Republic Aviation Corp. v. Labor Board*, 324 U. S. 793, 800." ^{46/}

(b) Federal Trade Commission. "In the *Keppel* case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice. . . .

"In the present proceeding the Commission has exhibited the familiarity with the competitive problems before it which Congress originally anticipated the Commission would achieve from its experience." ^{47/}

(c) Secretary of Agriculture. "... a complicated, intricate pattern of operation. ... any attempt to change the pattern calls for the most expert consideration and administrative judgment--a task that courts are ill-fitted to perform." ^{48/}

The Supreme Court has also described the development of administrative tribunals as a "response to the felt need" ^{49/} for a new

^{46/} Justice Murphy, *Securities & Exchange Commission v. Chenery Corp., et al.*, 332 U.S. 194, 209 (1947).

^{47/} Justice Black, *Federal Trade Commission v. Cement Institute, et al.*, 333 U.S. 683, 720, 727 (1948).

^{48/} Justice Minton, *Swift & Co. v. United States, et al.*, 343 U.S. 373, 381 (1952).

^{49/} *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142 (1940).

instrument of government to overcome the inadequacy of traditional modes of government. Administrative law has sprung not from a sterile theory of government but from the pragmatic demands of dynamic society; as Dean Landis has said, "the insistence upon the compartmentalization of power along triadic lines gave way . . . to the exigencies of governance."^{50/} "No one was thinking," Professor Davis has added, "in terms of judiciary versus bureaucracy, capitalism versus socialism, or laissez-faire versus governmental interference. The early agencies were created because practical men were seeking practical answers to immediate problems."^{51/}

If anyone were to object to the combination of judicial, executive and legislative powers in administrative tribunals, one would expect the objection to come from those whose power was being usurped--the judiciary, the executive or the legislature.

But the contrary appears. One Supreme Court Justice considered FTC and similar tribunals "indispensable."^{52/} The lower courts appear to agree. In a poll recently conducted by the Senate Judiciary Committee, three out of every four judges replied that they opposed the creation of a special court for the trial of antitrust cases.^{53/}

The executive has indicated similar views. For example, a former President of the United States, in his veto message on an earlier administrative court bill stated:

"Court procedure is adapted to the intensive investigation of individual controversies. But it is impossible to subject the daily routine of fact-finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often the traps for the unwary and technical rules of evidence often prevent common sense determinations on information which would be regarded as adequate for any business decision. The increasing cost of competent legal advice and the necessity of relying upon lawyers to conduct court proceedings have made all laymen and most lawyers recognize the inappropriateness of entrusting routine processes of government to the outcome of never-ending lawsuits.

"The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials, and informal proceedings supersede rigid and formal pleadings and processes. A common-sense resort to usual and practical sources of information takes

^{50/}Landis, *The Administrative Process* 2 (1938).

^{51/}Davis, *Administrative Law* 10 (1951).

^{52/}Justice Jackson, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 482 (1952).

^{53/}S. Rep. No. 128, at page 10, 85th Cong., 1st Sess. (1957).

the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and the leading case."^{54/}

Also, a chief legal officer of the executive has expressed the same view. In 1937, the Attorney General of the United States, in response to the President's direction that the Attorney General investigate identical bids on steel products, replied:

"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 identical bids in the steel industry are produced, in part, by the basing point system of price determination. This system, long used in the steel industry, not only affects the manufacturers who utilize it and the consumers who are subject to it, but it also presents economic and social questions due to the fact that communities as well as plants have been located and developed with reference to the price structure developed by this system. The machinery of the courts is not geared to the handling of the social and economic factors necessarily involved; and many persons and communities seriously affected cannot be parties to a court proceeding under the Anti-trust 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."^{55/}

Thirdly, we look to the legislature. Far from objection, we find in Congress the greatest of appreciation for the role and efforts of the Federal Trade Commission in the trade regulation field. For a current example, a resolution was recently introduced requesting the Commission to take action in the field of newsprint.^{56/} Further Congressional reliance in recent years upon the administrative process, as it is exemplified at the Federal Trade Commission, is indicated by its lodging responsibility in the Commission for enforcement of the Wool, Fur, Flammable Fabrics and Oleomargarine Acts.^{57/}

^{54/}Franklin D. Roosevelt, 86 Cong. Rec. 13942 (1940).

^{55/}White House Press Release, April 27, 1937.

^{56/}"The concurrent resolution [S. Con. Res. 20] directing the Federal Trade Commission to proceed with such an inquiry, is the result of the hearings, and was voted unanimously by the full committee, in the belief that the inquiry, because of its scope, could best be conducted by the Commission." S. Rep. No. 135, 85th Cong., 1st Sess. 2 (1957).

^{57/}Wool Products Labeling Act of 1939, 54 Stat. 1128, 15 U.S.C. §§ 68-68j (1952); Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. §§ 69-69j (1952); Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. 1191-1200 (Supp. III 1956); Oleomargarine Act of 1950, 64 Stat. 21, amending the Federal Trade Commission Act.

The advocates of the trade court have hit upon and have attempted to make mileage out of the unique argument that the Federal Trade Commission has completed its task of uncovering and cataloging unfair methods of competition and that the entire matter is now ready to be returned to the courts for routine handling. 58/

As early as 1914, Congress answered this argument:

“It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances.” 59/

A later answer to this argument is found in the Cement case which has been referred to earlier:

“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. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an ‘unfair method of competition.’ This general language was deliberately left to the ‘Commission and the courts’ for definition because it was thought that ‘There is no limit to human inventiveness in this field’; that consequently, a definition that fitted practices known to lead towards an unlawful restraint of trade today would not fit tomorrow’s new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an ‘endless task.’ See Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 310-312, and congressional committee reports there quoted.” 60/

More recently, Justice Jackson expressed the same view in Federal Trade Commission v. Ruberoid Co. 61/ His dissenting opinion notes that in performing its more complex law-making tasks, Congress must sometimes “legislate in generalities and delegate the final detailed choices to some authority with considerable

58/ “Discretion will yield its harvest of rules and regulations and can then be put back in the box.” Jaffe, Basic Issues: An Analysis, 30 N.Y.U. L. Rev. 1273, 1285 (1955).

59/ Report of the Managers on the part of the House of “an act to create an interstate trade commission”, 51 Cong. Rec. 14924 (1914).

60/ Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683, 708 (1948).
61/ 343 U.S. 470, 480 (1952).

latitude to conform its orders to administrative as well as legislative policies."62/

For another recent and very cogent analysis of the problem, I am indebted to our first speaker of this session, who three years ago stated as follows:

"The driving impulse in creating this, and other administrative agencies, was the need for specialization and expertise. The complexities of modern American trade and industry had made it apparent that effective trade regulation could neither be accomplished by 'self-executing legislation nor the judicial process.' See F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 142 (1940); Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1221, n. 215 (1952).

"The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. 'Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.' It contemplated clarification and completion by the Federal Trade Commission."63/

Strangely, the only case cited by the opposition is the Cement Institute case. The inappropriateness of this case for the basis cited

62/Id at 484.

63/In the Matter of Pillsbury Mills, Inc., F.T.C. Docket No. 6000, Opinion by Chairman Howrey, 9 (1953).

See also Oppenheim, Foreward to Silver Anniversary Issue on the Federal Trade Commission, 8 Geo. Wash. L. Rev. 249, 255 (1940):

"The background is one of an agency that survived the faltering steps of infancy, emerged from the inevitable conflicts of adolescence and is now at the state of a maturing policy and increasing expertness in administration. It may thus be said that the fuller life of this administrative agency has begun well before the proverbial forty. Without overlooking differences in subject-matter, legislative policies, procedure and judicial attitudes, it is noteworthy that the sister Interstate Commerce Commission also passed through a period of trials and tribulations before it was awarded a Ph.D. degree in administrative efficiency. The more than fifty years of the Interstate Commerce Commission teaches the lesson that the element of time cannot be circumvented in the accumulation of administrative wisdom and experience. It is a continuous process of trial and error."

has already been pointed out by another writer.^{64/} The concern with the Commission's Cement Institute case expressed by the Task Force of the Hoover Commission suggests that perhaps they were troubled not by the Commission's lack of efficiency and lack of effectiveness in the Cement case but rather by the fact that in that case the Commission was too effective!

Let me conclude discussion on this point by stating that the argument of the trade court advocates is hardly a realistic recognition of the inventive genius of the American businessman. And let me assure you that no day goes by at the Federal Trade Commission without complaint of some completely new type of business promotional activity raising serious question of legality under Section 5 of the Federal Trade Commission Act.

The Commission's work is far from done. In fact, in many respects we often feel that we are just getting a good start.

V. The Unanswered Questions

I submit that the Hoover Commission Task Force, the Hoover Commission, the ABA Special Committee of 15, the ABA Section

^{64/}Freer, The Case Against the Trade Regulation Section of the Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637, 648-9 (1956).

"The Cement Institute Case

"The discussion of 'inefficiency of present methods' 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. 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.

"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 case, 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."

of Administrative Law, and the ABA House of Delegates have failed to establish any substantial foundation for the trade court proposal. I believe in fact that they have failed to fulfill any part of that burden which must be upon anyone who is arguing for a change in an established and effective way of doing business.

I should like to state a number of questions which the advocates of the trade court and my opponent here this morning have left unanswered:

1. Why the Federal Trade Commission?

The Hoover Commission Task Force recognized the Federal Trade Commission's "special competence"^{65/} and its role as a leader in carrying out the intent of the Administrative Procedure Act.^{66/} The record of the FTC before the courts must rank it at the top in the field of administrative law. In the last three fiscal years the Commission has been before the Supreme Court 4 times and on each of those 4 occasions the Supreme Court has endorsed the decision of the Commission, most recently, in the National Lead case^{67/}, which involved a zone pricing system. The Supreme Court by a vote of 9-0 affirmed the Commission's action and reversed the Court of Appeals on the significant point of its right to issue an effective order. In 8 other cases, the Supreme Court has denied certiorari sought by respondents. In all courts, the three-year record has been 60 cases; 54 victories.^{68/}

2. What will happen to the number of Federal Trade Commission cases?

The advocates of the trade court have argued that the establishment of such a court would have a beneficial effect upon informal procedures.^{69/} No reasons have been given us for this conclusion. Authorities in the field are unanimous in opposition to the argument. For example, the Attorney General's Committee in 1941 concluded:

"... [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

^{65/}Task Force Report at 252.

^{66/}Id at 140, quoted *supra*, note 28.

^{67/}*F.T.C. v. National Lead Company, et al.*, 25 U.S. L. Week 4144 (February 25, 1957).

^{68/}A further indication of "special competence" is the fact that many other nations have sent delegates to the United States from their law-making assemblies to study the Federal Trade Commission. Within the past 2-1/2 years these have included Canada, England, Western Germany, South Africa and the Netherlands.

^{69/}"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." Task Force Report at 254.

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."70/

Robert E. Freer, in his recent work on the same subject, stated:

"Experience in the field leads me to believe that exactly the opposite would occur; that infinitely more formal complaint cases would result 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."71/

Another authority, Professor Nutting, stated:

"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 agency a means of carrying out its policies which would not be so clearly available if the adjudicative function were vested in a separate body."72/

Since 1914, the Federal Trade Commission has issued a total of 4925 orders to cease and desist and since 1925 has approved 8870 stipulations wherein parties have agreed to terminate unlawful practices. Moreover, as indicated above, a large number of other cases involving technical violations or violations lacking public interest have been voluntarily terminated with assurance to the Commission that they would not be resumed.73/

70/Attorney General's Committee, Report on Administrative Procedure in Government Agencies 58-9 (1941).

71/Freer, *The Case Against the Trade Regulation Section of the Proposed Administrative Court*, 24 Geo. Wash. L. Rev. 637, 647 (1956). See also Attorney General's Committee Report at 58: "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."

72/Nutting, *The Administrative Court, Symposium on Hoover Commission*, 30 N.Y.U. L. Rev. 1384, 1387 (1955).

73/Mr. Freer has observed:

"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."

Freer, *op. cit. supra*, note 72, at 648.

3. What happens to the public interest?

A simple answer may be suggested for this question, since in the latest draft of the amended Federal Trade Commission Act, Section 5, circulated by the Special Committee, we find the words "public interest" stricken from the Federal Trade Commission Act.^{74/} The Commission now acts only in the public interest.^{75/} We have seen earlier that in 1956, 250 matters were closed because they involved purely private controversies. Does the striking of the words "public interest" mean that the Commission is now to become an instrument of private litigation?

4. What happens to the Robinson-Patman Act? I do not know the answer. However, there may be some significance in the fact that Count II of the Cement case, which is the only case referred to by the proponents of the court, charged a violation of the Robinson-Patman Act.

5. Is this an attack not upon the method of regulation but upon regulation itself?

This question will have to be answered by Congress. Personally, I do not look upon my opponent here this morning as a wolf in sheep's clothing, nor do I look upon his cause as a new horse of Troy, but I would nonetheless like to call to your attention the following statements by one of the most highly respected jurists of our day:

"... From the very beginning the administrative tribunal has faced the hostility of the legal profession . . .

"The administrative tribunal . . . is often penetrating into new fields where precedents do not exist. Its concern is with the future more than with the past, and it counts the probable progeny of its decisions as of more importance than their ancestry.

"... Those who dislike such activities of the government as regulation of the utility holding companies, of labor relations, or of the marketing of securities, rightly conceive that if they can destroy the administrative tribunal which enforces regulation,

^{74/}Sec. 5(b) of the Federal Trade Commission Act provides:

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint . . ."

^{75/}"Policy as to Private controversies. The Commission acts only in the public interest, against alleged unfair methods of competition or unfair, deceptive or monopolistic practices in commerce. It does not take action when the alleged violation of law is merely a matter of private controversy and does not tend adversely to affect the public." 16 CFR, 1955 Supp., 1.21.

they would destroy the whole plan of regulation itself. It may be said that the administrative tribunal is the heart of nearly every reform which attempts to give a new validity to the rights of large numbers of people on the one hand against powerful interests on the other.

" . . . The record of the administrative tribunal in review of actual cases . . . gives no support for intemperate attacks upon administrative agencies as generally, or often, usurping, partisan, arbitrary, ignorant, or of doubtful integrity . . . Each of these vices, when at times they do appear, may be matched by examples of the same vices in the judiciary.

" . . . we do not condemn the judicial process because judges err, but a large number of persons are condemning the administrative process just because administrators err.

" . . . The necessity for administrative tribunals is too apparent to permit the enemies of effective government to destroy them." ^{76/}

6. What happens to business ?

My answer to this question is suggested above. There will probably be twice as many cases and very little advice and guidance.

7. What happens to the legal profession ?

Specialized courts are usually served by specialized bars. At the present time, legal work before the Federal Trade Commission is shared by numerous law firms all over the country. ^{77/} In the last 100 complaint cases ^{78/} docketed by the Federal Trade Commission in 1956, the respondents were represented by 123 different law firms scattered throughout the country -- Wilmington, California; Seattle, Washington; Baraboo, Wisconsin; Muskegon, Michigan;

^{76/}Jackson, *The Administrative Process*, 5 *Journal of Social Philosophy* 143, 146-9 (1940).

^{77/}"Appearances--(a) Qualifications. (1) Members of the bar of a Federal Court, or the highest court of any State or Territory of the United States, may practice before the Commission.

(2) Any individual or member of a partnership named respondent in any proceeding before the Commission may appear on behalf of himself or of such partnership upon adequate identification. A respondent corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

* * * * *

(c) Notice of appearance. Any attorney desiring to appear before the Commission or a hearing examiner thereof, on behalf of a respondent in a particular proceeding, shall file with the Secretary of the Commission a written notice of such appearance, which shall contain a statement of such attorney's eligibility as provided in this rule. No other application shall be required for admission to practice, and no register of attorneys shall be maintained." 16 CFR, 1955 Supp., 3.29.

^{78/}Dockets 6602-6701.

Fort Worth, Texas; Louisville, Kentucky; Jacksonville, Florida; Hartford, Connecticut; Adams, Massachusetts; Woonsocket, Rhode Island, to name a few. 117 law firms each appeared in but one docketed case. Only 6 of the total of 123 law firms appeared in more than one case, and no law firm appeared in more than 3 cases. If the trade court proposal were adopted, I have a suspicion that this widely scattered representation before the Federal Trade Commission would soon become a thing of the past, as the trade court developed its own specialized trade bar.

I prefer the present wide representation and consider it a healthy thing for everybody concerned. What do you think?

8. What is to become of FTC's precedents and existing orders?

I do not know. I suspect that some of the more ardent proponents of the trade court hope to relitigate most of the Commission's legal precedents of nearly half a century.

9. Is FTC to become a courtroom prosecutor competing with the Department of Justice?

This, I strongly suspect would be the case, at least temporarily until the Attorney General could take steps to remedy this usurpation of his traditional powers.

10. What would happen to Section 5 of the Clayton Act? Would convictions in the trade court constitute a basis for treble damage suits?

I do not know.

11. Does the commerce court experience provide any guidance?

Many years ago in response to pressure by the American Bar Association, Congress created a specialized commerce court ^{79/} which was abolished after three years ^{80/} because of its poor performance record. The people supporting the trade court will argue that it is wholly different from the commerce court. But no amount of argument can erase the fact that the trade court, like the commerce court would be a specialized Constitutional court. Despite the specialization, the commerce court was found to be wrong with respect to 10 of its 12 decisions which were reviewed by the Supreme Court. Specialization is not enough. There must also be the expertness which comes from daily contact with a vast number of special problems.

The expertness of an administrative agency includes more than the expertness of the heads of the agency. The entire agency, through

^{79/}Act of June 18, 1910, c. 309, 36 Stat. 539.

^{80/}Act of October 22, 1913, c. 32, 38 Stat. 208, 219.

its specialized staff and experience, is the source of administrative expertness. It is this type of expertness which not even the heads of agencies claim to possess as individuals. This type of expertness, the combined total knowledge and experience of the members and employees of the agency, is the expertness not of one but of many. No judge, however specialized or able, can lay claim to this type of expertise.^{81/}

12. What happens to other Federal agencies under this proposal?

The answer here is easy -- confusion.^{82/} There will be a specialized court invading the jurisdiction of a number of administrative tribunals. In many cases under the applicable statutes there will be two tribunals dealing with the same type of problem and no one will know which one is to take precedence.

Apart from the confusion inherent in the current trade court proposal, it appears from the Task Force report that several other agencies eventually are slated to walk the plank. These are 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.

The Special Committee of 15 was more guarded than the Task Force in its handling of this delicate situation of future action.

^{81/}"We start, of course, from the premise that on a subject of transportation economics, such as this one, the Interstate Commerce Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal." Justice Douglas, *New York v. United States*, 331 U.S. 284, 328 (1947).

^{82/}See the following comment on an earlier bill to effectuate the Hoover Commission's proposals by giving a Trade Section of the Administrative Court jurisdiction to conduct proceedings, issue orders, etc., under Section 11 of the Clayton Act:

"The effect of transferring jurisdiction over Section 7 of the Clayton Act from the I.C.C. to the Administrative Court, in the case of common carriers, would be confusion at best -- at worst, divided and conflicting authority. In the first place, if Section 7 were not amended it still would not, by its very terms, apply to 'transactions duly consummated pursuant to authority given by' the Interstate Commerce Commission. Thus, the transfer of jurisdiction over Section 7 proceedings would have no effect but to confuse matters.

"However, if this proviso of Section 7 were repealed or if the Administrative Court were to assume jurisdiction over acquisitions by carriers despite the express terms of Section 7, the result would be a clear conflict between the Commission's authority under Section 5 of the Interstate Commerce Act and that of the Administrative Court. This recommendation of the Hoover Commission thus appears to have been made without sufficient analysis or real understanding of the interrelation of the two statutes." Report of Special Research Committee, 23 I.C.C. Prac. J. Section II, No. 2 at 26.

However, I assume that all members of the bar familiar with the two reports, and certainly the agencies concerned, will readily agree that if the proposal for the trade 'court is approved by the Congress, there will be an immediate campaign to accord similar treatment to the other agencies.

13. Is this trade court proposal merely an opening wedge in a campaign for ultimate destruction of the entire administrative process?

I do not know, but the task force states that it "considers the Administrative Court, which it proposes, not as an end to the process of removing judicial functions from administrative agencies, but as a first step in that direction."^{83/}

14. Are the two ABA proposals for a redraft of the Administrative Procedure Act and a trade court basically inconsistent?

Not being privy to the Grand Strategy, I would think so. One plan contemplates improvement and reform of the administrative process in the tradition of the first Administrative Procedure Act; the other would largely abandon the administrative process and further burden the courts.

15. What happens to state administrative law agencies?

I do not know.

16. What happens to the hearing examiners?

The answer to this question is made clear in the latest draft of legislation proposed by the Special Committee. My work on the President's Conference for Administrative Procedure convinced me that one of the most important problems in administrative procedure today concerns the status and the future of the hearing examiner. Blindly, the draft bill of the ABA would make the examiner position even more untenable since they would be removable at the will of the court.

17. What happens to the courts?

Here, again, there would be confusion because two sets of lower courts would be handling the same problems. I assume that the district courts would continue to handle complaints by the Department of Justice and by private individuals under Sections 4 and 15 of the Clayton Act. Additional confusion would result by reason of the fact that the trade court would be, in effect, a dual range appellate court superimposed upon the Nation's court system. The decision of the court Commissioner would be equivalent to a Federal

^{83/}Task Force Report at 34.

district court decision. That decision would be appealable to the trade court, a completely new appellate step. Little wonder it is then that three out of four judges oppose the trade court.^{84/}

Administrative tribunals and the courts are full-time, working co-partners in the administration of justice. The administrative tribunals daily handle a flood of tedious complex matters that would inundate the courts and paralyze the administration of justice.^{85/} By far the vast majority of matters before administrative agencies are settled without any contest whatsoever.^{86/} Where the parties desire to contest matters before the agency, the Administrative Procedure Act guarantees all of the protections of due process and justice. Administrative tribunals can and do make mistakes, but in all such cases the aggrieved parties have the right to go to court and to have such errors corrected. In such cases, the courts have always more than carefully scrutinized the action of the agency, and the courts have been quick to rectify any wrongs, procedural or otherwise, which have occurred. In this co-partnership, each partner has and performs his own best function. In recognition of this fact, there is a cordial relationship between the courts and the administrative tribunals. There is no rivalry.^{87/}

18. Why is it that serious studies have always pointed in the opposite direction than toward a trade court?

The two most important such studies are in the 1941 report ^{88/} of the Attorney General's Committee on Administrative Procedure

^{84/}11 for, 35 against; S. Rep. No. 128, at page 10, 85th Cong., 1st Sess. (1957).

^{85/}See statement of Chief Judge Knox, January 23, 1952, New York City, reprinted in CCH Antitrust Law Symposium 1952 at 15: "The thing that presently worries me is that antitrust litigations in the court over which I preside are monopolizing the time, energy and effort of judges who ought to be trying cases that have to do with the lame, the halt, and the blind, who are daily being deprived of the rights of simple justice."

The Attorney General's Conference on Court Congestion and Delay has recently focused attention on such problems. See remarks of Justice Brennan before the Federal Bar Association, November 29, 1956, Washington, D. C., reprinted in January 1957, Federal Bar News at 4.

^{86/}For example, in calendar year 1956, the Federal Trade Commission issued 185 cease and desist orders of which 132 were by consent settlement. In addition, 142 stipulations were issued without resort to formal proceedings.

^{87/}"... I it is important to remember that courts and administrative agencies are collaborative 'instrumentalities of justice' and not business rivals." Justice Frankfurter, *United States v. Ruzicka*, 329 U.S. 287, 295 (1946).

^{88/}On February 24, 1939, Attorney General Murphy appointed "The Attorney General's Committee on Administrative Procedure." The Committee concerned itself "with the procedures and the procedural practices of the administrative agencies, and the general methods provided for judicial review of their decisions." Its task was "to make a thorough and comprehensive study ... to detect existing deficiencies and to point the way toward improvement." Report at 1.

The Committee selected 28 Departments, Boards, Commissions, and Agencies (including the Federal Trade Commission) "which substantially affect persons outside the Government through the making of rules and regulations or the (Cont'd on page 27)

and the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws.^{89/}

19. My last question: Has the case for the trade court been established on the record, here or anywhere? You know my answer to this question.

Conclusion

In conclusion, a suggestion.

The suggestion is addressed to the American Bar Association. In the introductory portion of the paper I expressed a view that the American Bar Association may be neglecting one of its most important functions. That function is the application of "knowledge and experience in the field of law to the promotion of the public good."

In adopting the trade court idea, I suggest that the American Bar Association has been guilty of a recurrence or possibly even a

(Continued from page 26) adjudication of rights." The Committee assigned to a staff of lawyer-investigators the task of studying the procedure of these agencies. The staff interviewed agency officials, 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.

The reports of the staff, after final revision, were published in a series of 27 monographs and widely distributed. On six different days in 1940, the Committee held public hearings to receive opinions on administrative procedure and comment on the monographs. Notices of the hearings, as well as of the Committee's readiness to receive written communications, were widely published, and, in addition, over 100,000 copies of the notices were sent individually to persons whose presence on various lists indicated some measure of interest in the administrative problems.

Consideration was given to the testimony of the various persons who appeared at the public hearings, to the many communications received by the Committee, and to published commentaries on administrative practices. Committee meetings other than those in connection with the public hearings, were held in March, May, October, November, and December of 1939, February, March, April, June, October, November, and December of 1940, and January 1941.

In its Report dated January 22, 1941, at 60, the Committee concluded: "... complete separation of functions would make enforcement more difficult and would not be of compensating benefit to private interests."

^{89/}The Attorney General's National Committee to Study the Antitrust Laws, appointed August 27, 1953, worked some 19 months. It included government officials, academicians, and lawyers who counsel all sizes and types of business enterprise. Although the Committee was concerned basically with substantive antitrust law, its Report includes a chapter on Antitrust Administration and Enforcement with sections on the Department of Justice, the Federal Trade Commission, and their Related Jurisdiction. The Committee stated at 375 of its Report (1955):

"This Committee indorses this goal of 'efficient cooperation' through dual enforcement. Accordingly, we reject two suggestions equally drastic--on the one hand, to abolish the Commission's antitrust function--or, on the other, to transfer from the Department to the Commission all antitrust matters. Rather, we focus attention on means for assuring achievement of the two agencies' joint task."

continuation of its 1887 preoccupation with personal preference and unreasoning theory rather than with the best interests and practical needs of the citizens. The current trade court proposal springs not only from a lack of study, a lack of analysis, both factual and legal, but also a lack of recognition of what is best for the public good. I strongly urge the American Bar Association and each of its members to ponder this suggestion.

While the administrative process has exhibited growing pains and failings just as the courts have done, there has been throughout the years a steady improvement in character, in responsibility and in value. I believe it is our duty as Federal lawyers on both sides of the counsel table to insure that this steady improvement continues.

In working with the President's Conference on Administrative Procedure, I have had occasion to review comments and statements on administrative proceedings made by members of the bar throughout the nation. I am still amazed at what those statements have shown--that throughout our bar there is a growing awareness of the importance of administrative law and a remarkable competence to deal with that body of law.

I would like to conclude this argument with one thought. It is this: Administrative law will grow in wisdom, will be finally purged of its inadequacies only if the organized bar directs toward the problems of administrative law the same attention and devotion which it has heretofore directed toward courtroom practice. In a branch of law which today affects more persons and more rights than all the courtrooms of our land, the bar can do no less.