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STATEMENT BY
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BEFORE A MEETING OF THE
DISTRICT OF COLUMBIA BAR ASSOCIATION
MAY 8, 1962
ON THE
ADMINISTRATIVE COURT PROPOSAL

INTRODUCTION

Our good friend, Courts Oulahan, advised me that the subject for discussion today would be:

> "Whither the Federal Regulatory Agency - A frank evaluation of the current status of Federal Regulatory Agencies and proposals for their reorganization or modification."

He suggested that I discuss the proposition that a Trade Court be established with the effect of replacing the Federal Trade Commission and perhaps other administrative agencies. Of course he suspected that I, as others at the Federal Trade Commission, would oppose any such proposal.

Perhaps we at the Federal Trade Commission are a bit biased in favor of maintaining the Agency as it is. However, I wonder whether our bias in that direction is really so great as the bias and lack of objectivity evidenced by many of the practicing lawyers supporting the proposal for the establishment of administrative courts. It is clear that bias and lack of objectivity have narrowed their perspective

to the point that they can think of the regulation of commerce by the Federal government only through the adjudication of "cases and controversies" by tribunals established as a part of the Federal judiciary. They would empower Federal District Courts to hear claims for Social Security benefits, veterans claims, questions under farm legislation providing for the establishment of quotas, and a host of other matters which must be handled from day to day unless we are to experience a complete breakdown in the government and suffer the pain of anarchy.

In the past the practicing lawyers who had become quite accustomed to the law courts were biased and lacked objectivity about the advent of courts of equity. However, despite the protests, courts of equity came into being and today are recognized as indispensable. The practicing attorneys of this day who have become accustomed to courts of equity would not destroy them solely for the sake of law courts, as was proposed in the past. It is hoped that members of the Bar who follow us will likewise see the need and the logic for maintaining administrative regulatory agencies.

A CONTEXT FOR DISCUSSION

I speak as a member of the Federal Trade Commission, a unique independent agency. Under our organic statute the broad spectrum of American business is subject to regulation. The authority which compels us to act is embodied in a single sentence, constitutional in its simplicity: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." 1/

No more specific criterion was set by the Congress, which in its wisdom understood that "there is no limit to human inventiveness in this field." 2/ Indeed,"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." 3/ It would be an "endless task" 4/ for Congress to frame precise definitions of unfair conduct.

While the Court is the final arbiter in determining whether any given practice is unfair, 5/ "the precise impact of a particular practice on the trade is for the Commission, not the courts, to determine". 6/ For it was realized that "the point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies

of a particular situation, trade practices, or the practical requirements of the business in question . . ." 7/

The great purpose of the Federal Trade Commission Act is preventive in nature. It is, in a large sense, totally unlike the Sherman Act under which individuals may be imprisoned. 8/ Feeling the daily pulse of business this Commission must curb those whose unfair methods threaten to destroy their competitors. It must stop monopoly at the "threshold." 9/ Small business is to be protected "against giant competitors". 10/ Competition is to be made "stronger in its fight against monopoly". 11/ We are not to wait until the unhealthy situation that may give rise to a Sherman Act criminal violation occurs, for we know at that point the wrong may not be cured no matter how harsh the remedy. The Commission's function is the prevention of diseased business conditions. Mr. Justice Brandeis long ago said:

> The task of the Commission was to protect competitive business from <u>further</u> inroads by monopoly. It was to be ever vigilant. If it discovered that any business concern had used any practice which would be likely to result in public injury--because in its nature it would tend to aid or develop into a restraint of trade--the Commission was directed to intervene, before any act should be done or condition arise violative of the Anti-Trust Act. * * * Its action was to be

> prophylactic. Its purpose in respect to restraints of trade was prevention of diseased business conditions, not cure. 12/

It is in this context that I discuss the Trade Court proposal.

II

THE ARGUMENT FOR THE TRADE COURT

In the disposition of cases speed and a flexible procedure are important considerations. The Federal courts have done much to expedite the handling of their docket. 13/ Administrative agencies have done comparatively little. 14/ Look, say the critics, how long it took the Federal Trade Commission to take the liver out of Carter's pills. 15/ The time has come, the public and the Bar are told, to reform the administrative agency which has failed in its primary task, the swift, just determination of litigated matters. To this particular breed of reformers the cure is the creation of a Trade Court. 16/ The adjudication of issues would be removed from the Commission to the judiciary. And for the Federal Trade Commission some of the reformers would have the prosecution conducted by the Department of Justice. 17/

III

A PURPOSE BEYOND SPEED AND FLEXIBILITY: CONTINUING RESPONSIBILITY

The Trade Court proposal, although easy to understand, rests upon faulty logic. Speed and a flexible procedure were

not the dominant reasons for the creation of the Federal Trade Commission. Indeed, Henderson in his authoritative work, The Federal Trade Commission, 18/ assumed the absence of these characteristics when he asked: "If neither perfect justice, nor promptness and speed were the guiding considerations in devising the Commission's procedure, the reader may well ask what they were. Why was an administrative procedure adopted, instead of leaving the matter to the courts according to the traditional method?" 19/ Answering his own question Henderson stated:

> The legislation was designed to protect the public interest in free and fair competition. It was felt that this paramount interest might not be adequately represented by private litigants or by the usual prosecuting agencies. In a sense, of course, a court represents the public interest in administering a statute, but it has no continuing duty to see that the law is enforced. It is the court's duty to decide cases as they come before it, but if no indictments or civil actions are brought, and the law becomes a dead letter, the court cannot be blamed. An administrative body, on the other hand, has a continuing responsibility for results. It must ferret out violations, initiate proceedings, and adopt whatever proper methods are necessary to enforce compliance with the law. As to the Department of Justice, it is already overburdened with other work, and moreover it is its traditional policy to act as a litigating department, rather than as an agency charged with discovering violations of law. Full responsibility was therefore placed in a specialized commission, directly charged with obtaining the results which Congress desired.

From this point of view, the Federal Trade Commission is in effect a specialized prosecuting agency, authorized to initiate and conduct proceedings in the public interest in a specialized and limited field. Since the Commission's order can be made effective only through the courts, it is perhaps more correct to say that it is an agency endowed with the faculty of creating, of its own volition, controversies over which the Circuit Courts of Appeals can take original jurisdiction in proper proceedings.

This is only half the story, however. The Commission is also endowed with the faculty of making, under certain conditions, findings which the courts must respect if they are supported by testimony. This faculty alone differentiates the Commission from a mere prosecuting agency, and gives it in a limited way a judicial character. The reason for conferring upon the Commission this typically judicial function must have been that Congress expected that the problems which would be encountered would be of a technical and specialized character, calling for experience and training which a court might not possess, but which could be found in a commission especially selected for the purpose, and authorized to employ technical experts as well as lawyers for its guidance. It was doubtless the belief of Congress that the Commission could perform more satisfactorily than a court the task of making findings of fact in the special field over which it was given jurisdiction. 20/ (Emphasis Added)

IV

THE RELATIONSHIP OF A CASE TO THE TOTAL PROGRAM OF COMMISSION ENFORCEMENT

Basic to the Trade Court proposal is the assumption that adjudication has no relationship to an agency's total

program. Thus, the argument runs, once a "body of law becomes rigid it should be administered either by general or specialized courts". 21/ Dean Nutting replied to this proposition: "It may be more desirable to retain the administration of the definitely developed rules within the agency as an aid to the development of its total program than to turn them over to courts simply because they are settled enough for courts to understand them." 22/

How right Dean Nutting is! This the Federal Trade Commission has proved. Trade Practice Conference Rules and Guides have been formulated for the benefit of the businessman. 23/ In ordinary language they define what he may or may not do. They attempt to give precise content to accepted law thereby forestalling unnecessary litigation. Soon, perhaps, these tools may be supplemented by formal announcements of Commission policy. 24/

Adjudication indeed is tied to the Commission's whole regulatory process. To separate it would destroy effective 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." 25/

As early as 1941 this factor was recognized and emphasized. Said the Final Report of The Attorney General's Committee on Administrative Procedure: ". . . 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." 26/

In its amended Rules of Practice the Federal Trade Commission has given priority to a new method for the informal disposition of cases. 27/ The Commission will notify a respondent of its intention to issue a complaint. Specifically, a copy of a proposed complaint and order are forwarded to the respondent. He is offered the opportunity of settling the contested issues without a formal hearing by negotiating a consent agreement with the Commission's new Office of Consent Orders. He must, however, evidence

his desire to settle within ten days after receipt of the proposed complaint and order. And within 30 days thereafter the agreement must be entered or else the complaint will be formally issued. As our Chairman stated: "The entire process of formulating consent orders has been removed from the province of the hearing examiner. That which occupied 70% of the examiners' dockets has been transferred to the staff. Clogged calendars which facilitated delay have been substantially freed." 28/

Beyond form, the method of enforcement, there is substance. Few litigated cases from administrative agencies such as the Federal Trade Commission involve solely legal questions; most contain questions of policy. In the words of Judge Friendly, a distinguished member of the judiciary: "The line between policy making and adjudication is altogether too shadowy to afford a basis for separation -- unless adjudication is limited to those cases, too few to be of concern, in which the only problem is whether the facts require the application of some specific rule of law. And the proposal /ed. for a Trade Court/ would destroy what is one of the greatest merits of the administrative agency, its combination of legislative, executive, and judicial attributes." 29/

Consider, Judge Friendly said, the National Labor Relations Board, an agency similar to the Federal Trade Commission in that it is charged with preventing unfair labor practices. The Hoover Commission deemed the finding of an unfair labor practice as primarily a judicial act. 30/ Judge Friendly said:

> Take the problem of union-operated hiring halls. After years of dealing with this on the basis of investigating whether discrimination was practiced in each case, the NLRB decided on a different tack. In the Mountain Pacific case, 31/ it announced that its experience had led it to conclude that any exclusive union hiring hall was discriminatory unless the hall displayed prescribed signs advising applicants of their legal rights. Certainly this is policy, and it smacks of legislation rather than adjudication. But, apart from the question of retroactivity, which led the Ninth Circuit to refuse to permit its application to the past, 32/ and without commenting on the merits of the particular ruling, is this not, as the Court of Appeals intimated, the type of thing that agencies with expert knowledge of and responsibility for a particular field ought to do? 33/ Also, even when the existence of an unfair labor practice is solely a question of fact, there is the important question of the remedy. By imposing ineffective remedies an administrative court could effectively frustrate policy, whereas by imposing penalties out of relation to the crime it might build up resentments which would lead to a demand for legislative change that a more expert administrator would have avoided. 34/

V

SPEED, FLEXIBILITY, AND SELECTIVITY

As I have indicated speed and flexibility were not the prime reasons for the creation of the Federal Trade Commission. 35/ Yet, I have conceded that they are important to an agency. I also concede that history dramatizes the minimal efforts which has been expended to bring these qualities to the administrative process. 36/ The Trade Court proponents, however, have caused inaction to mean inherent weakness: The administrative process, they argue, is not capable of speed and flexibility, I answer: The fault has not been in the system, but in a failure to make full use of the system.

At the Federal Trade Commission we have tried to remedy the fault in part with our amended Rules of Practice and Procedure. It would, I submit, be difficult for the judiciary to duplicate our consent decree program where expeditious handling is a mandate. But this is not the end of our efforts. No longer will hearings be conducted at intervals. Both counsel supporting the complaint and respondent must be prepared when the case goes to trial. For the rules now declare: "Hearings shall proceed

with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded." 37/

To achieve this end the Hearing Examiner is required to hold pre-hearing conferences "where it appears probable that the hearing will extend for more than three days . . ." 38/ The way has been opened to bring the highly developed Federal pre-trial techniques to the Commission. Now discovery is the rule, not the exception.

From inception to completion speed is requisite. Delay has been eliminated in the filing of proposed findings, for the Hearing Examiner, except under unusual circumstances, is required to file his initial decision within ninety days after completion of the reception of evidence. 39/ More, the structures of certorari have been imposed on interlocutory 40/ as well as appeals from initial decision. 41/ And when cases ultimately come before the Commission I can assure you they will be handled with dispatch.

Surely the administrative process is flexible enough to treat litigated issues with speed. Yet, what does this mean for the Federal Trade Commission? What do its new

Rules of Practice imply? The answer may be summed up in a word -- selectivity. With limited manpower and limited funds we cannot hope to police all of the vast American economy with the weapon of a cease and desist order. Our cases must be chosen with care, with a view toward total enforcement of the statutes the Commission administers. The future must see the Commission carefully ascertaining how it may best serve the public interest. How different this is from a prosecuting agency which might be concerned primarily with the game of complaint statistics.

The Federal Trade Commission may not wait and chose from the contents of daily mail deliveries. Limited resources combined with a statutory goal to uproot unfair practices before they become predatory will not allow such passive action. Our Commission must plan its activities; it must look to the future. And it was this thought which led us to create an Office of Program Review. We are taking a hard look at ourselves and our responsibilities, which we intend to meet.

VI

IMPARTIALITY: A REASON FOR THE CREATION OF THE TRADE COURT

In December of 1956 Mr. Ashley Sellers debated the question of the Trade Court before this Bar Association. 42/

The administrative agency, he argued, inherently is incapable of judging an issue impartially. Said Mr. Sellers: "No man can be a judge in his own case. Recognition of this principle has been in back of all the recent endeavors to provide internal separation of functions within Federal administrative agencies, particularly following the passage of the Administrative Procedure Act of 1946. But internal separation, however complete, can be no substitute for complete separation. The quality of justice will be strengthened by the extent to which we completely remove certain 'cases and controversies' from the Federal administrative agencies to the courts presided over by judges whose sole professional responsibility shall be to apply and interpret the Constitution and the law to complex fact situations." 43/

For this proposition, this sweeping condemnation, Mr. Sellers offered no evidence save an implied principle of natural law. Perhaps, he was relying on a similar statement in a British Committee report of the 1930's. Cited by Professor Jaffee the report declared: ". . . the first and fundamental principle of natural justice" is that a "man may not be a judge in his own cause." 44/ Professor Jaffee in 1939 answered the argument in words that deserve to be repeated:

The Committee relies on the "principle of natural justice" that a man may not be judge in his own cause. This, as the Committee admits, traditionally has in view a monetary interest. But "we think it is clear that bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest." It may well be that a sincere conviction as to public policy predisposes the mind where it might otherwise be in a position of doubt or balance on a conflict of fact or a choice of applicable principle. But to announce out of hand that such a state of mind constitutes a "disqualification" is in part Quixotic and in part non-sequitur. A strong and sincere conviction as to certain laws may exist and undoubtedly often does exist in judges. During prohibition, for example, there must have been great numbers of judges who disapproved of the law just as many disapprove of the antitrust laws. Juries, notoriously, may believe that plaintiffs should recover from insured defendants regardless of negligence. If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial-constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others looked upon Mr. Justice Holmes' prejudices in favor of free speech as the most precious of safeguards. The common man juror's prejudice against insurance companies is probably the herald of a desirable change in the accident law. Pecuniary interest in the judge brings into any one litigation a purely capricious, fortuitous bias having no relation to the competing social values in the case before him. It does not follow that a hatred of monopoly is inappropriate in a Federal Trade Commissioner or of espionage and employer violence in a Labor Board Commissioner. It must be admitted that such a man is liable to find monopoly or espionage where an indifferent man would be in doubt. Put in

another way it might be said that presumptions arise from special experience and conviction. Presumptions may be useful instruments of law reform. The administrator in daily contact with a specific subject matter -- the guardian and promotor of a new, experimental social policy -- does not merely find facts; he creates new attitudes toward situations, he calls upon the person before him to explain why a set of facts which arouse in him suspicion does not violate the policy of the state. It should be remembered that there is ordinarily no question of punishment for a past failure. In the criminal field presumptions tend to cut down constitutional protection but where the consequence of failure to "explain" is the requirement of repatterning future action we can complain of the presumption only if its operation bears no reasonable relation to achieving the general statutory purpose. 45/
(Emphasis Added)

VII

ARTICLE III COURTS: A QUESTION OF DELEGATION

The Trade Court proponents would have established a Constitutional rather than a legislative tribunal. As such the requirements of Article 3 of the Constitution take hold. The Trade Court would be permitted only to resolve "cases or controversies".

It would be well for the Trade Court proponents to refresh their recollection as to the significant import of the phrase, "cases or controversies". They might benefit from recalling the language of Muskrat v. United States 46/ where the Congress attempted to obtain a judicial declaration of a statute's validity. Mr. Justice Day for the Court held:

[The] judicial power . . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy", to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be

> executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution. 47/

What is the nature of a Commission cease and desist order? Is it the same as a judicial decision? In Federal Trade Commission v. Cement Institute 48/ the Supreme Court considered, inter alia, the admissibility of certain evidence. It held that ". . . administrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence . . . And of course rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where 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." 49/

The Commission concerns itself with the future. The past is of value only to the extent that it serves as a guide of what will be, for the Commission's task is to

convert actual legislation from a static into a dynamic condition. A court, on the other hand, is concerned primarily with the past, with dispensing justice for the wrongs that have been done. Long ago the Seventh Circuit made this clear in Sears, Roebuck & Co. v. Federal Trade Commission 50/ when it held:

> With the increasing complexity of human activities many situations arise where governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court. 51/

The Federal Trade Commission in the language of the law acts in both a quasi-legislative and quasi-judicial capacity in deciding any issue. One function cannot be separated from the other. A court has but one characteristic; it may treat only that which is judicial, a case or a controversy. The structure of our Government will permit nothing else. The Congress, the President, and the Judiciary each have their separate obligations. A check and balance system requires each to stay within its proscribed area of authority. An Article III Court constitutionally is incapable of assuming the adjudicatory duties of the Federal Trade Commission. Its proponents would gain much from restudying Humphrey's Executor v. United States. 52/ The President unsuccessfully tried to fire an FTC Commissioner. Denying the President this right the Court declared:

> The Commission is to be nonpartisan; and it 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. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience". Illinois Central R. Co. v. Interstate Commerce Comm'n., 206 U.S. 441, 454; Standard Oil Co. v. United States, 283 U.S. 235, 238-239. 53/

VIII

A QUESTION OF ENFORCEMENT

President Roosevelt sought the dismissal of Commissioner Humphrey, said one source, because his militant "trust-buster" policy would have been seriously crippled if the Commission were controlled by the deciding voice of a friend of big business. 54/ This, it was contended, dramatically illustrated the need to vest enforcement of Commission law in the Executive, specifically, in the Department of Justice. 55/ Responsible action can only come, the argument runs, under the general managership of the President. To the Humphrey illustration Professor Jaffe pointedly replied:

> Subsequent events have so laced up this particular situation with irony that it is difficult to keep the requisite straight face in considering it. The Commission was indeed won over to trust-busting when the President became very shortly enamoured of the NIRA and now the Department of Justice, at least in the person of Thurman Arnold, is directly opposed to the Commission's trust-busting philosophy. There is undoubtedly in the Government no coordinated antitrust policy. The President has not yet formulated one, the country has not and Congress has not. In the meantime in so far as the law speaks, the Commission rather than Mr. Arnold seems to express its obvious sense. Would it in this juncture be such a gain if the President were empowered to silence the tongue and stay the hand of the Commission? I suggest that the theory of the "general manager" will not provide the answer. 56/

Indeed, it is interesting to note the careful deliberations which Congress gave the issue of enforcement when the Federal Trade Commission Act was under consideration. Powerful leaders were disillusioned with Justice Department prosecution; the public interest to them was not being served. They spoke of the possibility of relieving the Justice Department of its antitrust duties. In 1914, Senator Newlands declared:

> "I am attacking this system of turning over the administration of our legislation regarding interstate trade to the Attorney General's office or to courts, when we should create a great administrative tribunal like the Interstate Commerce Commission, charged with powers over interstate trade similar to those possessed by that tribunal regarding transportation . . .if such a commission had been organized 23 years ago when the antitrust law was passed, these vast accumulations of menacing capital would have been prevented, that all the advantages of combination of capital would have been secured without the attendant abuses, and that we would have been saved the economic wrench that is now to take place through the dissolution of these giant combinations and the restoration of their constituent elements. 57/
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> "I was at first inclined following the views which I have frequently expressed to include a provision transferring the enforcement of the Sherman Antitrust Act from the Attorney General's Office to this commission for the reason that prior to the administration of the present incumbent the enforcement

> of the Sherman Act was fitful, subject to political influences, and likely to be affected by any political or financial exigency. But as the Attorney General's office is now proceeding . . . to break up the existing trusts, I thought it best not to complicate the work of the new commission with the administration of the Sherman Act. 58/

IX

CONCLUSION

For almost fifty years the Federal Trade Commission has existed. From the mistakes which were made, and there have been many, lessons have come. We can learn from the past. It was this view which led the Federal Trade Commission to adopt its new Rules of Practice and Procedure. Yet, the task of creating an ever more effective Commission did not end here. Indeed, it will never end. We must always undergo the process of introspection, of looking within ourselves to our failings so that they may be cured. In this endeavor the Bar can and should be of assistance. Mr. Freer, a former Chairman of the Federal Trade Commission, put it this way:

> 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. 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. 59/

FOOTNOTES

1/ 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 41 (1958).

2/ Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 310-12 (1933).

3/ Federal Trade Commission v. Cement Institute, 334 U.S. 683, 689-90 (1948).

4/ 291 U.S. at 310-12.

5/ Federal Trade Commission v. Gratz, 253 U.S. 421 (1920).

6/ Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 396 (1953).

7/ Ibid.

8/ United States v. McDonough Co., 180 F. Supp. 511 (S.D. Ohio 1959). Four officials of hand implement manufacturing concerns were each sentenced to 90 days in jail. One took his life. Time, Dec. 21, 1959, p. 76.

9/ Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650 (1931).

10/ Ibid.

11/ Ibid.

12/ Federal Trade Commission v. Gratz, 253 U.S. 421, dissenting opinion, at 435.

13/ Address of Hon. Irving R. Kaufman, Judge, United States District Court, Southern District of New York, at the 12th Anniversary Dinner of the Federal Trial Examiners Conference, Silver Spring, Maryland, May 7, 1959. The development of effective pre-trial techniques was the concrete example offered by Judge Kaufman. In the hands of the judiciary it has become a potent weapon for expediting cases. In the hands of the agency, the Judge argued, it has been but little used.

14/ Id. at 12: "If there is anything which symbolizes the disillusion of the proponents of the administrative agency it is the factors of delay, expense and volume of record. The agencies, it was proclaimed, would avoid the outmoded rigidities of the courts; they would do what it was believed the courts could never do -- have flexible procedures which would afford speedy determinations. The courts took these criticisms to heart and they went and proved that they could meet the challenge of modern day litigation. The shoe is now on the other foot and we are all waiting to see if the agencies can rise to the challenge."

See also, Bond, The Use of Pre-Trial Techniques in Administrative Hearings, 73 F.C.C. Bar J., 55, 56-57 (1953): "The uncomfortable truth is that whereas the processes of the courts were being rapidly improved and expedited, the hearing processes of the agencies and departments of the federal government remained virtually at a standstill."

15/ Sixteen years were consumed in the litigation of Carter Products, Inc. v. Federal Trade Commission, 268 F.2d 461 (9th Cir. 1959), cert. denied. For comments relating to prolonged litigation see, Friendly, A Look At The Federal Administrative Agencies, 60 Colum. L. Rev. 429, 433 (1960).

16/ An excellent article on the question of the Trade Court was written by Robert E. Freer, former Chairman of the Federal Trade Commission, Freer, The Case Against The Trade Regulation Section Of The Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637 (1956). Mr. Freer developed the background for the Trade Court proposal. Id. at 640: "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.' (1)/

"The Hoover Commission report was based almost entirely upon a subsequently published report of its Task Force on Legal Services and Procedure. (2)/

16/ (Continued)

"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.' (3)/ 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."

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(1)/ Commission On Organization of the Executive Branch of the Government, Report On Legal Services and Procedure, Recommendation No. 51, 87-88 (1955).

(2)/ Commission On Organization of the Executive Branch of the Government, Task Force Report On Legal Services and Procedure (1955). Although the Task Force Report was prepared earlier, publication was, apparently for tactical reasons, delayed until after publication of the Hoover Commission Report.

(3)/ Report of the Special Committee On Legal Services and Procedure To The 1956 Midyear Meeting of the House of Delegates 42 (1956).

17/ Id. at 641-42. "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, (1)/ its authority to prosecute complaints. While, under Section 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, (2)/ 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 the fix the compensation of such attorneys . . . as it may from time to time find necessary for the proper performance of its duties. . . .' (3)/

17/ (Continued)

"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. (4)/"

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(1)/ "In any proceeding before the Administrative Court, or any Section, division, or judge thereof, the United States shall be represented either by the 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.

(2)/ 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."

17/ (Continued)

(3)/ 15 U.S.C. § 42 (1952).

(4)/ 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).

18/ Henderson, The Federal Trade Commission (1925).

19/ Id. at 91.

20/ Id. at 91-92. The author repeated this position in his concluding chapter: ". . . it was desired that the Commission should represent the public interest, and should be in a position to take the initiative in behalf of the public, where private parties might prefer to let matters rest. In part, also, it was because the legislators feared that the Commission would be overwhelmed with a host of petty squabbles, and therefore provided that the formal machinery of the Commission could be set in motion only by the Commission itself, where the case seemed to be of sufficient importance. I can conceive of no other valid reasons than the two which I have mentioned. Certainly the procedure was not adopted because it was desired to subject the persons complained of to the jurisdiction of a tribunal which would be predisposed to rule against them." Id. at 329.

21/ Nutting, The Administrative Court, 30 N.Y.U.L. Rev. 1384, 1387 (1955).

22/ Ibid.

23/ These techniques were praised by Landis, Report on Regulatory Agencies to the President-Elect (1960). Anti-deceptive Guides issued by the Commission include Cigarette Advertising Guides (1955); Guides against Deceptive Pricing (1958); and Guides for Advertising Fallout Shelters (1961). Guides also have been issued interpreting Sections 2(d) and (e) of the Amended Clayton Act. Guides for Advertising Allowances and Services (May 19, 1960).

24/ See my address, "Uncertainties Under Our Antimonopoly Laws", before the Winter Conference of the American Marketing Association, New York, N.Y., Dec. 27, 1961.

25/ Nutting, The Administrative Court, 30 N.Y.U.L.Rev. 1384, 1387 (1955).

26/ Final Report of The Attorney-General's Committee on Administrative Procedure, 58-59 (1941). The report continued: "These factors are thrown into clear relief if it is recalled that the statutory prohibitions which administrative agencies are commonly called upon to enforce are not and cannot be as clear and precise as a promissory note or bill of sale. They necessarily describe in general terms, and with emphasis upon tendency or effect, those practices which are forbidden. It is and must be left to the administrative agencies to apply these general prohibitions to a great variety of conduct. As this is done, it is expected that the general terms will take on concreteness and that subsidiary principles may be worked out by which certain types of conduct will be known as improper and others as permissible. To do this involves the investigation of many informal complaints and the settlement by agreement of many situations where the practices may have been innocently or inadvertently or not consistently engaged in. To divorce entirely the investigating and enforcing arm from the deciding arm, may well impart additional confusion to this process. Even in the field of taxes, where historically the aim has been at precision, some confusion results from the separation of the collecting officials from the deciding officials. In many claims one person may take one view and another person a different view of the meaning of a statute, with resultant uncertainty and hardship for some taxpayers until the matter has been straightened out in the courts. The danger is even greater with statutes whose content is more vague. It seems most desirable that within the administrative field itself, interpretations should not have to be evolved by a series of litigations in which the enforcing branch endeavors to ascertain the mind of the deciding branch. For this would result, not merely in added difficulty of enforcement, which might be warranted if it were necessary to assure fairness, but in added burdens upon many private interests, who would be unnecessarily harassed by complaints and trials." [Emphasis added.] ibid.

27/ 16 C.F.R. § § 3.1 - 3.4 (July 6, 1961).

28/ Chairman Dixon, "The Federal Trade Commission in 1961", before the section on antitrust law of the New York State Bar Association, New York, N.Y., Jan. 25, 1962, at 3.

29/ Friendly, A Look at the Federal Administrative Agencies, 60 Colum. L. Rev. 429, 441 (1960).

30/ Commission on Organization of the Executive Branch of the Government, Legal Services and Procedures - A Report To The Congress, 87 (1955).

31/ Mountain Pac. Chapter, 119 N.L.R.B. 883, 893 (1957).

32/ N.L.R.B. v. Mountain Pac. Chapter, 270 F. 2d 424, 432 (9th Cir. 1959).

33/ See Mr. Justice Frankfurter's opinion in SEC v. Chenery Corp., 318 U.S. 80, 92-93 (1943).

34/ Friendly, A Look At The Federal Administrative Agencies, 60 Colum. 429, 442-43 (1960).

35/ See Part III, supra.

36/ Henderson, The Federal Trade Commission, 337 (1925). Judge Friendly wrote: " . . . I wonder whether law students still are taught, as we were, to contrast the celerity of those Mercury-like and wing-footed messengers, the administrative agencies, with the creeping and cumbersome processes of the courts. If they are, they have a rude awakening ahead, on both counts. To borrow Mr. Churchill's phrase, the regulatory agencies often tolerate delays up with which the judiciary would not put." Note 34, supra. at 432.

37/ 16 C.F.R. § 4.14 (d) (July 6, 1961).

38/ 16 C.F.R. §4.8 (July 6, 1961). The matters which must be considered in the conference include " (1) simplification and clarification of the issues; (2) necessity or desirability of amendments to pleadings, subject, however, to the provisions § 4.7 (a)(1); (3) stipulations, admissions of fact and of the contents and authenticity of documents; (4) expedition in the presentation of evidence, including, but not limited to, restriction of the number of expert, economic or technical witnesses; and (5) such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses or furnishing for inspection or copying of non-privileged documents, papers, books or other physical exhibits, which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody or control of any party to the proceeding." ibid.

39/ 16 C.F.R. § 4.19(a) (July 6, 1961).

40/ 16 C.F.R. § 4.18 (July 6, 1961). For both appeals from interlocutory rulings and initial decisions permission must be obtained from the Commission. The form for obtaining this is a petition for leave to appeal which must not exceed ten pages. For interlocutory appeals it must be shown to the satisfaction of the Commission "(1) that the ruling involves a novel and substantial question of law which is not controlled by prior decisions of the Commission or the courts, and (2) that a determination of such question could properly be made by the Commission without reference to evidentiary or other matters of record in the proceeding, and (3) that an immediate determination by the Commission may materially advance the ultimate termination of the proceeding and would be in furtherance of the Commission's policy to prevent unnecessary delay." 16 C.F.R. § 4.18(a).

41/ 16 C.F.R. § 4.20(b) (July 6, 1961): "The petition for review shall concisely and plainly state (1) the questions presented for review, (2) the facts in abbreviated form, and (3) the reasons why review by the Commission is deemed to be in the public interest . . ."

42/ 23 J. of D.C.B.A. 703 (1956).

43/ Id. at 706. Mr. Sellers prefaced his remarks by stating: "Also under our system of Government, it is not only important for an individual to receive justice, but also for him to be assured that he is being dealt with impartially.

"I believe that the end of all Government should be the welfare of the individual. Whenever we authorize a Federal agency to decide a case or controversy, the person affected loses some of the protection he would have if a court were to decide the case, or at least the person affected frequently believes this to be true." id at 705-706. Query: Within the confines of due process is not the public interest the dominant interest of this nation?

44/ Jaffee, Invective and Investigation In Administrative Law, 52 Harv. L. Rev. 1201, 1218 (1939).

45/ Id. at 1218-20.

46/ 219 U.S. 346 (1911).

47/ Id. at 361-62.

48/ 333 U.S. 683 (1948).

49/ Id. at 705-06. See, In the Matter of Manco Watch Strap Co., Dkt. 7785 (March 13, 1962) where the Commission utilized the decision making process to advice "hearing examiners and counsel . . . concerning the requirements of proof in cases of this type arising in the future."

50/ 258 Fed. 307 (7th Cir. 1919).

51/ Id. at 312.

52/ 295 U.S. 602 (1935).

53/ Id. at 624. See also, Federal Trade Commission v. R.F. Keppel & Bro., 291 U.S. 304, 314 (1934): "While this Court has declared that it is for the courts to determine what practices or methods of competition are to be deemed unfair, Federal Trade Comm'n v. Gratz, supra, in passing on that question the determination of the Commission is of weight. It was created with the avowed purpose of lodging the administrative functions committed to it in "a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected," and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would "give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess., pp. 9, 11. See Federal Trade Comm'n v. Beech-Nut Packing Co., supra, at 453; compare Illinois Central R. Co. v. Interstate Commerce Comm'n, 206 U.S. 441, 454."

54/ President's Committee on Administrative Management, Report With Special Studies, 221 (1937), cited by Jaffe, Invective and Investigation in Administrative Law, 52 Harv. L. Rev. 1201, 1240-41 (1939).

55/ Very recently the suggestion has been made to transfer the Commission's antitrust enforcement duties to the Department of Justice. Landis, Report on Regulatory Agencies to the President-Elect, 51-52 (1960).

56/ Jaffe, Invective and Investigation in Administrative Law, 52 Harv. L. Rev. 1201, 1241 (1939).

57/ 47 Cong. Rec. 1227 (1911).

58/ 47 Cong. Rec. 2621 (1911).

59/ Freer, The Case Against The Trade Regulation Section of the Proposed Administrative Court, 24 Geo. Wash. L. Rev. 637, 655 (1956).