Michigan Law Review

Volume 59 | Issue 2

1960

Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner

Raoul Berger

Member, Illinois and District of Columbia bars; chairman of the ABA Special Committee on Special Courts

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Administrative Law Commons](#), [Commercial Law Commons](#), and the [Courts Commons](#)

Recommended Citation

Raoul Berger, *Removal of Judicial Functions from Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner*, 59 MICH. L. REV. 199 (1960).

Available at: <https://repository.law.umich.edu/mlr/vol59/iss2/5>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

REMOVAL OF JUDICIAL FUNCTIONS FROM FEDERAL
TRADE COMMISSION TO A TRADE COURT: A
REPLY TO MR. KINTNER

*Raoul Berger**

N or long ago, Attorney General Rogers stated that, "The entire field of administrative law and of Government regulation may require a searching re-examination of some of the premises on which we have based our conclusions."¹ What lifts this utterance to the level of "man bites dog" is that the Attorney General almost alone among federal administrators does not insist that the administrative process, in major outline, is forever frozen. The orthodox administrative view is exemplified by Mr. Earl W. Kintner's (formerly General Counsel and now Chairman of the Federal Trade Commission) numerous strictures upon the American Bar Association proposal that the judicial functions of the Federal Trade Commission be transferred to a Trade Court. To his alarmed gaze, this "caps" "The Current Ordeal of the Administrative Process."² The ABA proposal grew out of a "searching re-examination," earlier undertaken by the Hoover Commission.³ "Without doubt," said Professor Jaffe in 1956, "the most acute problem of our administrative system is created by the so-called combination

* Member, Illinois and District of Columbia bars; chairman of the ABA Special Committee on Special Courts. — Ed.

¹ Speech at the 25th anniversary banquet of the Securities and Exchange Commission, Washington, D.C., Oct. 8, 1959, reported in the Wall Street Journal, Oct. 9, 1959. Mr. Kintner supplies for Dean Landis' "description of the current crisis" the label "The Crisis of Re-evaluation." Kintner, *Federal Administrative Law in the Decade of the Sixties*, Statement Before Federal Bar Association, Chicago, Sept. 16, 1960, p. 4 (hereinafter cited Kintner, *Fed. Ad. Law*).

² Kintner, *The Current Ordeal of the Administrative Process: In Reply To Mr. Hector*, 69 YALE L.J. 965, 966 (1960) (hereinafter cited Kintner, *Current Ordeal*). The proposal for an Article III court is now embodied in S. 1275, 86th Cong., 1st Sess. For details, see Kintner, *The Trade Court Proposal: An Examination of Some Possible Defects*, 44 A.B.A.J. 441 (1958) (hereinafter cited Kintner, *Trade Court Proposal*). For additional criticisms, see Kintner, *The Trade Court, the ABA, the Lawyer and the Public Interest*, Proceedings, ABA Section of Antitrust Law, Washington, D.C., April 4-5, 1957, p. 72 (hereinafter cited Kintner, *Trade Court and ABA*); Kintner, *A Government Lawyer Comments on the Davis Treatise*, 43 MINN. L. REV. 620, 629 (1959) (hereinafter cited Kintner on Davis); *Hearings Before Harris Subcommittee on Legislative Oversight, House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., Nov. 18, 1958, p. 43 (hereinafter cited *Harris Hearings*).

³ Hoover Commission on Organization of the Executive Branch of the Government (1955).

of prosecuting and adjudicating functions within one agency."⁴ It remains disquieting that the prosecutor who files a charge of law violation should be permitted to adjudicate the charge.⁵

Not content with challenging the validity of the arguments in favor of the ABA proposal, Mr. Kintner impugns the motives of its architects, charging that the Trade Court advocates "would destroy the Federal Trade Commission and possibly scuttle the entire administrative process. . . ."⁶ He views this as part of what he terms the "New Criticism," *i.e.*, those who were opposed to governmental regulation, having lost the "battle," shift their ground to "reforms" that "would abolish regulation."⁷ For this, Mr. Kintner cites Justice Jackson, then Solicitor General:

"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, they would destroy the whole plan of *regulation itself*."⁸

⁴ Jaffe, *Basic Issues: An Analysis*, 30 N.Y.U.L. REV. 1273, 1278 (1955) hereinafter cited Jaffe, *Basic Issues*). It needs remembering that President Franklin D. Roosevelt, who created the bulk of the administrative agencies, said in 1937: "There is a conflict of principle involved in their make-up and functions. . . . They are vested with duties of administration . . . and at the same time they are given important judicial work. . . . The evils resulting from this confusion of principles are insidious and far-reaching. . . . Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible. Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the Commission, in the role of prosecutor, presented to itself." Quoted, S. Doc. No. 8, 77th Cong., 1st Sess. 206 (1941).

For a recent clinical report to the same effect, see Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960) (hereinafter cited Hector *Memorandum*).

⁵ Recently the House Committee on Veterans Affairs, in Report No. 2031, 86th Cong., 2d Sess., June 29, 1960 (hereinafter cited *Veterans Affairs Report*), noting (at p. 2) that Veterans Affairs "in all instances judges the claim which it is also defending itself against," recommended establishment of a Court of Veterans Appeals, saying (at p. 5), "the importance of maintaining tribunals for the impartial adjudication of the rights of citizens cannot be too strongly emphasized. . . ."

⁶ Kintner, *Trade Court and ABA*, *supra* note 2, at 81. He has expressed the belief that "dismantling the administrative process . . . by removing the quasi-judicial functions from the administrative agencies across the board . . . *really is the intention* of those proposals emanating from the American Bar Association. . . ." Harris Hearings, *supra* note 2, at 43. (Emphasis added.) He asks the rhetorical question, "Is this trade proposal merely an opening wedge in a campaign for *ultimate destruction* of the entire administrative process?" Kintner, *Trade Court and ABA*, *supra* note 2, at 95. (Emphasis added.) Such remarks recall Communist rejection of "deviationism" from the "party line" as heretical.

⁷ Kintner, *Current Ordeal*, *supra* note 2, at 967, 965.

⁸ Kintner on Davis, *supra* note 2, at 629 (emphasis added), quoting Jackson, *The Administrative Process*, 5 J. SOC. PHIL. 143, 146-47 (1940). Referring to the ABA proposal,

Undoubtedly Jackson's remarks had considerable force in 1940, the time of their utterance. It cannot be gainsaid that an important segment of the ABA was opposed to much of the New Deal's socio-economic program,⁹ and to its enforcement by an "alphabet soup" of new agencies. But while the ABA "had engaged originally in a somewhat drastic attack on the administrative process as a whole, . . . it, along with the New Dealers,¹⁰ learned a great deal from the long battle for the APA."¹¹ It would be an impractical if not a foolhardy lawyer who would today seek, for example, repeal of the National Labor Relations Act, the Securities Act, and the Public Utility Holding Company Act. Faith in the permanence of these New Deal innovations is nourished by the militant zeal with which Republicans, such as Mr. Kintner, are now crusading to safeguard the once suspect New Deal agencies from the touch of desecrating hands.

he goes on to say that it has been demonstrated that "there is a close relationship between Mr. Justice Jackson's analysis in 1940 [Jackson, J., took his seat on October 6, 1941] and the American Bar Association action in 1956 with the resulting trade court bill in the present Congress. . . . The trade court bill, if adopted, might very well aid, as Mr. Justice Jackson suggested, in destroying effective trade regulation." *Id.* at 630.

⁹ "The tremendous proliferation of administrative power in the 1920's, reaching its zenith in the first few years of the New Deal, alarmed the lawyer community. Basically, no doubt, it was the substance of the granted powers with their threat to the *status quo* which was disturbing." Jaffe, *Basic Issues*, *supra* note 4, at 1273.

¹⁰ "[M]any who in the mid-thirties were cheering the newly created agencies of the New Deal . . . believed that some inner current ineluctably made the administrative agency an instrument of social and economic progressivism. . . ."

"By and large the liberals believed that administrators could be relied upon for wise and just decisions, and that, as a corollary they should as far as possible be free from judicial supervision that might rigidify administrative procedures or supplant the informed administrative conclusions." GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINT* 5, 8 (1956).

After 1946, "within the academic groves could be heard mutterings that perhaps the courts were *abdicating* their responsibilities, and should stand readier than in the past to review administrative acts, while diminishing their deference to the *supposed administrative expertness*. *Id.* at 11. (Emphasis added.)

The shift took place as administrative action became concerned with individual rights, *i.e.*, the "security," deportation, passport cases, etc., as differentiated from the earlier general economic questions. *Id.* at 19 et seq. Professor Gellhorn notes that in consequence "within this brief span of [25] years the defenders and detractors of the administrative process have all but exchanged roles." *Id.* at 4. Many "who a few years ago discovered the agencies as vehicles of social reconstruction now regard them as positive impediments." Jaffe, *Review of Davis Administrative Law Treatise*, 73 HARV. L. REV. 1638 (1960) (hereinafter cited *Jaffe on Davis*).

And there are tried "liberals" who now prefer judges to administrators, GELLHORN, *supra* at 22; Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 473-74 (1954).

¹¹ Jaffe, *Basic Issues*, *supra* note 4, at 1273. See also address, James M. Landis, "The Administrative Process—The Third Decade," before ABA, Section of Administrative Law, Aug. 29, 1960, Washington, D.C., p. 5

Having garbed those who are "re-examining" the administrative process with the robes of the "New Criticism," Mr. Kintner wraps himself in the mantle of "pragmatism," as opposed to the "rigid conceptualism" on which "the proposal for an administrative court is bottomed."¹² But what is "pragmatism" to one may appear like an "abstraction" to another: the Kintnerian School opposes "to the 'abstraction' of separation of powers . . . what is itself an abstraction . . . that policy making and adjudication are indissolubly married."¹³ Because the union of prosecution and adjudication was once experimental—and therefore "pragmatic," it does not follow that it is not now equally pragmatic to inquire whether the experiment "works," the touchstone of "pragmatism." Otherwise, "pragmatism" would be exhausted by its first exercise, mistaken though it was, and the "radical experiments of yesterday [would] become frozen into a new conservatism."¹⁴

It bears emphasizing that there is nothing sacrosanct about the union of prosecuting and adjudicatory functions in one agency. The union was not received on Mount Sinai; it is merely an experiment in government, and a comparatively recent departure at that. Professor Jaffe reminds us that while the ICC had been given power to adjudicate, initiation of prosecutions was ordinarily left to private parties, and the emphasis was "less an attempt to fix blame, than it was legislative," *i.e.*, rule-making. The "more obvious breach with the tradition [of separating adjudication from prosecution] came with the Federal Trade Commission which was authorized to initiate and try charges of unfair practices and other violations of law. . . ."¹⁵ The combination of those functions, says Professor Jaffe, is "a rather *novel* element of our administrative law. It seems to have grown up without too much thought and without sufficient awareness of its break with tradition."¹⁶ When

¹² Kintner, *Current Ordeal*, *supra* note 2, at 967, 965, 968.

¹³ Jaffe on Davis, *supra* note 10, at 1639.

¹⁴ Hector, *The Regulatory Agencies and the Pragmatic Approach*, Sterling Lecture, Yale Law School, April 19, 1960, p. 4, a delightful critique of the pre-emption by regulators of the "pragmatic" approach. "It was the greatest of conservative writers [Edmund Burke] who wrote: 'Nothing in progression can rest on its original plan. We may as well think of rocking a grown man in the cradle of an infant.'" BROGAN, *THE PRICE OF REVOLUTION* 267 (1951).

¹⁵ Jaffe, *Basic Issues*, *supra* note 4, at 1279.

¹⁶ *Id.* at 1284. (Emphasis added.)

"Viewed in retrospect, even the Interstate Commerce Commission for all its lauded precedent value was little more than a specialized court until the Transportation Act of 1920. It was concerned almost entirely with problems of discrimination and prejudice in tariffs, and acted largely at the instigation of shippers. Its discretionary area of policy-

the Attorney General's Committee came to study this union in 1940, it "suggested devices for mitigating its dangers,"¹⁷ chief of which was an internal separation of functions. But, said that committee, "Such internal separation by no means eliminates the problem of combination of functions; but it alters, or if wisely done may alter, its entire set and cast."¹⁸ Our starting point, therefore, is a "rather novel" combination of prosecuting and adjudicating functions, which despite all efforts to "mitigate its dangers" remains the "most acute problem of our administrative system." A proposed solution of this problem deserves to be considered in an atmosphere at once free from invective¹⁹ and from unreasoning worship of the status quo.

Being no less than Mr. Kintner a child of our "pragmatic" era, I propose to inquire how the combination "works," to prefer

making or rule-making was really very little more than that of a body such as the Tax Court today. After the railroads were returned to private ownership and the 1920 Act was passed, the ICC spent most of its energies trying to save and restore an industry in serious trouble rather than in curbing the forces of private acquisitiveness in the public interest. It was a rescue, welfare operation more than it was a regulatory operation.

"The Federal Trade Commission has a similar history. The product of Wilsonian democracy, it had scarcely got under way before the first World War temporarily overshadowed its work. During the 20s it accomplished little, and certainly did nothing to draw on itself any massive, all-out attack from private business.

"So it was that despite all of this purported long history of independent regulatory agencies, the real battle over them was postponed until the New Deal and the 1930s. This, of course, when it came, was a battle over economic issues fought in Constitutional terms. It was really the New Deal that was at stake, not the institution of the independent regulatory agency." Hector, *The Regulatory Agencies and the Pragmatic Approach*, Sterling Lecture, Yale Law School, April 19, 1960, pp. 5-7.

¹⁷ Jaffe, *Basic Issues*, *supra* note 4, at 1280.

¹⁸ REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 55 (1941). Judge Friendly recently said, "I trust no one is so naive as to think the separation of functions decreed by the Administrative Procedure Act really works." *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429, 438 (1960).

¹⁹ It is strange that Mr. Kintner should accuse the ABA of an undercover assault on the substantive scheme of regulation at the very time that the "new commission," installed by President Eisenhower, for which Mr. Kintner has been an eloquent apologist [Kintner, *The Revitalized Federal Trade Commission: A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143 (1955) (hereinafter cited Kintner, *Revitalized FTC*)], has been charged in important quarters with subverting the legislation confided to it for administration. Mr. Kintner records (at 1143) that "Representative Wright Patman, redoubtable author of the Robinson-Patman Act, is 'terribly disturbed and greatly disappointed' with the 'new look' of the Commission," and that the Commission is accused of being "at the forefront of 'subversive' assaults on the Robinson-Patman Act." *Id.* at 1145. Also, that Senator Kefauver "is fearful that the Commission is pursuing an ominous course 'which casts a threatening shadow over the entire structure of the antitrust laws,'" and that "other members of Congress have similar doubts." *Id.* at 1143-44. To be sure, Mr. Kintner has demonstrated to his own satisfaction that such doubts are ill founded. But at least one unbiased observer, Professor Jaffe, has said, "Recent appointees to the Trade Commission . . . appear to feel that they have a mandate to pursue a more conservative course and to *revise* somewhat agency doctrine." Jaffe, *Basic Issues*, *supra* note 4, at 1288. (Emphasis added.)

"practical considerations" to "neat theorems,"²⁰ and, so far as possible, to eschew "abstractions," if only because unthinking repetition has made some virtually impervious to the most hallowed generalization.²¹ Mr. Kintner's numerous criticisms afford convenient pegs for discussion.

No Man Should Be Judge in His Own Cause

Lowell Mason, for eleven years a commissioner of the FTC, states generally of administrative proceedings: "the men who sit in judgment on you will be the men who originally complained against you."²² There is no need to expatiate at this late date upon the value of the long-established principle that "No man should be judge in his own cause."²³ To some extent, the Board of Tax Appeals, predecessor of the respected Tax Court, was "established entirely outside the Treasury Department" to meet the demand for "review by an impartial outside body."²⁴ The success of both the Board and Tax Court alone should absolve the ABA of making an "untested utopian" proposal²⁵ for the divorce of adjudication from prosecution.

Mr. Kintner has no quarrel with the merits of the "slogan," "no man should be a judge in his own cause,"²⁶ but concludes that "the idea has no practical application to the Federal Trade Commission. The five Commissioners derive no personal profit from proceedings before them."²⁷ But, as the Lord Sankey Committee stated, "bias from strong and sincere conviction as to public policy may operate as a more serious disqualification than pecuniary interest."²⁸ On the other hand, there are those who believe, as Profes-

²⁰ Kintner, *Current Ordeal*, *supra* note 2, at 965.

²¹ We need to be reminded that a generalization such as "separation of powers is an accumulation of wisdom generalizing a corpus of down-to-earth experiences." *Jaffe on Davis*, *supra* note 10, at 1639.

²² MASON, *THE LANGUAGE OF DISSENT* 303 (1959).

²³ For an excellent discussion of this principle and of separation of power considerations, see Clark, *The Judicial Functions of the Federal Trade Commission Should Be Transferred to the District Courts*, Proceedings, Antitrust Section, ABA, April 4, 1957, p. 51 (hereinafter cited Clark, *Transfer of Functions*).

²⁴ H.R. REP. NO. 179, 68th Cong., 1st Sess., reprinted in 1939-1 CUM. BULL. (Part 2) 241, :247. For a similar recent report respecting a Court of Veterans Appeals, see *supra* note 5.

²⁵ Kintner, *Current Ordeal*, *supra* note 2 at 968.

²⁶ How easily a cherished tenet is transformed into a "slogan" or mere catchword.

²⁷ Kintner, *Trade Court and ABA*, *supra* note 2, at 81.

²⁸ REPORT OF THE COMMITTEE ON MINISTER'S POWERS 78 (1932); see also *infra*, p. 228. Professor Cooper recently stated that "administrators, appointed to administer broad policies of social or economic reform, entertain so strong a predilection for rapid imple-

sor Davis testified, that "the same agency which determines policy for particular subject matter through rule making, supervising, and prosecuting, and otherwise, should also adjudicate the cases that arise out of the application of that policy."²⁹ "Judges," Professor Davis goes on to say, "are characteristically relatively neutral; in fact, sometimes they are regarded as having biases which favor the protection of previously existing property rights, as against the furtherance of legislative or social objectives."³⁰ "Unlike a judge . . . an administrator often has an affirmative program to carry out; he often has a mission, a purpose, a policy."³¹ Here we come to grips with a major argument for administrative adjudication, rooted in a belief that administrators are instruments of "social and economic progressivism" and can be "relied upon for wise and just decisions."³²

Now I am heartily for "social and economic progressivism" and I entertain no doubt that in large part administrators are high-minded. But my doubts whether we can lodge such great power in administrators, virtually unreviewable power³³ to do what they genuinely believe is for our own good, were stirred when Bertram Wolfe demonstrated that Lenin was entirely highminded in concluding long before the Revolution that the ignorant, downtrodden Russian people could be rescued only by dedicated shock troops who would unquestioningly adhere to a "party line."³⁴ There is

mentation of these policies, that they exhibit an active interest in the outcome of cases pending before them. . . ."

"Their constant striving to reach desired results tends to make most administrators 'convicting judges.'" *The Executive Department of Government and the Rule of Law*, Address Before University of Michigan Summer School for Practicing Lawyers, Ann Arbor, Mich., June 23, 1960, pp. 6, 9-10. [This address will appear in a forthcoming issue of the *Michigan Law Review*.—Ed.]

²⁹ *Harris Hearings*, *supra* note 2, at 14. See also Fuchs, *The Hoover Commission and Task Force Reports on Legal Services and Procedure*, 31 *IND. L.J.* 1, 20 (1955).

³⁰ *Harris Hearings*, *supra* note 2, at 15.

³¹ *Id.* at 14.

³² Note 10 *supra*.

³³ For inadequacy of judicial review, see p. 218 *infra*.

³⁴ WOLFE, *THREE WHO MADE THE REVOLUTION* (1948); SHUB, *LENIN* (1948). Professor Brogan said: "A patriotic Chinese, faced with the poverty of that country, with what may be its increasing poverty and seeing no way out except a rapid increase in industrialization and a rapid increase in the output of the land, may conclude, in no selfish or vulgar intention, that only a vigorous, rigorous, modern power in China can do both and provide the necessary political authority without which the best schemes of industrial technicians and agronomists will come to nothing. And to that end, he may put up with a great deal of mendacity, a great deal of intellectual isolation and coercion, even with the shedding of a great deal of blood. He may be willing to pay the price of revolution." BROGAN, *THE PRICE OF REVOLUTION* 259 (1951).

no need to dwell on the lamentable fruits of that policy or to equate administrative adjudication with Stalinistic suppression of all political rights. But to lodge virtually unreviewable discretion in administrators to act for what they conceive to be our good may well seem an unnecessary step in that direction. From Lenin we can deduce that an Orwellian Big Brother who "knows best" is not for us, that administrative powers can and should be tested by impersonal tribunals. Agency adjudication was provided for those instances in which a person claims that the facts do not come within the agency rule or policy or that the policy or rule do not come within the statute. On such issues, a litigant is entitled to a judgment "unbiased" by a "mission or purpose."

Let it be admitted that from time to time courts, too, have been swayed by their biases against socio-economic legislation. One need only recall judicial opposition to minimum wage and hour legislation.³⁵ But the cure is not to substitute a legislative or administrative bias for a judicial one. Rather it is to inculcate in lawyers and judges a consciousness that adjudication requires a never-ending alertness against identifying personal predilections with the requirements of law.

Does the Separation of Functions Really Insulate?

Mr. Kintner would dismiss such considerations on the ground that the Commission does not "exercise at one and the same time the roles of prosecutor and judge" because "All investigational work is handled by a separate bureau of investigation within the Commission," and "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 . . ." if it concludes that to be in the public interest. When "the complaint has been drafted it is referred to the Commission." In "looking at a complaint and directing its issuance the Commission is merely signifying its belief that a probability of violation exists

³⁵ Courts are now "more conscious of current economic and social trends than they were two decades ago." Davison, *An Administrative Court of the United States*, 24 GEO. WASH. L. REV. 613, 617 (1956). Recently, Judge Irving R. Kaufman of the Southern District of New York referred to certain cases which were removed from the courts "at a time when people were worried about the conservatism of the Court—a complaint which isn't heard too often these days. . . ." Kaufman, *Have Administrative Agencies Kept Pace With Modern Court-Developed Techniques Against Delay?—A Judge's View*, 12 AD. L. BULL. 103, 104 (1960).

. . . ,” a procedure which Mr. Kintner assimilates to a ruling on a demurrer or grant of certiorari.³⁶ From this recital one infers that the Commission first learns of a complaint after submission by the Bureau of Litigation and that approval is more or less formal. On paper this seems like an aseptic procedure, conducive to truly judicial detachment. The need for insulation is real, for, as former Chairman Howrey found, “if I delved into the investigative file and made a personal study of the facts and the law that formed the basis of the complaint, I ran the danger of prejudging the matter.”³⁷

There is reason to believe that Mr. Kintner, and at least one other commissioner, Mr. Secrest, have not been equally alive to the “danger,” and that they cannot in fact divorce themselves from what the prosecutor-investigators are doing. Speaking with reference to “payola” practices in the radio-television industry on March 9, 1960, Mr. Kintner stated, “Our *investigational* files in the 60 cases where complaints have been issued or approved *reveal* that payments have been made by manufacturers or distributors to 255 disc jockeys or other employees of broadcast licensees. . . .” (Emphasis added.) He tells us on the same occasion, apparently on the basis of a “preliminary investigation to determine the method and extent” of an activity designated as “plugola,” that “in soliciting clients for hidden plugs, one such firm has assured its prospective clients that the hidden commercials would consist of” five described items, and describes the “cost of these hidden commercials” and by whom they are “planted.”³⁸ Details of eight complaints against food chains are found in his speech of October 19, 1959;³⁹ and he improved the occasion by describing a hypothetical case of “advertising allowances” which could “turn out to

³⁶ Kintner, *Trade Court and ABA*, *supra* note 2, at 78-79.

³⁷ Howrey, *The Federal Trade Commission — Present Problems and Suggested Changes*, Proceedings, ABA Section of Antitrust Law, April 4, 1957, p. 40 at 47 (hereinafter cited Howrey, *Fed. Trade Comm.*) Mr. Howrey continues to be troubled by the problem. *Id.* at 107.

³⁸ Address, *The Federal Trade Commission Today*, before the Federal Bar Association, Philadelphia Chapter, pp. 2 and 7.

³⁹ *Legal Obligations and Moral Responsibility of Powerful Food Buyers*, before Nat'l Ass'n of Food Chains, Washington, D.C., p. 6: “These 8 complaints contain allegations of inducing discriminatory advertising allowances, illegal receipt of brokerage, illegal coercion and price fixing, and mergers which may lessen competition. . . .”

See also a large group of complaint letters quoted in Mr. Kintner's *The Public Reports*, Remarks at Chicago to Alpha Delta Sigma, Professional Advertising Fraternity, November 24, 1959, which Mr. Kintner referred to the Bureau of Investigation, p. 4. See also Statement, “*Resurgens: The Federal Trade Commission in 1959*,” N.Y. State Bar Ass'n — Antitrust Law Symposium — 1960, p. 30 (hereinafter cited Kintner, *Resurgens*).

have been highly unprofitable when the balance sheet includes the cost of litigation,"⁴⁰ a cheerful enough prediction from a prosecutor, but quare whether it would be made by a judge.

Commissioner Robert T. Secrest, referring on June 1, 1960, to a "factual record" developed in the Commission's insurance investigation, detailed many disparities between the advertising claims of the companies and the actual facts. For example, he mentions a "typical claim" that the company would pay "up to \$15 a day for 100 hospital days . . . for each sickness or accident" and comments: "There were *in fact* many cases of accident or sickness for which policies so represented did not provide payment."⁴¹ From an investigator or prosecutor, this is quite appropriate, but does it not sound a note of "prejudgment" in the mouth of a "judge?" Against this background, Commissioner Secrest's statement on the same occasion that "the vote of the Commission in issuing the 41 complaints . . . was unanimous"⁴² suggests something more than pro forma approval of complaints.

Mr. Kintner tells us that the "Commission's principal role [*i.e.*, its enforcement program] . . . is as wielder of the big stick."⁴³ And he takes pride in the performance of that role, stating that in the first nine months of fiscal 1960 "the Commission issued 85 antimonopoly complaints. *This was 5 more than the number issued during the entire 1959 fiscal year.*"⁴⁴ On June 3, 1960, Mr. Kintner stated that the Commission filed 17 Clayton Act complaints during a certain period and that "Of these 17 cases, 9 have already resulted in cease and desist orders,"⁴⁵ an excellent batting average, of which a prosecutor might well be proud. But would a "judge" boast of a prosecutor's high conviction rate?

Consider, too, the singular identity between remarks by the Associate Director of the Bureau of Litigation and a subsequent speech by Mr. Kintner. On April 4, 1960, the former, addressing the dairy industry, said:

⁴⁰ Speech of Oct. 19, 1959, *supra* note 39, at 7.

⁴¹ Statement before the National Association of Insurance Commissioners, San Francisco, p. 3. (Emphasis added.)

⁴² *Id.* at 5.

⁴³ Statement, *The Current State of Advertising*, Los Angeles Breakfast Club, Los Angeles, June 15, 1960, p. 10.

⁴⁴ Statement, *One Goal Is Service*, before National Independent Dairies Ass'n, Washington, D.C., April 4, 1960, p. 4 (Mr. Kintner's emphasis).

⁴⁵ Statement, *Some Suggestions for Compliance with the Robinson-Patman Act*, before Carolinas-Virginia Purchasing Agents Ass'n, N.C., p. 10.

"If there are those in your industry who take comfort in the listing of these cases [a roster of complaints filed against industry members] and believe that the trade regulation laws are concerned only with the competitive behavior of giant concerns, a *somber note of warning was sounded* by the *issuance of an FTC complaint* six weeks ago against what must be a relatively small dairy. . . ." ⁴⁶

On April 22, 1960, Mr. Kintner sounded the same "somber note of warning" in virtually identical terms.⁴⁷ Would a judge regard the "issuance of a complaint" as a "somber note of warning?"

This "warning" was not adventitious, for Mr. Kintner states that the Commission is "fired by a determination" to achieve "the ideal of free and fair competition," and that "The Commission's powers of investigation and subpoena are indispensable *weapons* in the *battle* for an economy based upon free and fair competition. The Commission serves warning that it will *strenuously resist* any effort to diminish the effectiveness of these *weapons*, and it *pledges* that they will *never rust* from lack of use."⁴⁸ He stated that "The Federal Trade Commission quite honestly *wishes* to be a menace to predators of the market place. . . ." ⁴⁹ Would a judge brandish the "weapons" of the Commission at a business community which must contest before him whether those weapons were properly employed? And will not one who constantly evangelizes about the enforcement duties of the Commission be hard put to maintain an open mind for the re-examination and re-interpretation of the basic law which it administers? Every lawyer knows how hard it is to discard a conviction and start afresh; only the inescapable exigencies of government should place the process of adjudication under that handicap.⁵⁰ Louis Hector has graphically

⁴⁶ Statement by William R. Tincher, *The Federal Trade Commission and the Dairy Industry*, before National Independent Dairies Ass'n, Washington, D.C., p. 10.

⁴⁷ Statement, *The Federal Trade Commission and the Food Industry*, before the American Dry Milk Institute, Chicago, pp. 4-5.

Consider too Mr. Kintner's Statement, *What You Don't Know Can Hurt You*, before Sixth Annual Institute of Management for Appliance-TV Dealers, Washington, D.C., August 8, 1960, p. 5: "We are, however, determined to prevent misuse of bargain advertising through every means at our disposal — education [etc.] . . . But when these means do not work, our Bureaus of Investigation and Litigation are called upon for *more convincing action*." (Emphasis added.)

⁴⁸ Kintner, *Resurgens*, *supra* note 39, at 32, 46. (Emphasis added.)

⁴⁹ Statement, *Government and Trade Association Executives Have a Joint Responsibility for Compliance with the Antitrust and Trade Regulation Laws*, before New York Society of Association Executives, New York, N.Y., June 16, 1960, p. 4. (Emphasis added.)

⁵⁰ When a prior investigation of the "basing point system" resulted in charges that the Commission had prejudged the issues, the Supreme Court, faced by the painful fact

illustrated the difficulty a Board member has, when he dons his judicial cap, in dismissing from his mind relevant matters which he learned in his administrative-legislative capacity.⁵¹ Moreover, anyone who has served in government knows that "separation" operates as a permeable membrane rather than an air-tight partition, and that important staff views have a way of filtering through as if by osmosis.⁵² How often we have heard new appointees complain that they are prisoners of the staff.

An illustration of the strains to which the fusion of functions subjects the FTC's adjudicatory impartiality is furnished by the *Carnation* case. Defendants, in return for a stipulation that they might produce certain types of transactions by totals, agreed not to challenge Commission counsel's amendment of the complaint after the hearing began. Having amended and thus profited by the stipulation, Commission counsel sought to repudiate it and to obtain detailed evidence. The Examiner rejected the repudiation but was reversed by the Commission. Though recognizing that stipulations "should not be entered into lightly and when entered should be observed to the letter," the Commission nevertheless concluded that the stipulation should be set aside because it placed "an undue restriction on the obtaining of information which otherwise may be *necessary to establish the case of counsel supporting the complaints and to that extent it is contrary to the public interest.*"^{52a} Observe the facile *identification* of the *prosecution's*

that if the Commission were disqualified the "complaint could not have been acted upon by the Commission or by any other government agency" could yet offer only the scant comfort that "the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did *not necessarily* mean that the minds of its members were *irrevocably closed* on the subject of the respondents' basing point practices." Federal Trade Commission v. Cement Institute, 333 U.S. 683, 701 (1948). (Emphasis added.)

Contrast this with the judicial standard: "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interests of the parties. . . ." *Barnard v. Judge of Superior Court*, 191 Mich. 567, 574 (1916), quoting *Yazoo & Miss. Valley R.R. v. Kirk*, 102 Miss. 41, 54 (1912).

⁵¹ For two years the CAB had been *urging* carriers to introduce new low promotional fares in order to build up traffic and had discussed various plans. Suppose, says Mr. Hector, that one of the carriers files a new low promotional tariff and that two other carriers file a protest. How, asks he, can the Board forget its talks as policy makers and become judges looking only to the record, particularly when still talking to the same carriers on other tariffs still in the planning stage. To discontinue such talks is to make policy in a vacuum. He concludes that such conversations "undoubtedly influence adjudication" because the facts and impressions gained thereby simply cannot be forgotten. Hector, *Memo-randum*, *supra* note 4, at 954-55.

⁵² See note 18 *supra*.

^{52a} In the Matter of Carnation Co., Docket No. 6172-79, March 14, 1956. Trade Reg. Rep. (1956) ¶26,021. (Emphasis added.)

case with the public interest. District attorneys also represent the public interest in prosecuting law violators, but what court would out of hand release them from their stipulations solely because they could thereby better present their case?⁵³ Dissenting, Commissioner Lowell Mason justly stated that this repudiation "places us in a partisan role at variance with our judicial protestations."⁵⁴

The foregoing facts, to my mind, seriously impeach the claim that the "separation of functions" is "sufficient safeguard" against the "danger" presented by the union of adjudication and prosecution;⁵⁵ they remove criticism of this union from the realm of "abstraction" and suggest rather that it is sheer web-spinning to premise that incompatible functions lodged in one and the same man can be "separated" by a paper separation.

No Need To Lose Expertise

Pointing to Supreme Court reliance on agency expertise and the Hoover Task Forces' recognition of the FTC's "special competence," Mr. Kintner concludes that "such special competence largely would be lost" through transfer of its judicial functions.⁵⁶ The benefits attributed to administrative "expertise" have too

⁵³ Ordinarily stipulations are binding and will be set aside only upon proof of mistake, fraud, overreaching or oppressive hardship. 7 CYC. FED. PRO. 454-55 (2d ed. 1943). So, the Commission was permitted to set a stipulation aside entered under "mistake of fact." *P. Lorillard Co. v. FTC*, 186 F.2d 52, 55 (4th Cir. 1950). But *Lorillard*, upon which *Carnation* relies, does not support the proposition that anything which facilitates presentation of the prosecution's case authorizes repudiation of a stipulation.

⁵⁴ Reprinted in MASON, *THE LANGUAGE OF DISSENT* 77, 80 (1959). Commissioner Mason reminds us that "welshing is dirty business" in any context. *Id.* at 79. Mr. Kintner points out that in 1956 the Commission dismissed 32% of the cases which came before it. Kintner, *Trade Court Proposal*, *supra* note 2, at 443. Without examination of the cases the percentage is meaningless. Possibly there was so little evidence as to show plainly that the cases never should have been brought, and possibly adequate screening by the Commission itself would siphon off such prosecutions. Again, the errors may have been so glaring as to invite reversals by the courts of appeals if left uncorrected by the Commission.

⁵⁵ Mr. Kintner has uneasily alluded to the apparent "inconsistency in having investigative functions lodged with the group that also adjudicates," but concluded "if sufficient safeguards are thrown about the adjudicative process that it will work. . . ." *Harris Hearings*, *supra* note 2, at 46-47. See note 18 *supra*.

⁵⁶ Kintner, *Trade Court Proposal*, *supra* note 2, at 494. Former Chairman Howrey said, "as my friends on the Commission would be the first to admit, the courts' deference to the Commission has been somewhat misleading. Many of the references to the expertness of the Commission, upon closer examination, are found to be mere restatements of legislative intent rather than expressions of confidence. And more than one judge has gone out of his way to criticize the Commission." Howrey, *Fed. Trade Comm.*, *supra* note 37, at 42.

Indeed, Mr. Kintner himself tells us that the Supreme Court "has too often found the need to overrule the Commission's specialized judgment." Kintner, *Revitalized FTC*, *supra* note 19, at 1146.

long rested on unquestioned assumptions.⁵⁷ Mr. Kintner himself quite recently, answering the question "can we truthfully say that those who bear the responsibility of decision truly possess it [expertise] in the expected measure," states that "the obvious and sorrowful answer must be 'no.'"^{57a} The mine-run agency appointee is not an expert and generally does not stay long enough at his post to become an expert. When Mr. Kintner points to the fact that Commissioner Kern and himself were promoted from the staff,⁵⁸ he overlooks that such promotions are the exception, that the lion's share of administrative appointments go to outsiders without the slightest claim to expertise. Mr. James M. Landis tells us that when he became Chairman of the Civil Aeronautics Board he had "little knowledge of the subject."⁵⁹ And as Landis points out, rotation in office of agency members is "only too common,"⁶⁰ and in consequence "that the type of expertise resulting from experience is not developed. . . ."^{60a} Mr. Kintner himself has recorded the displacement of three incumbent commissioners, Carson, Spingarn and Carretta, by the Eisenhower Administration at the FTC;⁶¹ two others, Mead and Mason, have since been displaced—a complete housecleaning. Former SEC Commissioner McConnaughey reminds us that in its twenty-five years of existence the SEC "has had maybe 15 Chairmen,"⁶² and the bulk of its commissioners, my own study revealed, served one, two and three years. Such rapid turnover, justly stated Louis Hector, has made "almost meaningless the 'expertise' which agency members are supposed to develop in long terms of service."⁶³ By excluding himself, Mr. Kintner is able to arrive at an average service of four years of the incumbent FTC commissioners.⁶⁴ I daresay that the average incumbent district judge in the District of Columbia or on the Tax Court has been sitting about fifteen years. Is it not reasonable to assume, with lifetime tenure for judges of a Trade Court, that the judges

⁵⁷ We "should be examining the truth of certain legends . . . built up about the administrative process. . . . The first of these is the legend of its possession of expertise." Landis, *supra* note 11, at 6. Note the reference by Professor Gellhorn, *supra* note 10 to "supposed administrative expertness."

^{57a} Kintner, *Fed. Ad. Law*, *supra* note 1, at 6.

⁵⁸ Kintner, *The Current Ordeal*, *supra* note 2, at 977.

⁵⁹ *Harris Hearings*, *supra* note 2, at 112.

⁶⁰ *Harris Hearings*, *supra* note 2, at 96.

^{60a} Landis, *supra* note 11, at 9.

⁶¹ Kintner, *Revitalized FTC*, *supra* note 19, at 1147.

⁶² *Harris Hearings*, *supra* note 2, at 126.

⁶³ *Supra* note 51, at 957.

⁶⁴ Kintner, *Current Ordeal*, *supra* note 2, at 977.

will have an opportunity to develop the expertise which thus far has merely been an administrative mirage?

If the agency member is not an expert, at least, it is argued, he can be advised by specialists. So, Mr. Kintner stresses that "At the FTC our devoted staff has acquired several thousand man-years of experience, which is *constantly available* to the commissioners."⁶⁵ Experience has shown, says Professor Davis, that "controversies involving, say, questions of law, accounting, and engineering, may best be decided by an agency which is advised by lawyers and accountants and engineers."⁶⁶ The Commission itself excludes those engaged in performing investigative or prosecuting functions in any adjudicative proceeding from advising the Commission *ex parte* therein.⁶⁷ The reason for such exclusion, said the Attorney General's 1941 Report, is that "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." Continues the report, "the view of the investigators and advocates [should] be presented only in open hearing where they can be known and met by those who may be adversely affected by them."⁶⁸ Precisely the same considerations should govern *all* members of the investigating and prosecuting staffs and of staff experts as well. One who has worked for an agency knows that there is a "party line" in such matters. A particular suit is one of a series that may be in preparation by other staff members who vibrate sympathetically. Technical and unifying legal theories are constantly under discussion with fellow staff members. And the staff "experts" are by no means free of evangelistic zeal; often they trigger prosecutions. Generally speaking, "experts" tend to be "biased" for the party who calls them,⁶⁹ and there is no reason to conclude that government experts are immune. To the contrary, their bias may be intensified because they are constantly immersed in a stream of "mission or purpose." Then, too, experts are not infallible; the books are full of instances in which experts have been tripped on faulty premises or untenable inferences. Speaking of expert inferences "drawn from an extensive scrutiny of uncontradicted 'background' data . . . procured by

⁶⁵ *Ibid.* (Emphasis added.)

⁶⁶ *Harris Hearings*, *supra* note 2, at 15.

⁶⁷ Kintner, *Trade Court and ABA*, *supra* note 2, at 81.

⁶⁸ REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941).

⁶⁹ 2 WIGMORE, EVIDENCE 646-7 (3d ed. 1940); cf. FRANK, IF MEN WERE ANGELS 69 (1942).

staff experts and made part of the record," Judge Jerome Frank stated: "In all candor, it must be noted that, even as to such facts, there may be legitimate differences of opinion. For so-called 'economic data' are, often not 'data' (i.e., given) but involve interpretations; and there may legitimately be differing expert interpretations."⁷⁰ While, therefore, expert assistance is of great value in enabling an agency to prepare and prosecute a case, expert aid to adjudicators must in the interest of justice be subject to correction by cross-examination lest error be sealed in. Such factors presumably led Professor Davis, whose "careful scholarship and academic detachment" were recently lauded by Mr. Kintner,⁷¹ to state:

"[T]here is danger in consultation by the agency heads with the staff specialists behind the scenes, when ideas or information are brought into a case without giving representatives of the parties sufficient opportunity to know what it is, and opportunity to meet it. I think there is great danger."

The "cure," he said, is to

"require that the significant factual material that is used for decision shall be placed on the record or otherwise made known to the parties so that there will be an adequate opportunity to rebut or to explain or to cross-examine, as the case may be."⁷²

Fair play demands no less. But if expert testimony is to be placed on record, the expertise argument goes down the drain, for the agency tribunal will then enjoy no advantage over a court. Courts, too, can hear experts, and judges who remain on the bench, as for example on the Tax Court, will understand this record testimony far better than the fleeting agency appointee. And a concomitant and by no means inconsiderable advantage will flow from removal of the agency's adjudicatory function: instead of being insulated from its experts, the Commission will then be enabled to work closely with them in the formulation of enforcement programs and the initiation and prosecution of cases with the object of spreading the results before the Trade Court. Moreover, as Professor Jaffe recently remarked,^{72*} a separate adjudicatory organ

⁷⁰ FRANK, *op. cit. supra* note 69, at 122.

⁷¹ Kintner on Davis, *supra* note 2, at 630.

⁷² Harris Hearings, *supra* note 2, at 26.

^{72*} Jaffe on Davis, *supra* note 10, at 1641.

"may have its own specialists and it may learn a great deal from a specialized administrative and enforcement agency appearing before it. In some situations, indeed, the values of specialization may in this way be more effectively realized. There will be less hostility to free exchange between the adjudicators and their staff when their role is limited to adjudication."

Individual Opinion Writing and Institutional Decisions

The controversy over institutional decisions—opinions written by an anonymous opinion-writing staff—was stirred afresh by Louis Hector's candid report to the President respecting Civil Aeronautics Board practices.⁷³ Professor Davis, a proponent of agency adjudication, earlier noted that "the agency heads may in fact lean so heavily on the work of the staff as to know little or nothing of the problems involved in many of the cases decided in the agency's name."⁷⁴ And he more recently stated, "The weaknesses of the institutional decision lie in its anonymity, in its reliance on extra-record advice, in frustration of parties' desire to reach the men who influence the decision behind the scenes, and in the separation of the deciding function from the writing of the opinion or report."⁷⁵ To this may be added a breakdown of the case-to-case policy-making which was deemed an important attribute of agency adjudication.⁷⁶ Hector discloses an agency failure to engage in such policy-making, one of the reasons being that the agency members merely vote on the outcome of a case and the opinion justifying the outcome is written by the staff. The staff "consciously avoid statements of general principle" so as to "be able to write an opinion justifying an opposite conclusion the next day."⁷⁷ Lest this be deemed an isolated practice, Hector cites the statement of the FCC Chairman that "there is nothing, especially in the FCC . . . that you can . . .

⁷³ Hector, *Memorandum*, *supra* note 4. Decisions are written by an opinion-writing staff after the Board makes its decision. *Id.* at 947. The Board does not tell the writers in detail what to put in the opinion. *Ibid.* Seldom do the published opinions deviate from the drafts submitted and in one case the Board was urged to release a 71-page opinion which had just reached it the day before. *Id.* at 947-48. In no case did the opinion-writers come back and tell the Board that the facts do not square with the decision. *Id.* at 948. Since the Board does not read the record, *id.* at 946, it must be endowed with a power of factual divination that surpasses the wildest feats claimed for extra-sensory perception.

⁷⁴ DAVIS, *ADMINISTRATIVE LAW* 330 (1951).

⁷⁵ 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* 37 (1958), although he regards the institutional decision as "inevitable," *infra*, p. 216.

⁷⁶ *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

⁷⁷ Hector, *Memorandum*, *supra* note 4, at 942-43.

rely on.”⁷⁸ In a word, the commissioners, acting judicially, says Hector, “seldom enunciate policy.”⁷⁹

Striking confirmation for this view was recently furnished by ICC Commissioner Webb:

“If, as I believe, the Commission’s voice is too often uncertain, it is because an anonymous professional staff of opinion writers cannot reasonably be expected to articulate vital principles when they receive little or no guidance from individual Commissioners. . . . Today, and for some years past, members of the Commission have been unable to assume any large measure of responsibility for the writing of important Commission opinions.”⁸⁰

Dissatisfaction with “the institutional approach to the decision of cases which tends to substitute bureaucratic red tape for the personal participation of NLRB members” was recently noted by the Cox Advisory Panel.⁸¹

Indeed, Professor Davis states that “the objection to the separation of deciding from opinion writing may be unanswerable except in terms of inevitability,”⁸² the “inevitability” arising from the sheer volume of work in some agencies. But, as Professor Jaffe observes, “the inevitability is a consequence of the choice to load up the ‘members’ of the agency with ultimate responsibility for a great variety of tasks. . . . The vice of the argument, if any, proceeds from the . . . assumption that all the related tasks in an area, *e.g.* ‘policy making’ and adjudication, must be under a common direction.”⁸³

⁷⁸ *Id.* at 942 n. 31, quoting 11 *AD. L. BULL.* 137 (1958).

⁷⁹ *Id.* at 946. Landis states that opinion-writing by an anonymous staff has “resulted in the lack of development of adequate standards in various administrative fields.” Landis, *supra* note 11, at 7.

⁸⁰ Address, *The Voice of the Interstate Commerce Commission*, before the Richmond Chapter of the ICC Practitioners Ass’n, Richmond, Va., May 5, 1960, p. 2. Commissioner Webb goes on to state: “the report writer knows that the best way to guard against re-writing a draft report is to avoid an extended discussion of controversial issues of transportation policy and clear-cut findings on hotly contested issues of fact . . . the report writer, having little or no guidance from any Commissioner, is quite naturally disposed to write an *ad hoc* opinion having a minimum of value as a precedent.” *Id.* at 4.

⁸¹ REPORT TO THE SENATE LABOR COMMITTEE BY ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, Professor Archibald Cox, chairman, Organization & Procedure of NLRB, 86th Cong., 2d Sess. (Feb. 2, 1960), Doc. No. 81, p. 2. It recommended “less reliance upon legal assistants, elimination of the internal procedures by which legal assistants of the several members confer upon, and virtually determine, the Board’s decision. . . .” (p. 7). And it concluded, “Members should give personal attention to, and have personal responsibility for, all the decisions in which they participate.” (p. 6).

⁸² 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* 90 (1958). Commissioner Webb, *supra* note 80, at 2, states that “the institutional decision is presently a matter of stark necessity.”

⁸³ Jaffe on Davis, *supra* note 10, at 1641.

Anticipating objections to "institutional decision" writing, Mr. Kintner emphasizes that the FTC commissioners explain their votes in individually prepared opinions, that they "do not merely rubber stamp the work of an anonymous professional staff of opinion writers."⁸⁴ Professor Davis is of the view that such opinion writing by agency members is too burdensome to be feasible.⁸⁵ That view has considerable force. In the 1958-1959 fiscal year, the FTC issued 355 opinions,⁸⁶ or 71 opinions per commissioner. Consider the manifold additional duties of the Commission: the work of the Trade Conferences,⁸⁷ the Commission's coordination of investigation and litigation programs,⁸⁸ its masterminding of improvements in administration,⁸⁹ to which may be added the necessity of testifying before congressional investigating and budgetary committees, the submission of investigatory reports to Congress,⁹⁰ the promulgation of rules and regulations, and, last but not least, the amount of time spent by commissioners on the necessary task of educating American business. This last was intended to be one of its most important functions,⁹¹ and Mr. Kintner has energetically addressed himself thereto. It is reported that "during his term [one year] as Chairman, Kintner has made 160 speeches, appeared 300 times on TV programs, and held nearly 300 press conferences."^{91*} When, one wonders, can Mr. Kintner — let alone the mine-run commissioner who does not rejoice in his extraordinary energy — find time to study the massive records of Commission proceedings, to read voluminous briefs, do necessary legal research and prepare his own 71 opinions, let alone prepare

⁸⁴ Kintner, *Current Ordeal*, *supra* note 2, at 972. He recently stated that "many voices have been raised in opposition to the institutional decision. To these I add my own." Kintner, *Fed. Ad. Law*, *supra* note 1, at 6. It is widely believed that the Commission's "Division of Special Legal Assistants" writes the majority opinions for the commissioners.

⁸⁵ 2 DAVIS, *ADMINISTRATIVE LAW TREATISE* 90 (1958).

⁸⁶ Commissioner Webb, *supra* note 80, at 3.

⁸⁷ Kintner, *Current Ordeal*, *supra* note 2, at 971.

⁸⁸ Kintner, *Resurgens*, *supra* note 39, *passim*.

⁸⁹ E.g., the new Robinson-Patman Task Forces treated by the Commission for better enforcement of that act, *id.* at 3-4. See also Kintner, Statement, *A Challenge to the Food Industry*, before Grocery Manufacturers of America, New York, N.Y., Nov. 9, 1959, pp. 19-20.

⁹⁰ Kintner, *Current Ordeal*, *supra* note 2, at 974. See also Kintner, Statement, *Legal Obligations and Moral Responsibility of Powerful Food Buyers*, before Nat'l Ass'n of Food Chains, Washington, D.C., Oct. 19, 1959, pp. 2-3.

⁹¹ Mr. Kintner agreed that the FTC "was designed to be an educational body for businessmen. . . ." Proceedings, ABA Section of Antitrust Law, Washington, D.C., April 4-5, 1957, p. 113. See also Kintner, Statement, *Responsibilities of Government and Business in Our Free Market Economy*, before Chemical Specialties Mfrs. Ass'n, Chicago, Ill., May 17, 1960, pp. 3-4.

^{91*} 106 CONG. REC. 15605 (daily ed. Aug. 19, 1960) reprinting an article published in the Daily News, Aug. 15, 1960.

himself intelligently to assay the remaining 284 drafted by his fellow commissioners?

*Judicial Review of FTC Orders Is Inadequate Substitute
for Trade Court Initial Adjudication*

Deficiencies in administrative adjudication, Mr. Kintner intimates, are curable on judicial review. For cease-and-desist orders "are not self-executing," and a respondent "gets court review of the Commission's determinations of law, and the facts of violation. . . ." ⁹² But the facts underlying *the order* are virtually impregnable to attack, because "the courts are largely *bound* in [review] proceedings by administrative determinations of fact, which are thus similarly conclusive upon the respondents." ⁹³ We need to remember, as Judge Jerome Frank emphasized, that "*'the facts,' when there is a clash of testimony, are in truth nothing but a subjective reaction of the judge or jury [or Commission] to the testimony . . . [their] guess as to [the conduct of the parties],*" ⁹⁴ and that the "heart of the fact finding process often is the drawing of inferences from the evidence." ⁹⁵ Since, where the facts are the "prime factor in arriving at a decision the trial judge . . . often has a discretion . . . which is beyond control," ⁹⁶ and since "the scope of review of administrative findings is narrower than the scope of review of a judge's findings," ⁹⁷ well may the administrator say, "Let me but find the facts and I care not who writes the laws." So long as administrative disinterestedness is suspect, judicial review of virtually unreviewable fact findings can be no adequate substitute for initially dispassionate adjudication.

Will a Trade Court Impair Present Powers of Settlement?

To take away the adjudicatory power, Mr. Kintner states, "would destroy, in great part, the effectiveness of other techniques by which the Commission achieves compliance with the trade regu-

⁹² Kintner, *Trade Court Proposal*, *supra* note 2, at 443-44.

⁹³ Fuchs, *The Hoover Commission Report*, *supra* note 29, at 20. (Emphasis added.)

⁹⁴ FRANK, *IF MEN WERE ANGELS* 74-75 (1942). Judge Frank cites an SEC opinion which refers to the "*inescapable subjective factors in the minds of those who pass judgment and is therefore not safeguarded against error.*" *Id.* at 121.

⁹⁵ 4 DAVIS, *ADMINISTRATIVE LAW TREATISE* 137 (1958). Former Commissioner Lowell Mason found that in the administrative scales "one feather of government inference is worth a ton of a private citizen's facts." *THE LANGUAGE OF DISSENT* 303 (1959).

⁹⁶ FRANK, *op. cit.* *supra* note 94, at 92.

⁹⁷ DAVIS, *op. cit.* *supra* note 95, at 121.

lation laws without resort to formal proceedings.”⁹⁸ More specifically, he says, “the existence of the power to issue cease-and-desist orders assists the Commission in securing the closing of cases by voluntary⁹⁹ compliance after investigation, by stipulations, and by consent orders after a complaint is issued.”¹⁰⁰ “Consent orders” could, of course, be processed as well after filing of a complaint in the Trade Court, and, as Herbert Clark states, the mere “decision by the Federal Trade Commission to take the matter to court would in many cases lead to a consent order.”¹⁰¹ The Antitrust Division of the Department of Justice gets a substantial number of consent decrees without having the adjudicatory power. There must in consequence be some magic in the mere “existence” of the FTC adjudicatory power, presumably the confidence of the Commission’s prosecutors — and the correlative fear of respondents — that the Commission is more apt to swing the “Big Stick”¹⁰² — issue a cease-and-desist order — than is an “unbiased” court. Mr. Kintner quotes the Attorney General’s Committee Report, 1941, that “amicable disposition of cases is far less likely where . . . the prosecuting officials cannot turn to the deciding branch to discover the law and the applicable policies.”¹⁰³ If the “separation” of which Mr. Kintner boasts is meaningful, neither the investigating nor prosecuting officials should discuss a particular case with the Commission which it may later be called upon to judge. In truth, the trade court proposals, by releasing the Commission from its adjudicatory task, would really make it available for staff discussion of “law and applicable policies,” uninhibited by embarrassing considerations of “separation of functions.”

No Transfer of Legislative Power

Mr. Kintner argues that in proposing to transfer the function of deciding whether to issue “cease-and-desist” orders “the leaders

⁹⁸ Kintner on Davis, *supra* note 2, at 631; Kintner, *Trade Court Proposal*, *supra* note 2, at 493-94.

⁹⁹ The moderator of a discussion before the ABA Antitrust Section, Robert W. Austin, in which Mr. Kintner was stressing “the purely voluntary aspect of a stipulation” said, “I remember stipulations offered to me, already written, and with no negotiations and being told I took either the stipulation or the complaint.” Proceedings, ABA Section of Antitrust Law, Washington, D.C., April 4-5, 1957, p. 113.

¹⁰⁰ Kintner, *Current Ordeal*, *supra* note 2, at 976. See also Freer, *The Case Against the Trade Regulation Section of the Proposed Administrative Court*, 24 GEO. WASH. L. REV. 637, 647-48 (1956); Nutting, *The Administrative Court*, 30 N.Y.U.L. REV. 1384, 1387 (1955).

¹⁰¹ Clark, *Transfer of Functions*, *supra* note 23, at 57.

¹⁰² See note 43 *supra*.

¹⁰³ Kintner, *Trade Court and ABA*, *supra* note 2, at 90.

of the American Bar Association are promoting the transfer to a constitutional court of functions which are primarily legislative. . . ."¹⁰⁴ For this he cites no less an authority than the ABA itself in a 1936 report,¹⁰⁵ saying that "obviously, if the 1936 Special Committee was right the 1956 Special Committee is wrong."¹⁰⁶ The ABA, of course, is not infallible, and it would not be remarkable to find a group of lawyers differing with their predecessors after the lapse of twenty years. Have we not the august example of the Supreme Court? But the fact is that in 1936 the ABA Committee, like its 1956 successor, said, "Cease and desist orders are nothing more nor less than injunctions in effect. . . ."¹⁰⁷ This is the view of the courts,¹⁰⁸ and it follows logically from the fact that an injunction is a court order requiring a person to do or refrain from doing a particular thing.¹⁰⁹ Mr. Kintner himself states that cease-and-desist orders "look like injunctions. . . ."¹¹⁰ Such orders, of course, are judicial, not legislative. How can orders entered in adversary proceedings wherein the parties assert conflicting claims and the tribunal inquires whether past actions violate existing law be anything but judicial?

Mr. Kintner informs us, however, that "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,'" quoting *Humphrey's Executor v.*

¹⁰⁴ Kintner, *Trade Court and ABA*, *supra* note 2, at 80.

¹⁰⁵ *Id.* at 77, citing *Report of the ABA Special Committee on Administrative Law* 238 (1936).

¹⁰⁶ *Ibid.*

¹⁰⁷ *Report*, *supra* note 105, at 238. With respect to the jurisdiction "to prescribe rates, classification practices and regulations, for the future," the 1936 Report went on to say that the "exercise of *such a function* has usually been regarded by the courts as a legislative act. . . . The committee believes that even eventually it will not be desirable to lodge the original exercise of most of these functions in the Court, both for practical reasons and because the functions approach so closely to the legislative field." *Ibid.*

If the general reference is somewhat ambiguous, is it yet fair to deduce that the 1936 Report concluded that an injunction is legislative, like prescribing "rates . . . for the future?"

¹⁰⁸ "[A] cease and desist order is of the nature of an injunction." *NLRB v. Tehel Bottling Co.*, 129 F.2d 250, 255 (8th Cir. 1942); *NLRB v. Colten*, 105 F.2d 179, 183 (6th Cir. 1939). See also *Fuchs*, *supra* note 29, at 20.

¹⁰⁹ *Consolidated Coal & Coke Co. v. Beale*, 282 Fed. 934, 935 (S.D. Ohio 1922); *Gainsburg v. Dodge*, 193 Ark. 473, 476 (1937); *Railroad Commission of Texas v. McDonald Motor Freight Lines*, 127 S.W.2d 932, 935 (Tex. Civ. App. 1939).

¹¹⁰ Kintner, *Trade Court Proposal*, *supra* note 2, at 443 n.23, quoting, "The cease and desist order is in effect, an administrative injunction." Harris, *The Hoover Commission Report: Improvement of Legal Services and Procedure*, 41 A.B.A.J. 713, 716 (1955).

United States.¹¹¹ That case in no way involved the nature of the Commission's power to apply a statute to a particular case—a familiar judicial function—but the power of the President to remove a member of an independent agency without qualification. Its reference to the two means of “filling in” may be regarded as convenient shorthand for the *legislative* rule-making and the *judicial* “cease-and-desist” processes of administering the “unfair competition” provision. We should not attribute to a casual, not really relevant, dictum an intention to obliterate the carefully drawn, long-established line between judicial and legislative action.

Mr. Kintner also suggests that to the extent that the proposed transfer “includes the Commission's authority to *define* ‘unfair methods of competition’ . . . this might be an unconstitutional delegation of legislative power to the judicial branch. . . .”¹¹² Since the ABA proposal is confined to transfer of the *adjudicatory* power, it does not comprehend the truly legislative rule-making power. By power to “define,” Mr. Kintner must necessarily mean, therefore, the adjudicatory power to “interpret” the statutory terms. This is an everyday judicial function. Mr. Kintner himself quotes a Supreme Court statement that “this general language [of the relevant Clayton Act] was deliberately left to the ‘Commission and the courts’ for definition. . . .”¹¹³ For years the courts have been “filling in” and “defining” the details of the Sherman Act “restraints of trade.” The fact, therefore, that, in Mr. Kintner's words, “Each time that the Commission issues an order to cease and desist . . . it is filling in the meaning of the statute . . . ,”¹¹⁴ does not convert that judicial act into a legislative one. For, as he said elsewhere, the “ultimate application” of the FTC act is “to be arrived at ‘by the gradual process of *judicial* inclusion and exclusion.’ ”¹¹⁵

Miscellaneous

1. *No Need To Discard Precedents.* Mr. Kintner tells us, that “the forty-five years of precedent contained in the *Federal Trade Commission Reports* furnishes a valuable exposition of policy,” a

¹¹¹ 295 U.S. 602, 628 (1935). Kintner, *Trade Court and ABA*, *supra* note 2, at 77.

¹¹² Kintner, *Trade Court Proposal*, *supra* note 2, at 444.

¹¹³ Kintner, *Trade Court and ABA*, *supra* note 2, at 87, quoting *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948). (Emphasis added.)

¹¹⁴ Kintner, *Trade Court Proposal*, *supra* note 2, at 444.

¹¹⁵ Kintner, *Revitalized FTC*, *supra* note 19, at 1190.

"body of precedent [which] should not be discarded lightly."¹¹⁶ But in a more revealing moment, Mr. Kintner disclosed that

"Traditionally, Commission findings were couched in formalistic terms often a mere parroting of the language of the complaint, without narrative statement of any kind or any insight into the ratiocination of the decision. Gerard Henderson, in 1924, termed the decisions 'masterpieces of ambiguity.' In 1941, the Attorney General's Committee on Administrative Procedure considered Commission decisions 'of indifferent value as precedents.' . . . Professor Davis, as recently as 1951, agreed that the Commission 'has been glaringly deficient in its failure to prepare reasoned opinions.'

"The courts, too, have regularly upbraided the Commission for the quality of its decisions."¹¹⁷

But the " 'new' Commission," installed by the Eisenhower administration, "now issues an opinion in every case," a practice inaugurated during the past five years.¹¹⁸ This scarcely adds up to a "valuable exposition of policy" contained in "forty-five years of precedent." And in view of the "great weight" attached by the courts to administrative interpretation,¹¹⁹ who is to say that a trade court will "lightly discard" its administrative predecessor's "valuable precedents?"

2. *The Commerce Court.* "Many years ago," states Mr. Kintner, "in response to pressure by the American Bar Association, Congress created a specialized commerce court which was abolished after three years because of its poor performance record. . . . 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."¹²⁰ Thus specialization, which is repeatedly extolled as a virtue in agencies, unaccountably results in "poor performance" when acquired by a court. In fact, however, the Commerce Court "was born in a political storm, almost at once became the object of political attack . . . [and] under a new administration was choked to death. . . ."¹²¹ From the death of the Commerce

¹¹⁶ Kintner, *Current Ordeal*, *supra* note 2, at 971.

¹¹⁷ Kintner, *Revitalized FTC*, *supra* note 19, at 1151-52.

¹¹⁸ *Ibid.*, *Harris Hearings*, *supra* note 2, at 127.

¹¹⁹ See *United States v. American Trucking Ass'n*, 310 U.S. 534, 549 (1940).

¹²⁰ Kintner, *Trade Court and ABA*, *supra* note 2, at 94.

¹²¹ Rightmire, *Special Federal Courts*, 13 ILL. L. REV. 97 (1918). Nor is the transfer of the power to review administrative adjudications from the courts of appeals to the commerce court an apt analogy for the transfer of power to *make* administrative adjudications to a Trade Court. Many who esteem specialization at the trial level believe that the advantage lies with broad, overall experience on review.

Court in the heat of political battle,¹²² it cannot be concluded that a specialized court is synonymous with "poor performance."

3. *Waiting for Administrative Self-Improvement.* Repeatedly Mr. Kintner stresses that the administrative process can be improved — apparently by the agencies — and that it "should not be abandoned for an untested utopian alternative . . ." until such improvement is demonstrably ineffective.¹²³ Presumably it is not unfair to evaluate the possibility of future self-improvement by past performance. On this score I cannot improve on Mr. Kintner's own statements:

"Commission sluggishness has been repeatedly scored in the past. A 1946 Congressional inquiry uncovered startling evidence of delay in the processing of cases. In some cases as many as 8 years elapsed before completion. . . . A 1951 House Report found that 'an inordinate amount of time has been devoted to just plain "sleeping on a case."'

. . .

"Perhaps most glaring of the Commission's past infirmities has been its compliance program. . . . A 1946 Congressional inquiry reported with some astonishment that the Commission had no 'systematic follow-up' of Commission orders . . . to determine whether or not the orders *actually* [Mr. Kintner's italics] were being obeyed. . . . In 1951 a House group reported: 'In spite of the interest recently displayed by the Commission in enforcing its orders, its compliance program is still very weak.'"¹²⁴

¹²² Professors Frankfurter and Landis tell us that President Taft urged creation of a commerce court for reasons analogous to "those which induced Congress to create the Court of Customs Appeals" [THE BUSINESS OF THE SUPREME COURT 156 (1928)], that the proposal at once "drew the fire of the then 'insurgent' group in the Senate" [*id.* at 157], supported by the Democrats [*id.* at 158-59], and that "the gravaman of their objection furnishes the keynote of the opposition during the debate of the following 5 months and forecasts the fate of the court. It was feared that the bent of mind and the environment of the judges selected for such a court would incline them towards the railroads and against the public interest, in the dramatic conflict of 'public' against 'railroads,' in terms of which the problem of railroad control was conceived." *Id.* at 157.

In a word, the Commerce Court "entered an environment partial to the [Interstate Commerce] Commission and distrustful of courts. . . . [T]he Court, heedless of the public temper, promptly began to reverse the Commission and to curb its activity. . . . [T]he Commerce Court was itself promptly reversed and curbed by the Supreme Court." *Id.* at 165. The Commerce Court, "itself thus furnished apparent vindication of the foreboding prophecies of those who had bitterly contested its creation. The movement for its abolition, which was promptly under way, thus assumed the character of a revolt against the Administration. . . ." *Id.* at 166. When ". . . Democracy came to power on March 4, 1913, the Court's doom was sealed." *Id.* at 171.

¹²³ Kintner, *Current Ordeal*, *supra* note 2, at 968.

¹²⁴ Kintner, *Revitalized FTC*, *supra* note 19, at 1148, 1150.

Mr. Kintner's candid acknowledgment of his predecessors' sins is but a prelude to his recital of changes wrought by the "new" dispensation in 1953.

But we also have some "sleeping" on the part of the "New Commission" which we are entitled to consider in evaluating a plea for the chance to benefit by self-improvement. The Commission, Mr. Kintner tells us, is "engaged in a continuous search for methods that may be of use in eliminating delay."¹²⁵ In April 1957, former Chairman Howrey, addressing the meeting before which Mr. Kintner launched his attack on the ABA Trade Court proposals, said that "In some respects FTC procedures are still in the 'horse and buggy' stage as compared with federal court procedures," that "Because of the lack of such modern techniques as pretrial discovery . . . the trial of the so-called 'big case' before a hearing examiner is bound to be more cumbersome and drawn out than similar trials before a court," and that "It is *high time* . . . that the Federal Rules of Civil Procedure [which contain "extremely liberal provisions for discovery"] be followed in FTC adversary hearings."¹²⁶ It is "high time," indeed, for the Federal Rules have been in effect since 1938. A similar call was issued on May 7, 1959, by Judge Irving R. Kaufman of the United States District Court for the Southern District of New York.¹²⁷ In a symposium before the ABA Section of Administrative Law which met in Miami Beach, Florida, in August 1959, I outlined a statutory scaffolding which would support administrative regulations making discovery available, pointing out that the FTC already enjoyed the advantage of one-sided discovery through its investigation and subpoena procedures. Notwithstanding that, Mr. Kintner, in the same issue of the Administrative Law Bulletin which printed that outline,¹²⁸ stated that "if improvement in administrative process is necessary and can be supplied from within, . . . we should look upon it as *compulsory* [Mr. Kintner's italics] from within rather than voluntary,"¹²⁹ discovery is yet to be made available by the FTC. If a lag between 1951 and 1953 entitled the "New Commis-

¹²⁵ Kintner, *Current Ordeal*, *supra* note 2, at 973.

¹²⁶ Howrey, *Fed. Trade Comm.*, *supra* note 37, at 44-45. (Emphasis added.)

¹²⁷ Address, *Have Administrative Agencies Kept Pace with Modern Court-developed Techniques Against Delay?—A Judge's View*, before the Federal Trade Examiners Conference, Silver Spring, Maryland, reprinted 12 AD. L. BULL. 103 (1960). Judge Kaufman quotes (*id.* at 115) 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* 589 (1958): "Probably no sound reason can be given for failure to extend to administrative adjudication the discovery procedures worked out for judicial proceedings."

¹²⁸ Berger, "Discovery in Administrative Proceedings," 12 AD. L. BULL. 28 (1959).

¹²⁹ 12 AD. L. BULL. 3 (1959).

sion" to claim credit for the cure is it not equally to blame for failing still to act on ex-Chairman Howrey's call in 1957? This history, to my mind, suggests the wisdom of preferring a legislative transfer of judicial functions to waiting on possible administrative self-improvement,¹³⁰ particularly in an area where by the nature of the problem self-improvement is virtually impossible.

4. *Why Single Out the FTC.* Why, asks Mr. Kintner, single out the FTC, the agency which has gone so far to achieve an internal separation of functions.¹³¹ The answer lies in the nature of its functions. The Attorney General's Committee stated in 1941:

"There are . . . some agencies such as the Federal Trade Commission and the National Labor Relations Board whose *principal duty is the enforcement, by decision of cases, of certain statutory prohibitions.* In the case of such agencies, the practical objection . . . to isolating the adjudicatory function and handing it over to some independent body would not exist to the same extent. . . . And it is undoubtedly true that agencies whose only substantial task is that of enforcing the prohibitions of a statute through adjudication, especially in such controversial fields as that of unfair methods of business competition and labor relations, are peculiarly in *danger of being charged with bias* by those against whom the prohibitions are sought to be enforced."¹³²

The Commission's "principal role in policymaking is performed by applying broad statutes to individual cases,"¹³³ a typical judicial function, expressed in characteristic judicial form by issuance of the injunction-like "cease-and-desist" order. It is therefore a logical candidate for primacy in separating adjudication from prosecution.

The reasons advanced by the Attorney General's Committee in 1941 against separating FTC prosecution from adjudication deserve re-examination. First is the "danger of friction and of a break-down of responsibility as between the two complementary agencies."¹³⁴ The answer of the minority, Messrs. McFarland,

¹³⁰ Mr. Kintner testified in 1958 that "not enough has been done by the Government agencies towards implementing the excellent recommendations . . . of the President's Conference on Administrative Procedure of 1953 and 1954." *Harris Hearings, supra* note 2, at 44.

¹³¹ Kintner, *Trade Court and ABA, supra* note 2, at 90, 81.

¹³² REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 58 (1941). (Emphasis added.)

¹³³ Kintner, *Current Ordeal, supra* note 2, at 975, 970.

¹³⁴ REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 58 (1941).

Stason and Vanderbilt, has gained force with the years; there is a separation in administration of the Sherman Act, the tax system, and customs law¹³⁵ without a "breakdown." A second reason, the alleged harm to "informal settlements," has earlier been discussed. Then, too, it was asserted that interpretations of vague statutes should "not have to be evolved by a series of litigations."¹³⁶ Yet this, Mr. Kintner claims, remains — after 46 years — the principal task of the Commission.¹³⁷ These alleged evils which would flow from a separation of adjudication from prosecution are, to my mind, as nothing compared to those that obtain under the present union.

To suggest that the transfer of this one adjudicatory function will "destroy" the FTC¹³⁸ is to indulge in hyperbole. There will remain, first, its rule-making power, whereby it can maintain its grip on "policy" making.¹³⁹ Rules have the force of law if within the statute and in cases of doubt carry great weight as administrative interpretations. Second, the Commission will be freed for the task of vigorous investigation and enforcement; and the possibility of overlooking important enforcement problems, as in the case of the recent deceptive television "quiz programs,"¹⁴⁰ will be diminished. Third, it will be freer to undertake economic surveys and to educate the American businessman, tasks that were originally deemed of utmost importance.¹⁴¹ Fourth, it can devote more time to developing the usefulness of its trade conferences. Fifth, it can make more meaningful recommendations for legislation to the Congress. And last, it can take a much more vital role in the selec-

¹³⁵ *Id.* at 206-07.

¹³⁶ *Id.* at 59.

¹³⁷ Kintner, *Current Ordeal*, *supra* note 2, at 970-71.

¹³⁸ Note 6 *supra*.

¹³⁹ Sellers, *The Administrative Court Proposal — or Should Judicial Functions of Administrative Agencies Be Transferred to an Administrative Court*, 23 D.C. B.A.J. 703, 708 (1956). Compare the effect given by the courts to regulations of the Internal Revenue Service.

¹⁴⁰ The House Subcommittee on Legislative Oversight recently reported that it "cannot refrain from noting the opportunity which the FTC had in this [an early FTC] investigation to expose the whole sordid hoax of the rigged television quiz shows" (p. 27), and that in its opinion the FTC "had ample authority to proceed against the marketing and use of rigged television quiz show programs as a deceptive business practice within the meaning of Section 5 of the Federal Trade Commission Act." H.R. REP. No. 1258, 86th Cong., 2d Sess., Feb. 9, 1960, p. 29. See also ATTORNEY GENERAL'S REPORT TO THE PRESIDENT ON DECEPTIVE PRACTICES IN BROADCASTING MEDIA, Dec. 30, 1959, pp. 4-5, 14-15, 37-42. Note too that "A Senate Banking sub-committee has discovered that the Federal Trade Commission is not policing widespread use of 'deceptive and misleading' advertising of credit terms on installment sales. . . . The FTC has ample power to regulate such 'misleading' advertising of credit terms." Washington Daily News, April 25, 1960, p. 26.

¹⁴¹ See note 91 *supra*.

tion, preparation and prosecution of cases, thereby exerting a powerful influence on their decision by the Trade Court and on the continuity of its "policy." Thus, far from being "destroyed" by the removal of *one* function — adjudication, the Commission will be better able to perform all of its remaining and important functions.

Mr. Kintner challenges us to point out "real, not imagined, defects in the functioning of the administrative agencies as they are now constituted."¹⁴² It is not easy to get behind the scenes for a glimpse of how administrative adjudication "really" functions. We are indebted to Louis Hector for one such glimpse.¹⁴³ Proceeding without the benefit of a similar glimpse at the "dark side" of the FTC moon,¹⁴⁴ it is yet a "real defect" that Mr. Kintner should be under the need of brandishing the "weapons" of the Commission before the business community as a prelude to adjudicating whether those "weapons" were properly employed.¹⁴⁵ It is a defect that there remains grave doubt whether the "separation of functions" really insures dispassionate adjudication, that the FTC should too easily identify the case for the prosecution, as in *Carnation*, with the "public interest." It is a defect that charges should continue to be aired that administrative tribunals hear *ex parte* representations respecting pending adjudicatory matters and that Congressmen, Senators and others seek to influence such adjudication.

Would a court "be free of the defects?" asks Mr. Kintner.¹⁴⁶ What Congressman in his senses would dare to call a judge with the object of influencing his decision? The impartiality of a court would be unclouded by charges that its mind was "irrevocably closed" by virtue of investigatory reports submitted by it to Congress.^{146*} No court would be under the necessity of evangelizing with respect to enforcement programs that would come before it for adjudication. It would not be under suspicion of being unduly influenced by vigorous prosecuting and investigation divisions, or for releasing the prosecution from a stipulation merely to advance its cause. These may not constitute "real defects" in the eyes of Mr. Kintner, but they are "real" enough to those who seek fair play before administrative tribunals.

¹⁴² Kintner, *Current Ordeal*, *supra* note 2, at 968-69.

¹⁴³ See note 51 *supra*.

¹⁴⁴ Cf. Beclar, *The Dark Side of Agency Litigation*, 12 AD. L. BULL. 34 (1959).

¹⁴⁵ *Supra*, p. 209.

¹⁴⁶ Kintner, *Current Ordeal*, *supra* note 2, at 969.

^{146*} See note 50 *supra*.

Conclusion

Confidence in the "unbiased" judgment of our adjudicatory tribunals is an indispensable bastion of our form of government.¹⁴⁷ Chairman Leedom of the NLRB recently stated that "courts do have a public respect that agencies lack and must acquire."¹⁴⁸ If the FTC has been unable in 46 years to win such confidence, we may justifiably ask, why not. And the answer may in great part lie in the fact that the FTC is trying to accomplish divergent, basically incompatible tasks, tasks which no amount of paper "separation" can reconcile, and which should be once more divorced if only to preserve confidence in our adjudicatory processes.

In truth, it is idle to expect impartiality of an agency that is directed to effectuate a policy. If genuine impartiality is desired, adjudication must then be placed outside the agency, for agency adjudication can offer no more than the semblance of impartiality. This is the nub of the Sir Oliver Franks' Committee's recent report to Parliament:

"[W]hen Parliament sets up a tribunal to decide cases, the adjudication is placed outside the Department concerned. The members of the tribunal are neutral and impartial in relation to the policy of the Minister, except insofar as that policy is contained in the rules which the tribunal has been set up to apply. But the minister, deciding in the cases [left to him to decide], is committed to a policy which he has been charged by Parliament to carry out. In this sense he is not, and cannot be, impartial."¹⁴⁹

Whether certain exigencies may require agency adjudication of policy at all costs may be left for future examination. The Trade Court proposal is aimed at the situation where a prosecutor charges *law violation* which he is now required to judge, the classic situation for impartial adjudication.

¹⁴⁷ "In this country government rests fundamentally upon the consent of the governed. The general acceptability of these adjudications is one of the vital elements in sustaining that consent." REPORT OF THE [Sir Oliver Franks] COMMITTEE ON ADMINISTRATIVE TRIBUNALS AND ENQUIRIES 5 (1957). Quoted in *Veterans Affairs Report*, *supra* note 5, at 5.

¹⁴⁸ Speech, December 13, 1957. Attorney General Rogers recently said, "There *should* be in every instance the same public confidence in the integrity and fairness of administrative proceedings as court proceedings now enjoy," implying that agencies do not now enjoy such confidence. *Supra* note 1.

¹⁴⁹ *Supra* note 147, at 5. The Lord Sankey Committee said, "It is unfair to impose on a practical administrator the duty of adjudicating in any matter in which it could be fairly argued that his impartiality would be in inverse ratio to his strength and ability as a Minister." *Supra* note 28, at 78.

The Trade Court bill is a modest, empirical approach to what, despite the "separation of functions," remains an "acute problem." It singles out an unquestionably judicial function, determination in an adversary proceeding whether there has been violation of an existing law, culminating in issuance of a cease-and-desist order which is like an injunction in nature and a familiar staple of the courts. It does not represent a sharp breach with a long-established tradition but rather a return thereto after an experimental, unstudied and comparatively recent departure. If the Trade Court proves meritorious, we can profit by its example; if it fails, it can be abandoned. It "is one of the happy incidents of the federal system," said Justice Brandeis, that a "single courageous State" may try "novel social and economic experiments without risk to the rest of the country."¹⁵⁰ Bearing in mind also the successful example of the Tax Court and the Customs Court, it cannot be that the return of adjudicatory functions from one federal agency or two to an administrative court would "scuttle the entire administrative process."

¹⁵⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion, Stone, J., concurring).

ADDENDUM

Judge Friendly's recent article, "A Look at the Federal Administrative Agencies,"¹⁵¹ came to my attention as my own was in galley, too late to incorporate comment thereon in the body. Although he modestly points out that he is a "new judge," speaking from the "vantage point of six months,"¹⁵² his standing as a veteran practitioner before CAB lends special weight to his views.

Judge Friendly fears that the proposal to separate the adjudicatory from the policy-making function "would destroy what is one of the greatest merits of the administrative agency, its combination of legislative, executive, and judicial attributes."¹⁵³ By way of illustration, Judge Friendly says it "would deprive the public of the benefits of the very expertise that is a principal *raison d'être* of the regulatory agency."¹⁵⁴ Students of the administrative process increasingly view this "expertise" as a delusion,¹⁵⁵ and administrative courts can become at least as expert as administrators, witness the Tax Court. Aware of the increasing premature rotation of agency members, Judge Friendly suggests that their terms be lengthened to ten years.¹⁵⁶ Even if the lengthened term should fortify agency members against the siren calls of business or private practice, it will yet not remove the competing administrative pressures arising from a multiplicity of duties which constrain agency members to rely on institutional decisions, a prime source of dissatisfaction with agency adjudication.¹⁵⁷ It will not insulate adjudication from the incompatible prosecuting function,¹⁵⁸ nor will it erase from the minds of the administrative adjudicators the policy that they pressed upon an industry before they sat in judgment on a dissenter from that policy.¹⁵⁹ And it will not satisfactorily insulate the agency members from external pressures.

Judge Friendly's second objection to an administrative court is that the "line between policy making and adjudication is altogether too shadowy to afford a basis for separation."¹⁶⁰ If this

¹⁵¹ 60 COLUM. L. REV. 429 (1960).

¹⁵² *Id.* at 429.

¹⁵³ *Id.* at 441.

¹⁵⁴ *Id.* at 442; and see p. 443.

¹⁵⁵ *Supra*, p. 211.

¹⁵⁶ *Supra* note 151, at 445.

¹⁵⁷ *Supra*, p. 215.

¹⁵⁸ *Supra*, pp. 206-11.

¹⁵⁹ *Supra* note 51.

¹⁶⁰ *Supra* note 151, at 441.

means that policy making is not for courts, there are many areas in which they make policy; for example, they have been making policy within the vague confines of the antitrust laws for sixty years. Indeed there are those who prefer that "judges rather than commissioners should shape the large outlines of our economic policy, where Congress has not stated its will."¹⁶¹ The joint administration of the Sherman Act by the courts and the Department of Justice, and of the tax laws by the Tax Court and the Internal Revenue Service, indicate that administrative policy making is not hamstrung by judicial participation. If policy making by administrators is to be preferred because it is they who are responsible for carrying out the entire "program," I suggest that it is precisely this identification with the "program" which renders impartial administrative adjudication difficult, if not virtually impossible.¹⁶²

Moreover, Hector has given evidence of a break-down of adjudicatory policy-making, which is not confined to CAB.¹⁶³ If we free the commissioners from an uncongenial, burdensome, and inadequately performed judicial task, they can the better concentrate upon their legislative task — the formulation of policy. The agency can then retain control over policy through the formulation of rules¹⁶⁴ which, if within the statutory authorization, are binding upon the court. And the administrative court can undertake the case-to-case formulation of policy that is now neglected.

I would not suggest that the problem of separating the adjudicatory function from the other administrative functions in rate-making cases is of the same order as the simpler FTC issuance of a complaint that the law is being violated. But even though, as Judge Friendly states, the "fixing of future rates is surely not a 'judicial' function,"¹⁶⁵ for which reason it may not be confided to a "constitutional," Article III court, it does not follow that such functions cannot be assigned to a "legislative" court. The Tax Court furnishes an example of one such court; the Court of Claims

¹⁶¹ Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 473 (1954).

¹⁶² *Supra*, pp. 204-06, 228.

¹⁶³ *Supra*, pp. 215-16.

¹⁶⁴ *Supra*, p. 226. If *NLRB v. Mountain Pacific Chapter*, 270 F.2d 424 (9th Cir. 1959) intimates, with respect to union-operated hiring halls, that this is "the type of thing that agencies with expert knowledge ought to do," as Judge Friendly states, *supra* note 151, at 442, it is worth noting that the same 9th Circuit later suggested that the APA rule-making procedures would have been better suited to the problem than adjudication. *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 598, 601 (9th Cir. 1960).

¹⁶⁵ *Supra* note 151, at 442.

and Courts of Customs began as "legislative" courts. The object of the separation, as in the case of the Tax Court, would be to secure impartial adjudication, although I am not without further study prepared to say that such separation in rate-making cases is either necessary or desirable.

Finally, Judge Friendly, in connection with "unfair labor practices" adverts to the possibility that an administrative court would impose "ineffective remedies [which] 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."¹⁶⁶ Courts employ a very wide discretion in formulating antitrust decrees,¹⁶⁷ and such decrees have yet to breed the "resentment" which led to abridgment of the powers of those "expert administrators," the NLRB, by the Taft-Hartley laws and the institution of a separate office of General Counsel.

¹⁶⁶ *Id.* at 443.

¹⁶⁷ *Besser Manufacturing Co. v. United States*, 343 U.S. 444, 449 (1952). Professor Oppenheim states: "The difficulties of formulating an effective decree in complex anti-trust cases often involving the complex structure of the entire industry are obviously enormous." OPPENHEIM, *CASES ON FEDERAL ANTI-TRUST LAWS* 886 (1948).