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Administrative Law - Judicial Control - Appellate Review of Federal Trade Commission Proceedings

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COMMENTS

ADMINISTRATIVE LAW—JUDICIAL CONTROL—APPELLATE REVIEW OF FEDERAL TRADE COMMISSION PROCEEDINGS—During its forty-five year life the Federal Trade Commission has gone through some difficult periods to emerge today as one of the fundamental instrumentalities of government in the regulation of business. Its vast powers and influence, well known to lawyers, will not be explored here. Rather, the purpose of this comment is to appraise the extent of control which the judiciary now exercises over the commission in its adjudicative functions, so as to offer some indication to the practitioner of the probabilities regarding the outcome of judicial review on an appeal beyond the full commission. The approach to be used will be a study of Supreme Court cases involving the commission since 1914 along with a review of Federal Trade Commission cases that have been before the courts of appeals since 1947.

While the use of statistics is subject to at least some skepticism when the improbabilities of judicial review are involved, statistics here provide a helpful introduction and point of departure. The table presented below is based on a review of 106 cases cited in the 99 recent volumes of the *Federal Reporter, Second Series*.¹ The study covers only cases in which the courts were reviewing substantive decisions of the commission acting in an adjudicative capacity. Thus, all cases involving subpoenas or the enjoining of trade practice rules are omitted. In addition, those cases which were affirmed per curiam and without comment and those raising other problems not here relevant are not included.

The number of cases reviewed by the courts of appeals has increased over the past decade. There were four in 1948, sixteen in 1957 and eleven in 1958. It may be of particular interest to note that thirty-four of the cases appealed were taken to the Seventh Circuit, twenty to the Second Circuit, twelve to the Court of Appeals for the District of Columbia, and fewer than ten to each of the others.

The results on appeal are presented in the following table:

¹ The study ranges from 163 F. (2d) 1 (1947) to 261 F. (2d) 440 (1959).

RESULTS ON REVIEW BY COURTS OF APPEALS

Circuit Court	Total Appeals	Affirmed ²	Affirmed with Modifications ³	Fact Question Total Reverse ⁴	Fact Question Partial Reverse ⁵	Law Question Reverse ⁶
1	1	0	0	0	0	1
2	20	13	2	0	3	2
3	8	7	1	0	0	0
4	7	3	3	1	0	0
5	3	1	0	0	0	2
6	5	3	0	0	1	1
7	34	17	7	4	4	2
8	6	5	0	0	0	1
9	9	5	1	0	1	2
10	1	1	0	0	0	0
DC	13	7	4	0	0	2
Totals	107	62	18	5	9	13

This statistical analysis would be incomplete without a review of the same cases before the United States Supreme Court. At the time of this writing eighteen of the cases had been before the Supreme Court on the merits. In fourteen of them the result in the court of appeals had been to cut down the breadth of the commission's order in some way. Of the four court of appeals decisions which affirmed commission orders, the Supreme Court sustained three. Of the other fourteen, the Court agreed with the appellate court on six, but on eight entered an order more favorable to the commission.

A final figure: at the conclusion of all appellate litigation,

² The cases included here are ones in which the order of the FTC was wholly affirmed.

³ This includes cases in which the findings of the FTC were sustained, but the scope of the order was modified in some way. This classification includes those cases in which there was *any* modification of the order.

⁴ This classification includes those cases in which the petition to review was completely sustained, thus amounting to a dismissal of the FTC's complaint for failure to find substantial evidence to support any of the findings of the commission.

⁵ The cases grouped here include those in which the court failed to find substantial evidence to support some part of the findings of the FTC. This may relate to a single respondent or to a part of the findings against a single respondent. Thus, this category includes those cases in which there has been affirmation of a part of the commission's order.

⁶ This includes those cases which the court reviewed as an issue of law, found the FTC to be in error, and reversed.

respondent⁷ was required to cease and desist from some practice, or the case was remanded to the commission for further proceedings, in 92 of the 107 cases.

I. Issues Available for Review on Appeal

Whether a reviewing court will even consider an issue raised on appeal is preliminary to the type of review that will be afforded. As recently as 1958 the Supreme Court indicated that a reviewing court should not entertain a question not raised before the commission.⁸ This policy has been adhered to in the courts below.⁹

One circumstance in which this problem could arise, which is deserving of special attention, is where the hearing examiner is reversed by the full commission and an appeal is subsequently taken by respondent. In a recent case the hearing examiner found that respondent's advertising was false and misleading, but dismissed the complaint because in his view the practice had been discontinued. In that posture of the case, only counsel supporting the complaint appealed to the full commission. After determining that the practices had not been discontinued, the commission ordered respondent to cease and desist. Then respondent brought the action to the court of appeals. That court refused to consider respondent's claim that the findings of the examiner were unsupported by substantial evidence, saying that the failure to file a cross-appeal to the commission prevented respondent from raising this objection on appeal.¹⁰

II. Distinguishing Questions of Law and Fact

In analyzing the type of judicial review afforded in Federal Trade Commission proceedings, it may be helpful to characterize the reviewing court's activity. Concern here is with determining what are questions of "fact," where judicial review is limited, and what are questions of "law," where the scope of re-

⁷ "Respondent" is used throughout this paper to refer to the party opposing the FTC without regard to the court involved or the party actually seeking review.

⁸ *Moog Industries, Inc. v. FTC*, 355 U.S. 411 at 414 (1958). See also *United States v. Tucker Truck Lines*, 344 U.S. 33 at 37 (1952).

⁹ See, e.g., *Marlene's, Inc. v. FTC*, (7th Cir. 1954) 216 F. (2d) 556 at 558, and *Barclay Home Products, Inc. v. FTC*, (D.C. Cir. 1957) 241 F. (2d) 451, cert. den. 354 U.S. 942 (1957).

¹⁰ *American Life and Accident Ins. Co. v. FTC*, (8th Cir. 1958) 255 F. (2d) 289, cert. den. 358 U.S. 875 (1958).

view is much broader. It will be seen that calling an issue one of "fact" or "law" is only the characterization of a result rather than a tool used in determining the proper scope of review.

Turning first to the problem of determining what constitutes an unfair method of competition or an unfair or deceptive act or practice, the Supreme Court stated in the early case of *Federal Trade Commission v. Gratz*: "The words 'unfair method of competition' are not defined by the statute and their meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. . . ."¹¹

The same problem was before the Court in 1953 in *Motion Picture Advertising Service Co. v. Federal Trade Commission*.¹² Justice Frankfurter, dissenting,¹³ reaffirmed the doctrine of the *Gratz* case. Justice Douglas' majority opinion, however, can easily be given a contrary meaning.¹⁴ That opinion can be reconciled with *Gratz*,¹⁵ but only if it can be said that the conflicting remarks were addressed solely to the question of the remedy. This latter interpretation is plausible, though unlikely, because the cases he referred to dealt only with that point.¹⁶ If what seem to be Justice Douglas' views are accepted, however, it now appears that whenever a "technical"¹⁷ unfair method of competition is involved the courts will abdicate their function as expounded in the *Gratz* case and simply rubber-stamp the commission.

¹¹ *FTC v. Gratz*, 253 U.S. 421 at 427 (1920).

¹² 344 U.S. 392 (1953).

¹³ *Id.* at 404.

¹⁴ "The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes 'unfair' within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question." Majority opinion of Justice Douglas, *id.* at 396.

¹⁵ Justice Douglas also said: "It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of Section 5(a) of the Federal Trade Commission Act." *Id.* at 395.

¹⁶ *Jacob Siegel v. FTC*, 327 U.S. 608 at 612 (1946), and *FTC v. Cement Institute*, 333 U.S. 683 at 726-727 (1948).

¹⁷ To distinguish a technical from a non-technical unfair method of competition it is necessary only to compare the facts of the Motion Picture Advertising case with those in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), mod. 312 U.S. 668 (1941). In the former the issue was the impact of leases of advertising "trailers" to movie houses for varying lengths of time. Knowledge of theater practices, costs and profits of movie makers, and the total available market for advertising shorts were significant, and an expert body might be better equipped to analyze such facts. In the latter case one of the questions was more general, i.e., whether an incipient Sherman Act violation could be an unfair method of competition.

It may be that the opinion of Justice Stone in the 1934 case of *Federal Trade Commission v. Keppel & Bro.*¹⁸ can be used to explain these two conflicting opinions. Justice Stone approved the *Gratz* doctrine, then noted that when the court is deciding what is an unfair method of competition "the determination of the Commission is of weight."¹⁹ The remainder of the opinion is directed to the special competence of the commission to deal with such matters and the expansibility of the phrase to include novel methods not previously deemed illegal. The decision of the Court was a reinstatement of the commission's order after a reversal by the court of appeals. The practical answer may well be that the commission's decision will usually be final. More narrowly, it may be said that the courts of appeals generally adhere to the commission's conclusion that a particular practice is an unfair method of competition, though in most of these cases their decisions are arrived at through independent examination.²⁰

In cases involving misrepresentations the courts are more willing to accept the conclusions of the commission, but this is apparently on the premise that it is clear that misrepresentations are unfair or deceptive acts or practices.²¹ Confirmation that courts are arriving at independent conclusions as to what is an unfair method of competition or an unfair or deceptive act or practice occurs where the commission is reversed. This has occurred, for example, when the question raised was whether a particular scheme was a lottery²² and when the case involved whether certain trade association activity was an unfair method of competition.²³

Since the statute defines the term "false advertisement,"²⁴ and provides that the dissemination of a "false advertisement" by certain means shall be an unfair or deceptive act or practice,²⁵ the broad policy question of what is within the phrase "unfair or deceptive act or practice" is determined by Congress. Because of this, judicial review in this area is ordinarily limited to a review

¹⁸ 291 U.S. 304 (1934).

¹⁹ *Id.* at 314.

²⁰ See, e.g., *Bennett v. FTC*, (D.C. Cir. 1952) 200 F. (2d) 362 and *Gay Games, Inc. v. FTC*, (10th Cir. 1953) 204 F. (2d) 197.

²¹ See, e.g., *Independent Directory Corp. v. FTC*, (2d Cir. 1951) 188 F. (2d) 468, and *Kalwajtys v. FTC*, (7th Cir. 1956) 237 F. (2d) 654, cert. den. 352 U.S. 1025 (1957).

²² *J. C. Martin Corp. v. FTC*, (7th Cir. 1957) 242 F. (2d) 530.

²³ *Tag Mfgs. Institute v. FTC*, (1st Cir. 1949) 174 F. (2d) 452.

²⁴ 52 Stat. 116 (1938), 15 U.S.C. (1952) §55a.

²⁵ 52 Stat. 115 (1938), 15 U.S.C. (1952) §52b.

of the findings of fact, the principal findings being that the advertisement involved is in fact false, that it was disseminated as prescribed by the statute, and that the order is proper.²⁶ On occasion, however, the courts have treated as questions of law the issue whether an advertisement is false simply because it does not point out the product's shortcomings²⁷ and the effect of the word "free" in an advertisement.²⁸ On the other hand the Fourth Circuit felt it was a question of fact whether an advertisement that was technically true could be false.²⁹ No positive formula is seen regarding when the courts will conclude one way or the other in this particular area.

Another significant issue involves price discrimination under the Robinson-Patman Act. A number of questions which have arisen recently concern statutory interpretation, such as where the burden of proof lies, and are clearly questions of which the courts will make an independent determination. The establishment of a good faith defense was the subject of protracted litigation recently involving the Standard Oil Company. The Seventh Circuit on remand decided that whether respondent had established a good faith defense was a matter of law, and it then reversed the commission.³⁰ On certiorari, the Supreme Court concluded this was a factual issue and accordingly limited its review to a consideration of whether the court of appeals had given the record a "fair assessment." This, it decided, had been given.³¹

The Supreme Court's action in this case can be explained by its statement in 1945 that "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission. . . ."³² The status of this point today, as far as the Supreme Court is concerned, is apparently clear, although there are still other unresolved fact questions concerning the scope of the defense.

²⁶ See, e.g., *Arrow Metal Products Corp. v. FTC*, (3d Cir. 1957) 249 F. (2d) 83, and *Trade Union Courier Publishing Corp. v. FTC*, (3d Cir. 1956) 232 F. (2d) 636.

²⁷ *Alberty v. FTC*, (D.C. Cir. 1950) 182 F. (2d) 36, cert. den. 340 U.S. 818 (1950).

²⁸ *Book of the Month Club, Inc. v. FTC*, (2d Cir. 1953) 202 F. (2d) 486.

²⁹ *P. Lorillard Co. v. FTC*, (4th Cir. 1950) 186 F. (2d) 52.

³⁰ *Standard Oil Co. v. FTC*, (7th Cir. 1956) 233 F. (2d) 649, affd. 355 U.S. 396 (1958).

³¹ *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958).

³² *FTC v. Staley Co.*, 324 U.S. 746 at 758 (1945).

On the issue whether respondent's prices were actually discriminatory, the Second Circuit, in concluding that the practices were lawful, stated: "The argument is also made that because the Commission has a special competence in the field of grocery chain stores, its determination as to whether a given practice violates the Robinson-Patman Act cannot be disturbed. The expertise possessed by an administrative agency, however, does not empower it to rewrite the laws which it has been charged with enforcing. This is the function of Congress."³³

In trying to ascertain an overall pattern in these cases it might be well to distinguish between two types of statutory language: that of a general nature, as "unfair methods of competition," and that which connotes a historic jural meaning, as "good faith." In the former the language means little in the skeleton form in which it comes from the legislature. It seems proper for the courts to have the final say, as a matter of law, on the substantial contents of the statute. This certainly must have been the intention of Congress when it passed such a general statute, for it has been accepted practice with regard to other statutes as, for example, the Sherman Act. Additionally, it is questionable if Congress would want to vest authority for such interpretation of a statute in the agency that also acts as prosecutor under the statute. Moreover, the degree of expertise helpful in arriving at a decision would not seem to be relevant. Thus, it seems, the thirty-nine year old *Gratz* doctrine should still be good law. On the other hand, when the statutory language itself has substantive meaning, such as "good faith," it seems proper to relegate to the commission the question whether respondent's conduct fits into the required pattern. This might explain why establishment of a good faith defense is considered a fact question.

III. *Judicial Review on the "Public Interest" Requirement*

When acting pursuant to the Federal Trade Commission Act, the commission is authorized to act only "if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public."³⁴ The provision was first

³³ *Atalanta Trading Corp. v. FTC*, (2d Cir. 1958) 258 F. (2d) 365 at 374.

³⁴ 38 Stat. 719 (1914), 15 U.S.C. (1952) §45b. No such requirement is specified when the commission acts pursuant to the Clayton Act.

before the Supreme Court in 1929 in *Federal Trade Commission v. Klesner*,³⁵ when the Court affirmed a dismissal of the commission's complaint by the court of appeals. The Court said by way of illustration, not as an exclusive enumeration, that the public interest was involved when the unfair method threatened the existence of present or potential competition, when the strong were attempting flagrantly to oppress the weak, or when the loss to a particular person was so small that no one individual would bring an action to halt a practice that affected an entire group.³⁶ It noted that the commission exercised "a broad discretion" in its determination but that the public interest must be "specific and substantial."³⁷ After reviewing the facts, the Supreme Court agreed with the court of appeals that the requisite public interest was lacking, viewing the case as a private dispute between competing firms.³⁸ Four years later the Court made a similar review on the public interest question, saying, "We also are of the opinion that it sufficiently appears that the proceeding was in the interest of the public."³⁹ More recently the issue has not been raised before the Supreme Court.

Decisions in the courts of appeals indicate that those courts will sustain the decision of the commission regarding public interest unless there has been an "abuse of discretion," this phrase being employed to describe the *Klesner* doctrine. It means, apparently, an inquiry into whether the commission properly appraised the relevant factors. All four recent cases that specifically raised the question sustained the conclusion of the commission.⁴⁰

While the *Klesner* approach has been used consistently by the courts of appeals, it is at least arguable that their power to review is not so broad. The statute puts the decision squarely

³⁵ 280 U.S. 19 (1929).

³⁶ *Id.* at 28.

³⁷ *Ibid.*

³⁸ Compare *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956), where the Supreme Court limited its review under a similar statute to a consideration of whether the Civil Aeronautics Board used appropriate criteria to determine whether the proceeding was in the public interest.

³⁹ *FTC v. Royal Milling Co.*, 288 U.S. 212 at 216 (1933). And see also *FTC v. Algoma Lumber Co.*, 291 U.S. 67 at 81 (1934).

⁴⁰ *Motion Picture Advertising Service Co. v. FTC*, (5th Cir. 1952) 194 F. (2d) 633, *revd.* on other grounds 344 U.S. 392 (1953); *Consumer Sales Corp. v. FTC*, (2d Cir. 1952) 198 F. (2d) 404, *cert. den.* 344 U.S. 912 (1953); *Dejay Stores, Inc. v. FTC*, (2d Cir. 1952) 200 F. (2d) 865; *Standard Distributors v. FTC*, (2d Cir. 1954) 211 F. (2d) 7.

up to the commission, and it would seem that the reviewing courts have exceeded their powers when they look to see if the commission's discretion has been abused. Rather, it seems, judicial review should be limited to an inquiry into whether the "appropriate criteria" have been *considered* by the commission, especially in view of the Supreme Court's recent expounding of this test under an analogous statute.⁴¹

IV. *Judicial Review on Questions of Fact*

A. *Background.* The extent of judicial review on questions of fact has undergone a significant change within the past decade. The original practice under the Federal Trade Commission Act was that commission findings were conclusive "if supported by evidence."⁴² The procedure of the reviewing court was to look only at one side of the record to see if it could ferret out sufficient evidence to support the findings, paying no heed to what counterbalanced that evidence on the other side. This prompted Justice Black to note in a 1937 decision that "the courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the commission. The record in this case is filled with evidence of witnesses under oath which supports the commission's findings."⁴³ He reversed the court of appeals after that court had upset the commission's findings.⁴⁴

The Administrative Procedure Act⁴⁵ and its subsequent interpretation by the courts has brought about a change in the extent of judicial review. Justice Frankfurter stated in *Universal Camera Corp. v. Labor Board*⁴⁶ that the "courts must now assume more responsibility for the reasonableness and fairness of [agency] decisions than some courts have shown in the past."⁴⁷ He went on to state that the reviewing court is charged with finding that

⁴¹ *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79 (1956). See note 39 *supra*.

⁴² 38 Stat. 720 (1914), 15 U.S.C. (1952) §45c. There is a similar provision in the Clayton Act, 38 Stat. 734 (1914), 15 U.S.C. (1952) §21.

⁴³ *FTC v. Standard Education Society*, 302 U.S. 112 at 117 (1937), motion to amend opinion denied 302 U.S. 661 (1938).

⁴⁴ For other cases that apply the same test, see, e.g., *Consumers Home Equipment Co. v. FTC*, (6th Cir. 1947) 164 F. (2d) 972, and *Excelsior Laboratory v. FTC*, (2d Cir. 1948) 171 F. (2d) 484.

⁴⁵ 60 Stat. 243 (1946), 5 U.S.C. (1952) §1009e.

⁴⁶ 340 U.S. 474 (1951).

⁴⁷ *Id.* at 490.

the evidence *as a whole* supports the findings of the agency, noting what detracts from the findings as well as what contributes to them. This analysis does not mean that the court may run roughshod over the findings of the agency, for they "are entitled to respect,"⁴⁸ but it does mean that these findings must be set aside when "the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."⁴⁹

B. *A Review of Recent Courts of Appeals Affirmations.* When the reviewing court affirms the findings of fact made by the commission, its emphasis is likely to be on the powers of the commission. When the court overrules the commission, it is more likely to note its own prerogatives. The cases cited in this section are ones in which the reviewing court of appeals affirmed the commission. They seem representative of the attitude of the courts today.

Regarding admissibility of evidence, the rules used in the federal courts are not rigidly adhered to in agency proceedings.⁵⁰ Where the charge is made that evidence is incompetent, the courts usually indicate that evidence is admissible though incompetent, but quickly point out that the evidence before them is probably legally competent.⁵¹ This leaves some doubt as to how far the courts will go in giving effect to *clearly* incompetent evidence. The Administrative Procedure Act standard of "reliable, probative, and substantial"⁵² evidence will be of little help in particular situations until a body of case law is developed. Unfortunately, this may not occur too rapidly, for the courts have taken the position that it is not reversible error to exclude legally incompetent evidence which meets the new statutory standard,⁵³ thus discouraging the raising of this question on appeal. And on the other side of the coin, if the courts adhere to the rule used in the district courts in non-jury cases that

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ *Opp Cotton Mills v. Administrator*, 312 U.S. 126 (1941), mod. on other grounds 312 U.S. 657 (1941).

⁵¹ See, e.g., *Rhodes Pharmacal Co. v. FTC*, (7th Cir. 1953) 208 F. (2d) 382, mod. 348 U.S. 940 (1955), and *Buchwalter v. FTC*, (2d Cir. 1956) 235 F. (2d) 344.

⁵² 60 Stat. 241 (1946), 5 U.S.C. (1952) §1006c.

⁵³ *Dolcin Corp. v. FTC*, (D.C. Cir. 1955) 219 F. (2d) 742, cert. den. 348 U.S. 981 (1955), found in contempt for violation of order 247 F. (2d) 524 (1956).

it is not reversible error to *admit* most evidence presented,⁵⁴ the questionable evidence will be appraised only in cases where that evidence tips the scales either way in the application of the substantial evidence test.

Once it is determined that the evidence is properly before the commission, "the weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission."⁵⁵ This rule prevents a respondent who has lost before the commission from dragging conflicting testimony into the courts to be reweighed, even though the commission has completely disregarded certain testimony.⁵⁶ The problem is usually presented when there is a "battle of experts" over the ultimate fact in issue, and the courts with unanimity adhere to the above cited rule.⁵⁷ Thus it appears that the substantial evidence test of *Universal Camera* is met if the reviewing court is able to find that the conflicting testimony accepted by the commission (plus other evidence supporting the same result) outweighs the evidence supporting the opposite result, but *without considering* the conflicting testimony which the commission refused to adopt.

A similar problem arises in connection with the credibility of witnesses, and the Second Circuit has indicated that this, too, is a question for the commission and not the courts.⁵⁸

The problem of the weight to be given expert testimony was recently raised in several cases involving the down pillow industry. Ten separate complaints on a false labeling charge were heard simultaneously by an examiner. Each side presented an expert witness to sustain its position, and each expert reported percentage figures to support his testimony. The hearing examiner averaged the figures of the two experts and concluded his hearing by dismissing three complaints. The commission determined that the expert supporting its position should be sustained, so it gave no

⁵⁴ See in this connection Judge Wyzanski's remarks in *United States v. United Shoe Machinery Corp.*, (D.C. Mass. 1950) 89 F. Supp. 349 at 356.

⁵⁵ This oft-cited statement appeared originally in *FTC v. Pacific States Paper Trade Assn.*, 273 U.S. 52 at 63 (1927). For more recent repetitions, see, e.g., *Steelco Stainless Steel Corp. v. FTC*, (7th Cir. 1951) 187 F. (2d) 693 at 697, and *Standard Distributors v. FTC*, (2d Cir. 1954) 211 F. (2d) 7 at 12.

⁵⁶ *E. Edelmann & Co. v. FTC*, (7th Cir. 1956) 239 F. (2d) 152 at 155, cert. den. 355 U.S. 941 (1958).

⁵⁷ See, e.g., *Bristol-Myers Co. v. FTC*, (4th Cir. 1950) 185 F. (2d) 58, and *Koch v. FTC*, (6th Cir. 1953) 206 F. (2d) 311.

⁵⁸ *Standard Distributors v. FTC*, (2d Cir. 1954) 211 F. (2d) 7.

weight to the testimony of the expert opposing the complaint. It issued an order against all ten respondents. The Second⁵⁹ and Third⁶⁰ Circuits affirmed the commission. Judge Goodrich noted that "we should not have done so had we been the Commission but the responsibility for accepting the testimony of one qualified expert and rejecting that of another is emphatically not a problem for a Court of Appeals."⁶¹ In contrast, the Seventh Circuit set aside the cease and desist order in one case saying that the examiner properly averaged the conflicting figures.⁶² The court's analysis indicated that there was no basis for not giving effect to the testimony of both experts, and it felt bound to do so. This judicial intervention goes much farther than the mandates of the Supreme Court indicate is proper, and would probably not be followed in other circuits.

A related problem involves the effect of the immunity clause in the Federal Trade Commission Act⁶³ on testimony in agency proceedings. In a 1956 case before the Court of Appeals for the District of Columbia⁶⁴ respondent agreed that it was proper for him to testify, but argued that because of this testimony the commission was precluded from issuing an order against him. The court said that the statute did not immunize respondent from a cease and desist order, for it was remedial, not punitive. It would, however, be the basis for objecting to later criminal prosecution.

Many cases can be cited where the commission acted by giving effect to the hearing examiner's decision. In the case where the hearing examiner's dismissal is reversed by the full commission and the court of appeals affirms, its attitude is to minimize the examiner's contrary result. The Fourth Circuit put it this way: "It is the commission, not the trial examiner, that is charged with ultimate responsibility for finding the facts; and it is the

⁵⁹ *Buchwalter v. FTC*, (2d Cir. 1956) 235 F. (2d) 344.

⁶⁰ *Northern Feather Works v. FTC*, (3d Cir. 1956) 234 F. (2d) 335.

⁶¹ *Id.* at 336.

⁶² *Burton-Dixie Corp. v. FTC*, (7th Cir. 1957) 240 F. (2d) 166. In a companion case, *Lazar v. FTC*, (7th Cir. 1957) 240 F. (2d) 176, it approved the averaging method but still failed to find a basis for reversal.

⁶³ 38 Stat. 722 (1914), 15 U.S.C. (1952) §49 provides that no person shall be excused from testifying because his evidence "may tend to criminate him or subject him to a penalty or forfeiture" but that he shall not be subjected to "any penalty or forfeiture" for such testimony.

⁶⁴ *Drath v. FTC*, (D.C. Cir. 1956) 239 F. (2d) 452, cert. den. 353 U.S. 917 (1957).

commission's findings and order that we are authorized to review. . . ."⁶⁵ As will be noted shortly the examiner gains greater stature when the court reverses the commission in this situation.

Several cases made reference to the special competence of the commission in upholding its decisions. In a false advertising case before the Second Circuit that court upheld the finding of the commission in the light of its "special expertise and responsibility."⁶⁶ This expertise was again recognized a year later by the same court when it said, "the Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements." Rather it could rely on its own "expert experience in dealing with these matters."⁶⁷ And in a case involving the Federal Communications Commission, Justice Reed was referring to all federal agencies when he said, "Courts are slow to interfere with their conclusions when reconcilable with statutory directions."⁶⁸ The Ninth Circuit took that to be an inhibition on the extent of its review.⁶⁹

Finally, it should be noted that the reviewing court starts from the premise that the findings are properly supported. Thus it is necessary for the appellant to call the attention of the court to alleged errors, for the court will not search out undesigned errors when a shotgun attack is made on the record below.⁷⁰

C. *A Look at the Reversals.* The situation in which the court of appeals is most likely to reverse the commission on questions of fact appears to be when the commission has overridden a dismissal by the hearing examiner. The Seventh Circuit scolded the commission in the following manner when it reversed a dismissal by the examiner of part of a complaint: "The trial examiner made a very sensible and sound recommendation based upon the entire record. It is difficult to understand why the Commission did not follow his recommendation, instead of making a mountain out of a pimple as they attempted to do in this

⁶⁵ *Bond Crown and Cork Co. v. FTC*, (4th Cir. 1949) 176 F. (2d) 974 at 979. And see *Goodman v. FTC*, (9th Cir. 1957) 244 F. (2d) 584 at 601, where the court indicated that the hearing examiner's findings were entitled to weight but that there was no mandate for the commission to accept them.

⁶⁶ *Savitch v. FTC*, (2d Cir. 1955) 218 F. (2d) 817 at 818.

⁶⁷ *E. F. Drew & Co. v. FTC*, (2d Cir. 1956) 235 F. (2d) 735 at 741, cert. den. 352 U.S. 969 (1957).

⁶⁸ *United States v. Storer Broadcasting Co.*, 351 U.S. 192 at 203 (1956).

⁶⁹ *Goodman v. FTC*, (9th Cir. 1957) 244 F. (2d) 584 at 590.

⁷⁰ *Steelco Stainless Steel Corp. v. FTC*, (7th Cir. 1951) 187 F. (2d) 693.

case.”⁷¹ The commission argued on appeal that the hearing examiner’s decision was not of interest to the court. This was rejected, the court stating that it was as much a part of the record as the complaint or the testimony. It is important to note that the evidence on which the commission reversed the hearing examiner was in the record at the time that he made his decision. The commission had simply given a different interpretation to that testimony.

Another Seventh Circuit case involved an examiner’s decision that it would not be in the public interest to issue an order at that time. The commission reversed in a single paragraph, after adopting *in toto* the findings of the examiner. The court reviewed the four facts recited in this paragraph, decided they were of no help in altering the examiner’s conclusion, and reinstated his dismissal.⁷²

Another type of situation in which the courts have reversed commission orders in several instances involves a trade association or conspiracy case where a complaint was served on a number of different respondents. In both the Seventh⁷³ and the Second⁷⁴ Circuits the appellate court showed a willingness to review the evidence as to each particular respondent, and it failed to find facts from which it could be inferred that certain respondents were sufficiently aligned with the conspiracy charged.

The courts of appeals have reversed on several occasions after carefully scrutinizing the record and failing to find *any* evidence to support the findings or from which the commission could draw the inferences that it did.⁷⁵ The more unusual situation occurs when the court finds evidence to support the findings or inferences drawn but determines that on the record as a whole that evidence is not substantial.⁷⁶ The Fourth Circuit vacated

⁷¹ *Folds v. FTC*, (7th Cir. 1951) 187 F. (2d) 658 at 661. The case involved a claim that respondent’s medication would remove pimples.

⁷² *Stokely-Van Camp, Inc. v. FTC*, (7th Cir. 1957) 246 F. (2d) 458. See also *Burton-Dixie Corp. v. FTC*, (7th Cir. 1957) 240 F. (2d) 166, and *Minneapolis-Honeywell v. FTC*, (7th Cir. 1957) 191 F. (2d) 786, cert. dismissed 344 U.S. 206 (1952). It is worth noting that all four of these cases arose in the Seventh Circuit.

⁷³ *Allied Paper Mills v. FTC*, (7th Cir. 1948) 168 F. (2d) 600, cert. den. 336 U.S. 918 (1949).

⁷⁴ *Callaghan & Co. v. FTC*, (2d Cir. 1948) 163 F. (2d) 359, and *Metropolitan Bag & Paper Dist. Assn. v. FTC*, (2d Cir. 1957) 240 F. (2d) 341, cert. den. 355 U.S. 819 (1957).

⁷⁵ See, e.g., *Prima Products v. FTC*, (2d Cir. 1954) 209 F. (2d) 405; *Stokely-Van Camp v. FTC*, (7th Cir. 1957) 246 F. (2d) 458; and *Stenographic Machines, Inc. v. FTC*, (7th Cir. 1956) 233 F. (2d) 755.

⁷⁶ See, e.g., *Minneapolis-Honeywell Co. v. FTC*, (7th Cir. 1951) 191 F. (2d) 786 at

an order when all the evidence supporting it had been taken more than six years prior to its issuance, the court saying that it was not substantial.⁷⁷

An interesting problem recently arose in the Ninth Circuit. Respondent advertised that its device for shoes was "scientific" and "improved posture." The commission issued a cease and desist order after concluding that this was false advertising. The Ninth Circuit went along with the commission on the "scientific" claim, saying that on a highly technical matter where experts testified either way the commission could take its choice. But on the "improved posture" claim the court felt that other evidence in the record so detracted from the commission's finding that it was unsupported by substantial evidence.⁷⁸ On certiorari, the Supreme Court in just two sentences reinstated the entire order of the commission.⁷⁹ It could be argued that the Supreme Court felt that the Ninth Circuit had re-evaluated the evidence itself instead of simply applying the test of *Universal Camera*.

V. Judicial Review on Scope of Order

A. *Background.* In appraising the extent of judicial review of a Federal Trade Commission order it is important to note the breadth of the statute. It provides that the reviewing court shall have the power to make a decree "affirming, modifying, or setting aside the order of the Commission. . . ."⁸⁰ This language makes it clear that the framers of the statute intended that the courts of appeals have ultimate control over the remedy as well as other aspects of the case. This power was exercised by the Supreme Court in 1933 when it modified the scope of an order saying, "the orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public. . . ."⁸¹ The classic exposition of the extent of the judicial review, however, appears in *Jacob Siegel Co. v. Federal Trade*

792, cert. dismissed 344 U.S. 206 (1952), and *Metropolitan Bag & Paper Dist. Assn. v. FTC*, (2d Cir. 1957) 240 F. (2d) 341, cert. den. 355 U.S. 819 (1957).

⁷⁷ *New Standard Publishing Co. v. FTC*, (4th Cir. 1952) 194 F. (2d) 181.

⁷⁸ *Sewell v. FTC*, (9th Cir. 1956) 240 F. (2d) 228, revd. 353 U.S. 969 (1957).

⁷⁹ *FTC v. Sewell*, 353 U.S. 969 (1957).

⁸⁰ 38 Stat. 720 (1914), 15 U.S.C. (1952) §45c. The same provision appears in the Clayton Act, 38 Stat. 735 (1914), 15 U.S.C. (1952) §21.

⁸¹ *FTC v. Royal Milling Co.*, 288 U.S. 212 at 217 (1933).

*Commission*⁸² where Justice Douglas explained that the commission has a "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices"⁸³ and that the courts will not interfere unless the commission has "abused its discretion"⁸⁴ in the selection of a remedy.

The purpose of an order of the commission is not to penalize. Rather its function is remedial, or "to *stop* the unfair practice" as was indicated by the Seventh Circuit.⁸⁵ With this in mind, the pertinent cases will now be analyzed in order to determine when the courts have felt that there has been an abuse of discretion.

B. *Some Typical Orders.* The reporters are full of cases where the court failed to find an abuse of discretion. The Second Circuit held that it was proper for the commission to order a publisher to indicate clearly on the cover and in advertising the fact that a reprinted story was abridged. It also approved an order requiring the publisher to indicate the original title to the story when that title had been changed in the republication.⁸⁶ And more recently it stopped a respondent from soliciting advertising by mail because the presentation would be deceiving if the recipient did not take time to read the material thoroughly.⁸⁷ In a recent case the Supreme Court upheld a commission order which prohibited all respondents in a conspiracy case from *individually* adopting a similar pricing system for the purpose or effect of "matching prices of competitors."⁸⁸ On the other hand, an abuse of discretion was found when the commission's order refused to allow respondent to indicate to the public his old firm name in conjunction with a new name he was required to select at the order of the commission;⁸⁹ and another case modified a commission order involving false advertising, indicating that it was not within the power of the commission to require respondent to state that his product

⁸² 327 U.S. 608 (1946).

⁸³ *Id.* at 611.

⁸⁴ *Id.* at 612.

⁸⁵ *Eugene Dietzen Co. v. FTC*, (7th Cir. 1944) 142 F. (2d) 321 at 331, cert. den. 323 U.S. 730 (1944).

⁸⁶ *Hillman Periodicals, Inc. v. FTC*, (2d Cir. 1949) 174 F. (2d) 122. For subsequent confusion, see *New American Library v. FTC*, (2d Cir. 1954) 213 F. (2d) 143, *affd.* after remand to commission 227 F. (2d) 384 (1955).

⁸⁷ *Independent Directory Corp. v. FTC*, (2d Cir. 1951) 188 F. (2d) 468.

⁸⁸ *FTC v. National Lead Co.*, 352 U.S. 419 (1957).

⁸⁹ *Gold Tone Studios v. FTC*, (2d Cir. 1950) 183 F. (2d) 257.

was valueless more often than not.⁹⁰ But it is noteworthy that these two cases are the only ones found cutting down the scope of the order by this direct method.

In contrast, in *Federal Trade Commission v. Morton Salt Co.*⁹¹ the Supreme Court felt that the commission shifted too much responsibility to the courts. This was a price discrimination case, and the commission's order allowed respondent to make price differentials of up to five cents per case where they would not "tend to lessen, injure or destroy competition." The Supreme Court objected to this part of the order, saying that it amounted to shifting to the courts issues "which Congress has primarily entrusted to the Commission."⁹²

C. *Some Peripheral Problems.* As opposed to cases which relate directly to the practices involved, there are others which raise important peripheral problems with regard to the propriety of an order, including delaying its effective date and determining the persons and practices properly reached.

Two recent cases before the Supreme Court have made it clear that it is up to the commission to decide whether its order shall be held in abeyance.⁹³ In those cases, respondents argued that making the order immediately effective against them, the first two parties in the industry to be proceeded against, while competitive firms were engaging in the same practices, would force them out of business. The Court said that the decision of holding up the effective date of the order was squarely up to the commission and that it would not be overturned short of a "patent abuse of discretion."⁹⁴

What parties can be reached by an order of the commission has often been an issue on appeal. The situation arises when a corporate respondent is wholly owned by a small group of individuals, all active in the management of the corporation, and joined with it as respondents. The Supreme Court held over twenty years ago that it was proper to direct an order against the individuals when the findings indicated that "further efforts of these individual respondents to evade orders of the Com-

⁹⁰ *Alberty v. FTC*, (D.C. Cir. 1950) 182 F. (2d) 36, cert. den. 340 U.S. 818 (1950).

⁹¹ 334 U.S. 37 (1948).

⁹² *Id.* at 54.

⁹³ *Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958), involving two cases consolidated for hearing.

⁹⁴ *Id.* at 414.

mission might be anticipated. . . ."⁹⁵ Since it is clear that the order to a corporation covers its active management,⁹⁶ the very fact that the individuals appeal indicates that they may attempt to evade the commission's order, and this, as will be seen presently, should be sufficient basis to warrant extending it to include them.

The cases in the courts of appeals reflect the same result. The only difficulty seems to be in defining what activity of an individual is sufficient to warrant an order against him personally. The Seventh Circuit upheld an order after noting that the individual was "no ordinary employee and did direct and have sufficient control of the policies and sales activities" of the company.⁹⁷ Judge Learned Hand said that the order may include "those officers of a corporation who are in top control of the activities that the Commission finds to have violated the Act."⁹⁸ A more drastic order was aimed at an individual who had resigned as a corporate officer and director and disposed of his stock in the corporation. The Second Circuit's reason for sustaining this order was that there were other unlawful ways for him to conduct himself in the future.⁹⁹

Another important problem is what practices can be reached by an order of the Federal Trade Commission. Turning first to discontinued practices, it seems evident that abandonment of the practice alone is no basis for dismissing the complaint.¹⁰⁰ In addition, there must be "no reasonable likelihood" that the discontinued practice will be resumed,¹⁰¹ and a reading of the cases indicates that this test is rarely met. Two years' discon-

⁹⁵ *FTC v. Standard Education Society*, 302 U.S. 112 at 119 (1937), motion to amend opinion den. 302 U.S. 661 (1938).

⁹⁶ *Wilson v. United States*, 221 U.S. 361 at 376 (1911).

⁹⁷ *Surf Sales Co. v. FTC*, (7th Cir. 1958) 259 F. (2d) 744 at 747. The Seventh Circuit now adheres to the principle laid down in *FTC v. Standard Education Society*, 302 U.S. 112 (1937), motion to amend opinion den. 302 U.S. 661 (1938), but it has not always done so. See *R. J. Reynolds Tobacco Co. v. FTC*, (7th Cir. 1951) 192 F. (2d) 535, for a contrary result. This was abandoned in Clayton Act proceedings in *Anchor Serum Co. v. FTC*, (7th Cir. 1954) 217 F. (2d) 867, and finally under the Federal Trade Commission Act in *Mandel Bros., Inc. v. FTC*, (7th Cir. 1958) 254 F. (2d) 18, revd. on other grounds 359 U.S. 385 (1959).

⁹⁸ *Standard Distributors v. FTC*, (2d Cir. 1954) 211 F. (2d) 7 at 15.

⁹⁹ *Consumer Sales Corp. v. FTC*, (2d Cir. 1952) 198 F. (2d) 404 at 408, cert. den. 344 U.S. 912 (1953).

¹⁰⁰ *FTC v. Goodrich Tire & Rubber Co.*, 304 U.S. 257 (1938).

¹⁰¹ *Automobile Owners Safety Insurance Co. v. FTC*, (8th Cir. 1958) 255 F. (2d) 295 at 297, cert. den. 358 U.S. 875 (1958).

tinuance alone is not enough,¹⁰² and neither is four.¹⁰³ Nor is a longer period sufficient if other violations are continued.¹⁰⁴ A promise not to continue to act in the future is no justification for dismissal of the complaint.¹⁰⁵ On the other hand, a discontinuance in excess of six years prior to issuance of the complaint was deemed sufficient by the Ninth Circuit to warrant setting aside an order, although the court suggested that passage of time alone was not of determinative importance.¹⁰⁶

The order of the commission may be directed at practices related to those found to have been committed by respondent. In 1951 the Supreme Court indicated that "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past."¹⁰⁷ Thus, where respondent was found to have discriminated in price in some of its products, an order directed at all products of like grade and quality was sustained.¹⁰⁸ Similarly, where an ice cream producer was found to discriminate in price on one type of ice cream cone in one limited area, the court sustained an order directed at all ice cream cones sold by the producer everywhere. Justifying the result, the court said it was to "prevent evasion" and halt practices "of the same general kind" that respondent had engaged in.¹⁰⁹ And in a false advertising case it was held proper for the order to proscribe advertising found false as to products which respondent then had on the market and also "substantially similar" products which might be marketed in the future.¹¹⁰ The court felt this was necessary in order to prevent evasion by the simple expedient of changing the brand name.

¹⁰² C. H. Hunt Pen Co. v. FTC, (3d Cir. 1952) 197 F. (2d) 273.

¹⁰³ Chamber of Commerce v. FTC, (8th Cir. 1926) 13 F. (2d) 673.

¹⁰⁴ Dejay Stores, Inc. v. FTC, (2d Cir. 1952) 200 F. (2d) 865.

¹⁰⁵ Goodman v. FTC, (9th Cir. 1957) 244 F. (2d) 584.

¹⁰⁶ Oregon-Washington Plywood Co. v. FTC, (9th Cir. 1952) 194 F. (2d) 48. Cases of this type might also be explained by a failure to find substantial evidence, or by a lack of public interest.

¹⁰⁷ FTC v. Ruberoid Co., 343 U.S. 470 at 473 (1952). This language was cited by the Court during the present term when it reinstated an order of the commission acting under the Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. (1952) §69, which enjoined certain practices of respondent related to other activity by it which the commission had found to be in violation of the statute. FTC v. Mandel Brothers, Inc., 359 U.S. 385 (1959).

¹⁰⁸ E. Edelmann & Co. v. FTC, (7th Cir. 1956) 239 F. (2d) 152, cert. den. 355 U.S. 941 (1958).

¹⁰⁹ Maryland Baking Co. v. FTC, (4th Cir. 1957) 243 F. (2d) 716 at 718.

¹¹⁰ P. Lorillard Co. v. FTC, (4th Cir. 1950) 186 F. (2d) 52.

It is important to note that orders of the FTC may properly be directed at violations still in their incipency.¹¹¹ Indeed, this was an important purpose of the statute, for the feeling of many at the time of its passage was that the damage had been done by the time a full-blown Sherman Act violation had occurred.¹¹² Thus the commission is authorized to issue an order under section 5 of the Federal Trade Commission Act¹¹³ though the practices attacked have not fully matured.

There is also a group of cases in which the courts merely clarify what the commission has done by its order. Thus, when a commission order banned establishment of a single sales agent for a group of producers, the court clarified the order so as only to ban price-fixing arrangements through the medium of the agent.¹¹⁴ When an order of the commission is capable of different interpretations, the court may modify it so that the meaning is clear.¹¹⁵ However, one court refused to modify an order that included the phrase "in substantial part." The court felt that no interpretation was necessary, for if respondent would act within the spirit of the law he would not come close to treading in the proscribed area.¹¹⁶ It seems fair to conclude that when respondent's good faith activity might run afoul of an ambiguous order, the courts are willing to clarify and make the order more explicit.

VI. *Power of Court of Appeals To Order Taking of Additional Evidence*

The Federal Trade Commission Act gives the court of appeals discretion to order the adducing of additional evidence before the commission, if it is material and if there are reasonable grounds to excuse the failure to present it at the original hearing.¹¹⁷ Acting pursuant to this provision, the Supreme Court

¹¹¹ *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 at 466 (1941), mod. 312 U.S. 668 (1941).

¹¹² See Justice Brandeis' dissent in *FTC v. Gratz*, 253 U.S. 421 at 435 (1920).

¹¹³ 38 Stat. 719 (1914), 15 U.S.C. (1952) §45a.

¹¹⁴ *Virginia Excelsior Mills v. FTC*, (4th Cir. 1958) 256 F. (2d) 538.

¹¹⁵ See, e.g., *Hamilton Mfg. Co. v. FTC*, (D.C. Cir. 1952) 194 F. (2d) 346, and *Bork Mfg. Co. v. FTC*, (9th Cir. 1952) 194 F. (2d) 611, for two different modifications of the same order. See also *Rhodes Pharmacal Co. v. FTC*, (7th Cir. 1953) 208 F. (2d) 382, mod. 348 U.S. 940 (1955).

¹¹⁶ *Edward P. Paul & Co. v. FTC*, (D.C. Cir. 1948) 169 F. (2d) 294.

¹¹⁷ 38 Stat. 719 (1914), 15 U.S.C. (1952) §45c. A similar provision appears in the Clayton Act, 38 Stat. 734 (1914), 15 U.S.C. (1952) §21.

recently directed the Ninth Circuit to amend its judgment setting aside an order of the commission and to direct the commission to take additional evidence.¹¹⁸ The court of appeals had sustained respondent's claim that it was denied a fair hearing because of lack of opportunity to cross-examine witnesses. The significance of the Supreme Court decision is that the commission was authorized to reopen the entire case.

The Seventh Circuit has dealt less leniently with similar requests by respondents. In a case involving price discrimination respondent had urged that it was a part of the commission's case to prove absence of cost justification. The court held the burden was on respondent, and then refused its motion to put in the additional evidence since it found no "reasonable ground" for failure to do so originally.¹¹⁹ The decision of the court in refusing to allow the adducing of additional evidence seems easier to justify when respondent could claim only that it felt it would win on other grounds and thought an offer of proof would be useless and expensive.¹²⁰

The attitude of the District of Columbia Circuit has been more liberal. When subsequent to the hearing before the commission a clinical test and survey results became available for the first time, the court allowed the motion to present these as evidence before the commission at a later hearing. It did, however, say that the commission's order, directed at advertising misrepresentations, would be effective pending the rehearing.¹²¹

VII. *The Impact of the Administrative Procedure Act*

Apart from the *Universal Camera* situation there is apparently but one instance in which a Federal Trade Commission case was

¹¹⁸ *FTC v. Carter Products, Inc.*, 346 U.S. 327 (1953).

¹¹⁹ *Automatic Canteen Co. v. FTC*, (7th Cir. 1952) 194 F. (2d) 433, revd. 346 U.S. 61 (1952). The case was reversed on the burden of proof question when respondent was granted review by the Supreme Court, 346 U.S. 61 (1952). This indicates the Seventh Circuit will not find "reasonable ground" when there is an honest difference in the interpretation of the statute and in the evidence required. In contrast see *Simplicity Pattern Co. v. FTC*, (D.C. Cir. 1958) 258 F. (2d) 673 at 683, revd. on other grounds 27 U.S. LAW WEEK 4389 (1959), where the court of appeals did indicate that respondent could put in additional evidence after the statutory ambiguity as to burden of proof had been resolved.

¹²⁰ *Independent Grocers Co. v. FTC*, (7th Cir. 1953) 203 F. (2d) 941.

¹²¹ *Dolcin Corp. v. FTC*, (D.C. Cir. 1954) 219 F. (2d) 742, cert. den. 348 U.S. 981 (1955), found in contempt for violation of order, 247 F. (2d) 524 (1956).

reversed because of the Administrative Procedure Act. In that case the Eighth Circuit held that the requirements of section 5c of the act¹²² had not been met when the commission changed hearing examiners in the middle of a case.¹²³ The court felt the original examiner had not become "unavailable" to the commission simply because he had reached retirement age. It hinted at some bungling in commission handling of the matter, and also took care to note that the "retired" examiner was now working for another government agency. In addition, the court indicated the extreme importance of having the credibility evaluation made by the examiner who heard the case.

Other respondents have not fared so well in relying on the statute. One court felt the mandate of section 7c¹²⁴ was violated when certain scientific evidence was excluded by the examiner, but it felt that refusal to admit evidence incompetent in a court was not such a denial of "substantial justice" as would warrant a reversal.¹²⁵ And the requirement of section 11¹²⁶ of the statute was held not violated when an examiner was assigned out of rotation for purposes of economy.¹²⁷

The absence of cases may be used as a basis for saying the Administrative Procedure Act has had but limited effect. It seems only fair to note two contrasting factors, however. First, this study did not purport to reach all aspects of the statute, subpoenas among other things being omitted. Secondly, in some areas the absence of cases may indicate explicit compliance with the directive of the statute, as in the case of separation of functions¹²⁸ and burden of proof problems.¹²⁹

¹²² 60 Stat. 240 (1946), 5 U.S.C. (1952) §1004c, provides that the same officers who preside at the reception of evidence "shall make the . . . initial decision . . . except where such officers become unavailable to the agency."

¹²³ *Gamble-Skogmo v. FTC*, (8th Cir. 1954) 211 F. (2d) 106.

¹²⁴ 60 Stat. 241 (1946), 5 U.S.C. (1952) §1006c, says that "any oral or documentary evidence may be received," that agency policy shall provide for the exclusion of "irrelevant, immaterial, or unduly repetitious evidence," and that no order shall be issued "except . . . in accordance with the reliable, probative, and substantial evidence."

¹²⁵ *Dolcin Corp. v. FTC*, (D.C. Cir. 1954) 219 F. (2d) 742 at 749, cert. den. 348 U.S. 981 (1955), found in contempt for violation of order 247 F. (2d) 524 (1956). See notes 52, 53 and accompanying text.

¹²⁶ 60 Stat. 244 (1946), 5 U.S.C. (1952) §1010 indicates that examiners "shall be assigned to cases in rotation so far as practicable. . . ."

¹²⁷ *Tractor Training Service v. FTC*, (9th Cir. 1955) 227 F. (2d) 420, cert. den. 350 U.S. 1005 (1956).

¹²⁸ See Federal Trade Commission, Rules of Practice, May 1957, rule 3.15e.

¹²⁹ *Id.*, rule 3.14a.

VIII. *Conclusion*

In concluding, some reference should be made to the statistics presented at the outset. It would seem that, for several reasons, over-emphasis should not be placed on the high percentage of cases sustaining the commission. First, all the cases going before the courts of appeals are ones which respondent lost initially, for the commission does not, of course, seek review of cases in which it has dismissed the complaint. Thus, only a portion of the commission's activity is seen by a review of appellate cases. Second, it is probably true that in *all* areas the reviewing courts tend to affirm the action below more often than not. Finally, with the commission limited as to both funds and manpower, it is natural for it to proceed against the obvious violators first and either postpone action against other possible violators until a later date when the violation becomes more obvious or disregard it altogether.

Nevertheless, because it is an infrequent case in which respondent gets *complete* relief at the appellate level, the procedure before the commission is of great importance in dictating the final result. Adoption of several recommendations of the Hoover Commission Task Force on Legal Services and Procedures would assure a respondent of continued fair treatment before the commission and would also expedite and clarify the process of judicial review. These recommendations include extension of the internal separation of functions to include the process of final decision by agency heads,¹³⁰ alteration of the rules of evidence so as to follow the same rules that are applied in the United States district courts in non-jury cases,¹³¹ and limiting the power of review of an initial decision by the agency to the powers that a reviewing court would have and to matters of agency policy.¹³²

Recommendation 52 of the Task Force also deserves attention.¹³³ It calls for a clarification of the scope of judicial review on matters of agency discretion, fact issues, and mixed questions of law and fact. In all three instances the Task Force calls for a broader review by the courts. One result of acceptance of this recommendation would be abandonment of the substantial evidence test of *Universal Camera* in favor of another standard,

¹³⁰ Commission on Organization of the Executive Branch of Government, Task Force Report on Legal Services and Procedure, recommendation 41, p. 176 (1955).

¹³¹ *Id.*, recommendation 47, p. 199.

¹³² *Id.*, recommendation 49, p. 203.

¹³³ *Id.*, at p. 214.

that of setting aside the findings of fact if clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. This is the standard applied when non-jury district court proceedings are reviewed. This suggestion makes sense, particularly when cognizance is taken of the fact that both the commission and the district court are essentially similar triers of fact. It would avoid the application of a double standard by the court of appeals, one test for agency proceedings, another for cases from the district court. It is perhaps quite reasonable to take the position that the agency's fact-finding function in an adjudicative hearing is no different from that of a district court. This would seem to require an upgrading of the status of the hearing examiner's initial decision and limiting the reviewing power of the commission to that of an appellate court, for the examiner would be regarded as in a position equivalent to that of a district judge. Another result of adoption of these recommendations would be a clear authorization to the reviewing court to make a *de novo* application of the law to the facts as found in the course of its review of commission proceedings, a situation the Task Force feels is at present somewhat unsettled.

A final, controversial recommendation of the Task Force to be noted here is that calling for the creation of a Trade Section of an Administrative Court to take over the adjudicative functions of the Federal Trade Commission.¹⁸⁴ This would bring about, in the view of the Task Force, "the more effective performance by the Federal Trade Commission of its essentially administrative and regulatory functions." It further notes that in trade regulation, "industry cooperation is more important than industry prosecution." This recommendation would be important, in view of the great significance of the agency fact-finding process, if it could be shown that the present system was unsatisfactory. However, the more recent cases reviewed in the course of this comment do not give evidence of any judicial misgivings about the present commission practices. As a matter of fact, the contrary seems to be the case, for otherwise it would seem likely that the commission's findings would be upset with more frequency. Whether a trade court might be justified on grounds that it would facilitate administration through centralization, effect economy, or cause all trade cases to be heard before a single com-

¹⁸⁴ Id., recommendation 64, p. 250.

petent tribunal is another matter.¹³⁵ But it does not appear that the cases as a whole suggest that faulty performance by the Federal Trade Commission should be used as the reason for withdrawing its adjudicative functions.

David A. Nelson, S. Ed.

¹³⁵ One point stressed by the Task Force Report is that several other agencies currently handle a minimum number of trade cases annually, and the Task Force questions their competence properly to handle those cases. The establishment of a trade court would centralize handling of all these cases in a single expert tribunal. For two critical views on the trade court, see Kintner, "The Trade Court Proposal: An Examination of Some Possible Defects," 44 A.B.A.J. 441 (1958), and Freer, "The Case Against the Trade Regulation Section of the Proposed Administrative Court," 24 GEO. WASH. L. REV. 637 (1956).