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THE FEDERAL TRADE COMMISSION AND THE ADMINISTRATIVE PROCESS

Address of

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SECTION OF ANTITRUST LAW
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The role of the Federal Trade Commission, as an administrative agency, needs to be further defined,1/ better understood, and most of all, performed and implemented in the manner Congress intended.

It was designed to supplement the work of the Department of Justice and the courts under the Sherman Act. The job of the Department was to be primarily that of the prosecutor. The Commission, on the other hand, was meant to practice preventive law through administrative and regulatory activities as well as by the initiation and conduct of adversary proceedings.

Congress foresaw, and in fact intended, some mutual responsibility, 2/ but not mere duplication. Both agencies were to work in the same field, but with different tools.

In the light of this statutory setting, it may be helpful to give brief consideration to the history of the origin and development of the federal administrative agency. It constitutes an important chapter in human affairs. The rise of administrative agencies has been the most significant legal trend of the last century. "They have become a veritable fourth branch of government."3/

I

The creation of the Interstate Commerce Commission in 1887 furnishes the first well known example. The rapid development of the railroads, the complexity, significance and abuses which attended this development, created a public demand for governmental regulation. This was accompanied by a breakdown of judicial processes - or to put it more accurately, an inadequacy, as applied to these problems. The courts were not equipped to deal with the unreasonableness of rates, the intricacies of rate making, the discriminations between shippers or communities.

Some continuing supervision over the railroad problem as a whole was required; the solution could not be left to the cumbersome and sporadic processes of private litigation. The creation of an independent Commission provided the answer.

As the American economic system evolved, as various complex industries and occupations assumed significance in our national life, the Federal Trade Commission and other agencies came into being to supply the minimum of essential control.4/

1/I do not refer to further legislative direction but rather to a fuller recognition and acceptance of present statutory responsibilities.

2/Both agencies, for example, were given duties with respect to the enforcement of certain sections of the Clayton Act.

3/Federal Trade Commission v. Ruberoid Co., 343 U.S. 470, 487 (1952).

4/See remarks of Representative Covington, author of the House bill to establish the Federal Trade Commission and House Conference Manager:

"Mr. COVINGTON. * * *. When you begin to organize a bureau as an independent administrative body, authorize it to do work along certain lines, and employ steadily special classes of legal experts and certain classes of experts in the various lines of industrial business to make investigations, that just as the Interstate Commerce Commission has created its trained experts to get the facts regarding railway operations in the country, you would develop a set of experts by the constant special work who will be much more successful than the chance investigators that the Department of Justice or the Bureau of Corporations is able to find." (51 Cong. Rec. 8845.)

The administrative agency was not born as a single philosophical concept but came into being by an involuntary process based on experience and necessity. As a rule the business of these agencies has related not to society as a whole but to its particularized aspects. Their concern has been with particular commercial activities, such as, banking, commodity exchanges, packers and stockyards, aeronautics, communications, water power, utilities, shipping, securities, and the like.

In a few instances, the jurisdiction of the administrative agency has been defined with reference to special problems that cut across different industries and occupations. The outstanding example of this tendency is the Federal Trade Commission which was entrusted with the vital problems of trade regulation and the maintenance of our private competitive system.

II

The driving impulse in the creation of these new instruments of government was the need for specialization and expertise. The Federal Trade Commission, for example, was to be staffed with lawyers, economists, accountants, statisticians and other business experts.5/ It was intended that these gentelmen would become specialists in preventing price fixing agreements, combinations in restraint of trade, boycotts, false and misleading advertising, price and service discriminations, exclusive dealing and tying contracts, acquisitions of competitors, interlocking directorates, improper labeling of wool and fur products.

In an early case the Supreme Court, quoting from the original Congressional Committee Reports, declared that the Commission "was created with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of the business and economic conditions of the industry affected' "; that "it was organized in such a manner, with respect to the length and expiration of the term of office of its members, as would 'give to them an opportunity to acquire

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5/Senator Newlands, a principal proponent of the bill in the Senate and later conference manager, stated on the floor:

"Mr. NEWLANDS. * * * I assume that we will have appointed upon this commission very high-class men, very able men - lawyers, economists, and men of prominence - who are familiar with the industries of the country. I assume that as they proceed they will gain knowledge, information, and experience. (51 Cong. Rec. 11596.)

* * * *

"It is expected that the trade commission will be composed not only of eminent lawyers, but of eminent economists, business men of large experience, and publicists, and that their knowledge and information and experience will be of such a varied nature as to make them more competent to deal with the practical question of the dissolution of these combinations than any court or Attorney General could be. It is also expected that as a result of investigation and as the result of long experience they will build up a body of information and of administrative law that will be of service not only to them but to the country itself, and that gradually standards will be established that will be accepted and will constitute our code of business morals." (51 Cong. Rec. 11083.)

the expertness in dealing with these special questions concerning industry that comes from experience.'"6/

In a more recent case, the Court said: "We are persuaded that the Commission's long and close examination of the questions it here decided has provided it with precisely the experience that fits it for the performance of its statutory duty ..."7/

The expertness of the Commission and the great weight accorded its findings have become so well established that in 1952 we find a court of appeals, in reviewing an order of the Federal Trade Commission, merely stating the facts of the case, holding that respondent was engaged in interstate commerce, and concluding that "The whole matter being clearly within the jurisdiction and competence of the Commission, its order is affirmed."8/

III

The deference with which the courts have spoken of the capabilities of the Commission should be gratifying to the Commission - and, indeed would be, but for two reasons:

First is the fact that the courts, with their self-declared limited knowledge and experience in dealing with complex economic and marketing questions, have found it necessary on occasion to overrule the Federal Trade Commission "experts."9/ And, secondly, many of the court references to the expertness of the Commission, upon closer examination, are found to be mere restatements of general concept and legislative intent, rather than expressions of confidence.

Fortunately, when an agency fails in its duty as a body of experts, the courts usually find a way to deal with the situation. As Professor Davis said, "When judges have confidence in agencies' thoroughness and integrity, a strong case is required to move the judges to dig deeply into the problem, whether the problem is regarded as one of law or fact or discretion. But when the agencies' work seems slipshod . . . judges are

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6/Federal Trade Commission v. R. F. Keppel and Bro., Inc., 291 U.S. 304, 314 (1934), quoting from report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong., 2d Sess., pp. 9-11.

7/Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683, 720 (1948).

8/Bernstein, et al. v. Federal Trade Commission, 200 F. 2d 404, 405 (C.A. 9, 1952).

9/Jacob Siegel Company v. Federal Trade Commission, 327 U.S. 608 (1946), involved the issue as to whether respondent should be prohibited from using a particular trade name because it was false or misleading. The Commission issued an order requiring respondent to discontinue use of the name. Although it had long been the law that a person will not be required to discontinue use of a name where some remedy "short of the excision" will give adequate protection (Federal Trade Commission v. Royal Milling Company, 288 U.S. 212 (1933)), the Commission made no findings nor, as far as the record disclosed, gave any consideration to a lesser remedy. Although the court affirmed that "the Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed" and that the Commission's "expert opinion is entitled to great weight," the Court remanded the case to the Commission for further consideration on the question of remedy. Upon remand the Commission found a way to permit respondent's continued use of the trade name and at the same time protect the public from deception. See also Standard Oil Company v. Federal Trade Commission, 340 U.S. 231 (1951), and Automatic Canteen Company v. Federal Trade Commission, 346 U.S. 61 (1953).

likely, irrespective of formulas and theories, to do what is necessary to assure that justice is done."10/

The Federal Trade Commission has not always had the full confidence of the courts and has not been immune from criticism.11/ It has been suggested by one or two critics, quite erroneously, I think, that the Commission no longer serves a useful purpose.12/ This type of criticism is based, I feel certain, not on disagreement with legislative purpose or concept, but on alleged failure of implementation and administration. For these reasons it is appropriate, perhaps necessary, to reconsider the basic role of the Commission and its place in the administrative scheme.

IV

It has been recognized and agreed as a general tenet of political philosophy that vigorous enforcement of antitrust and trade regulation laws is in the public interest. Once this general premise was accepted by the major political parties,13/ it was evident, in view of our rapidly expanding economy, that the judicial system was deficient as the sole instrument of antitrust law enforcement.14/

Enforcement of private rights in the antitrust field could not adequately protect the public interest. Private parties often forego redress of legal wrongs, especially in the business field, because of fear of reprisal.15/

Individuals and small business concerns often lack the resources to pursue their rights. "Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversies in an administrative tribunal."16/

10/Davis, Administrative Law (1951) pp. 905-6. Likewise, the report of the Attorney General's Committee on Administrative Procedure (1941) at page 91 states "the confidence which the agency has won is one of the factors influencing the scope of judicial review."

11/See Oppenheim, Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1225-1227, 1952; Landis, Monopoly and Free Enterprise (1951) p. 548; Simon, The Case Against The Federal Trade Commission, 19 U. Chi. L. Rev. 297, 329 (1952).

12/Landis, Monopoly and Free Enterprise, (1951) p. 548.

13/The Republican and Progressive party platforms of 1912 recommended establishment of a Trade Commission. On January 14, 1914, when President Wilson addressed both Houses of Congress, he also recommended establishment of an interstate trade commission.

14/"To a large degree," said Mr. Justice Frankfurter, administrative agencies "have been a response to the felt need of governmental supervision over economic enterprise - a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process." F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 142 (1939); see also Davis, Administrative Law (1951), p. 13, and Landis, The Administrative Process (1938), p. 30.

15/Dickinson, Administrative Justice and the Supremacy of the Law (1927), note 22 at p. 12; Landis, The Administrative Process (1938), pp. 34-35.

This was the reason prompting the Commission, early in its history, to adopt a policy of not divulging the names of complainants. F.T.C. Annual Report (1916), p. 7.

16/President's veto message on Walter Logan Bill, H. Doc. No. 986, 76th Cong., 3d Sess. 3 (1940).

Moreover, businessmen do not relish becoming litigants in order to develop and establish new principles, and as Jhering pointed out many years ago, it is only through this process that the common law affords the possibility of carving out new rights.17/

In the fast developing industrial economy which this country has witnessed, it could not be expected that the cumbersome method of developing a body of antitrust law by vindication of private rights would be sufficient to protect the free enterprise system. A need was felt for an arm of government which could, on its own motion, initiate proceedings.18/ "Courts are not expected to start wheels moving or to follow up judgments."19/ Courts do not dig up evidence, analyze reports or prepare prosecutions, and the "judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to the issues in litigation ..."20/

Another reason for the inadequacy of private litigation was that such relief as might be obtained often came too late to protect the public interest. As stated by Freund, "It is obvious that the law of nuisance is inadequate as a substitute for modern ... /administrative/ regulation; it takes cognizance of practices only when danger passes into actual mischief."21/

The Sherman Act of 1890 was a substantial first step toward the alleviation of the deficiencies of private remedies. By 1914, however, there prevailed a general climate of doubt, particularly in the Congress, that the Sherman Act and the judicial process provided the complete solution in an America emerging from an agricultural economy.

Strong sentiment developed in favor of the administrative process. It was suggested that a trade commission would be well suited to deal with the complex problems of industries and markets, - problems which Congress was unable to solve and which it considered too burdensome for the courts to resolve unaided.22/

17/Jhering, The Struggle for Law (Lalor's translation, 1879).

18/"The demand for a power to initiate action was one of the primary purposes underlying the creation of the Federal Trade Commission." Landis, The Administrative Process (1938), p. 35.

19/U. S. v. Morton Salt Co., 338 U.S. 632, 641 (1950). "The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials ... Its agencies are provided with staffs to institute proceedings ..." Id. p. 640.

20/Id. 641. Cf. F.T.C. v. Morton Salt Co., 334 U.S. 37, 53-54 (1948). In this case the Supreme Court refused to sustain that part of the Commission's order which would have required the courts to make findings of fact as a basis for contempt proceedings.

21/Freund, Standards of American Legislation (1917), p. 67.

22/In speaking of the proposed legislation to establish a trade commission, the Senate Committee reported:

"These powers, partly administrative and partly quasi-judicial, are of great importance and will bring both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be proficient.

"With the exception of the Knight case, the Supreme Court has never failed to condemn and to break up any organization formed in violation of the Sherman law which has been brought to its attention; but the decrees of the court, while declaring

The view still prevails that the courts are not equipped to handle - without assistance - long, tedious, and highly complex antitrust cases. Chief Judge Knox of the Southern District of New York, recently said:

> "The thing that presently worries me is that antitrust litigations in the court over which I preside are monopolizing the time, energy and effort of judges who ought to be trying cases that have to do with the lame, the halt and the blind, and who are daily being deprived of simple justice."23/

Judge Knox illustrated his dilemma, by citing several antitrust cases which had consumed inordinate amounts of the time of the judges of his court. He referred to one case in which a jury trial had been demanded. Concerning this, he said:

> "Had that case gone to a jury, each of the jurors would now be ruined. Those of them who were employed would have lost their jobs, and those who were self employed would be in bankruptcy. Save in exceptional instances, the jury system is not adaptable to the trial of antitrust litigations and, in these prolonged trials, my disposition will be that the civil rights of jurors transcend in importance the legal rights of litigants."24/

A principal and additional advantage of the administrative process is that the undesired condition need not yet be in existence; there need be only a reasonable probability that it will come to pass if nothing is done to stop it. This, of course, was one of the underlying purposes of both the Federal Trade Commission and Clayton Acts, which are the principal laws administered by the Commission. They were designed to "supplement" the Sherman Act, to prohibit practices which singly and in themselves were not covered by that act, to arrest potential violations of the Sherman Act in their incipiency and before consumation.25/

Keeping in mind the fundamental reasons for the creation of the Federal Trade Commission, what attributes and characteristics are required to make it work in the manner Congress intended? They are many. Today I will mention three that I consider of overriding importance.

V

1. Sound administration requires strong, but fair, administrators who are in general sympathy with the objectives and policies expressed in the legislation which they administer.26/ "... /A/ dominant point of

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22/(Continued) the law satisfactorily as to the dissolution of the combinations, have apparently failed in many instances in their accomplishment simply because the courts and the Department of Justice have lacked the expert knowledge and experience necessary ..." Sen. Rep. 597, 63d Cong., 2d Sess., 12 (1914).

As early as 1911, Attorney General Wickersham had recommended an administrative agency such as the Federal Trade Commission to supplement his department's work in the antitrust field. 51 Cong. Rec. 11094 (1914) (speech given at Duluth, July 19, 1911).

23/C.C.H. Antitrust Law Symposium, 1952, p. 15.

24/Id., 16.

25/Sen. Rep. No. 698, 63d Cong., 2d Sess., 1, (1914); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922).

26/"It is a sine qua non of good administration that it believe in the rightness and worth of the laws it is enforcing and that it be prepared to bring to the task zeal and astuteness in finding out and making effective those purposes." Jaffe, The Reform of Administrative Procedure, 2 Pub. Ad. Rev. 141, 149 (1942).

view or bias may ... color all activities, including even the fact-finding function. Thoroughly conscientious men of strong conviction may sometimes interpret evidence to make findings which indifferent men would not make. The theoretically ideal administrator is one whose broad point of view is in general agreement with the policies he administers but who maintains sufficient balance to perceive and to avoid the degree of zeal which substantially impairs fairmindedness."27/

Although the legislative history of the Federal Trade Commission reflects a basic dissatisfaction with the courts,28/ Congress was not willing to confer carte blanche authority on the Commission without procedures for judicial review. As stated by Mr. Justice Jackson in the Morton Salt case, in reference to the combined prosecuting and adjudicatory functions of the Commission, "it is expected that this combination of duty and power always will result in earnest and eager action but it is feared that it may sometimes result in harsh and overzealous action."29/

Thus, while good administration requires a zeal and vigor in the prosecution of the statutes committed to the Commission, it likewise requires a balanced approach consistent with the whole body of antitrust law.

2. Another important characteristic of an administrative agency is that it arrive at a decision only after thorough exploration of all factors bearing upon the particular problem.

In the past the Commission has, I believe, followed the per se approach to a degree inconsistent with its status as an expert.30/

The laws given to the Commission to administer are, for the most part, general in nature and not clear of policy elements. "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business."31/ It contemplated clarification and completion by the Federal Trade Commission. If the administrative tribunal to which such discretion is delegated does nothing but promulgate per se doctrines, the rationale for its creation disappears.32/ If a particular competitive act is automatically to be presumed unlawful, the administrative process of the Commission loses its purpose, and the justification for limiting the scope of judicial review and for exempting the Commission from executive control no longer remain. In such event the administrative agency may as well give way to the prosecutor.

27/Davis, Administrative Law (1951), p. 347.

28/"The people of this country will not permit the courts to declare a policy for them with respect to this subject." S. Rep. No. 1326, 62d Cong., 3d Sess. (1914), 51 Cong. Rec. 11384. See also, Landis, The Administrative Process pp. 32-34.

29/338 U.S. 632, 640 (1950).

30/Of course, where Congress has laid down self-operative doctrines, the Commission should vigorously enforce them. I refer, not to these, but to instances where the Commission has adopted the per se approach on its own motion.

31/Federal Trade Commission v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392 (1952); Federal Trade Commission v. R. F. Keppel & Bro., Inc., supra, 310-312.

32/See dissenting opinion of Mr. Justice Jackson in The Ruberoid Co. v. Federal Trade Commission, 343 U.S. 470 (1952).

The courts consistently have recognized that the Commission was created for the purpose of appraising economic data and market facts, and they have repeatedly declared that the courts are ill-suited to perform such functions.33/

Regarding the admissibility and relevance of economic factors, there has been much discussion of the Standard Stations case,34/ which arose under Section 3 of the Clayton Act. In that case, Mr. Justice Frankfurter, speaking for the majority, said:

> "Our interpretation of the Act ... should recognize that an appraisal of economic data which might be practicable if only ... /the Federal Trade Commission/ were faced with the task may be quite otherwise for judges unequipped for it either by experience or by the availability of skilled assistance."35/

Mr. Justice Douglas predicated his dissent in large measure upon a failure adequately to analyze competitive effects. He said, "Whether it /the type of exclusive contract involved/ is a substantial lessening of competition within the meaning of the antitrust laws is a question of degree and may vary from industry to industry."36/

Mr. Justice Jackson's dissent, in which Chief Justice Vinson and Mr. Justice Burton joined, leaves no doubt that they believed it was necessary to examine all relevant economic factors. He said:

> "I regard it as unfortunate that the Clayton Act submits such economic issues to judicial determination. It not only leaves the law vague as a warning or guide, and determined only after the event, but the judicial process is not well adapted to exploration of such industry-wide, and even nation-wide, questions.
>
> "But if they must decide, the only possible way for the courts to arrive at a fair determination is to hear all relevant evidence from both parties ..."37/

Thus, while the Court split 5-4 on the merits, the controversial Standard Stations case may nonetheless be taken as an unanimous expression that the Federal Trade Commission can and should make adequate appraisals of economic and marketing data.

33/Standard Oil Company of California v. U. S., 337 U.S. 293, 310, 322 (1949).
34/Id.
35/Id., 310.
36/Id., 319.
37/Id., 322.

The Motion Picture Advertising case 38/ must also be considered. There the Commission held that exclusive contracts for five years were unlawful but that exclusive contracts for a one year period "would not be an undue restraint upon competition, in view of the compelling business reasons for some exclusive arrangement."39/

The Supreme Court affirmed saying that "The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine."40/

Mr. Justice Frankfurter, dissenting in this case, gave us a persuasive analysis of the practical reasons why the Commission should consider all relevant economic factors.

He began with the observation that the Commission had not explained its position with the "simplicity and clearness" necessary to tell the Court "what the decision means before the duty becomes ours to say whether it is right or wrong"; his primary concern was that the Commission had "not related its analysis of this industry to the standards of illegality of Section 5 with sufficient clarity to enable this Court to review the order."41/

He distinguished his own opinion in the Standard Stations case by suggesting that it turned on the seller's industry position; the large percentage of the market shut off by the contracts; the significance of the volume of commerce involved; the bargaining power of the large seller vis-a-vis the smaller retailer; and the fact that the filling station's entire inventory was subject to the exclusive arrangement.42/

38/ Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392.

39/ Id. 396.

40/ Id. 396.

41/ Id. 398.

42/ Id. 401-402. Mr. Justice Frankfurter said:

"It may be that considerations undisclosed could be advanced to indicate that the percentage of the market shut off here, calculated by a juggling of imponderables that we certainly would not confidentially weigh without expert guidance, ought not to be considered significantly different from that in the Standard Oil case, or perhaps more important in the light of that decision, see 337 U. S., at 314, that the aggregate volume of business is of as great significance to the public as it was there. Even so, there are apparent differences whose effects we would need to have explained.

"The obvious bargaining power of the seller vis-a-vis the retailer does not, so far as we are advised, have a parallel here. Nor are we apprised by proof or analysis to disregard the fact that here the advertising, unlike sales of gasoline by the retailer in the Standard Oil case, is not the central business of the theaters and apparently accounts for only a small part of the theaters' revenues. In any event, in the Standard Oil case we recognized the discrepancy in bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted. See 337 U. S., at 314. And although we are not told in this case whether the pressure for exclusive contracts comes mainly from the distributor or the theater, there are indications that theaters often insist on exclusive provisions. See Findings as to the Facts No. 12, In re Motion Picture Advertising Service Co., supra, at 388.

He then suggested that the Commission should exhibit "that familiarity with competitive problems which the Congress anticipated the Commission would achieve from its experience" and to furnish the Court with "expert guidance" as to competitive "effects," "interests affected," "how these practices, if full blown, would violate . . . /the Sherman or Clayton/ Acts" and "the need for enforcement" in the particular area.43/

Beginning then with the Keppel case in 1934 and continuing to date the Supreme Court consistently has defined the status of the Commission as an expert body possessing procedures and means not available to the courts.44/

42/(Continued)
"Further, the findings of the Commission indicate that there are some factual differences in the 'exclusive' provisions here, for in this industry, as may not have been feasible in gasoline retailing, distributors of films often do have access to the theaters having nominally exclusive contracts with competing distributors. At times the exclusive provision may do little more than give the distributor a priority over other distributors in the use of screen space. Indeed, the degree of exclusion of competitors in some instances is represented . . . ply by the inadequacy of a 15% commission paid the 'excluded' competitor wher he is permitted to show his films in theaters nominally exclusive. The Commission found the 15% unprofitable in local advertising, but it did not find how much of the affected competitors' total business, which may also have included manufacturer-dealer or cooperative advertising and national advertising, was in effect excluded because of the unprofitability of the commission in local advertising."

43/It has been suggested that the abandonment of the per se approach and the examination and appraisal of economic factors may extend the record, in the "big case," to unmanagable proportions. Where this threat exists the hearing examiner could control the situation, it seems to me, through the use of pre-trial procedures and by requiring the parties to submit their direct economic testimony and evidence in advance in written exhibit form.

My own experience indicates that large records, in Commission cases, have been due primarily to the admission of irrelevant and cumulative material, not to the admission of relevant evidence of competitive effect.

44/"The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process. Its agencies are provided with staffs to institute proceedings and to follow up decrees and police their obedience. While that process at times is adversary, it also at times is inquisitorial." U. S. v. Morton Salt Co., 338 U. S. 632, 640 (1950). See also, Far East Conference v. U. S., 342 U. S. 570, 574-575 (1951). Cf. remarks of Senator Hollis, a proponent of the bill to create the Commission, who stated on the floor:

"The commission, by reason of its knowledge of business affairs and the concentrated attention it will give thereto, its facilities for investigation, its rapid, summary procedure, will be able to protect business against unfair competition * * *." (51 Cong. Rec. 12146).

3. The heart of the Commission's work, as an expert body, is its fact finding.45/ The power to determine facts is probably as great a power, if not greater, than the power to interpret law. Chief Justice Hughes once said: "An unscrupulous administrator might be tempted to say, 'Let me find the facts . . ., and I care little who lays down the general principles.'"46/

What was the reason for conferring upon the Federal Trade Commission the power to make findings of fact which, if properly supported, would be binding upon the courts? It was, as I have indicated, because Congress "expected that the problems which would be encountered would be of a technical and specialized character, calling for experience and training which a court might not possess but which could be found in a Commission especially selected for the purpose, and authorized to employ technical experts as well as lawyers for its guidance. It was undoubtedly the belief of Congress that the Commission could perform more satisfactorily than a court the task of making findings of fact in the special field of which it was given jurisdiction."47/

Gerard Henderson in his early work on the Federal Trade Commission, devoted an entire chapter to the Commission's "findings of fact." He concluded that "regardless of accuracy and fairness, the formal character of the findings, the use of 'legal' phraseology and of ambiguous words and stock phrases, and the frequently obvious attempt to frame findings with a view to the legal result desired, rather than as a mirror of events and circumstances . . . tend to make the findings unsatisfactory and unconvincing."48/

Mr. Justice Jackson, in the recent Ruberoid case, said:

> "If the independent agencies could realize how much trustworthiness judges give to workmanlike findings and opinions and how their causes are prejudiced on review by slipshod, imprecise findings and failure to elucidate by opinion the process by which ultimate determinations have been reached, their work and their score on review would doubtless improve."

45/Fact finding is, of course, likewise the heart of the judicial process in the trial courts. Judge Frank states that "judicial fact-finding constitutes the most difficult part of court-house government"; that "it should be improved" but is "largely ignored" and "pushed off to the edge in most descriptions of our legal system." He concludes: "My experiences as a 'quasi-judicial' fact-finder on the SEC and my service on the bench have not changed my fundamental belief that trial-court fact-finding is the soft spot in the administration of justice." Frank, Courts on Trial (1949), pp. 70-74.

46/See Frank, op. cit. supra, p. 32.

47/Henderson, The Federal Trade Commission (1924) p. 92.

48/Id. 162-163.

There are a number of compelling reasons, in addition to technical legal requirements,49/ why the Commission should adopt a new policy with respect to its findings of fact. I propose to deal with these reasons in detail in a later paper.

For the present, I merely suggest that the findings should include a specific statement of the salient facts, as well as the conclusions of fact. They should give a narrative and descriptive account of the controversy involved and the issues presented. In the recent Pillsbury opinion, an attempt was made to set forth the facts in a manner that may serve as a partial pattern for future findings.50/

In closing, let me say again that the Department of Justice and the Federal Trade Commission are not, or at least should not be, duplicating federal agencies. They were designed to serve different, although complementary, purposes.

Putting aside the suggestion that the Commission may have strayed from the path of its statutory duty, it seems clear that its antitrust policy for the future should be firmly predicated upon a continuing purpose to perform - as Congress intended - its full function in the administrative process.

49/Davis states that although there is some judicial authority to the effect that the Constitution requires administrative findings, this proposition is "untenable" and that in its more recent opinions "the Supreme Court has shown no inclination to put the requirement on a constitutional ground." Davis, Administrative Law (1951) 525-526. See also Chamberlain, Dowling and Hays, The Judicial Function in Federal Administrative Agencies (1942) p. 27; McFarland and Vanderbilt, Cases on Administrative Law (2d Ed., 1952), p. 808; contra, II Vom Baur, Federal Administrative Law (1942) p. 535. Standards as to findings set up by the courts are, in any event, minimum standards. Likewise, the Administrative Procedure Act establishes only the "minimum requirements of fair administrative procedure." See remarks of Senator McCarran, Sen. Doc. 248, 79th Cong., 2d Sess., 327 (1946). I believe that the Commission's findings of fact, from a practical standpoint, should more than meet minimal standards.

50/In the Matter of Pillsbury Mills, Inc., F.T.C. Docket No. 6000, decided December 18, 1953.