THE CASE AGAINST THE FEDERAL TRADE COMMISSION

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THE ATTORNEY GENERAL and the Federal Trade Commission have virtually concurrent jurisdiction to enforce the Sherman¹ and Clayton² Antitrust Acts. The same statutes may in effect be enforced against the same businessmen by two different agencies of the government. Worse, these agencies appear to have conflicting economic philosophies and diverse views of the objectives of the antitrust laws. The result is an inconsistent, irresponsible, and inefficient antitrust enforcement program, with a failure to give the taxpayers maximum accomplishment for Congressional antitrust appropriations.

It seems apparent that dual administration of the same statutes is not in the public interest. The purpose of this article is to prove from the record that the only tenable solution is to take antitrust jurisdiction away from the Federal Trade Commission and to give exclusive antitrust jurisdiction to the Attorney General.

In submitting to Congress plans for the reorganization of certain government agencies, the President recently said:

A principal finding of the [Hoover] Commission on organization was that clean cut lines of authority do not exist in the Executive branch. The Commission stated that "the first and essential step in the search for efficiency and economy in the Executive branch of the Federal Government is to correct the present diffusion of authority and confusion of responsibility." The Commission warned that without this action all other steps to improve organization and management are doomed to failure.

Clearer lines of responsibility and authority will strengthen our Constitutional system and will also help to establish accountability for performance in office—a basic premise of democratic government.³

In the antitrust field, the President's objective could best be achieved by vesting unified authority in the Attorney General—and not in the Federal Trade Commission.

The consensus of informed people—including committees of both houses of Congress—is that the Federal Trade Commission has utterly

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¹ 26 Stat. 209 (1890), as amended, 15 U.S.C.A. §§ 1-7 (1951).

² 38 Stat. 734 (1914), as amended, 15 U.S.C.A. §§ 12-27 (1951).

³ 96 Cong. Rec. 3291 (March 13, 1950).

failed in its intended purpose. The record of its accomplishments, including its own public statements, show that it has inflicted substantial injury on our way of business life. This failure of the Commission in its statutory mission is due largely to its staff, the "unorthodox" ideologies for which they have crusaded, and their unwillingness to enforce the laws as promulgated by the Congress.

This article deals first with the Commission's unsatisfactory record, then with those responsible for that record, and finally with the changes required to preserve industrial democracy.

I. THE COMMISSION'S STATUTORY DUTY

The Federal Trade Commission was created to help businessmen understand the antitrust laws as passed by the Congress. Its creators never intended that the Commission should be substituted for the Congress in determining the economic policy of the nation. Yet that is what it has tried to do. And the economic philosophy it has tried to impose on the people has been contrary to the expressed will of the Congress.

In 1911 the Supreme Court "read" into the Sherman Antitrust Act of 1890 the "rule of reason."⁴ This meant that a "reasonable" interpretation would be given to the statutory prohibition against combinations and agreements in restraint of trade. That decision led to a debate in the 1912 Presidential campaign. Some felt that the "rule of reason" made the antitrust laws too vague, while others opposed the "rule of reason" as giving too much power to the courts. The three candidates for President in the 1912 campaign agreed—although for different reasons—that the Sherman Antitrust Act should be supplemented to specify with greater certainty the business conduct prohibited by the antitrust laws.

In 1913 Congress began a study of legislation to spell out the specific business conduct to be prohibited. This congressional study resulted in the Clayton Act, which prohibits certain price discriminations, various tying clauses, and other predatory practices. Woodrow Wilson conceived the idea of a "trade commission" to implement that legislation then being considered by the Congress. His purpose was to meet businessmen halfway. He intended this Commission to be an agency that would help businessmen understand the antitrust laws and the conduct required to comply with those laws.

On January 20, 1914 Wilson sent a message to Congress in which he asked it to create an "Interstate" Trade Commission. Wilson's message

⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

to the Congress shows the type of agency he had in mind.⁵ Acting upon that recommendation, in the Fall of 1914 the Congress passed the Federal Trade Commission Act. At the same time it passed the Clayton Act, which contained the results of its own study.⁶

Wilson wanted "*legislative*" definition of the policy of the *statutory* law and an administrative agency "only as an indispensable instrument of *information and publicity*." Rejecting administrative control of business, he wanted *the Congress* to define the laws. The Commission's function was to be only to publicize, and inform businessmen of, the requirements of those laws. He intended to "disturb the legitimate course [of business] as little as possible." The Commission, however, regards itself as empowered to establish new economic ideology.

In 1950, more than thirty-five years after Wilson's message outlined the Commission's function, a report of the Senate Interstate & Foreign Commerce Committee found that:

The Commission does not consider itself a body such as that envisioned by President Wilson. In the hearings before this subcommittee, the Commission has taken the position that it cannot indicate, in advance of specific litigation before it, the rules of law applicable to business in interstate commerce.⁷

⁵ "The business of the country awaits, has long awaited and has suffered because it could not obtain, further and more explicit *legislative* definition of the policy and meaning of the existing antitrust law. . . . Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden *by statute* in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

"And the businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice; the definite *guidance and information* which can be supplied by an administrative body, an interstate trade commission.

"The opinion of the country would instantly approve of such a commission. *It would not wish to see it* empowered to make terms with monopoly or in any sort to *assume control of business*, as if the Government made itself responsible. It demands such a commission *only as an indispensable instrument of information and publicity*, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided. . . .

"Inasmuch as our object and the spirit of our action in these matters is to meet business half way in its processes of self-correction and *disturb its legitimate course as little as possible*, we ought to see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we did see to it, that penalties and punishments should fall not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn." 51 Cong. Rec. 1962-63 (1914) (emphasis added).

⁶ The Federal Trade Commission Act was approved September 26, 1914 (38 Stat. 717); and the Clayton Act was approved October 15, 1914 (38 Stat. 730).

⁷ Sen. Rep. No. 2627, 81st Cong. 2d Sess. 5 (1950).

After an exhaustive study of the Commission, the Hoover Commission in 1949 made comprehensive findings of its performance record. Reviewing the purpose intended in the creation of the Federal Trade Commission, the Hoover group said that "over the years, the Commission has engaged mainly in activities contributing little toward accomplishing the primary Congressional objective of assuring widespread effective competition."⁸

The Hoover group restated the obligation imposed on the Commission by the Congress with the conclusion that "the Commission also has responsibilities for furtherance of the policy and mandate of the statutes. In a field of such public interest, the Commission has a duty to be truly informative, concerning its own standards and policies."⁹

The Commission Refuses to be Informative

The Commission's advice to businessmen is that they can learn the business conduct required of them by the statutes only when the Commission chooses to sue them and to litigate the propriety of their business activities in an adversary proceeding. As a result no one knows what is now the law in this field. Recent illustrations show the extent to which the Commission wilfully refuses to assist businessmen to understand the law.

As a result of confusion as to the legality of freight absorption, a special Senate subcommittee was appointed in 1950 to inquire into the extent to which the Commission clarified the law on that subject. That Senate Committee found that "[m]uch of this confusion—conceded by everyone to exist—is directly attributable to the Federal Trade Commission."¹⁰ Giving it an opportunity to be truly informative, the Senate asked the Commission for a formal expression of when freight absorption is lawful under existing statutes.

The Commission advised the business world in November 1950 that freight absorption is lawful whenever it is not unlawful.¹¹ The Senate Committee, observing that homicide is also lawful unless it is for an illegal purpose or effect, said:

We are somewhat surprised at being told by an agency that the legality of anything which has "no unlawful purpose or effect" is clear. Obviously, anything that is not illegal must be legal. The Commission could equally properly have said that killing a person is not unlawful if it "has no unlawful purpose or effect."¹²

⁸ Hoover, Task Force Report on Regulatory Commissions 122 (1949).

⁹ *Ibid.*, at 131.

¹⁰ Sen. Rep. No. 2627, 81st Cong. 2d Sess. 11 (1950).

¹¹ "The legality of freight absorption which has no unlawful purpose or effect is clear today. Such freight absorption has not been attacked by the Commission in any proceeding, and the Commission has repeatedly made public announcement that such freight absorption is legal." Letter reprinted in Sen. Rep. No. 2627, 81st Cong. 2d Sess. 22 (1950).

¹² *Ibid.*, at 9.

Another example of the Commission's refusal to be informative or to furnish guidance to business is its conduct with respect to the "Reports of Compliance" in *FTC v. Cement Institute*.¹³ After eleven years of litigation, the Supreme Court upheld the Commission's attack against pricing practices of the cement industry. The Court ordered the cement producers to file reports with the Commission showing the manner in which they proposed to comply with its order. Such reports were transmitted to the Commission. Fair play and the encouragement of voluntary compliance with the law require that the cement people be told whether what they proposed to do would comply with the law. Those reports have, however, now been in the hands of the Commission for over three years and it refuses to either approve or disapprove them. In fact, it declines to even file them on record.¹⁴

The Commission's failure to be informative, and its refusal to admit publicly the statutory construction which it advocates in the courts, appears to be the result of its, or at least some of its, staff's desire to achieve a judicial construction of the statutes in accord with their economic ideologies, without the public being aware of the effect on our economy of those constructions.

II. THE COMMISSION'S RESPONSIBILITY FOR CONFUSION IN THE ANTITRUST LAWS

The primary function of the Commission was to be informative, to guide businessmen in understanding the law. Not only has it failed to do that, but it has created confusion as to the meaning of the antitrust laws by its inconsistent and contradictory statements concerning interpretations of these laws.

The Commission has argued for its own construction of the law in the courts, and then denied to the public having made those arguments. For more than twenty-five years prior to the congressional study initiated by the Capehart Committee¹⁵ of the Senate in the Summer of 1948, the Commission's staff campaigned for required f.o.b. mill selling in the prosecu-

¹³ FTC Docket No. 3167, rev'd, 157 F. 2d 533 (C.A. 7th, 1946), rev'd, 333 U.S. 683 (1948).

¹⁴ Commenting on this conduct, the Senate Committee's 1950 report said [Sen. Rep. No. 2627, 81st Cong. 2d Sess. 6 (1950)]:

"Businessmen found to have violated the law are not entitled to sympathy from the Commission, but they are entitled to know what conduct is required of them to comply with the law in the future. There is no reasonable explanation given why the Commission has not either accepted or rejected those reports of compliance in more than 2 years. The court had ordered the reports to be filed with the Commission. If the reports were not satisfactory, the Commission could, and should, have so advised the court, as well as the businessmen involved."

¹⁵ Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce created by Sen. Res. 241, 80th Cong. 2d Sess. (1948).

tion of *litigated cases*. Then suddenly, *in speeches and public press releases*, the Commission not only denied that it then sought required f.o.b. mill selling, but denied ever advocating such a rule of law. Businessmen do not know whether to believe that the statutes require what the Commission's unofficial statements say they do, or what their lawyers tell them the Commission has argued *in its litigated cases*. Of course, the Federal Trade Commission does not act officially through speeches by either its members or its staff, or even through Commission issued press releases. It acts officially only in the orders it enters in litigated cases and the briefs it files in the courts.

The Origin of the F.O.B. Mill Campaign

In its court briefs the Commission long campaigned for required f.o.b. mill selling. But it now denies that it ever sought to require sellers to have a uniform f.o.b. mill price. Yet it admits that Walter B. Wooden was in charge of all its pricing cases,¹⁶ and Wooden was a vigorous advocate for required f.o.b. mill selling. The Commission now says it never knew that.

Frank Albert Fetter, late professor of economics at Princeton University, was a life-long, acknowledged, and open crusader for required f.o.b. mill pricing.¹⁷ Fetter was retained by the Commission as an economic expert in some of Wooden's cases, primarily the *Cement Institute* and *Pittsburgh-Plus*¹⁸ cases. Wooden became a disciple of Fetter. In 1948 Wooden testified before the House Small Business Committee that, on the economic aspects of the problem, he was in complete agreement with Fetter.¹⁹

For two decades, prior to 1949, Wooden had brilliantly argued for required f.o.b. mill selling, as is hereafter shown. On January 11, 1949, speaking on a nation-wide radio broadcast, Wooden publicly said that he favored required f.o.b. mill selling.²⁰ Yet on February 11, 1949 all of the

¹⁶ Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 236, 81st Cong. 1st Sess. 271-73 (1949).

¹⁷ See his book, *Masquerade of Monopoly* (1931); his testimony in Hearings before Committee of Interstate Commerce on S. 4055, 74th Cong. 2d Sess. 4-24 (1936); and his testimony in Hearings before House Select Committee on Small Business, 80th Cong. 2d Sess. 887-905 (1948).

¹⁸ *United States Steel Corp.*, FTC Docket No. 760, 8 F.T.C. 11 (1924-25); *aff'd* by stipulation *United States Steel Corp. v. FTC*, C.A. 3d Docket No. 6796 (1938).

¹⁹ "I would not attempt to go into the economic phases of the [basing point] question in any such way as the marvelous fashion in which Dr. Fetter has done it, but I would just like to say generally that so far as the economic aspects of the problem are concerned, and particularly its relation to and effect upon small business, the development of small business, I agree with him 100 percent." Hearings before the House Select Committee on Small Business, 80th Cong. 2d Sess. 907 (1948).

²⁰ Should Industry Be Permitted To Absorb Freight?, *American Forum of the Air* (Jan. 11, 1949); Hearings, *op. cit.* supra note 16, at 280.

then members of the Commission (except Lowell B. Mason) wrote the Senate Committee that, even then, they did "not now know that Mr. Wooden believes, as your question states, that all industry should be required to sell at f.o.b. mill prices."²¹

The Conduit Case: It's Black—No, It's White

The record of the *Rigid Steel Conduit Ass'n*²² case is an illustration of duplicity by the Commission which could only injure the national economy. The Commission's *Conduit* complaint contained two counts. Count I charged a conspiracy to fix prices through the use of basing-point pricing. Count II charged the use, by the same people, of freight absorption practices, but was distinguishable from Count I by the absence of any charge of conspiracy. That distinction was highlighted when the Commission acquitted two of the conduit sellers—Spang-Chalfant, Inc. and Clifton Conduit Co.—of the conspiracy charge, but nevertheless convicted them under the Count charging only that they absorbed freight to meet their competitor's prices with knowledge of the fact that others also did so. Furthermore, they were ordered "to cease and desist from . . . selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination."²³

In its brief to the Court of Appeals the Commission expressly argued: "[W]e grant that no issue of conspiracy arises under Count II." It told that court that "the basing-point practice . . . automatically frustrates competition," that "Count II does not rest upon agreement or combination," and that "there is no question at issue under Count II whether the facts . . . involve a combination or conspiracy. . . . Counsel for the Commission expressly refrain from so contending as such a question would be purely academic."²⁴ The Commission further argued in that brief that "Count II and a corresponding part of the order are frankly directed against the basing-point practice as being, *per se*, an unfair method of competition, even though not predicated on combination or conspiracy."²⁵

In sustaining the Commission's Conduit order, the Court of Appeals for the Seventh Circuit said:

²¹ Hearings, *op. cit.* supra note 16, at 272.

²² FTC Docket No. 4452, 38 F.T.C. 534 (1944), *aff'd*, *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (C.A. 7th, 1948), *aff'd* by an equally divided court (*per curiam*), *Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949).

²³ See quotations from the record in the Conduit case reprinted in *Study of Federal Trade Commission Pricing Policies*, Sen. Doc. No. 27, 81st Cong. 1st Sess. 39 (1949).

²⁴ *Ibid.*

²⁵ *Ibid.*

We now turn to consider petitioners' [conduit sellers] contention that the individual use of the basing-point method, with knowledge that other sellers use it, does not constitute an unfair method of competition. This contention embodies the theory of the second count of the complaint. . . . In the light of that opinion [*Cement Institute* case] we cannot say that the Commission was wrong in concluding that the individual use of the basing-point method as here used does constitute an unfair method of competition.²⁶

This record of *court action* by the Commission led many reasonable and intelligent people to believe that the Commission opposed basing-point pricing and considered it illegal, even in the absence of conspiracy.²⁷ In fact, immediately after the *Conduit* decision, the Commission issued a press release with the title, *Court Holds Basing-Point Method of Pricing to be "Unfair" Irrespective of Conspiracy*.²⁸ But the Commission now tells businessmen that it isn't against basing-point pricing at all and that it is only opposed to conspiracies.

Shortly after the start of the 1949 Capehart inquiry, Robert E. Freer, the Commission's Chairman, made a speech in which he said that "basing-point and delivered price systems, as such, are under no special attack."²⁹ Two months later this Commissioner officially said in a speech that:

During all of the time that this uproar has been going on officials of the Federal Trade Commission have been stating that the law does *not* require uniform f.o.b. mill prices, that the law does *not* prevent the absorption of freight to meet competition, and that the recent decisions, apply *only* to situations in which there is organized monopoly and conspiracy to suppress and restrain competition.³⁰

The following month (January 1949), Ewin L. Davis, a member of the Commission, testifying before a Senate Committee, vigorously argued that

²⁶ *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d, 175, 180 (C.A. 7th, 1948).

²⁷ In fact the Commission's present Chief Economist, Corwin D. Edwards, wrote a book, two months before being hired by the Commission in that position, in which he said:

"The Federal Trade Commission which has been foremost in the fight against basing-point systems, has contended that a proper handling of the problems of distance from the market requires establishment of a price at each point of production and addition of full freight incurred in shipments to other points. . . .

"It is to be hoped, however, that the Federal Trade Commission will abandon its present efforts to require rigid f.o.b. mill pricing in the terms of orders which it issues in cases of this class, or that the courts will modify the Commission's order sufficiently to avoid this result. Otherwise there will be need for amendment of the statutes designed to preserve adequate competitive alternatives in markets in which producers are widely scattered." Sen. Doc. No. 27, op. cit. supra note 23, at 47; the book was not published until a year after his employment by the Commission and this portion was changed before publication.

²⁸ That release continued:

"Use of a basing-point system of delivered prices by individual companies, engaged in the production and sale of rigid steel conduit, with knowledge that other sellers are using the same pricing methods and with the result that price competition is unreasonably restrained, constitutes an 'unfair method of competition' in violation of the Federal Trade Commission Act irrespective of any combination or conspiracy." Sen. Doc. No. 27, op. cit. supra note 23, at 41.

²⁹ Sen. Doc. No. 27, op. cit. supra note 23, at 46.

³⁰ *Ibid.*, at 46.

the Commission had never challenged basing-point pricing in the absence of collusion.³¹

In February, 1949 a majority of the members of the Commission wrote the Senate Committee that its Chairman's statement that "the recent decisions apply only to situations in which there is organized monopoly and conspiracy" was "obviously intended to refer to the decisions rendered in the Cement Institute and Rigid Steel Conduit cases, and it is in accord with the views of the Commission."³²

It is difficult to understand how the Commission could truthfully say that it had never attacked basing-point pricing in the absence of conspiracy or that the Conduit order applies only to conspiracy situations, in view of the above quotations from the record of that case.

The Cement Institute Case

In the oral argument before the Supreme Court of the *Cement Institute* case, Wooden, the Commission's attorney, said that the cement industry's "pricing method, apart from combination and conspiracy, results in unlawful price discrimination." In response to specific questions from Supreme Court Justices, Wooden argued that sellers were required either to have a uniform f.o.b. mill price to all customers, or delivered prices which were exactly equal to a uniform f.o.b. mill price plus full freight from the point of shipment to destination. The latter was conceded by him to be the equivalent of a uniform f.o.b. mill price.³³ That argument was made

³¹ "The Commission has not in a single case challenged the use of the basing-point method of pricing per se separate and apart from collusion. The Commission has not challenged freight absorption per se. The Commission has not required f.o.b. mill pricing. The Commission has not challenged the legality of the use of uniform delivered prices by an individual concern. . . .

"The Commission has not required any concern to use any particular method or methods of pricing. Each seller may choose his own method of pricing provided that he does not conspire or agree with his competitors and provided that he does not discriminate in price in the manner prohibited by law and thereby injure competition or tend to create a monopoly. A seller may absorb freight or absorb part of his manufacturing costs or any other costs in order to in good faith meet an equally low price of a competitor." *Ibid.*, at 62.

³² *Ibid.*

³³ MR. JUSTICE REED. "It may be just words, but the result of your argument is that if you must have a factory price plus freight for your delivered price, then you can never have any basis for your price except the factory price. . . ."

MR. WOODEN. "That is what the Court held in the Staley and Corn Products case, as I understand; that the discrimination in delivered prices there could be measured only in terms of the variation in the mill net. . . ."

MR. JUSTICE REED. "That means you cannot have, which you have said, a delivered price that is equal for everybody, of course; because the freight rates vary. Therefore, I supposed your opponents' argument is that they take only the f.o.b. . . . price."

MR. WOODEN. "They can have an f.o.b. price if it makes due allowances for [differences in] cost in delivery; that, in turn, would make a uniform net factory price for any particular concern." *Ibid.*, at 40.

in October 1947. In January 1949, however, the Commission issued a public statement, subsequently twice submitted to the Senate, which said: "The Commission does not advocate the imposition of a requirement that business enterprises price their goods f.o.b. mill or that they use any other form of geographic pricing practice."³⁴ The problem was further confused by the fact that the Commission's attorney in charge of the recent case against the steel industry, Lynn C. Paulson, publicly testified, contrary to the public statements of the Commission, that "the practical effect [of the law was] to require f.o.b. mill selling."³⁵

The Pittsburgh-Plus Case

The Commission's 1948 Court of Appeals brief in the *Pittsburgh-Plus* case (against United States Steel Corporation) states in part:

If every point of shipment were to be made a basing point and all phantom freight eliminated, the system would still be oppressive to the various purchasers in that those at or near the factory door would have to pay more to that factory in order that its distant purchasers might pay less. Such is the effect of systematic freight absorption. Such is the practice that must be appraised in the light of the Supreme Court's declaration in the *Staley* case that a nondiscriminatory pricing system was one "giving to purchasers, who have the natural advantage of proximity to its plant, the price advantages which they are entitled to expect over purchasers at a distance."³⁶

In 1949 the Senate Interstate and Foreign Commerce Committee, commenting on the Commission's argument in that brief, said:

The foregoing argument by the Commission appears clearly to oppose freight absorption by a single seller. . . . [The *Pittsburgh-Plus*] case did not charge a conspiracy. The philosophy that freight absorption cannot be permitted because it denies nearby purchasers the right to purchase at lower prices than more distant purchasers, is to say that the seller must sell exclusively at f.o.b. mill prices.³⁷

But a contrary statement of the law was given that Senate Committee in February 1949 when a majority of the members of the Commission wrote that "there is nothing inherently or necessarily unlawful about delivered prices, zone prices, or freight absorption."³⁸ Referring specifically to the order in the *Pittsburgh-Plus* case, the majority of the members of the Commission wrote the Senate Committee that "it seems to [us] quite clear that the practical effect of the order in the *Pittsburgh-Plus* case

³⁴ Hearings on S. 236, op. cit. supra note 16, at 280.

³⁵ Sen. Doc. No. 27, op. cit. supra note 23, at 47.

³⁶ *Ibid.*, at 42, citing *FTC v. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945).

³⁷ *Ibid.*

³⁸ Hearings on S. 236, op. cit. supra note 16, at 269 (Commissioners Ewin L. Davis, William A. Ayres and Garland Ferguson).

does not require f.o.b. mill pricing. When the sellers' market in steel comes to an end it will be surprising if the parties affected by that order do not abandon f.o.b. mill pricing methods."³⁹

The Commission's attorneys, however, do not agree with that statement of the Commissioners. At the November 1948 public hearings of that Senate Committee, three Federal Trade Commission attorneys were asked: "In an industry where freight is a substantial part of the delivered cost can any pricing system other than a uniform f.o.b. mill price be used with assurance of legality?" Their answers were in the negative and their interpretations of the cases in substantial disagreement with the above-quoted statements of the Commissioners.⁴⁰ The Senate Committee also asked these Commission attorneys: "Do the orders in the Rigid Steel Conduit and Pittsburgh-Plus cases require the parties to those cases to sell at uniform f.o.b. mill prices?" One replied that "as a practical matter, I say 'yes.' " The second answered, "I think the order in the Pittsburgh-Plus case does definitely, and I think that [as] a practical factor, but whether it does so straight out or not I am not sure." And the third said, "No."⁴¹

Of course, following the Capehart Committee inquiry, the Commission reversed itself. In 1951 it approved a consent order disposing of the *American Iron and Steel Institute* case which expressly provides that the "Commission is not acting to prohibit or interfere with delivered pricing or freight absorption as such when innocently and independently pursued, regularly or otherwise, with the result of promoting competition."⁴²

The point is that the Commission's twenty-five-year basing point campaign, having now been disowned, was a waste of time which could better have been spent fighting conspiratorial and other predatory practices. Furthermore, it has created harmful and unnecessary confusion among businessmen, much of which still exists. And the practice of thus sowing the seeds of confusion still continues.

The Commission's Attack on Functional Pricing

The Commission's recent attack on functional pricing is another example of the Commission denying publicly what it argues judicially. One would assume that after all the "furor" of the past few years on the "basing point" question the Commission would now be more careful about issuing diametrically opposed statements to confuse businessmen.

³⁹ Ibid.

⁴⁰ Sen. Doc. No. 27, op. cit. supra note 23, at 51.

⁴¹ Ibid., at 53.

⁴² FTC Docket No. 5508, CCH Trade Reg. Rep. ¶14,775 (1951).

In the October 1950 oral argument before the Supreme Court in *Standard Oil Co. (Ind.) v. FTC*,⁴³ the Commission's attorney told the Court that "if there was no difference . . . in the cost of sale or delivery of the quantity purchased, then regardless of whether it is a wholesaler or a retailer, they would have to pay the same price." To the Court's specific questions, the Commission's attorney gave answers as follows:

JUSTICE FRANKFURTER: "Standard had to give the same price to everybody who bought gas from them in this area."

JUSTICE JACKSON: "Or justify the differential in cost."

JUSTICE FRANKFURTER: "Of cost."

FTC ATTORNEY JAMES CASSEDDY: "That is my argument, yes."

JUSTICE FRANKFURTER: "And by 'retailer' you do not differentiate between a filling station and the so-called jobber?"

FTC ATTORNEY JAMES CASSEDDY: "I do not. The statute makes no such difference."

JUSTICE FRANKFURTER: "As I understand your position, it does not make any difference whether the intermediate jobber is himself also a so-called retailer or not."

FTC ATTORNEY JAMES CASSEDDY: "It does not make a bit of difference."

JUSTICE FRANKFURTER: "And there has to be a single price throughout this area, no matter who the purchaser is; is that right?"

FTC ATTORNEY JAMES CASSEDDY: "That is the way I understand it."⁴⁴

The same theory was advanced by the staff in the *Spark Plug* cases, which have been pending for twelve years.⁴⁵ Apparently disturbed by that argument of the FTC which would deny wholesalers' functional discounts, on November 13, 1950 the General Manager of Motor and Equipment Wholesalers Association wrote the FTC expressing concern over the contemplated prohibition of functional discounts not based on cost differences.⁴⁶ On November 22, 1950 the Director of the Commission's Anti-

⁴³ 340 U.S. 231 (1951).

⁴⁴ Transcript of Oral Argument at 95-100 (Oct. 9, 1950), *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

⁴⁵ *Champion Spark Plug Co.*, FTC Docket No. 3977; *General Motors Corp.*, AC Spark Plug Div., FTC Docket No. 5620; and *Electric Auto-Lite Company*, FTC Docket No. 5624.

⁴⁶ That letter is in part: "We understand it is contended that the adoption of the trial examiner's recommended decision in its proceedings against the AC Spark Plug Division of General Motors Corporation, The Champion Spark Plug Company and the Electric Auto-Lite Company would prohibit functional discounts except when same are based on differences in cost. . . .

"The prohibition of functional discounts except where same are based on differences in cost would spell the doom of the manufacturer-through-wholesaler-to-retailer system of distribution which is so important a bulwark in American free enterprise. We cannot believe the Commission will take any action that would have such disastrous results." Correspondence in FTC Press Release (Dec. 1, 1950).

monopoly Bureau replied to that letter, wholly denying any attack on functional discounts.⁴⁷ The following month, however, a Commission attorney in the same Bureau urged, in the oral argument of the *Spark Plug* cases, that only discounts justified by cost savings were permitted by the Robinson-Patman Act.⁴⁸ None of these statements was an offhand comment made outside the course of that attorney's official duties. Each of the statements was made while the spokesman was acting officially for the Commission.

The Commission Requires Conduct Prohibited by the Department of Justice

Not only is the Commission inconsistent in what it says is the conduct required by the antitrust laws, but it creates further problems for businessmen by requiring conduct which the Department of Justice (Attorney General) prohibits.

Paragraph 6 of the Commission's order in the "Detroit" case, against Standard Oil Company (Indiana), required that company to discontinue selling to any wholesaler who resold below the price which it charged to its retailers.⁴⁹ The effect of this order was to require Indiana Standard to maintain the resale prices of its wholesalers. The Supreme Court has consistently held, however, that it is unlawful for a seller to attempt to

⁴⁷ "Your letter expresses a fear that the Commission is moving to outlaw wholesaler functional discounts as such. You are assured that such a fear is groundless. In my opinion the Robinson-Patman Act does not provide for such action. The Commission has never so moved and in no present case does there appear any such intention. Certainly this Bureau and members of the Commission's legal staff are not urging any such position.

"Your fears apparently have been created by the proposed order in the so-called 'spark-plug cases' now pending before the Commission. No reasonable interpretation of the position taken by this Bureau or by the Attorneys supporting the complaints in these cases permits the conclusion that the Commission is being urged to prohibit sales being made to wholesalers at prices lower than prices made to retailers. That proposition has not been urged. In the briefs which we have filed with the Commission, we have stated that it is not our intention to urge such a proposition." *Ibid.*

⁴⁸ 49 Stat. 1526 (1936), 15 U.S.C.A. § 13 (1951). "[I]t is the only fair inference, buttressed by the fact of just plain practicality, that the respondent [spark plug manufacturer] has thereafter got to be restricted [after a finding of price discrimination] to those discriminations which are justified costwise. . . .

"It is my contention, sir, as I will further develop here, that call discrimination what you will, whether Champion discriminations, Auto-Lite discriminations, contract distributor discriminations, functional discriminations, denominational discriminations, interdenominational discriminations—there is only one class of discrimination under the Robinson-Patman Act, those discriminations that affect competition. . . .

"If you settled each one of those three broad discriminations the way I have indicated, you wouldn't have to worry about dual functional distributors, because the problem is solved. All the prices he gets are going to be justified by cost. You do not have to police him or do anything with him." Oral argument at 30, 51-52, *Electric Auto-Lite Co.*, FTC Docket No. 5624 (Dec. 6, 1950).

⁴⁹ Order dated Aug. 9, 1946, in FTC Docket No. 4389.

maintain his customers' resale prices.⁵⁰ Had Indiana Standard done voluntarily what the Commission there ordered it to do the Attorney General could, and no doubt would, have sought an indictment against it for violation of the Sherman Act. On somewhat similar facts the Supreme Court held, in *Ethyl Gasoline Corp. v. United States*,⁵¹ that it was illegal for a supplier to attempt to exercise control over jobber resale prices.

The Commission's order would have required every jobber who purchased gasoline from Indiana Standard to resell that gasoline at the price fixed by Standard for its sales to retailers. Those jobbers would then all be selling at the same price, each would know that all other Indiana Standard jobbers maintained the same price, and none could change his price unless FTC's price "fixer" did so. Had those jobbers adopted such a plan voluntarily the Attorney General could have sought their indictment for violating the Sherman Act. On somewhat similar facts, the Supreme Court found an unlawful conspiracy in restraint of trade in *Interstate Circuit, Inc. v. United States*.⁵²

The effect of the Commission's activities under the Robinson-Patman Act is toward requiring businessmen to have a uniform price to all customers. Competition in the sale of homogeneous commodities tends to result in like prices to the same buyers for like goods. When businessmen selling homogeneous commodities comply with the Commission's construction of the Robinson-Patman Act, by having like prices to all customers, the industry pricing pattern generally becomes one of rigid adherence to an identical price structure. This is considered, by the Supreme Court, as evidence of conspiracy in violation of the Sherman Act.⁵³

Recently the Commission itself charged a group of tag manufacturers with a conspiracy to fix prices. Those businessmen appealed the Commission's findings of conspiracy.⁵⁴ The Court of Appeals examined the evidence and found large-scale deviations from the sellers' published price lists. Based primarily on those frequent deviations from their price lists, the Court set aside the findings of conspiracy. It felt that the sales at widely disparate prices proved the sellers were not conspiring to fix identical prices. The evidence through which those businessmen acquitted themselves of conspiracy would, however, undoubtedly have caused the

⁵⁰ E.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

⁵¹ 309 U.S. 436 (1940).

⁵² 306 U.S. 208 (1939).

⁵³ *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit Inc. v. United States*, 306 U.S. 208 (1939); and *United States v. Masonite Corp.*, 316 U.S. 265 (1942).

⁵⁴ *Tag Manufacturers Institute v. FTC*, 174 F. 2d 452 (C.A. 1st, 1949).

Commission, in a case under the Robinson-Patman Act, to find them guilty of unlawful price discrimination.

The effect of these conflicting commands of different government agencies might be softened if a businessman could defend a charge of price fixing, by the Attorney General, by showing that he was merely complying with an order of the FTC. But Section 11 of the Clayton Act provides that compliance with a Commission order under the Robinson-Patman Act cannot be the basis for a defense to a charge of price fixing under the Sherman Act.⁵⁵ Even the Secretary of Commerce has recognized that businessmen may be compelled to choose between violating the Sherman Act and violating the Robinson-Patman Act.⁵⁶

The Commission itself does not seem to know what is the law. A December 1950 report of the Senate Interstate and Foreign Commerce Committee finds that

[f]or almost 3 years businessmen have been terribly confused as to whether they can lawfully absorb freight. Much of this confusion—conceded by everyone to exist—is directly attributable to the Federal Trade Commission. It must accept responsibility for the adverse effects on our economy of this confusion.⁵⁷

That Senate Committee found the Commission was both unable and unwilling to clarify that confusion.

Nothing is more inconsistent with the healthy growth of American business than the inability of businessmen to know what the law requires of them. And the purpose for creating the Commission was that it be informative. Businessmen have no "right" to laws which coincide with their wishes, but they do have a right to know what the law requires. The Commission is now unable even to tell Congress the conduct required by laws it administers.⁵⁸

⁵⁵ 38 Stat. 734 (1914), as amended, 15 U.S.C.A. § 21 (1951).

⁵⁶ In January 1949 Secretary Sawyer testified before a Senate Committee that "[t]he uncertainty in the minds of many businessmen as to what pricing practices are illegal, and the reasons for that uncertainty, have been abundantly documented in the testimony already given to this committee. Obviously some clarification is desirable. . . . In some situations businessmen feel that they are confronted with a choice between violating the Robinson-Patman Act by charging different prices to different customers or violating the antitrust laws by charging uniform delivered prices." Hearings on S. 236, op. cit. supra note 16, at 4-6.

⁵⁷ Sen. Rep. No. 2627, 81st Cong. 2d Sess. 11 (1950).

⁵⁸ In the Fall of 1950 the Senate Interstate and Foreign Commerce Committee sought clarification, from the Commission, of the legality of freight absorption. The Commission's response tried so hard to reconcile its conflicting statements that the Senate Committee stated: "They [the Commission], in effect, say that a businessman cannot know whether his competitive freight absorption practices are lawful in advance of litigation before the Commission. . . . Even after careful study of those lengthy answers, we are still unable to determine when and under what circumstances the Federal Trade Commission regards freight absorption as constituting an injury to competition." *Ibid.*, at 6-7.

After studying the Commission's current views on freight absorption, the Senate Interstate and Foreign Commerce Committee said:

Even at the painful expense of a slight loss of face, it would be far preferable for the Commission to admit that it has reversed its position than to compel businessmen to speculate on whether to accept what the Commission now says unofficially or what it previously argued in litigated cases.⁵⁹

III. THE COMMISSION'S ACTIVITIES CONTRARY TO THE WILL OF CONGRESS

The Supreme Court refers to the FTC as an "arm" of the Congress. The Commission reminds the courts that it is an "arm" of the Congress whose activities may not be interfered with by the courts.⁶⁰ But in its major antitrust activities the Commission's objectives have been contrary to the expressed desires of the Congress. In its attack on freight absorption, its attack on good faith meeting of competition, and its attack on functional pricing, the Commission's principal antitrust activities during the past two decades, it has defied the Congress.

Congress Has Repudiated the Commission's Policy toward Freight Absorption

On at least four occasions the Commission asked Congress for legislation requiring uniform f.o.b. mill selling. Congress refused on each occasion. First, in 1936 a bill was introduced which recited that its purpose was "[t]o prevent uniform delivered prices."⁶¹ The opening paragraph of that bill was:

That it is hereby declared to be the policy of Congress and the purpose of this act to prevent methods of pricing under which certain industries follow the practice of making uniform delivered prices, and of thus discriminating among purchasers by bearing substantially greater expense of transportation charges on sales to some customers than they bear on sales to other customers.

⁵⁹ Ibid., at 9. See also letter from Commissioner Lowell B. Mason to Senator Ed. C. Johnson, dated Aug. 14, 1950, which is in part: "I further believe that the Commission should frankly admit the error of any position formerly taken which is inconsistent with these views . . . the Commission should make clear that its retreat from its former position is certain, straightforward and consistent . . . it should direct its staff to clearly and explicitly present its change of attitude in order that a sound body of judicial precedent may be established." Study of Federal Trade Commission Views on Freight Absorption, Confidential Committee Print of Senate Interstate & Foreign Commerce Committee, 81st Cong. 2d Sess. 13-15 (1950).

⁶⁰ In the Conduit case, where it will presently be shown that the Commission acted directly contrary to the expressed will of Congress, the Commission's brief to the Court of Appeals is in part: "But if the order here were to be set aside for the reasons here discussed, it would be judicial legislation because it would conflict with legislative policy, with the factual conclusion of a body that is an arm of the legislature and whose findings of fact Congress made conclusive if supported by evidence substantial enough to convince reasonable men that they are the facts." FTC Brief at 90, *Triangle Conduit & Cable Co. v. FTC*, FTC Docket No. 8639 (1948).

⁶¹ S. 4055, 74th Cong. 2d Sess. (1936).

This bill, which would also have prohibited freight absorption, was strongly supported by the Commission. Several of its staff testified in support of the bill. Commissioner Robert E. Freer (who as its Chairman in 1948 staunchly denied that the Commission had ever attacked delivered prices) presented the Commission's official statement in support of that bill, which read in part:

The question of discrimination can only be gaged [sic] by the treatment the seller accords to buyers in terms of what he has left after paying any sums actually defrayed by him for transportation. If, after subtracting from each delivered price the sum actually defrayed by the seller for freight, the net results are not identical, there is price discrimination.⁶²

If price discrimination is gauged by what the buyer has left after deducting the cost of transportation, then discrimination is determined by the seller's mill net returns. This bill died in Committee. In spite of the fact that it was introduced by Senator Burton K. Wheeler, Chairman of the Committee to which it was referred, the bill was never reported out of Committee.⁶³

Second, when the Robinson-Patman anti-price discrimination law was before the Congress, the Commission urged a definition of the word "price" which would have required uniform f.o.b. mill selling. This definition was in the bill as it was reported out of the House Committee on the Judiciary and was later stricken out on the floor of the House. Subsequently Chief Justice Stone of the Supreme Court said that that definition would have required uniform f.o.b. mill selling.⁶⁴

⁶² Sen. Doc. No. 27, op. cit. supra note 23, at 37.

⁶³ During the course of the public hearings, Senator Wheeler said to a witness arguing that a prohibition against freight absorption would restrict competition: "There is no use covering that point, because of the fact that I hope I am not foolish enough to think that I can confine the industries of this country to the particular radius of their locality in which they serve. This is preposterous on its face, and there is no such intention on my part or upon the part of anybody else." Ibid.

⁶⁴ "[The proposed stricken definition] would have defined 'price' as used in § 2 of the Clayton Act, as meaning 'the amount received by the vendor after deducting actual freight or cost of other transportation, if any, allowed or defrayed by the vendor.'"

"The practical effect of this provision would have been to require that the price of all commodities sold in interstate commerce be computed on an f.o.b. factory basis, in order to avoid the prohibited discriminations in selling price. It would have prohibited any system of uniform delivered prices, as well as any basing-point system of delivered prices. These effects were recognized in the committee's report. . . .

"Such a drastic change in existing pricing systems as would have been effected by the proposed amendment engendered opposition, which finally led to the withdrawal of the provision by the House Committee on the Judiciary (80 Cong. Rec. 8102, 8140, 8224). We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered price systems and all basing point systems illegal per se." *Corn Products Refining Co. v. FTC* 324 U.S. 726, 737 (1945).

Third, in 1939 the Commission asked the Temporary National Economic Committee for legislation to require exclusive f.o.b. mill selling. The Commission produced voluminous evidence on basing-point pricing before that Committee and referred to a report it had previously made to the President urging legislation to prohibit basing-point pricing.⁶⁵ The Commission told the TNEC: "No more vitally needed legislation within the scope of the committee's function can be suggested than that of directly prohibiting the basing-point system by Congressional mandate."⁶⁶ The accuracy of recent Commission statements that it has never advocated required f.o.b. mill pricing may be measured against its recommendation to that Congressional Committee: "The open f.o.b. mill price system is essential, in the Commission's opinion, for the maintenance of fair competition in steel."⁶⁷ The TNEC did recommend legislation to require uniform f.o.b. mill selling,⁶⁸ but Congress failed to follow the recommendation.

Fourth, when the Kefauver Committee of the House made a study of "monopoly" problems in 1946, the Commission again recommended legislation requiring uniform f.o.b. mill selling.⁶⁹ The fourth request by the Commission was likewise rejected.

Although it was rebuffed by the Congress, the Commission took its campaign against basing-point selling to the courts where it achieved success in the *Cement Institute* case. But when the desirability of the result was questioned, the Commission sought to lay the blame on Congress. In August 1950 the Commission's Chairman told a Senate Committee—the same Senate Committee which killed the anti-basing-point bill in 1936—that "we, like the courts, probably have a different approach than is the case with a lawmaker. The lawmaker writes the law, and under the law we cannot brush it aside and have in mind only consequences. And when you visualized the terrible consequences of the decision of the Supreme Court in 1948, you illustrated the point that it is our duty to carry into effect the law of the lawmaker and it is the lawmaker's obligation to have constantly in mind the effects of previous laws and the anticipation

⁶⁵ That report was in part as follows: "Once Congress has enacted an anti-basing-point bill, the immense expense of separate investigations and the laborious trial of separate suits would be avoided. If in but one case the Supreme Court upheld the validity of the statute, it is believed that the artificial character of such basing-point systems would aid in their collapse." Sen. Doc. No. 27, op. cit. supra note 23, at 38.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Final Report, Sen. Doc. No. 35, 77th Cong. 1st Sess. 33 (1941).

⁶⁹ Staff Report to the Monopoly Subcommittee of the Select House Committee on Small Business, 79th Cong. 2d Sess. 33 (1946).

of future laws on the well-being of the country.”⁷⁰ The “1948 decision” refers to the *Cement Institute* case. How can anyone say that the “terrible consequences” were merely the result of the Commission’s “carrying into effect the laws” of Congress?

Then, in 1950, wholly to repudiate the Commission’s campaign for required f.o.b. mill selling, Congress passed the O’Mahoney Freight Absorption bill.⁷¹ Yet this Commission, although considering itself an “arm of the Congress” required only to administer the laws as passed by the Congress, recommended that the President veto the bill. He did so.

The Campaign against Good Faith Competition

The Robinson-Patman Act⁷² amended the Clayton Act to make unlawful certain price discriminations which had the effect upon competition prescribed in that statute. Section 2(b) of the Act provides that nothing therein “contained shall prevent a seller rebutting [a] prima facie case [of price discrimination] by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor.”⁷³

In the *Standard Oil Company (Indiana)* case⁷⁴ the Commission construed this proviso as being inapplicable whenever there was a showing of injury to competition among dealers at the resale level. The effect of the Commission’s construction of the statute was to make unlawful competitive sales conduct undertaken in good faith to compete with other sellers. The Court of Appeals for the Seventh Circuit sustained the Commission.⁷⁵ The Supreme Court reversed the Commission and the Court of Appeals,⁷⁶ pointing out that the Commission’s construction made the good faith proviso meaningless.⁷⁷

The Supreme Court majority found that the Congress had not intended to abolish or radically to curtail competition as the Commission had proposed, saying: “We need not now reconcile, in its entirety, the economic

⁷⁰ Sen. Rep. 2627, 81st Cong. 2d Sess. 5 (1950).

⁷¹ S. 1008, 81st Cong. 2d Sess. (1950).

⁷² 49 Stat. 1526 (1936), as amended, 15 U.S.C.A. § 13 (1951).

⁷³ *Ibid.*, at § 13(b).

⁷⁴ FTC Docket No. 4389, 41 F.T.C. 263 (1945), modified, 43 F.T.C. 56 (1946).

⁷⁵ *Standard Oil Co. v. FTC*, 173 F. 2d 210 (C.A. 7th, 1949).

⁷⁶ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

⁷⁷ “The proviso in § 2(b), as interpreted by the Commission, would not be available when there was or might be an injury to competition at a resale level. So interpreted, the proviso would have such little, if any, applicability as to be practically meaningless. We may, therefore, conclude that Congress meant to permit the natural consequences to follow the sellers’ action in meeting in good faith a lawful and equally low price of its competitor.” *Ibid.*, at 250.

theory which underlies the Robinson-Patman Act with that of the Sherman Act and Clayton Act. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."⁷⁸

The Commission's position in the *Standard Oil (Indiana)* case, that good faith meeting of a competitor's lower price was not a defense to a charge of price discrimination, is indeed a startling position for an antitrust agency to take. Not only was the Commission's position in the *Standard Oil* case opposed by all antitrust authorities, but the Commission itself was hopelessly confused on the issue. The majority of the Supreme Court reversed the Commission because it found that Congress had not intended "either to abolish competition or . . . radically to curtail it,"⁷⁹ as the Commission's order had done. Even the minority of the court, who supported the Commission, agreed that its construction would "weaken competition"; but they felt that Congress had intended to do just that.⁸⁰

Both the Attorney General and the Solicitor General refused to defend the Commission before the Supreme Court in the *Standard Oil (Indiana)* case (although they are required by statute to do so).⁸¹ While that case was pending, the Department of Justice wrote the Senate Committee that the law did not prohibit the good faith meeting of competition.⁸² The Assistant Attorney General in charge of the Antitrust Division told the same Committee that the law permitted a seller to justify a price discrimination by showing that he lowered his price in good faith to meet the lower price of a competitor.⁸³ And he testified before the House Judiciary Committee, specifically referring to the *Standard Oil* case, that "while we recognize the competitive problem which arises when one purchaser obtains advantages denied to other purchasers, we do not believe the solution to this problem lies in denying sellers the opportunity to make sales in good faith competition with other sellers."⁸⁴

Following the Court of Appeals' decision sustaining the Commission, a member of the President's Council of Economic Advisers testified before the House Judiciary Committee as follows: "My experience in business gave me such a high regard for the need for laws that the businessman

⁷⁸ *Ibid.*, at 249.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at 251.

⁸¹ 1 Stat. 92 (1789), as amended, 5 U.S.C.A. § 309 (1950).

⁸² Hearings on S. 236, op. cit. supra note 16, at 320.

⁸³ *Ibid.*, at 77.

⁸⁴ Testimony before House Committee on the Judiciary on S. 1008, 81st Cong. 1st Sess. 12 (1949).

can understand, laws that are so phrased that he can know what he can do and what he cannot do, that I was shocked by [the *Standard Oil*] decision."⁸⁵

Even many of the Commission's own staff were in disagreement with its construction of the law. Its Associate General Counsel, Robert B. Dawkins, testified before a Senate Committee in January 1949 on a proposed amendment to clarify that provision of the statute to assure the availability of this defense. He told the Senate Committee that "the provisions of this Section . . . make the defense of meeting the prices of a competitor in good faith an absolute defense to a charge of price discrimination. This may or may not be a change in existing law. Personally, I am inclined to believe that it is not a change. . . ."⁸⁶

A Commission Assistant Chief Trial Counsel, Allen C. Phelps, testified before the Senate Committee, as to the Commission's construction of the statute in the *Standard Oil (Indiana)* case, that "this position, if upheld in the courts, in my judgment will effectively and completely erase section 2(b) from the Robinson-Patman Act."⁸⁷

Even the Commission's late Associate General Counsel, Walter B. Wooden, had written in 1941 that the statute "now safeguards the right of a seller to discriminate in price in good faith to meet the equally low price of a competitor. . . . The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack."⁸⁸

Opposition to this impediment to competition was completed when the Commission itself wrote the House Judiciary Committee in June 1949 (after the Court of Appeals' decision in its favor and while the case was before the Supreme Court) that "all of the Commissioners believe that on balance it would be preferable to make the good faith meeting of competition a complete defense."⁸⁹

In fact the Commission appears to have been surprised when it won the

⁸⁵ 1 Hearings before Subcommittee on Monopoly Power of the House Committee on the Judiciary, 81st Cong. 1st Sess. 120 (1949).

⁸⁶ Hearings on S. 236, op. cit. supra note 16, at 92.

⁸⁷ Ibid., at 66.

⁸⁸ The Basing Point Problem, TNEC Monograph No. 42, at 139 (1941), quoted in *Standard Oil Co. v. FTC*, 340 U.S. 231, 246 n. 12 (1951).

⁸⁹ Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on S. 1008, 81st Cong. 1st Sess. 61 (1949). The minority of the Supreme Court, referring to that letter, observed that the Commission was only trying to enforce the statute as passed by the Congress, and not necessarily as it would have written the law. *Standard Oil Co. v. FTC*, 340 U.S. 231, 267 n. 17 (1951).

case in the Court of Appeals. On October 12, 1948 the Commission had issued a public statement of the law on "geographic pricing" in which it said that the law permitted a seller to reduce his price in good faith to meet a competitor's lower price.⁹⁰ By a footnote it added that it was then "testing" this construction in the *Standard Oil (Indiana)* case.⁹¹

The Commission, however, reserves the right to change its mind. After the Court had held that the law was what the Commission had said should be the law, the Commission turned around and said that that should not be the law. In 1951 it not only opposed legislation⁹² to conform the statutory law to the *Standard Oil* decision, but it asked Congress to reverse the Supreme Court.⁹³

The Commission's General Counsel also reserves the right to have his mind changed. Before the Supreme Court decision, when the Commissioners were saying the law should permit good faith competition, he said that if the Supreme Court should sustain that right it would be necessary to pass legislation reversing the Supreme Court.⁹⁴ When legislation was introduced to conform the statute to the *Standard Oil* decision, the Commission asked its General Counsel for his opinion on the proposed bill. On February 12, 1951 he answered: "The substance of the decision of the Supreme Court in the *Standard Oil* case is that the Court has said the law is what the Commission said it thought the law should be." He recommended that the Commission write Congress that: "In view of our understanding of the provisions of S. 719 and our understanding of existing law respecting the 'good faith' defense, as interpreted by the Supreme Court in [the *Standard Oil Co. (Indiana)* case] . . . the Commission sees no objection to incorporating this defense in the statute."⁹⁵ Then on March 1, 1951, the same General Counsel wrote the Commission that in view of "widespread differences of opinion" on this subject he had changed his mind, and in a long memorandum he vigorously criticized the bill and advocated reversal of the Supreme Court decision.⁹⁶

How can businessmen ever know what is the government's antitrust policy when it changes so rapidly?

⁹⁰ Quoted in Sen. Doc. No. 27, op. cit. supra note 23, at 59-60.

⁹¹ *Ibid.*, at 60.

⁹² S. 719, 82d Cong. 1st Sess. (1951).

⁹³ See FTC letter to Hon. Pat McCarran, Chairman, Senate Committee on the Judiciary, dated April 18, 1951, printed in Sen. Rep. No. 293, 82d Cong. 1st Sess. 7 (1951).

⁹⁴ 96 Cong. Rec. 5080 (1950).

⁹⁵ 97 Cong. Rec. 9481 (Aug. 1, 1951).

⁹⁶ *Ibid.*, at 9481-83 (Aug. 1, 1951).

Functional Pricing Attack Contrary to the Intention of Congress

Functional pricing is the charging of different prices to different buyers because of, and to compensate for, functions performed by one class of buyers which are not performed by others. Wholesalers generally get a lower price than retailers because they perform functions in the channel of distribution for which, by common business custom, they are compensated and permitted to make a profit.

In the *Spark Plug* cases, pending before the Commission for more than a decade, the staff has argued that except for provable cost savings—that is the actual savings which the manufacturer achieves in selling to a wholesaler over his cost in selling to retailers—sales to both wholesalers and retailers must be at the same price. The Commission's staff contends that functional pricing is not otherwise permitted under the Robinson-Patman Act. This attack is also contrary to the intention of the Congress.

The Robinson-Patman Act was originally drafted by H. B. Teagarden, attorney for the United States Wholesale Grocers Association. The law was conceived by the wholesale grocers as a device to protect them against competition from A & P. As the congressional hearings show, it was sponsored by Congressman Patman at their request. When asked about the bill's construction he said: "That is a question I would rather Mr. Teagarden, who will follow me, would answer. . . . Mr. Teagarden wrote this bill."⁹⁷

Prior to the Patman amendment to the Clayton Act, the courts had held that functional price differentials were not prohibited by the statute.⁹⁸ The construction given the Robinson-Patman Act by the Commission's staff, in its attack on functional pricing, requires the conclusion that the wholesaler grocers intended to legislate themselves out of business. On the contrary, however, the record shows that before Congress acted on this bill it was assured by its author that the bill would not affect price differentials between wholesalers and retailers.⁹⁹

⁹⁷ Hearing before the House Committee on the Judiciary on H.R. 8442, 74th Cong. 1st Sess. 9 (1935).

⁹⁸ *Mennen Co. v. FTC*, 288 Fed. 774 (C.A. 2d, 1923), cert. denied, 262 U.S. 759 (1923); *S. S. Kresge Co. v. Champion Spark Plug Co.*, 3 F. 2d 415 (C.A. 6th, 1925); and *Baran v. Goodyear Tire & Rubber Co.*, 256 Fed. 571 (S.D.N.Y., 1919).

⁹⁹ Mr. Teagarden, the author of the Patman bill, told the House Committee on the Judiciary: "For instance, it has been held in *Mennen Co. v. Federal Trade Commission* . . . that the act as it stands does not prevent differentials between wholesalers and retailers.

"Of course, we are preserving that freedom under this proposed bill.

"In *S. S. Kresge Co. v. Champion Spark Plug Co.* . . . and *Baran v. Goodyear Tire & Rubber Co.* . . . it was held that the present act does not prohibit differentials as between dealer-buyers and manufacturer-buyers.

"These automobile companies buy for use in further manufacture, and of course we conserve that in the present bill—that freedom." Hearings, op. cit. supra note 97, at 215.

The freight absorption (basing-point) cases, the *Standard Oil (Indiana)* case, and the *Spark Plug* cases represent the overwhelming bulk of the Commission's antitrust work in the last two decades. The objectives have been to require conduct contrary to that intended by the peoples' elected representatives in Congress. Yet the Commission now says the consequences of these cases result, not from its administration of the statutes, but from the laws passed by Congress.

IV. IMPACT OF THE COMMISSION'S POLICIES ON AMERICAN BUSINESS

The impact on American business of the Federal Trade Commission's policies determines its value to the national economy. The failure of the Commission to have a co-ordinated and consistent antitrust policy itself causes an injury to the economy. But far more important is the question: How would the economy be affected if the Commission's antitrust philosophy were imposed on business?

The Kefauver Small Business Committee asked the Commission, in 1946, to list "the cases handled by them in the last five years which they consider have been the most significantly successful from the standpoint of actually breaking monopolies and retarding concentrations."¹⁰⁰ This Committee found that "a review of the most successful cases listed shows that the FTC makes its claim for accomplishment to a considerable degree on its drive against zone pricing, basing points, and similar devices."¹⁰¹ The Hoover group also found that the Commission's "dockets were preoccupied with false and misleading advertising cases, save for an assault upon basing-point pricing systems."¹⁰²

Since the Commission considers that its most important work has been its basing-point "drive," a consideration of its influence on business should begin there. At the start we remove all conspiratorial price fixing from consideration for no one supports conspiracies; everyone agrees they are wrong.

Effect on Small Manufacturers and Buyers of the "Basing-Point" Attack

The Commission has long claimed to be the champion of small business. But it has actually been oblivious to the interests of the many small manufacturers. When sellers are required to have a uniform f.o.b. mill price to all customers and to charge each the full freight from the point of shipment to destination, there is always one seller who has a lower delivered price in any given community than any other seller. An area may be geo-

¹⁰⁰ Staff Report, op. cit. supra note 69, at 27.

¹⁰¹ Ibid.

¹⁰² Hoover, op. cit. supra note 8, at 122.

graphically described, with a producing plant at or near the center, in which one seller has a lower delivered price than any of its competitors. That plant, the Fetter theorists say, has a "freight advantage" over its competitors in that area which is, for that reason, called its "natural market." The local plant has a "monopoly" within that area, with competition existing only at the fringes.¹⁰³

The volume of business available to any seller would then depend solely on the number of prospective customers in his freight advantage territory. It would not be possible for the producer with only one plant to sell his goods throughout a large area by absorbing part of the transportation costs on sales to distant customers. The producer with only one plant would be at the mercy of the multiple-plant producer who could sell to customers in a large area and ship from its plant located closest to the buyer. Sellers of heavy goods would be encouraged, if not required, to relocate their plants closest to the greatest concentrations of buyers. In the industrial relocation flowing from such a change in historic pricing practices, producers with the financial resources to build a number of plants at strategic locations will have a substantial advantage.¹⁰⁴ The capital investment required to make shifts in location, to compensate for an inability to absorb freight, is generally available to the large companies. But it is not generally available to the small concerns who find the buyers in their "freight advantage territory" too few to permit the normal profitable operation of their plants.

Despite its more harmful effect on small businesses than large businesses, the Commission intended—or at least permitted its staff to advo-

¹⁰³ Sen. Doc. No. 27, op. cit. supra note 23, at 12-14.

¹⁰⁴ At a recent congressional hearing, Senator Francis J. Myers asked Benjamin F. Fairless, President of United States Steel Corp., these questions to which the following answers were made:

SENATOR MYERS: "Mr. Fairless, . . . it seems to me, that although United States Steel can purchase thousands of acres near Philadelphia to build a new plant, there are many small industries, small steel companies, small fabricators, that could not afford to do that; and if they cannot absorb freight, they have no recourse; they cannot move to another area; is that not so?"

MR. FAIRLESS: "That is right, Senator, I think the United States Steel Corporation, I hope, can take care of itself under any reasonable competitive condition that is provided."

SENATOR MYERS: "Because of the nature and type of your corporation, but there are many small companies, small businesses, that I understand are in a very bad way at the present time because they are confused as to whether or not they can legally absorb freight."

MR. FAIRLESS: "That is right, and the problem certainly needs some clarification."

Senator Myers was referring to the corporation's recent announcement of the construction of a \$400,000,000 steel mill on the Atlantic Coast in Pennsylvania. Hearings before the Joint Committee on the Economic Report on December 1949 Steel Price Increases, 81st Cong. 2d Sess. 15 (1950).

cate—that sellers be required to build branch plants throughout the country. The Commission's most recent pricing case is the *Bond Crown & Cork* case¹⁰⁵ in which it stated in its brief to the Court of Appeals that:

The petitioners [sellers of bottle caps] assert that the freight equalization plan is used only so that a manufacturer may compete in distant markets, and set forth four possible courses of conduct which a manufacturer may pursue for this purpose. Their conclusion under (c) is that he has no choice except the use of freight equalization. We suggest two other courses which are the methods pursued in any system of free competition: (d) He may instead of standardizing his product, compete in distant markets by attempting to produce a better cap than his competitor, (e) *he may eliminate the freight problem by building a factory near his competitor as has been done by others.*¹⁰⁶

The ability and means by which to pursue course (e) are not readily available to the small businessman for whose interest the Commission professes to be concerned.¹⁰⁷

Freight absorption is the seller's *reduction* of his price to a distant customer to meet the lower price of a more favorably located competitor. The increased volume which freight absorption permits, by expanding the seller's market, achieves production economies which not only offset the cost of absorbing freight, but frequently also reduce the cost to nearby customers. In 1950 the FTC issued a report on "The Divergence Between Plant Concentration and Company Concentration" which affirms this point. It there found that "where a company is large merely because its plant is large, there is no way of reducing the company's size without a fundamental change in methods of production, such as probably would raise costs by reducing efficiency."¹⁰⁸ To prevent a large plant selling outside its freight advantage territory, when the area can not consume its production, is to "reduce its size." The attack on freight absorption would result in many cases, the Commission therefore necessarily admits, in "raising costs."

¹⁰⁵ *Bond Crown & Cork Co. v. FTC*, 176 F.2d 974 (C.A. 4th, 1949).

¹⁰⁶ Brief for FTC, *ibid.*, Docket No. 5813 (emphasis added).

¹⁰⁷ This conclusion was also reached by the Senate Interstate & Foreign Commerce Committee in its 1948-49 study of Commission Pricing Policies, when it said: "The available evidence is all to the effect that the cost of industrial relocation and readjustment required by compulsory f.o.b. mill selling would be charged against, and payable by, both big and small business. But it appears that however unpleasant, big business will be able to withstand the payment of that bill. Unfortunately it seems that a large segment of small business will be unable to meet that financial obligation. The burdens of required f.o.b. mill pricing appear to fall most heavily on small business." Sen. Doc. No. 27, op. cit. *supra* note 23, at 23.

The December 1950 Report on "Competitive Freight Absorption" of that committee echoes the same conclusion. Sen. Rep. No. 2627, 81st Cong. 2d Sess. 10 (1950).

¹⁰⁸ FTC, Report on Divergence Between Plant Concentration and Company Concentration 1 (1950).

Furthermore, when producers cannot absorb freight to compete in distant markets, a competitive advantage is given to the dealers, in deficit production areas, who are able to purchase from the closest manufacturer. Testimony before the Capehart Committee by cement, building material, chemical and many other dealers, particularly in small towns, shows that a ban on freight absorption would virtually put out of business dealers not able to purchase from the closest mill. When supplies are short the closest mill can favor one dealer over another, to the extent of destroying one of them. Preserving competition among dealers, fabricators, or users of basic commodities, requires that each have the opportunity to buy from any supplier who is willing to sell at the lower price of the closest mill.¹⁰⁹ Freight absorption gives the buyers an increased number of producers competing for their business at the lowest price level. Prohibiting freight absorption limits the dealers' sources of supply and compels some to pay higher prices than their competitors for like goods. The dealers are largely small businessmen.

When Congress passed the O'Mahoney Bill¹¹⁰ in June 1950 to permit competitive freight absorption (in the absence of conspiracy), as previously noted, it was vetoed by the President on the recommendation of the Commission. The Senate Interstate and Foreign Commerce Committee's December 1950 report commented on how costly this veto has been to buyers of cement and steel.¹¹¹ The campaign to which the Commission has pointed with the greatest pride was not beneficial to anyone, and least of all to small business.

¹⁰⁹ Hearings before Committee on Interstate and Foreign Commerce on S. Res. 241, 80th Cong. 2d Sess. (1948). W. Hobart Reams (building material dealer) 55 ff., C. S. Beardslee (chemical wholesaler) 64 ff., J. B. Bonness (paving contractor) 672 ff., D. L. Davis (plywood distributor) 52 ff., C. Ballinger (paving contractor) 990 ff., H. T. Barry (wholesale plumbing supply distributor) 561 ff., R. L. Geer (retail building supply dealer) 683 ff., E. P. Magle (paper distributor) 1049 ff., H. E. Milton (gasoline jobber) 1221 ff., Art Munch (retail lumber dealer) 768 ff. and J. R. Pennell (cement dealer) 666 ff.

¹¹⁰ S. 1008, 81st Cong. 1st Sess. (1949).

¹¹¹ Sen. Rep. No. 2627, op. cit. supra note 107, at 10, 11, discloses that "freight absorption averages about \$1.50 a ton. Based upon an annual steel production of 100,000,000 tons and about 40,000,000 tons being used by fabricating subsidiaries of the producers or sold for export, it may be assumed that the enactment of S. 1008 would have resulted in steel producers absorbing an average of \$1.50 a ton on approximately 60,000,000 tons of steel a year. This would have meant a saving to steel consumers of approximately \$90,000,000 a year. . . .

"The published financial reports of cement companies disclose higher profits following the Supreme Court decision than they made before that decision was rendered. Those increased profits, of course, are due in some degree to their discontinuance of absorbing freight costs. One result of the Commission's order against the cement industry seems to have been to force the buyers to pay more money to the cement companies. We cannot, however, criticize those industries when they do not absorb freight, if the Government refuses to say that it is lawful for them to do so."

Effect on Small Manufacturers of the Attack on Functional Pricing

In the *Spark Plug* cases, filed in 1939 and pending as this is written, the Commission's staff attacked functional pricing (i.e., different prices to fabricators, wholesalers and retailers) except to the extent the price differences are cost justified. One of the *Spark Plug* cases involves sales of Champion spark plugs to Ford for use as original equipment in the manufacture of automobiles at lower prices than were charged dealers for replacement spark plugs. The Commission's staff attacked that price difference as illegal, and actually argued that it was unlawful for an independent parts manufacturer to reduce its prices to automobile manufacturers for original equipment if doing so induced the automobile manufacturer not to make its own parts.¹²² Obviously Ford would not purchase Champion spark plugs if it had to pay the same price Champion charged automobile supply stores selling replacement spark plugs. In that case Ford would make its own spark plugs. Yet, that is what the Commission's staff wants to compel.

Ford, General Motors, Chrysler and other automobile manufacturers purchase parts for use in the manufacture of automobiles from thousands of independent parts manufacturers. To require the automobile manufacturers to pay the same price for those parts as is charged in the replacement market would substantially raise automobile prices, if the automobile manufacturers continued to buy from those suppliers. Automobile manufacturers would be paying more than the cost at which they could manufacture the same parts themselves. Those financially able to do so would obviously make their own parts. And the smaller automobile manufacturers would be in trouble.

The Commission's staff would drive the independent parts manufacturers—most of whom are small businessmen—out of the automobile manufacturing market. They would coerce the automobile manufacturers into further vertical integration, to the disadvantage of smaller automobile manufacturers not having the capital to make their own parts. All this is from the "champion" of small business.

¹²² The argument in the Commission staff's reply brief in the Champion case is in part: "As set out in the statement of the facts, one of the effects of the discrimination in price by [Champion] in selling its spark plugs for original equipment to the Ford Motor Company below cost, was the prevention of that company from manufacturing spark plugs and selling them in competition with [Champion]."

It could not be clearer that the effect of [Champion's] discriminations in price may be substantially to prevent the Ford Motor Company from competing with [Champion] in the sale of spark plugs. It could not be clearer that a price discrimination with this effect is expressly in violation of this Act." See FTC Reply Brief, Champion Spark Plug Co., FTC Docket No. 3977.

Effect on Jobbers of Ban on Functional Pricing

The Commission's staff argued, in the *Standard Oil (Indiana)* and the *Spark Plug* cases, that wholesalers (or jobbers) can be given lower prices than the retailers in the same area only when the price difference can be justified by cost savings.¹¹³ When the wholesaler's discount is limited to cost savings, he is allowed a discount equal only to the manufacturer's actual cost of performing the wholesaler's distribution function. This does not allow anything for a return on invested capital, or for profit. To limit the wholesaler's discount to his supplier's cost saving compels the supplier to charge a profit on a distribution function which he does not perform. It denies a profit to the wholesaler on a function which he does perform.

Many gasoline refiners sell only to wholesalers in tank car quantities. The Robinson-Patman Act does not apply to those sales because those refiners have but one price to all customers. There are also, however, many refiners who sell to both wholesalers and retailers. "Dual distribution" is not permitted if the wholesalers are allowed only a discount equal to the refiner's cost savings. Wholesalers cannot remain in business without the opportunity to make a profit. Nor can they compete with other wholesalers who buy from refiners that sell only to tank car buyers and therefore are not restricted in the amount of their wholesale discount. This prohibition on functional pricing would compel gasoline jobbers to buy from refiners selling only in tank car quantities, in order to get a wholesale price which allowed for a profit. Many jobbers have a substantial investment in signs, pumps, tank wagon trucks, and other costly advertising devices, painted with the emblem of their present dual distribution supplier. Giving up their present dual distribution supplier and seeking a new supplier also involves the expense of trying to convert customers to handling a new brand of gasoline, a lot of sign painting and perhaps furnishing new pumps. Furthermore, the avalanche of jobbers looking for new sources of supply, with a much more limited number of available suppliers, would—at least for a time—make it difficult for some of them to obtain a new supplier.

Even more disastrous to the jobbers, however, is the competitive factor which could be expected to encourage present dual distribution suppliers to fight to retain present retail outlets for their products which are now supplied by jobbers. Such outlets already use those refiners' products, and they will presumably try to sell them directly. Dual distribution refiners, required to give up either their retail or their wholesale customers, may

¹¹³ See notes 48 and 49 supra.

be expected to give up the wholesalers. There is not only greater profit in sales to retailers but it brings the refiner into closer contact with the ultimate consumer.

Justice Douglas, in his dissent in *Standard Oil of California v. United States*,¹¹⁴ pointed out that a prohibition against retailer requirements contracts would be an incentive for further integration by the major oil companies. He demonstrated how that decision would encourage manufacturers to take over retail distribution. The Commission's staff would go further. Suppliers would not merely be encouraged to take over the present distribution of their jobbers, they would be forced either to do so or to give up valuable outlets of distribution. The gasoline jobbers were sufficiently concerned by this attack on their business methods, that twelve state associations of gasoline jobbers filed a brief in the Supreme Court opposing the Commission's order in the *Standard Oil (Indiana)* case.¹¹⁵

The effect of prohibiting functional pricing applies equally to every industry in which goods are distributed through wholesalers. This construction of the Robinson-Patman Act tends to put jobbers out of business. They too are inherently small businessmen. Many are former retailers who expanded their show to take on jobbing functions. This attack serves further to injure small businessmen and to invite vertical integration.

Guidance from Organized Retailer Groups

The most effectively organized businessmen are certain of the retailer groups. Their substantial numbers give them considerable political influence. Testimony at a Congressional hearing by a member of the FTC shows what induced him to recommend that the President veto the O'Mahoney Freight Absorption Bill. On August 29, 1950 Commissioner Carson told a Senate Committee: "I thought that the President should veto it" when opposition to the bill was launched by small business organizations, labor, farmers and cooperatives.¹¹⁶ Those groups complained that the bill would weaken the antitrust laws. Farm, labor and cooperative groups, whose concern for the antitrust laws so impressed Commissioner Carson, are themselves exempt from those laws. Having persuaded the Congress to exempt them from the antitrust laws, they urge a vigorous application for everyone else. Actually, however, they oppose competition by others just as they avoid it among themselves.

The "small business" groups who opposed the O'Mahoney Bill were the

¹¹⁴ 337 U.S. 293 (1949).

¹¹⁵ The writer appeared, as amicus curiae, for those jobber groups in the Supreme Court.

¹¹⁶ Hearings before the Senate Interstate and Foreign Commerce Committee, reported by Ward, Paul, Kohn & Monich (not printed).

druggists, retail gasoline dealers and tire dealers. In 1945 the Commission published a report on "Resale Price Maintenance" in which it said of the retail druggists:

Notwithstanding the broad terms of [a 1918] injunction relating to coercion, much pressure has been exerted by organized retail druggists on manufacturers of commodities sold in drug stores to place their products under resale price maintenance. In accordance with policies and plans laid down or approved by the National Association of Retail Druggists, retailers have been advised to support and push the sale of price maintained brands and to do the opposite respecting non-price maintained articles; retail price books listing the names of manufacturers of price maintained articles and the prices to be maintained for such articles have been issued in a form that may well serve as a white list of those whose products shall be given special effort, and threatening letters have been written to manufacturers who refrained from placing their products under resale price maintenance.¹¹⁷

The Commission further found that the druggists brought pressure on manufacturers to price-fix their goods under the Miller-Tydings Act¹¹⁸ through granting special displays for price-fixed articles, and at the same time placing non-price maintained goods, or those not granting a satisfactory markup "under the counter."¹¹⁹

Retail gasoline dealers appear to be as opposed to competition as the druggists. Recently the Supreme Court of Wisconsin affirmed a conviction of Wisconsin gasoline retailers for price-fixing in violation of a state statute.¹²⁰ A United States District Court in Connecticut recently dismissed a treble damage suit by retail gasoline dealers whom it found to be fixing prices.¹²¹ In the Summer and Fall of 1950 newspapers openly reported meetings in the midwest and in the east of retail gasoline dealers who met and voted to end local price wars by agreeing to fix prices by a majority vote of the retailers. But retail gasoline dealers were able to persuade the FTC to bring the "Detroit" case against *Standard Oil (Indiana)* in which it attacked the legality of good faith competition.¹²²

¹¹⁷ FTC, Report on Resale Price Maintenance, XXXII (1945).

¹¹⁸ 50 Stat. 693 (1937), as amended, 15 U.S.C.A. § 1 (1951).

¹¹⁹ FTC, op. cit. supra note 117, at XXXIII.

¹²⁰ "The printed and oral evidence shows that the attempt to fix, establish and maintain prices and restrain competition was so frequent and regular as to establish the conclusion that price fixing was a principal purpose of the Association if not the principal one." *State v. Retail Gasoline Dealers Ass'n*, 256 Wis. 537, 542, 41 N.W. 2d 637, 640 (1950).

¹²¹ *Spencer v. Sun Oil Co.*, 94 F. Supp. 408, 412 (Conn., 1950). That Court said: "It is plain from the evidence that plaintiffs as members of a retail gasoline dealers' association in Meriden, are parties to an illegal agreement to maintain retail gasoline prices in the Meriden area. They are not exempt from the provisions of the antitrust laws, or from public policy against price-fixing agreements. . . . Their agreement is between competitors and its effect is to destroy competition."

¹²² The President of the National Congress of Retail Petroleum Dealers testified before a Congressional Committee: "We are impressed, to say the least, that there is no common policy

During the oral argument of the *Standard Oil (Indiana)* case, Justice Jackson observed a lack of "common policy" in antitrust law enforcement, when he said:

The whole philosophy—what troubles me—the whole philosophy of the Sherman Antitrust Act is go out and compete, get business, fight for it.

Now, the whole philosophy we are asked to enforce here [under the Robinson-Patman Act] is that you really must not, you should let the business go and not meet the competition. I have difficulty in knowing where we are with this, and I should think the people who are trying to do business would find it much more troublesome than we do, for it does not trouble me but once a term, but it must trouble them every day.¹²³

The retail tire dealers were able to induce the Commission to bring a proceeding to limit quantity discounts. The proposed order in that case would limit any quantity discount for replacement tires to the carload price. Such a prohibition would discriminate against large buyers by denying them even the cost savings resulting from their more efficient distribution.¹²⁴

These retailers are, of course, small businessmen. But so are the small manufacturers for whose interest the Commission appears wholly unconcerned. Furthermore, there can be no justifiable excuse for denying businessmen the right to engage in bona fide competition, just because others, perhaps more effectively organized, are opposed to competition.

There appears to be a direct conflict between the interests of the small retailers and those of the small manufacturers. The former want to handle only the highly advertised brand name products, and they would like the law to compel everyone to sell those goods at the same price. The small manufacturer whose product is not highly advertised cannot hope to compete with his brand name competitors except on the basis of price. The price competition which is so vital to the small manufacturer is abhorrent

as to the enforcement of our antitrust laws. . . . Let me tell you, very generally, of our experience in trying to stop the destructive price cutting competition in the Detroit area. . . . We made our complaints to the Department of Justice and after some time decided that we would have to turn to the Federal Trade Commission. In fact, it seems the Commission was the place to which we should have gone in the first place." 96 Cong. Rec. 9560 (June 28, 1950).

¹²³ Transcript of Oral Argument at 98, *Standard Oil Co. (Indiana) v. FTC*, 340 U.S. 231 (1951).

¹²⁴ The retail tire dealers' Washington representative, claiming credit for this proceeding, told his members: "It can be said in all honesty and all modesty that this FTC case, with all the opportunities it presents for dealers, is the product of the joint efforts of the House Small Business Committee, the National Federation of Independent Business, and Burger Tire Consultant Service. We can say very factually that if it hadn't been for our joint effort that there might never have been such a case, that if it hadn't been for our constant pounding away—day in and day out—cooperating with the Commission at every turn of the road, and urging it to greater and greater speed, the case might never have reached its present maturity. Your financial and moral support have, in great part, made all this possible. . . ." Bull. No. 424 of Burger Tire Consultant Service (Oct. 7, 1949).

to the retailer. In this conflict FTC seems lined up with the anti-competitive retailers.

V. THE FEDERAL TRADE COMMISSION AS A BODY OF EXPERTS

James M. Landis, clerk to Justice Brandeis, a member of the Federal Trade Commission, later a member of the Securities and Exchange Commission, and for a decade Dean of the Harvard Law School recently wrote:

I share completely these criticisms of administrative regulation, but two other points should be made. The first is a noticeable decline in the quality of the personnel of the top level of bureaucracy that has the responsibility for this administrative regulation. This fact was commented on again and again in the reports of the Hoover Commission. Whether that is something innate to the processes of government or not, I do not know. But the fact is too patent to be denied. Secondly reference must be made to what I would call the utter bankruptcy of the Federal Trade Commission. As a practical matter the deterioration of that Commission has gone beyond the possibility of redemption. If duties of this kind are to be thrust on some agency, there is really only one thing to do, and that is to wipe out the FTC completely and start afresh.¹²⁵

Speaking to the New York State Bar Association on January 24, 1951, Commissioner Lowell B. Mason said:

Clyde Reed, the late distinguished Chairman of the Subcommittee on Independent Office Appropriations, once characterized the Commission as having dried up and blown away, an entirely unfair and inaccurate description of us, because as a matter of fact, we have not blown away.

On July 11, 1951, Commissioner Stephen J. Spingarn said of the Commission's antitrust activities: "Frankly, I could not say that the Commission has been a howling success in that respect [suppressing practices leading to monopoly, unfair competition and deception]. Neither, I think, has it been a failure. Some people say it has. The truth is probably somewhere in between."^{125a}

The Supreme Court, however, considers the Federal Trade Commission to be a "body of experts." In *FTC v. R. F. Keppel & Bro.*¹²⁶ the Court, in 1934, quoted from the 1914 Congressional Committee reports that the Commission *was to be* a "body specially competent to deal with [unfair competitive practices] by reason of information, experience and careful study of business and economic conditions" and that it was organized to "give to [the Commission] an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."¹²⁷ Fourteen years later, in the *Conduit* case the Court of

¹²⁵ Landis, *Monopoly and Free Enterprise* 548 (1951).

^{125a} Testimony before the House Committee on the Judiciary, Subcommittee on Monopoly Power, on H.R. 2820, 82d Cong. 1st Sess. 25 (1951).

¹²⁶ 291 U.S. 304 (1934).

¹²⁷ *Ibid.*, at 314.

Appeals said that "Congress has left to the Commission the determination of the facts . . . and the weight to be attributed to the facts proved and the inferences to be drawn from them."¹²⁸

In 1948 in the *Cement Institute* case¹²⁹ the Supreme Court referred to "the Commission's long and close examination of the questions" in issue and its "kind of specialized knowledge Congress wanted its agency to have." Referring to the Commission's "expertness," the Court talked about the assistance it received from these "men trained to combat monopolistic practices."¹³⁰ The Court, finding that the Commission had achieved that intended expertness, 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 performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice, which is left alone, "destroys competition and establishes monopoly."¹³¹

These quotations from the congressional reports refer only to what Congress had "envisioned" in 1914, not to what it now considers is the accomplished fact. More important is whether, after thirty-seven years of opportunity to become expert, the Commission is in fact the trained body that the Congress intended in 1914. Mr. Landis does not think this is possible.¹³² We have already observed that shortly after its "victory" in the *Cement Institute* case, the Commission disowned the philosophy which the Court found came from the expertness acquired by "long and close examination" of industry pricing practices.

Over the years the staff has become more and more responsible for formulating Commission policy. In the last years of his lifetime, the Commission's Associate General Counsel Walter B. Wooden was more responsible for formulating Commission policy than any of the Commissioners.

Commissioner Lowell B. Mason recently referred to this situation, in

¹²⁸ *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175, 180 (C.A. 7th, 1948).

¹²⁹ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

¹³⁰ *Ibid.*, at 726.

¹³¹ *Ibid.*, at 720.

¹³² While James M. Landis was Dean of Harvard Law School, and four years after leaving the Commission, he wrote that "[t]o assume that any five, ten, or twenty men have the ability to acquire, within their brief official lifetime, the expertness to comprehend the full range of our industrial problems, from aluminum to zinc, is once more to put our trust in supermen. In the business of governing a nation—to paraphrase Gerard Henderson again—we must take into account the fact that government will be operated by men of average talent and average ability and we must therefore devise our administrative processes with that in mind." Landis, *Administrative Process* 87 (1938).

what he described as a "swing left toward government control," with the observation that:

It [the change to the left] was a natural consequence of a decline in administrative leadership by the Commissioners. Into this vacuum it was natural and necessary for the staff to step into leadership. The Commission became the trial ground for new theories of industrial control sponsored by a man of personal integrity, ability and vigor. . . .

The merits of those ideas are not here under examination. The point is made that when decisions are abandoned to those without responsible authority, an agency, like a society, declines in its effectiveness even though it appears to increase its powers.¹³³

The legal questions coming before the Commission, particularly in anti-trust matters, are frequently complex and technical. With all the administrative and procedural matters to be decided by them, the Commissioners tend to rely on their staff for legal matters. The policies of the Commission with respect to the interpretation and administration of the laws under its jurisdiction have been made at the staff level. Recently two congressional committees studied the Commission's staff—the Kefauver Small Business Committee in 1946 and the Patman Small Business Committee in 1950. Congressman Wright Patman and Senator Estes Kefauver (then a Congressman) are among the Commission's best congressional friends. Their views show what its friends think of the Commission's staff.

Observing that there has been a substantial reduction in the number of cases handled by the Commission, the Patman Small Business Committee stated that "there has been some reduction in staff it is true, but not enough to cause this sharp break in the workload."¹³⁴ The Patman Committee also observed that

an indication of the failure to screen cases carefully is the fact that actions are started against firms out of business and even carried to the formal stage against practices already discontinued. . . . The real difficulty here seems to be in a haphazard procedure for the selection of cases.¹³⁵

The ultimate conclusion reached in this investigation is devastating. Congressman Patman himself filed the January 1951 report of his Small Business Committee which concluded:

There is convincing evidence that one of the main sources of trouble at the Federal Trade Commission is the generally low level of morale among the employees. Among this evidence, the following should be cited: (1) The internal strife and office politics that pervade the agency . . . the repeated changes in organization and assignments since 1946 have produced a feeling of uncertainty which seems to have placed a premium on interoffice deals, strategic alliances, and the other manifestations of office politics. (2) The many small cliques and groups whose chief interest is in per-

¹³³ Address before the N.Y. State Bar Ass'n (Jan. 24, 1951).

¹³⁴ H.R. Rep. No. 3236, 81st Cong. 2d Sess. 16 (1951).

¹³⁵ *Ibid.*, at 17.

sonal authority and advancement. The comment is made too frequently to be ignored that "So-and-So is Commissioner ——'s man." Or that "So-and-So is in with such-and-such a crowd." The strengthening of one part of the Commission's program is inevitably viewed by those interested in other work as nothing less than a raid on their activities. The work of the Planning Council seems to have been constantly attended by conflict over how the Council should be constituted and who should be in control. References are constantly made to the "palace guard," the "inner circle," and the "little Commission." (3) The pronounced feeling of unrest and dissatisfaction in many segments of the Commission. . . . (4) The presence of numerous "prima donnas," persons who are looking for personal glorification and who seem to have scant appreciation of the need for teamwork. As one member of the staff said, "everyone wants to be a straw boss, and no one wants to do the work." (5) Among the older employees an attitude of indifference toward the work of the agency, a reluctance to face new issues, and a determination that one's own little domain shall not be disturbed. . . . Permanence and security seem to be the chief ambition of many employees. This has prompted the phrase that to many employees the Commission represents "a way of life." Some sections of the organization are cynically referred to as pastures for faithful employees. . . .¹³⁶

The most important thing to any government agency is the size of its appropriation. The best evidence of what the Patman Committee really thinks of the Commission can be found in its recommendation concerning the Commission's appropriation. Finding that the Commission was not giving the public a dollar's worth of service for each dollar appropriated, it said:

The conclusion reached by the committee in respect to the need on the part of the Federal Trade Commission for additional financial support presupposes the maximum degree of operating efficiency and an ability to render a dollar's worth of public service for each dollar appropriated. Unfortunately, this high level of operating efficiency does not exist today. We do not disparage the numerous worthwhile efforts made by the present members to increase the Commission's effectiveness. We feel, however, that the progress made up to the present time is not sufficient to justify any very substantial increase in the Commission's appropriations.¹³⁷

Commenting that the delay in disposing of Commission cases was essentially a lack of "good management," the Patman Committee stated:

Among the reasons cited by the Commissioners and members of their staff for this slow motion, the one most frequently mentioned is the lack of men and money to handle the Commission's heavy case load promptly. It is, of course, obvious that a larger staff would permit the acceleration of individual cases. We are not convinced, however, that the lack of manpower is the basic source of the present difficulty or that reform can be achieved only through larger appropriations. The problem is essentially one of good management.¹³⁸

¹³⁶ *Ibid.*, at 18.

¹³⁷ *Ibid.*, at 44-45.

¹³⁸ *Ibid.*, at 21.

The recommendation of the Hoover group as to the personnel at the Commission indicated a similar view.¹³⁹

There are on the Commission's staff many able, competent and experienced lawyers. But they are in the minority. Many of the staff joined the Commission for a lifetime of security on the government payroll, doing only as much work as is required to prevent discharge.

The antitrust performance record at the Commission does not equal that at the Department of Justice. In comparison with the Department of Justice's record of antitrust accomplishments, there is little, if anything, to which the Commission can refer to sustain a claim for accomplishment in the antitrust field.

The Supreme Court's Experts

The Hoover group found that the Commission had been hampered by "mediocre appointments" and that "its operations, programs and administrative methods have often been inadequate, and its procedures cumbersome. It has largely become absorbed in petty matters rather than basic problems."¹⁴⁰ The Hoover group also reported, as to the Commissioners, that "with notable exceptions, appointments to the Federal Trade Commission have been made with too little interest in the skills and experience pertinent to the problems of competition and monopoly, and too much attention to service to political party."¹⁴¹ These are the men the Supreme Court has regarded as experts. (In fairness, it should be noted that a majority of the present Commissioners were appointed after that Hoover Commission Report.)

An attempt has recently been made to "reorganize" the Commission. Some progress has been made, but the limited extent of this progress shows that successful reform is not likely. The Commission's staff is largely under the Civil Service Laws, which tend to perpetuate inefficiency in public service. Those who have been at the Commission the longest have acquired the positions which permit of the greatest influence. They cannot be removed except for cause. If the Commissioners could start over they might assemble an able staff. But this is an impossible task with

¹³⁹ "The Commission's first task is to find qualified top personnel to replace a number of men now approaching retirement. In the past the Commission has assiduously applied a policy of promotion from within. That policy has enabled the Commission to retain some men of real competence. But in other cases, limited ability, plus sheer longevity, has won positions of importance, sometimes without regard to training and experience. Too often men have been promoted from clerical posts to professional status because of their long tenure. Under this policy a number of really able men on the staff have been blocked. Future appointments and promotions should discount mere seniority and instead should emphasize ability and experience." Hoover, op. cit. supra note 8, at 127.

¹⁴⁰ Ibid., at 119.

¹⁴¹ Ibid., at 125.

the present staff—a staff which the Patman Committee found is composed of “prima donnas” determined that their “own little domain shall not be disturbed” and divided by “many small cliques” with resulting “internal strife and office politics.”¹⁴² This is the situation former Commissioner Landis must have had in mind when he said, “the Commission has gone beyond the possibility of redemption” and recommended that “there is really only one thing to do, and that is to wipe out FTC completely and start afresh.”¹⁴³

In recent years the Commission has tried to “test” rather than to “administer” the laws under its jurisdiction. It has brought “test” cases to see just how far the courts would go in supporting its interpretations of those laws. The courts, not recognizing the cases as mere “tests” to “feel out” the extent of the Commission’s power, treat the Commission as “expert,” trained by long experience, whose judgment must be accepted. In this manner the Commission’s arguments made to “test” the law have been held by the courts to be the law. And the “experts” became experts.

VI. CONCLUSIONS AND RECOMMENDATIONS

The “luxury” of being sued by the Federal Trade Commission should be reserved for wealthy businessmen in the highest tax brackets.¹⁴⁴ The Kefauver Small Business Committee pointed out that the average period of time required to complete a Commission case (on which a cease and desist order issued) is five years.¹⁴⁵ There are two cases now before the Commission in which the taking of evidence was concluded and the trial examiners’ reports were filed three years ago.¹⁴⁶ It has taken FTC three years merely to consider exceptions to trial examiners’ reports. Whenever the Commission sues all the members of an industry a long drawn out proceeding is inevitable and a substantial financial burden is imposed on the smaller concerns in the industry.

The Commission refers to the large amounts of money which businessmen spend to defend these cases as an argument for increased Commission appropriations. It does not seem to consider the burden which its expensive litigation places on small businessmen unfortunate enough to be in an industry which the Commission sues “en masse.”

For years the Commission talked about its *Cement Institute* case campaign against basing-point pricing. That campaign, long cited as its major

¹⁴² Quoted in text at note 136 supra.

¹⁴³ Quoted in text at note 125 supra.

¹⁴⁴ The Commission says that the businessmen involved in the *Cement Institute* case had spent \$5,000,000 defending that proceeding up to 1946. The case went on for two years after that. Almost every cement producer had been sued. Staff Report, op. cit. supra note 69, at 29.

¹⁴⁵ Ibid., at 24.

¹⁴⁶ Chain Institute, FTC Docket No. 4878; National Lead Co., FTC Docket No. 5253.

achievement, is now not only utterly bankrupt, but the Commission even denies that it ever conducted the campaign. It now says that the *Cement Institute* case was just a plain, old-fashioned conspiracy case. Apart from its attacks on price fixing conspiracies (where the Department of Justice is both more effective and more efficient), there is little good that the Commission can show to sustain its existence as an antitrust agency, while the confusion and disruption to businessmen which it has caused borders on chaotic proportions.

Furthermore, there is little opportunity for a businessman to receive a fair and impartial trial before the Federal Trade Commission. It investigates complaints filed with it or originated by its staff. Whenever the Commission "has reason to believe" that a businessman is violating the law it issues its complaint against him, without hearing the businessman's side of the story. Then hearings are held before one of the Commission's trial examiners. The attorneys who appear to support the Commission's complaint are from its staff. The evidence is generally voluminous—almost 100,000 pages in the *Cement Institute* case—and the examiner is necessarily influenced by the fact that the Commissioners had reason to believe that there was a violation of law. The Commissioners do not, and under the circumstances of the work required of them probably cannot, examine the lengthy record in each case to reach independent conclusions as to the facts. Hence, they in turn are generally persuaded by what the trial examiner has found.

The statute permits businessmen to appeal Commission decisions to the courts; but on appeal the question is not whether the businessman is innocent or guilty. The courts are not permitted to decide wherein lies the truth or the weight of the evidence. For if the Commission has produced evidence to support its claim, the statute makes that finding conclusive on the courts, even if clearly contrary to the weight of the evidence. The recent decision of the Supreme Court in *Universal Camera Corp. v. NLRB*¹⁴⁷ may give some relief to this situation, but it will not change the basic problem. The Court there held that reviewing courts were required to examine the entire record to determine whether an agency order was supported by substantial evidence, and that an examiner's report was entitled to consideration even though it had been rejected by the agency.

The power the Commission claims over a businessman's conduct appears from its opening statement in a brief recently filed in which it told a Court of Appeals that "[t]he Commission is the trier of the facts, and its findings if supported by substantial evidence, are conclusive. It is therefore of no consequence that, if Congress had conferred fact-finding power

¹⁴⁷ 340 U.S. 474 (1951).

upon the Court, it might have reached a conclusion other than that of the Commission. . . . The Commission's findings are presumed to be supported by substantial evidence. . . . The weight to be given to the evidence as well as the inferences reasonably to be drawn therefrom is for the Commission to determine, and the 'possibility of drawing either of two inconsistent inferences from the evidence' does not prevent the Commission from drawing one of them."¹⁴⁸

The Commission's best congressional friend (Congressman Patman) has reported to the Congress that the Commission is doing a poor job, and that the Department of Justice is doing a generally good job, in antitrust law enforcement.¹⁴⁹ Not only does the Department of Justice do a better job of enforcing the antitrust laws, but the duplication of activity in this field by the Federal Trade Commission has tended toward an uncoordinated and confused antitrust policy.¹⁵⁰ Voluntary compliance with the law becomes almost impossible if businessmen cannot know what is the government's antitrust policy. The lack of a coordinated antitrust policy was demonstrated in the *Standard Oil (Indiana)* case when, presumably because they disagreed with its interpretation of the law, the Attorney General and the Solicitor General refused to represent the Commission before the Supreme Court in that case, although the law provides that they should do so.¹⁵¹

Public confidence in the Department of Justice does not appear to be misplaced. Nor is the lack of public confidence in the Commission unwarranted. One member of the Commission, Lowell B. Mason, has recently had the courage to say: "We lost the confidence of industry. We were reviled and berated by House and Senate. We allowed our staff to roam the halls of Congress, spreading discord, discontent and disrespect for our vain pretensions."¹⁵²

¹⁴⁸ Brief for FTC, *Bond Crown & Cork Co. v. FTC*, 176 F. 2d 874 (C.A. 4th, 1949).

¹⁴⁹ H.R. Rep. No. 3236, 81st Cong. 2d Sess. 51-79 (1951).

¹⁵⁰ The Patman Committee further reported that: "In spite of the present operating cooperation between the Commission and the Antitrust Division, there is still no means of assuring a common policy and a coordinated effort against threats to our competitive institutions. Each agency follows its own program, which, if it coincides with the program of the others, does so largely by accident. . . . The problem is complicated by the fact that the basic legislation creates a broad area of duplicating jurisdiction. There are few practices forbidden by the Sherman Act, for instance, which cannot be interpreted to be unfair methods of competition. In respect to the Clayton Act, the two agencies of course have concurrent jurisdiction. . . . Whether an offender will be punished by criminal action or merely subjected to a cease and desist order depends on the quite fortuitous circumstances of which agency becomes interested first in prosecuting the case." *Ibid.*, at 70-71.

¹⁵¹ 1 Stat. 92 (1789), as amended, 5 U.S.C.A. § 309 (1950).

¹⁵² Address before the N.Y. State Bar Ass'n, Jan. 24, 1951.

In addition to jurisdiction over "unfair methods of competition" and unlawful price discriminations, the Commission has jurisdiction over false and deceptive advertising. It also administers the Webb-Pomerene Export Trade Act,¹⁵³ the Wool Products Labeling Act¹⁵⁴ and the Lanham Trade Mark Act.¹⁵⁵ The Kefauver Committee reported in 1946 that "[o]nly about fifteen percent of all formal cases (those in which FTC issued complaints) were antitrust cases. This brings out very strikingly that antitrust cases constitute only a small percentage of the total FTC case load."¹⁵⁶ Yet this is the area in which it has caused so much trouble.

Legislative Recommendations

The simplest and most expeditious means of remedying the problems and difficulties caused by the Federal Trade Commission is to adopt the suggestion of James M. Landis—"wipe out FTC and start afresh" with a new Commission. As an alternative, three amendments to the statutory law are recommended.

First recommendation. The Federal Trade Commission and Clayton Acts should be amended to transfer to the Department of Justice the jurisdiction now held by the Commission in all antitrust matters. As at present, the Department of Justice would enforce the laws under its jurisdiction in the District Courts. This simple amendment could achieve a vigorous antitrust policy, would eliminate much of the present confusion, and would achieve a coordinated antitrust policy. Public confidence in the administration of the antitrust laws could be substantially enhanced.

The Commission and the Department of Justice now have concurrent jurisdiction under the Clayton Act. The Federal Trade Commission Act—which is directed in broad terms against "unfair methods of competition"—has been interpreted to give the Commission jurisdiction over complaints which actually state a cause of action under the Sherman Act. That jurisdiction would be given exclusively to the Department of Justice. The Commission would retain its present jurisdiction over what the Kefauver Committee found to be eighty-five percent of its case load.

The Department of Justice is under the Attorney General who, as a member of the cabinet, is directly responsible to the President. If the antitrust policy of the Department of Justice is, or should ever become, unsatisfactory it may be remedied by the Attorney General and through

¹⁵³ 40 Stat. 516 (1918), as amended, 15 U.S.C.A. §§ 61-65 (1951).

¹⁵⁴ 54 Stat. 1128 (1940); 15 U.S.C.A. § 68 (1951).

¹⁵⁵ 60 Stat. 437 (1946), as amended, 15 U.S.C.A. § 1114 (1951).

¹⁵⁶ Staff Report, *op. cit.* supra note 69, at 20.

him by the President. To give exclusive jurisdiction to the Department of Justice over conspiracies to fix prices would do no more than to achieve what the Congress intended when it first created the Commission. It would avoid situations such as occurred when the Department of Justice brought an antitrust action in Denver against the cement industry, paralleling the charges already litigated by the Commission.¹⁵⁷

Second recommendation. The Commission's Bureau of Industrial Economics employs a staff of economists and spends substantial sums of the taxpayers' monies compiling countless economic treatises. Many are but compilations of statistics previously issued by the Department of Commerce. The functions of the Economic Division could be performed equally well, and perhaps better, by the economic divisions of the Department of Commerce. The economic activities of the Commission should be transferred to the Department of Commerce.

Third recommendation. Commission orders should be subject to review by the "weight of the evidence." When the weight of the evidence shows a man to be in fact innocent, the courts should not be barred from finding him innocent just because the Commission has said he is guilty.

CONCLUSION

The Federal Trade Commission's orders should be subject to review on the weight of the evidence; its economic functions should be terminated and transferred to the Department of Commerce; and its antitrust activities should be transferred to the Department of Justice. The very minimum required for an intelligent, efficient and coordinated government antitrust policy is that it be formulated at one agency—this should be the Department of Justice.

¹⁵⁷ Asked during the debates on the bill which became the Federal Trade Commission Act if the remedies in the Act were to be cumulative, Senator Walsh replied: "Mr. President, I want to say a word with reference to that, too. We have given to this Congress, and to the country that is awaiting the passage of this bill, the most solemn assurance over and over again that these remedies are not cumulative to those already provided by the law for violations of the Sherman antitrust law. We have declared that the antitrust acts which Congress is now considering deal with matters which are entirely outside of the Sherman antitrust law and not reached by its provisions at all. When we had the trade commission bill under consideration we were accused time and time again of giving an alternate remedy to the Government in relation to violations of the Sherman antitrust law, and over and over again the assurance was given from this floor that nothing of the kind was contemplated by that legislation at all." 51 Cong. Rec. 14460 (Aug. 31, 1914).

In answer to a question concerning the proposed Federal Trade Commission Act, Congressman Covington told the House: "On the other hand, everyone recognizes that it would be a mistake to divide the authority of enforcement of the antitrust acts between any other body and the Department of Justice. The Attorney General should be left in full control, as the chief law officer of the Government, of the disposition of cases arising under the Sherman law." 51 Cong. Rec. 14926 (Sept. 10, 1914).