

Memorandum for the Chairman,
Committee on Interstate and Foreign Commerce:

H.R. 2390 - 79th Congress, 1st Session - February 27, 1945 -
Congressman Reece. A Bill to amend the Act creating the
Federal Trade Commission, to define its powers and duties,
and for other purposes.

In a letter dated March 2, 1945, from the Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, there was referred to the Federal Trade Commission for report, together with such comment as the Commission might desire to make, copy of H.R. 2390, 79th Congress, 1st Session, A Bill to amend the Act creating the Federal Trade Commission, to define its powers and duties, and for other purposes, introduced on February 27, 1945, by the Honorable B. Carroll Reece.

The Commission desires to submit the following comments upon the provisions of this bill:

The Federal Trade Commission Act presently provides that if, after notice and hearing, the Commission is of the opinion that a person is engaged in practices prohibited by the Act, the Commission shall enter an order requiring such person to cease and desist such practices. Any person against whom an order to cease and desist is entered may obtain a review of the order in an appropriate circuit court of appeals of his own choice by the timely filing of a petition to review. The Commission is thereupon required to certify to the court the "entire record in the proceeding, including all the evidence taken." Upon receipt of the record, the court acquires "jurisdiction of the proceeding and of the question determined therein," and the "power to make and enter * * * a decree affirming, modifying, or setting aside the order of the Commission." The Commission's findings as to the facts, the statute provides, "if supported by evidence, shall be conclusive."

This is exactly the same procedure which has been applicable to the review of the Commission's orders under both the Federal Trade Commission Act and the Clayton Act for more than thirty years, and is substantially the same as that applicable to the review of orders of the National Labor Relations Board, the Federal Communications Commission, the Securities and Exchange Commission, the Interstate Commerce Commission and other agencies. H.R. 2390, which applies only to the Federal Trade Commission, and only to orders issued by the Commission under the Federal Trade Commission Act, would make two important changes in this long-standing and more or less uniform administrative procedure. First, the statute's present provision that the Commission's findings as to the facts shall be conclusive if supported by evidence would be so amended as to make the Commission's findings conclusive only "if supported by the preponderance of the evidence." Second, the bill would authorize the reviewing court to make any such modification of the Commission's order as in the court's judgment "the circumstances of the case require." The purpose of these two changes, as stated by the author of H.R. 2390, is "To afford effective judicial review of the Commission's cease-and-desist orders."

In the opinion of the Commission the changes are both unnecessary and inadvisable.

It is common knowledge that the practice of Congress in entrusting to administrative agencies the enforcement of various statutes designed to give effect to Congressional policy has lately been the subject of vociferous criticism in certain quarters. And such critics have contended that administrative findings as to the facts possess a peculiar form of conclusiveness which makes them, for all practical purposes, virtually immune to effective judicial review. That is not true.

The statutory rule that the Commission's findings as to the facts are conclusive if supported by evidence has been uniformly construed to refer to substantial evidence, and this, of course, means substantial evidence in support of every essential fact. The courts therefore are not powerless to set aside a finding merely because there is "some" evidence to support it. Nor are they precluded from reviewing the entire record for the purpose of determining the substantiality of the evidence relied on in support of a finding.

"Substantial Evidence," the Supreme Court has declared, "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and the rule that administrative findings are conclusive if supported by substantial evidence "does not go so far as to justify orders without a basis in evidence having rational probative force." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 230 (1938). On the contrary, the evidence in support of such findings must be sufficiently substantial in character to justify, if the trial were to a jury, a refusal to direct a verdict against the agency. National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939). The question whether the evidence relied on is of such character is a question of law for the courts to determine. And in reaching their conclusion, they are at liberty to, and do, "examine the whole record," Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 580 (1923), for "the persuasiveness of evidence may upon occasion be destroyed by analysis even though uncontroverted." Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 F. 2d 620, 624 (C.C.A. 6, 1939), cert. denied 308 U.S. 557 (1939).

It is true that the courts have intimated in a few cases - less than half a dozen of the more than 300 Federal Trade Commission cases decided by the courts - that if they possessed the fact-finding power granted the Commission by Congress, they might not have made the findings of fact made by the Commission. But the courts have not hesitated to set aside the Commission's orders when they were of the opinion that the Commission's findings were not supported by substantial evidence. And there is no case on record in which any court has sustained, or announced itself powerless to vacate, findings which in its opinion were unreasonable. So far, then, from possessing any peculiar immunity from judicial review, the Commission's findings are subject to exactly the same rule as that which applies "in a review of cases tried to a jury," Stonewall Cotton Mills v. National Labor Relations Board, 129 F. 2d 629, 631 (C.C.A. 5, 1942), cert. denied 317 U.S. 667 (1942), in which, as the Supreme Court declared in Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944):

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses * * * and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Thus, the rule applicable in respect of the Commission's findings as to the facts comes to no more than this: If reasonable men, acting reasonably, could have reached the same conclusions and made the same findings as did the Commission, the courts will not disturb the Commission's judgment. The courts will determine for themselves, however, upon the basis of the whole record, whether reasonable and unbiased minds could have reached the same conclusions as the Commission, and if the courts think not, they will set the Commission's findings aside. In these circumstances, it would seem clear that the Federal Trade Commission Act already affords "effective judicial review" of the Commission's findings, and the enactment of H.R. 2390 is therefore not necessary to secure such review.

It is believed also that the bill is unwise.

The meaning of the phrase "preponderance of the evidence" is a matter on which courts are not in complete agreement (32 C.J.S., Evidence sec. 1021), and the "preponderance" rule has been criticized as one apt to lead the courts "close to the danger line of the fallacious * * * theory" that the weight of the evidence lies with the side which offers the greater quantity of testimony or the greater number of witnesses (4 Wigmore, Evidence (3rd ed., 1940) sec. 2498, p. 334). H.R. 2390 would therefore substitute for the definite and certain "substantial evidence" rule, a rule indefinite in meaning and uncertain in effect. Because of its close relation to the fallacious "quantitative and numerical" theory of evidence, adoption of the "preponderance rule" would inevitably and materially increase the length of the record in Commission proceedings, unduly prolong the trial of cases, and increase the expense of litigation. It would also probably result in a greater number of Commission cases being taken to court, and it would certainly greatly increase the work of the already overburdened courts in requiring them — contrary to established appellate practice — to weigh the evidence, determine the credibility of witnesses, and absorb to a material degree the fact-finding function which the Commission has performed successfully and with little criticism for more than thirty years.

The proposal, in Section 1 of H.R. 2390, to authorize the courts to modify the Commission's orders "as in the courts' Judgment the circumstances of the case require" is likewise unnecessary to secure "effective judicial review" of the Commission's orders.

It is well settled "that it is for the courts to determine what practices or methods of competition are to be deemed unfair," i.e., whether a person has violated the law, Federal Trade Commission v. Keppel & Brother,

291 U.S. 304, 314 (1934); Federal Trade Commission v. Gratz, 253 U.S. 421, 427 (1920), and the Commission's judgment in that respect, while entitled to weight, is not at all conclusive upon the courts. Where the Commission has properly concluded that a person is violating the law, however, it has been held that the Commission may exercise its discretion in so drafting its orders to cease and desist as to afford the public effective relief, and the courts will not disturb its judgment as to the remedy prescribed unless the Commission has abused its discretion.

This rule is by no means unusual or exceptional. It is precisely the same as that applied in reviewing decrees of United States District Courts under the Sherman Act, decisions of the Tax Court, and the administrative orders of various commissions. Nor is the rule a recent development in the law. More than forty years ago, in Bates & Guild Co. v. Payne, 194 U.S. 106, 108-109 (1904), the Supreme Court said that it had long been established

"that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

The reason for the rule is both obvious and sound. It was designed to secure uniform and efficient enforcement of such statutes as the Federal Trade Commission Act by delegating their administration to a single body "specially competent to deal with them by reason of information, experience and careful study." Federal Trade Commission v. Keppel & Brother, 291 U.S. 304, 314 (1934); Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935). That end, obviously, cannot be attained if administrative functions are to be delegated to eleven different circuit courts of appeals.

In the course of a year not one circuit court of appeals normally reviews as many as a half dozen Commission cases; and a number of them review, on the average, only one case every five or six years. The Commission, on the other hand, disposes of some 200 litigated cases annually. Moreover, the Commission annually investigates thousands of applications for complaints. After investigation, a majority of such matters are closed without corrective action by the Commission because the charges in the applications are not sustained, the matter is a private controversy or is trivial in character, no interstate commerce is involved, or because of the absence of public interest. With respect to the cases in which the Commission decides to take corrective action, it grants the proposed respondents the privilege of adjusting the matters by stipulations to cease and desist, except in cases involving intent to defraud or mislead; false advertisement of food, drugs, devices or cosmetics which are inherently dangerous to health; suppression or restraint of competition through conspiracy or monopolistic practices; violations of the Clayton Act; violations of the Wool Products Labeling Act of 1939 or the rules promulgated thereunder; or where the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act or practice. The vast majority of such cases are disposed of by the

execution of stipulations in which the proposed respondents agree to cease and desist from the continued use of the unfair methods or unfair acts or practices in question.

With respect to the cases in which formal proceedings are instituted and the cases tried before the Commission, a relatively small percentage appeal from the decisions of the Commission, notwithstanding the fact that every respondent has the undisputed right to appeal for a review of the Commission's cease and desist order to a United States circuit court of appeals of his own selection. In a large number of the cases that finally reach the courts, the facts are not disputed.

In the circumstances, and without intending any reflection whatever upon the courts, it would seem that the Commission is peculiarly qualified, as "a body of experts * * * informed by experience," Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935), to fashion the remedy to be applied in its proceedings. It is entirely fit and proper that the courts have, as they do, the power to modify the Commission's orders if they deem them arbitrary or unreasonable. But it is an entirely different thing to vest them with the power to substitute their judgment for the expert judgment of the Commission, with the result that upon identical facts the Commission's orders may be modified to read and apply differently in different circuits. As long as the courts possess the power to correct an abuse of discretion on the part of the Commission by modifying unreasonable orders, it cannot be said that there is no "effective judicial review" of the Commission's orders merely because as between two or more reasonable alternative remedies the one chosen by the Commission might not have been chosen by the courts;

Congress created the Federal Trade Commission as a "quasi-judicial and quasi-legislative" agency charged with the enforcement of the policy of the law as laid down by Congress. Both Congress and the courts have refused to subordinate the Commission to executive control. Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935). Whether it shall be subordinated to the judiciary is for Congress to determine. But the experience of thirty years would seem to prove the fairness of the review procedure which Congress has seen fit to prescribe, and to demonstrate that it is neither necessary nor desirable to transfer to the courts, as would H.R. 2390, administrative functions of the Commission and thus make the Commission, in a very real sense, little more than an instrument to take testimony for the ultimate action of the courts.

Section 2 of the bill purports to amend Section 5 (1) [one] of the Federal Trade Commission Act, but the section proposed to be amended, which deals with civil penalties, is Section 5 (1) [ell]. This amendment reduces the amount provided for each violation of an order to cease and desist after it has become final from \$5,000 to \$1,000, and, in addition, provides that the penalty is "not to exceed the sum of \$10,000 in the aggregate." A penalty of \$1,000, with an aggregate limit of \$10,000, would be wholly inadequate effectively to prevent violations of many of the Commission's orders, particularly in cases where large corporations combine and conspire to control the market, divide territory and fix and enhance prices to the consuming public. It should be noted that the amount provided under the Act as amended March 21, 1938, is a maximum, and it is

within the discretion of the Federal courts to assess any penalty less than the maximum. The total amount of penalties fixed by the courts in all cases heretofore adjudicated has been quite reasonable, the courts taking into consideration the financial condition of defendants and other appropriate circumstances. In some civil penalty suits the amount of the penalties assessed has not been more than \$50 or \$100 for each violation.

On the other hand, in combination and conspiracy cases, where prices to the consuming public are fixed and enhanced, the maximum penalty of \$10,000 would be wholly inadequate and would operate as a license rather than as a penalty. It should be understood that the Commission has no authority to impose any penalties, but all such penalties are imposed by Federal courts in appropriate proceedings instituted by the Department of Justice.

Experience in the enforcement of this section of the Federal Trade Commission Act since its enactment has disclosed no basis for changing the amount which Congress, after careful consideration, felt was necessary adequately to prevent violation of orders which have become final.

Section 3 of the bill amends Section 15 of the Federal Trade Commission Act, which section deals with the definition of "false advertisements," by striking from the Act, after the words "fails to reveal facts material in the light of such representations," the following, "or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual." In lieu of the stricken language the bill would substitute the following: "* * * so as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false." The adoption of this amendment would limit the responsibility of the advertiser to the affirmative representations made directly or by implication, and would make it impossible to require those who advertise potentially dangerous drugs or devices to disclose to the public the consequences which may result from the use of their products under the conditions prescribed in the advertisement or under such conditions as are customary or usual.

The general public knows little of the effects which may result from the use of drugs and therapeutic devices. In drafting the existing statute the Committee and Congress recognized the definite need of members of the public to be informed of serious potential dangers existing in the use of the drugs and devices advertised for their use. The amendment now proposed would deprive the public of the protection wisely provided by the present law. The effect of the proposed amendment can best be illustrated by reference to actual cases. For example, in Docket 3841, advertisements offering a preparation as a treatment for delayed menstruation were found to be false because they failed to reveal that its use as directed or under customary and usual conditions may result in a number of serious consequences to the user. The respondent was ordered to reveal that the use of the preparation "may cause gastro-intestinal disturbances and excessive congestion and hemorrhage of the pelvic organs, and in the case of pregnancy may cause uterine infection and blood poisoning." In Docket 4363, a preparation containing desiccated thyroid extract was offered as a treatment

for obesity. It was found that if used under the conditions prescribed in the advertisements or under customary or usual conditions the preparation "may produce nausea, vomiting, headaches, muscular and articular pains, vertigo, insomnia, physical exhaustion, tremor, tachycardia, and angina pectoris" and "may result in thyroid toxicosis, permanent injury to tissues, organic functions, and the entire body mechanism, and irreparable injury to the heart muscles, with auricular fibrillation." The order required that advertisements of this preparation reveal that its use "may result in permanent injury to the heart, thyroid gland, and other vital organs." In these and large numbers of similar cases adoption of the proposed amendment would leave the sellers free to advertise dangerous products to the public without warning. Frequently such preparations are sold by mail order and the only warning which such purchasers receive before purchasing the product would be the warning contained in the advertisements.

Many of the potentially dangerous drugs and devices which are offered to the public as a means of self-medication can be successfully advertised and sold without making any direct or implied representations that are false. If the protection now afforded by the statute should be removed, sellers could freely advertise drugs and devices which are potentially dangerous when used as directed or in a customary and usual manner, without notice or warning of the inherent dangers. The Commission views this proposal as one which would substantially lessen the effectiveness of the protection to the public health provided by the Committee and Congress in the amendments of March 21, 1938.

Section 4 of the bill provides for a new subparagraph defining the term "labeling" as it is defined in the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938. The Commission in all of its proceedings has adopted and followed the definitions of "labeling" as it appears in the Federal Food, Drug, and Cosmetic Act, and the courts have likewise adopted and followed this definition. The Wheeler-Lea amendment to the Federal Trade Commission Act and the Federal Food, Drug, and Cosmetic Act were both passed at the same session of Congress, and so far as Sections 12 to 15 of the Federal Trade Commission Act are concerned this Act is in pari materia with the Federal Food, Drug, and Cosmetic Act, and therefore the definition of labeling appearing in the latter Act must necessarily govern as to both. Consequently, there is no occasion or necessity for presently amending the Federal Trade Commission Act to include a definition of the term "labeling."

Section 5 of the bill proposes the addition of a new section to the Federal Trade Commission Act reading:

SEC. 19. Food, drugs, devices and cosmetics shall be exempt from the provisions of this Act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938, as amended (U.S.C., title 21, chapter 9).

The effect of this amendment would be to remove from the Federal Trade Commission such jurisdiction as it now has over false labeling as an unfair method of competition under Section 5 of its Act. While the Wheeler-Lea amendment of 1938 defined a "false advertisement" of food,

drugs, devices, and cosmetics under Section 12 to 15 of the Federal Trade Commission Act as "an advertisement other than labeling," the Commission's jurisdiction to prohibit false labeling, when used as an unfair method of competition under Section 5, was not disturbed.

In the case of Fresh Grown Preserve Corporation, et al. v. Federal Trade Commission, 125 F. (2d) 917, the United States Circuit Court of Appeals for the Second Circuit said:

"This argument, however, fails to take due account of two things. One is that the petitioners' conduct as found by the Commission/er/ amounted to unfair methods of competition in commerce in violation of section 5 of the Act (15 U.S.C.A. sec. 45) and the other, that the definition of false advertisement in section 15 is expressly limited to that term as used in sections 12, 13, and 14. The courts have repeatedly upheld the jurisdiction of the Commission to prevent unfair competition by means of false labeling and misbranding regardless of the kind of the product. (F.T.C. v. Winsted Hosiery Co., 258 U.S. 483 (4 F.T.C. 610); Royal Baking Powder Co. v. F.T.C., 281 Fed. 744 (C.C.A. 2 (4 F.T.C. 614)); F.T.C. v. Morrissey, 47 F. (2d) 101 (C.C.A. 7) (14 F.T.C. 716); F.T.C. v. Good-Grape Co., 45 F. (2d) 70 (C.C.A. 6) (14 F.T.C. 695). The last three of the cited cases dealt with unfair competition in the sale of food products. Since the Wheeler-Lea amendment of March 21, 1938, we have three times upheld this jurisdiction of the Commission (Fioret Sales Co. Inc. v. F.T.C., 100 F. (2d) 358 (27 F.T.C. 1702); Justin Haynes & Co. Inc. v. F.T.C., 105 F. (2d) 988 (29 F.T.C. 1578); Parfums Corday, Inc. v. F.T.C., 120 F. (2d) 808 (33 F.T.C. 1797). One of these cases dealt with a drug and the other with cosmetics. See also, Federal Trade Commission v. Kay, 35 F. (2d) 160 (C.C.A. 7), another drug case (13 F.T.C. 575)).

"The amendment to section 5 (15 U.S.C.A. 45) of the act did not modify the term 'unfair methods of competition in commerce,' but made unlawful what were called 'unfair or deceptive acts or practices in commerce,' and by so doing enlarged instead of lessened the scope of the jurisdiction of the Commission. The additions found in sections 12 to 15 inclusive were also to give the Commission greater control over the advertising of food, drugs, cosmetics, and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in section 15 relevant, not in a proceeding like this under section 5.

"The only proof of advertising was the interstate sending by the petitioners of price lists to their customers in the wholesale and retail trade describing their products as pure fruit preserves, and the representations to like effect by salesmen to such customers. We need not now decide whether that was advertising in violation of sections 12 to 15 inclusive. Like false labeling, it may have been deceptive and have amounted to unfair competition under section 5, and we need now be concerned with nothing more."

The Commission, as the Circuit Court of Appeals held, supra, retains jurisdiction over the false labeling of all commodities under Section 5

of its Act, where such false labeling is an unfair method of competition. It cannot successfully be contended that in dealing with false labeling as an unfair method of competition under Section 5, the Commission has acted in an unreasonable manner or in any way that conflicts with the jurisdiction of the Food and Drug Administration over false labeling. To restrict the Commission, as these two sections of the bill would restrict it, would to that extent prevent it from affording that degree of protection to the public that it has in the past.

The Commission is, consequently, of the opinion that the amendments to the Federal Trade Commission Act proposed in H.R. 2390 are both unnecessary and unwise, and are not in the public interest. Furthermore, Section 3 would seriously weaken that provision of the present law which was and is especially designed to protect the health of the consuming and using public.

In accordance with your request, this report and comments on the bill are transmitted in duplicate.

By direction of the Commission.

A handwritten signature in cursive script that reads "Ewin L. Davis". The signature is written in dark ink and is positioned above the typed name.

Ewin L. Davis,
Chairman.

March 27, 1945.