The FTC's Newly Recognized Power to Issue Substantive Intra-Agency Rules - or - Why the Sleeping Beauty of Section 6(g) Was Awakened by Court Order

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—or—

Why the Sleeping Beauty of Section 6(g) Was Awakened By Court Order

Powers long . . . unexercised are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescribed by an unchallenged exercise.

D.C. Circuit Court of Appeals

SUMMARY

For almost half a century the Federal Trade Commission has attempted to regulate commerce without using the kind of binding substantive rules issued by other independent regulatory agencies, such as the Interstate Commerce Commission and the Federal Communications Commission. How this has affected the Commission's regulatory performance, as perceived by the Commission itself and by outside observers is reviewed. The Commission's successful attempt to assert such rule-making power in recent years by creating a new type of substantive rule consistent with the Commission's narrow authorizing statute is chronicled, and the merits of a recent District of Columbia Circuit Court decision sustaining this new type of rule are analyzed.

BACKGROUND

The Federal Trade Commission Act\(^1\) declares that "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are . . . unlawful."\(^2\) One who commits acts made "unlawful" by the statute cannot for that reason alone be sued privately for damages,\(^3\) but the Act permits the Commission, after a proper administrative hearing, to serve such person with an order to "cease and desist from using such method of competition or such act or practice."\(^4\) A person ordered to cease and desist may obtain review of the Commis-

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sion's order in the appropriate circuit court of appeals at a proceeding where "the finding of the Commission as to the facts, if supported by evidence, shall be conclusive."\(^6\) Failure to obey a cease and desist order after it has become final makes the offending party liable to the United States for a civil penalty of not more than $5,000 for each violation. Each day of a continuing offense is deemed a separate violation.\(^6\) Orders of the FTC are not intended to impose criminal punishment or exact compensatory damages for past acts; rather, they are intended to prevent illegal practices in the future.\(^7\)

The FTC was designed to prevent acts and practices condemned by the Sherman Antitrust Act\(^8\) and the Clayton Act\(^9\) as well as the unfair competitive practices already illegal at common law, such as "passing off" one's goods as those of another. The Wheeler-Lea Amendment\(^10\) made explicit the Commission's power to halt unfair or deceptive practices in commerce that are harmful to the public interest even if they do not injure competition\(^11\) and gave the Commission additional powers to deal with false advertisements of food, drugs, devices, or cosmetics by obtaining a temporary injunction from an appropriate United States district court.

In addition to the enforcement duties set out in Section 5 of the FTCA, Section 6 of the Act gives the Commission broad powers to make investigations of, and require both special and annual reports from, any corporation engaged in commerce except banks and common carriers subject to regulation by the Interstate Commerce Commission.\(^12\) Section 7 of the FTCA gives the Commission the further duty to act as a master in chancery when called upon by the court in any antitrust suit in equity brought by the United States.\(^13\)

Since its inception, the FTC has suffered from the weakness of its


\(^7\) FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952).


\(^10\) 52 Stat. 111 (1938).

\(^11\) Such a situation exists, for example, when all the members of a given industry are engaging in a deceptive practice, such as mislabeling, which only misleads the ultimate consumer.


enabling statute. Respondents whose practices are challenged by the FTC are under no obligation to modify them until the Commission has issued a cease and desist order which has become final. In practice, this means that while the FTC is investigating the alleged unfair practice, taking testimony and evidence before a hearing examiner and deliberating on the propriety of issuing a cease and desist order, the challenged practice, however unfair, often continues unabated. A further delay in the enforceability of a cease and desist order often occurs when the recipient of the order successfully petitions the appropriate court of appeals for review as provided by the statute.14

Although the FTC was intended to substitute a speedy administrative hearing for the slow, tiresome process of the federal courts, the case-by-case adjudication mandated by the Act has tended to enmesh the FTC in extensive and interminable litigation.15 These protracted proceedings, instead of clarifying the statutory standard of unfairness, have often increased its uncertainty.16

By confining the FTC’s remedial powers to the issuance of cease and desist orders, the framers of the FTCA made it difficult for the Commission to deal with “deceptive acts or practices” which often can only be curbed by punitive sanctions or the power to order affirmative disclosures.17 Perhaps this limitation of remedial powers arose out of the framers’ assumption that the agency they were creating would deal primarily with unfair methods of competition, such as agreements in restraint of trade, which may be effectively terminated merely by a cease and desist order.

In an apparent attempt to overcome these statutory weaknesses, the FTC announced in 196218 that thenceforth, at its discretion, it would promulgate rules and regulations for use in reaching decisions in subsequent proceedings before the agency bearing on particular unfair practices.19 Although the original announcement merely stated that

17. Under the rubric of "cease and desist" the FTC has ordered such affirmative actions as disclosure of consumer information and corrective advertising. For a general discussion and an attempt to determine the limits of this approach, see Lemke, Souped Up Affirmative Disclosure Orders of the FTC, 4 U. MICH. J. LAW REFORM 180 (1970).
19. The Commission's current Rules of Practice provide:
Trade regulation rules.—(a) Nature and authority.—For the purpose of carrying out the provisions of the statutes administered by it, the Commission
the Commission would be able to "rely" upon these "trade regulation rules" in the adjudicative proceedings which precede the issuance of a cease and desist order, the FTC's 1962 Annual Report more firmly stated:

It would not be necessary to present evidence that the practice itself was violative of law since the respondent could not challenge the validity of the rule as such.\(^{20}\)

Although there was some subsequent wavering from the firm position taken in the 1962 Annual Report,\(^{21}\) it still is an accurate statement of how the Commission intends to use these rules.\(^{22}\)

Assuming that such trade regulation rules are to be formulated in compliance with the rule-making provisions of the Administrative Procedure Act,\(^{23}\) the procedural effect of these rules on agency determinations is shown in Figure 1. As can be seen from the figure, the primary effect of trade regulation rules is to shift the time for challenges to the FTC position from the agency enforcement process which follows a complaint to the rule-making process which precedes the filing of a complaint.

Not fully illustrated by Figure 1 is the time the Commission hopes to save by a single determination by rule-making that a practice is unfair in a given industry or trade instead of establishing this fact over and over again in separate adjudicative proceedings against individual members of the industry or trade. Thus, rule-making can act as a kind of super "class action" against all potential or existing users of a given practice.

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\(^{16}\) C.F.R. § 1.12 (1973).


\(^{21}\) The then chairman of the FTC, Mr. Paul Rand Dixon, indicated after 1962 that such binding rule-making authority did not exist for the FTC. *Hearings on H.R. 15440 Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 2d Sess.* 990 (1966).

\(^{22}\) See the position taken by the Commission in National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973), discussed infra.

Figure 1
Procedural Repercussions of Trade Regulation Rules

<table>
<thead>
<tr>
<th>RESPONDENT MAY SUBMIT</th>
<th>Formal</th>
<th>Bureaucratic</th>
<th>Highly Formal</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rule-making Procedure</td>
<td>Commission's Investigation</td>
<td>Pleadings, Taking of Evidence</td>
</tr>
<tr>
<td>Legal Argument That Rule Is Invalid</td>
<td>*</td>
<td>†</td>
<td>†</td>
</tr>
<tr>
<td>Evidence That Practice Forbidden By Rule Is Not Unfair</td>
<td>*</td>
<td>†</td>
<td>†</td>
</tr>
<tr>
<td>Evidence That Respondent Is Not Performing Acts Charged</td>
<td>†*</td>
<td>†*</td>
<td></td>
</tr>
<tr>
<td>Legal Argument That Respondent's Acts Are Not Described By Rule Or Not Within Purpose Of Rule</td>
<td>†*</td>
<td>†*</td>
<td>†*</td>
</tr>
<tr>
<td>Median Processing Time (approx.)</td>
<td>2 years</td>
<td>2 years</td>
<td>½ year</td>
</tr>
<tr>
<td>Cases Pending In 1969 (approx.)</td>
<td>1,700</td>
<td>50</td>
<td>100</td>
</tr>
</tbody>
</table>

† Without Rule-making
‡ With Rule-making
The Commission's promulgation of trade regulation rules can also be thought of as an attempt to replace the highly formalized proceedings which occur during agency adjudication with the less formal process of rule-making. In terms of the APA, this action represents a shift from Sections 5 and 7, which apply to adjudicative hearings and permit respondents to present oral evidence and conduct cross-examinations, to Section 4, which applies to rule-making proceedings and grants respondents a more limited right to make written submissions without an opportunity to cross-examine opposing witnesses.

The FTC claims to derive its rule-making authority from Section 6(g) of the FTC Act, which clearly states:

[T]he commission shall also have power . . . to make rules and regulations for the purpose of carrying out the provisions . . . of this Act.

Although this provision does not explicitly state that the FTC may define the statutory standard of unfairness by means of rule-making for particular practices, the Commission is encouraged by recent statements by members of the Supreme Court that for an agency with both rule-making and adjudicative powers, which is about to impose a new far-reaching standard of conduct that is not particularized to special facts, rule-making is the preferred procedure. This is because of the APA's provisions for advance notice and broad public participation in the rule-making process. One appellate court has even gone so far as to require rule-making.

The Commission is further encouraged to issue trade regulation rules under its general rule-making powers in Section 6(g) by the Supreme Court's treatment of a similarly worded statute empowering the Federal Reserve Board to prescribe regulations to carry out the purposes of the Truth-in-Lending Act. Writing for the Court, Mr. Chief Justice Burger stated:

24. 5 U.S.C. §§ 554, 556 (1970). Section 7(c) of the APA provides in part: A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.
25. 5 U.S.C. § 553 (1970). Section 4(c) of the APA provides in part: The agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.
28. Bell Aerospace Div. of Textron, Inc. v. NLRB, 475 F.2d 485 (2d Cir. 1973). The court refused to enforce a Board adjudication in part because it made the kind of significant change in the Board's definition of protected workers that should only have been promulgated by rule-making.
Where the empowering provision of a statute states simply that
the agency may "make . . . such rules and regulations as may
be necessary to carry out the provisions of this Act," we have
held that the validity of a regulation promulgated thereunder will
be sustained so long as it is "reasonably related to the purposes of
the enabling legislation. . . ."30

But from its beginnings in 1914 until 1962, almost half a century, the
FTC maintained that it lacked the kind of rule-making power it has
claimed since 1962. The legislative history of the FTCA reveals
that there were those who supported giving the Commission its present
powers while also believing that they did not include the power to
draw up a list of unfair practices.31

During its early years, the FTC would convene industry confer-
ences to draft "guidelines" defining fair trade practices. While
industry members were expected to comply with the guidelines, they
did not have the legal conclusiveness which the agency now asserts for
the trade regulation rules; did not necessarily rest on the solid eviden-
tiary basis which is established for each trade regulation rule by means
of the rule-making process; and were merely advisory as to the type
of practice the Commission might move against.32 A bill was intro-
duced by Senator Nye of South Dakota in 1932 to give these guide-
lines the force of law, but Congress took no action upon it.33

Because of the belief that, in spite of the clear language of Section
6(g) of the FTCA, the Commission lacked the power to make binding
rules defining unfair practices, Congress passed statutes in certain
discrete areas, dealing mostly with labeling and packaging, to authorize
the FTC to issue binding rules. Each of these statutes specified that,
in the particular area covered by the statute, acts which violate the rules
and regulations of the Commission shall constitute an "unfair method
of competition" or "deceptive practice" within the meaning of the

31. During the debates which preceded passage of the FTCA in the Senate, Senator
Cummins, a leading member of the Senate Commerce Committee and a proponent
of the measure, stated:

Why . . . if I thought the commission which we hope to create would sit
down and attempt to write out an instruction to the businessmen of this coun-
try as to the things they could lawfully do and the things which it would be
unlawful for them to do, there is no power that could induce me to favor it.
51 CONG. REC. 12917 (1914).
32. FTC, TRADE PRACTICE SUBMITTALS 22 (1925). These guidelines survive today
as the FTC's "trade practice rules," which have been described by a leading authority
as "numerous and extensive" but of "appalling" emptiness. K. DAVIS, ADMINISTRATIVE
LAW TEXT, § 6.07, at 151 (3d ed. 1972). Today the FTC issues "industry guides"
which it hopes will be adopted voluntarily. A period of about one year is allowed
to elapse before the Commission begins to enforce the guides by adjudicative proceed-
ings before the Commission. FTC, Procedure for Effecting Industrywide Compliance
33. S. 2628, 72d Cong., 1st Sess. (1932); 75 CONG. REC. 1287 (1932).
Commentators from outside the FTC have been highly critical of the Commission's assertion that it has the power to promulgate trade regulation rules. Typical of this criticism are the conclusions of Professors Burrus and Teter of Georgetown Law School:

In the face of legislative history and the individualized grants of rulemaking authority in specific instances, the imputation of a congressional intent to grant rulemaking authority strains the imagination.

Figure 2
Rule Tree


35. Burrus and Teter, Antitrust: Rulemaking v. Adjudication in the FTC, 54 GEO.
But the language of Section 6(g) clearly empowers the Commission to make some kinds of rules. In order to discuss what kinds of rule-making powers the FTC may have, use is made of the "Rule Tree" shown in Figure 2, which represents an attempt to classify and differentiate rules in a useful manner.

In constructing the Rule Tree of Figure 2, it is assumed that the rules are formulated by the chiefs of an administrative agency. It is also assumed that the enforcement hierarchy consists of agency personnel, agency chiefs (who may sit as an administrative tribunal), and courts of review. Rules can be either procedural or substantive. Procedural rules determine the mode and formalities of agency actions and communications, whether carried on within the agency or with persons outside the agency. Procedural rules must be followed by the agency itself and by those who have a duty to, or choose to, deal with it. Substantive rules define with more particularity the rights and duties granted or imposed by the statutes enforced by the agency.36

We next consider which public officials have a duty to enforce a rule without modifying it; this leads to a further division of rules into interpretive rules, intra-agency rules, and lawlike rules. Interpretive rules are enforced without modification by agency personnel. Both agency chiefs, who promulgate interpretive rules, and courts of review can modify interpretive rules by making discretionary changes in them during their application. Intra-agency rules are enforced without modification by agency personnel and agency chiefs, but courts of review retain discretion to modify these rules during application. Intra-agency rules are formulated by agency chiefs, but these same agency chiefs are bound by these rules until they modify them by a rule-making process.


36. The distinction between a procedural and a substantive rule is easier to illustrate with selected rules than to determine for every rule. There is, in fact, no guarantee that these two classes are mutually exclusive or that rules "stay put" in one class or the other over the course of time. Yet to the extent that there is a working consensus at any one time and place as to what kinds of rules belong in each class, the distinction is a useful one.
Figure 3
Rule Definitions and Examples for Figure 2

<table>
<thead>
<tr>
<th>Type of Rule (Level I)</th>
<th>Governs</th>
<th>Example</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Type of Rule (Level II)</th>
<th>Followed by</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interpretive</td>
<td>Agency Staff: YES, Agency Chiefs: NO, Courts: NO</td>
<td>FTC Trade Practice Rules</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Lawlike Rule (Level III)</th>
<th>Constructively Promulgated By</th>
<th>Promulgated By</th>
<th>By Authority of</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2. Emancipation Proclamation (1863)</td>
</tr>
</tbody>
</table>
Lawlike rules are enforced without modification by agency personnel, agency chiefs and courts of review. The agency chiefs, who formulate lawlike rules, modify them by a rule-making process. Such rules are "lawlike" because at each stage of enforcement, those who apply a lawlike rule treat it like a legislative act of Congress. For this reason, lawlike rules are often referred to as legislative rules, but this term has been reserved for a subclass of lawlike rules. Lawlike rules are often challenged as an unconstitutional delegation of Congressional power to legislate. The rationale used to sustain a given lawlike rule becomes a means of distinguishing lawlike rules as legislative, judicial or administrative. Legislative lawlike rules are those made pursuant to a valid delegation of Congressional legislative power. Often this exercise of delegated legislative power is justified as a filling-in of the statute with details best left to the enforcement agency. Judicial lawlike rules are those made by courts, either because of their constitutional or inherent powers or pursuant to legislative grants for the purpose of conducting judicial business. Administrative rules are made by public officials, either because of their constitutional or inherent powers or pursuant to legislative grants for the purpose of conducting business best determined by such officials. Figure 3 summarizes the rule definitions given above and gives examples of each type of rule.

A discussion of the kinds of rule-making powers the Commission was granted by Section 6(g) of the FTC Act is now possible. There is little dispute that Section 6(g) gives the Commission the power to promulgate lawlike procedural rules for the administration of the adjudications called for in Section 5(b) of the FTC Act as a means of issuing cease and desist orders against unfair practices. This power has been upheld by the courts.\(^{37}\)

This suggests that the Commission's decision to determine that certain practices are "unfair" prior to adjudication by means of rule-making is itself a Section 6(g) lawlike procedural rule (see Figure 2) and, therefore, can only be overruled by reviewing courts if it violates the existing procedural provisions of the FTC Act, such as that providing for the adjudicative hearing set forth in Section 5(b).\(^{38}\)

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37. The Commission may issue rules specifying in greater detail than does the statute the mode of serving process, requirements as to the filing of answers, and other litigation details. Hunt Foods & Industries, Inc. v. FTC, 286 F.2d 803, 810 (9th Cir. 1960); United States v. San Juan Lumber Co., 313 F. Supp. 703, 708 (D. Colo. 1969).
38. 15 U.S.C. § 45(b) (1970). The section provides that
"w"henever the Commission shall have reason to believe that any such per-
son, partnership, or corporation has been or is using any unfair method of
The trade regulation rules so formulated would then be substantive rules in that they would spell out the statutory prohibition against unfair methods of competition or unfair or deceptive acts or practices in greater detail. These substantive rules would appear to fall within the rulings stating that while the FTC's conclusions as to the standard to be applied are ordinarily shown deference,\(^{39}\) the standard must get its final meaning from judicial construction.\(^{40}\) Referring again to Figure 2, trade regulation rules would then appear to be intra-agency substantive rules. It is these novel intra-agency substantive rules which may be beyond the rule-making powers granted to the Commission by Section 6(g). A review of the history of the Commission's assertion of this rule-making power since 1962 follows.

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Figure 4 shows trade regulation rules now in force with a listing of the year in which each rule became effective. Additional rules are awaiting the assignment of an effective date, or have not gone beyond the proposal stage. It seems fair to characterize these rules as consumer-oriented and as dealing mostly with unfair or deceptive practices, as opposed to unfair methods of competition. Between 1962 and 1972 the FTC promulgated only about two trade regulation rules per year.

In two early court cases, challenges to the FTC's power to issue

<table>
<thead>
<tr>
<th>Effective Since</th>
<th>16 C.F.R. § (1973)</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963</td>
<td>400</td>
<td>Advertising and labeling as to size of sleeping bags.</td>
</tr>
<tr>
<td>1966</td>
<td>401</td>
<td>Misuse of “automatic” or terms of similar import as descriptive of household electric sewing machines.</td>
</tr>
<tr>
<td>1964</td>
<td>402</td>
<td>Deception as to nonprismatic and partially prismatic instruments being prismatic binoculars.</td>
</tr>
<tr>
<td>1965</td>
<td>403</td>
<td>Deceptive use of “leakproof,” “guaranteed leakproof,” etc., as descriptive of dry cell batteries.</td>
</tr>
<tr>
<td>1965</td>
<td>404</td>
<td>Deceptive advertising and labeling as to size of tablecloths and related products.</td>
</tr>
<tr>
<td>1965</td>
<td>405</td>
<td>Misbranding and deception as to leather content of waist belts.</td>
</tr>
<tr>
<td>1965</td>
<td>406</td>
<td>Deceptive advertising and labeling of previously used lubricating oil.</td>
</tr>
<tr>
<td>Cancelled</td>
<td>408</td>
<td>Unfair or deceptive advertising and labeling of cigarettes in relation to the health hazards of smoking.</td>
</tr>
<tr>
<td>1971</td>
<td>409</td>
<td>Incandescent lamp (light bulb) industry.</td>
</tr>
<tr>
<td>1971</td>
<td>410</td>
<td>Deceptive advertising as to sizes of viewable pictures shown by television receiving sets.</td>
</tr>
<tr>
<td>1968</td>
<td>412</td>
<td>Discriminatory practices in men's and boys' tailored clothing industry.</td>
</tr>
<tr>
<td>1968</td>
<td>413</td>
<td>Failure to disclose that skin irritation may result from washing or handling glass fiber curtains and draperies and glass fiber curtain and drapery fabrics.</td>
</tr>
<tr>
<td>1968</td>
<td>414</td>
<td>Deception as to transistor count of radio receiving sets, including transceivers.</td>
</tr>
<tr>
<td>1969</td>
<td>417</td>
<td>Failure to disclose the lethal effects of inhaling quick-freeze aerosol spray products used for frosting cocktail glasses.</td>
</tr>
<tr>
<td>1970</td>
<td>418</td>
<td>Deceptive advertising and labeling as to length of extension ladders.</td>
</tr>
<tr>
<td>1969</td>
<td>419</td>
<td>Games of chance in the food retailing and gasoline industries.</td>
</tr>
<tr>
<td>1972</td>
<td>422</td>
<td>Failure to post minimum research octane ratings on gasoline dispensing pumps constitutes an unfair trade practice and an unfair method of competition.</td>
</tr>
<tr>
<td>1972</td>
<td>423</td>
<td>Care labeling of textile wearing apparel.</td>
</tr>
<tr>
<td>1971</td>
<td>424</td>
<td>Retail and store advertising and marketing practices.</td>
</tr>
</tbody>
</table>


trade regulation rules were rejected by the court because they were premature, since the plaintiffs sought to enjoin the rule-making procedure which precedes promulgation of a rule. In *Bristol-Myers Co. v. FTC*, District Court Judge Holtzoff offered the following rationale for his court's refusal to consider issuing an injunction during the rule-making process:

It is a well established rule of law that the courts will not interfere with administrative proceedings while they are pending. As a matter of fact, no one can tell today what type of rule, if any, will eventually be adopted by the Commission. When one is adopted, if it is adopted at all, will be the proper time to seek court review.

The issue of the FTC's authority to promulgate substantive intra-agency rules was properly raised, however, in a later suit brought by two trade associations and thirty-four gasoline refining companies after the Commission had set an effective date for a trade regulation rule requiring the posting of octane numbers on gasoline pumps.

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46. *Id.*
48. The rule provides:

In connection with the sale or consignment of motor gasoline for general automotive use, in commerce as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispense. In the case of those refiners or other distributors who lease pumps, the disclosure required by this section should be made as soon as it is legally practical; for example, not later than the end of the current lease period. Nothing in this section should be construed as applying to gasoline sold for aviation purposes.

**NOTE:** For the purposes of this section, "octane number" shall mean the octane number derived from the sum of research (R) and motor (M) octane numbers divided by 2; (R + M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) "Standard Specifications for Gasoline" D 439-70, and subsequent revisions, and ASTM Test Methods D 2699 and D 2700.

36 *FED. REG.* 23871 (1971). Interestingly, similar provisions have been put into effect under the Phase IV Economic Stabilization Program:

Posting.—No later than 11:59 p.m., local time, September 7, 1973, each refiner-retailer, or retailer of gasoline, or No. 2-D diesel fuel shall post the ceiling price in a prominent place on each pump used to dispense retail sales of gasoline or No. 2-D diesel fuel and the octane number for that gasoline. The ceiling price and octane number must be certified and posted in the form and manner prescribed by the Cost of Living Council.


The Stabilization Program Guidelines also make clear that by octane number the guidelines mean minimum octane number:

"Octane number" means the octane number derived from the sum of Research
Jurisdiction for judicial review of the agency's action in this case, *National Petroleum Refiners Assoc. v. FTC*, was founded on Section 10 of the APA, and the following grounds were offered for the complaint:

1. the Commission lacked statutory authority to promulgate the rule;
2. the rule was an unconstitutional usurpation of Congressional legislative power;
3. the FTC's rule-making procedures denied future respondents the hearing guaranteed by Section 5(b) of the FTCA, the due process clause of the fifth amendment, and the APA;
4. the octane number posting rule lacked factual support;
5. promulgation of the rule was arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law.

The court granted the plaintiffs' motion for summary judgment on the issue raised in ground (1) of the complaint, holding that "the statute (FTCA) does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law." In reaching its decision, the district court stressed three grounds. First, it found that the failure of the FTC to assert its claimed rule-making authority for almost fifty years indicated that the agency always knew that it was not granted such powers. Second, having reviewed the FTCA's legislative history, the court found that Section 6(g) was only intended to authorize "internal rules of or-

(R) and Motor (M) octane numbers divided by two; (R + M)/2. The research octane (R) and motor octane number (M) shall be as described in the American Society for Testing and Materials (ASTM) "Standard Specifications for Gasoline" D 439-70 and subsequent revisions, and ASTM Test Methods D 2699 and D 2700. When gasoline of different octane numbers is mixed for sale, "octane number" means the lowest octane number of the gasoline used in this mixture.


It took the FTC almost three years to promulgate its proposed octane number rule: Announcement of Intended Rule (7/30/69); Original Rule Issued (but not yet effective) (12/30/70); Effective date of Original Rule (cancelled) (4/12/71); Revised Rule Issued (but not yet effective) (12/9/71); Effective Date of Revised Rule (stayed by district court) (3/15/72); Finally effective (stay vacated) (11/15/73).


A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 10(c) 2(C) of the APA, 5 U.S.C. § 706 (1970), requires the reviewing court to "hold unlawful and set aside agency actions . . . in excess of statutory authority. . . ."

ganization, practice, and procedure.”

Third, the court inferred from Congress' later grants of substantive rule-making to the FTC for use only in certain narrow areas, such as textile and wool products labeling, that the legislative branch did not intend Section 6(g) to be a general grant of substantive rule-making power.

On appeal to the Circuit Court of Appeals for the District of Columbia, the district court's grant of summary judgment was reversed and the case was remanded for treatment of the other issues raised in the complaint.

In response to the reasoning of the court below, the circuit court, in an opinion written by Judge Wright, held first, that the FTC's failure to make earlier use of its rule-making power was due to an "unduly crabbed and cautious analysis" of the statute's legislative background. Second, it held that the legislative history was too ambiguous to sustain an inference of specific Congressional intent to limit the scope of the FTC's rule-making power. Finally, the court reasoned that where there is solid evidence that Congress has enacted remedial legislation out of caution and to eliminate statutory ambiguity, it is not proper to view these actions as a de facto ratification of the narrow application of Section 6(g) rule-making powers. The court felt that the "plain language of Section 6(g)," if narrowly construed, would "render the Commission ineffective to do the job assigned to it by Congress."

The circuit court tempered its recognition of substantive rule-making power in two respects. First, a defendant in a Section 5 proceeding must be given some opportunity to show that the special circumstances of his case warrant a waiver of any trade regulation rule relied upon by the Commission. Second, it was pointed out that since the statutory standard which a substantive rule attempts to define with greater specificity is a legal standard, the rule is subject to full judicial review.

The circuit court based its decision, in part, on the construction which other courts had given to provisions similar to Section 6(g) in the authorizing statutes of other administrative agencies. Thus, National

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52. Id. at 1345.
54. Id. at 695.
55. Id. at 697.
56. Id.
56.1. Id. at 692.
57. Id. at 693.
58. Although called upon to review a determination as to whether Section 6(g) gives the FTC any substantive rule-making power at all, the court mostly confined its search for precedents to previous cases where an agency's statute was assumed to grant some substantive rule-making power and the issue to be resolved was the scope of that power.

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Broadcasting Co. v. United States was cited because it dealt with the Federal Communication Commission's (FCC's) power to impose certain rules under two then-existing statutory provisions which stated:

The [FCC] from time to time, as the public convenience, interest, or necessity requires, shall—

* * *

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act.

In National Broadcasting Co., the Supreme Court upheld the FCC's power to issue substantive rules regulating contractual relationships between networks and affiliates.

The court in National Petroleum also relied upon Morgan Stanley & Co. v. SEC and American Trucking Assoc. v. United States as authority for its decision. In Morgan Stanley, the Securities and Exchange Commission's (SEC's) power under the Public Utility Holding Company Act to formulate substantive rules regulating the financial practices and securities transactions of holding companies controlling electric and gas utilities was found to include regulation of underwriters' commissions in public utility offerings, while in American Trucking the scope of the Interstate Commerce Commission's (ICC's) substantive rule-making authority under the Motor Carrier Act was found to extend to regulation of the use of leased equipment by authorized carriers.

The most recent case relied upon to justify a liberal interpretation of rule-making grants was Mourning v. Family Publications Service Inc. It was not disputed in Mourning that Section 121 of the Truth-in-Lending Act stated only that the Act's disclosures were required of merchants who charged for extending credit. But the Supreme Court upheld a

61. In National Broadcasting it was not disputed that the statutory provisions had, at the very least, given the FCC the power to issue substantive rules determining engineering and technical aspects of radio communication. National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943). Therefore, the Supreme Court's decision appears merely to be a refusal to restrict the FCC's substantive rule-making power to scientific and technical matters. Id. at 215-16.
Federal Reserve Board Rule, promulgated under the general rule-making provision of the Truth-in-Lending Act, Section 105, that went beyond the statutory provision and required merchants who did not charge for credit to make similar disclosures if they arranged for repayment in more than four installments. Thus, the Court reasoned that since other regulatory agencies' powers to issue substantive rules have not only been sustained but liberally construed, and since the rule-making provision of each of these agencies' enabling statutes is phrased in language almost identical to Section 6(g) of the FTC statute, the FTC also has extensive substantive rule-making power.

In order to reach its decision in National Petroleum it was also necessary for the court to respond to arguments that the use of substantive rule-making to determine unfair practices is inconsistent with the provision for individual administrative adjudications in Section 5(b) of the FTCA. Its reply to this contention was that recent Supreme Court and federal cases show an "obvious judicial willingness to permit substantive rule-making to undercut the primacy of adjudication." In support of this conclusion, the circuit court cited United States v. Storer Broadcasting Co. and Federal Power Commission v. Texaco, Inc., cases in which it was held that where an agency has substantive rule-making powers, it need not grant a license application hearing to an applicant who is not in compliance with the agency's rules unless the applicant sets forth reasons in his application which, if

70. The rule-making provision stated:
The Federal Reserve Board shall prescribe regulations to carry out the purposes of [the Act]. These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith.
71. In view of the Truth-in-Lending Act's legislative history, which showed that Congress was well aware that merchants who extended installment credit "without interest" were likely to be concealing finance charges in the principal to be repaid, and the statutory provision authorizing rule-making to "prevent circumvention" of the Act, it could be argued that it did not require an especially liberal interpretation to uphold the rule. See Mourning v. Family Publications Service, Inc., 411 U.S. 356, 367 n.27 (1973).
72. National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 679 (D.C. Cir. 1973). Is this judicial willingness to undercut adjudication consistent with the circuit court's own view of its role in construing statutes?
Our duty here is not simply to make a policy judgment as to what mode of procedure best accommodates the need for effective enforcement. The extent of the FTC's powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background.
Id. at 674.
73. 351 U.S. 192 (1956).
true, would justify a change or waiver of the rules.\textsuperscript{75}

Additional authority for undercutting adjudication was found in a series of cases involving the Civil Aeronautics Board (CAB),\textsuperscript{76} the FCC,\textsuperscript{77} and the Federal Aviation Agency (FAA)\textsuperscript{78} wherein licensees were denied individual adjudicatory hearings when a federal licensing agency made changes in their license privileges by rule, even though individual adjudications were apparently required by each agency's statute. But opponents of substantive rule-making power for the FTC have argued that decisions dealing with the ICC, FCC, FAA, FPC, and CAB are irrelevant to the FTC. The FTC, it is argued, is best characterized as a \textit{prosecuting} agency rather than as a \textit{regulatory} agency; therefore, since the FTC does not exercise pervasive license-granting, rate-setting, or clearance functions, the courts should be less eager to infer that a general grant of rule-making authority was meant to include the power to make substantive rules.

In reply to this argument that the FTC be considered \textit{sui generis}, the circuit court noted that the National Labor Relations Board (NLRB), whose method of adjudication and enforcement is very similar to that of the FTC, undoubtedly has the authority to issue substantive rules.\textsuperscript{79} “Given the expanse of the Commission’s power to define proper business practices,” said the court, “we believe it is but a quibble to differentiate between the potential pervasiveness of the FTC’s power and that of other agencies on the basis of its prosecutorial and adjudicatory mode of proceeding.”\textsuperscript{80}

\footnotesize{\textsuperscript{75} United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).
\textsuperscript{76} American Airlines, Inc. v. Civil Aeronautics Board, 359 F.2d 624 (D.C. Cir. 1966) (en banc).
\textsuperscript{77} California Citizens Band Assoc. v. United States, 375 F.2d 43 (9th Cir. 1967); WBEN, Inc. v. United States, 396 F.2d 601 (2d Cir. 1968), cert. denied, 393 U.S. 914 (1968).
\textsuperscript{78} Air Lines Pilots Assoc., International v. Quessada, 276 F.2d 892 (2d Cir. 1960).
\textsuperscript{79} The NLRB’s power to make rules is granted by Section 6 of the National Labor Relations Act, 29 U.S.C. \textsection 156 (1970), which provides:
The Board shall have authority from time to time to make, amend, and rescind, in the manner provided by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act. (Emphasis added).
The language emphasized above was added by the Labor Management Relations Act of 1947. This additional language removed any doubt whether the NLRB had substantive rule-making power because the rule-making provision of the APA, 5 U.S.C. \textsection 553 (1970), does not apply “to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.” 5 U.S.C. \textsection 553(b) (1970). To date Congress has failed to similarly amend Section 6(g) of the FTCA.
\textsuperscript{80} National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 685 (1973). This appears to be inconsistent with the following language found elsewhere in the opinion:
The rules the FTC proposes to issue are not ICC type orders operating immediately on a designated class of parties at all. They are merely norms which in the absence of agency brought proceedings to enforce them have no legal effect whatever. . . . This is not even a case where the rule alone is de-}
Although the Commission's substantive rule-making powers have been sustained by the District of Columbia Circuit Court of Appeals, the FTC's rule-making authority will continue to be uncertain without a definitive ruling by the Supreme Court should National Petroleum Refiners Association's petition for certiorari be granted. Future challenges to trade regulation rules need not be brought within the District of Columbia, however. Each time the Commission issues a cease and desist order based on a trade regulation rule, it will create an opportunity for the respondent, under Section 5(c) of the FTCA, to obtain review of the FTC's legal conclusions "within any circuit where the ... practice in question was used or where [the respondent] resides or carries on business ..." Thus, other circuits will have an opportunity to rule on whether the issuance of trade regulation rules exceeds the Commission's statutory authority.

It seems particularly likely that if the Commission begins to formulate trade regulation rules in the area of competition, the circuit courts of appeal would be bound to consider whether National Petroleum, which dealt with consumer protection, adequately analyzed whether the 63d Congress meant to enforce the antitrust laws by rule-making. After all, it is one thing to leave to the FTC the modest task of drafting labeling rules for shirts or gasoline, and quite another to entrust it with the power to promulgate a national code of competition.

Even before the favorable reversal in National Petroleum, FTC Chairman Lewis A. Engman appeared before a House Subcommittee which was considering legislation to clarify the FTC's substantive rule-making powers and stated:

At this point ... the Commission would oppose any statutory rulemaking provision affording less flexibility than we believe we now have under the law. The Commission clearly recognizes

82. For an example of Supreme Court approval of the use of rule-making as a means for controlling a tendency towards monopoly in a particular industry, see National Broadcasting Co. v. United States, 319 U.S. 190 (1943) and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). In National Broadcasting the FCC was permitted to enforce a rule forbidding certain types of provisions in chain broadcasting contracts, while in Storer the FCC's rule setting a limit on the number of stations that could be owned by one licensee was upheld.
83. Consider the following assessment made by the President's Advisory Council Executive Organization:

Even though more policy formulation through informal rulemaking is needed, antitrust matters are often appropriately dealt with on a case-by-case basis while consumer protection problems are more readily amenable to resolution by rules and regulations.

PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION, A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES 91-92 (1971).
the need to achieve a balance between procedural efficiency and procedural safeguards. We believe . . . that judicial affirmation of the Commission's rulemaking authority will give us the flexibility to develop procedures which strike this essential balance.

For these reasons we have reached the conclusion that we should await the imminent court decision [in the Circuit Court of Appeals] and seek additional legislative authority only if that decision is unfavorable. Such a course will not jeopardize Commission rulemaking, and, in the meantime, American consumers can begin to reap the benefits associated with prompt enactment of the less controversial amendments provided in the legislation before this committee.84

The Subcommittee was considering passage of H.R. 20, Section 203 of which provided:

**RULEMAKING AUTHORITY**

Sec.203. Section 6(g) of the Federal Trade Commission Act (15 U.S.C. § 46(g)) is amended to read as follows:

“(g)(1) From time to time to classify corporations and to issue (A) procedural rules, and (B) rules defining with specificity acts or practices which are unfair or deceptive to consumers and which are within the scope of section 5(a)(1) of [the FTC] Act.

* * *

“(g)(2)(C) When any rule [of paragraph (g)(1)(B)] is promulgated and becomes final a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of [the FTC] Act.”85

Because the substantive rule-making grant in H.R. 20 was limited to “acts or practices which are unfair or deceptive to consumers,” it would not apply to the “unfair methods of competition”86 which are also banned by the FTCA. Thus, H.R. 20 actually would have the effect of diminishing the Commission’s claimed rule-making powers.

When the court of appeals announced its National Petroleum decision upholding the FTC's substantive rule-making power on June 27, 1973, an elated William Dixon, Director of the FTC's Division of Rules and Guides (a part of the FTC Bureau of Consumer Protection), confidently predicted that the Commission would soon be clearing up the rule-making backlog which had developed while the district court's adverse decision eclipsed the FTC's ability to make rules.87

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Two weeks later the FTC abolished the Division of Rules and Guides and made William Dixon a Commission hearing officer. The announcement of this reorganization was made by Chairman Engman, who said:

Since rulemaking is so essential to the work of the entire Bureau [of Consumer Protection], the separate division which has handled it exclusively has been eliminated and instead the various operating divisions will be responsible for developing rules. This will give all Bureau attorneys the option to proceed either by rulemaking or litigation in the areas where they have developed substantive expertise.88

Chairman Engman did not state whether this diffusion of "essential" rule-making power was meant to reach the antitrust enforcement attorneys in the FTC's Bureau of Competition, but on other occasions he has publicly taken the position that future budget allocations and manpower assignments must reflect a greater emphasis on competitive antitrust activities within the Commission.89

Congress' acceptance of the FTC's decision to retain broad substantive rule-making powers by relying on favorable judicial construction of Section 6(g) instead of asking for a legislative clarification was revealed when, on September 12, 1973, the Senate passed S. 356, the "Magnuson-Moss Warranty—Federal Trade Commission Improvement Act." Conspicuously absent from S. 356 was the provision, present in earlier versions of the bill which had passed the Senate, which authorized the FTC to define with specificity those acts or practices which are unfair or deceptive to consumers and in violation of Section 5(a)(1) of the FTCA.90 Thus, for some time to come the construction given Section 6(g) of the FTCA in National Petroleum will be the Commission's sole and preferred authority for issuing trade regulation rules.

Turning to the merits of the National Petroleum decision, it has already been noted that the court of appeals found that a lack of substantive rule-making power "would render the Commission ineffective to do the job assigned to it by Congress."91 In view of the Commission's active regulatory role for more than half a century without this power, such a characterization of the need for substantive rule-making

89. Interview with Lewis A. Engman, No. 633 ATRR, AA-2 (October 9, 1973).
would appear to be extreme. Moreover, critics of the FTC have been more prone to place the blame for the agency's failures on mismanagement of its existing resources rather than on a lack of rule-making authority:

Through an inadequate system of recruitment and promotion, [the FTC] has acquired and elevated to important positions a number of staff members of insufficient competence. The failure of the FTC to establish and adhere to a system of priorities has caused a misallocation of funds and personnel to trivial matters rather than to matters of pressing public concern.

* * *

[T]he agency must recognize that some of its most serious problems—such as excessive delays and conflict at the Commissioner level between the functions of prosecutor and judge—can be solved by greater delegation of authority to the staff . . . . [T]he Commission [should] confer on its bureau directors the authority to issue complaints and close investigations, on its General Counsel the authority to seek preliminary injunctions, and on its projected consumer protection task forces the authority to initiate and close investigations, issue complaints, and otherwise act as operating bureaus with respect to its own programs.92

It has also been suggested that the Commission undercuts the authority of its advisory opinions, industry guidelines, trade practice rules, and cease and desist orders by requiring compliance reports which it does not and cannot verify because of the small staff assigned to the Bureau of Industry Guidance.93

Since FTC procedure is largely a product of the Commission's own lawlike procedural rules, innovation to remove bottlenecks and speed processing of complaints is already within its power. A fruitful example of such procedural innovation within the Commission's traditional powers is the Proposed Complaint filed against the plastics industry on May 30, 1973. The gravamen of the proposed complaint was that testers, manufacturers, and marketers of cellular polyurethane and polystyrene plastics used for insulating and furnishing dwellings continued to designate these plastics as non-burning or self-extinguishing long after they became aware that their current methods for determining the flammability of the plastics were invalid and that such plastics posed a serious fire hazard.94

The proposed complaint showed innovations in three areas:

(1) Unlike past class actions, it covered an entire industry; the named respondents alone included 26 producers and marketers.

(2) A trade group and a standards setting organization were named respondents although it is rare for the FTC to take action against nonprofit corporations.

(3) The unfair practice complained of included a breach of the respondents’ duty to carry out precautionary and remedial actions to warn past purchasers that the plastics they had purchased actually constituted a substantial fire hazard. The FTC’s position that respondents violate the statute when they fail to take those remedial actions expected of reasonable persons is an unusual, but creative, way of applying the statutory standard.95

In addition to those remedies already available to the FTC for improving its performance without rule-making, several statutory improvements for the FTC are already pending in Congress. For example, S. 356, recently passed in the Senate, permits the Commission to:

(1) move against acts “affecting commerce” instead of only acts “in commerce,” as before;

(2) commence civil actions for penalties up to $10,000 against persons who knowingly engage in practices which are unfair or deceptive to consumers, and are prohibited by Section 5(a)(1) of the FTCA;

(3) seek specific redress for injuries to consumers caused by an act or practice ultimately prohibited by a final cease and desist order;

(4) bring suit for civil penalties of up to $10,000 for violations of a cease and desist order;

(5) represent itself in court in situations where it previously relied on the Attorney General;

(6) seek temporary and preliminary injunctions.96

Thus, even without substantive rule-making, it is unlikely that the Commission will have much excuse for being ineffective now or in the future.

But even if substantive rule-making is the sine qua non of efficient FTC enforcement, it would appear that just as rule-making, rather than agency adjudication, is the favored method of agency policy innovation, Congressional lawmaking, rather than judicial extrapolation, is

95. Id.
the preferred method of legitimating questionable claims to new agency powers. This is especially true where, as here, the agency has not shown that it is asserting the new powers primarily to protect classes which have been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.\footnote{97}{Quaere: assuming that the process of Congressional legislation is a kind of "rule-making." was the court of appeals following its own advice that:
Rulemaking, unlike adjudication, gives notice to an entire segment of society of those controls or regimentation that is forthcoming . . . and an opportunity for persons affected to be heard. . . . By exposing [themselves] to a wider range of criticism and advice than is ordinarily available in adjudicatory proceedings [those who formulate the rule] may . . . discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.
National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 682 (D.C. Cir. 1973).}

Next considered is whether the legislative history of the FTCA is an ambiguous guide to interpreting Section 6(g) of the FTCA, as found by the Circuit Court of Appeals for the District of Columbia in \textit{National Petroleum}. First, Section 6(g) is a part of the original, unamended, FTCA which forbade only "unfair methods of competition" and was primarily considered an antitrust act.\footnote{98}{As one early authority noted:
It should not be forgotten that the Federal Trade Commission was organized primarily to deal with the trust problem, the problems of monopoly and restraint of trade. All other matters were incidental. . . . Even in the field of misbranding and of deceptive advertising, valuable though the work has been, the Commission's jurisdiction has been a more or less fortuitous by-product rather than the result of a clear legislative design. Probably if the question of merchandise misbranding had been taken up on the merits, a law similar to the Food and Drugs Act would have been drafted, with its effective combination of administrative and criminal enforcement.
G. Henderson, \textit{The Federal Trade Commission} 339 (1924).}

In the Presidential campaign of 1912, which preceded the passage of the FTCA by two years, all three political parties, Democratic, Progressive and Republican, wanted to make the antitrust laws more specific and effective. Support for reform came from businessmen, who were exasperated by the uncertainty of relying on the Supreme Court's "rule of reason"\footnote{99}{The Supreme Court first enunciated the "rule of reason" in Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). In United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911), Chief Justice White summarized the ruling in \textit{Standard Oil} as follows:
[The duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.
interpretation of the Sherman Act,\footnote{100}{G. Henderson, \textit{The Federal Trade Commission} 17 (1924).} and those who found that the Sherman Act, either because of original defects or judicial construction had proven ineffective.\footnote{101}{Quaere: assuming that the process of Congressional legislation is a kind of "rule-making." was the court of appeals following its own advice that:
Rulemaking, unlike adjudication, gives notice to an entire segment of society of those controls or regimentation that is forthcoming . . . and an opportunity for persons affected to be heard. . . . By exposing [themselves] to a wider range of criticism and advice than is ordinarily available in adjudicatory proceedings [those who formulate the rule] may . . . discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice.
National Petroleum Refiners Assoc. v. FTC, 482 F.2d 672, 682 (D.C. Cir. 1973).}
To free this historical analysis from anachronisms, one must forget about most of the current independent regulatory agencies, such as the Federal Communications Commission (FCC),\textsuperscript{102} Federal Power Commission (FPC),\textsuperscript{103} Civil Aeronautics Board (CAB),\textsuperscript{104} Securities and Exchange Commission (SEC)\textsuperscript{105} and National Labor Relations Board (NLRB),\textsuperscript{106} none of which was yet even a gleam in Congress' legislative eye in 1914, the year of the passage of the FTCA.

At that time, the doctrine that Congress could never delegate any of its legislative powers, while making certain grudging accommodations to the needs of twentieth century government, was still a potent legal taboo. In our own time, the Supreme Court has said that "[d]elegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility."\textsuperscript{107} But in 1911, an earlier opinion of the same Court sustained a statute which gave the Secretary of Agriculture the power to protect public forest preserves, permitting him to promulgate what amounted to substantive criminal laws. Denying the functional equivalence of laws and lawlike rules and calling attention to the modesty of the delegation the court held:

That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." . . . But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

* * *

The Secretary of Agriculture could not make rules and regulations for any and every purpose. . . . [A]ll relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. . . .\textsuperscript{108}

In drafting the FTCA, Congress could draw on the variety of legal forms present in the embryonic development of the only prior independent regulatory agency, the Interstate Commerce Commission. In 1887, the ICC was given the power, after conducting an investigation of a complaint and preparing a report of its findings, to order common carriers to cease and desist (1) from charging unjust and unreasonable rates and (2) from practicing undue discrimination between

\begin{itemize}
\item \textsuperscript{102} 48 Stat. 1066 (1934).
\item \textsuperscript{103} 41 Stat. 1063 (1920).
\item \textsuperscript{104} 52 Stat. 980 (1938).
\item \textsuperscript{105} 48 Stat. 385 (1934).
\item \textsuperscript{106} 49 Stat. 449 (1935).
\item \textsuperscript{107} Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940).
\item \textsuperscript{108} United States v. Grimaud, 220 U.S. 506, 521-22 (1911).
\end{itemize}
shippers by such methods as rebates.\textsuperscript{109} ICC cease and desist orders were to be enforced by the Commission or an interested party in an equity proceeding in a circuit court of the United States in which the Commission's report of the facts would be prima facie evidence.\textsuperscript{110}

In 1906, the Hepburn Act gave the ICC the power, after full hearing on a complaint, to determine that the rates or practices of a common carrier were unjust or unreasonable and to prescribe what would be the maximum just and reasonable rates or fair and reasonable practices to be thereafter followed. Enforcement of ICC orders was now primarily by suits for civil penalties brought by the Attorney General, and by equity suits for specific performance in the Commerce Court brought by the ICC. The Commerce Court was to issue injunctions if the ICC order was regularly made. Evidently, ICC orders were treated as lawlike.\textsuperscript{111}

Finally, in 1910, the ICC was permitted to change existing rates or practices or to challenge new rates or practices on its own motion. It was still required to hold hearings before issuing orders determining rates and prescribing practices. Enforcement of ICC orders remained primarily by suits for civil penalties and by equity suits in the Commerce Court.\textsuperscript{112}

The FTC, as created by the FTCA of 1914, could take affirmative action on its own, after issuing a complaint and holding an adjudicatory hearing, to order a respondent to cease and desist from an "unfair method of competition in commerce."\textsuperscript{113} Although today the burden is on the respondent so ordered to stay the order by petitioning a circuit court for review,\textsuperscript{114} in the original Act the FTC was required to go into a circuit court for equitable enforcement of its order. In such enforcement suits the Commission's findings as to the facts, if supported by testimony, would be conclusive.\textsuperscript{115} Thus, aside from its power to proceed spontaneously, the FTC, as created in the 1914 Act, was an enforcement agency with only slightly more power than the weak ICC created in 1887. It could neither prescribe what practices would be fair and reasonable in the future or expect its orders to be given the same narrow review given to the ICC's orders since 1906; though its

\textsuperscript{109} The Supreme Court held that this grant of a power to condemn rates conferred no power to set them for the future. \textit{ICC v. Cincinnati Ry.}, 167 U.S. 479 (1897).
\textsuperscript{110} 24 Stat. 384 (1887).
\textsuperscript{111} 34 Stat. 584, 589-91 (1906).
\textsuperscript{112} 36 Stat. 551 (1910).
\textsuperscript{113} 38 Stat. 717 (1914).
\textsuperscript{115} 38 Stat. 719 (1914).
findings of fact were to be conclusive if supported by the evidence. While ICC orders since 1906 could not be ignored without incurring civil penalties, no one need obey an FTC order until the FTC won a judgment in a circuit court.

Actually the FTC, as finally created in 1914, was only the latest of a series of efforts to curb corporations' anti-competitive practices. In 1903, Congress had created a Bureau of Corporations within the Department of Commerce and Labor for the purpose of investigating corporations engaged in interstate commerce so as to make information concerning such corporations available to the President, Congress, and the public. Although it had no enforcement powers over corporations, this Bureau could compel testimony and documents in the same manner as the ICC. The President was expected to use such information to make recommendations to Congress for legislation to regulate corporations engaged in commerce.116

Another proposal introduced in the Senate in 1912 called for a commission without any enforcement powers that could both investigate and publicly report on corporations and also assist the federal courts as a special master by drafting decrees in Sherman Act antitrust suits.117 A plan for a commission that could issue orders to halt unfair competitive practices was introduced in the House in 1913 by the Progressive Party leader, Congressman Murdock of Kansas.118 A licensing approach was put forward by Senator Newlands of Nevada in 1911 in a bill which would have created a commission to license corporations whose gross annual receipts exceeded five million dollars and require them to submit annual reports. The license of a corporation found to have engaged in "unfair or oppressive methods of competition" would be subject to revocation and the defendant corporation could then be ordered not to engage in interstate commerce.119 These proposals, while not voted upon, indicate that the Congress had been exposed to a great variety of schemes for improving antitrust regulation.

Enactment of the FTC began modestly on January 20, 1914 when President Wilson, in his address before both Houses of Congress,120 announced that his antitrust game plan called for enactment of a tough new antitrust law, specifying with greater particularity than did

116. 32 Stat. 827 (1903); Compare the following provisions of the FTCA, 15 U.S.C. §§ 46(a), 46(f), 46(h), 49 (1970).
120. 51 Cong. Rec. 1962-64 (1914).
the Sherman Act a list of anti-competitive practices to be enforced by penal sanctions. An independent interstate trade commission would take over the investigative duties of the Bureau of Corporations, and be able to assist the Justice Department and the courts in framing antitrust decrees and settlements. The commission would have had the power to compel testimony, information and reports from corporations, but not to exercise any antitrust enforcement powers.

Representative Clayton of Alabama and Senator Newlands of Nevada almost immediately introduced the Administration’s bill for a trade commission without enforcement powers.

In the House, the bill creating the trade commission, as redrafted by Representative Covington of Maryland, was reported out of the House Committee on Interstate and Foreign Commerce over strong objections in minority reports by Representative Stevens of New Hampshire and Representative Lafferty of Oregon that the commission lacked enforcement powers, and that it did not give the commission substantive rule-making power to prohibit unfair methods of competition.

Section 8 of the Covington bill provided:  

[T]he Commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this act; and this provision was clearly understood to refer only to the power to elaborate in detail which businesses would be subject to its reporting requirements.

During the passage of the Administration’s bill in the House, four amendments attempting to give the commission enforcement powers were rejected:

(1) Representative Morgan of Oklahoma’s amendment would have given the commission the power to declare rules to prevent corporations from engaging in unfair competition or unjust discrimination between competitors.

(2) Representative Murdock of Kansas’ amendment would have...
given the commission the power to halt a carefully defined list of practices constituting unfair or oppressive competition and also given the commission some price-fixing powers.\textsuperscript{131}

(3) Representative Dillon of South Dakota's amendment would have given the commission both substantive rule-making and adjudicatory powers.\textsuperscript{132}

(4) A second amendment by Representative Morgan would have allowed the commission adjudicatory and price-fixing powers.\textsuperscript{133}

Final passage of the trade commission bill in the House occurred on June 5, 1914.\textsuperscript{134}

Shortly after the passage of the bill in the House, President Wilson announced that he had changed his position and now supported giving the proposed commission enforcement powers to deal with anti-competitive practices, apparently because he had become convinced that precise definition of all future unfair trade practices was impracticable.\textsuperscript{135}

The bill reported from the Senate Committee on Interstate Commerce\textsuperscript{136} provided for a commission with both investigative and enforcement powers, but it did not have a procedural rule-making provision such as Section 8 of the House bill. After debate and passage in the Senate on August 5, 1914, both bills went to the House-Senate conference committee, which was limited to framing a bill resolving the differences between the two Houses.\textsuperscript{137}

The conference committee drafted the FTCA of 1914, which the conferees assured the Congress did not go beyond the conference committee's mandate.\textsuperscript{138} Section 8 of the House bill had disappeared during the conference and the present Section 6(g) was written in. While the final debates in the House and Senate before the passage of the conference bill did not focus on the change in the rules provision, they did clearly indicate Congress' concern that it was not giving the FTC power to prescribe how businesses should be run in the future, as had been given to the ICC. This power to legislate future practices was convolved with the scope of the judicial review of the commission's orders. If the FTC did have the power to legislate future prac-

\begin{footnotesize}
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\item[131.] Id. at 9050-51, 9055.
\item[132.] Id. at 9056, 9057.
\item[133.] Id. at 9066, 9067.
\item[134.] Id. at 9910.
\item[136.] S. 4160, 63d Cong., 2d Sess. (1914); 51 \textsc{Cong. Rec.} 10376, 10377-78 (1914).
\item[137.] \textsc{Jefferson's Manual} 546; See House Rule XXVIII(3) (1971); \textsc{Rules \& Manual of the U.S. Senate} (1965).
\item[138.] 51 \textsc{Cong. Rec.} 14769, 14925 (1914).
\end{enumerate}
\end{footnotesize}
tices, since the source of this power was Congress' delegation, only narrow judicial review was possible. Conversely, if Congressional delegation was not involved, the agency, a factfinder and not a true court, would be subject to judicial review. Of necessity this judicial review would include an independent judicial finding as to the law, even though the commission's expert findings in this area were expected to be given considerable weight.139 Final passage of the Act occurred in the Senate on September 8, and in the House on September 10, and the bill was signed by the President on September 26, 1914.

Nowhere does the legislative history reveal that Congress contemplated that the FTC would attempt to reduce the Section 5(b) adjudications to mere determinations that the respondents had violated pre-judicial rules defining unfair practices drafted by the Commission at rule-making sessions. And while one cannot deny that the promulgation of trade regulation rules by the FTC would probably sit well with Progressives like Lafferty and Murdock, such a practice appears beyond the intentions of many others who voted for what they were assured was an agency which would proceed only by adjudication to halt recent or continuing unfair practices of individual respondents.140

139. Consider the distinctions made by Representative Stevens of Minnesota in the following colloquy with Representative Sherley during the debates which preceded the passage of the conference bill in the House:

Mr. STEVENS of Minnesota. * * * The Supreme Court has held that the Interstate Commerce Commission does exercise the right of determining whether a rate in existence is unreasonable or unjust. That is a quasi-judicial act and the decision of the commission on that point is reviewable by the courts, because it is a review of a legal decision upon a given state of facts. But when the commission goes further and decides what must be a reasonable rate or practice for the future, of course that is a legislative act which must not and can not be reviewed by the courts any more than could an act of Congress be so reviewed. There is that distinction, and we have carried that distinction into this bill. Whenever the trade commission decides that a certain act is an act of unfair method of competition, the decision on that point as a question of law is, and ought to be, reviewable by the courts. The facts themselves are found by the commission. Its finding as to the facts is conclusive. Its opinion as to whether that state of acts constitutes an act violating the law is its judgment of law upon the facts, and its judgment is and ought to be reviewed, and it is so provided by this bill.

Mr. SHERLEY. If the gentlemen will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

Mr. STEVENS of Minnesota. Certainly.

Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?

Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question.

51 CONG. REC. (Part 15) 14938 (1914).

140. Representative Covington made this point clear in the post-conference debates in the House:

The function of the Federal trade commission will be to determine whether an
The court of appeals in *National Petroleum* argues that the conference committee had the authority to draft substantive rule-making power into Section 6(g) of the FTCA:

The original House bill contained a rule making provision granting authority roughly commensurate with the powers of investigation the committee was then designed to have. While the Senate bill deleted any such authority, we believe it can be persuasively argued that by reinserting a rule making provision into the stronger commission bill all the conference did was reinstate the principle of the House bill as to rule making—that is, permitting the commission to exercise authority roughly commensurate with its other powers, great or small. In this sense, the insertion of Section 6(g), as interpreted here, does no violence to the principle limiting the authority of the conference.

This exercise of logic by the court would appear to be somewhat strained.

In a similar vein, the court maintains that FTC trade regulation rules “are merely norms ... with no legal effect whatever” because absent an FTC order to cease and desist, there is no penalty for disobeying the trade regulation rule. But when one considers the Commission’s avowed intention to use its extensive agency resources to enforce these rules in proceedings where the legality of the rules is not at issue until the respondent has run the gauntlet of FTC enforcement actions and has successfully petitioned a circuit court of appeals for review, one finds it hard to agree with the *National Petroleum* court that such rules have no legal effect.

Summarizing, while the legislative history amply supports the court’s finding that “the question of promulgating rules to elaborate the statutory standard and then relying on them in subsequent adjudications was a practice that simply failed to preoccupy those engaging in the post-existing method of competition is unfair, and if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature.

51 CONG. REC. 14932 (1914). Similar assurances were made by Senator Cummins in the Senate; he stated that the FTC would only have the adjudicative powers exercised by the ICC prior to 1906 and specifically would not have substantive rule-making powers like those given to the ICC in 1906. 51 CONG. REC. 12917 (1914).


142. Using similar reasoning, one might maintain that if the House passed a defense bill authorizing purchase of 30 destroyers for the Navy, and the Senate passed a bill authorizing purchase of 30 anti-tank guns for the Army, the conference bill could authorize the Navy to purchase submarines and the Army to purchase tanks because the House bill gave the Navy all the tanks it could use and the Senate bill gave the Army all the submarines it could use.

conference debates," the history does not appear sufficiently ambiguous to support a finding that such an innovation is consistent with the FTCA’s original statutory scheme; neither does it support a finding of a congressional consensus that the rule-making provisions of Section 6(g) mandated a type of discretionary power potent enough to make the adjudications of Section 5(b) little more than inquiries into whether the respondent has had the temerity to act in defiance of the agency’s prejudicial determination of his rights.

CONCLUSION

As a consequence of Congress’ tendency to delegate new tasks of enforcement to the FTC without mandating a corresponding increase in agency power, the agency has been led to seek significant additional powers in the courts, formulating a rationale for judicial re-evaluation of its original rule-making powers. This attempt has been successful in at least one court, but it leaves unanswered the question as to the ultimate ambit of these new rules.

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