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Federal Trade Commission and Its Due Process of Law

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FEDERAL TRADE COMMISSION AND ITS DUE PROCESS OF LAW*

Justice Sutherland's opinion in the United States Supreme Court on Monday, May 25, 1931, speaking for a unanimous court in Federal Trade Commission v. Raladam Co., criticized the commission for its failure to observe the limitation of its administrative power, and sent the commission to the books for a further study of what is meant by "due process of law" within its act.

The commission had charged the respondent with unfair methods in competition, and based its order upon the statement and conclusion that respondent's sale of an "obesity cure" advertised as a safe way to remove excess fat from the human body was a practice to the prejudice of the public and respondent's competitors, and that if it were to be taken by the fat citizens of our country respondent must advise that it be taken only upon the advice of physicians. The findings in general followed the language of the complaint. There were no findings of prejudice or injury to any competitors, but the conclusion was drawn, not based upon evidence, that the practice was to the prejudice of the public and respondent's competitors and therefore constituted unfair methods in competition.

The Raladam case, on its way to the Supreme Court, was watched with great interest and became of transcendent importance to lawyers interested in preserving constitutional limitations upon the actions of commissions that intermeddle with judicial and executive powers in disregard of the Fourth, Fifth and Fourteenth Amendments, in order to obtain showy results.

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The commission in this and many other cases had stepped into the picture in the new role of the "national family doctor," and it had devised a new proceeding to stop the sale of patent medicines not theretofore possible under the Pure Food and Drug Act, or in fact any other congressional or state act. It advertised, and members of the commission made speeches, declaring a prompt and effective method had been found to obtain quick results. Its action against patent medicines would be immediate and drastic because the use of competent material evidence and testimony required by its organic act could be disregarded by the use of its own conclusions of fact without sworn testimony.

Among the ingredients of the cure is "desiccated thyroid," said the commission in the Raladam case, which cannot be prescribed to act with reasonable uniformity on the bodies of all users. Its scientific analysis and decision upon the therapeutic value of "desiccated thyroid," it concluded, was binding and lawful to support an order even though there were no findings of fact that the practice was prejudicial to the public and competitors in commerce.

Justice Sutherland pointed out that the commission in so proceeding and finding had ignored the limitations of its non-judicial power when it failed to produce a single witness to prove that competitors who sold anti-fat remedies were affected by respondent's conduct of advertising or that the public interest in such activities of the commission was specific and substantial. The commission, the court said, had no right to assume that it had the power to preserve the business of one knave against the competition of another; no general sweeping authority over commerce or over the medical care of the people was given to the commission. Its assumed authority to prevent all sorts of competition in its own way would not be sanctioned by the court. The court, in reviewing the commission's action in ordering the respondent to cease selling its anti-fat remedy, said: "The

commission cannot by assuming the existence of competition, if in fact there be none, give itself jurisdiction to make such an order. If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the commission jurisdiction, the order could not successfully be assailed. But this is not all."

Unpunished combinations, conspiracies and monopolies practicing vicious tactics against the under dog who dared to stay in business in interstate commerce gave us the Sherman Act in 1890. Again in 1912 and 1913 the nation was flooded with protests against the evils of monopolies and combinations in restraint of trade. Out of the clamor for reform in the methods of keeping competition in commerce open and unfettered by monopolies and conspiracies the Federal Trade Commission Act was brought into existence during the Wilson administration (1914) in the high hope of the country that monopoly would be stopped at the threshold (Federal Trade v. Raladam). "Nip them in the bud" was the common expression in debates.

Justice Sutherland went to the debates in Congress to learn the nature and limitation upon the power being exercised by the commission. He comments: "In that debate the necessity of curbing those whose unfair methods threatened to drive their competitors out of business was constantly emphasized. It was urged that the best way to stop monopoly at the threshold was to prevent unfair competition; that the unfair competition sought to be reached was that which must ultimately result in the extinction of rivals and the establishment of monopoly; that by the words 'unfair methods' was meant those resorted to for the purpose of destroying competition or of eliminating a competitor or of introducing monopoly—such as tend unfairly to destroy or injure the business of a competitor; that the law was necessary to protect small business against giant

competitors; that it was an effort to make competition stronger in its fight against monopoly; that unfair competition was that practice which destroys competition and establishes monopoly. These and similar statements run through the debate from beginning to end."

What is or is not an unfair method in competition is left for the courts to decide and enforce. Justice Sutherland said: "It belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion' (Davidson v. New Orleans, 96 U. S. 97, 104). The question is one for the final determination of the courts and not of the commission (Federal Trade Comm'n v. Gratz, 253 U. S. 421, 427; Federal Trade Comm'n v. Beech-Nut Co., supra, p. 453)."

Congress believed that the Sherman Act was too slow to be adequate enough to keep the channels of interstate and foreign commerce free from combines and conspiracies. It had learned that after each great effort of the government to bust a trust, the trust emerged with a beautiful coat of whitewash or gathered more power and influence under "consent decrees" as a guide or license for their future conduct. President Wilson, the father of the Federal Trade Act, said that the country was "in a temper," hard times were abroad in the land, and something must be done to disintegrate the monopolies, unlawful trade groups and combines that infested the nation. Congress was certain that the cure for the evils of conspiracies was fully embodied in the Trade Commission Act which gave the commission power to prevent all unfair methods of competition in interstate and foreign commerce in order "to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain" (Federal Trade v. Sinclair Co., 261 U. S. 463, 476).

The paramount interest of the people in sanctioning the law was the faith they had in the commission's ability to immediately prevent by due process the continuation of those substantial restraints in trade that were not only injurious to the public, but were also actually functioning to prevent men from engaging or continuing in business.

Thus was launched as a supplement to existing anti-trust laws a new non-judicial fact-finding tribunal with authority to take testimony and find facts in a lawyer-like way that would be binding and conclusive upon the courts provided the facts were supported by competent evidence (sec. 5 of the Federal Trade Act). The commission's records for the first ten years of its activity show a studied effort upon the part of the lawyers advising the commission that it assume jurisdiction only according to the language of the act.

Within the past five years it seems apparent that the commission has broken away from the first principles of legal procedure by its reading into the act power and authority to proceed, prosecute, prevent and punish in a novel manner sundry violations of the rules of trade, which appear to me to be quite clearly beside the original intendments of congressional effort to thwart "monopoly at the threshold" by due process of law. Various "short cuts" around and through the organic act have been devised and taken by the commission in its efforts to regulate in the public interest competition in commerce. These short cuts examined in the light of judicial decisions appear violative of the due process provisions which were so well written into the Federal Trade Act.

The law in unmistakable terms provides only one method of procedure and practice for the commission to follow, and this is found in section 5 of the Federal Trade Act. Summarized it is:

Whenever the commission shall have reason to believe unfair methods of competition in interestate commerce are be-

ing used and a proceeding by it shall be in the interest of the public, *it shall serve its complaint* giving the party charged the right to appear and answer. It must hold a hearing and preserve the evidence in the case by the taking of testimony reduced to writing and file it for public use. "If upon such hearing the commission shall be of the opinion that the method in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served . . . its order to cease and desist from using such methods of competition." Justice Sutherland said in the Raladam case: "By the plain words of the act, the power of the commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) That the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the commission to prevent the use of the methods appears to be in the interest of the public."

After the commission has duly proceeded by written complaint, should the party charged fail to obey its orders it is only upon the findings of fact and the transcript of the record of public hearings held that the commission may go into the Circuit Court of Appeals in the first instance and tell its story. It cannot accuse wrongdoers in any other way. No provision for secret, alleged judicial consent decrees can be read into the act. The act provides for a detailed procedure in the Circuit Court of Appeals for the full protection of the party charged, relating to notices by the court, taking of additional testimony and the right to appeal to the United States Supreme Court after final decision. The Fifth and Fourteenth Amendments to the United States Constitution, which prohibit the taking of life, liberty and property without due process of law and all of the protecting requisites of these amendments have

been daily provided for in the commission's act to protect property rights of the one under investigation from arbitrary action.

Thus, said the court, the commission's first prerequisite of jurisdiction is public interest; that being present, it may not even then proceed unless the public interest is specific and substantial (Federal Trade v. Klesner, 280 U. S. 19, 28). "Unfair trade methods are not per se unfair methods of competition." Injury to potential and actual competitors may also not be ignored as a test for jurisdiction (Raladam, supra).

That the commission is without power to invent proceedings outside of its act was in no uncertain terms explained to it by the court: "The authority of the commission to proceed, if that body believes that there has been or is being used any unfair method of competition in commerce, was then qualified in conference by the further requirement, not in the original bill, 'and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public.' By these additional words protection to the public interest is made of paramount importance, but, nevertheless, they are not substantive words of jurisdiction, but complementary words of limitation upon the jurisdiction conferred by the language immediately preceding."

Upon a reading of the additional procedural provisions of the Trade Commission Act providing for complaint and answer in writing, taking and filing of testimony, findings of fact, making of order upon the evidence when reduced to writing, appeal to court, as above outlined, one could not hope to convince a court that the commission, in order to save time and expense could successfully invent a "short cut" in procedure and adopt a policy and practice against wrongdoers in commerce directly contrary to those due process provisions written into the act by Congress.

On March 17, 1925, amended April 30, 1927, and September 17, 1928, the commission adopted a rule of procedure and policy stating: "In the interest of economy and dispatch of business, as well as the desirability of accomplishing the ends of the commission with as little harm to respondents (wrongdoers in commerce) as possible (therefore) all cases should be settled where they can be by stipulation unless the public interest demands otherwise."

By the elimination of the handicap of public interest the commission immediately assumes jurisdiction by stipulation where it believes no public interest is involved, even though "public interest" appears to be the test to give it jurisdiction.

Under this rule the commission, upon convincing itself that a party is guilty and without giving to that party a chance to be heard or taking a single line of testimony or issuing its complaint or making its findings of fact after an unbiased hearing as required by law, sends by mail to the accused, not its complaint as required by law, but a letter including a stipulation of facts which it has found by investigation, and stating that if the accused will sign the enclosed stipulation admitting his guilt the government will keep secret and from the public his name and the facts of his guilt, quoting from the form of letter used, "As the commission is of the opinion that the law is being violated."

In order to further induce the signing of the stipulation the party charged is told that if he does not sign the government will proceed in the public interest to issue its complaint against him.

The effect of such "short cut" can be well imagined. Few resist; the easiest way out is to sign on the dotted line. To those who refuse to sign not much hope remains, because they have been told that judgment has been rendered in advance, even though the commission will then proceed to take testimony and find the facts already set out in the

stipulation. No less than 870 proceedings of this character were had, as shown from the commission's latest record, dated June 1, 1931.

No doubt thousands of such stipulations can be easily obtained to expedite and save money on law enforcement. The suggestion not to bother with complaints and lawyers and the offers of prompt justice will if continued be limited only by the ability of the commission's employees to write letters and devise shorter cuts. But there is a likelihood that these alleged and much advertised advantages may be decidedly over-balanced by the dangers always present from the use of power which the Supreme Court has not yet seen fit to approve as seen from Judge Sutherland's opinion in the Raladam case.

It is not so long ago that Mr. Justice Holmes, in Federal Trade v. American Tobacco Company (264 U. S. 290, 307), said this about one of the commission's short cuts: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Comm'n v. Brimson, 154 U. S. 447, 479)."

Another method which seems contrary to the provisions of section 5 of the act is the commission's rules governing what it calls "trade practice conferences," wherein it assumes to regulate unfair methods in competition in wholesale quantities contrary, in my opinion, of its defined authority. It claims this result for its short-cut rule and newly invented proceedings: "It deals with a whole industry as a unit."

Here again it attempts to dispense with the bothersome formality of a complaint, the taking of testimony, hearing or findings of fact, or the use of any of its other powers specifically given to it by Congress over all unfair methods of competition in an industry, and it offers this statement

publicly in reference to its all-embracing rule for the conduct of such trade conferences: "It performs the same function as a formal complaint without bringing charges, prosecuting trials or employing any compulsory process, but multiplies results as many times as there are members in the industry who formerly practiced the methods condemned and voluntarily abandoned."

Under this rule 130 proceedings have been conducted to regulate commerce. Until the Supreme Court's opinion in the Raladam case on May 26, 1931, the commission, after the use of the above rules for over five years, had arrived at the state of mind when it believed its powers, when used in the public interest, were not much limited over commerce.

Finality of the commission's judgments appeared to be its hope in regulating commerce by obtaining obedience to its administrative mandates, which were far-reaching in their power to persuade, although there might be at times a serious question as to whether the law had really been violated. And all this even though "the question (of fact) is one for the final determination of the courts and not of the commission" (Federal Trade v. Gratz, 253 U. S. 420, 427; Federal Trade v. Beech Nut Co., 257 U. S. 411, 453, cited in Raladam case). "Official powers cannot be extended beyond the terms and necessary implications of the grant. If broader powers be desirable they must be conferred by Congress. They cannot be merely assumed by administrative officers; nor can they be created by the courts in the proper exercise of their judicial functions" (Raladam case).

The good faith and uprightness of the members of the commission and its lawyers are not in question. There is no doubt but that it has rarely used its power in the wrong direction against violators of some law or other, but, as has frequently been said by the courts, this is a government of laws, not of men. The high quality of honesty and fairness existing to-day in the commission might be a thing of

the past to-morrow. Positive protection to the citizen by due process was in the mind of Congress when it wrote section 5 of the Federal Trade Act and all of its safeguards.

The commission had long been of the opinion that its conclusions and right to make conjectures in the public interest need not be supported by the taking of testimony. Regarding the use of such practices the court said in the Raladam case that the testimony of the physicians called by the commission and the putting into the record of a printed list of those selling anti-fat remedies was not the testimony of suffering competitors as contemplated by law. This prerequisite was left without proof and remains, said the court, at best a matter of conjecture. Something more substantial than that is required as a basis for the exercise of the authority of the commission.

As a people we are not content to have our rights tried by administrative fiat. If it seems only to the Trade Commission or any commission that the enlargement of its powers is desirable for the reasons given, we then have a fair example of benevolent despotism (Bruce Wyman, Jurisdictional Limitations, Upon Commission Action, 27 Harvard Law Review, 545; Yick Wo v. Hopkins, 118 U. S. 356, 369, 370; Interstate Comm'n v. Louisville, 227 U. S. 88).

"Although Parliament had left procedure to the discretion of the board, it would violate principles of statutory construction to interpret general words as abolishing due process. It is autocratic and bureaucratic" (1 Blackstone Commentaries, p. 91). "So when the final act is legislative the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same as would arise in the trial of a case" (Prentis v Atlantic Coast Line, 211 U. S. 210, 227).

Preventing monopolies combines and conspiracies has been for several years the least of the commission's activities. Its endeavors are now largely directed to prevent the

false advertising of patent medicines. Its stipulations for the month of April, 1931, included tobacco habit, bust developers, wrinkle oil, gland treatments, pile cures, ear drums, lucky stones, remedies for sterility, stomach and bowel disorders and many others of the same character. Of its 52 orders and stipulations entered and filed for April, 1931, enumerated in its report of May 25, 1931, only one refers to price-fixing and this bears only in a slight degree upon an attempt to monopolize. To students of anti-trust law who looked with President Wilson to the Federal Trade Act as the hope of the nation against combinations, conspiracies and monopolies, this devotion to the censorship of medical advertising seems to have taken it far afield.

The court, not intending to comfort medicine men by its decision against the commission, strongly indicated that the work of policing patent medicine advertisements did not rise to the dignity of preventing monopolies and conspiracies, or the things Congress told the commission to do when it said, referring to the police power of Congress over drugs: "Whether the respondent (anti-fat seller) in what it was doing was subjecting itself to administrative or other proceeding under the statute relating to the misbranding of foods and drugs we need not now inquire, for the administration of that statute is not committed to the Federal Trade Commission."

If the commission derived its authority under the police power of the constitution rather than from the commerce clause, its power could be as direct and as immediate as an arresting officer, but then it could only move by a proper proceeding such as a warrant for arrest, hearing and other protective measures (Ernest Freund, The Police Power).

The unanimous opinion of the Supreme Court concluded with this: "One of the facts necessary to support jurisdiction to make the final order to cease and desist is the existence of competition; and the commission cannot, by assum-

ing the existence of competition, if in fact there be none, give itself jurisdiction to make such an order. If as a result of the inquiry it turn out that the preliminary assumption of competition is without foundation, jurisdiction to make that order necessarily fails, and the proceeding must be dismissed by the commission (compare Federal Trade Commission v. Klesner, supra, pp. 29-30). That course should have been followed here."

In the Kwock Jan Fat case (253 U. S. 454, 464) the Commissioner of Immigration hurdled the congressional requirements directing him to find facts only upon testimony reduced to writing, by using statements, to warrant him in ordering deportation, from a letter written by the Chinaman's lawyer who had complained against the practice of circumvention. The Supreme Court in sending the case back for a hearing according to law said, after referring to the great power given to the commissioner by Congress: "It is a power to be administered, not arbitrarily and secretly, but fairly and openly under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved. . . . It is the province of the courts, in proceedings for review, to prevent the abuse of this extraordinary power and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment . . . It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded . . ."

To paraphrase this, we might add that it is better for much fake advertising to go unpoliced by so drastic a manner than to have one honest business man put out of existence by the trade commission's procedure disregarding due process by drawing stipulations and holding conferences as a substitute for its legal authority to proceed by complaint

and finding of facts, and letting the court, not the commission, pass upon the ultimate fact of guilt.

Not always does the Supreme Court appear to fully recognize the misuse of power by administrative fiat. Lack of alertness on the part of respondents' lawyers to protect clients' rights leaves many misuses in procedure go unnoticed. The matter of the requirements of due process before administrative bodies has been a lively subject for discussion in academic circles in recent years (Albertsworth, "Judicial Review of Administrative Action," 35 Harvard Law Review, 127; Hardsman, "Judicial Review as a Requirement of Due Process," 30 Yale Law Journal, 681; Tollefson, "Administrative Finality," 29 Michigan Law Review, 839).

By a coincidence, on the same day that Justice Sutherland read his opinion in the Raladam case, Circuit Judge Bryan of the Fifth Circuit, in Arnold Stone Company v. Federal Trade Commission, rendered a similar opinion. In this case the stone company mixed 75 per cent. of crushed natural stone with cement and called it "cast stone." It was shown by undisputed testimony that architects, builders and engineers, and those who dealt in the cast stone generally, did not understand "cast stone" to be a solid block of stone. But the commission held that the public interest demanded that the business cease because the respondent deceived the purchasing public. Judge Bryan said: "That finding or inference is not supported by any testimony, and at best is founded upon a very remote possibility for the occurrence of which it is difficult to conceive that petitioner would be responsible (citing cases). The remote possibility or fanciful theory of private injury is not enough to authorize the commission to issue an order to cease and desist from a business practice which cannot reasonably be said to constitute an unfair method of competition."

The commission's declaration of what is and what is not an unfair method of competition does not appear to be per se so surely right in all cases as to justify business men to sign stipulations or enter into agreements to go out of business until they consult their lawyers, who might find cause to resist the temptation of signing and quitting, and to try out in a lawyer-like way the serious questions of fact and law involved.

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Since writing the above, Professor Beer has directed the attention of the Editor to the ruling of the United States Supreme Court in the Raladam Case permitting the Commission to endeavor to obtain evidence of interference with and injury to competition in the sale of fat reducers and to the following recent cases:

"In Vivadou Incorporated v. Federal Trade Commission, United States Circuit Court of Appeals, 2nd Circuit, on November 2, 1931, reverse order of Commission in a Section 7 Clayton Act Case, holding it had no jurisdiction on the ground, 'There is no such proof of public interest adversely affected by reason of either the purchase of the Melba Manufacturing Company in the manner described or of the stock of the Smith Company, *nor was there a substantial lessening of competition,*' to give Commission jurisdiction."

In further support of Professor Beer's contention that the Commission is wrong too often to assume power which he claims it does not possess, and to invent proceedings not found in the organic Federal Trade Act and to convict traders of law violations without the issuance of a formal complaint required by Section 5 of the Act, he directs our attention to another recent case, Flynn v. Federal Trade Commission, C. C. A. 4th Circuit, decided October 12, 1931, where the Court said:

" 'Certainly Congress never intended that the machinery of the Federal Trade Commission, severe as its operation can be made, should be set in motion for the settlement of private controversies, when the courts can act. The official character of the Commission makes it all the more necessary that it act only when the public interest is involved. *It was never intended that the Commission should act the part of a petty traffic officer in the great highways of commerce.*' "