

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW
IN SUPPORT OF RECOMMENDATION NO. 10

Unlike the orders of other Federal agencies included in the Committee's study, orders of the National Labor Relations Board are not self-enforcing. Rather, the Board must seek an order of enforcement from a Court of Appeals. This involves a period of waiting to see if a party to the case intends to seek judicial review of the order. It serves no useful purpose but operates to delay the effectiveness of NLRB orders and to impose unnecessary costs on the Board.

Orders of other agencies, as detailed herein, are effective unless set aside upon court review. No reason for continuation of this special treatment of NLRB orders has been discovered, and it is the conclusion of the Committee that these orders should be accorded the same finality given to the orders of other agencies.

The problem was considered in detail by the 1961-62 Administrative Conference, and that Conference recommended a procedure which would result in automatic judicial enforcement of NLRB orders if no party promptly challenges the order. The procedure would have afforded a period of 45 days within which to challenge the order. If, after due notice to all parties, no such challenge were forthcoming, the order would be enforced without further proceedings by the entry of an appropriate court decree. (Recommendation No. 18 of the 1961-62 Conference.)

This relatively non-controversial recommendation has not been implemented, apparently because it has been linked with other more controversial proposals to amend the National Labor Relations Act. The Committee believes that the recommendation is sound. The supporting reasons are set forth in the report which accompanied the 1962 recommendation, attached hereto as Appendix II. Appendix I is a current review of the subject.

SCOPE OF MEMORANDUM

Professor Jaffe has noted that problems concerning the enforcement of administrative regulations and orders

“arise in large measure from the division of the enforcement function between agencies and the courts. . . . [The most common sanctions for

disregard of administrative orders] cannot be imposed without at some point running the gauntlet of judicial scrutiny, however much the degree of scrutiny may vary in different situations. When the process is the ultimate one of execution, it is customary for judicial action to precede execution." Jaffe, *Judicial Control of Administrative Action* (1965) at 261.

He has also pointed out that there are

"two stages in which the character of a remedy may be brought into question. Labor Board orders, for example, are indefinitely subject to court review and cannot be enforced unless and until a court, on motion of the Board, enters its own enforcing decree. Other orders become final, usually after sixty days, if the respondent has not sought review within that period." *Id.*, at 266.

Enforcement statutes for orders of the various administrative agencies and executive departments listed in the discussion section of this memorandum have been examined in an attempt to discover which agencies, in addition to the NLRB, issue orders which are not self-enforcing. Assuming absence of voluntary compliance with a given order, the NLRB must, in practice, take the initiative to subject its own orders to judicial review in order to insure their enforcement. Other agencies, *e.g.*, the FTC, may rely upon an aggrieved party being required to institute review proceedings on penalty of having the order in question become final without judicial review.

No attempt has been made to go beyond the statutes themselves into the rules of practice of any agency. Nor has any attempt been made to examine the legislative history of any of the various statutory provisions. The review statutes have been classified for descriptive purposes into four general categories.

CONCLUSION

Of all of the agencies examined, only the NLRB issues non-self-enforcing orders. Orders of the other agencies, if reviewable, become final within a specified time unless a petition for review is filed by a party aggrieved by the agency's action.

DISCUSSION

The review procedures may be grouped into four general categories:

1. *NLRB Orders*. 29 U.S.C. § 160(e) provides in part:

"The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States within any circuit or district, respectively, wherein the unfair labor practice in ques-

tion occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28."

Section 160 (f) provides:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

The operation of the review procedure established by these provisions is fully discussed in Recommendation 18 of the 1962 Administrative Conference. Here it is sufficient to say that these provisions differ in two important respects from the other statutory patterns for judicial review discussed below. *First*, section 160 (f) provides for no time limit within which an aggrieved party must file a petition for review before the order in question becomes enforceable. *Second*, the agency itself is given the power to initiate action before the reviewing court. The effect of these provisions is clearly to deprive all NLRB orders of enforceability until passed upon by a court of appeals.

2. *Other Orders Reviewed by Courts of Appeals.* A second review procedure (and the most frequently encountered among those examined) is illustrated by the Federal Trade Commission statute. 15 U.S.C § 45 (c) provides:

"Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, part-

nership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. . . Upon such filing of the petition the court shall have jurisdiction of the proceeding, and of the question determined therein concurrently with the Commission until the filing of the record and shall have the power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite* . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28."

15 U.S.C. § 21(c) is another review provision essentially similar to section 45(c) and governs Robinson-Patman Act cases. Section 45(g) specifically provides that FTC orders become final upon the expiration of certain periods of time following the entry of the order, action by a court of appeals, or filing of a petition for certiorari, or immediately upon denial of a petition for certiorari.

Other agencies whose orders are reviewed under essentially similar provisions, becoming final after sixty days unless a petition for review is filed are, with the appropriate citation:

(1) Atomic Energy Commission (28 U.S.C. § 2342; 42 U.S.C. § 2239(b)).

(2) National Transportation Board (49 U.S.C. § 1468 (a)). A special provision, 49 U.S.C. § 1485(e), expressly imposes a duty to observe and comply with orders while they are in effect on the parties at whom they are directed. In most other cases this duty is implicit but is not expressly set out.

(3) Federal Communications Commission (47 U.S.C. § 402(a); 28 U.S.C. § 2341 et seq.).

(4) Federal Power Commission (15 U.S.C. § 717r(b); 15 U.S.C. § 8251).

(5) Securities and Exchange Commission (15 U.S.C. § 77i(a)).

(6) Subversive Activities Control Board (50 U.S.C. § 793).

(7) Department of Agriculture (certain orders) (7 U.S.C. § 346a(i); 28 U.S.C. § 2341 et seq.).

(8) Department of Health, Education, and Welfare (certain orders) (21 U.S.C. §§ 348(g), 355(h); 15 U.S.C. § 1262(a)(2)(B)).

(9) Department of Justice (certain orders) (22 U.S.C. § 1631g(f)).

In other cases the petition must be filed in a court of appeals within thirty days,

(1) Federal Coal Mine Safety Board of Review orders under 3 U.S.C. § 478(a) and,

(2) Department of Agriculture orders under 7 U.S.C. § 194(a),

or in a court of appeals within ninety days,

- (1) Department of Defense orders under 33 U.S.C. § 505 and,
- (2) Department of Health, Education and Welfare orders under 21 U.S.C. § 371(f).

3. *Orders Reviewed By Other Courts According to Special Statutory Provisions in Each Case.* The following agencies issue certain orders which are reviewed according to particular procedures set out in the Code section cited. In no case, however, is an agency required to seek judicial review of its own order, as in NLRB cases:

- (1) Interstate Commerce Commission (in the district courts), 28 U.S.C. § 1336(a);
- (2) Civil Service Commission (in the district courts within thirty days), 5 U.S.C. § 118k(c);
- (3) Treasury Department orders, issued prior to Reorganization Plan No. 1 of 1965 by the Tariff Commission (in the Court of Customs and Patent Appeals), 19 U.S.C. § 1515;
- (4) Certain orders of the Department of Agriculture (in the district courts), 7 U.S.C. § 1365 (15 days), 7 U.S.C. § 608(c) (15) (B) (20 days), 7 U.S.C. § 499g(c) (30 days), and 7 U.S.C. § 210(f) (one year);
- (5) Department of Labor orders under 33 U.S.C. § 921 (in the district courts within 30 days); and
- (6) Post Office Department orders under 39 U.S.C. § 6212 (in the District of Columbia Court of Appeals only and within 20 days).

4. *Orders Reviewed Under the Administrative Procedure Act.* The orders of some agencies are reviewable only in nonstatutory review proceedings in accordance with the Administrative Procedure Act, 5 U.S.C. § 703:

"In the absence or inadequacy [of a statutory review proceeding], the form of proceeding for judicial review shall be . . . any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. . . ."

Orders reviewable only by injunction or declaratory judgment under these general provisions include orders not mentioned above of the following agencies:

- (1) Federal Home Loan Bank Board,
- (2) Department of Agriculture,
- (3) Department of Commerce,
- (4) Department of the Interior,
- (5) Department of Justice,
- (6) Department of Labor,
- (7) Department of State and,
- (8) Department of the Treasury.

In these situations, however, the administrative order is final and effective unless and until it is set aside by the court proceeding challenging its validity.

SUMMARY

In categorizing the various types of judicial enforcement provisions and classifying agencies in these categories, no attempt has been made to be exhaustive beyond the list of administrative proceedings set out in the document *Special Statutory Provisions Governing Judicial Review of Federal Administrative Proceedings, Parts I & II*, Committee on Judicial Review, Administrative Conference of the United States, August, 1962. Citations found therein were updated through 1967 by reference to Supplement III to the United States Code, 1964. Provisions of the Code relating to the Departments of Transportation and Housing and Urban Development were also examined. The focus of the inquiry was to discover whether among the various types of administrative orders described in the above mentioned document there were any which *must* be enforced in a manner similar to NLRB orders. The NLRB situation was found to be unique.

APPENDIX I

1962 RECOMMENDATION 18 WITH SUPPORTING REPORT

RECOMMENDATION NO. 18

It Is Recommended That—

The National Labor Relations Act be amended to provide in substance that a petition for review of a Board decision and order may be filed within 30 days in the appropriate court of appeals by the party seeking review; that if no such petition is filed, the board shall forthwith file a copy of the Board decision and order in an appropriate circuit court of appeals of the United States and that notice of such filing shall be served upon each respondent; that 15 days shall then be given to each respondent after notice to file objections to the order; and that if no such review is requested within that time, the clerk of the court shall then enter forthwith a decree enforcing the order of the Board.

REPORT OF THE COMMITTEE ON JUDICIAL REVIEW OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES IN SUPPORT OF RECOMMENDATION ON ENFORCEMENT OF NLRB ORDERS

I. THE PROBLEM

Under the present statutes, orders of the National Labor Relations Board lack binding effect until entry of a decree of enforcement by a Court of Appeals. It has been contended that this requirement contributes to the delays which constitute a serious impediment to the vitality of the national labor relations laws. The question is whether there is a need to remedy the situation and, if so, what measures would be appropriate.

II. PRESENT PROCEDURES FOR ENFORCEMENT OF NLRB ORDERS

A. *The Statute*

Section 10(c) of the National Labor Relations Act, as amended, provides that if the Board finds that a person has engaged in an unfair labor practice, "then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

Section 10(e) provides that "The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

Under Section 10(f), any person aggrieved by a final order

of the Board may obtain a review of such order in a court of appeals under similar proceedings.

Section 10(g) provides that the commencement of proceedings under section 10(e) or (f) shall not, unless specifically ordered by the court, operate as a stay of the Board's order. Section 10(i) states that "petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

B. The NLRB's Statements of Procedure

Pursuant to section 3(a)(2) of the Administrative Procedure Act, the NLRB has published in the Code of Federal Regulations a series of Statements of Procedure. The portions dealing with enforcement of Board orders are as follows:

1. Compliance with Board Decision and Order

Section 101.13. (a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D.C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

2. Judicial Reviews of Board Decision and Order

Section 101.14. If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. Or, the respondent may petition the circuit court of appeals to review and set aside the Board's order. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustain them if they are in accordance with the requirements of the law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's decree, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

3. *Compliance With Court Decree*

Section 101.15. After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's decree, the general counsel may, on behalf of the Board, petition the court to hold him in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

4. *Back-Pay Proceedings*

Section 101.16. After a Board order directing the payment of back pay has been enforced by a court order, the regional office computes the amount of back pay due each employee. If informal efforts to dispose of the matter prove unsuccessful, the regional director is then authorized to issue a "backpay specification" in the name of the Board and a notice of hearing before a trial examiner, both of which are served on the parties involved. The specification sets forth the computations showing how the regional director arrived at the net back pay due each employee. The respondent must file an answer within 15 days of the receipt of the specification, setting forth a particularized statement of its defense. The procedure before the trial examiner of the Board is substantially the same as in [original unfair labor practice case].

C. *Internal NLRB Procedures in Enforcing Board Orders*

Upon the issuance of a Board order in an unfair labor practice proceeding directing the respondent employer or union to cease and desist from committing the unfair labor practices which the Board has found and directing the taking of such affirmative action as the Board finds will effectuate the policies of the Act, the Regional Office in which the case arose attempts to secure the voluntary compliance with this order. If such compliance is not achieved the Regional Office refers the case to Washington for the institution of enforcement proceedings in the appropriate Court of Appeals. The Appellate Court Branch seeks full enforcement of all Board orders referred by the Regional Offices, unless the Board itself directs otherwise. Court proceedings may also be instituted by the employer or union against whom the order runs, or by any person who is aggrieved by the Board's failure to grant the relief to which such person believes himself to have been entitled.

When the case is received by the Appellate Court Branch (whether for enforcement or on petition for review) the case is assigned to a briefing attorney and to a briefing supervisor. Such assignments are normally made in the order in which cases are referred for enforcement and, depending upon the volume of work in the office at a particular time, will be made from 1 day to 2 weeks after the case is received. The briefing attorney reads the record, the briefs and exceptions filed by the parties, the intermediate report, and the Board's decision, and then discusses the issues in the case with his supervisor. This discussion, which normally takes place within a week after the case is assigned, will determine whether court proceedings will follow immediately or whether the case will be referred back to the Board for reexamination or correction in the

light of problems or possible errors which the briefing attorney and his supervisor may have discovered. Only a very small percentage of the cases are referred back to the Board. The balance are prepared immediately for court review. Normally a petition is filed in the court anywhere from 3 weeks to 2 months after referral of the case for enforcement, depending upon the complexities of the case. Special circumstances, for example settlement negotiations, may delay the filing of a petition further in some cases.

The briefing attorney prepares a draft of the proposed brief to be filed in the Court of Appeals in support of the Board's order. The briefing attorney also prepares a designation of the parts of the record which are to be printed for the court's use in reviewing the Board's order. The briefing supervisor reviews the brief and, using his best judgment, may to the extent that it may be necessary either revise the draft or return it to the briefing attorney with suggestions. The brief is then reviewed by the Assistant General Counsel, who may have further changes to suggest. Shortly before the date on which the brief is due in court (the due dates are fixed by court rule varying from circuit and ordinarily depend upon the date the proceeding was instituted), the brief will be sent to the Government Printing Office and will be reviewed in page proof by the Associated General Counsel and occasionally by the General Counsel where the case may present issues of special interest to him. In many cases a further brief, a "reply brief", is filed following the receipt of the opponent's brief—such a brief is prepared and reviewed in the same manner.

After all the briefs are on file, the Court of Appeals sets the case for oral argument, which is ordinarily presented on behalf of the Board by the brief writer or the supervisor assigned to the case. If the court's decision is adverse or contains language which appears contrary to the best interests of the Board, the brief writer and supervisor may recommend the filing of a petition for rehearing. If filing such a petition is approved by the Assistant and Associate General Counsels, it will be prepared and reviewed in the same manner as the brief. . . .

Over the past 10 years a little more than 50 percent of the Board's decisions and orders in unfair labor practice cases have been taken to court on either a petition for enforcement or a petition for review. The figure for Fiscal 1960 was 52 percent. The highest recent figure was 73 percent in 1952—a figure which stands alone as inexplicably high; the lowest was 47 percent in 1955. Omitting 1952, the 10-year figures vary between 47 percent and 57 percent.

The caseload of referrals for enforcement or review in recent years has been as follows:

Fiscal year:	<i>No. of cases</i>
1961 (to April 21)	173
1960	197
1959	155
1958	110
1957	76

The Appellate Branch also handles contempt proceedings in cases involving disobedience of a decree enforcing a Board unfair labor practice

order, Section 10(e) interim injunctive relief pending enforcement or review proceedings in the Courts of Appeals, and enforcement of Board backpay orders issued following the entry of a decree requiring a respondent to make whole employees who have been the victims of discrimination. Unlike proceedings for enforcement of a Board order, which are initiated following referral from a Regional Office without further authorization from the Board, contempt proceedings and proceedings looking toward a 10(e) injunction are cleared with the Board and specifically authorized in each case. Upon the receipt of a recommendation from a Regional Officer for the institution of contempt or 10(e) proceedings, the case is assigned to a brief writer and supervisor, just as in a regular enforcement case. They analyze the case and, if they concur with the Region's recommendation, they prepare a memorandum to the Board for the signature of the General Counsel recommending the institution of appropriate proceedings. If they disagree with the Region's recommendation, they prepare a memorandum for the Assistant General Counsel returning the case to the Region. In either event, the memorandum is then reviewed by the Assistant General Counsel and the Associate General Counsel before being forwarded either to the General Counsel for his approval or transmission to the Board, or back to the Regional Office, as the case may be. Where the question appears sufficiently close, a recommendation adverse to that of the Region may also be submitted to the General Counsel, and by him to the Board.

If the Board approves the institution of contempt or 10(e) proceedings, the papers initiating the court proceeding are prepared by the briefer and his supervisor and are reviewed in the same manner as an enforcement brief. Contempt proceedings may involve a protracted hearing before a court-appointed master and all the investigation and preparation for trial which precedes an ordinary unfair labor practice case. This work will normally be handled by the briefing attorney, often with the active cooperation of the Regional Office. Section 10(e) proceedings normally involve a short oral argument before the Court of Appeals, which will ordinarily be handled by the briefer or supervisor or Assistant General Counsel. Subsequent steps to a contempt proceeding such as briefs to the Master, exceptions to his report and oral argument in the Court of Appeals will be handled in the same manner as briefs and oral argument in an enforcement proceeding. Because of the importance and exacting demands of contempt and 10(e) litigation, such cases will normally be assigned to brief writers of outstanding capacity or long experience.

Backpay proceedings are referred in precisely the same manner as other proceedings for enforcement of Board orders, and are handled in the same manner as other enforcement proceedings except that instead of a routine petition for enforcement, we file a motion with the court asking that it direct the party objecting to the backpay award to indicate its grounds for stating that the court's decree should not be amended to include the specific amounts of backpay the Board has found due. This procedure effectively narrows the issues before the court so that our brief can be directed only to the specific points at issue rather than encompassing all conceivable issues in the case.

(Statement of Dominick L. Manoli, Associate General Counsel of the

NLRB before a Subcommittee on the House Committee on Education and Labor, May 8, 1961.)

D. Background of the Provision Requiring Court of Appeals Enforcement Order

At the time when the National Labor Relations Act was passed in 1935, the enforcement provisions represented a great advance over the situation which had prevailed under earlier Labor Boards during the NRA period. Milton Handler, who was General Counsel of the National Labor Board in the NRA period, testified that "under the present statute, interminable delays have resulted from the fact that numerous administrative hearings have been held by agencies without power to enforce their decisions. . . . Hence the need of an administrative agency with the power to issue orders enforceable in the courts." To the critics who asserted that unprecedented powers were to be vested in the new Board, Mr. Handler replied that "it must not be forgotten that the orders of the board are not self-executing; they can only be enforced in the courts. . ." (Legislative History of the NLRA, p. 66).

Francis Biddle, who was chairman of the old National Labor Relations Board, described the unsatisfactory enforcement situation:

Between July 9, 1934, the date of its creation, and March 2, 1935, the National Labor Relations Board issued findings and decisions in 111 cases. In 86 of these the Board found that violations had occurred. In only 34 of these did the employer make appropriate restitution in accordance with our decision. In the remaining 52 of the 86 cases such compliance was not obtained. In these 52 cases, therefore, it was necessary for the Board to attempt to obtain enforcement through the removal of the 'blue eagle' or through court action. Of these 52 cases the Board referred 33 to the Department of Justice.

The status of these 33 cases is as follows: In one case a bill in equity has been filed in the district court. Seven cases have been referred to the local United States Attorney, on the understanding that further evidence must be secured by him in cooperation with the Board before instituting suit. In none of these cases has suit been brought. In nine cases the Department of Justice has advised the Board that further investigation on certain points is necessary before the case can be referred to the local United States Attorney, and in three cases the Department has advised that as a matter of law no suit is justified. In 13 cases the Department has not proceeded for various reasons . . .

What I am getting at is not in any sense a criticism of the Department of Justice, but to show that the system under which we are working and the machinery under which we are trying to enforce the law makes inevitable the break-down of legal enforcement, and the necessity for such

machinery as the Wagner bill includes. (Legislative History of the NLRA, p. 1469).

Mr. Biddle was of the opinion that "the solution . . . is that adequate powers be given to a single experienced agency to find out the facts and carry through enforcement of the law up to the point of review in the circuit court of appeals."

Senator La Follette commented: "Even that will be slow enough."

Mr. Biddle replied that Senator Wagner had eliminated one step by providing they should go directly into the court of appeals rather than the district court. He noted that "it is not in any sense a novel procedure but on the contrary is one which has been adequately tested by the experience of other administrative tribunals, notable the Interstate Commerce Commission and the Federal Trade Commission." (Legislative History of the NLRA, pp. 1471-1473).

In summary, at the time of enactment of the court enforcement provision of the Wagner Act, it was regarded as a distinct improvement over the pre-existing situation; it was in line with the Federal Trade Commission procedure in existence at that time; and the delays in obtaining an effective order which have recently been observed were not then foreseen.

In 1940, the Monograph of the Attorney General's Committee on Administrative Procedure dealing with the National Labor Relations Board noted (p.2) :

The Board's orders are not self-executing; no penalty attaches to a violation thereof; and the Government must resort by petition to the appropriate circuit court of appeals for enforcement of the order. . . . Since employers have nothing to lose by violating the provisions of the Act, except to receive an admonition to discontinue their activities, amendments to provide for more effective sanctions have frequently been advocated. Proponents for change have suggested that . . . Board orders be made effective upon issuance . . . none of these suggestions has eventuated in congressional action.

In its Final Report in 1941, the Attorney General's Committee on Administrative Procedure noted (pp. 82-83) :

Statutes creating administrative tribunals generally provide methods by which their determinations may be judicially reviewed. In this way, a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the I.C.C. other than a suit by the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938, and it is true today of the National Labor Relations Act. . . .

A method of review which has found considerable favor in recent legislation is that first enacted in the Federal Trade Commission Act of 1914, that is, review in a Circuit Court of Appeals with discretionary appellate jurisdiction in the Supreme Court. This method has been enacted both for cases in which the administrative order is self-operative as those under the Federal Trade Commission Act since 1938, and cases in which the order carries no sanction until it is approved by the court, such as in the case of orders of the National Labor Relations Board now.

However, the Attorney General's Committee did not make any recommendations to change the situation under which the orders of the NLRB lack a sanction until the Board obtains an enforcement order from the Court of Appeals.

The National Labor Relations Act was substantially amended in 1947 (Taft-Hartley Act) and in 1959 (Landrum-Griffin Amendments), but the Legislative Histories do not indicate any proposals or debates dealing with delay in enforcement due to the necessity for the Board to obtain a Court of Appeals order before the Board's order would carry any sanctions.

III. CRITICISMS AND PROPOSED REMEDIES

The "Cox Panel" Recommendation

(Report to the Senate Committee on Labor and Public Welfare on Organization and Procedure of the NLRB, prepared by the Advisory Panel on Labor-Management Relations Law, 86th Congress, 2d Session, Senate Document No. 81.)

After noting that "no change . . . is more important than speeding up the processes of decisions in unfair labor practice cases" and that [rights are] "hardly vindicated by a cease-and-desist order which does not become effective through court enforcement until two years later" (p. 10), the Panel made the following analysis and recommendation (pp. 16-17) :

Enforcement and review of Board orders.—Under the present statute an NLRB order carries no legal sanctions. The respondent may ignore it. The Board may file a petition for enforcement and 378 days later, on the average, a judicial decree may be entered enforcing the order of the Board.²⁹ Violation of this decree would be punishable as contempt. The long delay between the NLRB decision and an effective judicial decree is another unsatisfactory aspect of the present unfair labor practice procedure.

One cause of the delay is the slowness of all appellate litigation. It takes time to print records and briefs. In some circuits the dockets are heavy. Some circuit courts do not sit in the summer months. The average time is built up by the 4 months minimum delay attendant upon peti-

²⁹ Memorandum from Hon. Boyd Leedom to a member of the staff of Senate Committee on Labor and Public Welfare, Feb. 11, 1959.

tions to the Supreme Court for writs of certiorari and the year or longer which the Supreme Court takes to hear cases on the merits. Manifestly this aspect of the problem is not peculiar to labor-management cases and cannot be solved by changes in the National Labor Relations Act.

A controllable factor is the time spent in negotiating about compliance with the Board's order. Once an order is passed there is no occasion for reviews by attorneys on the staff of the General Counsel or the proposed Administrator. If immediate compliance is not forthcoming, a judicial decree should be obtained.

The necessity of the Government's seeking judicial relief in order to put sanctions behind NLRB orders encourages procrastination by both private parties and the NLRB staff. No one questions the importance of allowing a full opportunity for judicial review but after the Board issued an order in a contested case it is not unfair to put upon the respondent the burden of complying or promptly seeking judicial relief.

The Federal Trade Commission Act provides that orders issued by the Federal Trade Commission under section 5 shall become final unless a petition for review is filed within 60 days. Violations of an order which has become final are punishable by a penalty of \$5,000 for each day the violation continues. The monetary penalty seems inappropriate but it would expedite the entire process of enforcement and judicial review to adapt the rest of the Federal Trade Commission procedure to NLRB cases. An NLRB order should become final if the respondent does not file a petition for review within 30 days. Once the order becomes final the Administrator should be required forthwith to file a copy in an appropriate circuit court of appeals, with notice to the respondent. If the respondent does not file a petition for review within an additional 15 days, the order of the NLRB should, unless the court otherwise directs, be entered by the clerk as the decree of the court. Violations would be punishable by contempt. We also believe that any party to NLRB proceedings should be allowed to intervene in the appellate proceedings. This would clarify an uncertain issue.

These changes would accelerate postdecision litigation without impairing the procedural or substantive rights of any party. The panel unanimously recommends their incorporation into the NLRA. The necessary statutory changes will be found in sections 10(e) and (f) of the attached bill.

Respectfully submitted.

DAVID L. COLE,
GUY FARMER,
ARTHUR GOLDBERG,
CHARLES GREGORY,
DENISON KITCHEL,
PLATO E. PAPPS,
GERARD REILLY,
LOUIS SHERMAN,
RUSSELL A. SMITH,
GEORGE W. TAYLOR,
W. WILLARD WIRTZ,
ARCHIBALD COX, *Chairman*.

January 15, 1960.

Sections 10 (e) and (f) of the "Cox Panel" bill are as follows:

"(e) Any person (except the Administrator) aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within thirty days after the service of such order a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board and the Administrator and thereupon the Board shall file in the court a transcript of the entire record in the manner and form provided under section 2112 of the Judicial Code. Upon such filing the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant to the petitioner or any other party including the Board such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, the order of the Board. Any party to the proceeding before the Board shall be permitted to intervene in the court of appeals. No objection, that has not been urged before the Board on exceptions shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). Attorneys appointed by the Administrator shall appear on behalf of the Board in any proceeding under this subsection.

"(f) If no petition for review is filed within thirty days, the Administrator shall forthwith file a copy of the order of the Board in a circuit court of appeals of the United States (including the Court of Appeals for the District of Columbia) within any circuit wherein the unfair labor

practice in question was alleged to have been engaged in or where a respondent named in the order resides or transacts business and the court shall cause notice of the filing to be served upon each respondent. Within fifteen days of such service any respondent may file objections to the order, and the court shall thereupon proceed in the manner provided by subsection (e) as if a petition for review had been filed. If objections are not filed within fifteen days of such service, the clerk of said court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order of the Board.

(Note: References to "the Administrator" deal with a separate proposal of the Cox Panel and can be deleted or supplanted by "the Board," as appropriate.)

The "Pucinski Subcommittee" Report

(Report of the Subcommittee on the NLRB of the House Committee on Education and Labor, 1961)

After noting that "by all odds, the witnesses stressed the delay in Labor Board processing of cases as the greatest impediment to effectuating the policy of the United States to encourage the practice and procedure of collective bargaining" (p. 8), and that "the Committee finds that there is much needless delay in enforcement of Board orders" (p. 2), the Subcommittee made the following summary of the testimony received in its hearings:

Enforcement and Review of Labor Board Orders

The problem of delay in proceeding before the Labor Board is compounded by the further delay in gaining judicial enforcement of the Labor Board order. Labor Board orders are not self-enforcing. The Labor Board has no authority to punish for violation of its decrees. Should a defeated party in a Labor Board proceeding decide simply to ignore the Labor Board decree, the Labor Board must request the appropriate court to enforce its order. This process takes, on the average, over a year. (Labor Board Member Boyd Leedom, then Chairman of the Labor Board, informed the Cox Panel in 1959 that the process of obtaining judicial enforcement took 378 days.)

Many defeated parties take advantage of this year's delay. Dominick L. Manoli, Associate General Counsel of the Labor Board, testified that:

Over the past 10 years a little more than 50 percent of the Board's decisions and orders in unfair labor practice cases have been taken to court on either a petition for enforcement or a petition for review. The figure for fiscal 1960 was 52 percent. The highest recent figure was 73 percent in 1952 (tr. 178).

But the year's delay in enforcement is not the only delay; much time is spent administratively prior to seeking judicial enforcement. Jacob Sheinkman, general counsel of the Amalgamated Clothing Workers of America, described the process as follows:

After issuance of such (Labor Board) order, the case is returned

to the regional office of the Board from whence it arose, and there efforts are made to secure voluntary compliance with the terms of the order. In many cases the offending party ignores the plea for voluntary compliance, and only then are steps initiated to secure judicial enforcement by way of a decree of the appropriate U.S. court of appeals. It has been our experience that an average of at least 4 months elapses from the date of the Board order until the necessary papers are prepared and enforcement proceedings commenced in the courts.

The significance of these delays was pointed out by the testimony of Al Hartnett, secretary-treasurer of the International Union of Electrical, Radio, and Machine Workers:

MR. HARTNETT. At the Greeneville Cabinet Co., in Greeneville, Tenn., a man was discharged because of union activity. He was discharged in April or May—I am not sure which it was—of 1950. We filed a charge. The case was first decided by the Board on February 27, 1953. That is a long period of time between the time we filed the charge and the time the finding is finally made by the Board. The employer was told to reinstate three employees and to cease and desist in discouraging union membership. We did not get enforcement of that order even though it was issued on February 27, 1953, until February 8, 1954, almost 4 years elapsing between the time of the incident and the time we finally got enforcement of the order. * * *

As the situation now stands, a Board order is issued. We stumble and fumble along. Nobody really makes any effort to get it compiled with. Maybe there is a posting, maybe there is not. Finally, a sufficiently long period of time has gone by and enough pressure has been generated, maybe somebody finds their way into a courtroom to get enforcement of an order. * * *

CONGRESSMAN ROOSEVELT. Is there any effective date now within which an appeal from a Board order must be made? * * *

MR. HARTNETT. You can just delay, linger and wait. There is no time limit. Delay, linger, and wait. Stall as much as you can, wait as long as you can. By the time that somebody has gotten around to doing something about enforcing the Board order, 9 times out of 10, it is too late. The horse is gone, and the stable needs no locking at this point.

Mr. Hartnett recommended the following:

First, we believe that orders shall be self-enforcing, with the burden placed upon one who contests an order to seek its review within a set period of time rather than as it now is upon the Board to institute enforcement proceedings. Second, we believe that Board orders should be effective for purposes of contempt proceedings pending review, unless the party seeking review can persuade the reviewing court of cause to the contrary and obtain a stay of the Board's order * * *. We suspect that if the advantage of delaying the effectiveness of Board orders were eliminated from review and enforcement proceedings, fewer Board orders would be contested in court. The advantages flowing from elimination of delay to those whose rights

have been infringed and to the public interest in seeking those rights enforced are undeniable. (Prepared statement.)

Mr. Guy Farmer, former Chairman of the National Labor Relations Board, and Mr. Louis Sherman, who served on the Cox Panel, gave joint testimony to the same effect:

We have one very brief recommendation, although a very important one. * * * We recommend that Board orders, which are now of no effect until someone takes them into court to enforce, * * * be made self-enforcing after a given period of time during which a respondent would be given an opportunity to file a petition for review. If no such petition were filed within that time, the Board order would in effect become by filing in court a court order, and any violation of that order would subject that violator to the normal contempt citations.

The Subcommittee then made the following finding and recommendation:

The subcommittee finds that there is much needless delay in enforcement of Labor Board decisions. The losing party "delays, lingers, and waits" because disobedience of a Labor Board order is not punishable.

The subcommittee recommends a legislative change in sections 10(e) and 10(f) to require that, in the absence of an agreement to comply with the Board order, a petition for review of a Board decision and order must be filed within 30 days in the appropriate court of appeals by the party seeking review; that if no such petition is filed, the General Counsel would be required to forthwith file a copy of the Board decision and order in an appropriate circuit court of appeals of the United States and that notice of such filing would be sent to the respondent named in the order. An additional 15 days would then be given to the respondent after notice to seek review by the court. If no such review is requested within that time, the clerk of the court would then issue a decree enforcing the order of the Board.

*Statements of NLRB Officials Before the Pucinski Subcommittee
in 1961*

BOYD LEEDOM, former chairman and present member of the NLRB:

"I think the recommendation of the Cox committee should be adopted and the law changed so that our orders are, to use the phrase that has been applied, self-enforcing. . . . The thing that I think is bad and is different in our agency than in some agencies, is that the aggrieved party can just sit and wait, incapable perhaps of finding any good grounds to present to the court, in petition for review. Notwithstanding that he just sits there and waits and raises no objections, we must go through a long and involved court proceeding in the circuit court of appeals to establish the validity of our order." (Hearings, p. 1056)

STUART ROTHMAN, General Counsel of the NLRB :

"I believe there is merit in the suggestion that the Board's unfair labor practice orders should be 'self-enforcing.' Under the present statutory scheme a Board order carries no sanctions until or unless it is enforced by a court decree. It has been said that the long—and frequently unavoidable delay—between a Board decision and effective judicial decree enforcing that order has militated against effective enforcement of the Congressional policy in this area. To some extent at least this situation might be remedied by providing that a Board order shall become final unless within a specified time, say 60 days, the party against whom the order is directed petitions for judicial review. Absent such a petition timely filed, a decree should be entered enforcing the Board's order upon the Board's application for summary judgment." (Hearings, pp. 1108-9)

"I favor the proposal such as that made by the Cox committee, and reiterate it, in effect, in my prepared testimony. To make the Board order self-executing would be helpful. I should point out that there are other reasons why some of these cases that you refer to, and I don't know the particular ones, may appear to have taken longer than they should have. In some of these cases I believe that it is the situation that they have taken longer than they should have. But there may be a period, of course, after the Board has issued its order where the regional office seeks to achieve voluntary compliance and watches the matter to see whether or not the respondent comes into compliance. And then there may be, by reason of the facts and circumstances of the particular case, some reason why it takes longer in one case than in another. There may be representations which have been accepted that the order would be complied with voluntarily. So there may be instances where a case has taken longer than it should.

"It may be in such a case that the regional office and ourselves should have moved a little more rapidly than it has, to bring about enforcement. But in answer to your question, I support the idea of making Board orders self-enforcing." (Hearings, p. 1310)

FRANK W. McCULLOCH, present chairman of the NLRB :

"I am quite ready to record my support for the suggestions that have been made about the possibility of amending the law to make the Board orders self-enforcing after a reasonable period for the filing of a petition for review by the respondents, and upon failure to so file, going into court, making the Board's orders self-enforcing, somewhat along the same line as has been done by the Federal Trade Commission." (Hearings, p. 1536)

GERALD D. REILLY, former member of the NLRB, now an attorney representing employers, and a member of the "Cox panel":

"If the legislation recommended by the Advisory Panel were adopted, all Board orders would automatically be filed for enforcement in the courts of appeals and would become final unless a petition for review by a party aggrieved was filed within 30 days.

"The purpose of this provision is to avoid the long delays which now occur between a final order of the Board and the docketing of a petition

for enforcement in the courts of appeals. It would also place the burden of obtaining review upon the losing party." (Hearings, p. 766)

GUY FARMER, former chairman of the NLRB, now an attorney representing employers, and a member of the "Cox Panel" made the joint statement with a fellow panel-member, Louis Sherman, who represents unions, which the Subcommittee quoted in its report and recommendations. In addition, the following colloquy occurred:

MR. PUCINSKI: "This is a procedure followed in other agencies now, isn't it?"

MR. FARMER: "The Federal Trade Commission is one agency that follows this procedure."

MR. PUCINSKI: "And it could apply in labor-management relations, in your opinion?"

MR. FARMER: "I see no reason why it should not. Sometimes in the past, the Board for one reason or another, and perhaps because of workload problems, there will be a great delay in filing a petition for review and the case is sort of left hanging there." (Hearings, p. 843)

IV. ANALYSIS OF PROBABLE EFFECT OF THE COX PANEL PROPOSAL

The objective would be to reduce the time within which an effective order can be obtained. Under the Cox Panel proposal, this would be accomplished by the Board order becoming an order of the Court of Appeals within 45 days, unless the respondent has petitioned for review within that time.

The time periods which elapse under the present system during various stages of the enforcement procedure are revealed in the following statistics which have been supplied by Marcel Mallet-Prevost, Assistant General Counsel of the NLRB.

Computation of days involved in case processing—

The following information has been compiled from the files of the Appellate Court Branch. Both the average and median number of days are indicated.¹

Number of days from issuance of Board's Decision and Order to referral of case to General Counsel for enforcement

	<i>Fiscal 1959</i>	<i>Fiscal 1960</i>	<i>Fiscal 1961</i>
Average	62.0	69.8	58.2
Median	35.8	43.0	37.9

¹ Averages are obtained by dividing the total number of days involved in all the cases by the number of cases. Median figures indicate that fifty percent of the cases have longer time periods than the median and fifty percent have shorter time periods.

*Number of days from referral for enforcement until petition filed with
Courts of Appeal*

	Regular cases	Regular plus suspended cases
	<i>Fiscal 1959</i>	
Average	74.3	81.8
Median	67.5	69.4
	<i>Fiscal 1960</i>	
Average	76.6	82.9
Median	69.6	70.8
	<i>Fiscal 1961</i>	
Average	44.8	51.0
Median	44.0	46.8

Action on cases after referral is sometimes suspended for various reasons, such as, to allow the Regional Office time to negotiate compliance of settlement, or to refer the case to the Board for further consideration. This delays the filing of the petition. In 1961 there were 16 such cases out of a total of 153 enforcement referrals. Accordingly, the "Regular Cases" column more accurately reflects the flow of work.

Number of days from filing of petition to decision by Courts of Appeal

	<i>Fiscal 1959</i>	<i>Fiscal 1960</i>	<i>Fiscal 1961</i>
Average	250.9	261.4	313.0
Median	236.7	262.5	240.5

Speaking in very round figures, it takes about 50 days from the date of the Board's order to the date when the case is referred to the General Counsel for enforcement. Again in very round terms, it takes another 50 days until a petition for enforcement is filed, or a total of 100 days before the average case reaches the Court of Appeals. The Cox Panel proposal would reduce this to 30 days, and if the respondent did not petition for review within an additional 15 days, the Board order would become the order of the Court. Of course, if the respondent does petition for review, the present proposal would not affect the amount of time that is consumed in trying the case in the Court of Appeals—roughly 250 days.

The principal effect of the proposal would be to require the respondent to make up his mind promptly whether to seek review. It would probably assist in achieving compliance with the orders of the Board by putting pressure on the respondent to reach this decision. As indicated in the testimony before the Pucinski Subcommittee, there is reason to believe that in a substantial number of cases, the respondent delays compliance while the

Board is going through the rather slow process of seeking an enforcement order. The following figures, supplied by Marcel Mallet-Provost, Assistant General Counsel of the NLRB, seem to bear that conclusion out.

Cases in which respondent complied after referral to General Counsel for enforcement and before Court of Appeals decision

<i>Fiscal year</i>	<i>Referred</i>	<i>Compliance before CA decision:</i>	<i>Percent</i>
1959	155	31	20
1960	197	33	16.7
1961	222	59	26
1962	305	72	23.6

According to Mr. Mallet-Provost, most of the cases of compliance occurred after the petition for enforcement was filed with the Court of Appeals and sometimes after the Board's brief was filed.

One of the principal advantages under the proposed procedure would be the saving of time and effort on the part of the Board's attorneys in this type of case. Where the Board seeks the enforcement order, it must prepare a brief justifying the Board position on points which may not be contested by the respondent. Putting the burden on the respondent to seek review would have the advantage of focusing attention on the particular points which he wants to contest.

It is not believed that the proposed procedure would shift the "burden of proof" before the Court of Appeals. Whether the respondent is petitioning for review or the Board is petitioning for an enforcement order, the statutory test of "substantial evidence on the record considered as a whole" would apply in either situation.

The proposed procedure would not appear to create difficulties with respect to back pay proceedings. Even where the order of the Board becomes the order of the Court after 45 days, later controversies over the amount of backpay due can be handled in the present manner by filing a motion with the court asking that it direct the party objecting to the backpay award to indicate its grounds for stating that the Court's decree should not be amended to include the amounts of backpay the Board has found due. (See Mr. Manoli's summary of this procedure, *supra*, p. 6.)

The proposed procedure would have a salutary effect upon compliance discussions in the Regional Offices. These have a

tendency to become long and drawn-out, and the 30-plus-15-day provisions for the Board's order to become an effective order of the Court would speed them up. Of course, the respondent retains the full right of judicial review, but if he wishes to challenge the Board order, he must take the responsibility of seeking the review. It should be noted that respondents frequently petition for review under present procedures, particularly where some choice as to the Circuit is involved. Out of 97 briefs filed by the Appellate Court Branch in the Courts of Appeals in fiscal year 1960, for example, 23 were on an aggrieved person's petition for review, as distinguished from a petition by the Board for an enforcement order.

V. COMPARISON WITH ENFORCEMENT PROCEDURES OF THE FEDERAL TRADE COMMISSION

At the time when the National Labor Relations Act was passed in 1935 the statutes governing the work of the Federal Trade Commission required the F.T.C. to obtain an enforcement order from the Court of Appeals before its orders carried any sanction.

However, the Federal Trade Commission Act was amended in 1938 and the Clayton Act was amended in 1959 so as to make F.T.C. orders "self-enforcing." At the present time, a cease and desist order becomes final 60 days after date of service upon the respondent, unless within that period the respondent petitions an appropriate Court of Appeals for review. In case of review, the F.T.C. order becomes final after affirmance by the Court of Appeals. Violation of a cease and desist order after it becomes final subjects the offender to suit brought by the Department of Justice in a U.S. District Court for recovery of a civil penalty of not more than \$5,000 for each violation. In the case of a continuing violation, each day of its continuance is a separate offense. Violation of an F.T.C. order which has been affirmed by a decree of a Court of Appeals makes the respondent further vulnerable to contempt proceedings in that court.

Thus, while the NLRB proposal recommended by the Cox Panel and the Puccinski Subcommittee is "adapted from" the current F.T.C. procedures, there are substantial differences. The NLRB proposal would rely on making an NLRB order become an order of the Court of Appeals within 45 days, in the absence of a petition for review by an aggrieved person, and thus subject to the ultimate contempt-of-court sanction. The Cox proposal would not make the NLRB order itself "final" in the sense of carrying a civil penalty sanction.

Apparently the enforcement procedures at the F.T.C. were more attenuated, prior to the 1938 and 1959 amendments, than at the NLRB, as is indicated by the legislative history of the 1959 amendments. The situation under the F.T.C. Act and the Clayton Act was thoroughly described by Sigurd Anderson, member of the F.T.C.:

Under both acts (the Federal Trade Commission Act and the Clayton Act), the Commission must investigate and, after complaint, prove on the record developed during hearings violations of the act before orders to cease and desist may issue. Although the two acts, as originally enacted, contained similar provisions for the enforcement of such orders, Congress, on the occasion of the passage in 1938 of the Wheeler-Lea amendment to the Federal Trade Commission Act, provided for the finality of orders issued under that act. As stated by the House Committee on Interstate and Foreign Commerce at page 4 of report No. 1613, 75th Congress, 1st session, on S. 1077:

The provisions of subsections (g) to (k) of section 5, inclusive, are for the purpose of making definite and certain when the Commission's orders to cease and desist become final, and are similar to those found in the Revenue Act of 1926, fixing the time when the orders of the Board of Tax appeals become final.

Under the Federal Trade Commission Act, by reason of the 1938 Wheeler-Lea amendment, an order to cease and desist becomes final upon the expiration of the time allowed for filing a petition for review, if no such petition is filed within that time. Once an order has become final, the Commission can certify the facts of a violation to the Attorney General who may then proceed in an appropriate district court for the recovery of civil penalties. In contrast, the Clayton Act contains no provision for finality of the order and no procedure for the securing of civil penalties for violations thereof.

Existing procedures under the Clayton Act are laborious, time consuming, and expensive. After a Clayton Act order to cease and desist has been issued, following investigation, complaint and proof of violation on the record, the Commission must again investigate and again prove violations of the order and of the act before the Commission's order to cease and desist. Only then, if the respondent violates the act a third time, by virtue of being in contempt of court, does he become subject to penalty. Thus, before a respondent can actually be punished for violation of the Clayton Act, as amended by the Robinson-Patman Act, the Federal Trade Commission must conduct three successive investigations and must on three successive occasions prove violations of the law.

As the Clayton Act now stands, a person found to have violated that act is not made subject to an effective order to cease and desist. The original proceeding at Commission level is a preliminary skirmish prerequisite to the Commission's going to court with respect to a subsequent violation. And it is only the court's order, issued after the subsequent showing of violation, that compels obedience.

The effectiveness of the Clayton Act has long been handicapped by the absence of adequate enforcement provisions. The proposed legislation

would fill this enforcement void. The need for the amendatory legislation became even more pressing in 1952 when the Supreme Court decided *Federal Trade Commission v. Ruberoid*, 343 U.S. 470. Prior to that decision, the Commission proceeded for enforcement of Clayton Act orders by cross-petition in cases where respondents had petitioned for review in the U.S. courts of appeals. In *Ruberoid*, the Supreme Court held that the courts were without authority to issue an order commending obedience to an order of the Commission under the Clayton Act until the Commission had established violations of its order. Commenting on this holding, Justice Jackson stated in dissent:

I see no real sense, when the case is already before the court and is approved, in requiring one more violation before its obedience will be made mandatory on pain of contempt. 343 U.S., at page 494.

It is indeed an anomaly that orders issued by the Commission in furtherance of the general proscriptions of the Federal Trade Commission Act have finality, whereas orders issued following violations of the more specific prohibitions of the Clayton Act do not. Not only is the present situation anomalous, but the Clayton Act stands incomplete until such an amendment as that proposed is enacted. The Commission believes that proper implementation of an effective antitrust policy requires correction of this situation.

The Commission has been asked to comment on objections to the bills contained in statements submitted by the American Bar Association and the Association of the Bar of the city of New York.

The American Bar Association has characterized the Commission's position of favoring the legislation as simply a plea for uniformity of enforcement procedure for Commission orders, whether issued under the Clayton Act or the Federal Trade Commission Act. We believe that this contention has already been answered in the foregoing portion of this statement where we have demonstrated that the proposed legislation is required to provide compliance with an act which the Congress undoubtedly intended should be enforced.

Both bar associations stress an assumed "right" or a respondent not to have to go to court as long as he is willing to comply with the order to cease and desist which has been issued against him. This position totally ignores the right and the interest of the public in having an effective order outstanding against a law violator.

The Commission's order is issued in the course of an adjudicative proceeding wherein a respondent has been found to have violated a law enacted by the Congress. Provision should be made for the completion of such an adjudication. The logical sequence of events should be that if a respondent objects to a Commission order for any reason, he should appeal to a court within a reasonable time so that the matter can be decided once and for all. He should not be allowed to sit back, possibly for years, and then not only contest the charges of a new violation, but be in a position to challenge all of the aspects of the original case upon which the Commission's order was based, as well as that order itself. Congress has already expressed its disapproval of such a frustrating and complicated procedure in its consideration and passage of the Wheeler-Lea amendment to the Federal Trade Commission Act.

The bar associations attempt to buttress their argument by making a general attack upon the breadth of the Commission's Clayton Act orders. This attempt confuses the problem of drafting appropriate orders in particular cases with the questions of whether orders should be made final. There is no relevancy between the two subjects. No one would suggest that courts be deprived of their injunctive powers because of a disagreement in a particular case with the specific order entered. And, in any event, the proposed legislation provides for adequate court review of Commission orders.

The Commission cannot discuss the question of the appropriate breadth of orders in a vacuum. Suffice it to say that in the very case relied upon by the American Bar Association in support of its argument, *Federal Trade Commission v. Ruberoid*, 343 U.S. 470, the majority of the Court decided that the Commission was justified in issuing the order that it did and upheld the court of appeals' affirmance of that order.

Whatever the challenge to a Commission order may be, the Commission feels that challenge should be raised in court within a reasonable time after the Commission's adjudication, at which time all of the protections which the American Bar Association urges would be available to the respondent.

Both bar associations oppose the proposed provision for civil penalty of not more than \$5,000 for each violation of the final order with each day of a continuing violation being deemed a separate offense. They state that the penalty is too severe and point to the fact that the majority of penalties imposed under such a provision in the Federal Trade Commission Act have been for less than \$1,000 per count.

The monetary and other economic interests involved in Clayton Act proceedings are substantial and orders to cease and desist, though made final, would be ineffective unless adequate civil penalties are provided. Under the comparable provision in the Federal Trade Commission Act, various penalties in excess of \$1,000 per count have been imposed and there have been three judgments, one by default, where full \$5,000 penalties for single violations were assessed. It can be assumed that instances may also arise under the Clayton Act where violations will merit the full \$5,000 penalty or some figure in excess of \$1,000.

In considering the possibility of the proposed provision constituting an onerous burden upon respondents, it is important to recognize that the \$5,000 figure per violation is the maximum amount that may be imposed. It is to be assumed that courts would, under the Clayton Act as they have under Federal Trade Commission Act, exercise their judgment to impose appropriate penalties. It is interesting to note the following discussion of penalty provisions by the House Committee on Interstate and Foreign Commerce at the time it reported on the then proposed Wheeler-Lea amendment to the Federal Trade Commission Act:

Subsection (1) provides that any person, partnership, or corporation who fails to obey an order of the Commission to cease and desist after it has become final, and while it is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered by a civil action brought by the United States. The object of the provision is to enforce obedience to the Commission's orders to cease

and desist after such orders have become final through approval of the courts or through the failure of respondents to seek review. Similar provisions are contained in the Packers and Stockyards Act of 1921 (sec. 195, title 7, U.S.C.A.) and in the Securities Exchange Act of 1934 (sec. 78y(a), title 15, U.S.C.A.) (Hearings on Finality of Clayton Act Orders, before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, 86th Congress, First Session, May 27, 1959, pp. 17-20).

From 1938 to 1959, there were 92 cases under Section 5 of the FTC Act in which civil penalties were assessed. The highest single case penalty was \$38,000, and the penalty in the great bulk of the cases amounted to from \$1,000 to \$5,000. (See pp. 28-29 of the above House Judiciary Subcommittee Hearings for a complete list).

In the fiscal year of 1962, the amounts of civil penalties assessed in FTC Act cases were as follows:

<i>Docket</i>	<i>Name of Case</i>	<i>Court</i>	<i>Concluded</i>	<i>Judgment</i>
6222	Vulcanized Rubber & Plastics Company.	E.D. Pa.	10-9-61	\$6,000
6086	Empire Press, Inc., et al	N.D. Ill.	12-5-61	Injunction
6089	Personal Drug	E.D. N.Y.	12-8-61	\$2,000-Inj.
5342	National Toilet Company	Tenn.	12-19-61	\$5,000
6426	Sterling Materials Company, Inc. et al.	E.D. N.Y.	2-6-62	\$11,000
6426	Carbozite Protective Coatings	E.D. N.Y.	2-6-62	\$11,000
6426	Ohmlac Paint & Refining Company.	E.D. N.Y.	2-6-62	\$6,000
6140	George's Radio & Television Company.	D.C.	2-2-62	\$6,000
5975	National Educators, Inc., et al.	D.C.	2-12-62	\$8,000
6342	Sun Vacuum Cleaner Company.	Md.	2-21-62	\$3,000-Inj.
3964	Fong Wan, et al	N.D. Cal.	6-4-62	\$1,300
3639	Parfums Corday	S.D. N.Y.	6-6-62	\$13,000
6916	Fire Safety Services, Inc., et al.	Md.	6-11-62	\$28,000
6644	Magic Weave, Inc., et al.	Mass.	6-28-62	Injunction

(Supplied by Barry W. Stanley of F.T.C.)

It can be seen from these figures that the potentially high \$5000-a-day penalty has not, in practice, resulted in unconscionably high penalties.

The processing of these civil penalty cases is slowed up and the enforcement is made less efficient than it could be by the fact that the proceedings are brought by the various U.S. Attorneys throughout the country. The extent to which the legal

staff of the FTC participates in these cases varies considerably among the offices of the U.S. Attorneys.

As to the experience under the 1959 "Finality" Amendments to the Clayton Act, there is very little to date. Only two civil penalty cases have been filed and they are still at the discovery stage. (*FTC v. Time Magazine* and *FTC v. Hearst*, both in the U.S. District Court for the Southern District of New York). The lack of experience with the operation of the 1959 amendments is largely due to the holding of the courts that the "Finality Amendments" apply only to FTC orders under the Clayton Act which became final after the effective date of the 1959 Amendments. Thus if a respondent violates today an FTC order issued before that effective date, the civil penalty provision does not apply. See *Sperry Rand Corp. v. FTC*, 228 F.2d 403 (CADC, 1961).

One effect of the 1959 Amendments to the Clayton Act has been to focus attention of the need for clear and precise cease and desist orders where the respondent is vulnerable to civil penalties. In *FTC v. Henry Brock and Co.*, 82 Supp. Ct. 431, 436 (1962), the U.S. Supreme Court stated:

We do not wish to be understood, however, as holding that the generalized language of paragraph (2) (of the commission's order) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

In summary, it is too early to assess the effects and workability of the 1959 Amendments to the Clayton Act, but the similar procedure of making orders final after a fixed period of time under the 1938 Amendments to the FTC Act has worked fairly well, and is certainly a considerable improvement over the pre-existing system.

VI. CONCLUSION

Professor Leroy S. Merrifield, special consultant to the Committee on Judicial Review, has talked informally with Archibald Cox, Russell Smith, and Guy Farmer. They do not recall the precise source of the proposal within the Advisory Panel, but Mr. Cox stated that it was obviously adapted from the Federal Trade Commission procedure. Mr. Smith recalls that Arthur Goldberg favored the proposal. There were no comprehensive studies or memoranda prepared on the matter within the Panel.

Professor Merrifield has also talked informally with Stuart Rothman, Dominick Manoli, Marcel Mallet-Provost, A. Norman Somers and Melvin Welles at the NLRB, who are or have been responsible for enforcement proceedings in the Courts of Appeal. They all would favor the Cox Panel proposal.

The proposal appears to have attracted wide support from Board members and officials and from reputable attorneys for both management and labor. Opposition might come from those employer interests who find it advantageous to seek delay. Unions would probably be more inclined to favor it; the impact would probably fall more on employers than on unions, since the employers already have the benefit of "mandatory" injunctions against the more important union unfair labor practices under section 10(1) of the Act.

It is our conclusion that it is necessary to eliminate delay wherever possible in NLRB procedure in order to have an effective law; that the proposal of the Advisory Panel headed by Archibald Cox is basically sound and would result in an average time saving of something like 55 days in getting an effective order without foreclosing in any way a full opportunity for judicial review.