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HEARING  
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## COMMITTEE ON COMMERCE UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ON

NOMINATION OF

MILES W. KIRKPATRICK, TO BE CHAIRMAN OF THE  
FEDERAL TRADE COMMISSION

AUGUST 20, 1970

Serial No. 91-88

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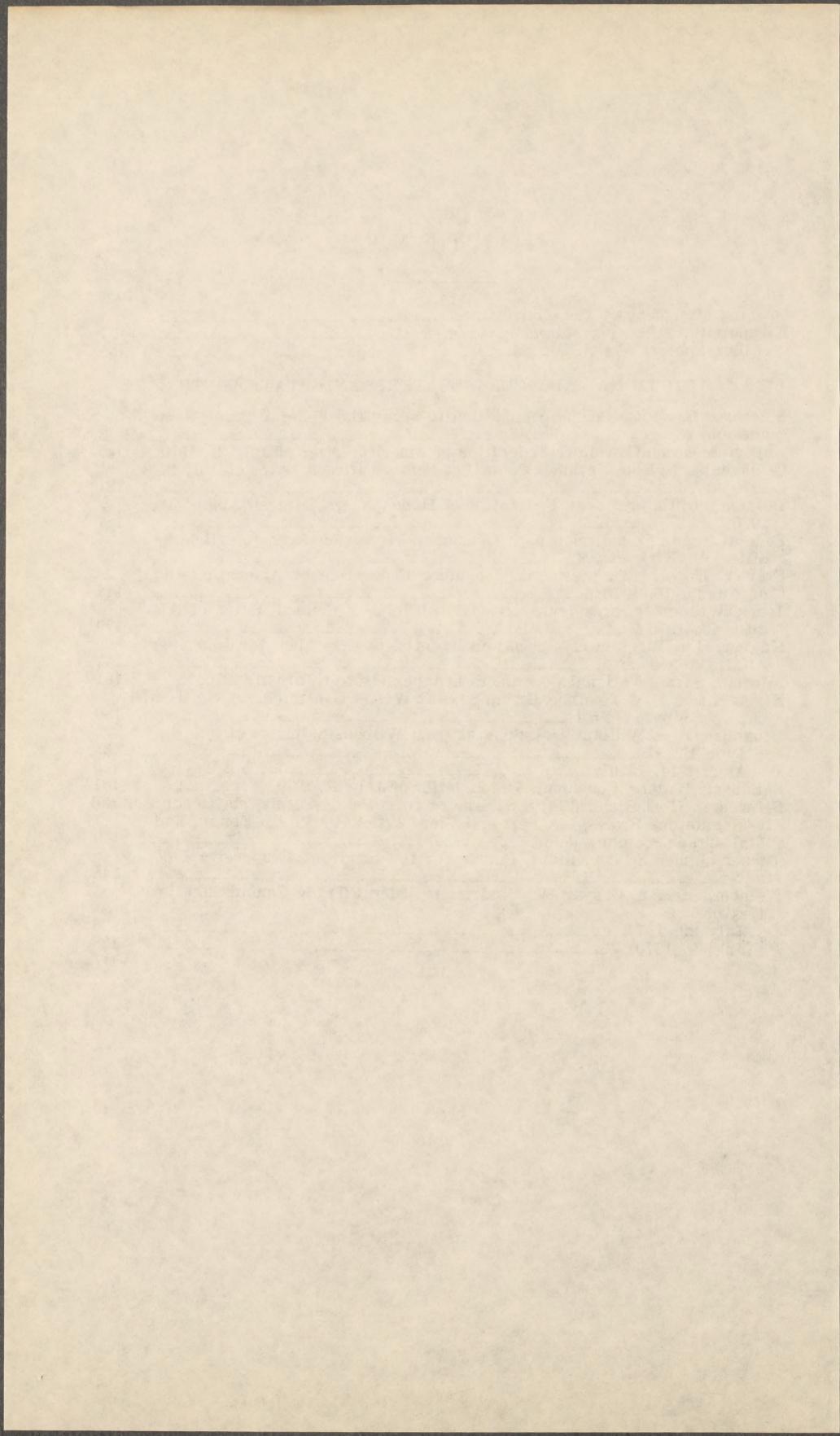
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## NOMINATION OF MILES W. KIRKPATRICK TO BE CHAIRMAN OF THE FEDERAL TRADE COMMISSION

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THURSDAY, AUGUST 20, 1970

U.S. SENATE,  
COMMITTEE ON COMMERCE,  
*Washington, D.C.*

The committee met, pursuant to notice, in room 5110, New Senate Office Building at 10:10 a.m., Hon. Warren G. Magnuson (chairman of the committee) presiding.

Present: Senators Magnuson, Pastore, Hart, Long, Moss, Cotton, Pearson, Baker, and Cook.

### OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will come to order.

This morning we have the nomination of Miles W. Kirkpatrick to be Chairman of the Federal Trade Commission. You may be seated there, Mr. Kirkpatrick.

The chairman has a short statement he would like to make for the record at this time.

Mr. Kirkpatrick, you do come before us at what we think is a critical moment in the life of the Federal Trade Commission. Only a few months ago Congress and the public began to have some doubts about the capacity of the Commission to function effectively for the American consumers. This committee is deeply interested in that because we have been the source of the bulk of the consumer legislation which is now on the books and many more pieces of consumer legislation are pending in the Commerce Committee.

Under your predecessor, Mr. Weinberger, whose term unfortunately was shortened by another call from the President, the Commission did undertake what might be called (in another political system) a "great leap forward."

In my judgment Chairman Weinberger succeeded in giving the Commission a new sense of commitment. He began the process of weeding out certain incompetents, attracting a more talented and resourceful staff and awarding initiative rather than undistinguished time serving.

He worked to reduce the layers of bureaucracy whenever possible and made the Commission's operation open to public scrutiny. And he sought to remove any shadow of cronyism in the Commission's dealings with attorneys and companies subject to the Commission's regulation.

Probably most important, he established an office and a system for setting Commission priorities, setting the most effective means to maximize the Commission's impact on the marketplace. All this is to

his credit. But the work has barely begun and a question remains, of course, will these sets of reforms, unlike any in the past, really succeed in awakening and keeping alive the awareness that we think he established in the Commission itself.

Now I will say to the committee, the nominee, Miles W. Kirkpatrick, appears uniquely qualified in my opinion to carry on these initiatives. It may well be as some critics have suggested that a lifetime of defending corporate clients does not qualify a man to be a vigorous advocate of consumer interests, nor does it disqualify him from being a consumer advocate.

Mr. Kirkpatrick's service as chairman of the American Bar Association's Commission on the Federal Trade Commission indicates that he sees and embraces the Commission's primary responsibility as insuring the economic health and welfare of the American consumer.

Of course, that is what the Commission is all about basically. I am going to place in the record of this hearing, therefore, the text of the American Bar Association's report and a recent article by Mr. Kirkpatrick appearing in the Antitrust Bulletin entitled "The FTC as a Consumer Protection Agency."

I will also place in the record at this time a letter from Chairman Weinberger to Senator Kennedy detailing the principal achievements of the Commission under his chairmanship. Also a letter and accompanying attachments from Senator Proxmire raising questions relating to the Commission's antitrust responsibilities which we will pursue while questioning the nominee, letters from the Consumer Federation of America and the Center for the Study of Responsive Law, and a copy of a speech delivered at the ABA convention in St. Louis last week by Commissioner Elman raising serious questions about the structure of the Federal Trade Commission.

(The documents referred to follow:)

(Questioning of Mr. Kirkpatrick resumes on p. 155.)

**REPORT OF THE ABA COMMISSION  
TO STUDY THE  
FEDERAL TRADE COMMISSION**

**(3)**

**September 15, 1969**

**MEMBERS OF THE COMMISSION**

MILES W. KIRKPATRICK

*Chairman*

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HARLAN M. BLAKE

ROBERT PITOFSKY

*Commission Counsel*

**LETTER OF TRANSMITTAL**

September 15, 1969

Bernard G. Segal, President  
American Bar Association  
1155 East 60th Street  
Chicago, Illinois 60637

Dear Mr. Segal:

It is my privilege to submit herewith the Report of this Commission which will be, as I understand it, presented by you to the Board of Governors of the ABA for consideration and approval.

As you will recall, this Commission was appointed in April of this year pursuant to the request of President Nixon that the ABA undertake a study and professional appraisal of the FTC. The ABA was requested to furnish a Report in response to the President's request by September 15th. I am pleased that the Commission has been able to accomplish its purpose by that date, and I am concurrently submitting a copy of our Report to the White House. We realize, of course, that our Report must be submitted to and approved by the Board of Governors before it becomes an official report of the ABA.

The Report has been joined in by 15 of the 16 members of the Commission. There are also submitted herewith two Separate Statements. One of the Separate Statements contains views supplemental to those set forth in the Commission's Report and the author has also subscribed to the Report itself. The other Separate Statement includes some views of the one member of the Commission who did not join in the Commission's Report.

I would be remiss if I did not express my appreciation for the opportunity to serve on this Commission. The Commission was truly a working group, and each member gave greatly of his time, energy, and skills throughout the Summer. The Report is the result of a full interchange of views between all members of the Commission, each contributing substantially to the final Report.

I wish also to express my appreciation and that of the entire Commission for the assistance of the Commission's Counsel, Professor Robert Pitofsky, and his able staff. He and his staff were unstinting in their devotion of professional skill of the highest order to the accomplishment of the Commission's work.

I trust that the enclosed Report will represent a useful contribution and will furnish to the President of the United States the appraisal for which he turned to the American Bar Association.

Sincerely yours,

Miles W. Kirkpatrick  
*Chairman*

cc: William T. Gossett, Esq.

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## I. SUMMARY

The Federal Trade Commission, an independent regulatory agency established in 1914, is assigned the responsibility of administering a wide variety of antitrust and trade regulation laws. Over the past 50 years, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties by reason of inadequate planning, failure to establish priorities, excessive preoccupation with trivial matters, undue delay, and unnecessary secrecy.

This present ABA Commission was appointed by President William T. Gossett of the American Bar Association, at the request of President Nixon, to undertake an appraisal of the "present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the antitrust laws, and of the allocation of its resources between these two areas."

The FTC of the 1960's is probably superior to most of its predecessors, but continues to fail in many respects. Through lack of effective direction, the FTC has failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner.

All available statistical measures of FTC activity show a downward trend in virtually all categories of its activities in the face of a rising budget and increased staff. Moreover, present enforcement activity rests heavily on a voluntary compliance program devoid of effective surveillance or sanctions. It thus appears that both the volume and the force of FTC law enforcement have declined during this decade.

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

The primary responsibility for these failures must rest with the leadership of the Commission. In recent years, bitter public displays of dissension among Commissioners have confused and demoralized the FTC staff, and the failure to provide leadership has left enforcement activity largely aimless.

Turning to specific areas of FTC efforts, we find, first, that in the field of consumer protection, the agency has been preoccupied with technical labeling and advertising practices of the most inconsequential sort. This failing derives in large part from a detection technique which relies almost exclusively on the receipt of outside complaints.

At the same time, the FTC has exercised little leadership in the prevention of retail marketing frauds. In this important field, the FTC has failed to build upon its most imaginative undertaking, the District of Columbia pilot project. Although emphasizing the need for state and local effort, the FTC has kept its Federal-State Coordination program patently understaffed. Unjustified doubts within the FTC as to its power or effectiveness in dealing with local frauds have caused it to remain largely passive in this area of enforcement.

We recommend a new and vigorous approach to consumer fraud. The FTC should establish task forces in major cities to concentrate exclusively on this problem. These task forces should be given ample manpower and authority to pursue localized frauds expeditiously and effectively.

We see in this project a source not only of improved enforcement but of substantially expanded knowledge as to the nature and significance of consumer fraud. We would expect the project to generate both new initiatives in the enforcement of the Federal Trade Commission Act and proposals for new legislation in the field of fraudulent and deceptive practices. Furthermore it would establish new lines for communication and cooperation with state and local agencies. We also believe that effective law enforcement in this area requires the creation of new procedural devices, including a right in the FTC, in appropriate situations, to seek preliminary injunctions against deceptive practices, and some form of private relief for or on behalf of consumers injured by such practices.

In the antitrust field, we believe that the FTC can perform valuable service in bringing the administrative process to bear on difficult and complex problems. We therefore propose that the concurrent jurisdiction of the FTC and the Department of Justice in antitrust enforcement be retained. We urge, however, that the present allocation of enforcement resources be reexamined and realigned in a manner more nearly consistent with the objectives of antitrust policy.

The work of the FTC's Bureau of Economics has been of substantial value. We think, however, that its public acceptance would be improved

by a structural division into two separate units—one to provide support to the enforcement work of the FTC, and the other to engage in fundamental economic research.

Finally, we believe that several serious and pervasive deficiencies at the FTC must be acknowledged and corrected.

First, it is imperative that the FTC embark on a program to establish goals, priorities, and effective planning controls. We recommend establishment of a special staff committee to review the current backlog of pending matters and to recommend to the Commission the closing of files of marginal significance. We further propose the immediate expansion and invigoration of the Office of Program Review to take primary responsibility for proposing to the Commission ways and means of coordinating future operations.

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

Third, Commissioners have been criticized for making themselves available to those representing respondents or potential respondents on an *ex parte*, off-the-record basis. The Commission should define and publish criteria concerning the circumstances under which businessmen and their attorneys may confer with Commissioners at all stages of its proceedings.

In conclusion, this Commission believes that it should be the last of the long series of committees and groups which have earnestly insisted that drastic changes were essential to recreate the FTC in its intended image. The case for change is plain. What is required is that the changes now be made, and in depth. Further temporizing is indefensible. Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence; the essential work to be done must then be carried on by other governmental institutions.

## II. INTRODUCTION

### A. ABA Commission History and Working Procedures.

On April 18, 1969, President Nixon wrote to the President of the American Bar Association, William T. Gossett, requesting that the ABA undertake an appraisal of the "present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the antitrust laws, and of the allocation of its resources between these two areas," and further requested that the report include recommendations for the "future activities and organization" of the FTC. The President asked that the study be completed by September 15, 1969. Mr. Gossett accepted the assignment on behalf of the ABA.<sup>1</sup>

On May 5, Mr. Gossett created a Commission to Study the FTC, naming Miles W. Kirkpatrick, Chairman of the ABA Section of Antitrust Law, as Chairman and at the same time appointing 15 additional members to this special Commission. In announcing the appointments, Mr. Gossett noted that the members were chosen for their "background, expertise and balance of viewpoint."<sup>2</sup>

Eight members of the Commission are not members of the ABA. Two members of the group are economists, five are law professors specializing in fields relating to antitrust law or consumer protection, and nine are principally engaged in the practice of law. Most of the Commission members have had extensive experience with FTC matters. At the time of their appointment, several of the practicing lawyers represented clients with respect to matters pending before the FTC. It was not thought that this would create any problems and, in fact, it made for none in the course of the Commission's proceedings. Indeed, in order to attract members with extensive practical experience in dealings with the agency, an obviously desirable objective, it was almost inevitable that lawyers having matters pending before the FTC would be members of the Commission. Professor Robert Pitofsky of New York University School of Law was appointed Commission Counsel. The staff consisted of an Associate Counsel, Mark G. Yudof, and Michèle Beigel Corash, Peter Gerhart and Robert Skitol.

The members of the Commission and of its staff did not perform their duties as representatives of any organization or other group but as individuals. The contribution of the members and the staff of the Com-

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<sup>1</sup>Appendix

<sup>2</sup>*Id.*

mission to this report is a reflection of their own independent, personal views. The report represents a consensus and synthesis of these individual contributions, rather than an expression of each member's individual viewpoint as to each separate detail of the report.

The Commission met five times; each meeting lasted two or three days. Various Commissioners prepared working papers on particular subjects. The Commission solicited and received views of a variety of persons knowledgeable in the fields of consumer protection and antitrust law. We also held meetings with the five FTC Commissioners (collectively and individually), three former FTC Commissioners, and ten senior FTC staff members. Individual members of the Commission, its counsel and staff also interviewed about 30 members of the FTC staff.

The Chairman and ranking minority members of congressional committees charged with responsibilities in the areas of consumer protection and antitrust law were consulted. We also solicited and received written views from about 30 public officials, including a number of former FTC Commissioners, and private citizens throughout the United States known to have special expertise in the area of consumer protection; from present and past officers and committee chairmen of the ABA Section of Antitrust Law; and from governmental departments, including the Antitrust Division of the Department of Justice, and the President's Committee on Consumer Interests.

## B. Profile of the FTC.

The Federal Trade Commission is an independent regulatory agency which was established in 1914 under the Federal Trade Commission Act. That statute, together with the Clayton Act, was the culmination of several years of public and Congressional debate and represented compromise positions among provisions in a series of proposed bills.<sup>3</sup> As a result, it is not possible to attribute to Congress a perfectly clear or fully consistent set of purposes which the agency was to implement. It does appear, however, that the FTC Act and the Clayton Act were the result in part of concern over the impact of the Supreme Court's 1911 decision in *Standard Oil Co. of New Jersey v. United States*,<sup>4</sup> which held that the Sherman Act was to be interpreted by a "rule of

<sup>3</sup>The history of the FTC is dealt with in T. BLAISDELL, *THE FTC: AN EXPERIMENT IN THE CONTROL OF BUSINESS* (1924); G. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* (1924) [hereinafter cited as HENDERSON].

<sup>4</sup>221 U.S. 1 (1911).

reason." Those in favor of vigorous antitrust enforcement feared that the judiciary would be disinclined to enforce the statute vigorously, businessmen and their advisors worried about operating under such a vague standard, and Congress was apprehensive about possible judicial usurpation of its power to regulate business practices.

In the long debates preceding enactment, Congress tried to find solutions to these three distinct concerns. Accordingly, specific practices such as price discrimination, tie-in sales, stock acquisitions and interlocking directorates were dealt with in Sections 2, 3, 7 and 8 of the Clayton Act. Section 7 was broadened by the Celler-Kefauver Amendment of 1950 which included a prohibition of acquisition of assets. Specifications of these practices, along with statutory language indicating that the legality of each would be tested by a stringent "incipient effect" standard, served to satisfy the supporters of a tough antitrust policy.

Congress recognized, however, that this specificity created the possibility of circumvention. To meet this, Section 5 of the FTC Act, declaring unlawful "unfair methods of competition in commerce",<sup>5</sup> was enacted. To provide businessmen with a forum for evaluating the great variety of fact situations likely to arise under the newly enacted Clayton Act and the flexible statutory language of Section 5 of the FTC Act, and to insure adequate antitrust enforcement, Congress created an administrative agency to implement the new statutes. The agency was designed to combine a number of features not available to the Department of Justice, including extensive fact finding powers, special experience in economic matters, and business advisory procedures. In addition, the agency was empowered to proceed formally "in the public interest" to restrain violations of law. The FTC was given concurrent jurisdiction with the Department of Justice to enforce Sections 2, 3, 7 and 8 of the Clayton Act, and exclusive jurisdiction to enforce the FTC Act.

In fact, the Department of Justice has left to the FTC virtually all enforcement of the price discrimination provisions of Section 2 of the Clayton Act, as amended in 1936 by the Robinson-Patman Act. In other areas of concurrent antitrust enforcement the Department and the FTC have developed procedures to avoid duplication of effort, under which representatives of each agency inform the other of prospective investigations and obtain "clearances" from the other agency for exclusivity until the investigation or subsequent enforcement action is terminated.

In 1931, the FTC's power to protect the consumer was limited by the Supreme Court's holding that Section 5 of the FTC Act did not prohibit

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<sup>5</sup>15 U. S. C. § 45 (1964).

a practice which was deceptive or unfair to the consuming public but which did not result in an injury to any competitor or to the competitive process.<sup>6</sup> In 1938, Congress gave the FTC power to overcome this limitation by adding the words "unfair or deceptive acts or practices in commerce" to Section 5,<sup>7</sup> and thereby made it clear that the jurisdiction of the FTC extended to the area of consumer protection.

In addition to Section 5, the FTC has further responsibilities under the FTC Act and administers other statutes which relate to the protection of consumer interests. Section 12 of the FTC Act prohibits false advertising in the sale of food, drugs, devices or cosmetics.<sup>8</sup> The recently enacted fair packaging and labeling<sup>9</sup> and consumer credit protection<sup>10</sup> statutes have added to the FTC's responsibilities. It also administers four older federal statutes that specify information that must appear on labels, invoices, and advertising materials relating to fur, wool and other textile products<sup>11</sup> and that prohibit the sale of certain dangerously flammable fabrics.<sup>12</sup>

Finally, the FTC has a variety of relatively minor responsibilities under a miscellany of federal statutes, including the McCarran-Ferguson Act (relating to the insurance industry),<sup>13</sup> the Webb-Pomerene Export Trade Act,<sup>14</sup> the Lanham Trademark Act,<sup>15</sup> the Federal Cigarette Labeling and Advertising Act,<sup>16</sup> the Oleomargarine Act<sup>17</sup> and the Packers and Stockyards Act.<sup>18</sup> In addition, the agency has broad powers under Section 6 of the FTC Act to gather and compile information from corporations engaged in commerce and to require such corporations to file annual or special reports concerning their business conduct and practices.<sup>19</sup>

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<sup>6</sup>FTC v. Raladam 283 U.S. 643 (1931).

<sup>7</sup>15 U.S.C. § 45 (1964).

<sup>8</sup>15 U.S.C. § 52 (1964).

<sup>9</sup>15 U.S.C. §§ 1451-61 (Supp. III, 1965-1967).

<sup>10</sup>15 U.S.C. §§ 1601-65 (Supp. IV, 1965-1968).

<sup>11</sup>15 U.S.C. § 68 (1964); 15 U.S.C. § 69 (1964); 15 U.S.C. § 70 (1964).

<sup>12</sup>15 U.S.C. §§ 1191-1204 (1964), *as amended*, (Supp. III, 1965-1967).

<sup>13</sup>15 U.S.C. §§ 1011-12 (1964).

<sup>14</sup>15 U.S.C. §§ 61-65 (1964).

<sup>15</sup>15 U.S.C. § 1064 (1964).

<sup>16</sup>15 U.S.C. §§ 1331-39 (Supp. III, 1965-1967).

<sup>17</sup>15 U.S.C. §§ 55, 56 (1964).

<sup>18</sup>15 U.S.C. §§ 181-231 (1964).

<sup>19</sup>15 U.S.C. § 46 (1964).

The FTC is headed by a Chairman and four Commissioners, each of whom is appointed by the President with the advice and consent of the Senate for staggered seven year terms. No more than three Commissioners may be of the same political party. The Chairman, who serves at the pleasure of the President, is Paul Rand Dixon, and the Commissioners are Philip Elman, Everette MacIntyre, Mary Gardiner Jones and James Nicholson.

In the fiscal year ending June 30, 1969, the budget for the FTC was \$16,900,000. As of March 31, 1969, 1154 persons were employed; about 400 were lawyers and about 200 were economists and other professionals. Of the attorneys, about 250 were employed at the agency's office in Washington, D. C.; the remainder were attached to 11 field offices located in Atlanta, Boston, Chicago, Cleveland, Falls Church, Virginia (near Washington, D. C.), Kansas City, Los Angeles, New Orleans, New York, San Francisco and Seattle.

Formal proceedings instituted by the FTC are initially adjudicated by a hearing examiner whose decision may be reviewed by the full Commission. If a violation is found, the FTC has no power other than to issue a cease-and-desist order, which becomes final if a respondent does not seek review in a Court of Appeals or if it is affirmed on appeal. If a respondent violates a final FTC order, it is subject to civil penalties of up to \$5,000 per day, with each day of continuing disobedience constituting a separate violation.<sup>20</sup>

In the past 6 or 8 years, the FTC has resorted less frequently to formal proceedings, and has increased its reliance upon an "informal" or "voluntary compliance" approach to bring about industry-wide compliance. Among the more important of these informal devices, each of which lacks the force of law, are the following:

1. *Industry Guides*. These constitute advice to the business community of the FTC's views of the legality of specific conduct in selected areas. Guides have been used to clarify the problems of particular industries, such as shoe labeling, while others have dealt with problems that affect many different industries, such as deceptive pricing and bait-and-switch advertising.

<sup>20</sup>Criminal sanctions may be imposed for violation of specific statutes administered by the FTC. See, e.g., 15 U.S.C. §§ 52, 54 (1964); 15 U.S.C. §§ 68a, 68c, 68f, 68g, 68h (1964); 15 U.S.C. §§ 69a, 69d, 69h, 69i (1964); 15 U.S.C. §§ 70a, 70c, 70d, 70g, 70h, 70i (1964); 15 U.S.C. §§ 1192, 1196, 1197b (1964); 15 U.S.C. § 1335 (Supp. III, 1965-1967); 15 U.S.C. § 1611 (Supp. IV, 1965-1968).

2. *Advisory Opinions.* These opinions are rendered in response to individual inquiries concerning the legality of a proposed course of action. Opinions can be requested, for example, with respect to proposed advertising campaigns and for the interpretation of outstanding cease and desist orders. While the FTC may reconsider its advice, particularly in light of changed circumstances, the advice affords a businessman a dependable assurance that the agency will not move against the business conduct in question.

3. *Trade Regulation Rules.* These rules are published after hearings, at which all businessmen who are likely to be affected have an opportunity to present their views. Once the rules are promulgated, the FTC may rely on them to resolve any issue arising subsequently in an adjudicative proceeding. However, the respondent is given a hearing on whether it is proper to apply the rules in its case.

4. *Assurances of Voluntary Compliance and Informal Corrective Actions.* "Assurances" are written agreements to discontinue objectionable practices, which now include a provision for the submission of a subsequent compliance report by the business unit. Informal actions take many forms, including an oral assertion by a businessman that he will abide by FTC rules.

### C. Prior Studies of the FTC.

This is by no means the first study evaluating the structure and performance of the FTC. Since its establishment in 1914, a succession of independent scholars and groups have sounded much the same themes in their criticisms of the FTC, including the absence of effective planning and failure to establish workable priorities, the consequent tendency to become involved in too many trivial cases, the delay and unnecessary secrecy in FTC operations, and the uneven quality of staff. It is worthy of note that each successive study made it clear that the older criticism was still applicable and that previously proposed solutions generally had been ignored.

Virtually all critics of FTC performance have emphasized its continuing failure to establish and follow clear priorities of administrative action. Gerard Henderson, an early critic of the FTC, noted that the

agency too often became involved in trivial matters, and attributed this deficiency to a lack of orderly planning.<sup>21</sup> Almost forty years later, Carl Auerbach (a member of this Commission), in an exhaustive study of FTC organization and procedure, documented the same absence of any sense of priority.<sup>22</sup> Auerbach proposed revisions in the FTC structure and procedures to improve the effectiveness of planning and to establish priorities. Nonetheless four of the five present FTC Commissioners (all except Chairman Dixon), in appearances before our Commission, asserted that control by the FTC of its own mission, goals and priorities continues to be a most perplexing and largely unsolved problem.

Closely associated with criticism concerning the absence of priorities is the charge that the FTC all too often has shown an unfortunate tendency to become involved in protracted litigation or administrative proceedings concerning relatively trivial controversies. The Hoover Commission in 1949 described this problem in the following language:

As the years have progressed, the Commission has become immersed in a multitude of petty problems . . . the Commission has largely become a passive judicial agency, waiting for cases to come upon the docket, under routinized procedures, without active responsibilities for achieving statutory objectives.

In the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance.<sup>23</sup>

Comparable similarities can be recounted with respect to each of the standard criticisms previously mentioned. For example, particularly with respect to cases challenging false and misleading advertising campaigns, there has been substantial unanimity of criticism of inordinate delay in FTC procedure.<sup>24</sup> Critics more recently also have challenged

<sup>21</sup>HENDERSON 337.

<sup>22</sup>Auerbach, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 390-94 (1964) [hereinafter cited as Auerbach]. See also BUREAU OF THE BUDGET, FEDERAL TRADE COMMISSION STUDY 4 (Staff Report No. (F-60-124) 12 (1960)) [hereinafter cited as BOB, FTC STUDY]; SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2d Sess., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 48-52 (1960) [hereinafter cited as LANDIS REPORT]; COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON REGULATORY

<sup>24</sup>See HENDERSON 87, 337; HOOVER COMMISSION REPORT 125; LANDIS REPORT 50. COMMISSIONS, App. N, at 122 (1949) [hereinafter cited as HOOVER COMMISSION REPORT].

<sup>23</sup>HOOVER COMMISSION REPORT 125, 128. See also HENDERSON 337; Auerbach 390-92. Similar conclusions were reached recently by L. KOHLMEIER, *THE REGULATORS* 251-261 (1969).

the FTC practice of publishing cryptic and obscure advisory opinions, and its general failure to make available to the public broad categories of information relating to its operations, particularly its determinations to grant or withhold pre-merger clearances.<sup>25</sup>

Finally, there is the constantly reiterated theme of concern with the uneven quality of FTC staff. The Hoover Commission Report called attention to the "deadwood" and the detrimental role of seniority at the FTC,<sup>26</sup> and summarized the problem with respect to senior staff in the following manner:

In the past, the Commission has applied a policy of promotion from within. That policy has enabled the Commission to obtain some men of real competence, but in other cases, limited ability, plus sheer longevity, has won positions of importance . . . Future appointments and promotions should discount mere seniority and instead should emphasize ability and experience.<sup>27</sup>

Henderson and Auerbach also made a variety of proposals to improve the personnel situation.<sup>28</sup>

This summary of the history of criticism of the FTC would not be complete without noting the highly publicized report issued earlier this year entitled *THE CONSUMER AND THE FEDERAL TRADE COMMISSION*.<sup>29</sup> That report developed out of a study in the summer of 1968 by a group of law students brought together by Ralph Nader. The report concluded not only that the standard criticisms of the FTC continue to be valid, but also that, among many other failings, the agency's methods of detecting statutory violations were inadequate, its consumer protection program (particularly in the area of false advertising) was largely ineffective in coping with modern forms of deceptive advertising, and its heavy reliance on voluntary enforcement techniques was failing to secure real compliance with the law.<sup>30</sup> The report concluded that the overall performance of the FTC was "shockingly poor".<sup>31</sup>

In the next section we will report on the results of our own evaluation of the quality of FTC performance.

<sup>25</sup>See generally Auerbach 445-49, 464-65, 518, 519.

<sup>26</sup>HOOPER COMMISSION REPORT 127.

<sup>27</sup>*Id.*

<sup>28</sup>HENDERSON 328; Auerbach 408-09, 417.

<sup>29</sup>E. COX, R. FELLMETH, & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION* (1969) [hereinafter cited as *NADER REPORT*].

<sup>30</sup>*Id.* at 128-37.

<sup>31</sup>*Id.* at 137.

### III. OVERALL EVALUATION OF WORK PRODUCT AND STAFF.

An evaluation of the quality of performance of the FTC is central to the mandate of this Commission, and we therefore have undertaken to make it.

#### A. Planning Procedures.

The most widespread criticism of performance at the FTC by its Commissioners and staff relates to the absence of effective planning and coordination of activities within the agency. Four of the present Commissioners and a number of senior staff members generally agreed that the agency's review of its own mission, goals and priorities continues on an *ad hoc* basis only, and two Commissioners indicated that efforts to improve planning in recent years had failed.

Such difficulties have a long history at the FTC. The most recent attempt at reform began in 1960, following the publication of a study by the Bureau of the Budget recommending establishment of a program review staff which would:

(a) . . . locate the primary "troublespots" in the economy in which FTC should apply its efforts, (b) evaluate competing proposals for project-type investigations, (c) determine and recommend to the Commission appropriate division of effort between anti-merger, other anti-monopoly and antideceptive practices work, (d) determine and recommend to the Commission the amount of agency effort which should be devoted to "applications for complaint" investigations as opposed to project-type investigations, and (e) develop or approve *standards* by which such applications will be judged." . . . All this and other pertinent data should be presented to the Commission in such a manner that it may weight the priorities and determine the annual program.<sup>32</sup>

An Office of Program Review was established by the Commission, but it consisted entirely of one program review officer, an economist, and a secretary. As far as we are aware, no statement of long-range objectives of the FTC or its bureaus was ever produced by the Office of Program Review, nor did it prepare any studies or reports delineating priorities as to substantive areas on which the respective bureaus and divisions

<sup>32</sup>BOB, FTC Study 12.

should concentrate. The incumbent program review officer died almost a year ago and has not been replaced.

The consequence of a lack of direction from the top has been *de facto* delegation of a good deal of authority to the staff, with a kind of veto authority over staff decisions exercised by the five Commissioners on a case-by-case basis.<sup>33</sup> Each time a complaint is received (at a current rate of more than 12,000 a year), some member of the FTC staff, usually at a fairly low level, must decide whether the matter is sufficiently important to justify committing a portion of the limited resources of the agency to an investigation. If numerous respondents are involved or the investigation would require a substantial commitment of manpower or funds, the staff must obtain prior approval from the full Commission, but the proportion of investigations opened pursuant to this procedure is not large. A staff member who decides to open an investigation may be in a position to compare the relative merits of that particular investigation against some other activity within his own division—for example, opening an investigative file for an alleged bait-and-switch fraud by one prospective respondent as opposed to a similar fraud by another. But we are advised that, at present, he has no institutional devices or agency-wide standards available to him for comparing the relative merits of allocating FTC resources to proceedings against possible violations of law handled by different divisions or bureaus.

Nor has the Commission indicated to its staff any useful criteria by which it should be guided in opening investigations, selecting among available enforcement devices, closing investigations, or recommending the filing of complaints. For example, the FTC's Administrative Manual lists only the following as "Criteria for opening an investigation":

An initial investigation shall be . . . opened . . . when:

- (a) a proposed respondent is to be contacted, or
- (b) a case is to be sent to a field office, or
- (c) 8 hours of legal, economic, accounting, or scientific analysis is to be spent on the case.

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<sup>33</sup>Lack of coordinated planning seems much less a problem in the FTC's merger division, partly because of the participation of economists from the Bureau of Economics in the planning process, and the comments in the following text are not meant to apply to that division.

It is necessary to follow the investigation procedure set forth below when the above criteria are met to prevent investigation of the same matter again without knowledge that it previously had been investigated; to save time and avoid confusion . . . and to be able to record work performed which reflects workload, productivity, and amount of time spent on specific work.<sup>34</sup>

Directions to the staff as to criteria for selection among available enforcement devices are hardly more helpful. The FTC in recent years has increasingly moved from formal to informal compliance procedures, and the staff now must decide whether to proceed by an "informal corrective action", by accepting an "assurance of voluntary compliance", or by insisting on entry of a formal order to cease and desist.<sup>35</sup> The criteria for making that determination appear in the FTC's Administrative Manual under a category entitled "Flexible Procedure", which states that an assurance should not be taken "where it appears likely that recurrence of unlawful conduct may be effectively prevented only by a formal order. . . ." The manual adds:

The sole test is whether "the public interest will be safeguarded" by informal non-adjudicatory disposition, and in every case information should be fully developed so as to permit a comprehensive application of this test to the acts or practices involved. One of the factors to be considered in the application of this test is the extent of cooperation by the proposed respondent. . . .<sup>36</sup>

These guides are not of appreciable use to the staff in estimating the relative value of committing the FTC's limited resources to action of various sorts. Other considerations, such as seriousness or public significance of the alleged violation, long-term enforcement goals of the agency, vulnerability of the victims of the violation, and the like, are not mentioned.

A similar lack of direction and control emerges in the area of formal complaints. Staff members frequently complain that they have no real

<sup>34</sup>FTC *Administrative Manual*, Series 6—Special Instructions, ch. 6-051.3. On occasion, there have been directives from the Commission to the staff dealing with particular problems, but these are not intended to provide comprehensive planning guidance. See Memorandum from Commissioner James M. Nicholson to the FTC 60-61 (August 11, 1969).

<sup>35</sup>For an explanation of the implications of these different enforcement techniques, see pp. 22 to 25 *infra*.

<sup>36</sup>FTC *Administrative Manual*, *supra* note 34, at 6-055.9B.

idea of the factors the FTC regards as decisive, or even relevant, in determining when formal actions should be brought, and that this situation has been aggravated by the sharp differences among Commissioners as to how the limited resources of the FTC should best be used.<sup>37</sup> These staff complaints appear to be justified. The Administrative Manual warns only that issuance of complaints "should not be recommended to the Commission unless the attorney responsible for the trial has evidence which, in his opinion, is sufficient to establish a prima facie case-in-chief in support of all the allegations of the complaint . . ."<sup>38</sup> Of course, when a majority of the FTC rejects a proposed complaint, there may be an accompanying memorandum explaining the reasons why formal action was not justified with respect to the particular matter, and such advice might help to decide similar questions arising in the future. But this kind of *ad hoc* approach is hardly a substitute for the kind of comprehensive planning envisioned by the Bureau of the Budget in 1960.

It further appears that there is no effective procedure within the FTC to keep track of progress on matters formally initiated, to establish realistic deadlines, or to terminate investigations once it becomes apparent that anticipated returns do not justify continued investment of time and effort.<sup>39</sup> Frequently, investigations or studies disappear into the lower levels of the FTC, and reappear only after many years have elapsed.<sup>40</sup> Without effective control and tracking techniques, this situation is almost certain to continue.

In joining the procession of critics who have discovered a lack of established priorities at the FTC, or effective planning consistent with those priorities, we do not mean to suggest that planning is a simple matter or that every action of the FTC can be made to flow from a preordained set of priorities. We recognize that sensible planning must avoid the competing dangers of aimlessness on the one hand and inflexibility on the other. We agree, however, with the views of the majority of present Commissioners that the balance has tipped too far in the direction of *ad hoc* and unordered responses to individual problems as they arise.

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<sup>37</sup>See discussion at pp. 35-36, *infra*.

<sup>38</sup>FTC *Administrative Manual*, *supra* note 34, at 6-051.17A.

<sup>39</sup>See *Nicholson Memorandum*, *supra* note 34, at 20.

<sup>40</sup>See pp. 42-43, *infra*.

## **B. Statistical Measure of FTC Performance.**

Statistics alone on cases and proceedings do not fully measure the meaningful output of an agency such as the FTC; nor do we believe that the budgetary allocations among specific areas of activity completely reflect the importance the Commission assigns them. Nevertheless, such quantitative data, subject to this important qualification, provide a rough but significant indicator of the trends in the Commission's output and its ordering of priorities, at least in the absence of countervailing data.

### **I. Comparative Output of the FTC: 1961-1969.**

Every three months, the FTC compiles detailed statistical summaries of its work product for the past quarters of the fiscal year in booklets entitled *Workload and Manpower Reports*.<sup>41</sup> Examination of these reports reveals some interesting facts about the operations of the FTC in recent years.

#### **a. Investigational stage.**

According to the FTC Administrative Manual, no more than eight hours of legal, economic, accounting, and scientific analysis may be spent on a matter before the opening of a formal investigation file, referred to at the FTC as a "7-digit investigation" file. As Table I indicates, the number of investigation files opened by the agency has declined substantially during the period 1961-1969, to a point where investigations opened in 1969 were less than one-third of the total for 1961.

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<sup>41</sup>The FTC's fiscal year ends June 30, so that Fiscal Year—1969 runs from July 1, 1968, to June 30, 1969. All references in the text to years refer to fiscal years.

**TABLE I\***  
**SEVEN DIGIT INVESTIGATIONS OPENED**

Fiscal Year	1961	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of Trade .....	884	741	301	351	236	249	352	218	181
Deceptive Practices .....	899	897	854	686	615	748	666	388	192
Textiles and Furs .....	241	157	156	346	216	160	174	146	238
Totals** .....	2,024	1,795	1,311	1,383	1,067	1,157	1,192	752	611
<b>Restraint of Trade</b>									
Discriminatory Practices .....				198	75	81	159	73	53
General Trade Restraints .....				110	99	107	112	64	67
Mergers .....				43	62	52	76	68	50
Compliance .....						9	5	12	11
Office of Director .....								1	
<b>Deceptive Practices</b>									
Food and Drug Advertising .....				176	67	180	143	75	48
General Practices .....				300	548	559	512	260	131
General Advertising .....				210					
Special Projects .....							6	53	12
Office of Director .....						9	5		1

\*Information in this and all other tables is taken from the *Workload and Manpower Reports*. Discrepancies in these tables reflect discrepancies in the reports.

Omissions in this and all other tables occur for one of the following reasons: 1) The division was not then in existence; 2) the division was functioning but figures were not available; 3) there was no activity in this area in that year.

\*\*Part of the reason for the decline in the total of investigations opened—particularly in 1963—may have been the institution of new rules of procedure in 1962 which, in effect, forced the FTC lawyers to be fully prepared for trial before a complaint was issued.

The total of investigation files opened by the Bureau of Textiles and Furs has been maintained at an average of a little more than 200 per year. Since the total for the agency has declined sharply, textile and fur investigations, which accounted for about 11% of investigation files opened in 1961, now account for nearly 40% of the total. Meanwhile, the number of investigation files opened by the Bureaus of Restraint of Trade and Deceptive Practices has declined sharply, and was lower in 1969 than in any year since 1961. The Bureau of Restraint of Trade opened 181 investigations in 1969, compared to 884 in 1961; the Bureau of Deceptive Practices opened 192 in 1969, compared to 899 in 1961.

The picture with respect to the annual number of 7-digit investigations completed is similar.

**TABLE II**  
**SEVEN DIGIT INVESTIGATIONS COMPLETED**

Fiscal Year	1961	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of Trade .....	336	709	346	467	729	492	321	196	289
Deceptive Practices .....	896	788	764	837	706	795	546	522	498
Textiles and Furs .....	195	180	202	253	275	186	191	166	167
Totals .....	1,427	1,677	1,312	1,557	1,710	1,473	1,058	884	954
<b>Restraint of Trade</b>									
Discriminatory Practices .....			285	330	585	375	165	74	120
General Trade Restraints .....			29	93	102	78	108	67	98
Mergers .....			32	44	42	39	48	54	66
Compliance .....									5
Office of Director .....									
<b>Deceptive Practices</b>									
Food and Drug Advertising .....			197	232	132	224	137	121	80
General Practices .....			276	287	574	571	396	364	386
General Advertising .....			291	318					
Special Projects .....							6	37	32
Office of Director .....							7		

As Table II shows, the totals for 1968 and 1969 (884 and 954, respectively) are substantially lower than the totals for 1961 and 1962 (1427 and 1677, respectively), and lower than any year since 1961. The Bureau of Textiles and Furs averaged about 190 investigations completed per year in the period 1961-1963, and about 175 completed per year in the period 1967-1969, so that the change for that Bureau is slight. In contrast, investigations completed by the Bureau of Restraint of Trade were down from an average of over 460 per year in the period 1961-1963 to an average of less than 300 per year in the period 1967-1969, and investigations completed by the Bureau of Deceptive Practices were down from an average of about 800 per year in the period 1961-1963 to a little over 500 per year in the period 1967-1969.

Because the downward trend in investigations completed is not as sharp as the downward trend in investigations opened, the FTC is making some progress in cutting into its backlog of pending cases. Table III shows that the total workload (i.e. investigations on hand at the beginning of the fiscal year plus investigation files opened) is down from a high of almost 4,000 matters in 1965 to about 3200 in 1967, 2900 in 1968 and 2600 in 1969.

TABLE III

## SEVEN DIGIT INVESTIGATIONS: TOTAL WORKLOAD

Fiscal Year	1961	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of Trade .....					1,659	1,181	1,046	943	933
Deceptive Practices .....					1,832	1,882	1,756	1,598	1,279
Textiles and Furs .....					502	388	376	333	406
Totals .....					3,993	3,451	3,178	2,874	2,618
<b>Restraint of Trade</b>									
Discriminatory Practices .....					1,193	693	475	373	352
General Trade Restraints .....					329	332	367	334	340
Mergers .....					137	147	187	207	202
Compliance .....						9	17	29	37
Office of Director .....									
<b>Deceptive Practices</b>									
Food and Drug Advertising .....					419	485	395	305	236
General Practices .....					1,413	1,389	1,291	1,147	961
Compliance .....								1	1
Special Projects .....							63	145	79
Office of Director .....						8	7		2

**b. Formal Proceedings.**

As Table IV shows, the number of formal complaints issued by the FTC is down from an average of a little over 350 per year during the period 1961-1963 to less than 200 per year during the period 1967-1969.

**TABLE IV**  
**COMPLAINTS ISSUED BY THE COMMISSION**

Fiscal Year	1961*	1962*	1963	1964	1965	1966	1967	1968	1969
<b>Restraint of Trade</b>									
Contest .....			17	15	8	14	7	6	9
Consent .....			213	80	18	80	17	10	19
Totals .....	121	49	230	95	26	94	24	16	28
<b>Deceptive Practices</b>									
Contest .....			43	32	19	11	40	16	11
Consent .....			86	97	47	37	68	29	54
Totals .....	177	93	127	129	66	48	108	45	65
<b>Textiles and Furs</b>									
Contest .....			6	2	2	3	2	1	2
Consent .....			66	83	67	49	87	61	125
Totals .....	115	91	74	85	69	52	89	62	127
<b>Totals for Agency</b>									
Contest .....			66	49	29	28	49	23	22
Consent .....			365	260	132	166	172	100	198
Totals .....	410	232	431	309	161	194	221	123	220

\*Breakdown of component parts is not available for 1961 and 1962.

The number of cease and desist orders issued by the FTC has correspondingly declined (see Table V).

**TABLE V**  
**ORDERS TO CEASE AND DESIST ISSUED BY THE COMMISSION**

Fiscal Year	1961	1962	1963	1964	1965	1966	1967	1968	1969
Restraint of Trade .....	103	92	261	136	39	94	30	23	27
Deceptive Practices .....	180	176	118	161	67	51	96	53	68
Textiles and Furs .....	92	143	75	88	69	51	89	62	126
Totals .....	374	407	454	385	175	196	215	138	221

In 1968 only 123 formal complaints, less than one-third of the totals for 1961 and 1963, were filed. In 1969, 220 complaints were filed, which is substantially higher than 1968 but still a good deal lower than many prior years.

Once again, it is instructive to analyze this trend for individual bureaus within the FTC. Complaints issued by the Bureau of Textiles and Furs have not declined as rapidly as those issued by other bureaus, with the result that in 1968 and 1969, that bureau accounted for more than 50% of total complaints issued. Most of the increase in the 1969 total over 1968 is accounted for by complaints coming out of that bureau. The number of complaints issued by the Bureau of Restraint of Trade is down from highs of 121 in 1961 and 230 in 1963 to 16 in 1968 and 28 in 1969. The Bureau of Deceptive Practices fell from highs of 177 in 1961 and 129 in 1964 to 45 in 1968 and 65 in 1969.

Issuing a proposed complaint does not necessarily commit the FTC to extended litigation, as many of the proposed complaints will lead to negotiation of a consent order. Table IV shows that in 1968, when a total of 123 formal complaints were filed, 100 of those were settled by consent. Thus, six restraint of trade cases, 16 deceptive practice cases and 1 textile and fur case inaugurated that year were contested. 49 cases opened in 1967 were contested, 28 in 1966, and 29 in 1965.

One consequence of the sharp decline in formal enforcement activity has been to put the FTC's hearing examiners virtually out of work. Table VI shows that the average number of hearing examiners at the FTC has declined in recent years from 20 in 1965 to less than 13 in 1969.

**TABLE VI**  
**HEARING EXAMINERS**

Fiscal Year	1965	1966	1967	1968	1969
Average number of hearing examiners .....	20.00	16.25	15.00	13.75	12.63
Total workload* .....	99	71	96	61	51
Cases disposed of during fiscal year .....	62	29	59	35	24
Litigated .....	44	21	39	26	16
Other** .....	18	8	20	9	8
Hearing days .....	300	307	459	345	247
Average total workload per examiner .....	5.0	4.4	6.4	4.4	4.0
Average total output per examiner .....	3.1	1.8	3.9	2.5	1.9
Average number of hearing days per examiner ....	15.00	18.9	30.6	25.1	19.6

\*Cases on hand at beginning of fiscal year, complaints docketed during fiscal year, and cases reopened or remanded during fiscal year.

\*\*Includes, *inter alia* consent agreement cases, hearings to determine if OCD has been violated or if it should be modified, cases placed on suspense by the Commission, and cases disposed of by the Commission before issuance of an initial decision.

The workload per hearing examiner has averaged less than five cases per year over the past five years, and the average number of hearing days per year was about 22 per examiner during the same period.<sup>42</sup>

**c. Voluntary Compliance Program.**

Voluntary compliance activity at the FTC involves two related categories. The first category is entitled "Assurances of Voluntary Compliance" (AVC), which are signed agreements between potential respondents and the FTC. FTC rules require that firms signing AVCs submit within 6 months a compliance report giving documentary proof of compliance. The second category is entitled "Informal Corrective Actions" (ICA), and includes, in addition to AVCs, exchanges of letters and purely verbal assurances of discontinuance.

(1) *AVC.* Table VII shows that the total number of AVCs has increased from 239 in 1963 to more than 500 in each year during the period 1967 through 1969.

**TABLE VII**  
**ASSURANCES OF VOLUNTARY COMPLIANCE**

Fiscal Year	1963	1964	1965	1966	1967	1968	1969
Restraint of Trade .....	3	16	36	45	62	28	44
Deceptive Practices .....	224	303	313	199	141	141	174
Textiles and Furs .....	12	97	144	97	68	39	45
Total for Three Enforcement Bureaus .....	239	416	493	341	271	208	263
Industry Guidance & Others .....			283	81	288	299	248
Totals for Agency .....	239	416	776	422	559	507	511

These figures are misleading, however, in that the total number of AVCs for 1963 and 1964 includes only those obtained by the three enforcement bureaus of the FTC, while the totals for 1965 through 1969 include not only the AVCs from those three bureaus but also from the Bureau of Industry Guidance. Prior to 1965, the latter bureau did not take AVC's.

<sup>42</sup>To take up some of the slack, hearing examiners have been given "special assignments" by the FTC, and also by other agencies.

If only AVCs from the three enforcement bureaus are considered, it will be seen that the total AVCs on the average for each year during the period 1967 through 1969 (about 250 per year) are a good deal less than the average for the period 1963-1965 (about 380 per year). Thus, the situation with respect to AVCs obtained by the enforcement bureaus is similar to that with respect to formal proceedings in that the trend is downward.

(2) *ICA*. The total number of ICAs increased from less than 2,000 in 1964 to more than 5,700 in 1969. But, as Table VIII indicates, the entire increase represents corrective actions by the Bureau of Textiles and Furs.

**TABLE VIII**  
**INFORMAL CORRECTIVE ACTIONS**

Fiscal Year .....	1964	1965	1966	1967	1968	1969
Restraint of Trade* .....	75	100	100	125	100	100
Deceptive Practices** .....	303	313	199	141	141	174
Textiles and Furs*** .....	1,178	****	2,614	2,422	3,656	5,120
Industry Guidance & Other* .....	341	341	451	413	385	300
Totals .....	1,947	2,566	3,364	3,121	4,282	5,768

\*Figures are based on interviews with bureau directors.

\*\*Figures represent assurances of voluntary compliance. Bureau director Frank Hale stated in an interview that AVC's are the only informal corrective actions reported for that bureau.

\*\*\*Figures are from budget hearings.

\*\*\*\*Figures are not available.

In 1964, that bureau accounted for about 60% of the total number of ICAs, whereas in 1969 it accounted for almost 90%.

#### **d. Compliance Activities.**

(1) *Compliance with Orders to Cease and Desist*. Under FTC rules, an initial compliance report must be filed within 60 days after the issuance of an order. Thereafter, the FTC may call for a supplemental report or initiate a compliance investigation. As Table IX indicates, the total number of requests for supplemental compliance reports and compliance investigations has not varied sharply during the period 1965 through 1969.

**TABLE IX**  
**COMPLIANCE**

Fiscal Year .....	1965	1966	1967	1968	1969
Orders to Cease and Desist Issued in the Ten Preceding Years .....	2,975	2,844	2,866	2,908	2,758
Supplemental Compliance Reports Received					
Deceptive Practices .....	14	33	49	14	19
Restraint of Trade .....	45	27	14	15	14
Textiles and Furs .....	33	48	23	18	33
Totals .....	92	108	86	47	66
Compliance Investigations Initiated					
Deceptive Practices .....	62	107	49	77	77
Restraint of Trade .....	19	49	33	23	22
Textiles and Furs .....	30	30	32	41	67
Totals .....	111	186	114	141	166
Total of supplemental reports and investigations ..	203	294	200	188	232
Percentage of orders checked .....	6.82	10.33	6.97	6.46	8.41
Certified to Justice for civil penalty or enforcement proceedings					
Deceptive Practices .....	2	7	3	3	5
Restraint of Trade .....	3	2	2		2
Textiles and Furs .....	2	6		3	4
Totals .....	7	15	5	6	11

Compliance investigations are generally initiated on the basis of complaints of continued violation; the FTC rarely initiates such investigations on its own motion.

In the last five years, only 44 cases (or an average of about 9 per year) from the entire agency were certified to the Department of Justice for penalty or enforcement proceedings for non-compliance with a cease-and-desist order. We were advised by a senior FTC staff member in charge of compliance activities that when a compliance report is unsatisfactory or a compliance check reveals some problem, the usual procedure is to negotiate with the respondent until compliance is satisfactorily established.

(2) *Compliance with ICAs and AVCs.* The FTC makes no effort whatever to secure compliance with ICAs. Businesses signing AVCs are required to submit compliance reports within 6 months, but we are advised that the bureaus generally do not make independent checks to see whether there actually is compliance after that report is filed. Also, while the bureaus have the authority to require additional reports on compliance, this is rarely done unless a letter of complaint is received against the same potential respondent.

#### e. Evaluation of Comparative Data.

Although we are perplexed by the magnitude of the reduction in investigational activity by the FTC, we are reluctant to draw critical inferences from that alone. The FTC perhaps was opening too many investigation files in the period 1961-1963, thereby spreading its resources too thinly to do a first-rate job in any area. Moreover, we do not want to introduce a kind of "numbers game" as a standard for measuring the quality of performance simply on the basis of whether more complaints were filed or investigations opened this year than last. It is disappointing however, that the FTC has not used the opportunity created by the sharp decline in investigational activity to reduce more substantially its backlog of pending cases, and to increase its selectivity in opening files in accordance with some perceptible objectives or order of priorities.<sup>43</sup> Because the trend in investigations closed is also down, the backlog of pending matters is still very great.

With respect to enforcement policy, we believe that the de-emphasis of formal enforcement has gone too far. It is extraordinary that the FTC issued less than 200 formal complaints in 3 of the 4 years between 1965 and 1968, and a total of only 123 in 1968. Of that 1968 total, only 61 were generated by the Bureau of Restraint of Trade and Deceptive Practices, and of that 61, only 22 involved contested proceedings.

It would be easy of course, to pad litigation statistics by bringing a whole series of relatively simple and pointless cases. On the other hand, for an agency employing over 400 lawyers, and charged with respon-

<sup>43</sup>The FTC's own rule, which requires the opening of an investigation after commitment of eight hours of agency time, makes it unlikely that extensive pre-investigation research explains the decline in 7-digit investigations opened. Also, if the FTC were being more selective in opening files, one would expect that the percentage of cases closed without affirmative agency action (i.e. without filing a complaint, entry of an order, or negotiation of some form of voluntary compliance) would decline. Our research indicates, however, that of the total number of investigations closed each year, it is still true that more than 50% are closed for reasons such as insubstantiality of violation, no evidence of violation, and insufficient public interest.

sibility for enforcement of statutes in important and developing areas of law, to initiate a grand total of 23 contested cases in a year is disturbing. With such an obvious disinclination by the FTC to proceed formally, we fear that the business community may cease to take seriously the guides, rules, and other administrative pronouncements by the FTC, and also may cease to take seriously the statutes the FTC is empowered to enforce.

In terms of allocation of enforcement efforts, we believe that the present commitment of effort—with nearly 40% of total investigations opened, and 50% of complaints filed, involving the Bureau of Textiles and Furs—indicates a fundamental failure in the establishment of priorities by the Commission. Moreover, we question whether the thousands of trivial ICAs and AVCs generated by the Bureau of Textiles and Furs provide very important consumer protection or serve any other worthwhile enforcement goal.<sup>44</sup>

Despite heightened emphasis at the FTC on its voluntary compliance program, the figures show that, except for the area of textiles and furs, there is a general decline in this form of FTC activity. The decline in the number of formal proceedings therefore does not coincide with any increase in the number of informal dispositions. In any event, we question the operation of a voluntary compliance program for which no effective compliance checks have been devised. Many companies that voluntarily agree to change their business practices undoubtedly will do so, but others will not. Absent a program of careful compliance surveillance, coupled with strong sanctions when necessary, the voluntary compliance program cannot be regarded as effective law enforcement.

Recognizing the frailty of statistical portrayals which ignore qualitative considerations, it nevertheless appears significant that available measurements of all these FTC activities, formal and informal, show a consistent and serious decline between 1961-1963 and 1969 (except in textiles and furs). At least in the absence of indications of other measurable FTC activities, this statistical downtrend would indicate an important slowdown by the FTC.

## 2. Allocation of Resources.

A review of the FTC's allocations of resources in recent years leads to some interesting conclusions about the agency's own estimate of the relative worth of the various programs it administers.<sup>45</sup>

<sup>44</sup>See discussion at pp. 45 to 49 *infra*.

<sup>45</sup>Allocations in the consumer protection area will also be discussed at pp. 42-43, 44 and 49 *infra*.

In 1959, the FTC spent a little over \$1 million, about 16.9% of its total budget in that year, on enforcement directly related to Section 7 of the Clayton Act. Although total dollars spent rose slowly to a high of a little more than \$1.5 million in 1967, the percentage of the budget decreased fairly steadily to 13.8% in 1961, 11.7% in 1963, and 9.9% in 1965—and then rose very slightly to 10.3% in 1966 and 10.7% in 1967. Thereafter, total expenditures were cut to about \$1.35 million in 1968 and \$1.4 million in 1969, representing 8.8% and then approximately 9% of the total FTC budget. Thus, in terms of a percentage of its total budget, the FTC was spending in 1968 and 1969 about one-half as much on merger enforcement as it had been spending in 1959. This reduction took place during a period when the United States, according to the FTC's own Bureau of Economics, was undergoing the greatest surge of merger activity in its history. Although monies spent by other bureaus may be devoted to the overall goals of merger enforcement—for example, for studies conducted by the Bureau of Economics—we believe that direct allocations to the merger division are a rough indication of the FTC's views of the priority of this area.

By comparison, in 1959 the FTC spent a little over \$600,000 (about 9.3% of its total budget) on the enforcement work of the Bureau of Textiles and Furs. Thereafter, the amount of money devoted to textile and fur enforcement rose steadily year by year until 1968, when the expenditure was over \$1.6 million, and 1969, when about \$1.7 million was spent. In terms of percentage of available resources, the FTC spent 10.5% in 1968 and approximately 11% in 1969. Thus, the FTC was actually spending more dollars and a greater percentage of its budget in 1968 and 1969 on Bureau of Textile and Fur enforcement than it was to support its division of mergers.<sup>46</sup>

In the area of deceptive practices, until the last year or two, the FTC devoted virtually no time or money to combatting ghetto frauds and other forms of localized marketing deception. In part, inactivity in that area was justified by claims that the agency could play a more effective role as a coordinator and stimulator of state and local enforcement agencies. Assuming the FTC was correct in avoiding direct involvement with the localized frauds, a judgment which we will examine in later sections of this report, it still is difficult to understand why it staffed its Office of Federal-State Coordination with only one attorney

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<sup>46</sup>The Bureau of Textiles and Furs is concerned primarily with detection and deterrence of relatively technical instances of garment mislabeling.

and one secretary, despite its own estimates of the importance of the program and reports from knowledgeable staff people that the commitment was not sufficient.

Similarly, despite the FTC's own assertions in budget appropriation hearings and elsewhere that it had inadequate resources to do an effective job of monitoring mass media advertising, or checking on compliance by firms that had previously entered into assurances of voluntary compliance or informal corrective procedures, the FTC has not seen fit to divert resources from other uses in order to carry out effective monitoring or compliance programs.

### C. Delay

Problems of delay have vexed the FTC ever since it was established, and some of the most notorious examples of protracted administrative proceedings have occurred in that agency.<sup>47</sup> One consequence of such delay was illustrated recently in *Columbia Broadcasting System, Inc. v. FTC.*,<sup>48</sup> in which a Court of Appeals, reviewing in 1969 an FTC cease and desist order entered in 1967 under Section 5, found that evidence of injury to competition had been based on a 1959 investigation. The Court concluded that market conditions had changed so substantially in the intervening years that the FTC's findings were no longer reliable, and it remanded the case for the taking of additional evidence on the question of injury.

We propose in the succeeding sections to look into the question of the comparative speed of FTC administrative procedures during the period from 1962 through 1969. We start from the premise, conceded by the FTC itself<sup>49</sup> and recognized by most informed observers of Commission operations, that in 1961 and the immediately preceding years, problems of delay were extremely serious and had all but strangled the FTC's administrative procedures.

<sup>47</sup>See, e.g., *Carter Products, Inc. v. FTC*, 268 F. 2d 461 (9th Cir.), cert. denied, 361 U. S. 884 (1959).

<sup>48</sup>No. 16492 (7th Cir. June 26, 1969).

<sup>49</sup>The FTC's 1961 Annual Report noted the following with respect to delay:

[In 1961] it became all too apparent that the Commission's machinery needed to be redesigned to speed the prosecution of cases—to shorten the time between the initial investigation . . . and the issuance of an order stopping it. The changes required would have to be fundamental—not just a shoring up of weak spots—if the problem of delay were to be met head-on. *FTC Annual Report 1* (1961).

Statistics relating to problems of delay at the FTC are available with respect to three overlapping categories of pending matters: (1) age of pending 7-digit investigations, (2) age of matters forwarded to field offices for investigation, and (3) age of complaints pending completion of the litigation process. All data below have been obtained from the FTC's *Workload and Manpower Reports*.

### 1. Pending 7-Digit Investigations.

The FTC maintains figures by bureaus on the length of time that investigations are pending, and our survey will follow the same approach. As Table X shows, total investigations pending in the Bureau of Restraint of Trade in the period 1966-1969 have been about 700 per year, substantially lower than the approximately 1500 investigations pending in 1962 and 1963.

**TABLE X**  
**AGE OF PENDING SEVEN DIGIT INVESTIGATIONS**

Fiscal Year	1962	1963	1964	1965	1966	1967	1968	1969
<b>Number Pending</b> .....	<b>2,872</b>	<b>3,064</b>	<b>2,908</b>	<b>2,283</b>	<b>1,978</b>	<b>2,120</b>	<b>1,990</b>	<b>1,664</b>
<b>Restraint of Trade</b>								
<b>Number Pending</b> .....	<b>1,513</b>	<b>1,531</b>	<b>1,417</b>	<b>930</b>	<b>689</b>	<b>725</b>	<b>747</b>	<b>644</b>
<b>Age: less than 6 months</b> .....	<b>15%</b>	<b>12%</b>	<b>8%</b>	<b>10%</b>	<b>20%</b>	<b>25%</b>	<b>13%</b>	<b>14%</b>
6 months-1 year .....	19%	5%	14%	11%	14%	15%	14%	10%
1-2 years .....	45%	25%	13%	18%	22%	25%	29%	22%
over 2 years .....	21%	58%	65%	61%	44%	35%	44%	54%
<b>Deceptive Practices</b>								
<b>Number Pending</b> .....	<b>1,183</b>	<b>1,345</b>	<b>1,208</b>	<b>1,126</b>	<b>1,087</b>	<b>1,210</b>	<b>1,076</b>	<b>781</b>
<b>Age: less than 6 months</b> .....	<b>39%</b>	<b>29%</b>	<b>30%</b>	<b>25%</b>	<b>37%</b>	<b>23%</b>	<b>16%</b>	<b>12%</b>
6 months-1 year .....	20%	26%	16%	18%	23%	25%	19%	9%
1-2 years .....	21%	28%	29%	27%	17%	31%	33%	27%
over 2 years .....	20%	17%	25%	30%	23%	21%	32%	52%
<b>Textiles and Furs</b>								
<b>Number Pending</b> .....	<b>176</b>	<b>188</b>	<b>283</b>	<b>227</b>	<b>202</b>	<b>185</b>	<b>167</b>	<b>239</b>
<b>Age: less than 6 months</b> .....	<b>33%</b>	<b>54%</b>	<b>55%</b>	<b>31%</b>	<b>31%</b>	<b>42%</b>	<b>29%</b>	<b>46%</b>
6 months-1 year .....	35%	14%	22%	23%	27%	27%	32%	35%
1-2 years .....	26%	24%	20%	31%	21%	22%	31%	12%
over 2 years .....	6%	8%	3%	15%	21%	9%	8%	6%

This reflects the fact that the trend in the number of investigation files opened by the FTC per year is drastically down. This downward trend has not led, however, to more expeditious completion of investigations. With respect to the length of time that investigations are pend-

ing, the percentage pending "over two years" in 1969 is only slightly less than the average per year for the period 1963-1966, and is substantially higher than the percentage for 1962.

Problems of staleness and delay are even more apparent in the Bureau of Deceptive Practices. The number of investigations in that Bureau pending in 1969 (about 800) also is down sharply from the highs in the period 1962-1964 (about 1200 to 1350 per year). But again in terms of the length of time investigations remain in a pending status, the percentage pending "over 2 years" was 52% in 1969, more than double the figure in each year during the period 1962-1964 and substantially higher than any single year since 1962.

With respect to the Bureau of Textiles and Furs, no clear trend is discernible. The percentage of investigations pending for more than 2 years has rarely exceeded 10% during the period from 1962 to 1969, and is down to 6% in 1969. Lengthy delays in investigations never have been a serious problem in this bureau, reflecting the fact that proof of violations of the textile and fur labeling statutes usually is less difficult than in other areas of FTC enforcement.

## 2. Investigations Pending in Field Offices.

The period of time measured here begins with the date an investigation is received in a field office. As Table XI shows, the total number of investigations pending in the field offices was somewhat lower in 1969 than in 1968.

**TABLE XI**  
**AGE OF ALL INVESTIGATIONS PENDING IN FIELD OFFICES**

Fiscal Year	1962	1963	1964	1965	1966	1967	1968	1969
Total Number in Field Offices .....	839	788	759	645	802	1,008	854	684
Restraint of Trade								
Number in Field Offices .....	345	361	315	213	249	314	259	224
Age: less than 6 months .....	45%	52%	39%	39%	54%	44%	24%	32%
6 months-1 year .....	13%	17%	27%	25%	26%	25%	22%	17%
1 year-18 months .....	18%	17%	15%	12%	8%	17%	20%	12%
over 18 months .....	20%	14%	19%	24%	12%	14%	34%	39%
Deceptive Practices								
Number in Field Offices .....	373	371	335	354	475	584	466	339
Age: less than 6 months .....	56%	65%	48%	62%	68%	47%	45%	41%
6 months-1 year .....	25%	21%	33%	23%	23%	31%	20%	24%
1 year-18 months .....	9%	7%	9%	6%	5%	15%	14%	17%
over 18 months .....	10%	7%	10%	9%	4%	7%	21%	18%
Textiles and Furs								
Number in Field Offices .....	117	48	107	77	76	86	70	79
Age: less than 6 months .....	57%	77%	71%	81%	79%	80%	88%	90%
6 months-1 year .....	27%	13%	22%	13%	18%	18%	10%	10%
1 year-18 months .....	6%	8%	6%	5%	3%	1%	1%	0%
over 18 months .....	10%	2%	1%	1%	0%	1%	1%	0%

On the other hand, the age of investigations pending has increased substantially. With respect to restraint of trade matters, 39% of all investigations in the field offices in 1969 were pending more than 18 months, a figure substantially higher than the average of about 18% during the period 1962-1964. Slightly more than half of all restraint of trade investigations had been in the field offices for over a year.

The percentage of deceptive practice investigations pending in the field offices reached new highs in 1968 and 1969. Thirty-five per cent of all investigational matters in the deceptive practice field had been pending in field offices for more than one year and 21% for more than 18 months in 1968, while 35% had been pending more than one year and 18% more than 18 months in 1969. By comparison, the averages for the period 1962-1964 were about 17% for matters pending more than one year and 9% for more than 18 months.

In the Bureau of Textiles and Furs, where the age of field office investigations never has been a serious problem, the situation has improved during the period under review to the point that almost no investigations remain in field offices longer than one year.

### 3. Complaints Pending Litigation.

We have already documented the drastic decrease in formal enforcement activity by the FTC during the period 1961-1969. As Table XII shows, pending enforcement matters totaled 38 in 1969 and 46 in 1968, compared with 243 in 1963 and 282 in 1962.

TABLE XII  
AGE OF COMPLAINTS PENDING LITIGATION

Fiscal Year	1962	1963	1964	1965	1966	1967	1968	1969
Total Number Pending .....	282	243	138	73	62	63	46	38
Restraint of Trade								
Number Pending .....	179	142	89	40	34	26	20	20
Age: less than 2 years .....	44%	32%	33%	35%	47%	62%	40%	60%
2-4 years .....	43%	46%	32%	23%	26%	19%	45%	40%
4-6 years .....	11%	18%	28%	30%	12%	8%	1%	0%
over 6 years .....	2%	4%	7%	12%	15%	11%	10%	0%
Deceptive Practices								
Number Pending .....	92	93	47	31	25	34	25	16
Age: less than 2 years .....	70%	68%	85%	81%	68%	82%	92%	81%
2-4 years .....	24%	28%	11%	16%	24%	6%	4%	19%
4-6 years .....	3%	4%	4%	3%	4%	6%	4%	0%
over 6 years .....	3%	0%	0%	0%	4%	6%	0%	0%
Textiles and Furs								
Number Pending .....	11	8	2	2	3	3	1	2
Age: less than 2 years .....	100%	100%	100%	100%	67%	100%	100%	100%
2-4 years .....	0%	0%	0%	0%	33%	0%	0%	0%

One consequence of this decline is that problems of delay with respect to formal proceedings are less serious. As Table XI indicates, it is increasingly rare that cases continue in a pending status more than 4 years after the complaint is issued. Problems of delay have by no means disappeared, however; in 1969, it was still true that about 40% of all restraint of trade cases and 19% of all deceptive practice cases were 2 to 4 years old.

#### **4. Evaluation of Comparative Data.**

In the investigative stages of restraint of trade and deceptive practice matters, it appears that despite a substantial reduction in the number of investigations, problems of delay are at least as serious now as they were in 1961. It is particularly disturbing that the most serious delay problems arise in the deceptive practice area, in which complex legal questions are seldom raised and consumers may continue to be defrauded pending completion of the FTC's investigation.

In the relatively few instances in which the FTC still resorts to formal proceedings, problems of delay are less serious today than they were in 1961 and 1962. This is almost certainly attributable to, and a desirable consequence of, the sharp decline in the FTC's formal enforcement activities. Given this decline, it is surprising that the remaining cases are not dispatched even more expeditiously.

In combination, the delays in investigation and litigation continue to produce decisions based on stale and unreliable evidence and to undermine effective enforcement of the statutes committed to the FTC's jurisdiction.

#### **D. Evaluation of Commission Staff**

According to critics who have reviewed FTC performance (see Section II, C, above), problems associated with the quality of staff have plagued this agency since its inception in 1914. Viewed in a broader perspective, these problems reflect the general inability of government to compete effectively with the private sector of the economy for the services of outstanding professional people.

It was impossible to evaluate the quality of every FTC staff member in a key administrative position in a manner that would be fair to individuals. Nevertheless, we believe that the FTC has serious problems in this area and that it will be impossible for it to implement present programs effectively, let alone institute the programs proposed in this report,

unless it attracts new personnel of high quality. We were informed by a majority of the present Commissioners that the FTC's task in this respect is made particularly difficult by pressure from Congressmen to hire or promote particular individuals.

There are of course a number of able, dedicated and hard working people in senior and other staff positions throughout the agency. With the appointment of new people to some senior staff positions and an influx of young lawyers and other professionals attracted by the prospect of participating in new programs, particularly in the area of consumer protection, we think this agency could begin to realize its potential.

Although the recruitment techniques of six or eight years ago were clearly inadequate, the agency has more recently organized and carried out a more aggressive recruitment program designed to attract able young people. Our review of FTC personnel records indicates that the young lawyers coming into the agency under this program are at least as able as young lawyers coming to most government agencies. We are not satisfied, however, that recruitment techniques are fully adequate to staff all bureaus and divisions with able personnel. For example, the quality of legal personnel in the FTC field offices, according to a majority of the Commissioners and knowledgeable senior members of the Commission staff, is generally lower than in the Washington office. This is at least partly due to the policy of the FTC not to assign any programs as such to its field offices and to permit field office attorneys to engage only in investigation rather than trial work—an approach likely to drive off the more able applicants. We were informed by the bureau chief in charge of recruitment of field office attorneys that this latter policy is based on the assumption that young lawyers are not competent to engage in both trial and investigative work—a view of the capacity of young lawyers that we doubt is shared by the Department of Justice or by many private employers in the United States. The same senior staff member also told us he preferred to hire older men—who had been out in the world for ten years or so and had come to appreciate that they were not going to make much of a mark—because they tended to be loyal and remain with the FTC. He also reported that he gave less weight to law school grades than to other factors. If there is a formula better designed to avoid hiring bright and energetic young men, we have not heard of it.

With respect to senior staff, a majority of the present FTC Commissioners advised us that some bureau and division chiefs are incompetent. We believe that this is attributable in part to the policy pursued in the last six or eight years of promoting almost exclusively from within the agency.

## E. Conclusions

The two recurring criticisms of the FTC that we have been in a position to evaluate—failure to plan and the crippling delay in its procedures—are about as serious today as at any time in the agency's history. Our conclusions about the quality of the FTC staff are necessarily in large part subjective, as are all evaluations. Nevertheless, it is our impression that there are too many instances of incompetence in the agency, particularly in senior staff positions.

Additional aspects of recent FTC performance are also disturbing. Underallocation of resources for consumer protection, particularly against localized fraud and deception, for anti-merger enforcement, monitoring of false advertising, and for compliance programs, have sapped the FTC's effectiveness in critical areas of its responsibility. In later sections of this report, we will describe how resources are meanwhile being wasted in other areas, such as overenforcement of labeling and disclosure requirements on textiles and furs, and promulgation and enforcement of guides and rules relating to trivial advertising and labeling problems. We agree with the Chairman of the FTC and others that Congress is partly responsible for the FTC's problems because of its practice of committing important new legislative programs to the agency without commensurate increases in budget. We also conclude that the FTC has not done what it could with the resources that have been available to it.

We conclude also that the FTC's enforcement program, which depends heavily on voluntary compliance by businessmen, with no effective check on that compliance, is unlikely adequately to protect the public interest. We believe that the FTC must avoid excessive reliance on formal case-by-case enforcement, but, for reasons discussed previously, we believe the trend toward voluntary compliance has gone too far. We note with approval that the decline in formal enforcement activity appears to have been reversed during the last year. It still remains for the FTC to mount an effective compliance program.

We have found further that problems of delay have been significant for the Commission through the years and that the Commission recently has sought to measure the degree of such delay as a first step in remedying the problem. We strongly support their determination to examine data on this problem.

To place our criticisms in perspective, we wish to emphasize that recent years have witnessed an improvement in several aspects of the

FTC's operations. The FTC has sought to improve its rules of practice and procedure. It has experimented with new administrative techniques such as the trade regulation rule and has developed new doctrine in merger and other areas. Also, opinion writing has been placed on a more responsible basis.

On the basis of our overall evaluation of the FTC's work product and staff, however, as well as our appraisal of its current performance in specific areas included in Section V of this report, we conclude that the FTC has lacked effective direction in recent years. As a result, its performance when measured against a reasonable standard of acceptable government operation has been disappointing. When actual performance is measured against the potential which the FTC continues to possess, the agency's performance must be regarded as a failure on many counts.

#### **IV. THE PROBLEM OF LEADERSHIP**

If the proposals in this report are ever to be implemented, and if the FTC is to fulfill the role we believe it can play, it must have the continuous vigorous support of the President and Congress. The first important manifestation of that support should be the appointment of a Commission Chairman with executive ability, knowledge of the tasks Congress has entrusted to the agency, and sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the business community that tend to cripple effective performance by the FTC. Because an urgent responsibility facing the new Chairman will be to unify the agency, we believe that it is important to appoint to this position someone not previously affiliated with it.

In that connection, we note that recent differences of view among Commissioners have reached unusual levels. This dissension, relating not only to enforcement philosophy but also to questions of how the agency ought to be run, has become a matter of public record, and is reflected in statements and speeches by Commissioners, oral exchanges during Commission proceedings, and exceptionally strong language contained in concurring and dissenting opinions.<sup>50</sup> Another indication of dissension is the action taken earlier this year by a majority of the Commission to increase from 11 to 63 the number of senior staff posi-

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<sup>50</sup>See, e.g., the opinion filed by the Commissioners concurring in or dissenting from the filing of complaints under 2(c) of the Robinson-Patman Act against five retail food chains and their brokers in Jewel Co., No. 8786-8790 (FTC July 22, 1969).

tions to which the Chairman could not make appointments without concurrence of the majority of the Commissioners. The Chairman stated that he would not abide by the determination of his fellow Commissioners, and the matter remains unsettled.

We do not mean to suggest that it is inappropriate for commissioners of an independent regulatory agency to express publicly their deeply held views, regardless of whether they happen to contradict the views of fellow commissioners, nor to imply that every disagreement must be solved by compromise among commissioners. But there does come a point at which bitter public statements reflecting disunity among commissioners begin to affect the performance of any agency. There are indications at present that members of the staff of the FTC, trapped between radically different philosophies of enforcement among commissioners, are perplexed as to how to perform their duties, and increasingly demoralized by the bitter exchanges among the Commissioners.

Looking toward the future, we do not believe the programs and innovations recommended in the remaining sections of this report can be effectively implemented by the FTC as it now stands. By the same token, we believe—and this is a view shared by a majority of the present Commissioners on the FTC—that it will continue to be almost impossible to attract and keep substantial numbers of good young lawyers and other professionals unless programs are revised and expanded. We see recruitment and the revision and expansion of present programs as complementary devices through which the FTC can realize its potential. It will require an outstanding Chairman to lead the way.

## V. EVALUATIONS OF FTC PERFORMANCE IN SPECIFIC AREAS AND RECOMMENDATIONS FOR FUTURE PROGRAMS.

### A. Consumer Protection.

There is a general conviction that marketing frauds against consumers are wide-spread in this country and constitute a problem of major national concern.<sup>51</sup> The feeling is not that business practices have changed

<sup>51</sup>This has been the conclusion reached by Congressional committees that have conducted investigations in this area in recent years. See *Hearings on S. J. Res. 130-S. 3066 Before the Senate Commerce Comm.*, 90th Cong. 2d Sess. (1968) [hereinafter cited as *Home Improvement Fraud Hearings*]; *Hearings on S. 1599 Before a Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 2d Sess. (1968). See also, among research studies, D. CAPLOVITZ, *THE POOR PAY MORE* (1967); W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKETPLACE* (1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 127 (1968) [hereinafter cited as *PRESIDENT'S COMM'N ON LAW ENFORCEMENT*]; Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 Column. L. Rev. 445, 450 (1968). The FTC itself drew this conclusion in *FTC, REPORT ON*

significantly but rather that the public is increasingly unwilling to tolerate exploitation. To a large extent, the publicity spotlight has fallen upon deceptive schemes practiced against the poor, uneducated and elderly, particularly in the urban ghettos of the United States, although, of course, these are not the only victims of such abuses.

Our study has led us to the conclusion that the FTC's efforts to investigate the basis in fact for this public outcry and to find ways of coping with whatever underlying problems exist have been inadequate. It is true that the FTC's resources may not match the scope of the problem, and we do not fault the FTC for failing to still all complaints of consumer fraud. Indeed, much of the responsibility for action in this area, particularly with regard to the local types of misconduct, rests with state and municipal authorities. However, the FTC has fallen far short of what it could have done. It has failed to instill a sense of mission either in its own personnel or in the states and municipalities which are so badly in need of the information and expertise which should be at the FTC's disposal. Its efforts have been piecemeal, and have lacked the study and planning which are essential to identify the most pressing problems faced by consumers, and to create a unified approach toward their solution. Often the agency has seemed more concerned with protecting competitors of an enterprise practicing deception rather than consumers.

In the succeeding sections, we will examine the FTC's existing programs in the areas of deceptive labeling, false advertising, wool and textiles, and localized marketing schemes, and will evaluate the agency's performance in each area.<sup>52</sup> Following that evaluation, we will indicate the areas where the FTC, although it has not been entirely inactive, should show new initiatives in the commitment of its resources.

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DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM 16 (1968). This was also the unanimous testimony of the more than 90 witnesses who appeared before the FTC in its public hearings into the problem of consumer fraud, held in November and December, 1968. (A transcript of these hearings, not yet published, was made available to the staff of our Commission).

The Kerner Commission found that 43% of ghetto families in New York "had experienced serious exploitation," REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 276 (1968), and that two of the major grievances producing conditions conducive to riots were "unfair commercial practices affecting Negro consumers" and the belief that "Negroes are sold inferior quality goods . . . at higher prices and are subjected to excessive interest rates and fraudulent commercial practices." *Id.* at 144-45.

<sup>52</sup>These categories do not cover all FTC consumer protection work, but account for over 90% of the total. Some of the matters that do not easily fit into these categories include investigations of games-of-chance, fraudulent warranties and misuse of audience rating claims by broadcasters, and the recently proposed trade regulation rule concerning the mailing of unsolicited credit cards.

In general, our comments concerning the strengths and weaknesses of FTC performance with respect to false advertising, deceptive labeling and localized marketing abuses apply equally to this miscellaneous category of projects.

## 1. Existing Programs

### a. Deceptive Labeling

(1) *The FTC Effort.* The FTC has committed a substantial portion of its total resources available for direct consumer protection to prevention of "unfair or deceptive acts or practices" in the labeling area.<sup>53</sup> Of the more than 200 formal proceedings initiated in the consumer protection field over the last three fiscal years, roughly 20% concerned deceptive labeling practices; the vast majority of the respondents were manufacturers. In addition, a substantial number of assurances of voluntary compliance were negotiated and advisory opinions issued in connection with labeling problems—particularly in the foreign origin area. Finally, a major commitment of resources to labeling problems was made in the Bureau of Industry Guidance; most of the guides and virtually all of the trade regulation rules promulgated by that bureau dealt, in whole or in part, with labeling problems.<sup>54</sup>

(2) *Evaluation.* The FTC has made some vigorous efforts in the deceptive labeling field. The Commission required health warnings on cigarette packages in the face of determined Congressional and industry opposition.<sup>55</sup> Guides promulgated by the FTC which seem to us

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<sup>53</sup>In areas other than labeling of hazardous substances and food, drugs, and cosmetics, the FTC is the principal federal agency charged with dealing with deceptive labeling problems. See 15 U. S. C. §§ 1261 et seq. (1964) as amended 1261-73 (Supp. III, 1965-1967), 21 U. S. C. §§ 301-92 (1964), conferring jurisdiction on the Department of Health, Education and Welfare.

The present discussion excludes FTC labeling activities in the fur, wool, and textile areas; for a discussion of enforcement in those areas, see pp. 45 to 49, *infra*. Further, it should be borne in mind that the distinction drawn between labeling and advertising often is tenuous. While it may be said that labels convey information, whereas advertising primarily is an attempt at persuasion, many advertisements have an informational purpose, and most labels, by the manner in which the contents are described, attempt to persuade the consumer to purchase the product. See generally, 80 HARV. L. REV. 1005, 1117 (1967).

<sup>54</sup>See, e.g., Guides for the Dog and Cat Food Industry, 16 CFR § 241 (1969); Guides for the Decorative Wall Paneling Industry (proposed), 16 CFR § 243 (1969); Guides for the Watch Industry, 16 CFR § 245 (1968); Tire Advertising and Labeling Guides, 16 CFR § 228 (1967); Guides for Shoe Content Labeling and Advertising, 16 CFR § 231 (1963); Trade Regulation Rule on Deceptive Advertising and Labeling as to Length of Extension Ladders, 16 CFR § 418 (1969) Trade Regulation Rule on Unfair or Deceptive Labeling of Cigarettes in Relation to the Health Hazards of Smoking (proposed), 16 CFR § 408 (1969); Trade Regulation Rule on Advertising and Labeling of Sleeping Bag Sizes, 16 CFR § 400 (1963).

<sup>55</sup>Trade Regulation Rule on Unfair or Deceptive Labeling of Cigarettes in Relation to the Health Hazards of Smoking, (proposed) 16 CFR § 408 (1969).

particularly useful include those relating to automobile tire labeling and deceptive labeling of dry-cell batteries.<sup>56</sup>

Notwithstanding these achievements, the FTC's deceptive labeling program does not seem to us to be designed to enforce Section 5 in a way that will protect important consumer interests or serve other sensible enforcement goals. For lack of adequate planning, the FTC has tended to select relatively trivial practices for staunch enforcement measures. While simultaneously asserting the lack of manpower and funds to initiate programs to combat ghetto frauds, monitor advertising, and secure effective compliance with orders, the FTC has issued complaints attacking the failure to disclose on labels that "Navy shoes" were not made by the Navy, that flies were imported, that Indian trinkets were not manufactured by American Indians, and that "Havana" cigars were not made entirely of Cuban tobacco. The record in relation to rules and guides also displays a preoccupation with projects of marginal importance. Thus the Commission announced that the use of the word "automatic" is deceptive when used in relation to sewing machines because "sewing machines, unlike 'automatic' washing machines or dishwashers, cannot be turned on and left, to operate by themselves."<sup>57</sup>

There are a number of reasons for the preponderance of trivia in the FTC's deceptive labeling activities. The range of matters which may be chosen for enforcement action is severely limited by the FTC's almost exclusive reliance on applications for complaint received through the mails. There has been an almost complete failure to identify areas of high consumer concern, affirmatively to seek out labeling deceptions,

<sup>56</sup>Tire Advertising and Labeling Guides, 16 CFR § 228 (1966); Trade Regulation Rule on Deceptive Use of "Leakproof," "Guaranteed Leakproof," etc. as Descriptive of Dry Cell Batteries 16 CFR § 403 (1964).

<sup>57</sup>Trade Regulation Rule on Misuse of "Automatic" or Terms of Similar Import as Descriptive of Household Electric Sewing Machines, 16 CFR § 401 (1965). In a similar vein, the FTC has looked into the question of deceptive labeling of extension ladders since "the maximum working or useful length of an extension ladder is invariably less than the total length of the component sections." Trade Regulation Rule on Deceptive Advertising and Labeling as to Length of Extension Ladders, 16 CFR § 418 (1969). Other guides and rules deal with such topics as the size of sleeping bags and tablecloths, nonprismatic binoculars, mislabeling of the leather content of waist belts, mislabeling of adhesive compositions, and deceptive labeling of watchcases and watch bands. See Guides for the Watch Industry, 16 CFR § 245 (1968); Guides Against Deceptive Labeling and Advertising of Adhesive Compositions, 16 CFR § 235 (1967); Trade Regulation Rule on Deception as to Nonprismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 16 CFR § 402 (1964); Trade Regulation Rule On Deceptive Advertising and Labeling as to Size of Tablecloths and Related Products, 16 CFR § 404 (1964); Trade Regulation Rule on Misbranding and Deception as to Leather Content of Waist Belts, 16 CFR § 405 (1964); Trade Regulation Rule on Advertising and Labeling as to Size of Sleeping Bags, 16 CFR § 400 (1963).

or otherwise to generate investigations and projects from within the agency. In addition, the vagaries of the passive mailbag approach have been compounded by the FTC's failure to set priorities within the deceptive labeling field or within the broader context of the FTC's overall consumer protection program.

Beyond the problems of input and planning, the involvement of the FTC in matters having a minor impact on consumers may be explained by the fact that the agency often acts at the behest of one group of industry members against another group. Sometimes these complaints of competitors deal with matters of concern to consumers, but often they do not. Also, there appears to be a great deal of effort spent on protecting industry members from product imitation by competitors.<sup>58</sup>

If the FTC had unlimited resources, we would be hard put to demonstrate any affirmative harm resulting from its preoccupation with trivial deceptive labeling practices. But where the FTC points to shortages in allocations as one reason for its inability to combat serious consumer frauds, it becomes clear that the consequence of the commitment of resources to these marginal projects is that more significant projects are left undone.

#### ***b. False and Deceptive Advertising.***

When considerations of health or safety are not directly involved, and the fraud is not so blatant that criminal sanctions can be sought, the FTC is virtually the sole effective protector of defrauded consumers in this area of the law. Section 5 of the FTC Act, conferring jurisdiction over "unfair or deceptive acts or practices in commerce . . .," and Section 12, dealing with the false advertisement of food, drugs, devices, and cosmetics, constitute an exceptionally broad grant of power in the FTC to deal with deceptive advertising. State advertising laws, private damage actions, and competition among advertisers in which they might publicize deceptions in a rival's advertising campaign are not now practical alternatives. Although the FTC has not been inactive in this area, lack of planning has led the agency to commit insufficient resources to the area, and to deploy them badly.

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<sup>58</sup>See, e.g., Guides for the Decorative Wall Paneling Industry (proposed) 16 CFR § 243 (1969); Trade Regulation Rule on Deception as to Nonprismatic and Partially Prismatic Instruments Being Prismatic Binoculars, 16 CFR § 402 (1964); Trade Regulation Rule on Misbranding and Deception as to Leather Content of Waist Belts, 16 CFR § 405 (1964).

(1) *The FTC Effort.* The FTC has been active in recent years in promulgating trade regulation rules and industry guides relating to false advertising, and some of its most effective administrative action has occurred in this area. There are guides dealing with deceptive advertising of guarantees<sup>59</sup> and tire advertising,<sup>60</sup> and it now has pending a proposed guide and trade regulation rule for advertising non-prescription analgesics.<sup>61</sup>

(2) *Evaluation.* The FTC has done some innovative work in the field of false advertising, particularly with regard to cigarettes,<sup>62</sup> and its successes should not be ignored. Unfortunately, however, commendable initiatives in conception often have been undermined by failures in implementation. The recurrent flaws of FTC enforcement—failures of detection, undercommitment of resources to important projects, timidity in instituting formal proceedings and failure to engage in an effective compliance program—tend to outweigh its occasional successes. To some extent, this is because Congress has refused funds to support enforcement activities. On the other hand, until very recently the FTC did not press Congress for additional funds to mount a more energetic campaign against false advertising, and, in any event, the FTC with present resources reallocated ought to be able to do a better job in this area.

Deficiencies in the FTC's current program are most pronounced in the following respects:

(a) *Detection.* The FTC's monitoring program is limited almost exclusively to examination of commercial advertising on national television. This monitoring consists of a review by attorneys and scientists of commercial scripts broadcast during the first week of each month, which are submitted to the FTC by the three major networks. Although vast amounts of material are accumulated dealing with national and local magazine advertising, national and regional radio scripts, regional television, and local newspaper advertising, no personnel have been assigned

<sup>59</sup>See Guides Against Deceptive Advertising of Guarantees, 16 CFR § 239 (1960).

<sup>60</sup>Tire Advertising and Labeling Guides, 16 CFR § 228 (1967).

<sup>61</sup>Proposed Guides for Advertising Over-the-Counter Drugs, 16 CFR § 249 (1969); Trade Regulation Rule on the Advertising of Nonprescription Systemic Analgesic Drugs (proposed), 16 CFR § 415 (1967).

<sup>62</sup>See Trade Regulation Rule on Cigarettes in Relation to the Health Hazards of Smoking (proposed), 16 CFR § 408 (1969). Of course no views as to the merits of issues underlying this controversy are intended.

to screen this material.<sup>63</sup> FTC employees have been requested, however, to report any questionable advertising that they may have seen personally. National TV does affect a great number of consumers. However, the ghetto frauds which the FTC believes numerous—such as fictitious pricing, home improvement frauds, and bait-and-switch schemes—usually appear in those local media that the FTC entirely ignores. We believe the FTC cannot mount an effective campaign against false and misleading advertising unless it monitors all interstate media with adequate personnel.

(b) *Undercommitment of Enforcement Resources.* The FTC has undertaken in recent years a broad range of investigations of questionable advertising, but it simply has not made the commitment of personnel necessary to carry out these investigations expeditiously and efficiently.

To take one example that came to our attention, the Division of Special Projects of the Bureau of Deceptive Practices is now responsible for conducting the following investigations which principally involve false advertising but also include other consumer fraud problems: misbranding of softwood lumber, cigarette advertising and labeling, fair packaging and labeling, encyclopedia and magazine subscription frauds, failure to publish or deceptive publication of gasoline octane ratings, advertising campaigns dealing with gasoline additives, promulgation of product safety standards, automobile warranty claims, and several other matters that are still confidential and cannot be listed at this time. A total of 12 attorneys have been assigned to handle all of these investigations, and six of those work exclusively on fair packaging and labeling. The predictable result is that investigations, once initiated, disappear from public view and surface, if at all, many years later. For example, in one way or another, the FTC has been investigating and dealing with the problem of false advertising of analgesic drugs since 1955. In March 1962, the Commission announced that it was initiating a study of the advertising of cold remedies to determine whether manufacturers of these products were overstating their effectiveness, but the results of that study remain unpublished and unimplemented. It is true that the agency has called for increased allocations, partly to expand the staff of attorneys available for false advertising work, only to see Congress cut the requested appropriations, and some of the responsibility for delay must be

<sup>63</sup> There is a procedure whereby attorneys in the FTC, investigating advertising with respect to a particular product, can ask two or three part-time undergraduate law students hired for the purpose to clip advertisements for that product from written materials submitted to the FTC by TV and radio stations, magazines and newspapers. This obviously does not qualify as a monitoring program.

attributed to legal maneuvers by attorneys for the firms being investigated. Nevertheless, the fundamental determination to commit a large number of important investigations to a staff of 12 lawyers in the Division of Special Projects, while almost 100 employees (lawyers, investigators, and others) staff the Bureau of Textiles and Furs, represents, in our view, an erroneous evaluation of enforcement priorities.<sup>64</sup>

(c) *Enforcement Procedures.* In the past few years, the FTC has resorted to formal enforcement procedures on the average less than 7 times per year in cases primarily involving false advertising charges. Most of these cases were terminated by negotiated consent arrangements so that rarely were the resources of the Commission devoted to the litigation process.

We recognize that in the false advertising area much can be accomplished by advising and consulting with advertisers, and encouraging voluntary compliance. On the other hand, if advertisers believe the FTC is reluctant to enforce the law vigorously where flagrant false advertising is uncovered, we fear they will not take the FTC seriously.

This failure to put some bite into enforcement is illustrated by the long history of the FTC's dealings with the J. B. Williams Company over advertising campaigns for Geritol. After more than three years of investigation, the FTC, in December, 1962, directed the issuance of a complaint in which it alleged, among other things, that respondents had misrepresented the efficacy of Geritol in the treatment of tiredness, nervousness, loss of strength and irritability. No preliminary injunction was sought. About three years later a cease and desist order was entered which was eventually affirmed with slight modification by the Court of Appeals.<sup>65</sup>

Early in 1968 respondents submitted their first compliance report. The new advertising campaign for Geritol was aired and, on November 14, 1968, the FTC held a public hearing for the purpose of determining whether the new Geritol commercials conformed with the Commission's order. The FTC found that the new Geritol commercials *still* violated the cease and desist order, but instead of seeking civil penalties the FTC merely ordered respondent to submit a second compliance report. In March, 1969, almost 10 years to the day after the beginning of the investigation, the FTC found that certain of Geritol's commercials *still* violated

<sup>64</sup>See p. 15, *supra*.

<sup>65</sup>J. B. Williams Co. v. FTC., 381 F. 2d 884 (6th Cir. 1967).

the cease and desist order, but again it did not seek civil enforcement penalties. No further action has been taken. Whatever the merits of the Commission's original complaint against the Geritol ads, we believe the Commission should have taken more effective action in the full decade since its investigation was initiated.

(d) *Ineffective Compliance Program.* Responsibility for securing compliance with cease-and-desist orders issued against respondents engaged in false and misleading advertising lies with the Compliance Division of the Bureau of Deceptive Practices. Eleven attorneys are assigned to this work, which consists largely of a review of compliance reports submitted by respondents, and the investigation of complaints received from the public alleging violations of orders.

According to the FTC's own personnel, this limited compliance program is falling further and further behind, and there is no program to institute a systematic check of compliance with orders or assurances of voluntary compliance after compliance reports have been approved. The last time such a survey was attempted was more than 15 years ago, and it resulted in penalty investigations in 25% of the cases surveyed, and civil penalty proceedings in 50% of the cases investigated.

The FTC recognizes the shortcomings of its compliance program in this area, and plans have been proposed within the agency to strengthen this area of its operations in the future. Such plans are long overdue.

(e) *Studies and Reports.* Little or no work has been done in recent years with respect to such questions as the evolving role of new techniques of advertising on buying patterns, the incidence and effectiveness of subliminal or motivational advertising, or the extent to which advertising has been directed toward establishing artificial product differentiation in the minds of consumers. Moreover, the FTC determines the "meaning" of advertisements and their impact on consumers without the benefit of empirical surveys conducted by advertising and marketing experts. In short, the FTC has made little use of its powers to investigate, study and report on problems in this area. In the future, hopefully, resources will be made available to undertake these activities.

(f) *Consumer Education.* Another area in which the FTC has been passive relates to possible programs of consumer education designed to make purchasers aware of flagrant deceptions and schemes to defraud.

The Kerner Report indicated that 88% of all Negro households and 95% of poor families in New York City have television sets.<sup>66</sup> Thus, an aggressive informational program on national and local television holds out the prospect of disseminating knowledge among low income groups who can ill afford to be victimized by deceptive practices.

We understand that the FTC is now considering establishing a Consumer Education Office to replace its present sporadic efforts. We commend this initiative, and propose that the office make efforts to secure, without charge, television and radio time by seeking the cooperation of the Federal Communications Commission, the national networks, local stations, and the Corporation for Public Broadcasting.

### c. Bureau of Textiles and Furs

(1) *The FTC Effort.* In terms of total dollars and the proportion of resources allocated, enforcement operations of the Bureau of Textiles and Furs have been and continue to be among the most preferred in the FTC over the last 8 or 10 years. In our view, this commitment represents poor planning and a misallocation of resources.

The Bureau of Textiles and Furs is engaged exclusively in the enforcement of four statutes: the Wool Products Labeling Act ("Wool Act"),<sup>67</sup> the Textile Fiber Products Identification Act ("Textile Act"),<sup>68</sup> the Fur Products Labeling Act ("Fur Act")<sup>69</sup> and the Flammable Fabrics Act.<sup>70</sup> Of these, the first three are primarily aimed at protecting producers rather than consumers.<sup>71</sup> We do not fault the FTC for enforcing these protectionist statutes. It is the judgment of Congress that these industries deserve some protection from competition, and it is neither our province, nor that of the FTC, to repeal the statutes. We believe, however, that in allocating its resources along the whole spectrum of social problems which the agency could attempt to ameliorate, the FTC has given inordinate attention to these areas. Moreover, the FTC's en-

<sup>66</sup>REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 274 (1968).

<sup>67</sup>15 U. S. C. § 68 (1964).

<sup>68</sup>15 U. S. C. § 70 (1964).

<sup>69</sup>15 U. S. C. § 69 (1964).

<sup>70</sup>15 U. S. C. § 1191-1204 (1964), as amended (Supp. III 1965-1967).

<sup>71</sup>See *Hearings on H. R. 944 Before a Subcomm. of the Comm. on Interstate and Foreign Commerce*, 76th Cong., 1st Sess. 17 (1939) (Wool Act); *Hearings on H. R. 469, 5606 and 6524 Before a Subcomm. of the Comm. on Interstate and Foreign Commerce*, 85th Cong., 1st Sess. 22, 38, 42 (1957) (Textile Act); *Hearings on H. R. 2321 Before the Comm. on Foreign and Interstate Commerce*, 82d Cong., 1st Sess. 8 (1951) (Fur Act).

forcement effort again has focused on trivial matters which bear little or no functional relationship either to the protection of competitors, or the protection of consumers.

For example, in *Marcus v. FTC*,<sup>72</sup> the FTC found a violation of the Act because of mislabeling on 4 wool blankets. One was labeled 70% wool and 30% rayon when it actually contained 79% wool, 5.9% nylon and various other fabrics, and a second was labeled 90% wool and 10% nylon, when it in fact had 93.7% wool. The FTC complained because the blanket labels understated the amount of wool, but the Court of Appeals found that understatement of wool content was not a violation. Another blanket was labeled 90% wool, but in fact had 89.9% and that label was held valid by the Court as an "unavoidable variation in manufacture." The fourth blanket was labeled 100% wool when in fact it contained 14.3% residue other than wool, and this was held to be a meaningful variation. Since the respondent had sold over one million blankets during the period under investigation, the Court concluded that the variations found did not constitute substantial evidence of misbranding.

Typical cases enforcing the Textile Act involve sleeping bags that were labeled "all acetate" but were found to contain "substantially less",<sup>73</sup> or men's trousers that were labeled 75% dacron-polyester and 25% cotton whereas "substantially less dacron" was present.<sup>74</sup> There are probably some consumer protection advantages that result from enforcement of the Textile Act. Most consumers cannot tell by sight or touch whether a textile is, for example, 60% cotton and 40% dacron, or contains other fibers, and the Act requires that the label disclose that information. For a sophisticated shopper, such information is relevant. On the other hand, the consumer interested in more practical considerations, such as durability, shrinkage, launderability, and warmth, needs to be told how these qualities relate to fiber content.

In enforcing the Fur Act, the FTC has adopted rules which provide that all information on the label must be in English, forbid the use of abbreviations on the label, and limit the minimum size of labels and the size of type that may be used on the label. Other rules prevent fictitious price comparisons, fraudulent claims of value, and bogus going-out-of-business sales. The following list of violations, taken from a report of a

<sup>72</sup>354 F. 2d 85 (2d Cir. 1965).

<sup>73</sup>Geotrade Industrial Group., 62 FTC 102 (1963).

<sup>74</sup>A. Brash & Sons, Inc., 58 FTC 1033 (1961).

case that eventually reached the Court of Appeals, is some indication of the kind of infractions that may occur:

A few hand written labels containing (in addition to the required data) non-required words "fur name" on the same side; one garment with no fur identification; a hand written label which omitted the information that the fur was dyed and which contained the non-required words "romance flank muskrat"; more than thirty labels containing non-required words, *e.g.*, "romance" and "fur name"; several labels omitting the information that the fur was dyed; about ten labels omitting the name or registered number of the marketer; several labels omitting the name of the mink trimming used on the garment of another fur; more than a dozen labels having the words "Southwest Africa" abbreviated as "S.W. Africa"; and several labels or garments of Persian Lamb in which the word "lamb" was omitted.<sup>75</sup>

It is difficult to justify such literal-minded enforcement of this statute by the Bureau of Textiles and Furs. Many of the trivial violations found in the literal text of labels, invoices and advertising are hardly relevant to any serious consumer interest. Indeed, if the misleading information were deceptive in a significant way—for example, if rabbit were labeled as Persian Lamb—Section 5 would be available to prevent continuation of such practices.

The fourth statute enforced by the Bureau of Textiles and Furs is the Flammable Fabrics Act, passed in 1953 and amended in 1967. It is not a labeling or disclosure statute, but directly prohibits the manufacture and marketing of any wearing apparel that does not conform to standards promulgated by the Secretary of Commerce. The Act resulted from a number of highly publicized incidents in the early 1950's involving severe burning of children by highly flammable children's cowboy playsuits and so-called "torch sweaters", and was amended in 1967 to allow for more flexibility in standards and to broaden the coverage of the Act to include household furnishings, draperies and blankets.

Time and effort devoted by the Bureau of Textiles and Furs to enforcement of this statute has been relatively minor compared to enforcement of the three labeling statutes. Of all Textile and Fur Bureau cases on the FTC docket in July 1962, 13.3% involved violations of the Flammable Fabrics Act. The percentage rose to 30% in 1964 and

<sup>75</sup>The Fair v. FTC, 272 F. 2d 609, 611 (7th Cir. 1959); *see also* Mannis v. FTC, 293 F. 2d 774 (9th Cir. 1961), affirming a Commission order although one of the violations was "far fetched" (the word "muskrat" was spelled "mustrak") and other asserted violations were "hypertechnical."

dropped to 5.6% in 1966 and 5.8% in 1967. By 1968 it was up to 16%. Budget allocation for Flammable Fabrics Act enforcement have run at about 10% of total textile and fur allocations over the last five years—compared to about 40% per year for Textile Act enforcement during the same period. In budget requests for fiscal 1970, the FTC has put substantially more emphasis on Flammable Fabrics Act enforcement. Thus, of 70 additional employees requested for fiscal 1970, 54 are to work in this area of enforcement.

(2) *Evaluation.* Operations of the Bureau of Textiles and Furs (other than in Flammable Fabrics Act enforcement) represent a glaring example of misallocation of resources and a misguided enforcement policy. Each year larger allocations are requested and increasing amounts spent on an energetic program to achieve results of highly dubious value to anyone. Moreover, the examples of concern with trivial labeling errors, mentioned above, came up in enforcement actions that were appealed to the Courts of Appeals; we suspect—and several of the present Commissioners in the FTC support us in this view—that even more trivial violations are involved in enforcement through voluntary compliance procedures.

Time and again, the FTC has defended itself against charges of inadequate consumer protection programs on the ground that a sufficient allocation to support these programs had not been made available. Keeping in mind that money saved by cutting the allocation to the Bureau of Textiles and Furs could be used for serious consumer protection work, we conclude that:

(a) The Flammable Fabrics Act is a legitimate and important aspect of consumer protection which, accordingly, should be rigorously enforced.

(b) Present efforts of the Bureau of Textiles and Furs to inspect 20% of all mills and manufacturers in the United States each year, and 10% to 15% of all retail outlets, are out of proportion to the contribution that such an ambitious program can make to consumer protection. We believe a carefully devised sampling program—cutting present expenditures on enforcement of the Wool, Textile, and Fur Acts by one-half to two-thirds—would be entirely adequate.

(c) The tendency of the Bureau to insist on literal compliance not only with the statutes but with the FTC's regulations under the statutes must cease. In other words, the Commission should devise a set of criteria

for actionable violations that distinguishes between trivial, nitpicking deviations as opposed to potentially serious deceptions of consumers.

#### **d. Retail Frauds.**

(1) *The FTC Effort—A Limited War.* Despite findings in its own studies that retail fraud against consumers is practiced on a vast scale, and findings by many others that it is a problem of major national concern, the FTC has devoted very limited resources to coping with these problems. The only comprehensive and organized effort to deal with retail marketing frauds was its consumer protection project begun in late 1966 in the District of Columbia. This program represents an embryonic effort at the type of study which the FTC needs in order to produce a unified plan of attack on consumer problems, but it was conducted on too small a scale, and for too short a period of time, to accomplish a sufficiently broad result.

As a result of this single program, however, 108 investigations of sellers in the District of Columbia were opened and 42 formal complaints issued. Several important FTC opinions were eventually handed down in connection with these complaints, including a few that broke important new ground in the development of consumer rights.<sup>76</sup> The knowledge gained as a result of the project influenced the drafting of the FTC's guides on retail installment credit sales, and is said by FTC personnel to have influenced the enactment by Congress of truth-in-lending legislation. These are extraordinary results from a program which, at the height of its activities, involved an average of five full-time lawyers. Nevertheless, the project itself has been allowed to dwindle to a skeleton operation, and no other similar project has been attempted. Several of the guides published in recent years touch upon consumer fraud problems,<sup>77</sup> and the FTC also has issued some complaints in this area. For example, we found that in the last three years the FTC had filed an average of about 15 complaints per year alleging fraudulent bait-and-switch practices or other fraudulent pricing tactics, about 12 complaints per year charging misrepresentations of potential earnings of franchises and dealerships (mostly involving chinchilla breeding franchises), about 7 complaints per year against home improvement frauds (e.g. bogus contests, phony commissions for "model home" displays, and fictitious pricing) and about 4 per year dealing with misrepresentations as to potential

<sup>76</sup>See, e.g., *In re Leon Tashof*, CCH TRADE REG. REP. ¶ 18,606 (FTC 1968); *Empico Corp.* [1965-1967 Transfer Binder] CCH TRADE REG. REP. ¶ 17,859 (FTC 1967).

<sup>77</sup>See, e.g., *Guides Against Deceptive Pricing*, 16 CFR § 233 (1967); *Guides Against Bait Advertising*, 16 CFR § 238 (1967); *Guides Against Deceptive Advertising of Guarantees*, 16 CFR § 238 (1967).

earnings upon graduation from various types of schools. With the exception of cases emerging from the D.C. Program, we are advised that every one of these actions developed from complaints received in the mail by the FTC. Determination whether to react to a letter of complaint alleging retail fraud is made on a case-by-case basis, and we are advised that no effort has been made to distinguish any trends in the approximately 12,000 letters of complaint now received each year. The planning failure is evident.

Another FTC program to combat localized consumer abuse has been its "federal-state coordination" program. This program involves referral of complaints received at the FTC to local enforcement officials when they involve essentially intrastate problems, solicitation of complaints from state and local officials where interstate problems are involved, responding to requests from state legislators and other state officials for advice or assistance in drafting legislation, preparing drafts of model legislation for consideration by states, and appearing and participating in conferences and meetings of local enforcement officials. We commend all of these efforts, but we also note that from the time the program was started in October, 1965, until a few months ago, the entire operation consisted of one lawyer and one secretary.<sup>78</sup> As a result of this undercommitment of resources, described as "miniscule" by the FTC's present General Counsel, this one-man operation has been unable to keep up with current responsibilities, much less expand the office's operations into new and promising areas.

Finally the FTC, in order to be more fully informed on consumer fraud problems in the nation and to receive advice as to the role it could best play in dealing with these problems, held extensive hearings in November and December of 1968. No action has yet been taken on the basis of these hearings.

(2) *Evaluation of Reasons for the FTC's Cautious Approach.* It is the view of the majority of the present Commissioners of the FTC that the agency should not become deeply involved in ghetto fraud and other retail consumer abuses. Three reasons have been offered in support of this judgment: (a) retail fraud principally involves criminal conduct, and the FTC, with the power to do nothing more than enter a cease-and-desist order, cannot play an effective role in this area; even where non-criminal conduct is involved, the sellers tend to be fly-by-night operators

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<sup>78</sup>The staff for the office of Federal-State Cooperation was doubled a few months ago; it now consists of 2 lawyers and 2 secretaries.

who are not likely to be deterred by injunctive remedies; (b) local consumer problems are best dealt with by state and local officials, and cannot be dealt with effectively by a federal administrative agency in Washington; and (c) the language of Section 5 making it applicable to unfair or deceptive acts or practices "in commerce" rather than "affecting commerce" creates a jurisdictional bar to the FTC dealing with most localized consumer fraud practices.

It is interesting that no single reason attracts the support of a majority of the present Commissioners. In any event, we suggest that these problems and difficulties have been exaggerated and that none of these reasons justifies the FTC's position that it should exclude itself from playing an effective role in this important area.

(a) *Inadequacy of FTC Remedies.* While many of the most flagrant consumer fraud schemes deserve to be prosecuted criminally, it by no means follows that there is no role to be played by an enforcement agency with solely civil sanctions. The President's Commission on Law Enforcement and Administration of Justice noted that the line between criminal and civil fraud often is unclear, and concluded that "the amount of civil fraud probably far exceeds that of criminal fraud."<sup>79</sup> Our interviews with FTC staff personnel who had experience in the consumer fraud area, and written submissions to our Commission by others active in the field, support this conclusion. For example, the head of the criminal fraud unit in the U. S. Attorney's office in New York advised us that he frequently had been placed in the awkward position either of seeking an indictment and criminal enforcement, or abandoning efforts to cope with consumer fraud violations because his office has no civil remedy. His view was that exclusively criminal sanctions were not adequate, and that there were important areas in which an aggressive FTC program could be effective. It was suggested that, at a minimum, FTC orders could be entered against interstate sources of credit or supplies who often appear to be tied closely to local sales outlets.<sup>80</sup>

(b) *Preferred Enforcement by Local Agencies.* In an ideal world, a solution to consumer fraud problems might well be that U. S. Attorneys' offices, using available criminal sanctions, would proceed against the more flagrant consumer fraud schemes, and state and local government units would cope effectively with civil fraud problems. We grant the force of the argument that many consumer fraud schemes are local in

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<sup>79</sup>PRESIDENT'S COMM'N ON LAW ENFORCEMENT 127.

<sup>80</sup>For a similar view, see *Home Improvement Fraud Hearings*.

origin and effect and preferably should be dealt with by local enforcement units rather than a Washington-based federal bureaucracy. Our proposals for new FTC initiatives, described below, take these considerations into account.

The fact is that resources now devoted to protection of consumers against widespread fraud and deception are inadequate; some municipalities and states have no consumer protection program, and others have consumer fraud programs in name only. As a result, the present coordination and referral system often consists of the FTC referring local complaints to state enforcement offices which have inadequate legislative power and resources to do anything effective about the complaint; meanwhile, state and local officials are urged to forward complaints concerning "interstate" problems to the FTC, where problems of delay, unwillingness to resort to formal proceedings, and the relatively small allocation of resources to consumer protection activities mean that little or nothing is done.

The FTC has some advantages in dealing with consumer fraud that are not duplicated in any other sector of federal or local government. Many defrauding sellers operate across state lines and cannot be dealt with effectively by local law enforcement agencies. Also, the FTC has an extraordinarily flexible statutory grant in Section 5 to deal with unfair or deceptive acts or practices, broad investigatory powers under Section 6, a large staff of lawyers and other professionals trained to deal with economic problems, and rule-making and other administrative enforcement devices which would allow the FTC to deal with a wide range of consumer problems in a single proceeding. If existing powers of the FTC are deficient in some respect—for example, because of the lack of power to enter a preliminary injunction against fraudulent schemes or to assess sufficient damages to deter wrongdoers—the FTC can seek additional authority from Congress.

At a bare minimum, it seems to us that the FTC has a responsibility under its legislative mandate to engage in a sufficiently active program of detection, enforcement and study of consumer fraud problems to report to Congress on the exact nature and dimensions of the problem, the economic conditions that permit these fraudulent schemes to flourish (including, if it is so determined, inadequate competition), and the needs, in terms of appropriations and new legislation, to cope effectively with this important problem area.

(c) *Alleged Jurisdictional Limitations.* The reason most frequently cited by Commissioners and FTC staff members for avoiding an active

program of detection and enforcement against ghetto and other localized frauds is that the jurisdiction of the FTC under Section 5 of the FTCA is inadequate to permit effective enforcement. Section 5 provides for the issuance of a cease and desist order "when firms have engaged in an 'unfair method of competition . . . [or] unfair or deceptive acts or practices in commerce'", and it has been argued that the "in commerce" language furnishes enforcement jurisdiction substantially narrower than the "affecting commerce" language of the Sherman Act and other regulatory statutes.<sup>81</sup>

The FTC's cautious approach in this area depends almost entirely on deference to a single 1941 Supreme Court decision, *FTC v. Bunte Brothers*,<sup>82</sup> in which a 6-3 majority of the Court held that the FTC did not have jurisdiction to enforce Section 5 against a localized fraud. Bunte Brothers, a candy manufacturer, allegedly had been using an unfair sales promotion to sell candy to children in Illinois. There were no interstate aspects to Bunte Brothers' sales activities, but the FTC argued that its fraudulent sales practices were "in commerce" because they adversely affected the competitive success of interstate rivals selling into the Illinois market. The Supreme Court majority rejected that contention.

We believe that the Commission has exaggerated the jurisdictional problems that might arise if it pursued a more active program against localized marketing frauds. In most consumer frauds of sufficient importance to justify commitment of the FTC's enforcement resources—i.e., the kinds of cases we propose the FTC deal with—we believe evidence could be introduced to circumvent any problems generated by the *Bunte Brothers* decision. For example, one line of evidence sufficient to distinguish *Bunte Brothers* would be that the fraudulent seller could foresee that some customers coming into its establishment would cross state lines.<sup>83</sup> In that connection, it is noteworthy that *de minimis* principles have been almost completely disregarded in interpretations of comparable jurisdictional limitations.<sup>84</sup> If the sales unit engaging in the alleged fraud or deception is a subsidiary or division of a multi-state seller, that also is likely to be sufficient to establish jurisdiction under Section 5.<sup>85</sup> In addition, if the fraud relies in any way on systematic use

<sup>81</sup>See *Id.* at 89-90 (testimony of Paul Rand Dixon); Address by James Nicholson before the ABA Admin. Law Section, Phila., Aug. 5, 1968.

<sup>82</sup>312 U. S. 349 (1941).

<sup>83</sup>*Standard Oil Co. v. FTC*, 340 U. S. 231 (1951); *Bankers Securities Corp. v. FTC*, 297 F. 2d 403 (3rd Cir. 1961).

<sup>84</sup>*Safeway Stores, Inc. v. FTC*, 366 F. 2d 795 (9th Cir. 1966), *cert. denied*, 386 U. S. 932 (1967); *Guziak v. FTC*, 361 F. 2d 700, 703 (8th Cir. 1966), *cert. denied*, 385 U. S. 1007 (1967).

<sup>85</sup>*Holland Furnace Co. v. FTC*, 269 F. 2d 203 (7th Cir. 1959), *cert. denied*, 361 U. S. 932 (1965).

of interstate mails (for example, requesting information in connection with credit reporting),<sup>86</sup> or if the seller advertises on TV, radio or any interstate media,<sup>87</sup> that is a sufficient basis to challenge fraudulent and deceptive statements included in the advertising, and also may provide a basis for challenging any and all fraudulent and deceptive conduct by the seller whether or not it is directly related to the advertising.<sup>88</sup>

If the *Bunte Brothers* decision cannot be avoided, we suggest a direct effort to test its continuing validity in the courts. We note that some of the theories used by the lower courts to distinguish *Bunte Brothers* since 1941—for example, finding interstate commerce where a subsidiary of a multi-state seller engages in purely localized frauds—are scarcely compatible with the theory underlying the decision that the “in commerce” provision be interpreted solely by looking at the geographic area directly affected by the fraudulent scheme.<sup>89</sup> Moreover, an expansionist reading of Section 5, whereby the “in commerce” provision is interpreted to have a jurisdictional reach approaching or coextensive with “affecting commerce” statutes, would be consistent with post-1941 Supreme Court interpretations of similar statutory provisions in several other regulatory areas.<sup>90</sup>

## 2. Proposals for New Initiatives.

Our study of the FTC's existing programs has indicated a serious misallocation of resources and a confusion of priorities. The only solution for this which can prevent similar distortions from occurring in the future is for the FTC to set up its own apparatus to define and to keep current a unified plan in the consumer area. Past efforts to do this have produced no effective results. The primary requisite for planning is ade-

<sup>86</sup>National Clearance Bureau v. FTC, 255 F. 2d 102 (3rd Cir. 1958); Rothschild v. FTC, 200 F. 2d 39 (7th Cir. 1952), cert. denied, 345 U. S. 941 (1953).

<sup>87</sup>See Guziak v. FTC, 361 F. 2d 700 (8th Cir. 1966), cert. denied, 395 U. S. 1007 (1967); Bankers Securities Corp. v. FTC, 297 F. 2d 403 (3rd Cir. 1961); Morton's Inc. v. FTC, 286 F. 2d 158 (1st Cir. 1961). See also, First Buckingham Community, Inc., 3 CCH TRADE REG. REP. ¶ 18,357 (FTC 1968) (FTC charged real estate brokers and apartment owners with false advertising because of failure to disclose that they would not sell or rent to Negroes; interstate commerce requirement based on advertising in interstate media).

<sup>88</sup>Cf. Shreveport Macaroni Mfg. Co. v. FTC, 321 F. 2d 404 (5th Cir. 1963); cert. denied, 375 U. S. 971 (1964) (jurisdiction over discriminatory advertising allowances, based, *inter alia*, on advertisements in interstate media).

<sup>89</sup>Note, *Jurisdictional Fetter on the FTC*, 76 YALE L. J. 1688, 1693 (1967).

<sup>90</sup>See, e.g., Fair Labor Standards Act: *Wolling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943); Natural Gas Act: *California v. Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965); Federal Power Act: *FPC v. Southern California Edison Co.*, 376 U. S. 205 (1964); Fur Labeling Act: *FTC v. Mandel Bros.*, 359 U. S. 385 (1959); *Morton's Inc. v. FTC*, 286 F. 2d 158 (1st Cir. 1961).

quate information about what consumer problems are, quantitatively and qualitatively. This can be achieved through analysis and classification of complaints received by the FTC, and by consultation and coordination with all interested groups, e.g., organized consumer groups, OEO Community Action Law Offices, U. S. Attorney's offices, Better Business Bureaus and the NAACP Legal Defense and Education Fund. Then the FTC must deploy its resources so that national problems are handled at a national level through the promulgation of regulations or through landmark proceedings, while regional enforcement efforts are carried out in a way which attains the maximum compliance per manhour of enforcement effort.

Achievement of these requisites, we believe, requires new initiatives on the part of the FTC. There are many routes to the goal. We will set forth herein three suggestions as a guide to the type of initiative the problems warrant.

First, a pilot project for a more intense study of retail marketing abuses and their prevention, which could carry out on a larger scale and a more sustained basis the embryonic effort of the District of Columbia pilot project. This pilot project could compile the information needed to classify and quantify consumer abuses, and demonstrate the most effective enforcement techniques. Second, there are substantial areas which have been largely neglected by the Federal Trade Commission, but which a pilot project might explore with an eye to FTC action under Section 5, or to federal legislation as necessary and appropriate. Finally, the addition of sanctions for which new legislation probably would be required could make the FTC a more effective enforcement agency across-the-board.

***a. Pilot Project for Prevention and Study of Retail Marketing Abuses.***

We recommend that the FTC establish special task force offices in 8 or 10 major urban areas in the United States which preferably would be independent of existing field offices. Each office would be staffed with an average of about ten lawyers and other professional personnel, and supporting clerical staff,<sup>91</sup> and their assignment would be to carry forward a

<sup>91</sup>As noted previously, the pilot project in the District of Columbia, conducted to some extent along lines proposed here, used an average of 5 attorneys plus supporting staff. Since this proposed project incorporates additional responsibilities and activities, we believe a larger staff is necessary. We chose ten as a convenient average; in cities like New York, an effective project would need to be larger, while in other places less than 10 might be adequate.

model program to detect, proceed against, and at the same time study, classify, and report on problems of localized fraud against consumers. These programs would be designed to protect consumers generally, but emphasis would be on economic fraud and deception against particularly vulnerable groups—the poor, the uneducated, and the elderly.

Project content would vary from city to city. For example, in a city where state and local enforcement agencies are relatively active, and OEO Community Action Law offices or the U. S. Attorney's Office is energetically pressing legal actions against economic exploitation of consumers, the FTC's program should emphasize coordination with existing enforcement groups by referring complaints, operating as an information clearing house, working on consumer education, etc. Where other sources of enforcement against consumer exploitation are deficient, however, the FTC might experiment with a program that involves a greater emphasis on formal enforcement activities.

The project described below would be designed to operate for three years, after which a report would be submitted to Congress. If results warranted, the program might be continued thereafter. The nature of the program is outlined below.

(1) *Detection.* Information as to consumer abuse would be developed through establishment of one or more "consumer complaint" offices in each area, staffed by FTC personnel, which would make known throughout the community the willingness of the FTC to investigate alleged consumer frauds. Project members also would set up cooperative arrangements with other public and private legal service organizations. One reason for careful coordination is that formal investigation by the FTC, conducted by subpoena, could confer immunity on the firm being investigated under 15 U. S. C. A. § 49. Before resorting to a formal investigation, it would be necessary for the FTC to be sure the matter would not be more appropriately pursued by federal or state agencies with criminal enforcement power.

In addition to local complaint offices, staff personnel would review newspaper and magazine ads and local radio and TV scripts for false advertising, study garnishment rolls and other court records to determine whether sellers may be taking oppressive advantage of the judicial process, and hold public hearings in the community to discuss economic abuses. The results of such studies then might be summarized and correlated with trends emerging in the letters currently received by the FTC from consumers complaining about fraud and deception.

(2) *Enforcement Proceedings.* Proceedings would be filed against companies where there is cause to believe they have engaged in serious consumer frauds in violation of Section 5. It is anticipated that many cases would be settled through consent decree or voluntary compliance, as is true with most FTC work. Where that is impossible or where a violation is particularly flagrant, cease and desist orders should be sought. Lawyers in the local office would be responsible for deciding whether to file a formal complaint, issue subpoenas, enter into a consent settlement, and, if necessary, try the case before hearing examiners assigned to sit in each local area where a project is established.<sup>92</sup> Since the staff of FTC hearing examiners has little work to do at present, a commitment of their time for this purpose would simply make use of resources currently being underutilized. Moreover, since most consumer fraud cases (e.g. bait-and-switch, false advertising, phony warranties, etc.) are relatively simple to try compared to the much more complicated cases that arise under anti-monopoly statutes, we expect that the young lawyers assigned to these local offices would be competent to handle these matters.

As we have previously noted, some consumer fraud situations are almost entirely local in character (for example, a single unconscionable contract between a seller and buyer); others can be dealt with effectively on a national basis (for example, false advertising, including bait-and-switch tactics, systematic abuse of holder in due course defenses, door-to-door sales frauds, etc.). Where the abuse is entirely local, the FTC office would be expected to establish liaison with and to refer the matter to city or state authorities, or to a neighborhood law office. Where clearly national, of sufficient impact, and within its planning priorities, the FTC itself would act. Finally, in the vast intermediate area of questionable conduct, where there are both local and interstate aspects, the field offices would be expected to deal with and dispose of those matters unless there is reason to believe that existing state or private law enforcement is adequate to handle them. As we have already indicated, we doubt that the jurisdictional problem would be a bar to the FTC in dealing with these mixed intrastate-interstate schemes.

In addition to case-by-case enforcement, it would be expected that other techniques characteristic of FTC procedure—e.g., trade practice guides and rules, advisory opinions, extensive voluntary compliance ar-

<sup>92</sup>This procedure would constitute an increase in authority delegated to staff over and above the present situation, but is consistent with proposals we have made in other sections of this report; see pp. 80 to 83 *infra*.

rangements, etc.—would be used, and also that existing guides in the fraud and deceptive practice area would be modified and updated on the basis of experience gained. Among other possibilities, the FTC might consider whether means could be found to encourage informal settlements of disputes between sellers and buyers—for example, by establishment of a community complaint board, appointment of a consumer ombudsman or establishment of a low-cost arbitration system for refunds, financed by sellers in the community.

While all of these investigations of novel doctrines of law or experiments with new approaches could be undertaken by personnel at the Washington office, we believe it is only by involvement at local levels that reliable data can be obtained and realistic approaches designed and implemented.

(3) *Coordination with Local Education and Enforcement Units.* In the long run, we recognize the desirability of having local enforcement agencies take over most of the task of coping with ghetto frauds and other localized abuses of consumers. We believe a federal presence is justified now, however, because consumer abuse is a serious problem and because local authorities, by their own testimony, are not capable, at present, of effectively coping with it. We note by the way that there seems to be no serious problem of resistance to federal activity; almost all state attorneys general seem to welcome federal law enforcement efforts in the consumer fraud area.<sup>93</sup>

A major emphasis of the program should be on cooperation with and the training of local enforcement personnel in order that they may ultimately assume responsibility in the local consumer abuse area. The FTC should continue its efforts to support adoption by the states of uniform state laws dealing with consumer frauds and deception, and should conduct seminars with state legislators or administrators to make available to the states relevant experience on the national level and in other states.<sup>94</sup> The FTC also might try to stimulate local units to engage

<sup>93</sup>*Home Improvement Fraud Hearings* 77.

<sup>94</sup>There are a number of uniform laws presently available to the states, but none has been widely enacted. Suggestions have emanated from the FTC, and from the Committee of State Officials on Suggested State Legislation of the Council of State Governments, and more will come from the National Commission on Product Safety. Recent suggestions from the Council of State Governments include bills on unsolicited merchandise (1969), false advertising (1965), retail installment financing (1963), and labeling of hazardous substances (1961). More generalized major bills are the Uniform Consumer Credit Code (UCCC), which covers both credit arrangements and sales, and incorporates some of the substantive suggestions made to the FTC above; the Uniform Deceptive Trade Practices Act which provides only a broad injunctive remedy but

more extensively in consumer protection education programs, through publication of written materials, TV programs, open meetings, and so forth. An obvious but important project would be simply to advise consumers of their rights under local court procedures. Faculties and students at local law schools, some of which are already engaged in clinical programs designed to study consumer fraud problems, also might be invited to become involved in a local consumer protection project.

(4) *Reports and Studies.* A major purpose of the proposed program would be to enlarge our knowledge of the types and extent of exploitation of consumers and of the most effective methods for combatting such exploitation. Essential to the acquisition of the requisite body of empirical data is the collection and analysis of economic and statistical information by professionals. The problems in the field of consumer protection are to a large extent economic and intelligent solutions require the full utilization of economic skills and insights. A substantial capability for economic data gathering and analysis therefore should be included in the pilot program.

One important by-product of the study function of the project should be comprehensive reports to Congress that illuminate the problems in these areas. Such reports would also address the question of the extent to which local enforcement agencies are adequately staffed and financed to protect the consumer interest. In that connection, criteria to determine adequacy of present enforcement efforts should be published, after consultation by the FTC with representatives of local agencies. Finally, the FTC should also consider whether and to what extent federal funding, through the model cities program or otherwise, ought to be made available to state and local consumer protection authorities.

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none in damages; and two sets of FTC recommendations. The first is the Unfair Trade Practices and Consumer Protection Law which includes treble damage actions, consumer class actions, criminal penalties, and preliminary injunctions among its remedies; and the abolition of the holder in due course doctrine among its substantive provisions. The FTC also recommends several "Proposals for Stimulating Competition as an Aid to Low-Income Consumers in the Inner Cities." These proposals include: granting subsidies, loans, insurance guarantees and tax incentives for ghetto businesses; developing management and clerical training programs for local residents; instituting educational programs for low-income market retailers and low-income consumers; and finally that the states study the feasibility of federally financed insurance programs for retailers extending low cost credit to ghetto dwellers.

Each of these bills contains useful provisions, although their adaptability to various states depends upon the particular problems of that state and on existing consumer legislation there. The FTC, instead of adding to the confusion, should attempt to coordinate the activities of all groups who are dedicated to the enactment of effective state legislation. This should be a major part of the Federal-State Cooperation program described above.

(5) *Substantive Proposals.* As we envision it, the pilot program will not be confined to preparing reports or developing new procedures for dealing with consumer fraud, important as these functions may be. We expect that one major result of the program will be to develop new, substantive consumer protection law.<sup>95</sup>

There is no shortage of problem areas. Widespread concern has been expressed by many persons and groups about a number of commercial practices which may adversely affect legitimate consumer interests. If, after proper study, the Commission finds that remedial action is necessary, it should not hesitate to act.

For some practices, new legislation may be necessary to effect needed reforms. In these cases, the Commission should enlist the aid of Congress, the business community, private consumer groups, and other federal agencies, in formulating and enacting new laws.

But new legislation may not be necessary to control all such practices. Imaginative use of Section 5 might bring many of these problems, or important aspects of them, within the jurisdiction of the FTC. Section 5 of the FTC Act is vastly flexible, and the boundaries of the phrase "unfair" practices, in terms of consumer protection, are still to be judicially determined.

We cannot consider and resolve the many problems of social and economic significance inherent in dealing with the various commercial practices that have come under attack in recent years. Indeed, this is one of the functions of the pilot program. But we cannot ignore the existence of these problems and some of the suggested solutions. Therefore, as examples of the type of problems to be attacked, and the type of questions to be considered in shaping solutions, we offer the following:

*Presale disclosure.* Under what circumstances need disclosures be made about the product's capabilities or disabilities in order to avoid a sale which is deceptive or "unfair?" What attributes of what products should be described by a producer on a label or tag attached to a product?

*Door-to-door sales.* Are home solicitation sales inherently likely to involve deceptive sales practices? If so, can such deceptions be remedied without excessive costs to legitimate transactions? Under what

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<sup>95</sup>The program is not designed to supplant the operations of the Federal-State Cooperation Office. We concur in what appears to be a general view of people active in this field that the Office furnishes valuable services, and that its operations should be continued and expanded.

circumstances, if any, and with what safeguards, should such rescission be permitted?<sup>96</sup>

*Warranty disclaimers and limitation of remedies clauses.* What kinds of limitations of liability by the seller should or should not be permitted? How much freedom of bargaining should be retained by a buyer who would prefer knowingly to assume product risks himself? Should forms be prescribed to communicate clearly to buyers whatever choices a contract may contain? What does fairness require by way of conspicuousness for contract clauses that the consumer may not expect, or that affect substantial rights?

*Deficiency Judgments.* In consumer transactions in which the seller retains a security interest, to what extent should he be entitled, as under general commercial law principles, to sue for a deficiency if the secured collateral upon resale does not compensate him for the total amount of the contract? To what extent do forced resales of consumer goods generate rather than avoid deficiency judgments? Are there alternative ways of handling these secured transactions which would protect all of the parties?

*Holder in due course.* The holder in due course doctrine, developed for the sporadic assignment of negotiable instruments, among strangers, has never been used in the commercial assignment of accounts receivable. Is it appropriate to continue its use in the consumer field, to shift the risk of unscrupulous sales practices from a knowledgeable finance company to an inexperienced consumer?

*Garnishment.* The garnishment of a debtor's earnings is a frequent collection device for consumer sales in default. Is such a device an appropriate one, to enable an otherwise impecunious debtor to establish his eligibility for credit, or is it an abuse of process? Prejudgment garnishment, absent notice and a prior hearing, was recently held unconstitutional by the Supreme Court in *Sniadach v. Family Finance Corp.*<sup>97</sup> The Truth-In-Lending Act, and many state laws, prevent firing an employee whose wages have been subjected to a single garnishment. Is firing of garnisheed employees still common? Is further legislation

<sup>96</sup>The Commission has recently taken action to curb door-to-door sales abuses. After finding that a door-to-door sales company used bait and switch and other unfair and deceptive practices to sell sewing machines, it issued an order requiring a three-day "cooling-off" period during which contracts negotiated in the customer's home could be rescinded. The FTC also ordered full disclosure in understandable terms that the sales contract would be assigned to a third party without recourse. Household Sewing Machine Co., No. 8761, (FTC Aug. 6, 1969). See also All-State Industries of North Carolina, No. 8738 (FTC April 1, 1969).

<sup>97</sup>395 U.S. 337 (1969).

necessary to protect wage-earners but still provide adequate creditor remedies?

(6) *Conclusions.* The benefits of this program would be immediate and long-run. The primary immediate benefit would be the suppression and deterrence of some of the most serious examples of local consumer fraud as a result of the coordinated Federal, state and local efforts. The numerous long-range benefits would include:

The collection of a body of empirical data necessary to evaluate properly the magnitude and nature of consumer fraud problems, and to assist in the evaluation of both pending and new legislative efforts.

The development of needed legislation on both Federal and state levels.

An expansion of the type of behavior that could be regulated within the limits of existing legislation.

The stimulation of state and local enforcement units to play more active roles in combatting consumer abuses, coupled with the education and training necessary to carry out the expanded role.

The significant contribution to a successful FTC recruiting program to attract able young lawyers who wish to become involved in contemporary social problems.

A gain in stature for the Federal government as a result of a concrete demonstration of concern about consumer fraud and a willingness to take effective action.

#### **b. Sanctions.**

(1) *Preliminary Injunctions.* Currently, a firm engaging in an unfair or deceptive practice may continue to do so until a Federal Trade Commission cease-and-desist order has become "final"; and the elapsed time between the initiation of a Commission investigation and the denial of certiorari is likely to be at least two years.

Under Section 13(a) of the Act, the Commission already has the power to seek preliminary injunctions in federal district court where the unfair or deceptive practice consists of false advertising of a food, drug, device, or cosmetic. Bills have recently been introduced which would amend Section 13 of the Act to cover other unfair or deceptive practices, and passage of such a measure is recommended.

So that the Commissioners need take no adversary position in the courts before adjudicating the case themselves, the power to seek preliminary injunctions should not be vested in the Commissioners. Rather,

the General Counsel, after consulting with the chief of the bureau in charge of the case, should make this decision. If a preliminary injunction is granted, it should be effective only for a limited period so that the FTC would be required to expedite the trial on the merits, unless the defendant chooses to waive this feature.<sup>97a</sup>

(2) *Private Recovery.* We recommend that private rights of action for damages and injunctive relief be created for and on behalf of consumers and other persons who are injured by deceptive practices which are violations of Section 5 of the FTC Act. This private right of recovery, particularly to the extent that it does not depend upon the utilization of FTC resources, would multiply the effectiveness of the enforcement mechanism and the seriousness of the sanction against violation.

Such actions could be brought in federal court, and the state courts could be given concurrent jurisdiction. Wherever the action is brought, the private party might rely for his right of recovery simply on violation of Section 5 to his injury. To make more meaningful to consumers these private rights, there might be created a type of consumer action which would require lowering or elimination of jurisdictional amounts or, alternatively, more permissive aggregation of claims to meet the jurisdictional amount.

A whole range of questions would need to be answered in defining the nature of the private right, but we do not regard the solution to these questions as within our jurisdiction. Should automatic or discretionary trebling of damages be permitted? Should the existence of an FTC cease-and-desist order constitute a *prima facie* case for the private party against the respondent subject to the cease-and-desist order? Should the private right arise only upon, and pursuant to, a finding of a violation by the FTC? Should it, instead, be restricted to actions based on settled interpretation of Section 5 by the FTC? Should the right accrue, not directly to individual consumers, but, instead, for their benefit, to some public authority like the FTC as *parens patriae* to collect amounts of which consumers have been defrauded, either to hold in the public fisc or to distribute among the defrauded private parties to the extent that they can be identified? As in Sherman Act suits, Truth in Lending Act suits, or Civil Rights Act suits, should successful plaintiffs be awarded attorneys fees and, if so, in what amounts? Are safeguards on such actions required to avoid the filing of frivolous or nuisance cases?

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<sup>97a</sup> It is possible that the FTC already has the power to seek preliminary injunctions in the Courts of Appeals against all unfair or deceptive practices, without need of further legislation. See *FTC v. Dean Foods Co.*, 384 U.S. 597, 608 (1966).

However these questions are resolved, legislation to provide an adequate private remedy to reimburse injured parties and to deter Section 5 violators should be sought with vigor.

## **B. Antitrust Activity: The Clayton, Robinson-Patman, and FTC Acts.**

The FTC has explicit jurisdiction, concurrent with that of the Antitrust Division of the Department of Justice, to enforce Sections 2, 3, 7 and 8 of the Clayton Act. The courts have also interpreted Section 5 to give the FTC jurisdiction to deal with practices that violate the letter or the "basic policies" of all the antitrust laws. In practice, the Department of Justice has left enforcement of the Robinson-Patman amendments to Section 2 of the Clayton Act almost entirely to the FTC.<sup>98</sup>

### **I. Continuation of Concurrent Jurisdiction.**

We do not propose divesting the FTC of its antitrust jurisdiction, even though we recognize that enforcement of the antitrust laws through the FTC's administrative process has been less than satisfactory. We do not think these past failures proceed inevitably from any incompatibility between effective antitrust enforcement and the administrative process; on the contrary, the FTC in our view has rarely operated so as to take advantage of the unique strengths conferred upon it by Congress when it established the agency in 1914.

The idea of creating an administrative agency to operate in the antitrust field arose out of a concern that federal district judges, unequipped with a staff of fact-finders, evaluators and economists, would not be able to apply the antitrust laws effectively to halt the growth of anti-competitive practices and at the same time not unduly interfere with vigorous economic growth. However well the federal judiciary may now be thought to be functioning in this area, there is an important role for the administrative process in solving difficult and complex antitrust questions. To carry out that function, Congress conferred on the FTC powers and characteristics that are not now duplicated by Department of Justice enforcement through the federal courts. These are, **first**, wide powers to investigate and require submission of reports; **second**, centralization in one agency of Commissioners, hearing examiners, attorneys and economists who can concentrate on antitrust questions and, from long experience, develop a special competence to deal with these questions; and **third**, the opportunity to decide antitrust questions without reliance

<sup>98</sup>Under the Lanhan Trademark Act, 15 U. S. C. § 1064 (1964), the FTC has power (never used) to cancel trademarks where used for anticompetitive purposes.

necessarily on individual case-by-case precedents, including promulgation of industry guides, advisory opinions, and programs; and fourth, the power to issue studies and reports to the President, Congress and the public which can illuminate antitrust issues and evaluate the need for additional legislation.<sup>99</sup>

If the measure of the quality of FTC performance in the antitrust area is whether the agency has broken new ground and made new law by resort to its unique administrative resources, it seems clear that the record is largely one of missed opportunity. However, the FTC did lead the way in implementation and interpretation of Section 7 of the Clayton Act. Moreover, that program has been carried out not simply by the institution of formal proceedings, but by the publication of economic reports and the promulgation of guides, *i.e.*, by use of the full panoply of administrative resources available to the FTC.

In the expectation that these kinds of successes can be repeated and extended by the revitalized FTC we envisage, we decline to propose the elimination of antitrust enforcement authority in the FTC. We are influenced in this judgment because we believe the antitrust problems of our times are great enough to challenge both the judicial and administrative processes, particularly in view of the already crowded judicial dockets.

## **2. Coordination Between the Department of Justice and the FTC.**

Procedures for coordination are set out in a 1948 memorandum, signed by representatives of the Department of Justice and the FTC, supplemented by subsequent exchanges of letters. Particular individuals in each agency have been designated to coordinate enforcement efforts and see to it that there is no duplication of investigational activity. Where agreement is reached as to the agency which will conduct an investigation, the other agency will not participate. If agreement cannot be reached at the operating level, the matter can be taken to higher staff personnel in each agency, and if necessary to the Assistant Attorney General for Antitrust and the Chairman of the FTC for negotiation and settlement.

We have been advised by personnel who have recently been discharging coordination responsibilities in the FTC and the Department of Justice, that the arrangements are stable and reasonably effective in avoiding conflicting investigations by the two agencies. We accept that judgment, but we make two proposals for improving the present situation.

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<sup>99</sup>For an evaluation of FTC performance in preparing studies and reports, see pp. 68 to 72 *infra*.

**a. Long-term Planning and Coordination.**

At present, the principal criterion used in determining the allocation of responsibility between the two agencies is the experience of each agency with the industry or company being investigated. We believe, however, that the fact that one of the agencies previously opened a file on a company or has had some enforcement experience with a particular industry, while a relevant consideration, should not be the sole or even a principal governing factor.

Allocation of long-term investigation and enforcement responsibility should be determined by a standing committee of relatively senior staff personnel from each agency. Any plan proposed should be approved by the FTC and the Assistant Attorney General. We believe such an arrangement would benefit both agencies, and we urge them to implement it promptly. Aside from obvious planning advantages, such an arrangement would provide a means for permitting the Department and the FTC to reconcile differences of view with respect to different aspects of enforcement policy (for example, the kinds of differences that currently exist in the merger guidelines promulgated by the two agencies).<sup>100</sup>

**b. Governing Criteria in Allocating Responsibility.**

We recommend that the FTC concentrate on antitrust enforcement that would make best use of the unique advantages of its administrative process. This would mean, for example, that the FTC should take no action in situations in which the conduct at issue, if challenged by the Department of Justice, would be likely to be challenged in a criminal proceeding. Cases of *per se* illegality, such as price-fixing, market allocation, and boycotts designed to enforce price-fixing cartels should thus be left to the Department of Justice. For the trial of these cases which usually involve nothing more than controversies over whether alleged conduct in fact occurred, the criminal sanctions, where appropriate, and litigation procedures of the district courts are better suited than the FTC's administrative approach.

On the other hand, where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases have not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct, such matters should generally be assigned to the FTC.

<sup>100</sup>Compare Department of Justice Merger Guidelines (May 30, 1968) with FTC Statements of Enforcement Policy with Respect to Mergers in the Food Distribution Industries (Jan. 17, 1967), and Product Extension Mergers in Grocery Products Manufacturing (May 15, 1968).

### 3. Appraisal of Specific Aspects of FTC Enforcement Activity.

In recent years, FTC enforcement, with few exceptions, has been limited to enforcement of the Robinson-Patman Act, some investigations and formal proceedings under Section 5 of the FTCA concerning antitrust problems in connection with vertical distribution arrangements, and economic studies, reports, promulgation of guidelines, and formal proceedings challenging mergers under Section 7 of the Clayton Act and Section 5 of the FTCA.

#### a. *Robinson-Patman Enforcement.*

We note the large and growing body of uniformly critical opinion questioning the FTC's enforcement of the Robinson-Patman Act,<sup>101</sup> and, in particular, of the *per se* and quasi *per se* rules embodied in 2(c) of the Act (dealing with the payment of brokerage), 2(d) (dealing with payment to customers for services rendered), and 2(e) (dealing with the furnishing of services to customers). Many of these critics have observed a tendency on the part of the FTC to interpret the price discrimination provisions of the Act so as to equate injury to a particular competitor with injury to the competitive process. They have also noted that such enforcement has been detrimental to the consumer in its tendency to suppress price competition, deter experimentation with new and more efficient methods of distribution, and erect barriers to entry into new markets by highly competitive, geographically diversified firms.

The FTC itself, in recent years, has de-emphasized formal proceedings enforcing the Robinson-Patman Act. In addition, many recent pronouncements by the FTC in the Robinson-Patman area have reflected increasingly sharp differences of policy among the Commissioners, with a multiplicity of opinions precluding any clear guidance as to the meaning of the Act.<sup>102</sup> There is now widespread uncertainty among businessmen and their advisors as to how to comply with this statute.

We are persuaded that the time has come for the FTC to initiate a study and appraisal of the compatibility of the Robinson-Patman Act and its current interpretations to the attainment of antitrust objectives.

<sup>101</sup>See, e.g., EDWARDS, THE PRICE DISCRIMINATION LAW (1959); *Annual Report of the Council of Economic Advisers* 109 (1969); *Report of the Attorney General's National Committee to Study the Antitrust Laws* 155-221 (1955); *Task Force on Productivity and Competition* (1969) ("Stigler Report"), reprinted in ANTITRUST & TRADE REG. REP. No. 413 (June 10, 1969); *White House Task Force Report on Antitrust Policy* (1968) ("Neal Report"), reprinted in ANTITRUST & TRADE REG. REP. No. 411 (May 27, 1969).

<sup>102</sup>See, e.g., *Jewel Co.*, No. 8786-8790 (FTC July 22, 1969); *National Dairy Prods. Corp.*, 3 CCH TRADE REG. REP. ¶ 18,027 (FTC 1967); *Dean Milk Co.*, [1965-1967 Transfer Binder] CCH TRADE REG. REP. ¶ 17,357 (FTC 1965).

Pending completion of this study and report, we recommend that the FTC focus enforcement of the Act on instances in which injury to competition is clear, taking into account the consumer interest in vigorous price competition and the fact that the Act's principal purpose is to curb abuses of mass-buying power by large firms. Also, the FTC should direct its enforcement proceedings under Section 2 (c), (d) or (e) of the Act to cases in which injury to competition exists.

### **b. *Distribution Problems.***

In the last year or two the FTC has virtually abandoned efforts to use Section 3 of the Clayton Act or Section 5 of the FTCA to proceed against alleged antitrust violations involving distribution arrangements. The stated reason is that the agency has received few complaints charging such violations.

This appears to us to be another complicated and economically significant area where the FTC has foregone opportunities to participate in the constructive development of law that might contribute to the attainment of antitrust objectives. A cursory review of private antitrust litigation reveals that problems in this area—of dual distribution, territorial confinement and other limitations on franchises, price squeeze—are among the most perplexing facing the courts and the business community.

These are areas of law in which the expertise of the FTC could be employed to enlighten the business community and the courts. We do not mean to suggest that all of the mentioned practices are anticompetitive. Since the mentioned practices may or may not be anticompetitive, the FTC can play an important role in defining those which should be prohibited. Moreover, the FTC has the unique capacity for making this determination through industry guides rather than through litigation. The important point, we reiterate, is that matters are involved with which the courts have been forced to deal without the expert assistance that should be forthcoming from the FTC.

### **c. *Merger Enforcement.***

Each year since 1965, the FTC has initiated about 40 or 50 formal investigations of mergers and issued about 10 complaints. In addition, it has held public hearings and published statements of enforcement policy affecting, among others, the cement, grocery products manufacturing, and food distribution industries.<sup>103</sup> Its Bureau of Economics, in pub-

<sup>103</sup>See Statement of Enforcement Policy With Respect to Product Extension Mergers in Grocery Products Manufacturing (1968); Statement of Enforcement Policy With Respect to the Cement Industry (1967); Statement of Enforcement Policy With Respect to Mergers in the Food Distribution Industries (1967).

lished reports and testimony before Committees of Congress, has documented the current unparalleled surge of merger activity in the United States. In this area, as we have said, the FTC has contributed to the adoption of original and important theories of antitrust enforcement.<sup>104</sup>

The principal difficulty, as we noted previously, is that the FTC has not committed enough of its resources to the divisions charged with responsibilities in the merger area. For example, its merger division received allocations in 1968 and 1969 that were less than those it received in 1963, 1966 and 1967. Indeed the total allocation in 1968 of \$1.35 million was only slightly higher than the \$1.1 million allocated in 1961. As a result, those in charge of the merger division maintain with justification that lack of sufficient funds and personnel has prevented them from conducting appropriate studies and investigations and from filing complaints in cases that should have been prosecuted. However, we note that substantial increases for merger enforcement are projected in the budgetary allocations for 1971.

### **C. Economic Studies and Reports**

#### **1. Boundaries of the FTC's Investigatory Powers.**

As originally conceived, a principal function of the FTC was to serve as a fact-finding body that would study the economy, investigate industries, and expose corporate practices harmful to the economy. The FTC's investigatory function was designed to aid in the regulation of business in at least three ways. First, it would provide publicity as an instrument of control. Second, it would provide advice to the Justice Department on antitrust matters and advice to the business community as to how to comply with the antitrust laws. Third, it would assist Congress in determining the adequacy of existing regulation and the need for new legislation.<sup>105</sup>

When Congress enacted the FTCA, it was aware of the Supreme Court's prior narrow construction of investigatory powers contained in the Interstate Commerce Commission Act.<sup>106</sup> To avoid a similar stifling of FTC investigatory activity, Congress used extremely broad language in defining the FTC's powers in this area. For example, Section 6 grants the Commission power to "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in

<sup>104</sup>See, e.g. *FTC v. Proctor & Gamble Co.*, 386 U. S. 568 (1967); *FTC v. Consolidated Foods*, 380 U. S. 592 (1965).

<sup>105</sup>See HENDERSON 45, 46.

<sup>106</sup>*Harriman v. ICC*, 211 U. S. 407 (1908); see H.R. Rep. No. 533, 63rd Cong., 2nd Sess. 7 (1914).

commerce . . . and its relation to other corporations and to individuals, associations, and partnerships."<sup>107</sup> In addition, Sections 7 and 8 of the FTCA,<sup>108</sup> and fact-finding authorizations in a number of other statutes the FTC is empowered to enforce,<sup>109</sup> give the FTC additional powers to investigate for various special purposes. Although some early judicial interpretations tended to limit the scope of inquiry by the FTC, the Supreme Court in 1950 in *United States v. Morton Salt Co.*<sup>110</sup> confirmed the power of the FTC to investigate corporate behavior in extremely broad terms.

The total effect of these various authorizations is to confer on the FTC a broad range of power to investigate, and, in consequence, a broad power to prepare and publish reports on almost any relevant aspect of economic performance by corporations subject to its jurisdiction.

## 2. Present Organization of the Economic Staff of the FTC.

Economists and statisticians at the FTC (both groups are hereafter referred to as "economists") currently are organized in three divisions within the Bureau of Economics: Economic Evidence, Financial Statistics, and Industry Analysis.<sup>111</sup> All three are under the supervision of a Chief Economist who also has the title of Director of the Bureau of Economics.

Economists in the Division of Economic Evidence in theory assist the legal staff in connection with all cases litigated by the Commission; in practice, these economists have worked closely with the legal staff only on merger cases.

The Division of Financial Statistics prepares, jointly with the Securities and Exchange Commission, the "Quarterly Financial Report for Manufacturing Corporations." Begun in 1947 and published quarterly, this series summarizes for each calendar quarter uniform confidential financial statements collected from a probability sample of manufacturers. The sample survey is designed to produce an income statement and balance sheet for all manufacturing corporations, classified by industry and by asset size. The SEC compiles the data for listed corporations while the FTC compiles the data for non-listed corporations.

The Division of Industry Analysis prepares economic studies designed for publication, as well as reports for the internal use of the FTC and its

<sup>107</sup>15 U. S. C. § 46 (a) (1964).

<sup>108</sup>15 U. S. C. §§ 47, 48 (1964).

<sup>109</sup>See, e.g., 15 U. S. C. § 65 (1964) (Webb-Pomerene Act), and 15 U. S. C. § 1194 (1964) (Flammable Fabrics Act).

<sup>110</sup>338 U. S. 632 (1950).

<sup>111</sup>One economist has been located outside the Bureau for some years as a member of the program review staff.

staff. Despite its title, this division does not confine itself to industry studies but also has prepared reports on such practices as the use of games of chance in food and gasoline retailing, or the use of credit and installment contracts in sales by retailers in the District of Columbia.

Because the Director of the Bureau of Economics is also the Chief Economist of the FTC and, therefore, the man to whom the Commission turns for economic advice when acting in its judicial capacity, special arrangements have been made to insulate him from direct participation in the Bureau's advocacy work. Under these arrangements, the economic evidence work of the Bureau is carried on in a division which reports to the Assistant Director of the Bureau of Economics, but not to the Director. The financial statistics and industry analysis is carried on in divisions which report to the Bureau Director. Although not spelled out in the FTC's organizational chart, it appears that individual members of the staffs of the Divisions of Economic Evidence and of Industry Analysis may be assigned to the projects of the other division. The staff of the Division of Financial Statistics, by contrast, works only on the basic assignment of that division.

### **3. Evaluation and Recommendations**

The economic reporting function of the FTC is important and should be strengthened in ways set forth in detail below. The economic staff of the FTC, in its normal inquiries and studies pertinent to the work of the Commission, assembles much vital factual information on U. S. industries not generally available to the public; moreover, the economic staff is so strategically located and so occupied with analyses of factual industrial situations that it should be peculiarly sensitive to new industrial developments and the data and techniques required for analyzing them. For this latter reason, and others, the fundamental economic research falling in the broad field of industrial organization, as well as the study of specific industries and trade practices, is a proper function of the FTC's economic staff.

It was impossible for the members of our Commission to review in detail and appraise the many reports prepared and published in recent years by the FTC's Bureau of Economics. We feel that the coverage of these reports, given the fact that the staff must respond to numerous and varied demands on its time, does not appear unreasonable.

What we do find, however, is that the present organizational structure and allocation of functions within the Bureau of Economics leads to the criticism, which we believe to be in part justified, that the Commission's economic reports, or parts of reports, do not always clearly distinguish fact from inference—or fundamental research from advocacy.

Both advocacy and objective analysis are proper functions of the FTC's professional economic staff; for there clearly are occasions when Commission economists are expected to assemble facts and provide interpretations helpful to those trying the Commission's cases. Nonetheless, when the economic staff engages in basic economic analysis, it should render its policy judgments, in appearance and in fact, with the same objectivity to which other professional analysts are held. Further, the Commission's economic reports should explicitly indicate, in ways that later research can validate, what methodology was adopted, what basic data were used or excluded, and what reasoning supported the classification of the data. In this manner, the objectivity of the reports would be clearly demonstrable.

In this connection, we feel concern over the present structure and allocation of functions within the Bureau of Economics. We believe that there should be a clear-cut separation of advocacy, on the one hand, and factual analysis designed to inform the Commission, other government officials, and the public generally, on the other. The following recommendations suggest the lines along which such a separation of responsibilities might be carried out.

#### **a. Organization of Economic Functions.**

We suggest that the economic work of the FTC be organized into two major units, a Bureau of Economics and an Office of General Economist, structured according to the diagram below. The Bureau of Economics should be action-oriented and should service the legal work of the FTC. The Bureau Director would cooperate with the various bureau chiefs of the operating sections of the FTC and would have no greater direct contact with the Commissioners than the directors of the other bureaus. The Office of the General Economist should, by contrast, be policy-oriented, should advise the Commissioners, and should be responsible for statistical and non-statistical fundamental economic research.

### Suggested Organization for Economic Work of the Federal Trade Commission

Bureau of Economics (Bureau Director)			Office of General Economist (General Economist)		
Division of Economic Evidence	Division of Current Analysis	Division of Accounting	Ass't. General Economist for Statistical Data	Ass't. General Economist for Economic Research	Ass't. General Economist for Special Projects

This suggestion goes deeper than a mere shift in boxes or lines of responsibility, since it provides for separate staffs to handle advocacy and non-advocacy functions; to handle *ad hoc* requests as contrasted with long-range research; and to handle requests from special interest groups as contrasted with fundamental research.

Within the Bureau of Economics, the Division of Economic Evidence would service the legal work, as such. The Division of Current Analysis would generate economic reports on industries or business practices as back-up for the case work; it would also carry out analysis in connection with trade regulation rule hearings and respond to *ad hoc* requests for reports and data for the legal staff and specific interest groups outside the FTC. The Division of Accounting would service the legal work, as at present.

Within the Office of the General Economist, the Assistant General Economist for Statistical Data would be responsible for financial reports, merger data, and any new basic data series that might be initiated. The Assistant General Economist for Economic Research would be responsible for long-range studies in the field of industrial organization, without any necessary orientation toward law; studies of the economic consequences of existing or proposed enforcement policies could also be undertaken in this unit. The Assistant General Economist for Special Projects would be responsible for assisting the General Economist in preparing advice to Commissioners, analyzing existing statistical measures, developing new statistical and analytical tools, and proposing methods by which economists could be of assistance to the legal staff; he would also act to assist, and seek advice from, the business community on problems raising new or difficult issues.

### **b. Procedures and Standards for Hiring.**

The kind of economic research relevant to the work of the FTC remains a relatively inexact science, and the economics profession is not in a position to define precisely the qualifications of economists who have special competence in the analysis of problems of industrial organization. There are, however, some things that can be done to improve the prestige of economists working at the agency.

With respect to hiring procedures for economists on the staff, we note that civil service requirements, applicable in the hiring of economists but not attorneys, occasionally have created problems in hiring. We urge

the FTC to seek to persuade the Civil Service Commission to widen the options available to the FTC.

### *c. Generation and Use of Data.*

We suggest that the Office of General Economist serve as the FTC's repository for basic economic information. Before the Office seeks to develop its own data, however, we recommend that it survey existing government information and conduct discussions with other government agencies to determine whether it can obtain access to governmental data relevant to the analyses it undertakes.

To ensure that confidential information included in the files of individual companies is not disclosed, we recommend that the files and work material of the Office of the General Economist be set up independently of — and insulated from — the staff engaged in advocacy work. We also recommend that published analyses based on these materials take account of the nature of the data and do not present current confidential information except in the form of aggregates from which individual company figures cannot be determined.

### *d. Experimenting with Outside Advice.*

The FTC has found that many well-trained economists are not willing to put in long tours of duty at the Commission. It must also accept the fact that an economist who works for many years for the FTC will tend to be isolated from the mainstream of professional interchange and broad-gauge research. We therefore present three proposals designed to stimulate new relations between the FTC's economists and the economy to which the FTC's regulatory functions are addressed:<sup>112</sup>

(1) We suggest that the General Economist experiment for a period of 3 to 5 years with a program of long-term internships for younger men and long-term consulting arrangements for more mature economists who would be encouraged to serve as temporary adjuncts to the staff without becoming permanently attached to it.

Under the proposed experiment, the General Economist would seek to attract one or two top-flight economists each year who would be asked to take responsibility for a report or a special project and so widen the range and depth of the FTC's economic research program without diverting highly specialized members of the permanent staff.

<sup>112</sup>During interviews in the course of our study, we learned that experimental approaches sometimes similar to those proposed here have been attempted in the past few years on an informal basis.

This proposal is based on the thought that major research on problems in industrial organization can in appropriate cases be generated by a strong individual working with minimum staff, as opposed to a research system under which relatively large groups of individuals at different staff levels combine to produce a report.

(2) We suggest that the General Economist experiment with the establishment of one or more outside advisory panels to aid him in carrying out the various functions of his Office.

(3) We suggest that the General Economist experiment with the development of mechanisms for transfers of personnel back and forth between the FTC and outside institutions, according to the present pattern of the Council of Economic Advisors. Some such procedures might, for example, be tested in connection with the report contracting process suggested above.

## VI. ADDITIONAL PROPOSALS FOR MODIFICATION OR IMPROVEMENT OF THE FTC.

In addition to recommendations concerning specific FTC programs, discussed in previous sections, there are a number of agency-wide reforms that we believe would improve the performance of the FTC.

### A. Problems of Confidentiality and Ex Parte Dealings at the FTC.

In recent years, observers of the FTC have criticized both the agency's failure to disclose to the public various categories of information relating to its operations and the reported willingness of some Commissioners to make themselves available to counsel or others representing respondents and potential respondents for *ex parte*, off-the-record conferences concerning pending matters.

Many of the charges of excessive secrecy and confidentiality in the FTC involve complex legal questions, depending to some extent on the proper interpretation of the Freedom of Information Act<sup>113</sup>—as well as

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<sup>113</sup> U. S. C. § 552 (Supp. III, 1965-1967). A private citizen's right under the Act to obtain access to government documents is subject to several broad exceptions, including exceptions for intra-agency memos and letters, and investigatory files. Many charges of excessive secrecy at the FTC therefore depend on accurately discerning the legislative purpose of particular sections of the Act as well as the intended scope of the exceptions.

the interpretation of the FTC's own rules. In trying to resolve these questions, conflicting considerations often must be taken into account. For example, it is sometimes claimed that to publicize the names of parties signing AVC's (assurances of voluntary compliances) except to the complainant would unfairly damage the reputation of respondents who had not yet been found guilty of any violation and would discourage businessmen from entering voluntary agreements to discontinue questionable business conduct. On the other hand, it is difficult to comprehend how a voluntary compliance program, which relies on public complaints for detection of violations of assurances can be effective without disclosing to the public the name of the party giving an assurance that it will comply. Similar conflicts arise with respect to disclosure of confidential information underlying advisory opinions and pre-merger clearances.

We recognize that unnecessary secrecy in administrative agencies and elsewhere in government is a serious problem, particularly when it results in preventing the public from evaluating agency performance. Moreover, it is our impression that the FTC has not, in the past, disclosed as much information to the public as it might have. Nevertheless, we have decided not to recommend specific changes in FTC rules relating to these matters, principally because we note that, in the last year, the FTC has come to appreciate that additional categories of information should be disclosed and has amended several of its rules in an effort to achieve that result.<sup>114</sup> We urge that these efforts continue.

There is one area, however, in which we feel compelled to recommend immediate and specific action. This is the matter of *ex parte* and off-the-record communications with Commissioners. The lack of any definite, published standards on this subject has created an atmosphere of uncertainty and suspicion that is damaging to the prestige of the FTC. Accordingly we recommend that the FTC promptly adopt and publish rules stating clearly the criteria governing formal and informal access to the Commission or individual Commissioners, on or off the record, by business firms or their counsel, at all stages of all proceedings, from investigation to compliance.

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<sup>114</sup>See FTC News Release, *FTC Proposes to Change its Rules on Freedom of Information* (June 20, 1969), announcing a proposed amendment to Rule 4.11. The amendment removes the necessity that a member of the public show good cause when requesting specific information. See also Shanahan, *FTC to Publicize Merger Decisions*, *New York Times*, May 24, 1969, at 47, col. 1, reporting a new FTC policy of publicizing tentative decisions on pre-merger clearances.

## **B. Policy Planning.**

Many of the present problems of the FTC — including allocation of resources, commitment of time and effort to relatively trivial matters, and extensive delay in the investigational stage of agency action — are traceable to a considerable extent to the fundamental failure to establish goals and priorities and to implement effective planning controls consistent with those goals and priorities.

The first and most pressing order of business in revitalizing the FTC must be to replace present case-by-case techniques for opening and closing investigations, filing complaints, and settling cases with comprehensive planning controls. In general, two tasks are involved: The Commission must clear up the extensive backlog of pending matters and must coordinate and control future agency activities. We propose that three separate groups be assigned to these tasks.<sup>115</sup>

### **1. Attack on the Backlog of Pending Matters.**

We noted previously that while investigations opened and formal complaints filed by the FTC were substantially lower in 1968 and 1969 than in most previous years, the total of pending investigations is still very great. Also, there appears to be inadequate personnel to handle expeditiously all of the special projects, such as special studies and proposed trade regulation rules and guides, announced by the FTC. As a result, delay in the pre-litigation stages of FTC action continues to be a serious problem.

The FTC cannot improve the quality of agency action on the projects it does undertake until it substantially reduces its unwieldy backlog of pending matters. To deal with this problem, we propose that a Special Committee be established, separate from the Office of Program Review described below, and directed to review, over the next 12 months, all matters in the current backlog of pending matters at the FTC, and to recommend to the Commission the closing of files on those that are of marginal importance in terms of a sensible assessment of the agency's enforcement goals. In addition, matters that have been

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<sup>115</sup>The recommendations in this portion of our report in some instances draw upon proposals by Commissioner Nicholson to the FTC, Memorandum *supra* note 34, and proposals by Chairman Dixon, contained in a response to the Nicholson memo, dated August 29, 1969. The Chairman's fundamental position is that planning reforms, particularly with respect to augmented responsibilities for the Office of Program Review, should not be put into effect at once but should be put off until a "temporary period of stability" is achieved at the FTC. On the assumption that the Commission nevertheless might decide to reconsider planning procedures promptly, he offered a series of proposals, some of which we have adopted in this section of our report.

pending so long that effective agency action would be difficult or impossible to achieve should also be closed. We note that the FTC already has called for reports from the Bureaus of Restraint of Trade and Deceptive Practices concerning all matters pending in each bureau for more than 18 months and 1 year respectively, and these reports could be a first step in the Special Committee's review procedures. Commissioner Nicholson has estimated that 70 to 80% of the current backlog could be disposed of after such a review; if the Committee disposed of half that amount, it would still serve to clear the way for more effective future actions.

If a decision is made not to close out a pending matter, realistic deadlines should be imposed and strictly observed.

## **2. Planning for the Future—Office of Program Review.**

We propose the immediate expansion and reinvigoration of the Office of Program Review to take principal responsibility for reporting to the Commission on ways and means of coordinating future agency operations. This office should take advantage of modern budgeting techniques and avail itself of the expertise in this area of the Bureau of the Budget. We suggest a staff for the office of from 5 to 10 lawyers and economists, with appropriate support services under a top-ranking and effective Director responsible to the Commissioners.

We propose that the Office undertake the following projects, in the order indicated below:

### ***a. Agency-wide Evaluation of Allocation of Resources.***

The first job of the Office should be to review long-range enforcement goals of the FTC, and submit a report to the Commission indicating whether appropriate shares of the agency's resources and personnel are being devoted to reaching those goals. We suggest the Office require that each Bureau and Division prepare memoranda summarizing present activities and describing projects planned for the immediate future. We understand that this year, for the first time, the FTC has required that program projections be prepared by the staff; our recommended review by the Office of Program Review would build upon this useful development. The Office would then consider and report on whether the current and planned projects are consistent with the agency's enforcement goals, whether the various projects appear feasible, and whether the commitment of the agency's limited resources to those projects is worth the anticipated return.

The Office also should consider whether changes in patterns of enforcement that have already taken place at the FTC have been reflected in appropriate reallocation of resources. For example, we previously noted that there has been a substantial decline in formal and informal enforcement of the Robinson-Patman Act in recent years; nevertheless, the allocations of money and personnel to Robinson-Patman work have not declined to a degree commensurate with the reduction in agency activity. Finally, the Office ought to consider whether resources are appropriately being allocated between formal enforcement and informal compliance programs, and whether sufficient resources are being devoted to ensuring that there is compliance with agency orders and informal assurances. We strongly recommend in that connection that the various compliance sections within the FTC immediately undertake an expanded program of checking on compliance with cease and desist orders, and also on current compliance by companies that entered into assurances of voluntary compliance or agreed to informal corrective actions.

#### ***b. Criteria for Staff Decisions.***

We have already noted the failure of the FTC to publish useful criteria to assist the staff in deciding when to open or close an investigation, or to recommend that a complaint be filed. This failure to devise and promulgate criteria will become an even more serious problem if proposals for increased delegation of authority to the staff, included in the next section of this report, are implemented.

We suggest that the Office of Program Review prepare, for each separate category of business conduct regulated by the FTC, reasonably specific criteria advising the staff of the Commission's views with respect to opening and closing of investigations, accepting assurances of voluntary compliance, filing complaints, and recommending in favor or against settling cases once brought as well as the range and scope of acceptable compromises or remedies. For example, in the Bureau of Restraint of Trade, we expect that separate sets of criteria would be devised to cover various types of mergers, price discrimination cases, exclusive dealing contracts and so forth. In the Bureau of Deceptive Practices, separate criteria would be devised to cover localized marketing fraud, false advertising on national media, fraudulent practices in the home improvement industry, and so forth. The following factors, among many others, presumably would be touched upon: the nature of the violation, total annual sales by the respondent, the estimated number of competitors or consumers affected by the practice, and the estimated extent of competitive

damage or consumer injury that has occurred as a consequence of the allegedly illegal act. Draft guidelines would be submitted to the Commissioners for approval, and then communicated to the staff.

We recognize, of course, that all cases cannot be disposed of by reference to handy sets of pre-established criteria. But these guidelines can tell the staff the kinds of matters as to which the FTC believes the case for action or no action is relatively clear, and give some sense of direction as to how close cases are to be handled. When difficult questions involve commitment of a substantial portion of agency resources, or totally new questions arise, staff lawyers might certify the question to the Office of Program Review for advice and assistance.

Once criteria are promulgated, it will be the responsibility of the Office to keep informed as to how they are being applied, to report regularly to the Commission on the direction in which the agency is moving under the guidelines (for example, by reporting on the number and nature of investigations or special projects opened each month), and to submit to the Commission proposed modifications or additions to the criteria.

### *c. Proposals for Agency Action.*

We have noted at several points in this report the failure of the FTC to initiate projects relevant to pressing contemporary needs and its unfortunate tendency to involve itself in investigations and projects of marginal importance. In important part, this results from the agency's traditional reliance on the mailbag to generate most investigations and projects in the absence of comprehensive planning and priorities.

We recommend that the Office of Program Review propose to the Commission an agenda of projects that ought to be undertaken by each bureau and division within the FTC, and indicate priorities with respect to each. In preparing this agenda, suggestions should be solicited not only from the Bureau Directors, General Counsel, proposed General Economist as well as other members of the staff of the FTC, but also from outside attorneys, economists, and members of the academic community who have specialized within the enforcement area of the FTC. For example, we believe it is essential in devising an agenda of projects in the consumer protection area that the opinions of state attorneys general and others active in the field of consumer protection be sought.

### 3. Tracking Matters Within the FTC.

We believe effective planning means more than a sensible determination of which investigations or projects to start and which complaints to file. Once a matter is initiated, it is also essential that continuing supervision be exercised, that deadlines be established, and that some group causes those deadlines to be met. This kind of tracking is not done at the FTC on any systematic basis at the present time, and it is largely for that reason that projects of various kinds often disappear into the lower reaches of the agency and then resurface after many years.

We propose that division and bureau chiefs report on a quarterly basis to the Executive Director as to the current status of all matters on their agenda. A rough indication of a time range should be included with respect to each matter, and the bureau and division chiefs should be called to account by the Executive Director, and if necessary by the Commission, when deadlines are not met. The problem of tracking illustrates the importance of the executive director in the planning area although, in past years, this office has not been appropriately developed.

### C. Delegation of Authority.

#### 1. Authority to Delegate and Present Exercise of That Authority.

Under Reorganization Plan No. 4 of 1961,<sup>116</sup> which took effect pursuant to the Reorganization Act of 1949,<sup>117</sup> the FTC has authority "to delegate, by published order or rule, any of its functions to a division of the Commission, and individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business or matter."<sup>118</sup>

The FTC has made limited use of its broad power to delegate authority to the staff. The Directors and Assistant Directors of the operating bureaus have authority only to open investigations, including compliance investigations,<sup>119</sup> accept compliance reports on assurances of voluntary compliance, issue section 6 (b) investigational subpoenas, and grant extensions of time for complying with orders requiring access to corporate

<sup>116</sup>5 USC § 133z-15 (1964).

<sup>117</sup>5 USC §§ 133z - 133z-15 (1964).

<sup>118</sup>5 U.S.C. § 133z-15 (1964).

<sup>119</sup>In practice, however, investigations involving large outlays of money and manpower are approved by the Commission.

files, and submission of reports, written answers, compliance reports and subpoenas.

In addition to the above delegation of absolute authority, the Bureau Directors and Assistant Directors have conditional authority to close investigations, other than investigations under Section 7 of the Clayton Act and some other excepted categories described below, either without corrective action or by the acceptance of an assurance of voluntary compliance. Under this so-called 5-day closing procedure, a case may be closed by the staff after the file has been circulated to the Commissioners if no Commissioner objects to the closing and if the case does not fall within the following categories:

. . . any matter in which there are conflicting staff recommendations, any matter which has received previous Commission consideration or in which the Commission or any Commissioner has expressed an interest, any matter proposed to be closed by reason of expense of investigation or testing, or any other matter involving substantial questions as to the public interest, Commission policy or statutory construction.<sup>120</sup>

At present the bureaus have no power to issue complaints, amend complaints, enter into consensual cease and desist orders, or accept compliance reports pursuant to cease and desist orders.

## 2. Evaluation and Recommendations

We believe the FTC has not taken full advantage of its extensive powers to delegate authority to the staff, and that additional delegation is in order. At the heart of the argument in favor of increased delegation is the belief that the FTC, in appearance and in practice, should attempt to avoid acting both as prosecutor and judge. As long as the Commission reviews investigation files and passes on recommendations for the issuance of complaints or for closing investigations, it will continue to disable itself from appearing to pass with absolute impartiality on the merits of each case when it comes before the Commission in due course. Moreover, when the Commissioners review an investigational file and then authorize the filing of a complaint, necessarily taking into account whether the action would be in the public interest and whether there is sufficient evidence to justify a formal proceeding, it is, we believe, virtually impossible for those same Commissioners subse-

<sup>120</sup> 32 Fed. Reg. 16121 (1967).

quently to pass on the merits of the proceeding with impartiality and without pre-judgment.

In addition, delegation of authority would free the Commissioners from many of the routine but time-consuming tasks which they now perform, and lessen the delays caused by the seemingly endless transfers of files back and forth between the field offices, the Washington staff, and the Commission.

The principal counter-argument to proposals for increased delegation is that it will take away from the Commissioners control over the direction that agency action will take. In the absence of comprehensive, agency-wide planning and review, we grant that the initiation of significant investigations, issuance of complaints and settlement of cases can be a partial substitute for planning. Accordingly, a prerequisite for implementation of our delegation proposals is the formulation and publication of guidelines to the staff reflecting Commission judgment with respect to the agency-wide allocation of resources and with respect to the kinds of investigations that should be opened, cases settled, or complaints filed. Once these guidelines are published, the Commissioners can discontinue present case-by-case review of agency action, and can devote their time instead to determining whether the guidelines and criteria are being properly framed and implemented.

Assuming improvement in planning techniques along the lines indicated in the previous section, we propose that the Bureau directors be given the authority, in addition to that which has already been delegated, to close all investigations and accept assurances of voluntary compliance (without any "5-day closing" review by the Commissioners), and to issue complaints. The Commissioners could assure themselves that the delegated authority was being responsibly exercised by directing the staff to submit periodic reports on agency action, and by providing that cases raising new or difficult questions, and involving substantial expenditures of money and manpower, be certified to the Office of Program Review.

Once the staff has made the decision to file a complaint, we believe that the Commissioners should be responsible for final adjudication. Accordingly, we believe the Commissioners should continue to approve or reject proposed cease and desist orders as well as compliance reports submitted pursuant to cease and desist orders, based on criteria available to the staff and the bar for future guidance.

With respect to one aspect of FTC operations, we believe that delegated authority should pass through the Bureau directors and assistant directors to be exercised by personnel even further down the line. If the FTC is to mount an effective pilot project against consumer frauds and

deceptions in our cities, the special field offices participating in this project must have the flexibility and discretion to proceed against violators as local conditions require. Thus, we believe that it is essential that these special field offices have authority to initiate and close investigations, settle cases, issue complaints, and otherwise to act in the same manner as the operating bureaus. Similar authority should reside in all field offices with regard to deceptive practices. The Commissioners could devise procedures to assure themselves that the delegated authority was being properly exercised and coordinated.

Finally, we recommend a program of continuing review and improvement of the Commission's Rules of Practice and Procedure designed to modernize and maximize the efficiency of the Commission's operations, in consultation with the professional bar.

Respectfully submitted,

MILES W. KIRKPATRICK  
*Chairman*

FREDERICK M. ROWE  
JACK GREENBERG  
THOMAS E. HARRIS  
ELLEN ASH PETERS  
PAUL G. BOWER  
ALLEN C. HOLMES

IRA M. MILLSTEIN  
JOHN E. FRENCH  
CARL A. AUERBACH  
CARL H. FULDA  
JESSE W. MARKHAM  
BETTY BOCK  
CHARLES E. STEWART, JR.  
HARLAN M. BLAKE

## APPENDIX

1. Exchange of letters between President Nixon and William T. Gossett, President of the American Bar Association, on a forthcoming study of the Commission by the ABA. April 18, 1969.
2. Press release announcing formation of ABA Commission to Study the FTC.

Dear Mr. Gossett:

As you may be aware, this Administration is conducting an extensive review of the Federal Government's activities in the field of consumer protection. Consumer protection has become a matter of major public concern, in part it appears, because existing agencies charged with the protection of consumer interests may have failed to discharge their obligations satisfactorily.

The Federal Trade Commission has broad consumer protection responsibilities under the Federal Trade Commission Act and several more specialized statutes as well as important responsibilities in the field of anti-trust.

The American Bar Association has a number of eminent experts who are familiar with the Federal Trade Commission and its work. It would be of great assistance to this Administration if the Bar Association would undertake a professional appraisal of the present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the anti-trust laws, and of the allocation of its resources between these two areas. I would hope that such a study would make recommendations for the future activities and organization of the Commission.

It would be most helpful if the report could be made available to me by September 15 so that I may consider it together with a review of consumer protection activities of the Executive Branch now in progress.

May I express in advance my great appreciation for your cooperation in this important effort.

Sincerely yours,

RICHARD NIXON

Dear Mr. President:

The American Bar Association is pleased and honored to undertake an appraisal of the role and efforts of the Federal Trade Commission in the field of consumer protection and its other statutory responsibilities, with a view toward affirmative recommendations for its future organization and activities.

We share your concern that the Federal Trade Commission carry out its functions effectively, efficiently, and in the public interest.

In view of the urgency of the requested study, I am asking the Chairman of the Section of Anti-Trust Law to recommend immediately a list of nominees for appointment to a working study group. I would expect that this group would include economists familiar with the activities of the Federal Trade Commission, and that it would receive from other persons views pertinent to the objectives of the study.

In my judgment, such a group should have the collective experience and familiarity with the work of the Federal Trade Commission which will facilitate an expeditious study project, culminating in sound recommendations for your consideration.

We are honored by your request for our assistance and view it as an important challenge to our Association to provide constructive recommendations on a vital matter affecting the public interest.

Sincerely yours,

WILLIAM T. GOSSETT

## PRESS RELEASE

CHICAGO—President William T. Gossett of the American Bar Association has appointed a 16-member special commission to conduct an appraisal of the work of the Federal Trade Commission in the fields of consumer protection and antitrust law enforcement. The study is being undertaken by ABA at the request of President Nixon.

Miles W. Kirkpatrick, Philadelphia attorney and chairman of the ABA Section of Antitrust Law, was named to head the commission. Other members are law practitioners experienced in antitrust and administrative law, economists and members of the academic community having familiarity with the work of the FTC, and others qualified in the area of consumer interests.

In announcing the appointments, President Gossett said the government's request to ABA to conduct the study presents "a challenge to the Association to provide constructive recommendations for the effective functioning of a important agency of the federal government in the public interest". He said the commission members were chosen for their "background, expertise and balance of viewpoint." Two are not lawyers, and eight are not members of ABA.

Chairman Kirkpatrick heads a section of the American Bar Association made up of more than 6,000 lawyers whose practice includes the antitrust and trade regulation spheres. He formerly was chairman of the Section's committee on the Sherman Act. Kirkpatrick also has been active in civic work as a past president of Philadelphia's Family Service Association.

Others appointed to the study commission are:

*Frederick M. Rowe*, Washington, D. C., vice-chairman of the ABA Antitrust Section, chairman of the Council on Antitrust and Trade Regulation of the Federal Bar Association;

*Jack Greenberg*, New York, director-counsel for the Legal Defense and Education Fund of the National Association for the Advancement of Colored People;

*Thomas E. Harris*, Washington, D. C., associate general counsel of the AFL-CIO, and former special assistant in the office of the Solicitor General;

*Richard A. Posner*, Stanford University law school professor, former legal assistant on the staff of FTC and in 1967-68 general counsel of the President's task force on communications policy;

*Mrs. Ellen Ash Peters*, Yale law school professor of contracts and commercial law;

*Paul G. Bower*, Los Angeles attorney and former consumer counsel of the Justice Department;

*Allen C. Holmes*, Cleveland, Ohio attorney who has long been active in the ABA antitrust section;

*Ira M. Millstein*, New York attorney, former special assistant to the Attorney General, antitrust division; former chairman of the New York State Bar Association Section of Antitrust Law;

*John D. French*, Minneapolis attorney and former legal assistant on the FTC staff.

*Carl A. Auerbach*, professor at the University of Minnesota law school, and former staff director of the Committee on Internal Organization of the Administrative Conference of the U. S.;

*Carl H. Fulda*, University of Texas law school professor, whose subjects include administrative and antitrust law;

*Jesse W. Markham*, professor of the Harvard University Graduate School of Business Administration, and former chief economist of FTC (1953-55);

*Dr. Betty Bock*, New York, National Industrial Conference Board, Inc., former economic advisor to the FTC;

*Charles E. Stewart, Jr.*, New York attorney, chairman of the FTC committee of the ABA Antitrust Section; past-chairman of the Trade Regulation Committee of the Bar Association of the City of New York;

*Harlan M. Blake*, Columbia University law school professor of trade regulation and antitrust director, European Common Market Antitrust Law Project.

Counsel for the commission will be Robert Pitofsky, New York University law professor.

In a letter (April 18) requesting ABA to conduct the FTC appraisal President Nixon asked that it encompass the "present efforts of the Federal Trade Commission in the field of consumer protection, in its enforcement of the antitrust laws, and of the allocation of its resources between these two areas". The President also requested that the report include recommendations for "the future activities and organization" of the FTC, and that the study be completed by Sept. 15 this year.

He informed President Gossett that the study was part of the administration's review of activities in the consumer protection field, which had "become a matter of major public concern" in part because "existing agencies charged with the protection of consumer interests may have failed to discharge their obligations satisfactorily".

### CONCURRING STATEMENT OF JOHN D. FRENCH

I concur in the report of the Commission. I believe that its implementation can result in a substantial improvement in the administration of our national antitrust and consumer-protection policies with a minimum of necessary legislative effort.

I also believe, however, that the full, effective, and immediate implementation of this report should constitute the "last clear chance" of the FTC to avoid major legislative surgery. Indeed, there are many who will say that radical legislative change is overdue.

We are, after all, dealing here with a body whose sweeping legislative mandate—to prevent "unfair methods of competition" and "unfair or deceptive acts or practices"—and broad procedural authority should make it the most exciting agency in Washington. Its long-standing failure to satisfy the expectations of its friends, students, and critics casts reasonable doubt on the likelihood of improved future performance, even in the wake of this report. My concern in this respect leads me to offer a supplemental recommendation.

The roles played by the FTC and its staff are essentially three—prosecutor, judge, and student of the economy. I believe that, in general, the record of the FTC as a prosecutor has been poor; its judicial performance has been relatively good; and it has engaged in valuable economic inquiry, some of which has led to the promulgation of useful regulatory doctrine. I further believe that the two latter functions are complementary in the establishment of coherent antitrust policy, while the first is nonessential to it.

Accordingly, in the event that the Commission's report fails of implementation, I suggest that the prosecutorial work of the FTC be transferred to the Department of Justice, leaving the FTC, supported by a staff of hearing examiners and economic, scientific, and other experts, to perform as a trade regulation court, commentator, and rulemaker.

The purpose of this proposal is to reconstitute the FTC in a form that will permit it to do the job historically envisioned for it, *viz.*, the thoughtful, imaginative search for, and enunciation of, sound fundamental principles of trade regulation. The prosecutorial function—*i.e.*, the selection, preparation, and presentation of individual cases—which should have contributed to the accomplishment of this objective, has, in fact, hindered it by diverting the attention of the FTC to petty, inconsequential fact questions and by creating the oft-noted, troublesome internal conflict between the task of prosecuting and the task of judging in the same case.

As judge and economic observer, however, the FTC has shown that it can pursue antitrust policy in the large. These two functions sensibly belong together. The latter permits the agency to maintain an active role—significantly unlike the passive role of a court—in establishing policy; the former turns policy into law.

As I envision the new structure, the antitrust-litigation staff of the FTC would move to the Antitrust Division, while the deceptive-practices staff might be placed under a new Assistant Attorney General for Consumer Protection. Thereafter, the relationship of the FTC and the Department of Justice would be guided by reference to the underlying philosophy of the plan; *i.e.*, that the FTC should be the principal source of national economic, regulatory policy, free of the distractions of factual trivia.

To illustrate the application of this approach, consider an important question that would immediately arise, *viz.*, which antitrust cases should the Department of Justice bring in the FTC and which should it bring in the courts? In general, it should take to the courts its fact-oriented cases, and to the FTC its cases involving novel questions of law. To be more specific, a reasonable rule of thumb might be that the Department would go to court in criminal cases and in their companion civil cases, because these tend to turn on their facts and raise few unsettled questions of substantive law; conversely, the Department would be required by statute to go to the FTC with any civil case in which it considered a criminal action unjustified, because there tend to be cases which raise more difficult legal questions.

This type of allocation should lead to a consistency in the development of antitrust policy in unsettled areas that is unfortunately lacking under the present scheme of overlapping jurisdictions between the FTC and the Antitrust Division.

To mention another example, it might be asked, who would give advisory opinions, the Department or the FTC? Here again, the underlying functional principle should be our guide. We might therefore require that requests for advisory opinions be addressed first to the FTC, which would review them under a "public interest" standard, passing pro or con on those which appeared to raise important questions of regulatory policy, and referring to the Department those which appeared to raise essentially the question whether a prosecution was justified on the facts.

Obviously many other details would need to be supplied to make this plan complete. I see no reason why they could not be, as long as care were taken to make all specific administrative features consonant with the policy-planning role of the FTC.

The only serious question that immediately presents itself is, how could the FTC "force" the Justice Department to bring cases which FTC policy might indicate? The answer is, of course, that the FTC could not "force" these cases to be brought, but I do not consider this an important problem. It is difficult, indeed, to imagine that the Attorney General of the United States could long withstand the criticism generated by refusal to enforce the decisions and rules promulgated by the nation's most important agency of economic regulation. An intelligently operated FTC should be able to guide the course of Government antitrust litigation by precept and example, without unnecessary immersion in the prosecution of every case.

In sum, it is my opinion that if the FTC will only heed the recommendations advanced by the Commission, a wholesale reorganization like the one described above will be unnecessary; otherwise, it becomes imperative.

### SEPARATE STATEMENT OF RICHARD A. POSNER\*

#### I.

When a committee<sup>1</sup> such as this is given less than five months to conduct a comprehensive evaluation of an established institution of government, it is naturally tempted to adopt an incremental approach, that is, to accept the basic assumptions that underlie and guide the institution and consider only the possibilities for marginal improvements in its efficiency. And not only because it is a committee or because it has only a few months. The temptation more fundamentally reflects the futility, much of the time, of asking basic questions such as, has the institution a socially useful role to play? Are its basic premises still valid? Were they ever? At any moment, concerning any number of institutions, questions such as these are not within the universe of discourse. So it once was with the institution of slavery; so it is in our time with that of the family.

I urged my colleagues on this committee—unsuccessfully, as it has turned out—to resist the temptation to place the fundamental premises of the FTC beyond discussion, concentrating instead on the "realistic"

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\*Professor of Law, University of Chicago Law School.

<sup>1</sup>I realize that this is actually an ABA commission, not committee; but to avoid confusion with the Federal Trade Commission, I shall use "committee" to refer to this ABA commission and reserve "Commission" for the FTC.

possibilities of marginal reform. We have entered a period in which it is possible to raise basic questions about the role of administrative agencies in economic life of a sort that were once unfashionable, if not, indeed, unthinkable. Faith in administrative processes of economic ordering is a legacy of the Progressive and New Deal eras, and a cornerstone of the economic policies instituted during these periods. The current of public opinion that ran overwhelmingly in favor of those policies for many years has lately begun to change. In the perspective supplied by current social problems, thoughtful observers are increasingly coming to believe that, far from eliminating poverty, inequality, monopoly, and other social evils, the most celebrated reforms of the Progressive and New Deal Administrations—in labor, agriculture, housing, welfare, and other areas—may actually have aggravated them. The deficiencies of government as a regulator of economic life, the gaps between pretensions and performance, the frequent perversion of governmental power to serve the ends of private economic blocs, are being perceived with a new freshness.

In a time when "new Philosophy calls all in doubt," it will no longer do to rest upon the old verities regarding the administrative process. If it is to reflect contemporary currents of thinking and awareness, a serious analysis of the FTC must address fundamentals: What is the need, if any, for a government agency charged with protecting consumers from deception or ignorance? Are the benefits of such an agency likely to outweigh its costs? Does the record of performance of the FTC justify its continuation? Are its defects merely accidental and remediable, or inherent? Are there alternatives to administrative regulation that should perhaps be tried? The majority report of this committee largely ignores these questions and confines its attention to the surfaces of problems. It is missed opportunity of major dimensions. This is a uniquely auspicious occasion to conduct a far-ranging examination of the assumptions underlying the entire range of the FTC's activities, not only because of the change in public opinion noted earlier but also because of the extraordinary mood that pervades the Federal Trade Commission today. Deeply shaken by the revelations of mismanagement and demoralization contained in the report sponsored by Ralph Nader,<sup>2</sup> virtually paralyzed by internal dissension, and increasingly conscious of its inability to respond effectively to the growing pressures of the re-

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<sup>2</sup>Cox, Fellmuth & Schulz, *The Consumer and the Federal Trade Commission* (1969), reprinted in 115 Cong. Rec. E 370 (daily ed., Jan. 22, 1969).

surgent consumer movement in this country, the Commission is at present in a state of crisis, self-doubt, and self-criticism. The response of the majority report to this anguish consists of homilies on the importance of inspired leadership, good planning, and sensible priorities; and of proposals that amount to tinkering with the details of the Commission's existing operations and organization.

I turn now to an analysis of what I conceive to be the fundamental issues in a serious assessment of the FTC.

## II.

The Federal Trade Commission was created to deal with monopoly problems. Concern with fraud evidently played no part.<sup>3</sup> I believe that a vigorous antimonopoly policy should be the cornerstone of consumer protection. But a system of public and private judicial remedies for antitrust violations long predated the creation of the FTC. The pertinent question is not whether antitrust policy is a good thing, but why it was thought desirable to supplement the existing antitrust institutions with an administrative agency.

The reasons were substantive, procedural, and political.<sup>4</sup> Substantively, it was believed that the Sherman Act,<sup>5</sup> as it had been interpreted a few years earlier by the Supreme Court in the case against the Standard Oil Trust,<sup>6</sup> was effective only against achieved monopoly and would not prevent monopolies from arising in the first place. The Clayton Act,<sup>7</sup> passed simultaneously with the Federal Trade Commission Act, was designed to remedy this deficiency by subjecting to stringent criteria of illegality certain practices believed to be important in the growth of monopoly—stock acquisitions, interlocking directorates, exclusive-dealing arrangements, and area price discrimination. Lest this enumeration leave out any nefarious practice, Congress in section 5 of the Federal Trade Commission Act sweepingly forbade "unfair methods of competition."<sup>8</sup> The FTC was given exclusive authority to enforce sec-

<sup>3</sup>Rublee, *The Original Plan and Early History of the Federal Trade Commission*, 11 Acad. Pol. Sci. Proc. 666, 669-70 (1926).

<sup>4</sup>See Henderson, *The Federal Trade Commission*, ch. I (1924).

<sup>5</sup>15 U. S. C. 1, 2 (1964).

<sup>6</sup>Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1911).

<sup>7</sup>38 Stat. 730, as amended, 15 U. S. C. 12 *et seq.* (1964).

<sup>8</sup>15 U. S. C. 45 (1964).

tion 5, and authority concurrent with the Justice Department and private plaintiffs to enforce the Clayton Act.

Procedurally, it was believed that the intelligent implementation of antitrust policy would be promoted by establishing a continuing body with specialized responsibility and broad powers to deal with trade restraints. Politically, it was believed that the Department of Justice was too susceptible to partisan political pressures to have a stomach for vigorous antitrust enforcement, while an independent agency would presumably be free from political inhibition.

Experience has proved these premises wrong; one is also irrelevant. It is now clear that the practices regulated in the Clayton Act, as well as the additional anticompetitive practices attacked by the Commission under section 5, were never significant sources of monopoly power. If we exclude the special cases of governmental franchise and of overwhelming economies of scale—problems to which the antitrust laws afford no solution—the sources of monopoly power were and are two: mergers (or other forms of corporate amalgamation) leading to monopoly, and price-fixing agreements among competitors. Both of these practices had been condemned by the Supreme Court in Sherman Act proceedings before the Clayton and Federal Trade Commission Acts were passed.<sup>9</sup> In the one area where a strengthening of preexisting law might have been thought appropriate—that of mergers and acquisitions—the new acts turned out to be ineffectual. Section 7 of the Clayton Act, until its amendment in 1950, was inapplicable to mergers, which involve the acquisition of the assets rather than the stock of the acquired firm, and the FTC was helpless to proceed under section 5 of its enabling act, having been held powerless to order the divestiture of illegally acquired assets.<sup>10</sup>

Some will argue that the regulation of other practices besides mergers and horizontal price-fixing can be justified on anti-trust grounds. I shall not attempt to debate the point here.<sup>11</sup> It is inessential. As we shall see in due course, whatever additional regulations might plausibly be considered appropriate in furtherance of antitrust policy, they are not those the FTC has been implementing. More fundamentally, the fact that substantive law is considered inadequate is not a sufficient reason

<sup>9</sup>See *Northern Securities Co v. United States*, 193 U. S. 197 (1904); *Standard Oil Co. of New Jersey v. United States*, 221 U. S. 1 (1911); *United States v. American Tobacco Co.*, 211 U. S. 106 (1911); *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897); *United States v. Joint Traffic Assn.*, 171 U. S. 505 (1898).

<sup>10</sup>The sad story is recounted in *United States v. Philadelphia National Bank*, 374 U. S. 321, 337-40 (1963).

<sup>11</sup>See *Director & Levi, Law and the Future: Trade Regulations*, 51 *Nw. U. L. Rev.* 281 (1956).

for creating an administrative agency. Congress can change the law without changing the enforcement institutions. When in 1950 it amended section 7 of the Clayton Act to make it applicable to mergers,<sup>12</sup> the principal impact, as it turns out, was on the enforcement activity of the Department of Justice; the FTC's role in the enforcement of the merger law has been secondary.

Whatever the substantive contours of antitrust policy, it can be argued that an administrative agency has a comparative advantage in articulating, elaborating, and applying that policy, or at least some facets of it. A coherent body of technical law is indeed more likely to emerge from a single tribunal specialized in the subject than from courts of general jurisdiction, especially if the specialized tribunal, unlike a court, is not limited to the role of passive arbiter of controversies fortuitously thrust upon it for decision but has substantial control over the selection of cases and the time of litigation. In the field of antitrust, however, this comparison between an administrative agency and the courts is misleading. It is misleading because it fails first to separate out the components of the administrative process and then to compare each with its counterpart in the system of judicially enforced antitrust policy.

In the administration of regulatory statutes such as the antitrust laws, one can distinguish a number of operations: announcing general principles to guide the application of the law in doubtful cases; determining enforcement priorities; investigating; selecting cases and deciding upon their sequence; deciding when to settle a case; adjudicating the guilt of the accused in contested proceeding; fashioning effective remedies; and supervising compliance. Administrative agencies perform all of these functions, and it is easy to see that, in contrast, courts do not. But the judicial enforcement of regulatory statutes is not exhausted in the actions of courts. The proper counterpart of the FTC in many of its functions is not the federal judiciary but the Antitrust Division of the Department of Justice.<sup>13</sup> It is the Division, subject to review and direction by the Attorney General, that decides on enforcement priorities; that issues, where appropriate, either individual advisory opinions or general policy guidelines; that conducts investigations; that negotiates settlements; that proposes theories and remedies to the courts; that supervises compliance

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<sup>12</sup>64 Stat. 1125 (1950).

<sup>13</sup>This point is usually overlooked in discussion of the Commission's potential contribution as an antitrust agency. See, e.g., Zimmerman, *The Federal Trade Commission and Mergers*, 64 Colum. L. Rev. 500 (1964).

with the courts' judgments; and, in short, that provides continuity and direction in the development and application of judicially enforced antitrust principles. Like the FTC, the Antitrust Division is a specialized body. It is actually more specialized than the Commission, since it does not divide its time between monopoly and fraud. And like the FTC, the Division has the flexibility, the investigative resources, and the positive enforcement mandate that courts lack. The qualities of continuity, expertise, focus, and initiative ideally predicated of administrative agencies should find equally fertile soil in the Antitrust Division. Most observers would agree that these qualities have actually developed further in the Antitrust Division than in the FTC and that it is the Division, not the Commission, that has had the greater and on the whole healthier influence on the evolution of antitrust policy.

It is true that the Division is denied a method of policy formulation that the FTC can and does use and that holds an honored place in our legal traditions—the common law method, whereby policy emerges from the process of deciding particular cases. However, if the Division cannot actually decide a case, it can urge the courts how to decide. And, although the FTC has the power to issue decisions, they are reviewable by the federal courts of appeals and the Supreme Court. Since the antitrust standards are not purely administrative, the courts have not felt bound to adopt the FTC's theories of antitrust liability. As vehicles for the formulation of antitrust policy, FTC rules and decisions have been functionally, if not formally, little different from Department of Justice briefs. In both cases the agencies merely propose and the courts dispose.

Insofar, then, as the FTC is more than merely another kind of court, it would appear to enjoy no comparative advantage in the administration of the antitrust laws. We must now consider whether it is a superior kind of court. It is not. A federal district court judgeship is a more remunerative and prestigious post than that of an FTC hearing examiner, and it tends, not surprisingly, to attract abler individuals. This is so even though politics plays a major role in the appointment of federal judges; it plays a role in the appointment of hearing examiners too. And, just as hearing examiners are specialized, so some district court judges acquire expertise in the trial of antitrust cases by being repeatedly assigned to such cases. Contrary to the myths of the administrative process, moreover, the procedures that have been developed by the federal district courts for the trial of major antitrust cases are more flexible than those followed in

FTC hearings. The traditional rules of evidence, largely disregarded in federal antitrust trials, continue to obsess FTC hearing examiners. While comparison is difficult, it is a fair guess that a major antitrust case takes longer to try before the FTC than before a federal district court. Nor has the FTC been more imaginative than the courts in fashioning remedies or supervising compliance. Viewed as a "trade court," the FTC has displayed no comparative advantage over ordinary courts. If anything, the opposite has been true.

Arguably, it is not the executive or adjudicative aspects of the administrative process, considered separately, that distinguishes it, but the combination of both functions in one body. In fact, this has been a source of profound weakness. Preoccupation with the decision of particular cases to the exclusion of alternative methods of policy-making is a familiar and justified complaint against the agencies. What is less frequently emphasized is that executive responsibilities get in the way of fair and efficient judging. It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place. An agency that dismissed many of the complaints that it issued would stand condemned of having squandered the taxpayer's money on meritless causes. Besides, commissioners who lack the tenure, the high status, and the freedom from other duties that federal judges enjoy cannot realistically be expected to perform the judicial function as well; and they do not.

The founders of the FTC were also mistaken in their estimation of the relative boldness and independence of Executive Branch and "independent" agency antitrust enforcement. The controversial cases and major doctrinal advances, the forward thrust and progressive direction of our antitrust policy, have come chiefly from the Department of Justice. This may not be merely historical accident. Major policy initiatives are rarely taken without the backing of the President, and if an independent agency is less subject to Presidential direction than is the Attorney General, it is by the same token in a less favorable position to enlist Presidential support. Moreover, the Attorney General is more independent than the Commission of another powerful source of political pressure, the Congress, whose committee chairmen have over the years exerted a strong and on the whole baleful influence over the FTC's activities.

I have argued that the administrative process appears to have no distinctive contribution to make to antitrust enforcement and that the FTC's contribution has in fact been marginal. But the FTC as an antitrust agency has been worse than merely superfluous. The existence of two

federal antitrust agencies with overlapping jurisdictions has not engendered a healthy rivalry; like any sensible duopolists not subject to antitrust law, the agencies have proceeded by way of a division of markets. But it has retarded the creation of a coherent body of antitrust law. Even more serious is the penchant of the Trade Commission for bringing cases that lack a rational basis. A partial verification of this assertion can be attempted by examining the restraint-of-trade cases decided by the Commission in the course of an arbitrarily selected recent year of activity. I have chosen the year beginning July 1, 1962, and ending June 30, 1963, only because that it is the last year for which bound volumes of the Commission's decisions are available.

The Commission issued more than 250 decisions and orders in the restraint of trade area that year.<sup>14</sup> All but a handful of them were issued on the basis of consent, without a trial. In discussing these cases, I assume the facts to be those stated in the Commission's opinion or, in the case of consent orders, those alleged in the complaint. The bulk of the orders—more than 200—involved alleged violations of sections 2(d) or (in one case) 2(e) of the Clayton Act, provisions added by the Robinson-Patman Act.<sup>15</sup> Section 2(d) forbids a seller to grant an advertising allowance to one of his distributors without making it available on proportionally equal terms to those of his other distributors who compete with the recipient. Section 2(e) applies the same principle to the furnishing of advertising services. The cases involve, for the most part, allowances by wearing-apparel manufacturers to department stores, by magazine publishers to news dealers, and by toy manufacturers to toy wholesalers selling through catalogs. In none of these cases, or any other 2(d)-(e) case in the sample, did the Commission suggest, or is it remotely likely, that there was monopoly power at the manufacturer level or monopsony (buying) power at the distributor level of the industries involved. In the absence of such power, the granting of disproportionate allowances must be either in recognition that certain distribution outlets are more efficient advertisers or a form of indirect price competition among the manufacturers. In either event, the practice should not be prohibited.

Seventeen cases in the sample involved alleged violations of section 2(c) of the Clayton Act, another Robinson-Patman provision: the broker-

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<sup>14</sup>For the sake of brevity I have omitted citations to the cases discussed in this section. All may be found in volumes 61 or 62 of the Federal Trade Commission Decisions (which are reasonably well indexed), and I shall be happy to furnish the particulars of any case on request.

<sup>15</sup>49 Stat. 1526 (1936).

age clause. In 15 of the cases, sellers of citrus fruits were ordered to stop paying brokerage to buyers or buyers' representatives. There is no indication that the recipient of the brokerage payment did not render services entitling him to brokerage; but even if phony brokerage were involved, it would be unclear why a public agency should be concerned. Unearned brokerage might either be a form of concealed price competition or, in some cases, a fraud on the seller's broker, but in neither case would competitive processes be seriously endangered. Two of the 17 cases involved discounts in lieu of brokerage, and in one, the Commission, to its credit, found that the discount was compensation for a legitimate function in distribution performed by the recipient and dismissed the complaint.

Nine cases involved section 2 (a) of the Clayton Act. In five, a seller is charged with granting a discount to a grocery store or other large chain retailer, but no circumstances are alleged that would support an inference of monopolistic conditions or tendencies. On the contrary, these cases, like almost all of the Robinson-Patman cases in the sample, arise in highly competitive industries—wholesale and retail distribution, magazine publishing, agriculture, auto parts, toys, etc. These are industries where one would have thought that the determination of price could safely be left to free market processes.

In two other 2 (a) cases, the Commission condemned functional (also quantity and volume) discounts granted by auto-parts manufacturers to jobbers or other distributors. The fact that different auto-part distributors may perform different functions in the distribution process, entitling them to different prices, is treated by the Commission as irrelevant where the distributors receiving different functional discounts are in competition. The effect is to freeze the structure of auto-parts distribution in a particular mold regardless of efficiency.

In another case, the Commission struck down a large dairy company's practice of selling its own brand milk at a higher price than milk sold under distributors' brands. A price difference is necessitated by the fact that a seller incurs advertising expenses in promoting its own brand that it does not incur when its product is sold under the distributor's brand and advertised, if at all, by the distributor. The Commission's hostility to the sale at lower price of off-brand merchandise is inexplicable in terms of the goal of promoting a competitive economy: distributor brands weaken the power of the heavily advertised manufacturer brands.

The last of the Commission's section 2 (a) cases in the sample involves a charge of predatory conduct on the part of a woodenware manufacturer. The opinion recites evidence of predatory intent that, if true, would easily support a criminal conviction under section 2 of the Sherman Act, but that, no such criminal action having been brought, is probably untrue. The critical defect of the Commission's case, as pointed out by the dissenting Commissioner—but evident on the face of the Commission's opinion as well—is the want of evidence that price differences, which is all that section 2 (a) reaches, were the weapon used by the alleged predator.

The Robinson-Patman cases that I have briefly sketched cannot be justified in terms of the goal of promoting competition and efficiency, or, for that matter, in terms of any other arguably meritorious goal that the reader may care to supply. It will not do to reply that the Commission in these cases is merely doing the will of Congress. The Commission was instrumental in procuring the passage of the Robinson-Patman Act.<sup>16</sup> Besides, nothing in the Act compels the Commission to enforce it so much, and with such literal-mindedness. The wise exercise of administrative discretion should lead the Commission to remit most Robinson-Patman complainants to the private remedies that the Act provides, and, in those cases that it does bring, to interpret the rather plastic language of the Act in a manner designed to make it harmonious with rather than subversive of antitrust policy.<sup>17</sup>

Turning to other areas of the Commission's restraint-of-trade activity in the test year, one finds 10 cases under section 5 of the Federal Trade Commission Act. Of these, 4 involved price-fixing and other conspiracies among competitors. For reasons that I have explained in a recent article, a weak injunctive remedy is not an adequate remedy against conspiracy; conspiracy cases should normally be prosecuted by the Department of Justice and punitive sanctions sought.<sup>18</sup> Another case involved a charge that a buyer had induced the grant of an advertising allowance unlawful under section 2 (d) of the Clayton act; my earlier comments on that provision apply here. The remaining section 5 cases, which involve various forms of exclusive dealing, are clearly sports from the standpoint of promoting a competitive economy. A franchise system of retail dis-

<sup>16</sup>See FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

<sup>17</sup>As the Supreme Court has said it should. *Automatic Canteen Co. v. FTC*, 346 U. S. 61 (1953).

<sup>18</sup>Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 *Stan. L. Rev.* 1562, 1588 (1969).

tribution in the highly fragmented shoe industry is struck down. Frozen-food manufacturers are accused of having attempted to sew up retail outlets by giving them display cases without charge. Territorial and customer restrictions imposed by a floor-covering manufacturer on its distributors in an attempt to stave off imminent bankruptcy are invalidated. Lastly, the Commission condemns requirements contracts in the scrap-iron business in an opinion that, as the dissenting Commissioner points out, lacks any intelligible theory of illegality.

There remain for discussion six cases under section 7 of the Clayton Act. Two are dismissals. Two involve attacks on mergers between manufacturers of the same product in different geographical markets; economic power is darkly alleged, but no coherent theory as to why such mergers are thought to endanger competition is suggested. In another case, a merger is struck down on the ground that it might facilitate reciprocal buying. The Commission's opinion assumes that reciprocal buying is an anticompetitive practice. The question bears closer scrutiny.<sup>19</sup> Suppose widget-maker *X* both purchases steel from steel-producer *Y* for fabrication into widgets and, through a newly created or acquired catering subsidiary, applies for the cafeteria concession in one of *Y*'s plants. If *Y* has other, equally good customers for its steel, it will grant the cafeteria concession to *X* only if *X*'s terms are better than competing concessionaires'. If *Y* is for some reason at a disadvantage in bargaining over the sale of steel with *X*, then *X* may be able to insist that *Y* use its cafeteria service even though it is more costly than, or otherwise inferior to, competitors' service. But if *X* has such power over *Y* it can exploit it without going into the cafeteria business; it can demand a lower price on steel. Reciprocal buying is thus hard to fathom either as a means to or as a manifestation of monopoly, and it seems much more likely to represent either a justified preference or a method of covert price competition. (*Y* might prefer to grant *X* a discount indirectly, by paying an excessive price for cafeteria service, rather than directly and risk reprisal by competing steel suppliers.) A prohibition of reciprocal buying seems, therefore, unwarranted; and a rule outlawing mergers that facilitate the practice is built on sand (it can also be used to justify attacking virtually any acquisition by a large company).

In my sample of more than 250 restraint of trade orders, I find none that can be justified on economic grounds, or on any other ground, with

<sup>19</sup>See Stigler, *Working Paper for the Task Force on Productivity and Competition: Reciprocity*, 5 CCH Trade Reg. Rep. ¶ 50252 at p. 55525 (June 24, 1969); Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 Law & Contemp. Prob. 552 (1965).

the exception of (a) one merger case, not previously discussed, involving leading manufacturers of particle accelerators, and (b) the conspiracy cases that probably should have been brought, if at all, by the Department of Justice. I doubt the picture would change markedly if a similar analysis were performed on the Commission's antitrust work product of other years, or if the focus were enlarged to include the Commission's nonadjudicative activities. The Report of the President's Task Force on Productivity and Competition (the Stigler Report) gave one instance of what goes on beneath the adjudicative surface: the protection of dealers against termination in circumstances unrelated, where not opposed, to antitrust objectives.<sup>20</sup>

All this activity, 99.5 per cent of which seems misdirected, is not costless. In fiscal year 1963, which is coextensive with my sample, the Commission's appropriations were \$11.4 million, at least 50 per cent of which should be allocated to restraint of trade work.<sup>21</sup> The legal and related expenses incurred by firms in attempting to comply with (or evade) Commission rules and orders, and in defending the cases prosecuted by the Commission, are, at a guess, 5-10 times as great as the Commission's expenses. The direct cost of the Commission's restraint of trade activity in the sample year must therefore have exceeded \$30 million. The total social cost of the activity may be much higher, since in many of the cases in the sample, as we saw, practices designed to promote competition or efficiency were struck down. However, a study of compliance would be necessary to establish that the Commission's orders actually abated the forbidden practices and hence imposed these additional costs.

### III.

Although originally created to grapple with monopoly problems, the FTC, within a few years after it opened its doors, was devoting the bulk of its time and resources to combatting false advertising and other deceptive or unfair merchandising practices.<sup>22</sup> The shift is instructive and we shall consider the reason later. A more fundamental question, one rarely put because the answer strikes most people as self-evident, is whether there ought to be a government agency that prosecutes sellers who try to mislead consumers. Even in the absence of any legal remedies,

<sup>20</sup>Report of the Task Force on Productivity and Competition, 5 CCH Trade Reg. Rep. ¶ 50250 at pp. 55517-18 (June 24, 1969).

<sup>21</sup>FTC 1963 Ann. Rep.

<sup>22</sup>Rublee, *supra* note 3.

it is unclear that deception would be markedly more frequent than it is. Good preventives against deception are to be found in the incentive of the consumer to exercise reasonable care and commonsense in purchasing, in the incentive of sellers not to antagonize customers, and the incentive of competitors of deceptive advertisers to give consumers prompt and accurate information in order to correct any misrepresentation that might cause a substantial diversion of their sales. The last point is too little stressed. In other areas of discourse we posit a marketplace of ideas in which good ideas can be expected to prevail in open competition with bad. One could quite reasonably take a similar approach to advertising. Individuals probably know a good deal more about household products than about political questions. If we trust them to evaluate competing and often fraudulent claims by political candidates, we should also trust them to evaluate competing product claims. Since other sellers, like rival candidates, have every incentive to counter the misleading representations of a competitor, there seems little danger that false claims will not be exposed. Nor is it clear that occasional, transitory misrepresentations are entirely a bad thing. If a false claim elicits a substantial increase in sales, the industry has learned something about consumer demand, and competitors of the false advertiser will have an incentive to develop a product about which the claim can be truthfully made.

This is not to suggest that market processes afford complete protection against consumer deception. Since the provision of information is not a costless activity, one can imagine cases where the impact of the deceptive practice is so limited that it does not pay competitors to supply correct information, even though some consumers are fooled and switch their business to the deceiver. However, these are doubtful cases for any form of corrective action, public or private; they are cases where the costs of truth appear to outweigh its benefits. A related, but more serious, problem arises when other sellers lack incentive to inform the public of the fraud, not because its impact is very limited, but because exposing it will not significantly increase their sales. What sellers could expect marked gains from telling the public that cigarette smoking is harmful to health? (More on this shortly.)

Most important, there is bound to be a lag between the misrepresentation and the truthful rebuttal. The prospect of a quick killing before consumers are made wise to the fraud by competing sellers may induce a firm that is not concerned to remain in the business to engage in deceptive practices, and when it is exposed switch to another line. If consumers have no legal protection against such a firm, they may

resort to all sorts of costly self-protective devices, such as vastly increased expenditures on shopping, blacklists of sellers, and refusing to deal with newly established firms. That is one reason why we have a law of contracts.<sup>23</sup> The provision of legal remedies for breach of contract reduces the cost of transactions by obviating, or at least reducing, the need of buyer or seller to take costly and cumbersome measures to protect himself against the other's bad faith. As an incidental feature of the system of contract rights and remedies, one who is inveigled by fraud or misrepresentation into a transaction may rescind it, or, if it has already been consummated, collect damages from the defrauding party.<sup>24</sup> In this fashion, the legal system protects buyers against sellers who are tempted by the prospect of short-term gains to obtain business by deceit.

As in the case of the FTC's antitrust role, then, there was an existing system of remedies for fraudulent conduct, and the question is why it was thought necessary to supplement these by a scheme of administrative regulation. (As mentioned earlier, apparently it was not thought necessary by the sponsors of the Commission, who envisaged it as an anti-trust agency.) The justification that is usually advanced for having the government prosecute deceptive sellers is that the system of private remedies is ineffectual where the injury to any single consumer is small. Although the aggregate injury to the consuming public may be considerable, no individual consumer has an incentive to assume the costs of litigation. The corollary to this is that private remedies should be relatively effective in preventing serious frauds—frauds that endanger health or safety or inflict large monetary loss—for these are cases where the likelihood of a private suit is great. What the point about the small claim ignores, however, is that competitors of the deceptive advertiser should have a substantial incentive to institute judicial proceedings to eliminate a fraud that, if successful, must be diverting appreciable sales from them. In such proceedings, the competitor of the deceptive advertiser (or trade association of competitors) would, in effect, be aggregating the individually insignificant consumer claims. Consumers would not be made whole for past losses but the practice would be stopped, which is all that FTC fraud proceedings can do.

Implicit in the foregoing is the assumption that the courts are capable of evolving reasonably satisfactory legal principles governing con-

<sup>23</sup>I do not mean that the only purpose of the law of contracts is to prevent bad faith; another is to resolve peaceably bona fide disputes arising from ambiguity, unforeseen circumstances, and the like.

<sup>24</sup>Restatement, Contracts, §§ 470 *et seq.* (1932). Fraud and misrepresentation are also torts. Restatement, Torts, §§ 525 *et seq.* (1938).

sumer fraud. The assumption seems broadly correct, although the courts have been slow to recognize the right of a competitor to sue on the ground of false advertising *per se*<sup>25</sup> (the occupation of the field by the FTC may provide a partial explanation). Fraud and misrepresentation are familiar concepts in Anglo-American jurisprudence, and their application in the sale context would appear to present neither conceptual nor practical difficulties of moment. In any event, the assumption of judicial lawmaking adequacy is not necessary. If the courts hesitate or stumble in adapting common law principles to novel circumstances, it is open to the Legislature to lend a hand by excising existing defenses or declaring new rights of action.<sup>26</sup> Indeed, Congress in the Lanham Act created a new right of action for competitors injured by misrepresentation that, although little utilized,<sup>27</sup> appears to remedy any deficiencies of the common law in this area.<sup>28</sup>

Procedurally or institutionally, it is doubtful that administrative enforcement of antifraud principles has any comparative advantages over judicial. The nature and complexity of the issues do not argue for an administrative agency. The interpretation of advertising or sales representations and the determination of their truth seem well within the ordinary competence of judges and juries. True, an agency, if given its head, is likely to develop stricter standards of what constitutes unlawful deception than would courts. The agency is more likely to define its mission as one of consumer protection (narrowly conceived), rather than as the neutral resolution of disputes between sellers and buyers. But society may not gain from the stricter standards. Just as the cheapest way to reduce the incidence of certain crimes, such as car theft, is by inducing potential victims to take simple precautions (locking car doors), so possibly the incidence of certain frauds could be reduced at least cost to society by insisting that consumers exercise a modicum of care in purchasing, rather than by placing restrictions on sellers' marketing methods. Whenever the Commission compels a seller to supply additional information to consumers, it increases the consumer's shopping burdens and, since consumers must be nearly saturated with product information already, may force the displacement of other and equally significant product messages. Much advertising that the Commission

<sup>25</sup>See *American Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281 (6th cir. 1900); *Developments in the Law—Competitive Torts*, 77 Harv. L. Rev. 888, 905-07 (1964).

<sup>26</sup>See, e.g., 45 U. S. C. 51 *et seq.* (1964) (Federal Employers' Liability Act).

<sup>27</sup>Perhaps because, as we shall see, the FTC affords a costless remedy to a firm injured by a competitor's deceptive sales practices.

<sup>28</sup>See 15 U. S. C. 1125 (1964).

views as suspiciously inexplicit or elliptical may simply reflect the need to economize on product information, albeit, a byproduct may be that here or there someone is misled. The answer in these cases may be to hold the consumer to a somewhat higher standard of care. But this is a line of thinking that the FTC, which avows a standard of protecting "fools" as well as average or reasonable consumers from deception,<sup>29</sup> seems incapable of grasping.

A system of private remedies for fraud is unlikely to be completely adequate. In particular, it will fail to deter sellers who compound their fraud by ingeniously evading legal processes through concealment of their assets or frequent changes in the locus of their activity and in their corporate identity. Criminal or other punitive sanctions are necessary in such cases. But this is not a problem that having a Federal Trade Commission will cure.

The one area in which the case for an agency is stronger than previously suggested is where no seller has an incentive to furnish correct information, or to sue a seller who misleads the consumer. An example is cigarettes. There are no direct substitutes for cigarettes, except other tobacco products. If cigarette sales declined because people became convinced that smoking was dangerous, the sales of other products or services would rise. However, apart from sellers of other tobacco products, for whom a campaign of disparaging cigarettes would involve a palpable risk of being hoist with their own petard, there is probably no seller or group of sellers who could anticipate a marked rise in sales as a result of a reduction in smoking. There is therefore no "competitor" with an incentive to supply information on the relationship between smoking and health that cigarette companies naturally try to withhold.

Even this case is less clear-cut than at first appears. Competitive pressures should induce cigarette companies to search out ways of making their cigarettes less toxic and should evoke efforts to devise a nontoxic substitute for cigarettes. Both forces have been at work. Cigarette companies have striven to reduce the tar and nicotine content of their tobaccos and to improve filtration, and ingenious people have invented cigarettes that contain lettuce or some other allegedly harmless tobacco substitute. In the ordinary course one would expect cigarette companies to advertise that a particular brand was safer than competitors'—thereby tipping the industry's hand, for such advertising unmistakably implies that there is a health hazard—and for the inventors of nontobacco cig-

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<sup>29</sup>See, e.g., *Aronberg v. FTC*, 132 F. 2d 165, 167 (7th Cir. 1942); *General Motors Corp. v. FTC*, 114 F. 2d 33, 36 (2d Cir. 1940), certiorari denied, 312 U. S. 682 (1941); *Exposition Press, Inc. v. FTC*, 295 F. 2d 869, 872 (2d Cir. 1961).

arettes to advertise that their products, unlike tobacco cigarettes, are safe. Competition should thus cause the information barrier eventually to crumble. It is a profound irony that for years the FTC, encouraged by cigarette companies that feared the process I have described, forbade the disclosure in advertising of the tar or nicotine content of any cigarette brands.<sup>30</sup>

It is one thing to identify an area in which free competition may not supply an adequate flow of correct information and another to devise an appropriate remedy. One possibility might be a government agency charged with studying the characteristics and effects of consumer products, especially in the area of health and safety, and publicizing the results to consumers. To explore this avenue, however, would take us too far afield. For present purposes, it is sufficient to observe that, although the most persuasive case for a consumer-protection agency relates to the situation where the fraud embraces all close substitutes of a product, and there is consequently no incentive for competing sellers to furnish correct information or to bring suit, this has not been the emphasis of the FTC. One's strong impression is that most FTC fraud cases are initiated, either directly or indirectly, by the complaint of a competitor (or of the union representing the competitor's employees). These are precisely the cases where private remedies should be adequate. Where competitors do not complain, and private remedies may be inadequate, the FTC usually provides no remedy either. Individual consumers rarely complain to the FTC—they have little incentive, since the FTC cannot give them reparations—and the Commission has never developed effective machinery for independently uncovering frauds. And by hypothesis, in an area where the private market is failing to supply correction information, consumers frequently will not realize that they have been defrauded.

If this is a correct description of the FTC's emphasis in the fraud area, and some corroborative evidence will be provided in a moment, the FTC is doing little or nothing that is not within the competence of courts. But the FTC's fraud activities are not merely redundant. Ordinarily, a firm cannot conduct a lawsuit against a competitor or potential competitor without incurring costs comparable to those of its opponent. This rough equality of burdens is a deterrent to the use of the litigation process to harass. Proceeding against a competitor by way of a complaint to the Trade Commission, in contrast, is a method of imposing the cost of litigation on the competitor at no cost to the complainant. All of the

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<sup>30</sup>See FTC 1960 Ann. Rep., p. 82.

costs of prosecution are borne by the FTC; all of the costs of defense by the respondent. The complainant pays nothing. This arrangement creates an incentive to engage in litigation designed purely to suppress competition, for it enables the complaining party to create a barrier to entry in its exact technical sense: a condition that imposes upon a new entrant a cost not borne by firms already in the market.<sup>31</sup>

I emphasize the effects of the unequal burdens of FTC litigation on entry because it is the new firm or, what is analytically quite similar, the new product sold by an existing firm that is most vulnerable to a charge of deceptive marketing. A new product is generally a substitute for an old one, and to market the new product successfully the seller must convince consumers that it has all or many of the best features of the old, besides being cheaper or otherwise preferable. This gives an opening to the seller of the old product to argue that its attributes are being falsely ascribed to the new. Such arguments are likely to fare better before an administrative agency that conceives its mission as one of protecting fools from being misled than before a court that views its mission as the impartial resolution of disputes between an old and a new seller.

A perusal of FTC rules and decisions reveals hundreds of cases in which prohibitory orders have been entered against practices, not involving serious deception, by which sellers have attempted to market a new, often cheaper, substitute for an existing product. Forced disclosure of the country of origin of watchbands, Christmas tree bulbs, radio components, and scores of other products; prohibition of literally true designations on the ground that they might cause confusion with the same product made by a different process (e.g., charcoal made out of corn cobs); broad prohibitions against comparisons with more expensive substitutes; forced disclosure of facts that are irrelevant to product performance but might alarm consumers (for example, that motor oil has been "reprocessed"): these and other unworthy categories of proceeding constitute a significant part of the FTC's total output over the years.<sup>32</sup> And, in contrast to the antitrust area, reviewing courts have deferred broadly to the judgment of the Commission in fashioning standards of deception (e.g., the fool test), doubtless because the unfair-or-deceptive standard of section 5 of the Federal Trade Commission Act, unlike antitrust provisions, is a purely administrative standard.

<sup>31</sup>Stigler, *The Organization of Industry* 67 (1968).

<sup>32</sup>Many of these cases are discussed in Alexander, *HONESTY AND COMPETITION* (1967).

Partial confirmation of the judgment that the FTC's efforts in the consumer-fraud field are systematically misdirected is furnished by a survey of the more than 200 decisions and orders in this field issued by the Commission during the 12-month period, July 1, 1962, to June 30, 1963, scanned earlier in connection with the agency's antitrust work. In more than one-third of the cases, there was, so far as one can determine from the allegations of the complaint or, in the few litigated cases, the Commission's opinion, no fraud or unfairness worthy of the name involved. Some of these cases turn on technical issues—the efficacy of vitamin or iron supplements, the salubriousness of yogurt, the efficacy of a "six month" floor wax—on which experts differ. Others involve payola, which is a form of commercial bribery and has nothing to do with fraud; still others, the use of games of chance to sell merchandise. A few involve the practice of collection agencies in smoking out elusive debtors by announcing that a reward or bequest awaits the individual whom they are trying to run to ground. A number of cases involve nondisclosure of the foreign origin of badminton-set components, watchbands, ball bearings, and other products. In one case manufacturers of domestic substitutes were called to testify that consumers prefer American-made products! In no case was there a suggestion that foreign materials or workmanship were inferior in quality to domestic, or otherwise distinguishable save in being cheaper.

A number of the cases in this group involve allegations of fictitious pricing. A sale price is represented to be lower than the seller's regular price or the manufacturer's preticketed or list price. Judging from the cases in which the Commission wrote an opinion, the seller's representation is usually accurate—the sale price is lower than the former price; the compared price is the bona fide manufacturer's list price—and the Commission's complaint is that the seller did not have many sales at the former price, or that, due to widespread discount selling in the local area, the manufacturer's list price is not a common selling price there. However, such representations are not only literally truthful, but unlikely to be understood by consumers in the strained sense insisted upon by the Commission. Consumers realize that price reductions are commonly motivated by the seller's inability to move the item at the former price and that many products are never sold at the manufacturer's list price. These cases serve no purpose other than harrassment of discount sellers.

Among the many other cases in which it is hard to believe that a substantial number of consumers would be fooled are cases in which the Commission orders a seller of dime-store jewelry to disclose that its

"turquoise" rings do not contain real turquoises," orders a toy manufacturer to disclose that its toy tank does not fire projectiles that actually explode, orders the maker of "First Prize" bobby pins to change the name because a consumer might think his purchase would make him eligible to enter a contest, and orders a manufacturer of shaving cream to cease representing that his product can shave sandpaper without first soaking the sandpaper for several hours. The representation that a product is "guaranteed" is interpreted by the Commission, though I doubt by any consumer, to mean fully guaranteed; furthermore, the term is deemed misleading per se unless all of the conditions of the guarantee are printed in the ad. "Free," as in "buy one and get one free," means, to the Commission, and only to the Commission, a true gratuity. The practice of offering a cheap product in order to get a hearing from the consumer and then trying to switch her to a more expensive one is condemned even where the seller appears perfectly willing to sell the cheaper product if the consumer is unconvinced by his spiel.

In another one-third or so of the year's consumer-protection cases, if there is any fraud, and my guess is that typically there is none, the private legal remedies for the wrong seem plainly adequate and there is no excuse for expending public funds. This group includes cases of passing off one product as something else and of disparagement of competitors. Typical are false claims that a product is "stone china" or "whole cowhide" or meets the standards of the Aluminum Window Manufacturers Association. The trade association composed of sellers of the genuine article should have no difficulty obtaining an injunction in a private suit. Other cases involve sales not to consumers but to business firms, or to businessmen qua businessmen, who should be held responsible for protecting themselves against deception, either by the exercise of normal caution or by invoking the tort and contract remedies on which business enterprises usually rely in purchasing. The remaining cases in the group, and the vast majority, are those under the Fur Products Labeling Act, the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act.<sup>33</sup> Sellers of fur, wool, or textile products who resorted to fraud could be dealt with under section 5 of the Federal Trade Commission Act. The purpose of the specialized statutes, as disclosed by their terms and the legislative history,<sup>34</sup> is less to combat fraud than to protect the trademarks and goodwill of high-grade furs, wools, and textile fibers against infringement or dilution by sellers of cheap substitutes. Judging

<sup>33</sup>15 U. S. C. 69 (1964); 15 U. S. C. 68 *et seq.* (1964); 15 U. S. C. 70 (1964)

<sup>34</sup>Cited in the discussion of the Bureau of Textiles and Furs in Part V.A. of the majority report.

from the cases in my sample, much of the Commission's enforcement activity under these statutes consists of springing traps on the unwary: sellers are enjoined for failing to label natural mink "natural"; for using abbreviations instead of the full name; and for other misdeeds of comparable gravity. My point, however, is not that the Commission's enforcement of these curious laws (which it helped get enacted)<sup>35</sup> is frequently aberrational but that the policing of trademarks and quality standards is a job for sellers and their trade associations rather than for the government.

Another group of cases does not involve fraud or information at all. They are cases under the Flammable Fabrics Act,<sup>36</sup> a safety statute, curiously lodged with the FTC, which forbids the sale in interstate commerce of dangerously flammable fabrics. A number of other cases involve hard-core fraud where, if the allegations of the complaint be believed, the number and blatancy of the misrepresentations, combined with the evasive character of the respondent's operations, indicate the kind of malice or wilfulness (in the legal sense of those terms) that would justify criminal proceedings under the federal mail-fraud statute<sup>37</sup> or state criminal fraud laws.<sup>38</sup> These are the freezer-plan, correspondence-school, and other mail-order or door-to-door frauds that have long been the staple of the Commission's fraud docket. The respondents in these cases seem thorough rogues, and I would be astonished if the feeble weapons at the Commission's disposal had much effect on them beyond mild harassment and perhaps inducing some to abandon interstate commerce and prey on intrastate commerce instead.

That leaves a bare handful of cases in which Commission action may have served a useful purpose, although knowledge of the true facts might lead one to revise this estimate, and in only one case is it probable that private legal remedies would be inadequate. Thus we find cases (not marked by evidence of wilfulness) where a seller falsely claimed that a fabric had been imported from Italy; where the length of a tape was misrepresented; and where one brand of bread was falsely advertised as lower in calories than other breads. And these are instances where corrective action against the deception could probably be left to competitors. There is, however, an interesting case in which cheap jewelry was repre-

<sup>35</sup>See e.g., Hearings on H. R. 2321 before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 8 (1951).

<sup>36</sup>15 U. S. C. 1191 *et seq.* (1964).

<sup>37</sup>18 U. S. C. 1341 (1964).

<sup>38</sup>Collected in Note, *the Regulation of Advertising*, 56 Colum. L. Rev. 1018, 1098-1111 (1956).

sented as goldplated, when in fact a minute layer of gold had been applied by electrolysis. At first blush, one might think that this, too, is a case where competing sellers, sellers of real goldplate, can be relied upon to correct the deception—until one remembers that the people who buy the cheap jewelry in question may not be potential customers of real goldsmiths.

In fiscal year 1963, one is forced to conclude, the FTC bought precious little consumer protection for the more than \$5 million that it expended in the area of fraudulent and unfair marketing practices,<sup>39</sup> and the many millions more that it forced the private sector to expend in litigation and compliance. Besides wasting a good deal of money in tilting at windmills, the Commission inflicted additional social costs of unknown magnitude by impeding the free marketing of cheap substitute products, including foreign products of all kinds, fiber substitutes for animal furs, costume jewelry, and inexpensive scents; by proscribing truthful designations; by harassing discount sellers; and by obstructing a fair market test for products of debatable efficacy.

Before leaving the subject of fraud and the FTC, I should like to say a word about the extent of deception in sales to poor people. The majority report of this committee recommends that the FTC give more emphasis to the protection of poor people from fraud. I am far from satisfied with the evidence that has thus far been adduced to support the proposition that fraud is rampant in the urban slums. It consists, for the most part, of unverified and often incredible assertions by dissatisfied consumers in testimony before legislative committees or in interviews.<sup>40</sup> Nor is it immediately clear why fraud should be prevalent

<sup>39</sup>FTC 1963 Ann. Rep.

<sup>40</sup>See items cited in section V.A. of the majority report. The lawyer's penchant for substituting anecdotal for scientific evidence has been a frequent source of blunders. A relevant case is that of predatory pricing. For many years it was believed that large sellers would frequently sell below their cost in order to destroy their competitors. This belief, sustained by victims' anecdotes much like those we now read about in the fraud area, spurred enactment of section 2 of the original Clayton Act and other statutes. In 1958, a scholarly study of the Standard Oil Trust showed that, even before section 2 was enacted, the most notorious predator of them all had not, in fact, employed predatory pricing; the study also supplied reasons why, as a matter of economic theory, such pricing is rarely a rational strategy for monopolizing. McGee, *Predatory Price Cutting: The Standard Oil (N. J.) Case*, 1 J. Law & Econ. 137 (1958). This study has never been refuted, and is widely accepted. See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1339-52 (1965). And they are corroborated by the extraordinary paucity of cases over the years in which predatory pricing could plausibly be inferred. Predatory pricing is now regarded by most students of antitrust as very largely a mythical beast. The belief in its reality was based on the same kind of casual, anecdotal evidence now adduced, again without good basis in theory, to create belief in the existence of a serious problem of consumer fraud.

in sales to the poor. Since the poor of any major city represent in the aggregate a substantial market, one would expect sellers to compete in supplying true information about products to poor as to rich consumers. And neither the reported profit rates of slum merchants nor the structure of retail distribution and finance markets support a hypothesis of exploitation. Still, I do not deny the possibility that there may be a serious problem here. Perhaps, as Anthony Downs has argued in another context, the poor "are people who 'fall into the cracks' between the neat logical categories" of economic analysis.<sup>41</sup> Maybe the educational deficiencies of poor people are such that honest sellers find it too costly to educate them to the product misrepresentations of dishonest rivals. At all events, given the state of our knowledge, it is premature to unleash the FTC on the problems of poor consumers. Study should precede action. Having failed in so much else, the FTC is not likely to succeed in making a dent in our most intractable domestic problem, that of poverty, until it is better understood.

I am also concerned lest a campaign of compelling greater disclosure of product claims by slum merchants have results quite different from those intended. To repeat an earlier point, information is not costless. If slum merchants are forced to supply additional information, they will raise their prices; in effect, the careful poor consumer will be insuring his careless neighbor against the consequences of imprudence. This seems a curious way to fight poverty.<sup>42</sup>

#### IV.

My colleagues of the majority, while fully conscious of the Commission's deficient performance of more than 50 years, maintain a resolute air of optimism. With better leadership and better staff, with greater appropriations, with a renewed sense of dedication, and with wise direction from committees such as these, the Commission, in their view, can still be redeemed for socially productive activities. I am not so sanguine. The Commission has done so badly continuously over so long a period of time that it is difficult any longer to regard its failings as accidental

<sup>41</sup>Comments, in *Issues in Urban Economics* 419, 426 (Perloff & Wingo eds. 1968).

<sup>42</sup>Equally questionable are proposals to abrogate, as unfair, certain devices used in the financing of consumer purchases, such as the defense of holder in due course. See, e.g., Comment, *Consumer Legislation and the Poor*, 76 *Yale L. J.* 745 (1967). Any rule that makes it more costly for merchants or finance companies to do business with poor people is likely to raise the price of products and credit to them, and thereby make it even more difficult for them to obtain the goods they want.

and remediable. It is not as if the deficiencies in its performance had gone unobserved until the present committee began its study. The criticisms and recommendations of this committee were anticipated by the Hoover Commission in its 1949 report on the FTC<sup>43</sup> in such detail as to make the present study little more than an updating of that report. And 25 years earlier a perceptive study of the FTC by Gerard Henderson had reached similar conclusions.<sup>44</sup>

The failure of these studies to have a significant impact on the Commission's behavior is rooted in the fact that they were preoccupied, as is the present majority report, with management efficiency. It is tempting to ascribe the deficiencies in the Commission's performance to mismanagement, and hence to focus on leadership, personnel, organization, planning, and other managerial concerns. But it is doubtful that mismanagement is more than a symptom of the agency's underlying problems. Two of these problems that have already been touched on in these pages are the unsoundness of the assumptions that underlie most of the Commission's activities and the remoteness of the Commission from Presidential interest and support. The proposition that supplies the Commission with its *raison d'être*—that the administrative process has a constructive role to play in supplementing judicial and market remedies against restraints of trade and deceptive practices—is highly questionable. Even if the conceptual foundations of the Federal Trade Commission were stronger than they are, the Commission would still suffer greatly from its isolation from the President. The consumer interest has always been poorly represented in Congress in comparison with organized interest groups. Dependent on Congress to a degree that no Attorney General is, the Commission is naturally influenced by the parochial interests of powerful Congressmen. And Presidents have deemed it statesmanlike to conciliate these Congressmen on appointment, staffing, and other matters relating to the Commission as a means of enlisting their support for legislation more central to the Administration's program. Exhortations by this committee are unlikely to change these stubborn facts of political life.

Another inherent limitation of the FTC arises from the structure of incentives operating on the members and staff of the Commission. Fundamentally, the problem is that the output of a regulatory agency, unlike the output of a private firm, is not sold in any market, and, not

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<sup>43</sup>Commission on Organization of the Executive Branch of the Government, Task Force on Regulatory Commissions, Appendix N, p. 122 (1949).

<sup>44</sup>Henderson, *supra* note 4, ch. VI.

being sold, cannot be priced. As a result, regulators lack objective criteria against which to measure the effectiveness with which they pursue the goals of regulation. The absence of such criteria makes it difficult to design a system of rewards for success and punishments for failure that would align the regulators' personal interests with the social interest in effective regulation. Unlike businessmen, whose social product is measured with reasonable precision by profit-and-loss statements, or professionals, whose performance can usually be measured with tolerable accuracy by reference to widely accepted professional standards, regulators' performance cannot be well evaluated, any they are in consequence left with considerable latitude to substitute their personal goals for the social goals of regulation.<sup>45</sup>

This analysis has implications that go far beyond the problems of the FTC. Its relevance here is in reminding that the personal goals of FTC members and staff (power is shared between these groups, not concentrated wholly in the hands of the commissioners) influence the character and direction of the Commission's activity. It has been proposed as a reasonable hypothesis that regulators motivated by self-interest act so as (a) to retain their jobs and (b) to obtain greater appropriations for their agency as a way of augmenting personal power (and frequently remuneration as well).<sup>46</sup> This assumption seems reasonable as to those commissioners who seek reappointment and those members of the staff who make a career of government service. The path of self-interest for such individuals would appear to lie through conciliation of well organized economic interests and influential Congressmen—foci of political power. Zealous pursuit of the consumer interest offers few dividends besides unquiet.

Not every commissioner or staff member makes a career of government service, however. Among the 14 FTC commissioners appointed since 1949 who are not present incumbents, the average tenure was only 4 years, less than a full term (7 years). The majority of these commissioners left the agency to join private law firms. The turnover among staff is also high, and most of those who leave enter the private practice of law too. A commissioner concerned with his future success at the bar will have no greater incentive to promote the consumer interest fearlessly and impartially than one whose guiding principles are job retention and agency aggrandizement. He will receive no bonus upon

<sup>45</sup>Cf. Downs, *Inside Bureaucracy* (1966); Stigler, *The Regulation of Industry* (April 10, 1969, unpublished).

<sup>46</sup>*Ibid.*

entry (or reentry) into private practice for the vigorous championing of the consumer interest. The gratitude of consumers—indulging the improbable assumption that such a thing exists—cannot be translated into a larger practice. On the other hand, the enmity of the organized economic interests, the trade associations and trade unions, that a zealous pursuit of consumer interests would engender may do him some later harm, while making his tenure with the Commission more tense and demanding than would otherwise be the case. Exceptional people may rise to the challenge but they are unlikely ever to constitute a sizeable fraction of commissioners.

The picture is much the same with regard to those members of the staff who do not intend to make the Commission a career. The principal attraction of government service to lawyers who wish to use it as a steppingstone to private practice lies in the opportunities it affords to gain trial experience of an amount and at a level of responsibility usually denied young men in private firms. (Thus, it is reported that the recent reduction in the level of the FTC's litigation activity has made it difficult for the Commission to recruit good young lawyers.) The value of their trial experience to future employers is unaffected by whether the cases tried promote or impair the welfare of society. It is the experience of trying cases, the more the better, not the social payoff from the litigation, that improves the professional skills and earnings prospects of government lawyers.

Given the absence of any mechanism for effectively conforming the private interests of FTC personnel to the social interest in consumer protection, it is hardly surprising that over the years the FTC has devoted its principal efforts to bringing cases that, if our sample is at all representative, do not promote any coherent public policy, at the behest of corporations, trade associations, and trade unions whose motivation is at best to shift the costs of their private litigation to the taxpayer and at worst to harass competitors. By taking the part of well organized economic pressure groups, representing established firms and their employees, rather than of new entrants, foreigners, and the unorganized, largely silent consumer, the FTC commissioners and staff have minimized the friction and work that a genuine dedication to consumer interests would have entailed. By concentrating on trivial fraud cases, the Commission and its staff have created the illusion of tangible results, while minimizing controversy. And by concentrating its antitrust activities not in monopolistic or oligopolistic industries, but in the most competitive industries in the American economy, such as food, textile,

and retail and wholesale distribution, and by applying antitrust principles to shield powerful organized economic blocs in those industries (such as food brokers and retail gasoline dealers) from the competitive gale, the Commission has curried favor with the groups whose power to affect the fortunes of Commission personnel is greatest.

## V.

The alternative to a trade commission is greater reliance on market processes and on the system of judicial rights and remedies that provides the framework of transactions in the market. A comparison of these alternative institutional arrangements reveals some interesting contrasts between courts and the Commission. One is in regard to capacity for modernization and reform. During the more than 50 years that the FTC has been adrift in its backwater, enormous strides in reducing the cost and increasing the efficacy of judicial processes have been made. Judicial procedure has been radically simplified; small claims courts have been created; new rights of action have been declared—recently, at the state level, in one of the areas, protection against fraud, where the FTC has been floundering; and Neighborhood Legal Services have been created to assure meaningful legal remedies for poor people. One can criticize some of these changes, and certainly much remains to be done. In particular, it is shocking that successful litigants are generally unable to recover their legal expenses from the losing party. But the crucial fact is that the updating of the judicial process appears to be proceeding more rapidly than the reform of the administrative process.

A second source of strength in the judicial process is the prestige that judges enjoy in our society. It is significant that judicial appointment is normally a terminal appointment, not a steppingstone. In the federal court system, certainly, it is rare for judges to leave the bench for private practice. I do not mean to imply that members of administrative agencies should be given life tenure. Considering the caliber of the appointees, which I do not think would be materially improved by such a system, the results would be disastrous. For reasons apparently deeply rooted in the attitudes of lawyers, it is impossible to attract many first-rate people to a lifetime career as a member of an administrative agency. Until those attitudes change, life tenure for agency members is out of the question, and judicial enforcement of rules against fraud will continue to have this marked advantage over administrative: in striving to establish a proper

balance between the rights of sellers and consumers, judges, with rare exceptions, are not going to be influenced by considerations of the impact of their decision upon a future career at the bar.

It is time to sum up. In the real world, a choice among possible institutional arrangements for dealing with social problems is a choice among highly imperfect alternatives. A free market backed up by private judicial remedies will not eliminate all frauds, nor will the Antitrust Division acting through the courts eliminate all restraints of trade. It does not follow that the administrative process should be used as an alternative or supplement to these approaches.

Since many of the basic goals and policies of the institution seem to me misconceived, I cannot regard proposals for improvements in its operational efficiency without mixed feelings. On the other hand, I do not believe that a proposal for abolition of the FTC can be justified on the basis of the kind of evidence that I have been able to assemble for the purposes of this statement. I would propose, however, a policy of (a) freezing the Commission's appropriations at their present level and (b) withholding from it any new responsibilities. It is scandalous to allow so dubious an enterprise to continue to wax in size and power. The procedure that I suggest would at least force the agency and its supporters to attempt to justify its existence and actions. If no justification were forthcoming, the freeze would be maintained and the forces of inflation and economic growth would gradually effect a practical repeal of the regulatory scheme.

## THE FEDERAL TRADE COMMISSION AS A CONSUMER PROTECTION AGENCY

(By Miles W. Kirkpatrick\*)

My assignment today is to comment on "The Federal Trade Commission as a Consumer Protection Agency." Because, I surmise, of my participation in the recent Report of the Commission of the American Bar Association to Study the Federal Trade Commission, I am asked to focus on the future role that the Federal Trade Commission can and should play in respect of consumer protection rather than on any shortcomings in its past and present performance. I very much welcome that guideline, because it is my conviction that the Federal Trade Commission can and will play a uniquely important role in the development of this country's approach to the many and varied problems of consumer protection.

I would like to start, however, with some history. It is worthwhile, I think, to view the Federal Trade Commission and its relationship to consumerism in some historical perspective. I believe that it is clear that when the Federal Trade Commission was created in 1914 it was not looked upon as a consumer protection agency as those words would be understood today. There is much legislative documentation surrounding the beginnings of the Federal Trade Commission. The underlying legislative theme was antitrust and antimonopoly and not, I suggest, fraud or dishonesty in the market place. In 1911 the Supreme Court of the United States had decided the *Standard Oil*<sup>1</sup> case and had thereby grafted the rule of reason squarely onto the Sherman Act. Congress was apparently distrustful of the Court's intentions with respect to vigorous enforcement of the Sherman Act in the future. Business, on the other hand, was somewhat apprehensive of the vague standard that the Courts would be called upon to apply. The Clayton Act and the Federal Trade Commission Act were the result. The Clayton Act, with its specificity, and the Federal Trade Commission Act, with its very general proscription of "unfair methods of competition," complemented one another. The Federal Trade Commission was given jurisdiction under both statutes and its jurisdiction was made exclusive as to "unfair methods of competition."

The Federal Trade Commission quite soon reached the conclusion, however, that its jurisdiction under Section 5 of the Federal Trade Commission Act was not limited to monopoly and antitrust restraints and that it had jurisdiction to challenge dishonesty in the market place as well as activities which were traditionally regarded as trade restraints.

By and large the Courts supported the Federal Trade Commission in its view that it had jurisdiction to prevent false advertising. However, in 1931 the FTC temporarily met a hurdle in the form of a Supreme Court decision<sup>2</sup> holding that where a practice was deceptive or unfair, but did not result in competitive injury, the Commission did not have jurisdiction. It is interesting to note that the Commission showed no dismay at this apparent limitation on its jurisdiction and in cases brought thereafter appeared to have little difficulty in finding the necessary anticompetitive effect.

In any event, in 1938 Congress cured the situation and confirmed the Federal Trade Commission's jurisdiction in the area of consumer protection by passing the Wheeler-Lea Act under which the Commission was given authority to prevent "unfair or deceptive acts or practices" in addition to "unfair methods of competition." The same Act, of course, also gave the Commission quite specific authority to prevent misrepresentations concerning foods, drugs and cosmetics.

To the broad general authority which Congress had given to the Federal Trade Commission under the Federal Trade Commission Act, Congress started in 1940 to assign some quite specific and relatively narrow responsibilities. In 1940 Congress assigned the enforcement of the Wool Product Labeling Act to the Federal Trade Commission. That Act and the Fur Product Labeling Act in 1951, the Flammable Fabrics Act in 1958, and the Textile Fibre Products Identification Act in 1958 place upon the Commission a quasi policing and surveillance activity. There followed in 1966 the Fair Packaging and Labeling Act, and in 1967 an amendment to the Flammable Fabrics Act broadening the scope of that Act to household fabrics; finally in 1968 the Commission was given charge of broad areas of the so-called "Truth in Lending Act." There are other relatively minor assignments of the Commission under a miscellaneous assortment of Federal statutes that I will not undertake to enumerate at this time.

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<sup>1</sup> *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>2</sup> *FTC v. Raladam*, 283 U.S. 643 (1931).

It is apparent, therefore, that the Federal Trade Commission is no stranger to consumer protection and that it has been attacking dishonesty in advertising ever since Congress created the agency. Clearly the Federal Trade Commission has declared itself to be the champion of the consumer on matters of deceptive labeling and false advertising. The same is true of its enforcement of the Textile and Fur Labeling Acts and the Flammable Fabrics Act, although the Labeling Acts are of questionable consumer orientation since arguably their primary aim was the protection of producers rather than consumer.

The Commission has not, however, displayed the same interest and enthusiasm in attacking retail fraud.

Like September morn the Commission has had only its toe in the problems of retail marketing fraud—a little more than its toe, perhaps, but not much more.

The Commission has, however, made some interesting moves into this area. One of its most significant ventures was started in 1966 when the Commission instituted a consumer protection project in the District of Columbia, where it has plenary jurisdiction. The project, which at one time involved five full time lawyers but which now has dwindled to a mere skeleton operation, involved the opening of some 108 investigations of retailers in the District of Columbia and some 42 formal complaints were issued. New ground was broken in this experiment and as the ABA Commission notes in its Report the knowledge gained was important in developing guides as to installment credit sales and in the enactment of truth in lending legislation.

Another FTC program tailored to localized consumer abuse has been the program of the Commission with respect to Federal-State coordination. That program involves the development of relationships between the FTC and local enforcement officials. Complaints received by the Commission are referred to local officials. Also, model legislation has been prepared for consideration by the States, and FTC personnel participate in conferences and in advising local enforcement officials. The program has not been a broad one, however, and was initially conducted by one lawyer; I understand that there are now assigned to it two lawyers.

In November and December of 1968 the FTC held extensive hearings on consumer fraud problems in the nation. The hearings resulted in a wealth of information bearing on the problems of consumer fraud; as yet, however, I am unaware of any conclusions drawn on the basis of the hearings in question but these may shortly be forthcoming.

Finally, over the years the FTC has issued a number of complaints in the area of retail marketing fraud. Fraudulent bait-and-switch practices and deceptive pricing tactics have been the subject of limited FTC action in the past. Complaints have also been issued charging home improvements frauds and misrepresentations of potential earnings of franchises and dealerships.

Withal, however, I think it can be said that the Commission has not moved with strength or in depth in the field of retail frauds.

The reason most given for the reluctance of the Federal Trade Commission to develop a strong program directed against ghetto and other localized retail frauds is that its jurisdiction extends by the terms of Section 5 of the Federal Trade Commission Act to the prevention of unfair or deceptive acts or practices only when such acts or practices are "in commerce." Certainly the jurisdictional standard of being "in commerce." is not normally thought of as being as broad as the test, for example, of "affecting commerce." Moreover, no less authority than the Supreme Court of the United States already expressed itself on that matter in 1941. Thus, in *Federal Trade Commission v. Bunte Bros.*<sup>3</sup> the Supreme Court had before it an order of the Federal Trade Commission against a candy manufacturer which sold products in what the trade called "break and take" packages, which made the amount that the purchaser received depend upon chance. The Commission has found that the "break and take" sale constituted unfair methods of competition under Section 5 of the Federal Trade Commission Act even though the sales took place wholly within the State of Illinois. The Circuit Court of Appeals had set aside the order and the Supreme Court affirmed the decision of the Court of Appeals holding that the sale did not take place "in commerce" within the meaning of the Act. It is interesting to note, however, that Mr. Justice Douglas dissented and was joined in his dissent by Mr. Justice Black and Mr. Justice Reed. The dissent took the position that:

"So far as the jurisdiction of the Commission is concerned, it is the existence of that injury to interstate commerce not the interstate or intrastate character

<sup>3</sup> 312 U.S. 349 (1941).

of the conduct causing the injury which is important. An unfair method of competition is 'in' interstate commerce not only when it has an interstate origin but also when it has a direct interstate impact. Respondent is "using" unfair methods of competition 'in' interstate commerce when the direct effect of its conduct is to burden, stifle, or impair that commerce."

I believe that the development of the law since 1941 has been such as to indicate that were the question again presented to the Supreme Court that the rationale of the dissent might well this time be adopted by the Court. Also, retail fraud of any consequence is frequently intertwined with aspects of interstate commerce which would qualify it for FTC jurisdiction even under the narrower "in commerce" test.

It is interesting to note that former Chairman Paul Rand Dixon in his testimony before the Senate Commerce Subcommittee on Consumers in connection with the administration's "Buyer's Bill of Rights," Senate Bill 3201, opposed that section of the Bill which would amend Section 5 of the Federal Trade Commission Act by changing the words "in commerce" to "affecting commerce" and thereby broaden the jurisdiction of the Commission. His position was based, at least in part, upon the proposition that local consumer problems can best be solved by local and state governmental action.

Chairman Dixon's opposition to the enlargement of the Federal Trade Commission's jurisdiction brings us, it seems to me, to the center of the problem. What part should the Commission play in preventing hard-core, localized frauds?

Commissioner Elman believes that the Commission and its administrative processes are not well equipped to deal with criminal conduct of that kind. Thus he has said:

"High priority must be given to elimination of hard-core frauds and unconscionable ghetto market practices. The poor, the sick and the elderly are always the prime targets of swindlers and cheats, whose 'salesmen' go from door to door in the ghetto, peddling worthless or inferior merchandise at grossly exorbitant prices, and wheeling the buyer into signing a negotiable instrument which they then sell to a so-called holder in due course who takes it free of any defenses the buyer had because of the fraudulent aspects of the transactions . . . The parasites who exploit and prey upon the poor and ignorant are not businessmen, even though they may be listed in the 'Yellow Pages' or belong to the Chamber of Commerce. Not to mix words, they are crooks—and should be treated as such by the law."<sup>4</sup>

Commissioner Elman concludes that the Federal Trade Commission is clearly inadequate to deal with such matters—at least in the Commission's present form. He urges that the administrative processes of the Federal Trade Commission are least necessary and least effective in the hard-core criminal type of case. "In its very nature the Commission functions best as a deliberate, more reflective, less dynamic body. Its organization and structure are simply not geared to the vigorous and expeditious discharge of prosecutorial duties."<sup>4</sup>

Commissioner MacIntyre, on the other hand, supported the enlargement of the FTC's jurisdiction to matters affecting interstate commerce.

In attempting to reach conclusions as to the Commission's proper role in relation to consumer frauds, one must, I think, keep in mind the relatively small size of the organization which is under consideration. For the fiscal year which ended June 30, 1969 the budget of the FTC was approximately \$16,900,000. Today the Commission has about 1,250 employees, of which about 400 are lawyers and about 200 economists and other professionals. Of the attorneys, about 250 are employed at the agency's office in Washington, D.C. The remainder are attached to 11 field offices located in Atlanta, Boston, Chicago, Cleveland, Falls Church, Virginia, Kansas City, Los Angeles, New Orleans, New York, San Francisco and Seattle. It is an agency already heavily engaged in anti-trust and Robinson-Patman Act enforcement in addition to its fur, textile, packaging, labelling and lending responsibilities and to the unfair and deceptive acts or practices more traditionally within its jurisdiction.

No one can doubt, it seems to me, that it is not adequate in size and composition to deal in adequately across the nation with hard-core ghetto and consumer frauds.

The ABA Commission, of course, recognized that fact and was thoroughly aware that there was no likelihood that the Commission would overnight receive additional appropriations sufficient to equip it to deal broadly with the retail

<sup>4</sup> See testimony of Commissioner Elman on December 16, 1969 before the Subcommittee for consumers of the Senate Committee on Commerce. Hearing Serial No. 91-48, pt. 1.

fraud problems throughout the country. We also recognized the desirability of local frauds being handled by and large on a local basis by local enforcement agencies. We noted, however, that a federal action was indicated at this time because consumer abuse is a pressing problem and because local authorities did not seem fully capable at present of effectively coping with it. Moreover, although a great many people do a lot of talking about consumer retail frauds, in actual fact there seemed to be comparatively little by way of a solid and reliable body of knowledge concerning either the quantity of such abuse or its characteristics.

Accordingly, we proposed that the Federal Trade Commission establish special task force offices in eight or ten major urban areas which would operate independently of existing field offices. Each office would be staffed with an average of some ten lawyers and other professional personnel and a supporting clerical staff. Their assignment would be to carry forward a model program to detect, proceed against, and at the same time study, classify, and report on problems of localized fraud against consumers. The emphasis would be on economic fraud or deception against particularly vulnerable groups, the poor, the uneducated, and the elderly.

The recommended pilot program would have five principal objectives. First would be to study and develop detection methods. Federal Trade Commission personnel would establish in each area one or more "consumer complaint offices" which would be made known throughout the community. Cooperative arrangements would be set up with other public and private legal service organizations; complaints would be screened and studied to be sure that each matter would not be more appropriately pursued by federal or state agencies with criminal enforcement power. Second, proceedings would be filed where serious consumer frauds are found in violation of Section 5. In addition to case by case enforcement, characteristics Federal Trade Commission procedures such as trade practice guides, rules, advisory opinions and voluntary compliance arrangements would be experimented with. New approaches could be undertaken; we concluded that only by involvement at local levels could reliable data be obtained and realistic approaches worked out. Third, a major part of the program would be the coordination of activities with local educational and enforcement units. As indicated earlier, we recognized the desirability of having local enforcement agencies take over in the area of retail frauds. That end might be materially promoted by a program of cooperation with the Federal Trade Commission and the Commission's training of local enforcement personnel. Fourth, a major purpose of the proposed program would be the study of the types and extent of exploitation of consumers and the most effective methods of dealing with such exploitation. Basic to an understanding of the subject is the collection and analysis of economic and statistical information by professions of the type that are available to the Federal Trade Commission.

Finally, as we envisioned it, the pilot program would not be confined to preparing reports or developing new procedures or bringing cases dealing with consumer frauds, important as those functions may be. We expected that a major result of the program would be to develop new, substantive consumer protection law. The data gathered and analyzed in the course of the pilot program (which we suggested might be operated for three years, after which a report would be submitted to Congress) would be an invaluable source of information in that respect. New legislation might be recommended, or it might not be necessary except in rare circumstances. Imaginative use of Section 5 might bring many of the problems under control. The experience of the Federal Trade Commission could be translated to the state agencies operating under similar legislation having to do with "unfair or deceptive practices." As former Chairman Dixon noted recently in testifying before the Senate Subcommittee, 28 States have now adopted such legislation. What better guide could the States have than the Commission's informed and broad experience? The FTC's experience would also have bearing on the desirability, for example, of legislation having to do with pre-sale disclosure, door to door sales warranties, deficiency judgments, holder in due course, and garnishment abuses.

Before concluding, it may be worthwhile briefly to consider some of the consumer legislation now pending in Washington, particularly as it relates to the Federal Trade Commission. The administration's Consumer Protection Bill, Senate 3201, would directly affect the Federal Trade Commission in a variety of ways.

Under the present law, except where the advertising of food, drugs, devices or cosmetics are involved, the Federal Trade Commission has no power to enjoin

fraudulent acts or practices pending the completion of its own administrative processes. That lack of power in the Commission alone makes it a poor weapon against the localized and highly mobile practitioners of fraud. Delay and dilatory tactics pretty much blunt the Commission's effectiveness in this area and it's an unhappy situation where the patience of consumers is exhausted while the Commission moves through its regular procedures. The administration's Bill would correct this situation by authorizing the Commission to seek injunctions from the Federal Courts pending the completion of proceedings before the Commission itself, where it appears that emergency steps are needed to protect consumer interest. A preliminary injunction may, in those circumstances, be sought.

Also, as I indicated earlier in my remarks, the Commission's authority to bring cases is now bottomed upon the "in commerce" test. Arguably, the Commission's opportunity to act in purely localized fraud is severely curtailed. Former Chairman Paul Rand Dixon expressly disagreed with the Report of the Bar Association's Committee to Study the FTC in respect of its suggestion that the FTC already had the power to proceed in most local fraud and deception situations. Moreover, as I have previously noted, Rand Dixon does not want the Commission's jurisdiction enlarged so that it could, under the proposed legislation, act where activities "affect" interstate commerce. What the former Chairman had to say in this regard is worth our careful consideration. I offer the following excerpts from his testimony on December 16, 1969 before the Senate Committee on Interstate Commerce, Subcommittee for Consumers.

"What I am about to say, Mr. Chairman, may surprise you. Now, I am not in favor of this amendment. I am not in favor of enlarging the Commission's jurisdiction at this time. I realize this position is contrary to views I have expressed at an earlier time on other occasions. I have been giving this matter serious thought, however. I have struggled with my inner emotions, understandably tugging in opposite directions on this question. But I have reached the conclusion that this is not the time to enlarge the Commission's jurisdiction. My reasons are simple.

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"You can change the words 'in commerce' to 'affect commerce' but please do not do it unless you give me authority to put the employees in to do it and the money to hire them. Please do not do it unless you do that."

Chairman Dixon then outlined the activities of the FTC in encouraging local governments to solve consumer problems and pointed to the fact that 28 states have adopted laws generally similar to the Federal Trade Commission Act. Mr. Dixon then said as follows:

"We have sat at the Federal Trade Commission literally for weeks on what we call consumer protection hearings. We have not completed our summation but, in my opinion, as I listened to them I heard things that were tragic; things that were happening on Broad Street, America; things that had the overtone of deception and fraud. They do not belong in a cease-and-desist situation; they belong in jail. They need somebody to tell the mayors and the governors of those cities and states that they are kidding their constituents. They are not doing their best for them. That is what is needed on consumerism. It is needed right there."

Mr. Dixon's views on this matter, coming as they do from long years of experience and involvement, are well worth listening to. That is particularly so in view of Commissioner Elman's apparent agreement with him on this point.

Another aspect of the proposed legislation, although not affecting the Federal Trade Commission directly, would give effect to its decisions and orders. Thus, as in the case of an injunction on behalf of the United States against a fraudulent practice under the Bill, the right of private action would also arise where the FTC in a proceeding under Section 5 of the Federal Trade Commission Act entered a cease and desist order which had become final. The private action would not come into being under the legislation until either the Attorney General or the Federal Trade Commission had successfully brought a case.

Interestingly, enough, however, whereas in a proceeding which has been brought by the Attorney General a court decree would be *prima facie* evidence against the defendant in a private action brought by any consumer, such is not the case with a Federal Trade Commission order. Former Chairman Dixon points out that this results in the weakening of the ability of the Commission to protect the public interest and makes the Commission a secondary protector of the consumer. I must say that I don't disagree with the former Chairman in this regard.

I also agree that I see no logical reason for a belittling of the Commission's

authority in this respect. The argument might be made that the Commission's orders are not protected by the fundamentals of due process to the extent that a Court order is and that the findings of a Court may, therefore, with greater confidence be used as the *prima facie* basis for future litigation. It seems to me that this argument really has very little force and even less force after the decision of the Court of Appeals for the First Circuit in *Farmington Dowel Products Co. v. Forster Mfg. Co., Inc.* of December 10, 1969.<sup>5</sup> There the Court in reaching the conclusion that a final Federal Trade Commission order would be given *prima facie* effect under Section 5(a) of the Clayton Act examined the procedures of the Federal Trade Commission and found them to be not wanting in giving a defendant his "day in Court."

The administration's consumer protection package of legislation has been the subject of a good deal of critical and conflicting comment and testimony. It seems unlikely that it will be passed in its present form. The conflicting views and the criticism that it has generated, however, appear to make more sensible the approach recommended by the ABA Commission to Study the Federal Trade Commission. The central pivot of our recommendations concerning consumer protection was that the Federal Trade Commission should establish task forces, which I described earlier in my remarks, in major cities to concentrate on consumer fraud problems. We saw in those projects a source of not only improved enforcement but, of at least equal importance, of substantially expanded knowledge as to the nature and significance of consumer fraud. We expected that the pilot projects would generate new initiatives in Federal Trade Commission enforcement and in proposals for new legislation in the field of fraudulent and receptive practices. New lines of communication and cooperation would be established through those offices with state and local agencies.

It was the view of the ABA Commission that the FTC was an agency of great potential in the field of consumer protection. That is also my own conviction and I will be very interested to observe in the months to come the constructive steps that I am sure will be taken by the FTC in this regard under the guidance of its new Chairman.

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FEDERAL TRADE COMMISSION,  
Washington, D.C., July 22, 1970.

HON. EDWARD M. KENNEDY,  
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you very much for your letter of June 23, 1970. I welcome the opportunity you have afforded me to describe some of the achievements of the Federal Trade Commission during the months of my chairmanship. I particularly appreciate your kind comments concerning my chairmanship.

As you point out in your letter, during the past several years a number of recommendations have been made, some of them in the hearings held by your subcommittee, concerning ways in which the Commission could more effectively carry out the functions delegated to it by the Congress. In the six months I have been at the Commission I think that significant progress has been made. We have tried also to lay the foundation for yet more improvements in our performance in the future.

I think the progress that has been made can best be described by referring to three distinct areas. *First*, we have attempted to improve our internal procedures at the Commission. This improvement has been principally oriented towards speeding up our procedures at all levels of the Commission and more careful consideration of priorities in deciding how we should allocate our limited resources of funds and manpower.

*Secondly*, we have substantially increased the number of the points of contact between the Commission and the public, both consumers and businessmen. There are two different objectives in this: to insure that the Commission keeps abreast of ever-changing marketing practices, and to make consumers and businessmen alike aware of these practices, their legal rights and remedies, and the requirements of our laws.

*Thirdly*, we have tried not only to make the best use of our financial and manpower resources by increasing our internal efficiency, but also to make the most use of that other resource given to us by the Congress—our statutory powers. We have encouraged the staff to make recommendations to us which

<sup>5</sup> BNA Antitrust and Trade Regulation Reports, No. 440, December 16, 1969.

will probe the frontiers of our statutes, so that in today's market of ever more complicated products and ever more complicated ways of promoting and distributing these products the Commission may continue to fulfill what Learned Hand called its duty "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."

1. The principal action taken by the Commission in the past six months to improve our internal procedures was the adoption of a reorganization plan early in June. The reorganization, which took effect on July 1, 1970, divides the Commission into two principal operating bureaus, the Bureau of Competition and the Bureau of Consumer Protection. These replace the four old bureaus of Textiles and Furs, Industry Guidance, Deceptive Practices and Restraint of Trade. The Bureau of Economics has been left much as it was—a staff group to serve the operating bureaus.

I think that the establishment of two principal operating bureaus in place of four will significantly speed up the Commission's operations at the staff level. The functions of the old bureaus of Industry Guidance and Textiles and Furs are now located in the two new operating bureaus as their substance indicates. As well as providing that a single officer, for example the Director of the Bureau of Consumer Protection, is now fully responsible for administering the Commission's program in any single area, whether we choose to proceed by rule-making or on a case by case basis, this consolidation according to subject matter has also eliminated the need for frequent meetings and consultations which were previously necessary in order to coordinate activities of two different bureaus with jurisdiction over a single project—meetings, it should be noted, which did not always result in agreement. In another attempt to speed up the time which it takes for a staff recommendation to get to the Commission for consideration, the reorganization provides for the elimination of various levels of review of a staff attorney's work. There is no need for three supervisors to pass on a staff recommendation before it comes to the Commission, as in the past; and indeed, the existence of an excessive number of layers of review may well result in less scrutiny being given to the recommendation at *any* level than it should have.

In the past the Commission has been much criticized not only for delay, but for failure to establish priorities for itself. The reorganization plan establishes an Office of Policy Planning and Evaluation which is intended to help us to devote our resources to that work most likely to help us reach our goals quickly and to eliminate the pursuit of the trivial. I anticipate that this office will play a substantial role in helping the Commission establish its program and determine its priorities. An office devoting its efforts to reviewing the entire scope of the Commission's responsibilities will act as a vital counter-force to individual recommendations coming from various staff members interested primarily in only one area of the Commission's activity.

Finally, in order to put an end to delays in formal Commission proceedings, we have established an Advisory Council on Rules consisting of a distinguished group of technical experts who will make recommendations to us for revision of our Rules of Practice. I am most hopeful that the result will be a significant increase in the speed with which our trials are completed.

2. In attempting to increase the contact between the Commission and the public we are to help protect, and the businessmen we regulate, we have taken a number of actions. Principal among these has been the expanded role which the Commission has given to its field offices located in eleven cities throughout the country. Hitherto, the field offices had been limited to investigating the facts of cases which were referred to them by the central office. On my recommendation, the Commission adopted, on the 25th of February, a proposal which would empower the field offices to: (1) initiate preliminary investigations without reference to or from the central office; (2) recommend complaints and conduct trials, if necessary, of cases concerned primarily with problems of a local nature; and (3) negotiate settlements with respondents and make recommendations to the Commission in light of these negotiations. In short, the attorneys in the field offices were empowered to act much as our attorneys in the Washington office. The Federal Trade Commission has been one of the last of the highly centralized Federal agencies. This delegation to our field offices brought us into line with modern administrative practice.

These field offices are expected to operate as the Commission's eyes and ears in detecting consumer frauds and any practices which may result in a lessening of competition, or any other violations of law. We hope through them to over-

come what in the past has been criticized as too heavy a reliance on individual complaints in selecting our cases.

They will also be in the forefront of the Commission's expanded program of consumer education. Particularly important in this regard is the program the Commission inaugurated soon after the beginning of this year, employing and training Consumer Protection Specialists. These non-legal investigators, originally conceived of for the Truth-in-Lending Act enforcement program, now have a sufficiently broad training to enable them to be given a roving commission to detect and report on all sorts of consumer problems. They also will serve to educate consumers, particularly those in disadvantaged areas most in need of advice, in the ways of the marketplace, and to help businessmen know the requirements of our laws. Ultimately, the Commission hopes to have some 90 consumer specialists working out of our field offices across the country. During June the first of several special training courses for these Consumer Protection Specialists was begun, and I understand that some 30 investigators are already operating out of various field offices.

It is further expected that our field offices will operate as liaison between the Commission, and state and local consumer protection authorities. Since January, the Commission has worked to establish Consumer Protection Coordinating Committees in all of the cities in which our field offices are located. The first such committee was established in Chicago at the end of March and is now very much in operation. Other committees have been set up in New Orleans, Los Angeles and San Francisco; it is anticipated that we will have committees in Boston and Philadelphia, and I hope New York, by the end of the summer.

These committees operate as a one-stop complaint center for consumers whereby a complaint submitted to any federal, state or local consumer protection authority is immediately referred to the particular authority best equipped to deal with it without further effort by the complainant. It is clear that this network of Consumer Protection Coordinating Committees will operate to give the Commission the information about business activities throughout the country which it needs in order to establish its priorities and most effectively develop its overall program.

In some areas, as determined by local desires, Citizen Advisory Boards will be established to assist the Joint Committees. These boards are made up of representatives of consumer protection authorities from the federal, state and local governments and also representatives of private consumer, business, and other groups.

All of this activity is intended to keep the Commission informed of consumer deceptions and to encourage local authorities and consumers themselves to become aware of possible deceptions. They also serve to alert businessmen to the role which the Commission and other consumer protection authorities play in regulating their practices. A more informed Commission is better able to enforce its laws or advise the Congress of a need for new laws. A more visible Commission means more awareness of business practices, legitimate and illegitimate, by both consumers and businessmen, which can only result in a fairer marketplace for all.

3. Making the best out of our resources is essential if the Commission is to fulfill the purpose for which the Congress intended it. This may be interpreted, as it commonly has been, as requiring that the Commission act as efficiently and expeditiously as possible with the funds and manpower placed at its disposal. I attach, however, an additional meaning to the phrase. Among the most important of the resources, given to us by the Congress, which must be efficiently employed, are our statutes.

In the past six months while I have been at the Commission, we have encouraged the staff, and we have tried ourselves at the Commission level, to make the most use of the statutes which describe our powers. Typical of this attitude is a Commission directive to the staff stating that "the Commission is receptive to novel and imaginative provisions in orders seeking to remedy alleged unlawful practices" and urging the staff "to include such provisions in orders for future submissions to the Commission recommending issuance of complaints." In a number of cases we have included provisions in proposed orders which would require the respondent to make some kind of reparation, perhaps in a monetary form, to those who may have been injured by his unfair or deceptive practice. We have also required respondents to make disclosures in future dealings, if the facts found concerning past conduct indicate that this is necessary to insure that the illegal practice is not revived.

The imagination of proposed order provisions is matched by that shown in some of the recommendations for complaints which have come before us. Here, also, the Commission has been attempting to use the statutory tools delegated to it most efficiently in protecting the country's consumers and businessmen from unfair trade practices and methods of competition.

Probing the outer limits of our statutes and using all of our powers is not, however, always sufficient to achieve the congressional purpose in establishing the Commission of insuring the presence of fairness and truth in the marketplace. Accordingly, in appropriate instances we have not hesitated to make recommendations to the Congress for increased powers whenever we felt that these were necessary in order to remedy practices in the marketplace which we consider to be undesirable. For example, after a long study of automobile warranty practices, the Commission recommended to the Congress the enactment of an Automobile Quality Control Act. We have also, after consideration, made suggestions that would significantly strengthen the proposed Consumer Protection Act of 1970.

Finally, because we felt that the procedures prescribed for enforcement of the Flammable Fabrics Act were inadequate to give consumers the protection to which they are entitled in this important area, we recommended to the Congress that legislative action be taken to strengthen the law. I am pleased that within a month the Senate took affirmative action as recommended by us.

I think that in making these and other responsible recommendations for legislation, the Commission is performing one of the historic functions assigned to it by the Congress. This is what those who created the Commission saw as one of the most valuable contributions an independent agency could make to the governmental process. At the same time we have been exploring the frontiers of our statutes and making recommendations to Congress, we have been keenly aware of the importance of preserving our capitalistic, free enterprise system, and aware therefore of the importance of preserving and encouraging honest business while trying to stop deceptive practices, which furnish ammunition to those more interested in destroying our system than improving it.

These, then, are the three principal areas in which I think we have made the most progress at the Commission in the last half year: we have made our internal procedures more efficient; we have tried to improve our mechanisms for detecting violations of our laws and for educating consumers in the practices of the marketplace; and we have been examining closely the contours of our laws to see how they should be interpreted in ways most applicable to modern market practices.

By emphasizing these achievements, however, I do not wish to denigrate the work which the staff has performed in other areas or to imply that nothing further remains to be done. Work has been proceeding on many more fronts than could easily be described here—in pursuing economic studies, in preparing and trying cases, and in other fields. Also, much is left to be done. I am hopeful that our job of consumer protection and trade regulation will be made easier by the passage of important bills now before the Congress, which will strengthen our powers in a number of ways.

It is certain that dealing with new statutes will present new problems along with new responsibilities. I am confident, however, that the Commission and its staff will deal most capably with both.

Thank you for the opportunity to submit these views to your committee.

Sincerely,

CASPER W. WEINBERGER,  
*Chairman.*

CONGRESS OF THE UNITED STATES,  
JOINT ECONOMIC COMMITTEE,  
*Washington, D.C., June 1, 1970.*

HON. CASPAR WEINBERGER,  
*Chairman, Federal Trade Commission,*  
*Washington, D.C.*

DEAR CHAIRMAN WEINBERGER: This is in further regard to my recent request that the Federal Trade Commission undertake an investigation of the noncompetitive obligopoly industries in the economy. As Vice Chairman of the Joint Economic Committee, I am growing increasingly concerned about recent reports linking the existence of these giant oligopolies and their pricing power to the current inflation-unemployment problem now facing the country.

As you are no doubt aware, much of the criticism directed against the Federal Trade Commission in recent months has centered around the proposition that it has in the past persistently spent its resources in such a way as to avoid important issues in big industries and has focused, instead, on (a) small industries, (b) unconcentrated (competitive) industries, and (c) issues that have been largely irrelevant (or harmful) to the real interests of consumers.

The Commission's annual reports to Congress do not, unfortunately, provide the kind of information that would be needed in order to evaluate these charges or otherwise measure the economic impact, if any, of the Commission's work. I would appreciate it, therefore, if you could provide us, perhaps with the help of your Bureau of Economics, with the following information:

1. A list of the industries (4-digit or 5-digit SIC definition) on which the Commission spent more than \$100 during the past fiscal year (or any other more convenient recent 12 month period), together with, for each such industry:

- (a) The industry's 4-digit (or 5-digit) SIC number.
- (b) Annual sales volume of the industry.
- (c) Dollars spent by the Commission on each inquiry or matter involving the industry during the year.
- (d) 4-firm concentration ratio of the industry.
- (e) Name of each matter involving that industry handled by the Commission during the year (including investigations, orders, advisory opinions, etc.), together with its file number, sales volume of respondent firm(s), the conduct at issue, sales volume involved in the questioned conduct, and the disposition (or current status) of the matter.
- (f) Evaluation of the industry in terms of its current performance in the interests of consumers, particularly in terms of its price level in relation to the level that your Bureau of Economics would expect to prevail if it was competitively structured.

(g) Evaluation of the relief or other results achieved (or contemplated) by the Commission in each of its cases involving the industry in terms of its performance in the interests of consumers, particularly in terms of its effects, if any, on the industry's (i) consumer prices, (ii) 4-firm concentration, and/or (iii) advertising expenditures.

2. A list of the industries (4-digit or 5-digit SIC definition) on which the Commission contemplates that it will be spending more than \$100 during fiscal 1971, together with, for each such industry:

- (a) The industry's 4-digit or 5-digit SIC number.
- (b) Annual sales volume of the industry.
- (c) Dollars the Commission estimates it will be spending on matters involving the industry during the year.
- (d) 4-firm concentration ratio of the industry.
- (e) Dollar expenditures of the industry on advertising.
- (f) Evaluation of the industry in terms of its current performance in the interests of consumers, particularly in terms of its price level in relation to the level that your Bureau of Economics would expect to prevail if it was competitively structured.

(g) Evaluation of the proposed relief or other results anticipated by the Commission from its efforts in the industry, particularly in terms of the effects, if any, on the industry's (i) consumer prices, (ii) 4-firm concentration, and/or (iii) advertising expenditures.

3. A list of any past cases of the Commission that are known to have resulted in a perceptible effect on an industry's (i) consumer prices, (ii) concentration, and/or (iii) advertising expenditures, together with the dollar volume of the industry's sales and the estimated amount of those effects.

If the Commission employs other criteria or measures of its performance than the three mentioned here—effect on consumer prices, on the industry's 4-firm concentration ratio, and on its advertising expenditures—it would be helpful if you would please describe them for us and give us an explanation by your Bureau of Economics as to how they are employed to measure or quantify the effect of the Commission's individual cases on the interests of consumers and thus how they are used in the selection of priorities. Illustrations would be most helpful here.

It is my understanding that the measures mentioned here are applicable to all of the Commission's work, including both its anti-deceptive and its anti-monopoly efforts and including those situations where the objective of a particular Commission action is to prevent a feared injury to consumers rather than abate an existing one (the so-called "incipiency" cases). On the first point,

I am advised that the effects of false advertising show up primarily in consumer prices that are higher than would otherwise have prevailed, higher concentration ratios than would otherwise have been the case, and/or larger advertising expenditures than would have otherwise been made. On the second situation, I understand that economists specializing in this area, properly directed, can provide some very helpful analyses or estimates as to the (i) probability, and (ii) magnitude of any such feared injury to consumers that would have been expected to occur in the absence of the Commission action in question.

The questions raised here have recently taken on an even more pressing significance, one that, as I mentioned before, centers around the inflation-unemployment problem now plaguing the nation. It has recently been suggested to me by a highly regarded economist that some 90% or more of the country's inflation over the course of the past decade is attributable to monopoly (oligopoly) in our major industries. I am told, in brief, that our current inflation is of such a character that it is the FTC and the Antitrust Division of the Department of Justice—not the Federal Reserve, the Treasury Department, and the Budget Bureau—that must shoulder the responsibility for bringing this devastating inflationary situation (and the unemployment it spawns via our efforts to combat it) under control, i.e., that there is no way to secure both reasonably full employment and reasonably stable prices other than by undertaking some serious efforts at structural reform in some of these more significant of our noncompetitive industries. In view of the urgency of the current inflation-unemployment problem and the importance of finding out whether it is in fact related to the oligopoly phenomenon your agency is concerned with, I would appreciate it if you would give me some estimate as to how much time will be required to furnish the information requested here.

Sincerely,

WILLIAM PROXMIRE,  
U.S. Senator.

FEDERAL TRADE COMMISSION,  
Washington, D.C., July 9, 1970.

HON. WILLIAM PROXMIRE,  
U.S. Senate,  
Washington, D.C.

DEAR SENATOR PROXMIRE: This is in further response to your letter of June 1, 1970, in which you express concern about the influence of oligopolistic industries on inflation and unemployment. In addition, you requested detailed industry information about the impact of the Commission's enforcement activities on consumer prices, concentration, and advertising expenditures in specific industries.

I am informed by our staff that our present record-keeping is based on individual investigational files and a docket number system. However, we decided a few months ago to improve our data processing retrieval system so as to permit us to respond readily to inquiries such as you put to us in items designated in 1 a. through e. of your letter. But even a special study on an industry by industry basis will not in all cases yield specific estimates as to the extent of departure from competitive norms, or the specific dollar benefits Commission action will yield. The latter is especially true with respect to external benefits flowing from Commission action.

The Commission is, however, seeking to improve its ability to monitor more precisely price and profit trends within the array of industries in which it has regulatory responsibility and to collect more detailed data on corporations. We are now substantially modifying our Quarterly Financial Reporting system to assure more complete corporate reporting of detailed industry financial data. Access to adequate industry data has become increasingly difficult in recent years as conglomerate firms have moved into a large number of industries. I have previously recommended to Congressional committees that high priority should be given to modification of corporation reporting practices to provide better ability to assess current competitive trends on an industry by industry basis. This will enable the Commission to evaluate the industry effects of past enforcement activities more effectively and to plan its future programs more specifically.

The Commission has also recently established an Office of Policy Planning and Evaluation which, with improved data collection and with an updated ADP retrieval system, will enable the Commission better to assess needs and priorities and act accordingly.

The Commission shares your concern regarding current inflation problems. Although the problem of inflation is more complex than one involving simply the development of a more effective antitrust policy, the potential role of antitrust in dealing with some aspects of the current inflation should not be minimized. Major concentrated industries, through the exercise of discretionary pricing power, can of course contribute to both inflation and unemployment.

But the mere recognition that price behavior in concentrated industries can pose special problems with respect to inflation does not automatically provide a guide for antitrust action no matter how great our concern. There are no laws which make high prices and profits, concentration, or large advertising expenditures illegal. It was for this reason that the so-called Neal report proposed legislation which would require the deconcentration of highly concentrated industries. Thus far, as you know, no court decision under the antitrust laws has hinged solely upon the criteria of excessive prices, concentration or advertising.

Developments on two fronts may be of interest to you: *First*, there has been an increasing study of any links between structural variables and industry performance. *Second*, some recent court decisions with regard to mergers have indicated a growing willingness to take explicit account of economic analysis in assessing injury to competition. Whether or not there emerge new standards of illegality for future antitrust actions will depend, I believe, on (1) improvement in our knowledge of oligopoly behavior, (2) the ability of the antitrust enforcement staffs to reduce difficult economic concepts to manageable evidence which can be presented to the courts and the Commission, and (3) whether courts are willing, without statutory changes, to broaden present concepts of what is illegal activity. With a view toward broadening the Commission's knowledge in this area, we recently directed our Bureau of Economics to undertake a series of studies of concentrated industry. The Bureau's study will focus on industries in which serious competitive problems appear to exist and will seek to determine whether there is any violation of existing laws. In addition, we presently have under way a study which seeks to examine price changes in manufacturing and the relationship of these price changes to industry concentration and changes in demand and supply conditions.

In recent years, Commission antitrust enforcement effort has been strongly directed to the *prevention* of concentration. In the context of a widespread merger movement, we have focused our investigations on large acquisitions in relatively concentrated industries. In 1969 the Commission initiated a premerger notification program which requires that any corporation with assets of \$250 million or more provide detailed information on all acquisitions involving assets of \$10 million or more. The purpose of this requirement is to permit the Commission to assess quickly the structural effects of large acquisitions. The role of concentration, the level of prices, and product differentiation as criteria in the implementation of Commission merger enforcement policy is clearly indicated in its decision involving Procter & Gamble's acquisition of Clorox. It is further emphasized in the Commission's statement of "Enforcement Policy with Respect to Product Extension Mergers in Grocery Manufacturing."

At the same time, however, it must be recognized that the fulfillment of the Federal Trade Commission's mandate under existing legislation requires consideration of criteria other than price, concentration and advertising levels. The consumer can be injured by practices other than the direct exercise of monopoly power. Indeed, many consumer problems can arise in industries which are relatively unconcentrated or can arise entirely apart from the issue of concentration *per se*. Automobile repairs is an example of an industry in which concentration is low, yet widespread problems of deception appear to exist. The Commission has recently taken action against a charge of serious deception in the repairing of automatic transmissions. The value of this action is not lessened by the fact that the industry is unconcentrated. Similarly, our effort to require affirmative disclosure of the health hazards of cigarette smoking in all advertisements was a legitimate object of policy action regardless of the industry concentration level.

Nor are cigarettes the only area in which consumer health and safety considerations have been of paramount importance in Commission policy determination. Such considerations are at the heart of many of our actions involving proprietary drugs. Here the issue is not whether concentration is high or low but instead whether the health of consumers is being threatened by false claims of medical benefits.

Still another goal of Commission activity, increasing the effectiveness of competition, requires the Commission to concern itself with unfair and deceptive

practices whether in concentrated or unconcentrated industries. Actions frequently take the form of defining the rules of fair competition with respect to product variation, advertising format, and price policies. The basic purpose of these actions is to assure that competitive rivalry focuses on efforts to provide consumers with quality and service at lowest cost and to assure that no producer gains unfair advantage through fraudulent or deceptive practices.

Beyond the consideration of the appropriate criteria to be included in the Commission's effort to fulfill its legislative mandate is concern regarding the most effective manner of policy implementation. In developing such implementation it is obvious that both benefit and cost considerations are relevant. From a benefit standpoint, it should be recognized that most Commission actions have effects which reach beyond any particular 4 or 5 digit product classification. Indeed, the major benefits of a particular action with regard to, for example, the prevention of fraud by a firm using mail order advertising may extend beyond the firm and even beyond the particular industry affected to the whole array of industries which are suited to this form of marketing. Thus, stopping even a small firm from using fraudulent sales methods may, in terms of total benefits, make a considerable contribution to consumer welfare. In like manner, penalties for price fixing are not intended merely to punish the offenders in a given industry but, more broadly, are intended to deter similar actions in other industries.

Thus, the benefits of many forms of antitrust action must be judged, not solely in the context of the particular industry involved, but rather in a broader context of the deterrent effect on all industries in which similar problems might arise.

Cost considerations too are extremely critical in framing the strategy of Commission policy. First and most obvious, Commission resources are extremely limited in relation to its range of responsibilities. The Federal Trade Commission Act is only one of many statutes for which we have enforcement responsibilities and the range of our responsibilities continues to grow as Congress delegates new areas of enforcement to the Commission. For example, in recent years we have acquired responsibilities for enforcement of truth in lending and fair packaging. In relation to range of responsibility, costs of enforcement can vary widely. One of the most costly methods of enforcement is litigation, particularly when such litigation involves a novel issue in a complicated industry. The Commission must continually balance its responsibility to maintain enforcement credibility in its many established areas of authority while at the same time undertaking to clarify the outer boundaries of antitrust enforcement. Action against any industry based primarily on structural considerations, at this time, must be viewed as a path-breaking form of litigation, not supported by statute or precedent.

Given this fact with limited existing Commission resources, it is not feasible to undertake a large scale program that would seek to attack simultaneously a number of major concentrated industries. Nevertheless, the Commission believes we can fruitfully proceed on a pilot basis in this area without compromising our other enforcement responsibilities. The Commission's recent directive to the staff to undertake a study of the breakfast cereal industry is an illustration of the kind of study that we can pursue without overextending our resources.

If I may be of further assistance, please do not hesitate to let me know.

With kind personal regards.

Sincerely,

CASPAR W. WEINBERGER,  
*Chairman.*

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CONGRESS OF THE UNITED STATES,  
JOINT ECONOMIC COMMITTEE,  
*Washington, D.C., August 14, 1970.*

Hon. FRANK E. MOSS,  
*Chairman, Consumer Subcommittee, Commerce Committee,  
Washington, D.C.*

DEAR TED: I want to make it clear at the outset that this letter is not intended to reflect in any personal way on the nominee you are considering for F.T.C. Chairman. I have no reason to believe he is anything other than a lawyer of the highest standing in his profession and a man of intelligence and integrity. I do want to present for your consideration, however, a number of qualifications that I think the chairman of the Federal Trade Commission ought to have, qualifications that your Committee ought to direct its attention to in its hearings.

The chairmanship of the Federal Trade Commission requires, it seems to me, at least three highly important characteristics: First, technical competence; secondly, a will to perform in the interests of the consuming public; and, thirdly, the confidence and support of the country's consumer movement.

These are all obviously related. The first, technical competence, refers simply to the capacity of the man to *recognize* and accurately appraise the public interest, to avoid the common error of honestly confusing public and private interests. The second refers to a willingness to *act* on that perception, to pursue the public interest in the face of the inevitable pressures that effective public-interest action always generates. And the third refers to the important principle that government officials, like Caesar's wife, should not only serve the public interest faithfully but should clearly be *seen* by the public as a faithful servant of public rather than narrow, private interests.

Let me take the last of these first.

A short while ago, the President was asked to consult with the country's various organized consumer groups in the selection of the next Chairman of the FTC. Ralph Nader and his associates; the Consumer Federation of America, an organization that includes many state consumer groups with, I am told, some 20 million consumer-members; and the editors of a scholarly antitrust publication, the *Antitrust Law & Economics Review*, all sent the President a formal request that the country's consumer groups be given the same voice in the selection of the head of the nation's principal consumer agency that business, for example, is given in the selection of the Secretary of Commerce and that organized labor is given in picking the Secretary of Labor.

These requests were not honored. The name under consideration now for this office was never mentioned to any of these consumer groups prior to the public announcement of that name in the press. They were not asked to propose names for the President's consideration. In short, the decision has apparently been made that consumers do not have the same rights in these matters as business and labor, the right to have a voice in the selection of the men who are to represent *them* in the councils of government and in the courts.

Like a number of our other regulatory agencies, the FTC has been subjected to some increasingly severe criticisms in recent months, one of the most troublesome of these being the charge that it really does not represent the consumer at all. We are now beginning to witness, for example, the phenomena of the student-advocate, the law-school student group that comes before our federal agencies asking for an opportunity to intervene and present the *consumer's* case. It is understood in these matters—and I gather there is indeed quite widespread agreement on the point—that the agency itself does *not* represent the consumer. In short, we have reached a point in our national life when the citizen candidly acknowledges a lack of faith in these regulatory agencies. No one would claim, I suspect, that the American consumer regards the FTC as a consumer-advocate in the sense that it regards, say, Mr. Nader in that role.

My point here, then, is that the public is entitled to an FTC chairman that enjoys its full, affirmative confidence and support, not simply one that is not suspected of some specific anti-consumer bias. The consumer wants—and, in my view, is entitled to have—a powerful advocate for its own interests, a man who is not only pro-consumer in the full meaning of that word but is fully accepted as such by the consuming public and its representatives, the organized consumer movement.

I am of course profoundly skeptical of the fairness of appointing to the country's major consumer agency men who have devoted their professional lives to the representation of precisely those interests that the consumer is currently demanding protection *from*. Many such men do of course turn out well in public office. But to pass over the consumer's own chosen representatives in favor of their former opponents—to put business advocates in charge of consumer protection—seems to me a most inappropriate way to win the confidence of the American consumer in the sincerity and gravity of the Federal Trade Commission's work. I think the time has come to recognize the consumer movement in America as the power it is rapidly becoming and that it fully deserves to become.

The most difficult part of my argument to you today has to do with the question of technical competence, with the technical knowledge and intellectual capacity to accurately distinguish public from private interests in the complex industry situations that come before the Federal Trade Commission. How does one measure the "performance" of an agency like the FTC and thus the performance of the men that head it up? What technical skills are required in order to turn out an acceptable performance in this area?

One of the groups that I mentioned a moment ago, the editors of the *Anti-trust Law & Economics Review*, argues that the responsibilities of the Federal Trade Commission are so heavily *economic* in character that only a highly qualified professional economist—one of the stature normally associated with, say, the Chairmanship of the Federal Reserve Board or the Council of Economic Advisers—can really be expected to adequately represent the consumer there. As they argued in their wire to the President: "We urge you to consider the selection of a non-lawyer for this post. There is no statutory requirement that this agency be headed by lawyers and, in view of its key role in carrying out the Nation's economic policy in such vital areas as the preservation of competitive industrial structures, in the prevention of monopoly pricing, and thus in supplementing the country's other anti-inflation policies, we think the same factors that argue for the appointment of professional economists to the Federal Reserve Board and the Council of Economic Advisers call for their appointment to the Chairmanship of the FTC."

Many others have urged the putting of at least one professional economist on this five-man Commission, the argument being that only the presence of at least one technically qualified person of equal status could provide the other four commissioners with a sharp enough incentive to make them give up their alleged current preoccupation with economically trivial matters.

There is much to be said for all of these arguments, particularly, it seems to me, for the latter one: I would very much favor putting at least one professional economist on the FTC. It might very well be, as many economists have suggested, that this would be the single most important step that could be taken toward a genuine reformation of this agency.

And while I am well aware that the chairmanship involves administrative as well as substantive duties—and that some competence in economic analysis can be acquired without formal economic training—I would not dismiss out of hand the suggestion that the chairman of the FTC should be a professional economist with special competence in the antitrust and consumer-protection branch of the discipline, industrial organization. I have recently become seriously concerned with the question of whether a non-economist, no matter how able he might otherwise be, can really be expected to cope with the technical demands of that office.

I recently requested the present chairman of the agency Mr. Weinberger, to conduct an economic study of the country's major oligopolies—the more highly concentrated of our major manufacturing industries—the objective of that study being a direct factual determination of which industries, if any, are noncompetitive in character and are thus charging the consumer prices that exceed competitive levels. A copy of that request to the FTC, together with Mr. Weinberger's reply, is attached to this letter for your consideration. Because I was not entirely sure what the FTC was trying to tell me, I then sent Mr. Weinberger another letter, one in which I asked for such details as: (1) what industries the Commission is spending its \$20 million budget on; (2) the level of concentration in those industries it is investigating; (3) whether the public is being charged a higher-than-competitive price in those industries; and (4) what the FTC expects to get for the consumer in those industries in return for the tax dollars being spent there. A copy of that letter and Mr. Weinberger's response are also attached for your consideration. As I read this correspondence, the FTC *doesn't know* which industries it is currently spending its money on—and, what is more, I gather that it doesn't think the answer is very important.

In addition, I have also concluded that the Commission does not intend to conduct the oligopoly study that I requested. Some mention is made in these FTC papers of studies already underway in six industries—steel, autos, drugs, electrical machinery, the energy industries, and chemicals—but I am advised that, while such an inquiry was in fact *proposed* some 2 years ago, in 1968, not a cent has been spent on it to date and that, in good bureaucratic terms, the project holds a "very low priority" at the FTC.

I have prepared a further request for this information on the agency's work and am hopeful that I will ultimately be able to persuade it that the public has a right to know which industries, if any, are charging higher-than-competitive prices. The FTC was created precisely for the purpose of investigating these things and informing the Congress, the Executive, and the public in that regard. If it doesn't know the answers to some of these questions, then it has, it seems to me, the duty to find out. It has the power to summon evidence—that is, the subpoena power—and it has the resources, a budget, as noted, of some \$20 million and the authority to hire whatever economists it needs. In short, I am hard-

pressed to find an acceptable reason for the FTC to be, as it seems to be claiming, uninformed on the question of whether the American consumer is being overcharged for its automobiles, its gasoline, and its bread, and I am hoping that I will be able to persuade its chairman in due course that the agency is going to have to prepare for us and for the public at large a full report on the state of competition in our oligopoly industries, a report that will tell the consumer whether she is paying a competitive price or a higher-than-competitive price to these 100 or so concentrated industries.

Until the FTC has demonstrated that it is prepared to give the public this kind of a report, its technical competence seems to me to be seriously in doubt. The capacity to do this kind of work for the consumer—to hire and supervise a staff of genuinely competent economists who can develop the kind of data we have to have if we are going to have a rational consumer-protection program—is at the heart of the professional skills required of the men who head up this agency.

In short, I would not vote to confirm any man as chairman of the FTC until he was able to persuade me that he would in fact give the very highest priority at the agency—with a commitment of a very substantial part of its total resources—to an immediate, full-scale economic study along the lines of my recent request for the oligopoly investigation that I mentioned earlier.

Mr. Chairman, the FTC is a small agency but it is a very important one. Recent estimates by Mr. Nader, Senator Hart and others put the cost of monopoly and related industrial crimes at some \$100 billion or more each year—more than 20% of every dollar spent by the consumer. As several commentators have written in recent weeks, some of our other great national problems seem almost small by comparison with this enormous figure. For example:

The country's total *crime bill* was \$32 billion last year.

Removing the major sources of pollution would cost \$15 billion per year.

*Eliminating poverty* (\$3,000 minimum income for all families) would cost \$11 billion per year.

As one commentator has put it: "If the public is in fact being overcharged by \$100 billion or more each year for the goods it buys, and if the five commissioners that sit on the FTC are in fact seriously charged with the duty of seeing that such overpricing doesn't occur, then they are five very important men indeed. Few men have it in their power to cost their fellow countrymen, by lack of technical skill, social concern, or of any other intellectual or human shortcoming, anything near \$20 billion a year."<sup>1</sup>

The FTC is supposed to protect the American consumer from that \$100 billion overcharge and future commissioners—particularly future chairmen—should be evaluated by this Committee in terms, it seem to me, of their *capacity* and their willingness to get on with the job of stopping it. It is a job that demands, I believe, an extraordinarily high order of technical competence, of dedication to consumer interests, and of support and confidence by the American consumer and his chosen representatives.

Sincerely,

WILLIAM PROXMIRE,  
U.S. Senator.

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CONSUMER FEDERATION OF AMERICA,  
Washington, D.C., August 16, 1970.

Senator WARREN G. MAGNUSON,  
Chairman, Commerce Committee, U.S. Senate,  
Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed is a statement by me as President of the Consumer Federation of America on the nomination of Mr. Miles W. Kirkpatrick to be a Commissioner of the Federal Trade Commission.

This nomination is of particular interest to consumers, as are all nominations and appointments to consumer protection positions in the Federal Government. Therefore, I respectfully request that the statement be made part of the record of the hearings on this particular nomination.

Respectfully,

HOWARD T. FRAZIER,  
President.

Enclosures.

<sup>1</sup> Editors' Foreword, 2 *Antitrust Law & Economics Review* 17 (Summer 1969).

## STATEMENT OF HOWARD T. FRAZIER, PRESIDENT, CONSUMER FEDERATION OF AMERICA

Mr. Chairman and members of the committee: As President of the Consumer Federation of America, a federation of 179 consumer organizations representing over 30 million members in all States in the Nation, I would like to raise questions about the process and criteria by which individuals are selected to represent the consumer in the Councils of Government and how that process limits consumer participation in the day-to-day work of consumer protection agencies.

Congressional hearings on the various bills to establish an independent consumer affairs agency are replete with the criticism—repeated over and over again—that consumer advocacy in existing consumer protection agencies is unsatisfactory. Some critics have gone so far as to say that consumer advocacy is non-existent, arguing persuasively that regulatory agencies charged with protecting the “public interest” have become, over time, the captives of the industries they regulate. Example after example of administrative laxity, blatant compromise and capitulation to industry’s vested interests were cited to support this conclusion. No agency escaped public criticism and certainly none has been cited to date as a paragon of consumer protection—least of all the Federal Trade Commission.

Both Ralph Nader and the American Bar Association faulted the Commission for lack of aggressiveness, for inferior staff (particularly supervisory personnel) and for a preoccupation with trivia. This blanket indictment may have been too severe since the consumer has friends in court on the Commission and on the Commission’s staff. But the criticism vividly underscored the significance of the Commission’s almost exclusive responsibility for keeping the marketplace honest—for making it a place where the consumer can get value for his money at competitive prices—for *preventing* (as opposed to mere policing) the growth of business practices that deter competition and result in non-competitive consumer prices. This is a broad and powerful mandate—but, clearly, the FTC has failed abysmally. Some have even alleged that its efforts against deceptive practices have been counterproductive to its anti-trust responsibilities. It has failed to understand its mission, let alone fulfill it!

The question is why?

There is no real incentive for the staff of the Commission or the Commissioners themselves to take on industry and its friends on the Hill on behalf of the Consumer. If they were to do so, there would be no rewards awaiting them when they had finished their tenure. Private law firms do not become lucrative representing consumers—defendant firms are the rich guys. The Federal Trade Commission is merely a stepping-stone to bigger and better things for the attorney. There are just too many ex-Commissioners and staff members serving with private law firms appearing before the Commission today. In the legal profession, the only road to success, recognition and prestige is via private practice, the “big case,” and the American Bar Association. It is time that reputations were earned for advocating consumer rights.

Mr. Richard A. Posner, a member of the Kirkpatrick Commission, appears to agree with us as he suggests that it will ever be so—not only because of the structure of the legal profession but also because the consumer really is not yet a force in society. Our relative silence has hitherto denied us access to the significant forums where power politics is played and where influence is peddled.

Mr. Posner’s thesis is grim—not easily rebutted because it has a ring of self-evident truth about it. It does not matter whether we agree with the specifics of his thesis. What is important is the lesson inherent in his comments—and that is: *Consumer protection in Government is only as good as the watchmen who watch the watchmen of industry.*

The Consumer Federation of America has heeded the lesson and has been following closely recent developments at the Federal Trade Commission. Former Chairman Weinberger announced a reorganization of the Commission that we have no reason to doubt was motivated by anything other than a sincere desire to improve the performance of the Commission. There have also been signs that the Commission is really endeavoring to rekindle its dedication to consumer protection and to charter new waters.

However, lest these hopeful signs induce a false sense of security, we should remember that the mere reshuffling of people into new organizational blocks with impressive titles does not change the leopard’s spots UNLESS the changes are accompanied by a redefinition of mission, an altered philosophy, meaningful innovations, legal experimentation, original research, and procedures that will

help the watchmen watch the watchmen of industry. *And, most important, the appointment of individuals possessing credentials as consumer advocates to top level positions in the Commission and to the Commission itself.* Every new Commissioner comes in advocating reorganization of the Commission. But, the fact of the matter is, the Commission is operating in essentially the same way as it did when it was created in 1914.

Our interest in this matter is not new. In June of this year, CFA representatives met with the Commissioners to discuss consumer issues. In conjunction with that meeting we submitted a list of suggestions that would go a long way toward introducing the incentives we believe are now lacking in the present structure of the Commission. A copy of those recommendations is attached.

This is the only instance, as far as we know, of any regulatory agency inviting consumer representatives for an informal discussion. Yet the regulators meet everyday with industry representatives. We did not get all that we wanted. Indeed, I would say, that we probably came out of that meeting with only one concrete understanding and I think it is worthwhile taking a look at why.

We represent 30 million consumers. But we were able to get less in two hours than an industry lobbyist can get in two minutes. This really goes to the heart of the matter. The problem lies with the way in which Commissioners are appointed by the President. It is regrettable but most appointments are made to satisfy Presidential political debts. That means that appointments are made—not on ability or out of concern for the consumers whom the agencies are supposed to represent—but on the basis of pre-conditioned commitments.

We do not for one moment hope to change the system of appointment overnight—but we do intend to influence it. We do intend to see that the consumer representatives are consulted BEFORE agency appointments are made. We do intend to see that Commissioners—from here on out—measure up to the criteria of the CFA. And, if they do not measure up to the best interests of the American consumers, then we intend to blow the whistle. That is what our statement is all about.

The President is appointing a Chairman of the FTC without any consultation with any consumer group. We have not been asked what we think. We have not been asked to recommend any list of names. We have not been asked to define the criteria for a consumer-oriented Chairman. We believe that the consumers have the right to be consulted on appointments affecting their interests just as management and labor are consulted on appointments in their respective fields. Although we do not expect our views to carry every time, we do expect to have them weighed carefully. We do not expect every one of our suggestions to be adopted. But we do expect to be consulted. And, as a means of improving the accountability of the Commission we reiterate a recommendation made to the Commission last June for the appointment of a consumer counsel within the Commission.

If we had to single out any one recommendation as to the most likely to guarantee improved Commission dedication to the consumer, it would be the appointment of a consumer counsel within the Commission. The general public is no longer content to accept without question the decisions of patriarchal administrative agencies. They have too much at stake—too much riding on the issues awaiting administrative action. They are demanding participatory government to offset the unreasonable influence of special interest groups and to insure that the deliberations of government are truly balanced. The establishment of a consumer counsel in the Commission would be the first step toward participatory government—toward recognizing that without interested citizen involvement in decisions affecting their lives, government agencies will become more and more suspect. This will eventually lead to demands for their abolition because they have become fossilized and anachronistic in an era of demands for honest, responsive and responsible government.

Hitherto the consumer movement has adopted a passive stance with regard to Presidential appointments to consumer protection agencies such as the Federal Trade Commission. But no longer—The quality of consumer protection is the direct result of the quality and philosophy of the men and women directing the operations of an agency. The FTC is the most powerful consumer protection agency in Government today. And the battle for better government begins with the nomination process. Consequently, on July 21, 1970 the Consumer Federation of America sent a letter to the President requesting an opportunity to discuss the selection of the new Chairman. A copy of that letter is attached to this statement. The President did not reply to us directly but through Mrs. Virginia Knauer thanking us for our interest.

That in essence is the process which operates to defeat participatory government. That is the way in which individuals are selected to head consumer protection agencies—i.e., without consultation with consumer representatives.

It signals a total indifference to the plea of citizens to have a meaningful voice in the selection of their representatives in the Executive Branch of Government or in the regulatory agencies. Citizens can be trusted to elect a President but their judgment somehow is suspect when it comes to suggesting individuals for appointment to the Federal Trade Commission.

It should be made clear that we did not request veto power over Presidential nominations to consumer protection agencies similar to that afforded the American Bar Association by the Administration in the selection of Supreme Court Justices. We *did* ask for an informal consultation to discuss the qualifications of prospective candidates and to suggest individuals known to us who have built a record supporting the consumer viewpoint.

We do not know who the President consulted on this nomination. We do not even know what criteria the President used to determine who would make a competent Commissioner. We do not know if the President considers it important that an appointee have a technically sound background in economics. We do not know if he even explored the philosophy, commitment and bias of the individual proposed. Generally, these are relevant issues in selecting appointees to agencies that represent a specific constituency such as the Secretaries of Labor, Agriculture, and Commerce. Why? Because the administrative heads of such agencies are advocates—arguing their client's case with tunnel vision before the President, the Congress and the Nation. They stand in an attorney-client relationship with their constituency. However, if they do not enjoy the confidence of their client, their effectiveness is limited. It is true that the governmental system precludes a clear-cut choice by the client. Nevertheless, labor, farmers and businessmen are not precluded from having some voice in the selection of the cabinet officers who will be representing their interests.

*Such is not the case when it comes to the selection of officials for consumer protection positions.* The AMA and the Pharmaceutical Association are consulted in connection with the nominations for the Assistant Secretary of Health and Scientific Affairs (remember Dr. Knowles!) the Surgeon General and the Food and Drug Administrator. Wall St. Law firms regarding Security Exchange Commissioners; the media for Federal Communications Commissioners; industry for the head of the new Environmental Administration; and now, according to recent press articles, industry again for the Commissioner of Education—*Never consumers.* Is it any wonder then that Government consumer protection falls short of expectations? Is it any wonder that agencies such as the Federal Trade Commission have been characterized as the captives of the industries they regulate?

Lack of incentives—Mr. Posner calls it (and Commissioner Elman suggests the same)—because such appointees are beholden to the groups consumers must fight—to the groups subject to regulation. The consumer's opponent has control—the opponent has the decision-making process weighted in his favor.

The process must stop. Consumers need representatives beholden to them—beholden to the public interest. And because we were not consulted on the nomination of the new Chairman of the FTC, we cannot offer any evidence of the nominee's philosophy or commitment to the public interest. In fact we know very little about the gentleman. We know he has had a distinguished career in private practice, having been associated with a prestigious Philadelphia law firm for many years. We know when he was born, and where he went to school. We also know that he chaired the ABA Commission's study on the FTC. We have no reason to believe that the nominee for the Chairmanship of the Federal Trade Commission is other than technically qualified as a lawyer to hold this position. But this is all we know. We do not know of any consumer oriented activities in which he has been involved. We do not know if he has represented consumers in his law practice. More importantly, we do not know the extent of his association with firms who have been or who are likely to be respondents before the Federal Trade Commission.

Under the circumstances, the Consumer Federation of America cannot endorse the nominee. He is not known to us and has no standing in the consumer movement. Since the nominee lacks consumer credentials, the burden is on him to come forth with more detailed information on his associations, on his clients and the fees received for services performed. Furthermore, the views of any appointee on issues we have raised here should be scrutinized before any serious thought is given to confirmation.

In view of the White House's failure to brief and consult with us beforehand, we have had no opportunity to make our recommendations. But we shall, hereafter, demand active participation in the nomination process to insure that representatives in the Executive Branch of Government and independent agencies are truly representatives of the people. We will sit back no longer—we will fight for the consumer's right to participate in the choice of his advocate.

WASHINGTON, D.C., August 18, 1970.

HON. FRANK E. MOSS,  
*Chairman, Consumer Subcommittee, Commerce Committee,*  
*Washington, D.C.*

DEAR SENATOR MOSS: The proposed appointment of Miles W. Kirkpatrick as Chairman of the Federal Trade Commission raises a serious question for all consumers. Can a Commission Chairman chosen without consultation with consumers be truly responsive to the needs of the consumer? It is my belief that he cannot.

The problem is not one of the personal intentions or ambitions of Mr. Kirkpatrick. These are unknown. The problem is that Mr. Kirkpatrick was selected for his potential new job without consultation with consumer spokesmen. This fact raises three serious problems.

First, it appears that consumer consultation was rebuffed even though consumers specifically requested an opportunity to have their point of view listened to. The following telegram was sent to President Nixon prior to his announcement of the proposed appointment:

A new Federal Trade Commission Chairman is soon to be appointed to replace Caspar Weinberger. The undersigned request that consumer representatives be given the same opportunity to be consulted in the selection of the new Chairman as labor unions have in the choosing of the Secretary of Labor and Business the selecting of the Secretary of Commerce and other top officials. Congress originally intended the FTC to function as a consumer representative at the federal level, yet over the years the insistent lobbying and lawyering efforts of corporate interests have denied this original purpose. The lack of consumer representation among recent appointees to the FTC Advisory Council on Rules of Practice and Procedure has made it clear that the Commission today regards industry rather than the consumer as its principal constituency. This gross and unjustified imbalance will not be corrected until the President of the United States seeks consumer participation, initially by consulting consumer representatives including the undersigned, on this important appointment.

To discuss this appointment and other major consumer matters pending before your administration, we request a meeting with you—your first, we believe, with consumer spokesmen—at your early convenience.

Thank you.

AUTO SAFETY RESEARCH CENTER,  
TOM VACAR, *Director*,  
CENTER FOR AUTO SAFETY,  
LOWELL DODGE, *Director*  
CONSUMER ASSOCIATION OF THE  
DISTRICT OF COLUMBIA,  
MRS. JANIE BOYD, *President*

FEDERATION OF HOMEMAKERS,  
MRS. RUTH DESMOND, *President*  
CHARLES R. HALPERN  
BENNY L. KASS  
REUBEN ROBERTSON

The failure of the White House to arrange for the requested meeting suggests a lack of interest in discovering actual consumer concerns.

Second, the answer to the consumer telegram from Mrs. Knauer suggests that the Federal Trade Commission is going to continue in the same manner as it has up until now.

President Nixon has asked me to respond to your very thoughtful recent telegram regarding the selection of a new FTC Chairman. The president certainly agrees with you that consumer spokesmen should be consulted on matters affecting them.

As I am sure you know, the question has been thoroughly deliberated and public announcement of a new chairman is imminent. As the President's consumer advisor, I naturally have been involved in the discussion of candidates.

I am pleased to report that the proposed chairman is thoroughly versed in the major problems confronting the FTC. I believe he will continue the dynamic

consumer leadership displayed so well by the outgoing chairman, Caspar W. Weinberger.

As in the past, I will be happy to meet with you at any time to discuss the FTC and any other consumer matters.

Sincerely,

VIRGINIA H. KNAUER,  
Special Assistant to the  
President for Consumer Affairs.

Mrs. Knauer's telegram suggests that FTC problems that have continued to be of concern to consumers while Mr. Weinberger has been chairman will be allowed to remain. Specifically, it suggests that the long sought study of the oligopolies of the nations—in a number the most critical areas of consumer good manufacture and retailing—will continue. It means that answers to such questions as, a.) what industries are being investigated?, b.) how concentrated are those industries?, c.) are those industries charging competitive prices?, will remain unanswered. It means that the current non-competitive nature of many of America's leading industries—which has been allowed to thrive under the present FTC organization—will remain at an estimated cost of \$1000 billion a year to the consumer. The prices of continuing the current type of FTC leadership are too high to ask consumers to pay and are direct results of not allowing the consumer to participate in the selection procedures through which the selection procedures through which the proposed chairman has passed.

Third, the proposal of Mr. Kirkpatrick for the chairmanship has had the air of cynical press agency about it. It is obvious from public comments on the appointment that Mr. Kirkpatrick's role in the preparation of the American Bar Association critical report on the FTC is his prime qualification for the job. In that report it was stated: "The first important manifestation of that support (of the President and Congress) should be the appointment of a Commission Chairman with executive ability, knowledge of the tasks Congress entrusted to the agency, and sufficient strength and independence to resist pressures from Congress, the Executive Branch, or the Business community that tend to cripple effective performance of the FTC."

This sentiment having been identified with Mr. Kirkpatrick has gone a long way toward making him a desirable candidate for the Chairmanship. However, the narrow and closed procedures—excluding nearly all but the closest to the President—raise a serious question about the kind of Chairman the President expects he is appointing. When this question is joined by the ominous comment of the New York Times that "the only possible basis for criticism of his (Mr. Kirkpatrick's) appointment is that in his long experience as a private attorney he has defended major corporations in anti-trust cases", the consumer can only assume that he is not getting a champion until shown otherwise. Mr. Kirkpatrick's role in the ABA report is only part of a much larger career which alone cannot establish him as a consumer protector.

The crucial point is that as long as appointments to consumer protection positions are made without reference to consumer spokesmen—no matter how good the appointment may be—the consumer must view it suspiciously. To avoid this problem in the future, I, as an attorney spending full time in the examination litigation, and communication of consumer issues, will attempt to prevail upon fellow consumer workers to prepare a list of qualified individuals for appointment at various consumer protection posts with the Federal Government. Hopefully in this way, the President will have the benefit of consumer sentiment on these important decisions.

In the meantime we must apply the comments of Mr. Kirkpatrick on the FTC to his future stewardship. He said in a recent speech reprinted in the Anti-trust Bulletin:

"It was the view of the ABA Commission that the FTC was an agency of great potential in the field of consumer protection. That is also my own conviction and I will be very interested to observed in the months to come, the constructive steps that I am sure will be taken by the FTC in this regard under the guidance of its new Chairman".

With less sureness but much hope I await the efforts of the current new Chairman. Possibly the knowledge that the concerned individuals who attempted to cope with the problems of the consumer in a systematic way outside the agency did so, will enable Mr. Kirkpatrick to better function inside the agency.

In the meantime, I hope that it is understood that many of us feel that appointments of this caliber can become much more meaningful when they are based in part on consultation with consumer spokesmen.

Sincerely,

JAMES S. TURNER,  
*Consultant, Center for the Study of Responsive Law.*

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THE REGULATORY PROCESS—A PERSONAL VIEW

(By Philip Elman, Federal Trade Commissioner)

I appreciate very much your invitation, as I leave government service after more than 31 years, to express a personal view of the regulator process, particularly in relation to the agency I know best—the Federal Trade Commission.

I came to the Commission in 1961 with the strong encouragement of Justice Frankfurter, who during our long friendship had instilled in me his profound faith in the administrative process. Indeed, no one ever came to an agency more convinced that the independent regulatory commission had an essential and important place in government; that its theory and structure were basically sound; and that, while reforms were necessary, they could be achieved simply with better men and better management. I went to law school in the late 1930's, when the New Deal agencies were in full flower. I learned about administrative law from such men as James M. Landis and Calvert Magruder, as well as Felix Frankfurter. As a government career lawyer, my work brought me in close contact with the federal agencies. In the Solicitor General's Office, where I spent 16 years, I argued or briefed hundreds of cases defending government agencies before the Supreme Court.

Thus, it was not unnatural that the only "instructions" I should receive when I was appointed to the FTC were that President Kennedy expected me to be "the lawyer" on the Commission. To others this might have seemed rather vague; but I knew precisely what was meant, and never forgot it. For, as I said in my first speech as a Commissioner, "Lawyers are supposed to be experts in the administration of law, experts in the art of getting things done and in ways that are fair and just. And lawyers in government, especially, become inescapably involved in that most challenging process: the attainment of justice through legal institutions administered by men".

I have burdened you with this long preface so that you will know that the view of the regulatory process which I express is that of a friendly critic-in-residence, whose perspective has perhaps been distorted by being too close to the scene.

I.

Today, when all institutions of government are being found wanting, none has been more criticized—and less responsive to such criticism—than the independent regulatory commission. With monotonous regularity, studies and reports appear in an unending procession, all saying essentially the same things. While the criticisms cover a very broad ground, the most fundamental deficiency has been found to be the agencies' chronic failure to fulfill their unique quasi-legislative function of developing and implementing regulatory policies responsive to public needs and the public interest. With each new study and report, there is the same ritual call for better appointments and improved administration. Yet the agencies go on essentially unchanged and seemingly undisturbed, with little evidence of basic improvement in performance.

Without a doubt, the theory underlying the independent regulatory commission was original and brilliant. It emphasized the agency's independence; its ability to bring expert judgment to bear upon technical and complex economic issues; its insulation from political partisan control; its capacity to provide both continuity and flexibility of policy; and its blending in a single tribunal of a wide range of powers and functions, from general rule-making to case-by-case adjudication, permitting the agency to exercise broad discretion in choosing the best tool for dealing with a particular problem.

It is almost a century, however, since the Interstate Commerce Commission, the grandfather of the federal agencies, was created in 1887. We must now look to experience more than theory. And, like Louis Hector and Newton Minow before me, I have come to the view that the chronic unresponsiveness and basic deficiencies in agency performance are largely rooted in its organic structure

and will not be cured by minor or transient personnel or procedural improvements.

Experience shows, I believe, that the independent multimember regulatory commission suffers from the defects of its virtues. Independence, collective deliberation and decisionmaking, and fusion of powers and functions in a single agency, are all useful values in the administrative process; but we have pushed them too far, relying too much on the pure simplicities of the original theory and neglecting the lessons of actual experience. It is time for radical structural reform.

## II.

At the outset, let me make a preliminary general observation. The public suffers from too much of the wrong kind of regulation. Broadly speaking, government regulation is necessary and justified only when it serves the *public* interest, not the special interests of private groups or industries. While the lines of demarcation are not always sharp and clear, we should recognize that preservation of the environment, and protection of the health and safety and other essential interests of the public, are proper objectives of government regulation; shielding businessmen from the risks of competition and the marketplace is not. So-called "infant" industries may perhaps need a helping hand from government for a short time; but we should not go on sheltering and subsidizing them forever in the guise of protective regulation. The present transportation mess is an obvious example of what results from misguided regulation. Regulatory institutions should not be allowed to develop permanent lives of their own, impervious to changing conditions and needs. Existing and proposed regulatory programs should constantly be reexamined, and, to the maximum extent possible, competition should be established and maintained as our national economic policy—in fact as well as in rhetoric.

Another basic point which seems to have been disregarded is that the regulatory agencies were created in order to redress those injuries to the public which can best be remedied by administrative action. Where only private interests are aggrieved, the proper remedy is private action in the courts. A tort, whether the victim is a competitor or a consumer, is a private, not a public, wrong—and the place to seek relief is a court, not a regulatory agency. To be sure, there may be disadvantaged individuals or groups who will need—at least for a time—some kind of government help in securing effective access to the courts. But this does not justify the transformation of regulatory agencies into courts. Just as the administrative process should not be used to insulate businessmen from the rigors of a free-enterprise economy, it should not be used to relieve the courts of their duty to redress violations of private rights.

## III.

Thus, there is much room for reducing the areas of agency regulation, thereby encouraging greater reliance on free competition and on private self-help through traditional legal methods. Inevitably, however, there will remain many areas in our economic life where administrative regulation is required to serve essential public needs, and where there will be continuing need for federal regulatory agencies.

In creating these agencies, Congress recognized its own inability, through self-enforcing legislation, to prescribe specific and detailed rules and regulations for dealing with complex and dynamic economic conditions. The agencies were established as continuing administrative bodies designed to keep pace with the evolution of a growing and ever-changing economy. Each of these "arms" of Congress was given—as its primary and principal assignment—the duty of developing and executing a body of subsidiary regulatory policies within the broad limits provided by the governing statute.

The agencies were designed to supplement, not to duplicate, the work of the courts. It was contemplated that an agency would sit, not like a court, as a passive and disinterested arbiter of cases or controversies brought fortuitously before it, but, rather, as the surrogate of Congress, exercising delegated legislative power to regulate commerce and affirmatively advancing basic national policies and objectives declared by statute. To that end, each agency was equipped with a broad array of flexible administrative tools, permitting a comprehensive approach to regulatory problems in their full dimensions.

According to the theory, the independence of the regulatory commission would be a source of institutional strength, insulating its members from partisan political pressures and enabling them to act creatively and boldly. Its multi-member structure would insure that agency decisions would be reached after group

deliberation, providing both a barrier to hasty or arbitrary action and assurance of judicious and prudent policies. And its flexibility and fusion of powers would assure that case-by-case adjudication would be used, not in the traditional manner of the courts for the purpose of applying established legal rules to particular cases, but rather for the primary administrative purpose of developing new, wise, and informed regulatory policies responsive to changing conditions and public needs.

In each of these basic respects, however, there is a wide gap between the theory and the fact of the regulatory process.

#### A.

In fact, independence and security of tenure for agency members have not achieved the intended result of insulating agencies from undesirable political pressures and special interest pleading. Of course, government regulations are—and should be—subject to external pressures and influences. But we must distinguish between those that are improper or harmful to the public, and those that are not only legitimate but necessary and desirable. It is one thing for agency members to be responsive to narrow, partisan, political or special interests; it is quite another to be attentive to, and indeed welcome, the advocacy of consumer interests and public needs. Paradoxically, independence and security of tenure tend to encourage the former and to discourage the latter. In fact, they foster, on the one hand, agency passivity and a reluctance to “rock the boat” by antagonizing powerful special interest groups; and, on the other, an attitude of complacency and indifference to those larger public concerns for which there is as yet no effective “people’s lobby”.

Since agency members are appointed for long terms and cannot, for all practical purposes, be removed from office, the public cannot take effective action against the regulators directly. Nor, as matters stand now, does the public blame the President for poor agency appointments and continued agency failures. Despite such failures, the public can neither do anything to remedy the situation nor find anyone to hold accountable.

As long as I can remember, Presidents have said—and have been reminded by every new study and report—that revitalization of the agencies must begin by appointing better commissioners. Yet, as Kenneth Cox said the other day in commenting on the quality of agency appointments over the years, “I am appalled by the way Presidents generally have treated the agencies”. While it is indeed appalling, it should not be surprising that this is the case, and will continue to be, no matter who is President.

So long as the agencies constitute a “fourth branch” of government for whose performance no one holds him accountable, a President is under little pressure either to seek out the best qualified men or to resist political influence. It would be instructive to compare the agency members appointed over, say, the last quarter of a century with the Assistant Secretaries (or Assistant Attorneys General) chosen during the same period. Both positions receive the same pay and, theoretically, enjoy the same status and prestige. In fact, however, the caliber of appointments to the two categories is vastly different, as are the criteria for selection.

A President knows that after an “independent” agency member is appointed, he is essentially on his own; and if he proves to be incompetent or unresponsive to the public interest, the President will usually not be held at fault. On the other hand, an incompetent Assistant Secretary reflects directly on the President, his Administration, and his standing with the public. Every President incurs political obligations. The “independence” of the regulatory agencies tempts a President to satisfy a political debt to a deserving friend or supporter by appointing him to a comfortable agency berth. It is no historical accident that President Roosevelt’s decision to use the FTC, not as an instrumentality for advancing his New Deal programs but primarily for political patronage purposes, coincided with the Supreme Court’s ringing declaration of agency independence in the 1935 *Humphrey’s* case.

Contrary to the original theory, independence is a source of institutional weakness, not strength, and tends to discourage creative and courageous regulation in the public interest. Independence means that an agency lacks a constituency, a power base, and the backing of the President. Without these, the agency will stand naked and alone when it takes controversial action impinging on powerful private interests—as the Federal Trade Commission discovered when it promulgated its Cigarette Labeling Rule in 1964. Independence nourishes institu-

tional timidity and fear of those who may use their political or economic influence to take reprisal action against the agency, reducing its powers or cutting its appropriations.

Another consequence of carrying the concept of independence too far is that it impedes the development of comprehensive and harmonious national policies in such broad areas, for example, as transportation, communications, and trade regulation, where a single agency's responsibility covers only part of the field. In these areas we should not let the abstract notion of agency independence interfere with the President's constitutional power and duty to take care that the laws enacted by Congress are faithfully executed; that the various agencies concerned do not neglect their statutory responsibilities; and that the specific regulatory policies followed by each of them are complementary and coordinated with basic national goals.

#### B.

Turning now to its multi-member structure, experience shows that this produces a dangerous depersonalization and invisibility of agency activity. When the public is only dimly aware of an agency as a distant and impersonal institutional entity, when one man cannot clearly be identified as responsible, who is there to hold accountable for the agency's shortcomings? Group deliberation and decision-making also engender unnecessary delay as well as indecisiveness, compromise, and the expedient of solving difficult and controversial problems by waiting for them to go away. As everyone with agency experience knows, its multi-member structure is a substantial and frustrating obstacle whenever swift and incisive regulatory action is required.

#### C.

Finally, as a device for developing regulatory policy, case-by-case adjudication of alleged violations of law has proved to be inefficient and ineffective, and, in many cases, unfair. Litigation is an excessively slow, expensive, clumsy, and inadequate process for resolving technical and complex economic issues. Yet, agencies like the Federal Trade Commission—staffed as they are by lawyers whose training and experience make them feel most comfortable with procedures drawn from the courts—continue to rely on adjudication as a policy-making technique where other quasi-legislative methods, principally rule-making, are far more efficient, expeditious, and advantageous to the public.

On the basis of my own experience and observations, the strongest argument I would make against agency adjudication of alleged violations of law is that the blending of prosecutorial and adjudicative powers in a single tribunal imposes intolerable strains on fairness. The problem of avoiding prejudgment, in appearance or in fact, constantly hovers over all agency activity, and is troublesome to agency members in almost every kind of action it takes. It can arise in the most subtle as well as obvious forms.

Consider, for example, the so-called test case where the agency issues a complaint in order to establish a new legal principle or remedy—precisely the "Rule in Shelley's Case" type of adjudication which agencies have been urged to undertake as an essential and proper method for developing new regulatory policies. Agency members frequently take an active part in the pre-complaint investigative and prosecutorial phases of these cases; and the complaint is usually issued with the knowledge that, because of the novelty and importance of the issues, it will be fully litigated and be back for adjudication on the record. When such a test case does come up on appeal to the agency members, while there is no bias or prejudgment of guilt in the classic sense, there is an inescapable predisposition in favor of the agency position, as set forth in the complaint. After all, the whole point of starting a test case is to let the case go forward into the reviewing courts, where the issues may be finally settled. To put it bluntly, once such a complaint is issued, one should ask for long odds before betting against issuance of a final order. While a test case may be and usually is vigorously contested, the result—at least in the agency phase—is likely to be a foregone conclusion.

Indeed, in such a case an agency member may vote for an order not because he is personally convinced that there is a violation of law but because he feels, perhaps in an excess of humility, that it is a test case involving a doubtful or unsettled question of law, his duty is to find against the respondent so that the case may go on to the courts for definitive resolution. This Catch-22 process may reach full fruition when conscientious judges on the reviewing court affirm the

agency ruling, whatever their own doubts about its merits, because they feel obliged to defer to the agency's expert judgment and discretion.

There are other institutional factors that intrude upon fair and impartial agency adjudication. Theoretically, when an agency member sits as a judge, his freedom to decide is the same as if he were on a court. But the judicial process is designed to insure that the judge is both neutral and disinterested, and has no interest other than that of applying the law fairly and evenhandedly. An agency member, on the other hand, cannot be unconcerned with whether the outcome of the case is to advance or to retard an important agency program to which substantial resources have been committed. Even the most conscientious regulator cannot, when he acts as judge, ignore the effect which the decision will have on the agency's regulatory policies and goals.

Moreover, an agency member cannot escape the implications of his leadership role in the agency. He may fear the effect on staff morale if he votes to dismiss the complaint or reject the agency position in an important case. He may prefer to see the onus of dismissal borne by a reviewing court. And an agency member, *qua* judge, may well be apprehensive that dismissal of a complaint will imply that he made an error in having voted, *qua* prosecutor, to issue it.

In these respects and others I have not mentioned, the context of agency deliberation and decision-making differs markedly from court adjudication. But the solution is not to judicialize the administrative process further, or to seek the appointment of "better" commissioners who will make better agency judges. Agency members are not, and should not be, selected for their judicial qualities; and the institutional environment in which the work does not nourish the development of such qualities. It should surprise no one that the agencies have not produced a Learned Hand or a Henry Friendly. Agency members should be chosen for their capacity to perform the essential regulatory task of developing policies that are wise, informed, enlightened, and in the public interest—and not for their judicial detachment and learning, or ability to write a polished legal opinion.

In short, agency members will become better regulators if we no longer expect them to act as judges as well as administrators. We should not require conscientious agency members to shoulder the irreconcilable burdens of both vigorously prosecuting and fairly judging in the same case. Those suspected of violating the law should indeed be proceeded against with vigor and dispatch; but the agency should prosecute its cases in an impartial and disinterested judicial tribunal. We should relieve agency members of the impossible duty of determining whether the allegations of their own complaint have been proved by the evidence in the record of a proceeding in which the agency itself is an adversary party.

#### IV.

Thus, while I have long held to the opposite view, I am now convinced that we will lose nothing, and gain much, by eliminating from agencies like the Federal Trade Commission the function of case-by-case adjudication of alleged violations of law. This function should be transferred either to the district courts or, preferably, to a new Trade Court which is decentralized and holds hearings in every state, thus bringing the judicial phase of the regulatory process much closer to the people. The Trade Court could be given jurisdiction not only of complaints prosecuted by the agency, but also private class-action suits brought by consumers and competitors injured by the same alleged unfair trade practices. To permit full and comprehensive disposition of the case by a single tribunal, the Court should have authority not only to issue preliminary and final injunctions, but also, where appropriate, to award damages, civil penalties, and other equitable relief.

Relieved of its adjudicative responsibilities, the agency's remaining functions should be vested in a single Commissioner serving at the pleasure of *both* the President and Congress, and removable by either (in the case of Congress, by a majority vote of both Houses). This would permit the public to hold both the President and Congress accountable for an agency's continued failures or poor performance.

I do not offer this proposal as a panacea for all agency ills. Nor do I suggest that it is without risks and dangers. On the positive side, however, elimination of the adjudicative function will enable an agency to concentrate its resources on a single central objective: the development and enforcement of regulatory policies carrying out the statutory mandate. To that end, it would conduct investigations and studies, utilizing fully its power to gather information on

emerging regulatory problems; it would make expanded use of its rule-making authority (including issuance of guides and enforcement statements) as the primary method for formulating policies and standards; it would proceed in court against persons charged with engaging in unlawful acts or practices, including those prohibited by valid agency rules or regulations; and it would advise the Congress and the President on any need for new legislation. All of these essential administrative tasks, executive and quasi-legislative in nature, are better performed, more quickly and more incisively, by a single administrator than by a multi-member tribunal.

Centralizing full authority and responsibility for an agency's activities in a single administrator will unquestionably facilitate the development and formulation of regulatory policy. It will also lighten the burden of fashioning comprehensive and coordinated national policies in those areas where other government agencies or departments have overlapping responsibilities.

Moreover, an agency should be no less independent, in the best sense of the term, because it is under the leadership of a single man. The agency should still be required to develop regulatory policies that are truly non-partisan and responsive to public and consumer needs, and not to those of special interest pleaders. By increasing its visibility and accountability to the public, the proposed change in structure should result in a far greater degree of agency responsiveness than now exists.

Admittedly, having only one man in charge may make it easier to exert political pressures on him, bad as well as good. I do not wish to overstate the case, but it seems clear that the present structure of the agencies has failed to insulate them from improper influences, while the proposed change at least offers the hope of increased responsiveness to consumer needs and the broad public interest. Nor do I see any reason why a policy-making government regulator should be appointed for a long term of years, and not be removable from office despite continued public dissatisfaction with his performance. Such a public official should be required to live dangerously in that respect. It cannot be repeated too often that visibility and accountability to the public are essential keys to good government. If Congress, the President, or the public is disappointed with an agency's performance, there should be one man upon whom attention can focus and from whom immediate improvement can be sought. We cannot do that with the independent regulatory commissions today; and both they and the public suffer from it.

With a single man given full authority and responsibility for an agency's activities, it should be easier to attract "better" men. A President will be more reluctant to appoint incompetent Commissioners, for their failure will be his failure; their incompetence will be his embarrassment; continuing them in office, despite poor performance, will be his responsibility.

We should make sure that an agency is not given more jobs than it can reasonably be expected to handle. If it is, we know from experience that the agency will concentrate on those which are easiest, least controversial, and yield the quickest results, putting aside those more difficult and complex tasks which may be more important to the public. Nor should we allow an agency to excuse its own failures by putting the blame on a parsimonious Congress. It makes no sense to assign a job to an agency and then withhold from it the necessary resources of money and manpower.

I think it would be a serious mistake to transfer the regulatory agencies to the large Executive Departments where they would disappear, like the Food and Drug Administration, submerged under massive layers of bureaucracy. Agencies should continue to be independent in that sense—so that they may be clearly visible, fully accountable, and unable to blame others for their own deficiencies.

I am not as fearful as I once was that transferring agency adjudication to the courts would create a competing organ of policy-making. If the proposed changes should result, as I believe they will, in far greater and more effective utilization by the agencies of their administrative powers—again I stress the tremendous potential of rulemaking as a practical and fair method for developing and articulating regulatory policy—, there will be little danger of judicial usurpation of the agencies' authority. Experience shows that where an agency is alert to its responsibilities, and is demonstrably endeavoring to fulfill its statutory duties in the public interest, reviewing courts generally give its actions the benefit of a reasonable doubt.

It is perhaps unnecessary to say, in conclusion, that no reforms in the structure of the regulatory agencies will succeed unless there also are radical changes in the climate of government and the political processes. As John W. Gardner has said, "Our political and governmental processes have grown so unresponsive, so ill-designed for contemporary purposes, that they waste the taxpayers' money, mangle good programs, and smother every good man who comes into the system. \* \* \* Sooner or later, someone is going to have to tackle the central structures of our society or it isn't going to work." We must institutionalize the means whereby the public may be aware of, and participate in, political and governmental processes that affect the quality of all our lives. We must open wide the doors and windows of government agencies, so that the public may see for itself what is or is not being done, and demand an accounting from those in charge.

Every institution of government must be renewed and adapted to changing social and economic conditions. It is no criticism of the administrative process, and the creative scholars and statesmen who have nourished its growth, to find that it is no longer adequate to the needs of the present and the future. The current widespread dissatisfaction with the performance of the regulatory agencies offers an opportunity for genuine reform. I leave you with the hope that this opportunity will not once again be allowed to slip by, without meaningful change and improvement.

The CHAIRMAN. Also Mr. Kirkpatrick's financial statement will be a part of the committee's file in accordance with our policy.

As I stated many times it is the policy of this committee not to put the financial file in the record as such but to put it in our files and it is open for anyone who wishes to look at it, whether it be the press or anyone else or other members of the Senate.

I am pleased to note for the record that Mr. Kirkpatrick has not only made a full financial disclosure of his assets, but he has gone further; he has listed all of the clients of his firm for which he has performed any substantial services since October 1, 1969.

I know Senator Proxmire as well as the Consumers Federation—and I cite Senator Proxmire because he sent a letter to be put in the record—and the study of the Center of Responsive Law have each criticized the President for failure to consult with consumer groups prior to the nomination of Mr. Kirkpatrick.

While I do not believe that any particular interest, including the consumer interests, should be entitled to name a nominee to any position, particularly the Federal Trade Commission, which is charged with protecting the interests of the consumer, I think the President would benefit from such consultation and the recommendation of a responsible consumer organization should be carefully considered.

But the committee was not, as far as I know, privy to the conversations or the discussions that led up to the selection of Mr. Kirkpatrick. When the selection was about to be made, I guess some of us privately were asked about Mr. Kirkpatrick, and we expressed our opinion, and that is proper and a matter of practice with this committee.

So, with that, Mr. Kirkpatrick, we would be glad to hear from you. We will also put your biography in the record.

(The biography follows:)

#### BIOGRAPHICAL SKETCH OF MILES W. KIRKPATRICK

Miles W. Kirkpatrick, commissioner-designate of the Federal Trade Commission, was born in Easton, Pennsylvania, June 1, 1918. He received his A.B. degree from Princeton University in 1940 and his LL.B. degree (in absentia) from the University of Pennsylvania Law School in 1943.

A partner in the law office of Morgan, Lewis & Bockius, Philadelphia, Mr. Kirkpatrick joined the firm following Army service in World War II and continued this affiliation until his appointment to the Federal Trade Commission.

Mr. Kirkpatrick is a member of the American, Pennsylvania and Philadelphia bar associations, the Union League Club and the Princeton Club. He was chairman of the Antitrust Section of the American Bar Association in 1968-69 and headed the ABA Commission to Study the Federal Trade Commission. The ABA Commission's findings were submitted to President Nixon in a report dated September 15, 1969.

Mr. Kirkpatrick's Army service was first with the 11th Armored Division and later with the Army Air Corps.

Mr. Kirkpatrick is married to the former Anne Skerrett, and the Kirkpatricks have three children: Mary, 18, a high school student; Nancy, 20, who attends the University of Colorado, and William, 22, now serving in the Army in Alabama.

Mr. Kirkpatrick's father, William H. Kirkpatrick, was a U.S. District Judge for many years, having served as Chief Judge of the District Court for the Eastern District of Pennsylvania.

The CHAIRMAN. Senator Cotton, do you have a short statement?

Senator COTTON. I merely wanted to say, Mr. Chairman, that both Senator Scott and Senator Schweiker of Pennsylvania heartily endorse Mr. Kirkpatrick's nomination.

Senator Scott asked me to inform the committee that he will try to get over here briefly to personally say a word on behalf of Mr. Kirkpatrick.

Senator Schweiker asked me to read into the record a very brief statement from him. May I do so?

The CHAIRMAN. Yes.

Senator COTTON (reading):

Mr. Chairman, I am pleased to offer my unqualified endorsement of Mr. Kirkpatrick for the position of chairman of the Federal Trade Commission. I sincerely regret, due to a previous commitment, that I am unable to appear in person.

However, I am delighted that President Nixon has nominated Mr. Kirkpatrick for this important post. At the request of the President, the American Bar Association appointed a group of 16 lawyers and economists in May of 1969 to make a thorough study of the Federal Trade Commission. Mr. Kirkpatrick headed the study group which made its report in September.

The result of the study was a report which has been very influential in reshaping the Federal Trade Commission under the immediate past chairman, Casper W. Weinberger. Among other things, the report suggested the agency emphasize to a much greater extent the detection and elimination of frauds against consumers, particularly frauds against the poor, the elderly and the uneducated.

In addition the report recommended that the Federal Trade Commission establish local offices in about 10 major cities and this proposal has recently been implemented.

Mr. Kirkpatrick has for many years been a partner in the Philadelphia law firm of Morgan Lewis & Bockius. He is a former chairman of the Anti-trust section of the American Bar Association. He is a native Pennsylvanian, having been born in Easton.

He graduated from Princeton University in 1940, from the University of Pennsylvania Law School in 1943. In my judgment, Mr. Kirkpatrick is eminently qualified to be the chairman of the Federal Trade Commission and I am very pleased to have the opportunity to offer my support to his nomination.

That is Senator Schweiker's statement. Senator Scott, whose senatorial duties, plus those of the minority leader keep him very busy is unable to be present. However, if Senator Scott can come it is his purpose to heartily endorse Mr. Kirkpatrick.

Thank you, Mr. Chairman.

The CHAIRMAN. Do you have a statement, Mr. Kirkpatrick?

## STATEMENT OF MILES W. KIRKPATRICK

Mr. KIRKPATRICK. I have no statement, sir.

The CHAIRMAN. We can proceed with some general questioning, which will probably serve the purpose.

I think what you might have had to say in a statement will be covered in the things we put into the record. I have two or three questions and then I will call on the other members of the committee.

Last week, Mr. Kirkpatrick, the Commerce Committee reported a Consumer Protection Act, S. 3201, which would grant substantial new powers to the Commission. Chairman Weinberger told our committee that he considered those powers extremely important proposals, the enactment of which—and I am quoting him—“will enable the Commission to give the country’s consumers the protection from unfair and deceptive practices to which they are entitled.”

Do you agree with that general statement in a general way?

Mr. KIRKPATRICK. I am generally familiar, of course, Mr. Chairman, with the legislation, S. 3201. May I make several comments on that?

The CHAIRMAN. Yes.

There has been some criticism that the consumer class actions would add to the heavy burdens that the courts now have, which was referred to also by the Chief Justice I think at the bar association meeting in St. Louis just recently.

Mr. KIRKPATRICK. I hesitate to take on the Chief Justice, Mr. Chairman, but I do have several comments.

First as to title I. There are a number of items with which I and as I understand it the Commission emphatically agree. There is the matter of the Commission’s jurisdiction and ability to get preliminary injunctions. I think it is clear and has been clear in the past that in the area of consumer fraud a cease-and-desist order is an inadequate remedy and that we should have the power certainly to seek a preliminary injunction in the courts.

There is the question of the broadening of the jurisdiction of the Commission to matters affecting commerce, rather than matters in Commerce. That is certainly emphatically to be recommended. I don’t propose and I would not propose that the Commission be turned into a giant law office to pursue each fraudulent transaction all over the country in every village and hamlet. It can’t do it. It doesn’t have the wherewithal to do it.

But in order to pursue and make the studies that are necessary to generate the kind of information that should be generated with respect to consumer fraud, that is a necessary power.

Certainly, finally, in title I, I would heartedly approve the ability of the Commission to seek to enforce its own orders and to enforce its own penalties. All of those matters are provided for in the bill.

The balance of the bill, as far as I know, has not received Commission comment. I have had no opportunity to consult with my colleagues or with the staff of the Commission on it. I do have some thoughts, however, on the question of class actions that I would like to express to this committee.

I start with the proposition that the Commission and I are dedicated to consumer interests. That is our purpose. The question is how do we best serve that. I have looked pretty hard at that aspect of the legisla-

tion and find myself in substantial agreement with the comments former Chairman Wienberger and Paul Rand Dixon made in suggesting to this committee that in respect of class actions that there are a number, a host, really, of unknown factors.

It is a strange animal in our system of Anglo-Saxon jurisprudence. It is in effect a clientless law suit. I do not think the question of clogging the courts should be a substantial matter. I think if there are wrongs to be righted, the Congress should provide the judges to right those wrongs.

The question is whether or not there is a more efficient way to right those wrongs. I would tend, I believe, pending further study of the matter and consultation, to favor, myself, the triggering action that was in the original bill. But I have no final opinion on those matters, not having had the opportunity fully to consult with my colleagues.

The CHAIRMAN. I appreciate this general comment and any suggestions that the Commission or you may have. This committee will welcome those suggestions, because we realize that this is a complicated bill and it can be subject to amendments, and modifications to make it more effective.

Now I don't suggest that anyone should be bound by his predecessor in everything that they do. I think people like yourself should be as independent as you want to be and as your conscience and judgment dictate.

But, generally speaking, Chairman Weinberger did make some reforms. Some of them are very important reforms that you might be familiar with.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. You sharply criticized the Commission for excessive secrecy and for its reliance on what was called weak consent orders, and unmonitored voluntary compliance.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. Now, generally speaking, the reforms that we understand Chairman Weinberger began to institute down there, do you intend to carry those out?

Mr. KIRKPATRICK. Yes, indeed. I think former Chairman Weinberger has done a splendid job. Much remains, obviously, and he would be the first to acknowledge that, that needs to be done. But the changes he put into effect I propose to carry forward and perhaps some of my own.

The CHAIRMAN. You probably will be in a unique position—the Commission has always come before us in the Appropriations Committee for money to do this and do that, to competently administer the laws we pass, so I imagine you and Mr. Weinberger will be in close touch on this matter.

Mr. KIRKPATRICK. I would look forward to that, sir.

The CHAIRMAN. And I suspect that his judgment down in the budget will be quite persuasive on matters pertaining to the Federal Trade Commission.

Mr. KIRKPATRICK. Yes; I dare say I won't get away with too much with him there.

The CHAIRMAN. Now, do you have any preconceived ways in which you would get at this matter of excessive secrecy and reliance on consent orders or unmonitored voluntary compliance?

Mr. KIRKPATRICK. Yes; let me start with the matter of secrecy first. I believe there is a standing or recognized rule of the Commission at the moment which requires as to all matters, investigatory in nature, that any communication, ex parte in nature, be given in a written memorandum to each Commissioner and circulated to each other Commissioner.

I think that is a fine rule, but whether it goes far enough, I have not yet made up my own mind.

With respect to adjudicatory matters, there should be no ex parte communications whatsoever. I think the Commission's rules are clear on that.

The CHAIRMAN. Maybe the other committee members want to ask about this, but you are suggesting you are going to proceed, should you be confirmed—and you will get my vote—you will pursue these matters that you found out and criticized.

Mr. KIRKPATRICK. Yes; indeed.

The CHAIRMAN. I think one of the good things that the Federal Trade Commission does in a basic way is these advisory opinions. Because business, good business does take advantage of it. By that I mean to find out how they can remain good and not violate any law. I hope the basic thrust of that won't be violated in any change.

Mr. KIRKPATRICK. I anticipate no detailed change, sir.

The CHAIRMAN. Then the public disclosure of voluntary settlements, I imagine you will go into that.

Mr. KIRKPATRICK. Emphatically that will continue; yes, sir.

The CHAIRMAN. Now I don't want to pursue in any detail—maybe the other members of the committee do—what Commissioner Elman said, but as I read his speech, he was dealing more with the structure, the administrative structure of the Commission and where there should be some reforms made, or suggested them. You are familiar with that and you will look at it I am sure.

Mr. KIRKPATRICK. Yes, indeed, sir.

The CHAIRMAN. The Senator from Pennsylvania mentioned offices in 10 cities. Are they regional offices?

Mr. KIRKPATRICK. Yes, sir; there are actually 11 regional offices of the Commission, sir.

The CHAIRMAN. And the problem there has been—it always is with all of the independent agencies—they set up these offices and the people have access to them, physical access, and this is true with the ICC, the FCC, the Power Commission, all of them, they set up the regional offices and put someone in charge, but when it gets down to something that really needs to be decided and moved upon quickly, they are either too timid themselves or they say, they hide behind the facade that they don't have the authority, it has to come back to Washington, it has to be mulled over back here and then back to them.

I am hopeful that if we are going to set up these offices that we give the people—we assume they are going to be competent—give the people the authority to make the decisions.

Mr. KIRKPATRICK. I couldn't agree with you more, sir.

The CHAIRMAN. This has been the usual complaint.

Chairman Weinberger recommended to this committee that we establish vigorous enforcement procedures for the FTC in dealing with the Flammable Fabrics Act.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. To me that is a question of convincing the Budget to give you a sufficient amount to administer the act properly.

Mr. KIRKPATRICK. In addition I understand there were some legislative proposals.

The CHAIRMAN. And the certification procedures and penalty provisions have to be enforced.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. Are you a Republican or Democrat?

Mr. KIRKPATRICK. I am a Republican, sir.

The CHAIRMAN. Now the second question I have to ask is, do you intend to, as far as you know, barring some unforeseen possibility, intend to serve out the term you are to be appointed for?

Mr. KIRKPATRICK. That is my intention, sir.

The CHAIRMAN. Senator Cotton?

Senator COTTON. Thank you, Mr. Chairman.

I join the chairman in commending you for disclosing so much information, going to the extent of listing the clients of your firm in the past. However, there is one question we always ask and no personal reflection is intended or is to be inferred. On the matter of your investments I want to ask you, so it will appear in the record, do you know of any investments, or any interests you or the members of your family have, that you foresee giving rise to any possibility of any conflict of interest?

Mr. KIRKPATRICK. Save, sir, for those that are listed there, which are going to be disposed of, either committed to government obligations or to a so-called blind trust, I do not know, I have no knowledge of any such interests.

Senator COTTON. Thank you.

I gather that you are going to either dispose of them or put them in the blind trust as others have done in like situations?

Mr. KIRKPATRICK. That is my intention, sir.

Senator COTTON. Thank you.

Now, Mr. Kirkpatrick, the report of the American Bar Association group which you chaired contained the following statement:

Notwithstanding the great potential of the FTC in the field of antitrust and consumer protection, if change does not occur, there will be no substantial purpose to be served by its continued existence. The essential work to be done must then be carried on by other governmental institutions.

Would you care to comment on that? I am particularly interested to know what other governmental institutions would carry on if the Federal Trade Commission should prove inadequate?

Mr. KIRKPATRICK. I would like to comment first, sir, that it would be my hope and my purpose that the Federal Trade Commission will carry forward the very important and great purpose. I think under Chairman Weinberger, large steps have been made. I propose that and I hope that I will be able to, along with my staff and colleagues, be able to demonstrate that this Commission is and will continue to be and has been a fine force both in enforcing the antitrust laws and also with respect to consumer matters and false and misleading advertising. I see no reason this Commission cannot perform effectively its intended function.

Senator COTTON. Thank you.

I won't go into the matter of how you visualize the beefing up of enforcement, since I think other members of the committee have questions on that subject. But, in your statement made to the chairman regarding the matter of preliminary injunctions, for instance, it is my understanding that the ABA's report recommended that such injunctions be handled by the General Counsel and not by the Commission. Am I correct?

Mr. KIRKPATRICK. I would anticipate that would be one of the functions of the General Counsel's Office; yes, sir.

Senator COTTON. That would speed them up?

Mr. KIRKPATRICK. Very much so.

Senator COTTON. Is it your feeling that these preliminary injunctions should be entirely ex parte proceedings, or should the corporations, individuals, or parties against whom they are issued, be given a chance for a hearing?

Mr. KIRKPATRICK. Oh, I have no doubt that in the normal situation that notice at least to the proposed defendants should be given. Whether the situation would permit a hearing or not, I think that would depend upon a case-by-case basis of choice. But certainly notice, if it can be given. And a hearing of course under the Federal rules would be promptly forthcoming after any order would be entered by the court. And I would think normally there would be, it would require a hearing, but I would anticipate there would be emergency situations where that would not be desirable or possible.

Senator COTTON. Of course there is a certain impact on any business resulting from the mere issuance of a preliminary injunction. This may not be so much a financial impact as one adverse to its public image and relations. It could be rather grave and substantial. But, do you visualize the situation where no hearing would be held to prior issuance, unless the Commission acted to the contrary?

Mr. KIRKPATRICK. I think, Senator, that in the normal situation, if I recollect the rules of civil procedure under which we would be acting, that a hearing in any event would be required after entry of an order. And I would certainly not seek an ex parte order except in an extraordinary situation.

Senator COTTON. Again referring to the ABA Commission's report on the FTC; it notes the following:

The first important manifestation of that support should be the appointment of the Commission chairman with executive ability, knowledge of the tasks Congress entrusted to the agency and sufficient strength and independence to resist pressures from Congress, the executive branch, or the business community, which tends to cripple effective performance by the FTC.

Now, I am not raising a question of whether you think your own personal qualifications fulfill this criteria. That would be hitting below the belt and this is not my purpose. But, I am a little interested about these "pressures from Congress."

What are these pressures that you apprehend from Congress?

Mr. KIRKPATRICK. I think if I recollect what was intended there, sir, it was a question of personnel more than anything else. From time to time as I understand it, and I did not myself go into the details of this aspect of the report, it was felt that perhaps undue recognition was given to an applicant for employment, because he happened to be sponsored by a Senator or Congressman. That we felt was undesirable.

Senator COTTON. In other words, your understanding of what the study commission had in mind is patronage?

Mr. KIRKPATRICK. That is correct, sir.

Senator COTTON. I think it would be well to let the record show, as it has many times before, that despite the fact most of us feel these quasi-judicial Commissions have been created by acts of Congress and are actually creatures of the Congress, we have had a tendency to view with a little jealousy that they have come to be regarded as a part of the executive branch. This committee, for instance, has oversight duties with respect to several such agencies. However, while we do not want to stick our fingers into their independence and right of decision, we still don't like, as the years go on, to have them considered an adjunct of the executive branch.

What is your reaction to that?

Mr. KIRKPATRICK. My reaction is the Federal Trade Commission is an independent agency, a fully independent agency, in its adjudicatory functions.

With respect to its investigative function, I think section 6 of the Federal Trade Commission Act sets out that we should be substantially responsive both to the requirements and wishes of Congress and the White House with respect to studies, investigations, and reports, and that is set out rather specifically in the underlying legislation.

Senator COTTON. I would like the record to show one other thing, which I think it also has shown before. I was reassured by your statement that what the ABA study commission had in mind was the matter of Congressmen and Senators seeking to get their friends appointed to jobs, rather than something else. Now, it is my own practice—and I think one now followed by most Members of Congress for our own protection, if for no other reason—that if a constituent wants me to approach a commission or commissioner in regard to any matter pending before it, then I do so by letter with copies to be furnished interested parties, unless the only purpose is to ask that something be expedited if possible, with no possible comments on the merits of the case. If haste dictates a telephone call, then I request of the member of the commission or such official as I do reach, that the call be monitored, with the assurance that I will confirm our conversation by letter. I think that is the only safe way for Members of Congress to deal with these commissions.

Is that your concept of what is the proper approach?

Mr. KIRKPATRICK. It strikes me as entirely proper, meticulously proper, sir.

Senator COTTON. Do you agree then that it is all right if it is merely a matter of seeking to expedite some pending matter?

Mr. KIRKPATRICK. Oh, certainly.

Senator COTTON. It could be done informally by telephone, as long as that is all it is. Nonetheless, in such matters I always confirm it by letter so the record shows that is all it was.

Mr. KIRKPATRICK. So long as, Senator, when we are unable to expedite it, you will be understanding, there is no problem.

Senator COTTON. You also understand if a constituent wants us to make such a request, then we make it even though it may not be possible to grant it.

The CHAIRMAN. Would you yield on that for a second?

Senator COTTON. Certainly.

The CHAIRMAN. I have, and I am sure other members of the committee have, instructed our staff to do as was suggested there for a long time, but we don't have any monitors in my office.

Do you have them at the Federal Trade Commission?

Mr. KIRKPATRICK. I don't know the answer to that.

The CHAIRMAN. Well, maybe you can find out.

Mr. KIRKPATRICK. Yes, sir. I simply don't know the answer.

The CHAIRMAN. All right. I won't pursue that. Thank you.

Senator COTTON. It is easy enough if the person calling requests it?

Mr. KIRKPATRICK. I must assume if we said we are doing it, we have the facilities to do it. I am personally unacquainted with it.

Senator COTTON. All you have to do is have your secretary or stenographer monitor the call.

Mr. KIRKPATRICK. Oh, I was thinking of a recording device. I thought that is what you meant.

Senator COTTON. Well, yes, but that is not the only way you can monitor the conversation.

The CHAIRMAN. A letter is the best way. What I usually do is call up and say I am sending you a letter, you ought to get it tomorrow morning, and then you are through.

Senator COTTON. I think some of my colleagues have other questions regarding some of the matters that you have already addressed, but I have nothing further at the moment.

May I say that I join the chairman in expressing my approval and congratulate the President on offering so well qualified an appointee.

On some of the questions of philosophy I still want to reserve my own judgment, but insofar as your qualifications are concerned you give us reason to hope that the Federal Trade Commission will become a much more dynamic force. I think we are very fortunate in having you. Thank you.

The CHAIRMAN. Senator Pastore?

Senator PASTORE. Yes.

First of all, I agree with the chairman that I think the President should be congratulated for this nomination and certainly, Mr. Kirkpatrick, you have no trouble with the Senator from Rhode Island. But you know I am afraid that we are prone to fall in the habit of talking about consumer protection and then when it comes to specifics we don't seem to be as enthusiastic and as affirmative as we are in the cliches we use in speaking about these problems in a general fashion. I am afraid that part of that even falls within the report that you made.

On page 27 of your report you make a comparison between the amount of money that was spent by the Federal Trade Commission with reference to mergers, as against the amount of money that was used for the enforcement of the textile and the fur labeling aspect of your responsibilities.

Now I would like to ask you, why is that so? Why isn't it just as important to protect the consumer in making sure that what he buys is what it is labeled to be, rather than something that is a fraud upon that consumer? Why isn't that important?

Mr. KIRKPATRICK. I certainly would concede, sir, that that is important. I think it is a question of the relativities of the matter.

Senator PASTORE. Why should there be any relativity at all? I mean if a function in your department—one of my responsibilities, of course, is to manage the funding aspect of the Federal Trade Commission. We have always been as cooperative as we can be and we have always been very generous, as generous as we could be. In many, many instances we have taken it upon ourselves to restore some of the cuts that were made by the House, even though in view of the fact that there has been a standing complaint, a standing joke around this district that if you want to look for an important staff member of the Federal Trade Commission—I don't say this has happened under Mr. Weinberger or it is going to happen under you, but it was a standing joke, all you need to do is to go to a local golf course some afternoon and you would find him.

When I questioned Mr. Weinberger about this, he did admit there was a certain sloppiness about the organization of the Federal Trade Commission. And that we were not getting a day's work out of every member of the Commission, out of every staff member of the organization. And I brought up the question, this question of mislabeling, and I am afraid that there has been a relaxation down there at the Federal Trade Commission, that they think that this is of such an insignificant importance that more or less they are pushing this into the background and hardly anything is being done about it. Have you anything to say about this?

Mr. KIRKPATRICK. If that is the case, sir, it is not in line with our report. I would point out, Senator, that at page 45 of the report we say:

We do not fault the FTC for enforcing these protectionist statutes. It is the judgment of Congress that these industries deserve protection from competition, and it is neither our province nor that of the FTC to repeal those statutes.

It would certainly be my intention, and I know nothing in this report that would disown that intention, that we would enforce the statutes. I think it is a question in the report of a recommendation perhaps as to more effective and less costly means of doing it.

Senator PASTORE. If I remember correctly, when Mr. Weinberger came before our committee he emphasized the fact that they were very much interested in carrying out their work and continuing with reference to inflammable fabrics, but they were not so enthusiastic about the mislabeling. I think that is important too. Not only is that a protection to the economy of the country, because it depends on the competitive structure, insofar as business is concerned, but at the same time it does protect the consumer.

In many, many instances some of these imports that come in, for instance, are mislabeled, a lot of them are, as to the contents of synthetics, cotton, what have you, and we have no way of policing that, unless you do it with the Federal Trade Commission. At the same time here we are, we make investigations of our domestic industries, and any one of the investigators can go on the premises and detect any deception that is being perpetrated. I am afraid sometimes what we are doing, we are placing American industry in a very non-competitive position unless we enforce this law equally as against imports as we do against domestic production. You agree with that, do you not?

Mr. KIRKPATRICK. Without knowing how the underlying legislation touches that matter, sir, I would say that we are charged with the enforcement of those acts, and enforce them we shall.

Senator PASTORE. I would hope, Mr. Kirkpatrick, that you would bear in mind what I am saying here today, because I am going to go into detail when you come before our committee for funding, because I think we would like to get an up-to-date report on exactly what you have done about enforcing the law on mislabeling.

Now another one of my functions is the chairman of the Subcommittee on Communications of this committee. For a long time there has been a "passing of the buck" between the FTC and FCC with reference to some of these outlandish assertions that are made in advertising on television. You have been pretty much involved in this; that is, the Commission has been very much involved, and so has the FCC. For the longest time we couldn't get the proper liaison between the two, so that the left hand would know what the right hand was doing. I would hope that you would look into that and make sure that we do promote and continue to maintain a liaison so that the FCC has the power of revoking or failure to renew a license gets into the act on some of these things that I detect that are frauds against the consumers in the advertising area. I would hope that you would look into that as well.

Mr. KIRKPATRICK. I certainly intend to, sir.

Senator PASTORE. Thank you.

The CHAIRMAN. Senator Pearson?

Senator PEARSON. Thank you, Mr. Chairman.

The CHAIRMAN. In "Truth in Packaging," partial enforcement is lodged in FDA and there has got to be the same liaison there as you are talking about on that.

Senator COTTON. Mr. Chairman, if the Senator will yield for just one moment, the distinguished Senator from Tennessee, Mr. Baker, was here briefly but had to leave because of a pressing engagement. He asked me to point out for the record that he was here, that he was interested in the hearing, and that he, too, congratulated the President on his selection of Mr. Kirkpatrick for this important position. The Senator joins the rest of us in looking forward to your very effective service on the Commission.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Senator Pearson?

Senator PEARSON. I thank the chairman for making that reference to the Fair Packaging Act, because I want to make reference to that particular piece of legislation in a question.

What I started to say is that I think that both the Government and the governed are particularly fortunate that one with your qualifications would enter the public service, because we now have a chairman who goes in with a great deal of experience by virtue of heading the committee that made this study of the Federal Trade Commission.

May I ask you if you would comment on the Consumer Protection Agency that is envisioned in legislation now pending in both the Government Operations Committee of the House and Senate, with reference to what impact that would have upon the Federal Trade Commission, an independent agency operating with another independent agency?

Mr. KIRKPATRICK. I am not familiar, Senator Pearson, with the legislation to which you refer in any detail. I would hope that to the extent that that legislation would remove any powers or any jurisdic-

tion from the Federal Trade Commission that it would be withheld pending a year or more experience of the Federal Trade Commission.

I think we have got a Commission here that should be given an opportunity in this time of consumerism to react and to bring itself to the forefront of both the consumer movements and the antitrust laws. And I hope that there would be no legislative dismemberment in the meantime.

Senator PEARSON. I have introduced legislation providing for unit pricing of food commodities. The distinguished chairman of the Consumer Subcommittee, Senator Moss, and other Senators, are cosponsors of that legislation. We were of the opinion that there should be at least two exemptions, one, to exempt the so-called mom-and-pop grocery stores, the corner convenience stores.

The problem in drafting that legislation is a problem that legislative bodies always have and that is where to draw the line. Do you feel that such legislation giving the power to the Federal Trade Commission to make that distinction—that that function would be proper for a consumer agency within the Federal Trade Commission?

Mr. KIRKPATRICK. I have not seen that legislation, Senator, and I have not had any opportunities to consult with my future colleagues or the staff of the Commission on it and I don't know that I really could comment.

It strikes me that its objective is one that has the consumer's interest at heart. Other than that I prefer not to comment, sir.

Senator PEARSON. Let me say finally that I was very pleased with your observation in reference to an answer about class actions. In previous hearings I think I indicated that I thought that we did not make remedies to fit the courts, but we made courts to fit the broadest range of remedies for people. In your endorsement of the triggering device, particularly as proposed by the administration, triggering device by the Attorney General, my concern about that particular part of the legislation is not the judgment or the good nature or the wisdom of the Attorney General, but the state of the courts as they are now. Some Federal courts are 17 months behind today and I know you can cite the delays better than I can.

Mr. KIRKPATRICK. Yes, sir; many more months than that in some districts.

Senator PEARSON. So the point is if we are going to put in a triggering device at a time when we have this great backlog in our courts—I recall the Chief Justice of the United States in addressing the American Bar Association in St. Louis made reference to the fact that it was found in 1906 that the courts were inadequate and we really haven't done much about them in the last 60 some years, and he made a reference to the fact that they are operating in a supermarket age with a cracker-barrel judicial system today.

I think that is part of the class action problem which is our responsibility also. I once again want to say that often I hear Presidents and Governors talk about the greatest problem today, to get good people to enter public service. I think you bring unique and superb qualifications to this job and I wish you luck.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Senator Moss?

Senator Moss. Thank you, Mr. Chairman.

Mr. Kirkpatrick, I welcome you before the committee. As I indicated in our conversation in my office, I think that you bring to this office, that you have been nominated for by the President, the unique qualifications that certainly should enable you to function very successfully there.

I have a few questions I did want to ask. I was pleased to see the Commission institute a rulemaking proceeding to require the listing of tar and nicotine in all cigarette advertisements. This is a logical next step following the congressionally imposed ban on broadcasting advertising of cigarettes, and one which Chairman Magnuson and I have long sought.

Although the Commission has been criticized in many areas, it can be proud of its forthright stand on cigarette advertising. As you know on January 1 of next year cigarette advertising will disappear from the electronic media. This committee is particularly concerned that there may then ensue a flood of cigarette advertising in the printed media. I very much hope you will have the staff of the Commission closely monitor the practices of the cigarette companies.

At the end of June of 1971, under the terms of this cigarette labeling law, you will then be free to proceed with your trade regulation rules to require warnings on printed advertising.

Would you be prepared to require a warning in all cigarette advertising if the behavior of the cigarette companies warrants that action?

Mr. KIRKPATRICK. If the behavior of the cigarette companies warrants that action, of course, sir.

Senator Moss. And by behavior, I am really predicating that on this flood into printed advertising when electronic advertising ceases.

Mr. KIRKPATRICK. If you speak, sir, merely of the amount of advertising involved, I don't think I could comment on that very knowledgeable at this time. It would involve a great deal, I think, of background in the cigarette rulemaking that I simply don't have and have not had access to.

But I want to very much consult with my future colleagues and with the staff on that matter. It certainly is a matter we would be very much alert to.

Senator Moss. The rationale behind the cigarette advertising bill was that, one, the product was found by the Surgeon General to cause serious disease, impairment of public health, and the electronic media was being used to induce more people to take up the habit and continue the habit, and therefore because of the peculiar control that we have over electronic media, we, the Congress, decided that it should cease.

But now if the tobacco companies simply divert those funds and with ingenuity and the type of advertising, all of the rest, to still attempt to achieve the same results through printed media advertising, it seems to me the basic reason for banning the electronic advertising would then appear over on the printed side of the media.

And one of the things that must be done is a warning in the advertising itself to people of what it is going to do to their health if they take up or continue the habit of cigarette smoking.

Mr. KIRKPATRICK. I don't quarrel with what you say, Senator Moss, at all. I think one of the factors that I am unaware of is what weight to attribute to the peculiar and compelling nature of television ad-

vertising on cigarette sales. That may be something that would distinguish and compel the action to be taken by the Congress on television advertising that would not be a factor in magazines or newspapers.

I am simply, I think, unable to deal with the question in terms of, in the categorical terms you would like me to deal, because I am simply not qualified to do so at this point.

Senator Moss. We already had some counterweight in the electronic advertising by the requirement of carrying the anti-ads, the little spots that are prepared by the voluntary agencies, to tell the effects of cigarette smoking. And they have been very effective.

What I am talking about is whether we might require some sort of similar thinking by putting in the ad itself what the health effects will be of continued use.

Mr. KIRKPATRICK. It is certainly a matter in my judgment that the Commission should carefully consider.

Senator Moss. On the 29th of June, Chairman Weinberger informed me that the Commission was undertaking a study of the relationship between advertising and drug abuse in response to a proposal now pending before this committee which I introduced. I hope that you would give this strong support and resources to this study.

Many experts in the drug field are convinced that certain kinds and types of advertisements, particularly those for over-the-counter medicines, are contributing to the drug abuse problem in this country. At the very least by promising the relief from anxiety and tension which they cannot offer, many of these ads deceive the American public into believing that problems can be solved simply by popping a pill.

Will you pursue this study vigorously?

Mr. KIRKPATRICK. This study will be pursued, Senator. I believe it is already in the competent and vigorous hands of the Commission.

Senator Moss. The recent hearings I held on the nutritional value of dry breakfast cereals and advertising of these cereals caused some concern. Will you vigorously pursue your announced study of the cereal industry?

Mr. KIRKPATRICK. It is my intention, and as I understand it the intention of the Commission.

Senator Moss. Will this focus on the advertising practices of the cereal industry?

Mr. KIRKPATRICK. I could not speak with personal knowledge of the precise focus. I believe it would be a general study, covering market structure, as well as performance, which would undoubtedly involve advertising practices as well.

I do not, myself, know whether that is the central focus of it or not, sir.

Senator Moss. One of the other problems is the structure of the industry, concentrated very largely in four producers of cereals that dominate the market. The structure of the industry should also be scrutinized might also be of interest.

Mr. KIRKPATRICK. I understand that is very much a part of the subject matter of the study, sir.

Senator Moss. On the 10th of June Chairman Weinberger recommended to this committee that we establish a vigorous enforcement procedure for the Federal Trade Commission in dealing with the Flammable Fabrics Act. Those recommendations have now been embodied in S. 3765.

Do you subscribe to the certification procedure and the penalty provisions which Chairman Weinberger recommended?

Mr. KIRKPATRICK. I think if I might, Senator, Chairman Weinberger proposed a pretest procedure rather than certification procedure. I certainly subscribe, very definitely and emphatically, to the objectives of that legislation. I do understand there have been subsequent hearings which raised technical questions. But the objectives of that legislation are beyond question in my mind.

Senator Moss. That is correct.

The CHAIRMAN. It is a strong bill and will give you plenty of authority down there to get at it.

Senator Moss. The pretesting—by saying certification I perhaps neglected to say this was pretesting, and therefore certifying that the fabric had passed the test. Rather than the system that we have now of having goods all distributed and out and then making a discovery there is a flammable fabric and you probably can't recall all of the goods.

Mr. KIRKPATRICK. I am wholeheartedly in favor of this legislation, sir.

Senator Moss. Mr. Kirkpatrick, you are familiar with the automobile warranty report of the Federal Trade Commission?

Mr. KIRKPATRICK. I know that it exists. I have not studied it in detail, sir. I have not had an opportunity to do so. It is a rather voluminous report. I think I know in substance what its recommendations are.

Senator Moss. I would hope that you would support the recommendations of that report, particularly as they relate to prohibiting the disclaimer of implied warranties.

Our committee saw no reason why a written warranty should be used to limit the rights of the consumer, rights that he would have but for the written warranty. Do you agree with that?

Mr. KIRKPATRICK. I agree with that.

Senator Moss. Do you believe that all warranties should clearly and conspicuously disclose their terms to the consumer?

Mr. KIRKPATRICK. I do.

Senator Moss. Do you believe that there should be some direct and simple means for consumers to identify warranties that are full and complete and that offer total protection against malfunction from those warranties for parts, but not for labor, or otherwise have only partial coverage?

Mr. KIRKPATRICK. I think that would be highly desirable. Senator Moss.

Senator Moss. The committee received a statement from Howard Frazier of the Consumer Federation of America. You are acquainted with that organization, I assume?

Mr. KIRKPATRICK. I had not been acquainted with it, sir. But Mr. Frazier was kind enough to send me a copy of that communication so that I have read that which you refer to.

Senator Moss. As I read it, the main point of the statement seemed to be that the consumers must be given a voice in the day-to-day operations of consumer protection agencies.

Mr. Posner claims there are no incentives to the agencies to be faithful to the consumer interests.

Commissioner Elman says the problem is due to the fact that there is no accountability to an identifiable constituency. There have been proposals that an independent consumer council be established within the Commission. I assume this means a council with power of intervention, such as was done in New York by the State Utilities Commission.

What do you think of that as a possible solution to this problem posed by Mr. Frazier?

Mr. KIRKPATRICK. I look upon the Commission as just such an agency, sir. We are committed to the protection of the consumer, and to have somebody in our midst who is just like we are would be, I would be a little nonplussed, I wouldn't know what to do with him I think.

Senator Moss. He is in effect the devil's advocate down there. Because of the allegation that the Commission was not fully oriented to protect the consumer, he is in there for just that purpose, to be a consumer man. You don't think that is a necessary addition?

Mr. KIRKPATRICK. I would like to give that—I really have not considered that, Senator Moss. I would like to give it consideration. My instant reaction is that I don't like it, sir, because the Commission is indeed committed and its purpose is the protection of the consumer. To have somebody whose avowed purpose is that of looking over our shoulder, being part of us, I say, I am confused as to what he would do. Because we are there to advocate and prosecute the interests of the consumers.

Senator Moss. What do you think of the suggestion that the Commission be shorn of its adjudicative responsibilities, it simply be an action, advocate agency?

Mr. KIRKPATRICK. Senator Moss, I am not critical of the Commission's functions, of the Federal Trade Commission and others. Criticism has been leveled at this for many years. It does pose difficulties, and my own conviction is, and I think it has been demonstrated under former Chairman Weinberger and I hope I and my colleagues and staff can continue to demonstrate that we can deal with that and be more effective because we do have both of those functions. I very much believe in the commission process. Indeed I don't think I would be here sitting before you today if I did not so believe.

Senator Moss. Those two sort of tie in, the Commission being required to sit in adjudication cannot carry out as fully its function as an advocate of the consumer, because of the necessity of sitting in judgment.

Isn't there a conflict there?

Mr. KIRKPATRICK. I think that we have—I have not gone into this in the detail I would expect to—I think there have been procedures devised at the Commission such that such separation as should in fact take place is assured. And that the process is a smoothly working one and that the criticism really is, I would hope it could be demonstrated, more an intellectual exercise than a realistic one in these circumstances.

Senator Moss. Do you think consumers should have a voice in selecting their advocates in government?

Mr. KIRKPATRICK. Well, I am unable to identify, really—well, the answer is "Yes." But I am unable to identify who the consumer is, because we are all consumers.

Senator Moss. You are aware of course that consumers are showing an increased interest and in fact demanding their rights to participate in the regulatory process by which we are supposed to protect the environment and the quality of the marketplace and the old rules appear to no longer be in effect. We are concerned that the FTC as the major agency of consumer protection at the Federal level be fully responsive to the burgeoning insistence that the marketplace be improved. In that connection do you believe the FTC rules of practice should be amended to assure interested parties the right to participate in FTC proceedings?

Mr. KIRKPATRICK. I assume without knowing the answer that we already have procedures which permit intervention of interested parties. And I assume also the procedures would permit the appearance, the filing of briefs and the like. This is a complicated question with which the Commission has dealt in some detail in recent cases. I am not familiar with the detail of the matters and really cannot comment further than that at this time.

Senator Moss. The designation of the Bureau of Deceptive Practices has been changed to the Bureau of Consumer Protection. Other than the establishment of a Consumer Advisory Board and consumer protection committees in the field and the creation of a Consumer Education Office, what new steps have been taken in consumer protection?

Mr. KIRKPATRICK. We have, as I understand it, a few groups of consumer representatives, I don't know that that is the exact title, that have been coming from the field offices, who have been taking training, if you like, and then going back to the field offices. That has been done, sir.

I think these consumer advisory and consumer protection committees are a great step forward. I think they will be the eyes and ears of the Commission in the matter of consumer protection, to develop what must be developed in this field.

May I say there is a great deal of talk and I am aware of that, about consumer protection. But there is to the best of my knowledge very little solid economic learning in this field. I would hope that these consumer protection agencies in the field and the consumer advisory groups, would develop a body of learning.

May I give you a further example?

I understand that the computerized program that the Commission established in Chicago has developed this interesting fact, that the most frequent complaint that has come to that consumer protection group is the failure to deliver goods upon an order of a consumer. That is a surprising fact. I would not have expected that. But that is the kind of thing I hope we develop, the kind of information, which is very important in this field.

Senator Moss. Do you intend to make increased use of public hearings and trade regulation rules?

Mr. KIRKPATRICK. We intend to—it would certainly be my intention to do so.

Senator Moss. We covered that part earlier.

Senator Moss. Thank you very much, Mr. Kirkpatrick. I appreciate your answers.

As you can see, we have many things about which we have great concern, and on which we must turn to the Trade Commission for effective enforcement. We are anxious that you vigorously pursue these

consumer areas that we have been talking about in this series of questions.

Thank you very much.

Mr. KIRKPATRICK. Thank you, sir.

The CHAIRMAN. Thank you, Mr. Chairman.

Mr. Kirkpatrick, I have just one other question that was brought up on the cigarette bill. There is a new proposed rule of the Trade Commission to require tar and nicotine listing in the advertising of cigarettes. As you know, we have been working with the tobacco industry for a long time, and I must say there has been good cooperation with the industry, seeking a voluntary agreement by them to do just what the Trade Commission is suggesting in the proposed rulemaking.

Mr. KIRKPATRICK. Yes, sir.

The CHAIRMAN. I wanted to ask you if this can be done by voluntary agreement, without the need of long, drawn out litigation or further legislation, would that be better than the rule?

Mr. KIRKPATRICK. In my judgment; yes, sir.

The CHAIRMAN. I hope that that can be pursued, because I must say they have been very cooperative and I think we might work out something along that line. We did that a long time ago in advertising with the hard liquor people. And for years it has been just an agreement between us and them that they don't go on television. And it has worked. And we have a sort of a loose agreement with the beer people that they don't drink beer on television.

Now if you stopped a man on the street and said, "Do you know that people don't drink beer on television?" He would say, "What do you mean? I just saw them drinking beer last night."

Mr. KIRKPATRICK. That is my impression.

The CHAIRMAN. Because the advertising gets right up to it. But it seems to me if there could be achieved a voluntary agreement on this tar and nicotine, which this committee has long pursued, or at least we have been talking about it, that that might be the better arrangement.

Mr. KIRKPATRICK. It would be a highly desirable arrangement, sir; indeed, yes.

The CHAIRMAN. All right.

Senator Hart?

Senator HART. I will yield to the Senator from Kentucky.

Senator COOK. May I say to the Senator and the chairman, after Senator Moss and the chairman get through with tobacco and whisky, there is not much left of the Commonwealth of Kentucky.

The CHAIRMAN. Well, there are a few things left, but we won't mention them today.

Senator COOK. For Senator Magnuson's benefit, we are getting a group of people to be anti-SST in the Commonwealth of Kentucky.

Mr. Kirkpatrick, to be serious, I would hope from the start of questioning that your nomination wouldn't depend on your overall enthusiasm of S. 3201. As you well know I have strong objections to this bill and purely and simply because I believe that the Congress is about to extend to the Federal Trade Commission authority that it has to and should reserve to itself.

Let me ask you this: I was delighted to hear you say if the adjudicatory authority of the Commission were not in existence, probably

you would not be sitting here. I think this is fine. But you do agree there is a limit beyond which the adjudicatory authority of an agency should go before the Federal court system assumes its responsibility; do you not?

Mr. KIRKPATRICK. Well, there must be some limit, sir, yes. Exactly what you have in mind, of course I don't know. I don't mean to fence with you, but, yes.

Senator COOK. What I have in mind is at least my own legal interpretation of rule 23 of the Rules of Civil Procedure, in relation to S. 3201 and the authority that is to be vested in the Federal Trade Commission by this bill. And I merely had this in mind. I hope I will be able to expound on it at a later time.

The CHAIRMAN. Would the Senator yield a moment there? I must be excused, and I think Senator Cotton has to leave too.

Senator COTTON. Before leaving, I will say I didn't go into these matters, because I knew Senator Cook was going into them. However, I am very much interested in the questions I anticipate he will ask.

Senator COOK. I wonder whether you have read to any great extent section 201, subsection 1(p) of the present proposed act?

Mr. KIRKPATRICK. I have not studied it, I am aware of it.

Senator COOK. As a matter of fact, in light of the criticisms that have been leveled against the FTC and as a matter of fact some of which are contained in your report, don't you think Congress should retain the power to define those unfair acts which may become a legal cause of action in a Federal district court? Or do you think that broad, all-expansive power should be delegated to the Federal Trade Commission?

Mr. KIRKPATRICK. I think in fairness, Senator, I have not come to grips with that in any way that permits me to give you an answer which is categorical. I do, however, appreciate the force of that which you are saying, and the force of your statement in the report and, indeed, it disturbs me.

On the other hand, I have not had the benefit of any thinking on the matter, any conferring with my colleagues or others. I would prefer to simply leave it that I recognize very much of the force of your remarks but I have not myself made up fully my mind.

Senator COOK. There is another question I have to ask you and I am sure your answer will be satisfactory in the record, but I hope that in this business of cigarette advertising, that you would not have any preconceived ideas or that you would not have any strong objectivity in regard to the attitude of some of the members of this committee.

Let me tell you why. During our discussions relative to the act that was passed in the spring, we had a hearing with the radio and television people and it was their desire, and I am sure this is public knowledge, it was their desire that they wished to be phased out in 3 years. It was the desire of this Senator that the advertising go off last September. It was their desire that they be phased out in 3 years because this represented 12½ to 14 percent of their entire income and they could not sustain such a loss.

I might even say to you part of the argument that made up the decision to go until after the bowl games of January 1 of next year, for their benefit, by many of the people on the committee who were

opposed to cigarette advertising, was summed up by the head of the broadcasters at that time he said they needed the opportunity to supplement this income, but he wanted the committee to know if they could stay on the air that much longer, with the antismoking advertising, that they would convince more people not to smoke. And this seemed like a strange thing to this Senator, that they were saying to the tobacco industry we appreciate your over \$400 million a year in advertising dollars, but we want to stay on longer, so we can have antismoking advertisements, so we can convince more people not to smoke.

In other words, if you stay with us and pay your bill, we will dig you right into the ground. That seemed like a strange analysis to me from a major industry.

Would you not agree to that?

Mr. KIRKPATRICK. As you state it, sir, it does surprise me.

Senator COOK. I might say when you answered Senator Cotton's question about the political invasion of positions down at the Federal Trade Commission, I might say for the junior Senator from Kentucky, if this were to occur, it would be a great change. And I might say in regard to Mr. Frazier's comments, I am delighted with your nomination, I am delighted that the President has exercised his own choice to name you, because I am having a great running battle with the Department of Justice because I feel that they have forsaken their authority to recommend members of the Federal judiciary to the President and have given that authority completely, and absolutely, with almost a power of veto to the American Bar Association which I have serious objection to.

So I am delighted the Executive has exercised the prerogative to nominate you and I will be delighted to vote for you.

Mr. KILPATRICK. Thank you, sir.

Senator HART (presiding). Mr. Kirkpatrick, I join with the others who have expressed delight that one with your background and established excellence would come into Government.

Senator COOK. Senator Hart, may I ask one more question?

Senator HART. Sure.

Senator COOK. Or at least a suggestion. That is relative to Senator Moss' question about the cereal business, I would hope when this is looked into, it might be done on a combined basis, with the Federal Communications Commission and the Federal Trade Commission. Because a great deal of publicity has been given lately on television relative to what is and what is not in cereals. But yet when you turn the television set on, those advertisements are still there in full bloom, they are still there every Saturday and every morning, and I might suggest that if you are really going to tackle the problem, that one does not just look to the industry itself and as a matter of fact what the advertising media may recommend to the industry, but it looks at both of them, because you can't blame the industry for advertising when there is no objection by the advertiser; namely, the media, that they continue to take and continue to utilize it, while they are being critical of it by the way, by reason of their news and editorial comments.

So I would hope if you go into this, and obviously you should, but I hope if you do it, you do it in coordination with the Federal Communications Commission and our own Commission.

Mr. KIRKPATRICK. Thank you. We will certainly be mindful of that suggestion, sir.

Senator COOK. Thank you, Mr. Chairman.

Senator HART. I make my statement in part, Mr. Kirkpatrick, based on background that I acquired growing up. I grew up very near Philadelphia and since I wanted to be a lawyer from my earliest days, I came to know that anyone who got into Morgan, Lewis and Bockius was a hard hitter and at the head of the lawyers parade.

I also understood as I grew up in Pennsylvania that anyone who was a member of the Union League Club was dedicated to the destruction of Democrats. But I shan't inquire if you continue to discriminate. And that may give comfort to Senator Cook, who thinks that there is an insensitivity of Democrats.

Senator COOK. Mr. Chairman, he set forth his political affiliation before you got here and it was to my satisfaction.

Senator HART. They don't describe that and it looks like a social organization, the Union League Club, and I just wanted to get that in. And how in heaven's name you got into both the 11th Armored Division and the Air Corps in one war I don't know! There has been a lot of controversy over the allocation of the Commission's resources among the various enforcement responsibilities. It was in part for this reason that Professor Posner dissented on that ABA report.

What do you think should be the proper allocation between the Commission's antitrust responsibilities and its unfair and deceptive practices responsibilities?

Mr. KIRKPATRICK. I wish, Senator Hart, that I could give, were competent to give a categorical answer to that at this time. It is very much under study. The Commission has revitalized its office of policy planning and evaluation, and it is a matter to which we will give top priority. But it attempts here to give percentages; I couldn't do it.

Senator HART. I do interpret correctly the professor's point; do I not?

Mr. KIRKPATRICK. Yes; I think that point was also made in the report. There has been no effective planning in that regard, and that we are trying to develop that at this point.

Senator HART. I understand that you have been of the view that economists should be utilized more fully by the Commission.

Are you in a position yet to tell us what modifications you might attempt to apply to past practices of the Commission on this score?

Mr. KIRKPATRICK. I am not, Senator Hart. That is one of the matters that again will have top priority, but I, myself, am not prepared to go into detail on it at this time.

Senator HART. You don't have any economist or economists in mind as men or ladies you would like to get?

Mr. KIRKPATRICK. I have some in mind, but I would prefer, I have no commitments of any kind at this point.

Senator HART. Do you have any reaction to Commissioner Elman's remarks about restructuring the administrative process, especially as they relate to the Federal Trade Commission?

Mr. KIRKPATRICK. Well, Senator, I have the greatest admiration for Phil Elman. He is a fine lawyer and a splendid thinker, and he presented a provocative and interesting paper. I disagree with it. I do not agree with it as applied to the Federal Trade Commission. I think

we have shown under Chairman Weinberger that this Commission is going to work, even though it has the combination so often criticized. There is nothing new about that criticism of the prosecutorial and adjudicatory function.

I think also the criticism of Mr. Elman was they become cozy with the industry they regulate. That is not true in my judgment of this Commission. We are not cozy with anybody. We enforce the law as we see it, independently and vigorously and shall continue to do so.

Senator HART. As anyone would be with an antitrust responsibility, I have on occasion spoken in a fashion that would be regarded as critical of the Commission, but I share your feeling. I am not even aware that you find them on the golf course too often, but I don't go to the golf course, so I don't know.

Mr. KIRKPATRICK. I have yet to play golf in the summer, sir.

Senator HART. At my request, voiced out of another committee, the Commission prepared a comprehensive study of the conglomerate merger problem and Mr. Weinberger told the Subcommittee on Antitrust he was very much concerned with the problem. And in line with your ABA report, is it your intent substantially to upgrade merger enforcement? I know that is a broad question, but it is also a very narrow point.

Mr. KIRKPATRICK. Let me start—you have indicated—I think perhaps it is the word "upgrade" that gives me a little trouble. It is my view that one of the areas that the Commission has functioned best in in the past is its imaginative enforcements of section VII. Our report so indicates. I think it has done a first-class, imaginative, resourceful job in probing the boundaries of section VII. I would very much hope that we would continue on exactly that course with a vigorous and imaginative enforcement policy.

Senator HART. In that report it was stated: "We recommend the Federal Trade Commission concentrate on antitrust enforcement and would make best use of the unique advantages of its administrative process."

Carrying out that proposal, how do you conceive you will move?

Mr. KIRKPATRICK. Well, in just such ways. To use an example, in the section VII field. We have the competency and in the economic field we have the means of making economic investigations, of making all kinds of investigations and requiring reports, that does not lie within the power of the Department of Justice.

I would hope we would continue to get in those areas which can best utilize that very flexible, those very flexible devices we have to probe the law and enforcement. I don't think, for example, that the report would indicate that we really belong in court.

Assuming the Department of Justice will bring the case, I would say the Federal Trade Commission should not essentially prosecute price fixing, deliberate violations of the Sherman Act.

Senator HART. When you have an industry or if you have an industry where among other anticompetitive practices there appears to be price fixing, but it is on a broad industry pattern and is accompanied by other anticompetitive activities, is it not correct that the Trade Commission is in a better position to analyze than the Justice Department is, to pick a specific example and prosecute?

Mr. KIRKPATRICK. You state my views very well, sir.

Senator HART. Well, I was going to vote for you anyway, but thank you. This I suppose bears a little on class action, although when we wrote the question we didn't anticipate it that way. In view of the understaffing of the Trade Commission, isn't it inevitable that the Commission will have to choose not to enforce some laws that Congress has assigned to the Commission?

Mr. KIRKPATRICK. Well, you start with an assumption that we are understaffed, Senator Hart. I couldn't myself, from where I sit and the limited opportunity I have had, make that assumption. If, of course, that is correct, and we find we can't by more efficient means and better management and by perhaps different techniques enforce all of the provisions of the law, we are going to have to make do. But we will come to you for more money first or come to the appropriate arm of the Congress for more money.

Senator HART. I was a prosecutor for a brief period of time and you are never going to be able to proceed against every violation. Perhaps you shouldn't. But if as a prerequisite to a consumer class action there must be a successful prosecution by Justice or the Commission, I think it is just an inescapable fact that thousands of valid consumer grievances, wrongs done consumers, will go without relief simply because they are too low in the order of priority to justify either agency taking care of them.

Mr. KIRKPATRICK. I don't know that I fully agree with that. For example, we have very well qualified hearing examiners who are far from fully occupied. Should the Commission be given jurisdiction in this regard, we would occupy those examiners with these important matters, and we would have expertise, I believe, in the manner that could more efficiently and expeditiously process litigation than the Federal courts.

Senator HART. I think where we would have to continue our discussion would be on the business of these important matters. Now an electric toaster that costs \$12 and doesn't work very well isn't really of direct relationship to the survival of the Nation, but it sure creates a lot of frustrations in perhaps thousands of homes.

You don't have to be a member of the SDS to get a feeling that nobody is listening—"How can I get the system to work? The toaster won't work either. And I am not going to hire a lawyer." And the Trade Commission has got other thing to do. Justice too. I think it would be desirable, if we are going to establish class actions, that we make sure that those relatively nickel-and-dime frustrations that accumulate and raise doubts in the minds of many that the system is not functioning, be permitted to have some citizen self-help.

Senator COOK. I might say, Mr. Chairman, in that regard, as you well know when our hearings first started on this act, and it was anticipated at least by the Justice Department that they would have some hand in it, that they proposed they set up a separate division and were prepared to create additional staff.

Senator HART. They would have received additional staff if we had given it to them.

Senator COOK. I think there is one other interesting thing and maybe the first time in a long time this will have occurred. I notice Senator Pastore said this morning he is chairman of the Subcommittee on Appropriations for the Federal Trade Commission. But Mr. Kirk-

patrick will have to make up his budget first with Mr. Weinberger down at the White House before he comes to the committee. So I think it is one of the few occasions when he will have a sympathetic ear in both places.

Senator HART. Yes. That reminds me of a very great story. We spent about 7 years trying to persuade the Congress that the Packaging Act should be adopted—truth in packaging. With the help of this committee it was finally adopted.

As the chairman I think indicated, the bulk of the enforcement of it is assigned to HEW, Food and Drug. Mrs. Knauer, a delightful lady, was out lecturing the country that the act wasn't any good. And I suggested it would have been better if she stayed around to try to persuade the administration to ask for at least \$5 to enforce it.

They sent a bill up here for Truth in Packaging for HEW of zero dollars. So on the floor we did add \$691,000 to that HEW bill. That is the first HEW bill the President vetoed. Before it got vetoed it was cut to \$345,000, and then the veto came. But on the repassage of that bill, we did hang on to the \$345,000 for Truth in Packaging.

So, Senator Cook is quite right in making the point that even with the most sincere will on the part of the Congress to formulate a weapon to protect the consumer and a very sincere agency anxious to use it in its defense of the consumer, if the Budget Bureau imposes its judgment that it isn't that important, the Government is not going to give that consumer the protection which having read the paper he thinks has been made available.

And this too I think explains in part the reason people wonder why the system doesn't work as well as it should. We read about these things being done, and 2 years later they see no change. It may well be because somebody decided that they wouldn't be given the money to do it.

Mr. Weinberger in February said that "In the allocation of the Commission's limited resources I would assign high priority to the development of coherent policies on such matters as undue concentration, product differentiation advertising, oligopoly pricing and power buying."

Does that about reflect your sense of priority on this matter, which really involves the whole concept of oligopoly market structure and conduct?

Mr. KIRKPATRICK. Those are unquestionably matters of great importance, sir. And they should be studied carefully.

Senator HART. When the Commission's report on conglomerate mergers was given to the Antitrust Subcommittee in November last year, Dr. Mueller, then the chief economist of the Commission, said the staff was continuing with an indepth study of a group of conglomerate mergers which we will get in the future.

And again in February Mr. Weinberger indicated to the subcommittee that this study was still in progress. Could you make it a point to inquire as to the status of this second report?

Mr. KIRKPATRICK. Yes, indeed. I am aware it is underway. I do not know its exact status.

Senator HART. There have been various estimates made as to the cost to the American consumer from monopoly and other industrial crimes. Some have estimated it ranges between \$170 and \$230 billion every year. That is about 40 cents on every dollar we spent.

Compared to those figures, even some of our massive social problems seem relatively less significant.

Now in your ABA study was there any effort to inquire into the magnitude of the economic loss suffered by consumers as a result of the Trade Commission's omissions, for whatever reason, that you pointed up in the study?

Mr. KIRKPATRICK. No, we did not make that an object of our study. We did not feel we were competent, and we really hadn't been asked for such a study.

Senator HART. On the Truth-in-Packaging law, we have had testimony from economists that if it was enforced at optimum, slightly under 11 percent of every consumer's dollar spent would be saved if the person would make the judgment as to the best buy.

I have no further questions.

Senator Cook?

Senator COOK. I have nothing. Thank you, Mr. Chairman.

Senator HART. Mr. Kirkpatrick, all of us hope very much you will find your tour satisfying, and I am sure you will.

Mr. KIRKPATRICK. I thank you for the honor of appearing before you, Senator.

Senator HART. We have a letter from the National Oil Jobbers Council which we will place in the record at this time.

Senator HART. The hearing is adjourned.

(Whereupon, at 11:55 a.m., the hearing was adjourned.)

(Further information on Mr. Kirkpatrick's nomination follows:)

NATIONAL OIL JOBBERS COUNCIL,  
August 19, 1970.

HON. WARREN G. MAGNUSON,  
Chairman, Committee on Commerce,  
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: After consultation with your staff, this statement is submitted for inclusion in the record of the hearings on the nomination of Miles W. Kirkpatrick to be a member of the Federal Trade Commission.

It is not our purpose to oppose Mr. Kirkpatrick's nomination. He is a gentleman and an extremely distinguished member of the bar. Thus, as to both his professional competence and his personal integrity, we would have to say his nomination is of the first order of excellence.

However, in light of Mr. Kirkpatrick's chairmanship of the American Bar Association Commission to Study the Federal Trade Commission, which issued its report on September 15, 1969, certain questions do arise. Apart from the fact that Mr. Kirkpatrick's antitrust background is, I am informed, that of defense counsel for substantial corporate clients, these questions become germane because of certain positions taken by the ABA Commission under his chairmanship with regards to the Robinson-Patman Act.

I have taken the liberty of enclosing a printed copy of the hearings held by the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the U.S. House of Representatives, under the Chairmanship of Representative John D. Dingell of Michigan. Included in that document is the full text of the ABA report on the Federal Trade Commission. On pages 67 and 68 of the ABA report (pages 409 and 410 of the House report) the ABA Commission recommends that "the FTC should direct its enforcement proceedings under Section 2 (c), (d) or (e) of the Act to cases in which injury to competition exists." This, of course, is in rather startling contrast to the language of the Robinson-Patman Act itself. The Congress imposed no such test concerning Section 2 (c), (d) or (e). It simply provided that "it shall be unlawful for any person" to perform certain prohibited acts. Thus, the ABA Commission, in effect, proposed administrative amendment of an act of the Congress.

Mr. Kirkpatrick appeared before the Dingell Subcommittee on October 9, 1960. His testimony appears in the printed transcript on page 228 through page 269.

The members of the National Oil Jobbers Council are independent small busi-

nessmen. They place the highest value on the protection afforded them, through the wisdom of the Congress, by the Robinson-Patman Act. We are most fearful that the policy outlined in the ABA report, under Mr. Kirkpatrick's leadership, might result in a sharp lessening of this protection. We do not feel that there is any conflict between consumer interests and the prevention of price discrimination. We disagree sharply with Mr. Kirkpatrick that damage to a competitor is not worthy of the law's protection. Indeed, we feel that this was clearly the intent of the Congress in enacting the Robinson-Patman Act. A small Businessman in our industry, if discriminated against, typically faces an adversary controlling capital assets numbered in the billions of dollars. Obviously, if we are deprived of this protection, many of our number may receive fatal injuries in the future.

It is, therefore, our hope and we herewith earnestly request that you and the other distinguished Members of your Committee explore thoroughly through appropriate questions as part of the record of Mr. Kirkpatrick's nominating hearing, his attitudes and proposed policy with respect to these matters. It seems to us imperative that it be established clearly and on the record that Mr. Kirkpatrick is willing to enforce the Robinson-Patman Act as enacted by the Congress without any weakening administrative amendment.

Sincerely,

WM. S. JONES, *President.*

[From the Washington Post, Aug. 20, 1970]

#### NIXON HIT ON FTC NOMINEE, GROUP SAYS IT WASN'T CONSULTED

(By David Vienna)

The Consumer Federation of America, an association of 179 consumer organizations across the country, yesterday criticized President Nixon for not consulting with consumer groups before nominating the new chairman of the Federal Trade Commission.

Moreover, Consumer Federation president Howard T. Frazier said at a news conference that because his group knows of no "commitment to the public interest" on the part of the nominee, Miles W. Kirkpatrick, the association "cannot endorse" him.

Frazier noted, however, Kirkpatrick's "distinguished career" as a Philadelphia lawyer and his role as chairman of a critical 1969 American Bar Association review of the FTC.

#### RELEASES STATEMENT

He released a statement the Consumer Federation has filed with the Senate Commerce Committee which will hold a hearing to confirm Kirkpatrick today.

The statement that "we do not know of any consumer oriented activities in which he has been involved. We do not know if he has represented consumers in his law practice."

"More importantly," Frazier said, "We do not know the extent of his association with firms who have been or who are likely to be respondents before the Federal Trade Commission."

#### WILL PROVIDE LIST

It is understood that Kirkpatrick will provide the Committee with a list of his clients as well as a financial statement. Traditionally, members of the FTC remove themselves from participation in cases involving companies with which they were associated in private practice.

Frazier said that last month, before Kirkpatrick was nominated, the Consumer Federation sent a telegram to the President asking to meet with him to discuss the appointment. "But we were boldly bypassed," Frazier said.

Virginia Knauer, the President's Special Assistant for Consumer Affairs, responded for the President, assuring the federation that she had consulted with Mr. Nixon over the appointment.

#### "WONDERFUL ADVISOR"

"Virginia Knauer is not a spokesman for the consumer movement," Frazier charged. "She is a spokesman for the President." She's a wonderful advisor when her advice is taken," he said.

Frazier, who also is a member of the President's Consumer Advisory Council, said he would bring up the matter of consultation with consumers before appointments are made at the panel's next meeting in the fall.

But before that meeting, another vacancy will be created at the FTC when Commissioner *Philip Elman's term expires in September*. Frazier said the Consumer Federation would push for a role in at least suggesting names to the White House.

JULY 21, 1970.

*The President, The White House:*

Consumers are impressed with the forward thrust Chairman Caspar Weinberger has given the Federal Trade Commission. We support his efforts to tighten the Commission operations and to strengthen its rules and procedures. We hope his efforts will not be lost in the transition. We respectfully request an opportunity to discuss our concern for the FTC's future and your selection of a new chairman.

ERMA ANGEVINE,  
Consumer Federation of America.  
NELSON CRUIKSHANK,  
National Council of Senior Citizens.  
SARAH NEWHAN,  
National Consumers League.  
WALKER SANDBACH,  
Consumers Union.

SUGGESTIONS FROM CONSUMER REPRESENTATIVES TO THE FEDERAL TRADE COMMISSION, JUNE 12, 1970

*More Consumer Participation in FTC Processes*

1. We commend the Commission for naming a council of attorneys and law professors to review procedures and practices. We believe FTC should add two additional members from public interest law firms selected by consumers.
2. We urge the FTC to set up a Citizens Consumer Advisory Council to meet regularly with its program review officer.
3. We request FTC's public information office to furnish five complete sets of testimony to national consumer groups. (Since all groups represented here today are members of Consumer Federation of America, the documents could be held in CFA's name for distribution.)
4. We urge that a recognized consumer spokesman be named to each of FTC's 11 consumer advisory boards. (CFA can furnish lists of names from which the Commission could select such a person.)

*Consumer Advocate*

1. We believe the FTC should name a consumer counsel to represent the rights of consumers in FTC proceedings, or should furnish free legal counsel for consumer groups wishing to intervene or participate in FTC proceedings.
2. We believe the FTC should make available to consumer groups seeking to intervene, the complete file behind a consent order of the rationale behind decisions not to act.
3. We believe all conferences between FTC members and outside groups should be on public record.

*Tighter Enforcement*

1. Where the Commission has proposed some innovative and effective remedy, we urge it to develop these as trade regulation rules. (e.g. In the New York Jewelry and Household Sewing Machine cases FTC required that the company tell the purchaser his contract could be sold and required Household to allow a 3-day cooling off period before a contract was valid.)
2. We urge less voluntary enforcement and more formal action. When voluntary enforcement is used, we urge more compliance checks and action against those who fail to comply.
3. We urge FTC to use the equal disclosure doctrine to stop deceptive advertising (e.g. Require Geritol for a designated period to state in its advertising that tiredness is not caused by iron-poor blood and that geritol helps only a small number of people).
4. Require manufacturers and advertisers to substantiate all claims made.
5. Establish machinery for evaluating effectiveness of what has been done by FTC.
6. Issue basic reports such as complete District of Columbia 1968 study, pointing up the significant aspects.
7. In selecting issues, consider the public need.

*Budget*

1. Acknowledging that the key to effectiveness may be budget and that the public does not see the budget until it is set (a questionable practice), we urge the FTC to make public its priorities, showing the percentage of its budget it will commit to its priorities.

2. In selecting priorities, we urge the Commission to consider the public need and the impact on society (e.g. flammable products are more important than labeling milk; packaging and labeling reaches every household).

*Restraint of Trade*

The Commission has a responsibility wherever sellers restrain the free, competitive flow of trade. It must meet this unlimited responsibility with limited resources. The Bureau of Restraint of Trade must, therefore, establish priorities wherever the Commission's preliminary investigation, indicates—

That consumer goods (as opposed to building supplies, machinery, structural materials, and other non-consumer goods) are involved;

That the value of sellers' products represents a significant part (as opposed to an insignificant part) of consumers' total purchases;

That a national market (as opposed to a regional or a local market) is involved;

That a few sellers (as opposed to many sellers) produce most of the industry's total output; and

That the Commission has received numerous (as opposed to few) consumer complaints of price-fixing, price-gouging, monopolistic pricing, allocation of markets, and other anti-competitive practices.



